



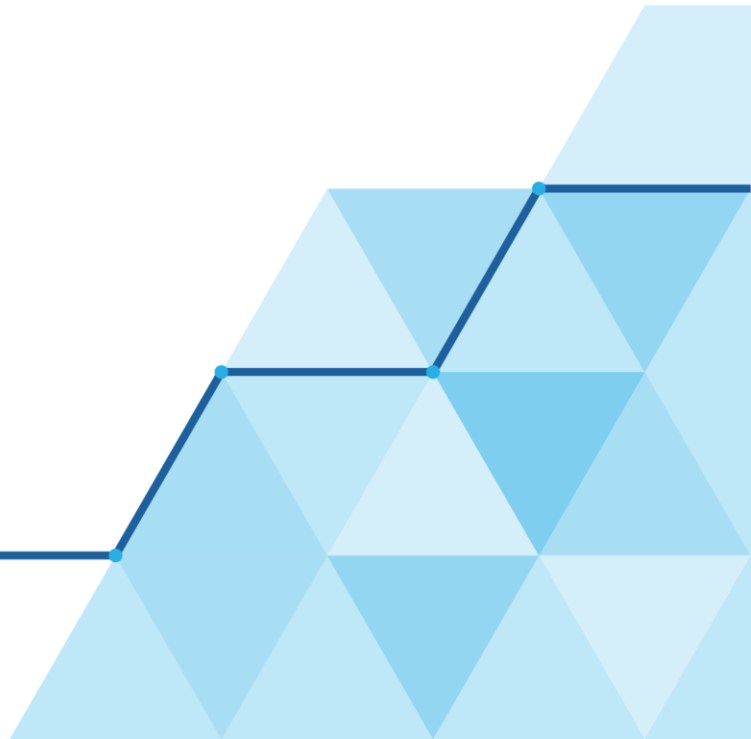
Ministry
of Justice

Strategic Lawsuits Against Public Participation

A Call for Evidence

This Call for Evidence begins on 17 March 2022

This Call for Evidence ends on 19 May 2022





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of Justice

Strategic Lawsuits Against Public Participation

A Call for Evidence

A Call for Evidence produced by the Ministry of Justice. It is also available at <https://consult.justice.gov.uk/>

About this Call for Evidence

- To:** This Call for Evidence is aimed at anyone with an interest in the issue of Strategic Lawsuits Against Public Participation and is likely to be of particular interest to the legal profession, media, publishers, commercial organisations and interest groups.
- Duration:** From 17/03/22 to 19/05/22
- Enquiries (including requests for the paper in an alternative format) to:** SLAPPs Evidence
PostPoint 10.24
Ministry of Justice
102 Petty France
London SW1H 9AJ
Email: slapps.evidence@justice.gov.uk
- How to respond:** Please send your response by 19/05/22 to:
SLAPPs Evidence,
PostPoint 10.24
Ministry of Justice
102 Petty France
London SW1H 9AJ
Email: slapps.evidence@justice.gov.uk
- Response paper:** A response to this Call for Evidence will be published on a date to be confirmed.

The Ministry of Justice is grateful to everyone who responds to this Call for Evidence.

A Welsh language summary will be made available at <https://consult.justice.gov.uk/>

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Foreword



I have launched this urgent Call for Evidence in response to the challenges presented by the increasing use of a form of litigation known collectively as SLAPPs – Strategic Lawsuits Against Public Participation. I am determined to act quickly and effectively on this issue.

SLAPPs can 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.

These actions are typically initiated by reputation management firms and framed as defamation or privacy cases brought by individuals or corporations to evade scrutiny in the public interest.

They are claims brought by extremely wealthy individuals and corporations. The invasion of Ukraine has heightened concerns about SLAPPs, as we have clearly seen that aggression is closely associated with clamping down on free speech and reporting of events.

We need to isolate these cases in devising counter-measures, so that while we prevent our justice system being abused we do not curb access to justice in legitimate cases.

In responding to SLAPPs, we need to fully understand the breadth of litigation and range of misconduct involved. A Call for Evidence will enable us to establish a number of things.

Firstly, we want to hear at first hand from parties who have been involved in SLAPPs – their experiences and the impact on them personally and professionally.

Secondly, we are conscious that high profile cases are likely to represent the tip of this iceberg, in two important respects. One is the number of pre-action letters that are issued in cases that never reach court as they result in a settlement or other form of agreement.

The other is the chilling effect of SLAPPs – the perfectly appropriate news investigations that may be curtailed or not even started because of the fear or the risk of their incurring the crippling expense of High Court litigation.

This Call for Evidence will provide us with the robust basis to move quickly on reforms to address this problem. As such, this paper sets out areas where the Government is considering reform.

We expect to need legislative reform to strike back effectively against SLAPPs, but procedural and regulatory reforms will also play an important role. SLAPPs are a sophisticated and many faceted problem – our response needs to be tailored, targeted and focused.

With your help we will achieve that.

