Council of Europe

Submission on the draft text of the Committee of Ministers Recommendation on Countering Strategic Lawsuits Against Public Participation (SLAPPs)

Background

The UK Anti-SLAPP Coalition[1] is an informal working group established in January 2021, co-chaired by the Foreign Policy Centre, Index on Censorship and English PEN. It comprises a number of freedom of expression, whistleblowing, anti-corruption and transparency organisations, as well as media lawyers, researchers and academics who are researching, monitoring and highlighting cases of legal intimidation and SLAPPs, as well as seeking to develop remedies for mitigation and redress. The coalition has worked to make the case for structural and meaningful responses to SLAPPs. The coalition, which meets monthly, brings together expertise from a range of different fields to engage with policy-makers, regulators, media outlets and other organisations to ensure that the right to free expression and the ability for all to participate in society around them is not restricted by legal threats deployed by the wealthy and powerful seeking to shutdown scrutiny and democratic accountability.

Progress in the UK

Coalition members welcome the strong Draft Recommendation as a vital baseline from which Council of Europe member states, including the UK, can seek to address the impact of Strategic Lawsuits Against Public Participation (SLAPPs) in national legislation, as well as other important measures, such as regulation and support offerings directed at those targeted by SLAPPs. The UK's contribution to the Europe-wide proliferation of SLAPPs has been well documented. At the time of writing, seven alerts on the Council of Europe Platform to promote the protection of journalism and safety of journalists relate to SLAPPs and other examples of legal harassment in the UK.[2] The importance of action in the UK is highlighted by the number of threats that involve parties based outside the country, including USA, Sweden, Russia, Malaysia and other countries both inside and outside the Council of Europe region.

[1] UK Anti-SLAPP Coalition (2023), https://antislapp.uk/
[2] Council of Europe (2023), Platform to promote the protection of journalism and safety of journalists, https://fom.coe.int/en/accueil

Commitments to address this have been announced but progress is slow. In July 2022, the UK Government announced a pledge to bring forward legislative measures to address SLAPPs as part of its commitment to tackle Russian aggression in the context of the ongoing war in Ukraine.[3] For many months, progress stalled while the government sought a legislative vehicle to affix amendments to, or space in the legislative calendar to introduce a standalone bill (as called for by the UK Anti-SLAPP Coalition). However, on Tuesday 13 June, the UK Government announced an anti-SLAPP amendment[4] to the Economic Crime and Corporate Transparency Bill[5], currently progressing through Parliament. If adopted as part of the Bill, the amendment would provide courts in England and Wales with the power to strike out before trial SLAPPs that relate to economic crimes. While it moves the UK legal system closer to anti-SLAPP protection, it is only a partial victory.

The scope of the amendment is limited by a restrictive definition of "SLAPP", which is limited to claims relating to the "public interest in combating economic crime"; introduces an unnecessary element of uncertainty by relying on the belief of the defendant and the purpose of the disclosure; and requires the court to identify the intent of the filer – a notoriously difficult, time consuming, and costly task. Further to this the amendment, as drafted, lacks any means of compensating the defendant, punishing the claimant, or suspending proceedings pending resolution of the anti-SLAPP motion.

In November 2022, the Solicitors Regulation Authority (SRA) published a Warning Notice, which highlights to solicitors and firms that predatory litigation tactics and the facilitation of SLAPPs could put them in conflict with the SRA's code of conduct.[6] Notices such as this are considered by the SRA when they exercise their regulatory functions. In it, the SRA outlines some examples of behaviour or actions undertaken by solicitors that could be indicative of a SLAPP, such as acting as part of a proposed course of action that could be defined as SLAPPs, seeking to threaten or advance meritless claims, targeting a proposed publication on a subject of public importance, and labelling or marking correspondence 'not for publication', 'strictly private and confidential' and/or 'without prejudice' when the conditions for using those terms are not fulfilled. Following the publication of the Warning Notice, in February 2023, the SRA published the outcome of a thematic review it carried out after visiting 25 law firms and reviewing 50 files. The SRA found that while firms "had a good general understanding of SLAPPs", the level of training and knowledge was not consistent across the industry, leaving the SRA to find that law firms need to do more on SLAPPs.[7]