A handwritten signature in blue ink, appearing to read "Dominic Raab". The signature is fluid and cursive, with a large initial 'D' and a stylized 'R'.

Rt Hon Dominic Raab MP

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

Background

What are Strategic Lawsuits Against Public Participation (SLAPPs)?

The term SLAPPs is commonly used to describe activity that aims to discourage public criticism through an improper use of the legal system.

SLAPPs have two key 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.

Individuals or organisations wishing to prevent information reaching the public eye engage reputation management firms or legal professionals to help them do so. This will often result in communications to the targeted individuals or organisations which threaten litigation, though the desired outcome is to prevent further investigations from taking place. Occasionally SLAPPs serve to divert attention from legitimate enquiries, by commencing action on spurious points such that the target's resources are consumed and taken away from their initial focus.

SLAPPs are often framed as legal cases, but they represent an abuse of law and procedure as their principal objective is stifling public debate, rather than the pursuit of a legal remedy. SLAPPs are frequently threatened or brought in defamation law, though increasingly data protection and privacy law is being misused against free speech within the law.

Why are we looking at this issue?

The Government is concerned that SLAPPs threaten free speech within the law and the rule of law, which are fundamental parts of our democratic tradition. Public watchdogs, including the press and public officials, are vital in ensuring accountability and transparency in our legal system. We are aware that SLAPPs interfere with parliamentary affairs: reports suggest parliamentary clerks have been subject to SLAPPs such that their constitutional duties are impeded.

SLAPPs are often brought by powerful entities whose resources vastly exceed those whom they seek to silence, resulting in public interest reporting being withdrawn pre-emptively to avoid expensive confrontation. This means a single successful SLAPP can have far-reaching consequences, in effect censoring others who fear similar tactics.

Provisional data from the Coalition Against SLAPPs in Europe (CASE) estimates there were 14 SLAPPs cases in the UK in 2021, an increase on the two cases in both 2020 and 2019 and one case in 2018. Whilst this may appear to be a small number of cases, we are issuing this Call for Evidence to uncover information about cases which might have gone unrecorded. We believe there will be many, as well as cases which never reached court because the respondent was intimidated into settling, which are likely to far exceed the number of cases which reach court.

The think tank Foreign Policy Centre found in its 2020 survey of 63 investigative journalists working globally on corruption that civil legal cases, including cease and desist letters, surveillance, interrogation by authorities and smear campaigns, were experienced by more than 50% of respondents. 73% of those receiving threats had been threatened with legal action. 61% of respondents also reported that their investigations had uncovered a link (directly or indirectly) with UK financial and legal jurisdictions.¹

The Government is supportive of media freedom here and abroad. We have taken action to protect the press through the National Action Plan on the Safety of Journalists led by the Department for Digital, Culture, Media and Sport and the Home Office, which provides measures to counter threats to journalists' physical safety.

The Foreign, Commonwealth and Development Office lead on the Government's participation in and support of the Media Freedom Coalition, a partnership of countries working together committed to media freedom and safety of journalists and to hold to account those who would harm journalists for doing their job. Members of the Coalition have signed the Global Pledge on Media Freedom, a written commitment to improving media freedom domestically and working together internationally.

Whilst SLAPPs are typically designed to intimidate opponents psychologically, there is evidence suggesting that these threats can escalate into physical harm. Tragic cases overseas, such as the murder of Daphne Caruana Galizia who reportedly faced over forty SLAPPs cases at the time of her death, illustrate how public interest investigative reporting can attract intimidation by lawsuit and, separately, risk to physical safety.

In the first instance this Call for Evidence focuses on establishing evidence about the use of SLAPPs in England and Wales, before focusing on reforms within defamation law, which to date has been the primary vehicle for SLAPPs cases. We welcome broader suggestions on how to address SLAPPs to inform Government action to curb this abuse of law.

¹ <https://fpc.org.uk/wp-content/uploads/2020/11/Unsafe-for-Scrutiny-November-2020.pdf>

Evidence requested – Impact on SLAPPs recipients

We acknowledge that SLAPPs can have serious effects on personal and professional life. We invite affected parties to come forward with their experiences of SLAPPs to inform Government action. We want to gain a greater understanding of how SLAPPs operate in more detail to help us develop targeted reforms that will crack down on abusive behaviour.

It has been reported that public officials engaged in due diligence duties have been personally targeted, alongside academic researchers, members of the press and whistle-blowers. Bad faith use of subject access requests (under the Data Protection Act 1998) can also be an example of SLAPPs tactics which intend to slow down or block enquiries.

Many SLAPPs succeed in discouraging investigations and publications from going ahead. Only a small proportion of cases will result in formal litigation, which means official data cannot capture the volume of activity that may exist. We therefore welcome first-person accounts from people who have been subjected to SLAPPs to support our evidence base.

NB: Please indicate if you wish your responses to remain confidential in our analysis and response to the Call for Evidence.

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.

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.

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?

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.

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?

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.

Legislative reforms

A statutory definition for SLAPPs?

Background

An important issue for the Government in this Call for Evidence is the question of whether a statutory definition of SLAPPs is required in order to address the issue properly.

We are clear that the absence of a legal definition will make it more difficult to identify SLAPP cases and to assist in dealing with all aspects of this issue. We think that a statutory definition would be helpful because:

- It will enable procedures and courts to use the definition as criteria in deciding issues such as whether powers to strike out claims and make civil restraint orders, costs awards etc may be applicable.
- It will provide clarity of which cases are properly SLAPPs and which fall outside that category, as to allowing claimants to illustrate why their actions are not SLAPPs, and should not be subject to a special regime.
- It will provide a legal basis for regulators to use.
- It will provide a platform for future reforms, particularly as SLAPPs may evolve to seek to evade the new controls.

What should the definition be?

It is easy to say that there should be a definition for SLAPPs, it is harder to devise a definition that captures the many aspects and characteristics of SLAPPs.

Several jurisdictions in other common law countries have grappled with this issue and produced working statutory definitions. There are opportunities to consider these and how they have fared in practice as the courts have interpreted the meaning and intention of the legislation against the rigours of challenge.

The Government has also considered the work of a number of interest groups who have drawn up suggestions, such as a new right of public participation² and the groups who have developed a model European Union Directive on SLAPPs³ which contains a range of definitions for SLAPPs, public participation and 'a matter of public interest'.

² UK-Anti-SLAPP-Law-Proposals-for-Procedural-Reform.pdf (fpc.org.uk)

³ anti-SLAPP model directive_final draft_for proof read and layout.pdf (mediadefence.org)

We are interested in reviewing all of these examples, but we also need to take into account the legal framework of England and Wales. This Call for Evidence demonstrates that both legislation and common law provide existing defences to the excesses of SLAPPs. We need to take a considered approach so that we build appropriate defences against SLAPPs, but do not in the process impede proper access to justice.

It is fair for the Government's position to be summarised as being that we consider that there is a need for reform, that we see legislative reform that defines SLAPPs as being an important part of achieving effective reform, but that we do not have a preordained view of the fixed form that legislation should take.

As such we welcome views from all parties on this fundamental issue.

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

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?

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?

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.

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

Legislative reforms stemming from there being a defined cohort of SLAPPs cases

Later in this paper, we explore various procedural reforms which the Government is interested in pursuing or providing advice to others responsible for reform.

As mentioned above, we believe a statutory definition of SLAPPs cases would offer a gateway to other reforms, and to increasing the powers and ability of courts and regulators to deal effectively with SLAPPs where they represent an abuse of process.

There is an option of making some of these reforms on the face of the statute book in primary legislation. Doing so sends a very clear message of Parliament's intention and determination.

For example, we want to consider whether there would be any benefit in putting on a statutory footing a court's ability to strike out a SLAPPs application where it manifestly met the criteria set out in the definition of SLAPPs in legislation.

Another example would be putting on a statutory footing a costs protection regime for SLAPPs cases. That potential reform is explored in more detail below on page 27.

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.

Defamation (libel) laws

Defamation is the term and area of law that concerns the publication of material that harms someone's reputation. There are two forms of defamation:

- a) *Libel* – this covers 'lasting' forms of defamation, such as printed material in newspapers or books; online publication; and broadcast media.
- b) *Slander* – this covers more temporary forms of defamation such as the spoken word.

Libel is the area of law that is most relevant to SLAPPs.

Background – Defamation law in England and Wales

Defamation stems from the common law of England and Wales made by courts and judges developing the law by resolving disputes and setting precedents. However, that law was largely codified and placed on a statutory footing by the reforms that led to the Defamation Act 2013. Some of the key provisions of that legislation are discussed below, with questions flowing on how they apply in SLAPPs cases.

The Government believes that while in many respects the 2013 Act has worked well (as concluded by a post-legislative scrutiny report in 2019⁴), the reforms were not specifically designed to meet the challenges which SLAPPs represent. The Government will always consider a case for reform where it is needed and where freedom of speech within the law, the public interest and the balance between different interests are engaged. It is appropriate and consistent with this approach to conduct a review in relation to the libel aspects of SLAPPs and seek evidence and wider views.

There are two aspects to this. Firstly, a look at some of the existing defences in defamation claims and how relevant they are to the SLAPPs context; and secondly, what further legislative reforms in defamation might cover?

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/838398/post-legislative-memorandum-defamation-act-2013.PDF

Existing defamation defences in England and Wales

The Serious Harm defence

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. So, in other words, what has been said needs to substantially affect others' attitudes to that person. This was intended to raise the bar for bringing a claim so that only cases involving serious harm to the claimant's reputation could proceed.

The Act 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. This was also intended to raise the threshold for commercial claimants.

Acts of Parliament are subject to challenge on meaning and interpretation, and there have been a number of cases in relation to the serious harm test in defamation. The UK Supreme Court set out a definitive position on this in its judgment in the case of *Lachaux*.⁵

In this case, the Supreme Court considered how the serious harm test should be interpreted and operate in practice. The court held that the definition of a defamatory statement includes that it must have caused or is likely to cause serious harm. The effect of the court's ruling is that 'serious harm' now has to be proven at a higher level than previously. The court also held that the limitation period of one year runs from the date of publication and not the date of harm. Any subsequent harm is merely of evidential value.