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[3] Ministry of Justice (2022), Crackdown on corrupt elites abusing UK legal system to silence critics, https://www.gov.uk/government/news/crackdown-on-corrupt-elites-abusing-uk-legal-system-to-silence-critics

[4] UK Anti-SLAPP Coalition (2023), Government-led anti-SLAPP amendment a welcome first step for the UK, but falls short of protecting against all SLAPP actions, https://antislapp.uk/2023/06/13/government-led-anti-slapp-amendment-a-welcome-first-step-for-the-uk-but-falls-short-of-protecting-against-all-slapp-actions/

[5] UK Parliament (2023), Economic Crime and Corporate Transparency Bill, https://bills.parliament.uk/publications/51963/documents/3729

[6] Solicitors Regulation Authority (2022), Warning Notice: Strategic Lawsuits against Public Participation (SLAPPs), https://www.sra.org.uk/solicitors/guidance/slapps-warning-notice/

[7] Solicitors Regulation Authority (2023), Conduct in disputes thematic review, https://www.sra.org.uk/sra/research-publications/conduct-disputes/

Response to the Draft Recommendation

Scope and definitional approach

In Paragraph 1 of the Draft Recommendation's appendix, SLAPPs are defined as "legal claims, proceedings and other actions brought in relation to public participation and expression on matters of public interest that have as their main purpose to prevent, restrict or penalize the exercise of rights associated with public participation." This use of 'main purpose' is also seen in Paragraph 5, under the Definitional criteria Paragraph. While we, as a Coalition, support this definition, we warn against the identification of purpose being required as part of any anti-SLAPP law, since such a subjective inquiry into the mind of the filer would create uncertainty and undermine the effective application of the law.

Key Terms

The UK Anti-SLAPP Coalition welcomes the Draft Recommendation's expansive and inclusive definition of public participation and public interest as a vital step towards tackling all SLAPPs, not just those that receive the most media attention. While the UK has seen a large number of SLAPPs aimed at journalists and media outlets, the coalition is aware of others targeting whistleblowers, facebook communities, activists, academics and others who contribute to the public's understanding of the society around them. While the Paragraph includes a list of examples that is to be read as indicative as opposed to an exhaustive list, it is important to keep this as broad as possible.

To this end we would recommend removing the qualification that users of social media be "popular", since this says nothing as to the quality or public interest nature of their engagement. This is especially relevant for users of social media platforms, where popularity may be determined by algorithmic decisions made by the platform as opposed to an organic display of the most commonly engaged with content.

Recommended action: Amendment to Paragraph 4 (i):

> *… including environmental and anti-corruption associations and activists; unions; whistleblowers; academics; bloggers; human rights defenders; legal professionals; ~~popular~~ users of social media; cultural; creative industry actors and others.*

Definitional Criteria

Paragraph 6 confirms that any anti-SLAPP legislative measure should include all causes of legal action. This approach should be welcomed to ensure the Draft Recommendation acknowledges SLAPPs as an abuse of the legal process, not the pursuit of specific causes of action. While some laws are more amenable to abuse than others, this will differ from jurisdiction to jurisdiction - with new (and indeed old) laws being weaponised against public participation at different points in time.

The Paragraph includes an indicative list of causes of action that can be deployed and it is important that this is not read as exhaustive. This technical amendment addresses this issue:

Recommended action: Amendment to Paragraph 6:

> *Legal actions may entail the misuse, abuse or threatened use of all types of statutory or common law to prevent, inhibit, restrict or penalise contributions to public debate, including**, but not limited to,** defamation, libel, insult, invasion of privacy, conspiracy, breach of intellectual property rights, economic interference or infliction of emotional harm.*

Paragraph 6 also highlights that any anti-SLAPP legislative measures should "also extend to so-called 'legal intimidation tactics' – interlocutory or interim measures, aggressive subpoenas, or simply threats designed to intimidate the other party into backing down."