Another case addressed the second part of this section on what serious harm meant in relation to the impact on a commercial body's reputation. In *Brett Wilson LLP*⁶, the High Court established that it should mean serious loss, although serious loss should be seen in the context of that business's size.

Is the serious harm test relevant in SLAPPs cases and does it need reforming? We would welcome views on this question. The Government's initial view is that it will be applicable in SLAPPs cases – SLAPP claimants have to demonstrate to a court's satisfaction that there has been serious harm to their reputation. It is a helpfully high bar, although probably not high enough to deter SLAPPs claimants.

In terms of how it could be amended, one question that has emerged is whether serious harm – like the truth defence (see below), should be treated as a preliminary issue. There are conflicting views on the benefits of that. On the one hand, it is argued this has potential for saving costs and resolving matters more quickly; on the other, because it engages

⁵ *Lachaux v Independent Print Ltd and another* [2019] UKSC 27

⁶ *Brett Wilson LLP v Person(s) Unknown, Responsible for the Operation and Publication of the Website www.solicitorsfromhelluk.com*, [2015] EWHC 2628 (QB)

arguments about the substance of the case it may have the effect of aggravating and frontloading costs, and could lead to a trial within a trial.

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?

The defence of Truth

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.

So if a press report included a description of someone as a 'criminal' and went on to describe their offences, the truth defence would apply even if in two of the seven charges they were found not guilty, if in five of the seven they were convicted.

A claim proceeds on the basis that the defamatory statement is false and the burden of proof falls on the defendant to prove it is true. One reform option on which we are seeking views is whether in SLAPPs cases the burden of proof should fall instead on the claimant to prove that the statement is not true.

The meaning of the defamatory statement is now generally established at a preliminary hearing and thus a truth defence can be determined at an early stage. The courts have also established that meaning can be determined on the parties' submissions without a hearing being necessary.⁷

Is the truth defence relevant in SLAPPs cases and does it need reforming? We would welcome views on these questions. The Government's initial view is that while this defence already contributes to defences against SLAPPs (for example in enabling preliminary hearings that may decide the substance of a claim), we are interested in views on whether it should be strengthened in these cases.

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?

⁷ *Hewson v Times Newspapers Ltd & Anor* [2019] EWHC 650 (QB) (22 March 2019)

The defence of Honest Opinion

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’.

There are three conditions to be met for the defence to be applied, as the defendant must show the alleged defamation was a statement of opinion rather than fact. They are:

- The statement complained of was a statement of opinion.
- The statement indicated, in general or specific terms, the basis of the opinion.
- An honest person could have held the opinion on the basis of:
 - a fact that existed at the time the statement complained of was published; or
 - anything asserted to be a fact in a privileged statement published before the statement complained of.

Even if these conditions are met, the claimant can still win their case if they can show the defendant did not hold the opinion that forms the basis of the defence.

There are also uncertainties and challenges in using this defence in terms of proving that a statement was intended to express an opinion (rather than be a stated fact), although the High Court has provided guidance on this point.⁸

As such, this defence may not seem promising as a counter-measure to SLAPPs in its current form. That said, it is a defence available where the published statement is exaggerated, obstinate or prejudiced, as long as the views are honestly held.

Is the honest opinion defence relevant in SLAPPs cases and does it need reforming? We would welcome views on these questions. The Government’s initial view is that it would likely not be one of the main defences in a SLAPPs case, but it is open to suggestions on suitable reforms.

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?

⁸ Koutsogiannis v The Random House Group Ltd [2019] EWHC 48 (QB)

The defence of Public Interest

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.

Is the public interest defence relevant in SLAPPs cases and does it need reforming? We would welcome views on these questions. The Government's initial view is that public interest issues are at the heart of SLAPPs claims, and it will frequently be the most important defence to them.

A public interest defence is based on the defendant being able to show two things:

- That the statement complained of was, or formed part of, a statement on a matter of public interest.
- That the defendant reasonably believed that publishing the statement complained of was in the public interest.

The legislation requires the court to take all relevant factors into account in assessing whether the public interest defence is justified, for example making allowance for editorial judgment. The public interest defence also engages human rights principles, in terms of where the line should be drawn on balancing the competing interests of freedom of expression against the claimant's reputation rights.

The courts are well versed in deciding where the public interest lies and how it should be applied in different circumstances. The courts have rejected 'newsworthiness' as being too wide a definition for what is in the public interest; and 'what the public need to know' as too restrictive. The general rule is that the more serious an allegation made, the more compelling the requirement for the public interest test to be satisfied.

The courts will make an assessment of the 'reasonable belief' that the publisher considered they were acting in the public interest. They will have regard to editorial judgement, but also the reasonableness of the report.

The new statutory test is being interpreted broadly by the courts and is not just applicable to the media.⁹ It may also be used where the honest opinion defence has failed.

Is the public interest defence relevant in SLAPPs cases and does it need reforming? We would welcome views on these questions. The Government's initial view is that public interest issues are likely to be central to SLAPPs cases.

The question is perhaps whether SLAPPs cases present additional challenges, as they involve harassment and intimidation, such that public interest defences are not sufficiently

⁹ *Economou v David De Freitas (Rev 1)* [2016] EWHC 1853 (QB)

widely drawn. It has been argued that expanding the Defamation Act statutory defence of public interest to cover a wider category of 'public participation' cases should be pursued. Legislative reform options are explored in more detail on page 12.

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?

Reports protected by Privilege

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. Statements covered by privilege are those made in a context that is generally deserving of protection (for policy reasons), such as comments in Parliament or court.

- **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 and some other categories of material e.g. lawyer/client communications.
- **Qualified privilege** – this form of privilege offers a potential defence to libel claims. There are two types – statutory and common law.

Statutory qualified privilege requires certain criteria to be met to be used as a defence:

- Fair and accurate.
- Published without malice.
- A matter of public interest, the publication of which is for the public benefit.

Common law qualified privilege generally requires a reciprocal relationship of duty and interest between publisher and the person being published about. An example of a protective qualified privilege would be information when someone reports a person to the police. The normal rule is that the defamatory statement was made where the communication involved a duty or interest in making it to the person who received it, and that receiving person had an interest or duty to receive it.

Common law qualified privilege also requires there to be no evidence of actual malice on the part of the defendant. An example would be failing to take an opportunity to fulfil a duty

(to report something) or serve the relevant public or other interest. However, case law holds that a false claim need not be a malicious one.¹⁰

Proving malice to overcome a qualified privilege defence would be demonstrating the defendant had some dominant improper motive in making their statement – such as not believing their own words or being reckless with false information.

Is the privilege defence relevant in SLAPPs cases and does it need reforming? We would welcome views on these questions. The Government's initial view is that absolute privilege is generally well understood and established, and it is hard to envisage a SLAPP being used against a statement made in Parliament or reporting of things said in open court.

The position on qualified privilege is more difficult. One issue that has become apparent during the recent Parliamentary debates on SLAPPs has been that, while absolute privilege applies to what is said in Parliament, it does not apply to fair and accurate reporting of what was said, which is a matter of qualified privilege.

The principles and application of Parliamentary privilege are beyond the scope of this Call for Evidence and there are important wider matters to consider in reforming this area, such as preventing reporting of (for example) matters subject to court injunctions. Nonetheless, we would welcome views on whether reforms should be considered in relation to the reporting of Parliament's debates.

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.

¹⁰ [Owens & Anor v Grose & Anor \[2015\] EWHC 839 \(QB\)](#)

Libel Tourism

The Defamation Act 2013 (Section 9) addressed a major concern, the problem of 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.

The tests applied when assessing the most appropriate jurisdiction include:

- The extent of publication in each jurisdiction.
- The amount of damage to the claimant's reputation in this jurisdiction compared to elsewhere.
- The extent to which the publication was targeted at a readership in this jurisdiction compared to elsewhere.
- Whether there is reason to think that the claimant would not receive a fair hearing elsewhere.

In the first case testing the legislation¹¹ the High Court underlined that Section 9 represented a high threshold, placing a heavy onus on a claimant to show why England and Wales was the most appropriate jurisdiction to bring a claim. The courts have also clarified that for online publication claimants will need to show evidence of material being accessed and downloaded within the jurisdiction, not just published.

The reform is generally considered to be working well and addressing the concerns that prompted the reform.

Is the appropriate jurisdiction test relevant in SLAPPs cases and does it need reforming?

We would welcome views on these questions. The Government's initial view is that the Defamation Act reform of libel tourism has worked well, but that it has tended to be irrelevant in the high-profile SLAPPs cases we have seen, as they centre on media and books published in the UK by UK writers.

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?

¹¹ [Ahuja v Politika Novine I Magazini D.O.O & Ors \[2015\] EWHC 3380 \(QB\)](#)

Other possible defamation reforms on SLAPPs

Malice in defamation

One concept in defamation law that is relevant in considering reforms in relation to the challenges which SLAPPs style litigation raises is malice or 'actual malice'.

Malice has long been a component of English and Welsh law and of defamation law – for example the Libel Act 1843 provided that absence of malice was a libel defence, while presence of malice was an aggravating factor for courts deciding libel claims.

Actual malice is also a concept that applies in some aspects of our current defamation law. To overturn a defence of qualified privilege, or the common law defence of fair comment, actual malice must be proven against the defendant.

Actual malice in this context is ill will or spite and depends on the state of the defendant's mind when making the defamatory statement.

In American defamation law actual malice has a constitutional standing following the case of *New York Times Co. v Sullivan*.¹² This set a higher legal threshold for public officials and public figures to reach if bringing a libel suit than for ordinary members of the public. The claimant must show the defendant was false or reckless in publishing what they knew to be a defamatory statement.