It would be helpful here to recognise, explicitly, that injunctions can be weaponised as a form of SLAPP. This is important as injunctions do not fit neatly into the traditional paradigm of SLAPPs, since the process of *obtaining* an injunction is generally speaking very short - indeed, those on the receiving end of injunctions will often not know about the injunction until it has been secured against them.

Injunctions can, however, form the foundation of a particularly insidious and pernicious form of SLAPP; one that allows the filer to weaponise the criminal law in jurisdictions (such as the UK) which does not otherwise allow private parties to trigger criminal proceedings. Over the years this has developed into a powerful tool of legal harassment for SLAPP claimants. As with other forms of SLAPP, these injunctions have stretched the application of laws - including the Protection Against Harassment Act 1997, originally designed to tackle stalking, and more recently the tort of conspiracy to commit injury - to cover acts of public participation (specifically peaceful protest) in a way that is disproportionate and departs from the original intention of the legislature.

Professor Christopher Hilson from the University of Reading has pushed back against the idea that only cases that involve intimidating damages can qualify as SLAPPs, noting that "injunctions that are drawn unnecessarily broadly are also SLAPPs, because they seek to close down participation beyond what is necessary to protect the claimant's private interests".[8] Injunctions can, however, shut down public participation in other ways that fit within the SLAPP paradigm. Once an injunction is obtained, private parties can seek committal orders against those who breach the injunction - exposing public watchdogs like climate activists not just to protracted legal proceedings, but to *criminal* legal proceedings.

In the UK, this can ultimately lead to sentences of up to two years in prison. As with more traditional forms of SLAPPs, however, the sentence itself is often beside the point. The chilling effect caused by the *threat* of such a sentence - and the legal proceedings that precede it - is sufficient to discourage peaceful protest.

Indeed, companies have recently been using injunctions to threaten activists with extortionate cost applications - regardless of whether they have broken the injunction in

[8] Hilson, Prof. Christopher (2016), Environmental SLAPPs in the UK: threat or opportunity?, https://centaur.reading.ac.uk/44535/

question. In the recent case of *National Highways Ltd.* the court ordered the 133 named Defendants to pay 580,000 pounds in costs - a total of 4,360 pounds each. A number of activists have found themselves being named as defendants on multiple injunctions, despite never breaking one. These activists are then forced to live in uncertainty as to when the next injunction will emerge.

An increasing number of injunctions in the UK have been issued against "persons unknown**",** meaning it is even less likely that those targeted will know of the injunction's existence. These cannot be contested without applying to be named first as a defendant, thereby exposing the challenger to potential legal costs.

While persons unknown injunctions (PUI) used to be exceptional, there has been an explosion in their use in recent years. Friends of the Earth, who are challenging the use of these injunctions at the Supreme Court, have referred to this as a "privatisation of public order laws".[9] Indeed, since there is no cost protection limiting the fines in cases of contempt, PUIs can represent a more serious threat to activists than the criminal law that they might be breaking.

While most of these injunctions target protesters, those contributing to public interest reporting have also been targeted. In Scotland there is currently a case, which the Coalition Against SLAPPs in Europe (CASE) has identified as a SLAPP,[10] where MOWI, a salmon farming multinational company has attempted to prevent Don Staniford, an environmental campaigner who documents and reports on the welfare and conditions of farmed salmon, from accessing the farms. After requesting that Staniford take down videos, graphics and blogs he'd created about the company's salmon fish farms, while threatening legal action, in October 2021, MOWI sought permission for an interdict (injunction) against Staniford, preventing him from going within 15 metres of MOWI's fish farms, as well as other prohibitions such as not being able to fly drones within 50 metres of any farm, recording or speaking to employees or encouraging others to act on his behalf.