There are grounds for considering whether the nature of SLAPPs justifies a tougher regime of a requirement to prove actual malice on the part of the defendant. This is an area where the Government would want to give careful consideration in terms of whether it would be just and proportionate to amend the law. We will need to achieve the right balance between access to justice and restraining aggressive, intimidatory litigation. Reform would also need to be based on there being a clear definition of qualifying cases in terms of identifying SLAPPs (see section on definitions, page 9).

Question 28: Do you consider that the Government should consider reforming the law on actual malice to raise the threshold for litigation 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?

¹²[New York Times Co. v. Sullivan, 376 US 254](#)

Other possible reforms

The Government has reviewed whether other defamation defences may have some relevance and utility in addressing the problems which SLAPPs present. On balance, there do not appear to be any which would be relevant in the SLAPPs context.

For example, the 'offer of amends' defence in the Defamation Act 1996 where the defendant is able to resolve the dispute by saying they had made an honest mistake and offering a way of making it up to the claimant e.g. offering a money settlement or printed apology. These would not be as relevant in relation to SLAPPs where a claimant is bent on punitive action and wants no coverage rather than an apology.

Similarly, defences used by intermediaries (such as web hosting platforms) do not seem relevant, as SLAPPs are characterised by targeting not just direct publishers but individual authors of pieces.

The single publication rule (Defamation Act 2013, Section 9) is an important libel reform in general terms. It provides that where subsequent publications of a statement are made in a similar manner, an action against a publisher must generally be brought within a year of the first publication by that publisher. Previously, each publication of defamatory material (e.g. each 'hit' on a website) created a new cause of action, and so publishers were potentially liable however long after the original publication the material was accessed. However, again this defence is unlikely to be relevant in a SLAPPs action.

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?

Procedural reforms

Pre-Action

The period before a claim is issued at court when a party is considering litigation is known as the ‘pre-action stage’.

During this period parties are still expected to behave appropriately. This can include following guidelines on pre-action conduct including those set out in specific pre-action protocols (PAPs) or the general Practice Direction – Pre-Action Conduct (PD-PAC). PAPs are issued by the Master of the Rolls, a senior judge. This follows wide consultation and consideration by the Civil Justice Council (CJC) and the Civil Procedure Rule Committee.

Pre-action guidelines in all forms have a number of functions: they support the efficient management of proceedings where litigation cannot be avoided; they encourage the exchange of information about a prospective claim before proceedings; importantly they encourage parties to consider alternative dispute resolution (ADR) and avoid litigation by agreeing a settlement before the commencement of proceedings.

In the context of SLAPPs, the most commonly relevant PAP is the one for Media and Communications Claims,¹³ as well as the PD-PAC. The Media and Communications Claims PAP came into force in October 2019, replacing the PAP for Defamation. It covers a range of cases in which SLAPPs have been brought including defamation and privacy claims.

We understand that a common feature in SLAPP actions is the issuing of ‘pre-action’ letters to journalists, writers and others. We are keen to understand the effects of this practice in the context of SLAPP actions.

In particular, we would welcome information on how the current PAP for Media and Communications Claims and the PD-PAC are being used in claims involving public participation and whether reform should be considered in the case of claims involving public participation.

The Court has discretion in some cases to order cost sanctions against parties who fail to follow pre-action guidelines. Given the nature of SLAPP actions, these costs sanctions are not going to be as sufficient a deterrent as they would normally be in other civil disputes. However, non-compliance can have other consequences such as case management directions the court makes e.g. staying proceedings until a protocol has been complied with.

¹³ https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def Pre-action Protocol for Media and Communications Claims - Civil Procedure Rules (justice.gov.uk)

The CJC is currently conducting a review of pre-action and PAPs. It published an interim report and consultation in November 2021. The CJC is currently reviewing responses and will be reporting later this year. That work has not focused on SLAPPs.

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.

Strike-Outs

The court has the power to strike out some or the whole of a party's statement of case using powers in the Civil Procedure Rules (CPR) or its inherent jurisdiction. Removing such material means that a party cannot pursue part of its case – if the whole statement of case is struck out the court will generally give judgment for the other party.

There are various circumstances in which a court will consider using a strike-out. The principal ones are:

- Where a party is pursuing or defending a case that has no reasonable basis.
- Where there would be a waste of resources on both sides if the litigation continued.
- To prevent proceedings that are an abuse of process.

A strike-out can be considered on the application of one of the parties, or the court may decide to impose one of its own initiative.

The Government's initial view is that there is already considerable scope in appropriate cases for the court to exercise its powers to take strike-out action in SLAPPs claims. For example, abuse of process was defined in *Attorney General v Barker* [2000]¹⁴ as 'using the process for a purpose or in a way significantly different from its ordinary and proper use'.

However, the Government would be interested in views on this issue, and whether further reform should be considered on criteria for SLAPPs to be adopted to guard against an 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?

¹⁴ *Attorney General v Barker* [2000] EWHC 453 (Admin)

Civil Restraint Orders

Under the CPR, Civil Restraint Orders (CRO) 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.

Vexatious claims can generally be identified by the following: they have little or no basis in law; are used to inconvenience or harass the defendant rather than seek a legitimate determination; aim to cause disproportionate expenses to the defendant; and importantly, are an abuse of process of the court.

The rationale for restraining vexatious litigants was summarised in *Crimson Flower Productions Ltd v Glass Slipper Ltd* in the following terms: 'It is only to prevent persistent bringing of applications which are hopeless and which actually hamper the administration of justice rather than assist it or are a part of it'.¹⁵ A CRO can therefore be made against a party who has repeatedly and persistently issues claims to the court or made applications which are 'totally without merit' (under CPR¹⁶ 2.3 and CPR PD 3C, para 1) and prevent the abuse of civil procedure. However, SLAPP claimants may not match this profile.

Depending on the number of applications by a party and/or the merits of a claim, three types of CROs can be issued which restrict a party from either making applications in certain proceedings or in certain courts without the approval of the issuing judge. A judge can decide between a Limited CRO (LCRO), an Extended CRO (ECRO) or a General CRO (GCRO).

There is an overlap between the characteristics of a vexatious claim and those of a SLAPP claim as outlined in this Call for Evidence. However, while sharing some attributes with vexatious litigation (e.g. factors such as harassing opponents and forcing them to incur costs) SLAPPs will differ in other respects.

The Government is keen to hear views on whether CROs may be an effective procedure against SLAPPs litigants and whether there are any reforms which should be considered.

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

Question 36: Should courts consider anything beyond the current issues of number of applications and merits of a case when considering whether to issue a CRO?

¹⁵ *Crimson Flower Productions Ltd v Glass Slipper Ltd* [2020] EWHC 942 (Ch)

¹⁶ CPR = Civil Procedure Rules

Other procedural reforms

The Government recognises that the CPR and the court's inherent jurisdiction may afford some powers or processes by which the courts may manage SLAPPs cases in a way that is fair and proportionate to all parties.

We are also conscious that the court has discretion and powers to manage cases to mitigate some of the excesses associated with SLAPPs, and judges will exercise these where they feel it is appropriate to do so in the interests of justice.

We would welcome any views or suggestions of procedural reforms, in additions to the ones we have referred to above, which may be relevant or brought to bear in managing SLAPPs type litigation.

One example might be to adopt the same procedure for SLAPPs cases as in Judicial Review, with a formal permission stage. In this process the court would establish whether there is an 'arguable' case, looking at issues such as whether the claimant has attempted and exhausted other ways of getting the dispute resolved. If the court grants permission, the case proceeds to the court process (the 'substantive stage') and a hearing unless the parties can reach some form of settlement.

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?

Regulatory reforms

The Government is committed to protecting access to justice and the defence of reputation and recognises the legal profession's integral role in doing so. The legal sector is independent of government, as are the legal regulators. These independent regulators ensure adherence with professional standards and Codes of Conduct. The Government is keen to explore if existing regulation is working well to uphold the public interest and limit abusive behaviours in these cases.

We recognise that SLAPP tactics are not confined to legal professionals, though often reference to the law is made to intimidate SLAPP recipients. Whilst legal professionals are duty bound to represent their clients' best interests, they must not do so where the effect would be to undermine the rule of law and trust in the legal profession. We believe SLAPPs are a behavioural issue requiring regulatory interventions as much as one that can be solved through legislation.

Conduct of litigation is generally undertaken by solicitors, though other legal professionals can apply for authorisation to do so. We understand that the distinction between conducting litigation in clients' best interests through fearless representation, and oppressive conduct amounting to SLAPP tactics, is at times difficult. The Government will work with regulators to support professionals where further guidance is needed.

Solicitors Regulation Authority Guidance on SLAPPs

The Solicitors Regulation Authority (SRA) oversees the solicitors' profession and protects the public by ensuring that solicitors meet high standards and acting when risks are identified.

The SRA updated its conduct on disputes on 4 March 2022, making reference to SLAPPs for the first time. The guidance is aimed at all firms and regulated individuals who conduct litigation and who give dispute resolution and pre-action advice.

The SRA identifies SLAPPs as 'cases in which the underlying intention is to stifle the reporting or the investigation of serious concerns of corruption or money laundering by using improper and abusive litigation tactics.

Features of these cases may include:

- making excessive or meritless claims, aggressive and intimidating threats
- otherwise acting in a way which fails to meet the wider public interest principles

- duties to which solicitors must have regard, and which are highlighted in this guidance.¹⁷

Solicitors are required to remain compliant with their professional duties, which requires vigilance and scrutiny of conduct. Behaviours described in the updated guidance can be evidence of misconduct capable of amounting to a serious breach of the profession's regulatory arrangements, which could lead to disciplinary action being taken. Solicitors should report any concerns to the SRA in line with their duty to report. Guidance on reporting and notifications can be found at:

<https://www.sra.org.uk/solicitors/guidance/reporting-notification-obligations/>.

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.

Reporting SLAPPs

The legal system relies on transparency in order to ensure public confidence in its operation. Some SLAPPs are initiated on behalf of individuals or organisations that are subject to investigations into illicit finance and corruption. SLAPPs themselves may be financed by corrupt gains.

Illicit financing of legal services can seriously corrode public trust in the legal system and profession. Solicitors handle client money and are subject to detailed money laundering regulations. Guidance for the solicitors' profession is available at:

<https://www.sra.org.uk/globalassets/documents/solicitors/firm-based-authorisation/lsag-aml-guidance.pdf?version=49d62e>.

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?

¹⁷ <https://www.sra.org.uk/solicitors/guidance/conduct-disputes/>

Defamation costs reforms

Legal costs: general position

The general position in civil litigation in England and Wales is that the loser pays the winner's legal costs (base fees) as well as the loser's own. This is a long-standing principle which seeks to ensure that the winner's legal costs are reimbursed, and that unmeritorious litigation is discouraged. 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 considerably over the past 30 years.

Defamation cases

The ability to bring or defend claims was historically limited to the wealthy, or those who could get lawyers to act for them without cost. However, 'no win, no fee' Conditional Fee Agreements (CFAs) have been available in defamation cases since 1998. 'After the event' (ATE) insurance is also available to insure against the risk of having to pay adverse costs. The CFA and ATE insurance arrangements have changed over the years, but the current position is as follows.

In a CFA case (which can be taken by claimants or defendants), the lawyer will not generally charge a fee if the case is lost, but if the case succeeds can charge a success fee (e.g. from damages recovered). As an exception to the general position in civil litigation, the premium for ATE insurance remains recoverable. This means that ATE insurance can be more easily obtained to insure against adverse costs in defamation cases. If the CFA/ATE funded case succeeds, the CFA/ATE funded party can recover their normal costs in the usual way, as well as the ATE premium. If the CFA/ATE funded case fails, the lawyer will generally not charge a fee, and the other side's costs will be covered by the ATE insurance. This ATE regime enables parties with a good case to litigate and discharge their Article 10 rights (freedom of expression) without the fear of having to pay potentially ruinous legal costs if their case fails. But this is dependent on the party being able to obtain ATE insurance for their particular case. ATE insurance is a private market, and the Government does not have details of how readily it is available in SLAPPs cases.

While it is therefore the case that, personal injury (PI) claims aside, it is currently easier to obtain costs protection – through ATE insurance – in defamation cases than in other types of civil litigation, even this costs protection may not be as certain as it should be. It would be helpful to know how well the current costs regime (i.e. recoverable ATE insurance premiums) works in SLAPPs cases, or whether more certain costs protection, such a variation of the regime for certain environmental judicial reviews as set out below, would be preferable.

Other forms of costs protection: the Environmental Costs Protection Regime (ECPR)

If costs protection is to be rolled out to other types of claim, it is likely now to be based on a version of the Environmental Costs Protection Regime (ECPR) that exists in environmental judicial reviews under the UN Aarhus Convention.¹⁸ This is not least because the ECPR provides a simple starting point with default costs caps for claimants and defendants, and a mechanism for varying them.

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 cost caps can be varied upwards or downwards according to financial means.

The Government is interested in whether a costs capping regime would be appropriate in SLAPPs cases as an effective mechanism for deterring or controlling cases that are designed to harass or intimidate, and to make it easier for parties to defend a claim, especially where there is the risk of very high adverse costs.

The ECPR offers an interesting model which could be applied for SLAPPs cases, assuming that class of case can be effectively categorised. We would welcome views on this proposal, or other suggestions for costs measures that would assist in addressing the challenges which SLAPPs litigation raises.

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

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

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.

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?

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?

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?

¹⁸ Aarhus Convention - Environment - European Commission (europa.eu)

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

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.

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.

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?

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.

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?

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.

Legislative reforms

Statutory definition for SLAPPs

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

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?

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?

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.

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

Reforms stemming from there being a defined cohort of SLAPPs cases

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.

Defamation (libel) laws

The Serious Harm Defence

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?

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?

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?

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?

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.

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?

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?

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?

Procedural reforms

Pre-Action Protocols

Question 31: Do you have any views or experience on how the Pre-Action Protocol for Media and Communications operates in SLAPPs cases? If so, to what extent does it help to regulate the conduct of SLAPPs claims? Please explain your response.

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

Strike-Outs

Question 33: To what extent do you consider that SLAPP type litigation represents an abuse of process, and should be considered by courts for strike-out action?

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

Civil Restraint Orders

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

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Other procedural reforms

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?

Regulatory reforms

Solicitors Regulation Authority Guidance on SLAPPs

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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?

Defamation costs reforms

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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?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 19/05/22 to:

SLAPPs Evidence
Ministry of Justice
102 Petty France
London SW1H 9AJ

Email: slapps.evidence@justice.gov.uk

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