Recommended Action: Amendment to Preamble Paragraph J:

> *… including by threatening or taking* ***abusive*** *legal action ~~on fully or partially unfounded claims~~ and exploiting imbalances in financial, political or societal power while doing so, a practice often referred to as Strategic Lawsuits Against Public Participation (hereinafter "SLAPPs");*

Recommended Action: Amendment to Paragraph 6:

> *… While this will generally mean a civil lawsuit, in some jurisdictions it is possible to trigger misdemeanours, administrative measures or criminal charges against their critics,* ***including through the use of injunctions****.*

[9] Mortimer, Josiah (2023), Supreme Court to Consider if Anti-Protest Power Grab Injunctions Should be Struck Down, Byline Times https://bylinetimes.com/2023/02/07/supreme-court-to-consider-if-anti-protest-power-grab-injunctions-should-be-struck-down/

[10] Coalition Against SLAPPs in Europe (CASE) (2023), Don Staniford – Price for exposing the dark side of salmon farms, https://www.the-case.eu/latest/don-staniford-salmon-farms-lawsuit/

This definition can also extend to so-called "legal intimidation tactics" – interlocutory or interim measures, aggressive subpoenas, or simply threats designed to intimidate the other party into backing down.

SLAPP Indicators

Paragraph 8 of the Appendix to the Draft Recommendation outlines a number of indicators or characteristics that can be used to identify SLAPPs. This will be an invaluable resource to judges and prosecutors when determining the nature of threats aimed at public participation. However, it is vital that this list not be interpreted as an exhaustive or cumulative set of criteria that encourages judges to prioritise only those threats that satisfy multiple indicators. While SLAPP claimants may use multiple tactics in pursuit of a SLAPP threat or action, others may use only one, but the nature or severity of the threat would be sufficient to warrant action outlined in anti-SLAPP legislative measures.

While we support the inclusion of these indicators, we recommend that the text be amended to ensure acute threats are addressed alongside those who satisfy multiple indicators. This would also prevent claimant lawyers and other bodies who enable SLAPPs to avoid the application of Paragraph 8 by advancing only a small number of the tactics listed. Judges must be empowered to analyse the quality, or acuteness, of the behaviour in question as well as the quantity of SLAPP tactics.

Recommended action: Amendment to Paragraph 8:

> *While SLAPPs do not necessarily include all of these characteristics,* ***the more acute the behaviour or*** *the more of them that are present, the more likely the legal action can be considered as a SLAPP. Such indicators include****, but are not limited to****:*

The indicator outlined in Sub-Paragraph 8 (v) states "The legal action targets individuals or organisations, or other individuals or organisations associated with them." This is unclear and imprecise.

The intention of this sub-paragraph may be to include SLAPP actions that target individuals or organisations secondary to or not directly responsible for the challenged action, as a means of maximising the intimidatory impact of the lawsuit. Efforts to target individuals in addition to the organisations responsible for the perceived harm is, in particular, a common intimidation tactic used by SLAPP claimants. Individuals are generally speaking more exposed to serious financial harm and the prospect of long protracted litigation is therefore more intimidating. Even if the organisation in question supports the individual, the knock-on effects of being named in a lawsuit (e.g. when applying for a mortgage or a loan) can be enough to intimidate and deter individual public watchdogs.

As documented in the SLAPP action against investigative journalist, Carole Cadwalladr, many claimants will therefore target the individual journalist, where the challenged statement was published by an institution such as a newspaper (or in Cadwalladr's case also via

TED).[11] This act isolates the individual from their employer or platform and prevents them from being able to access the legal, financial and institutional support that would arise from the institution themselves being targeted. That such targeting indicates a SLAPP purpose is particularly apparent where the ultimate responsibility of the publication lies with the organisation itself. In the case of *Cadwalladr v Banks*, for example, the Court of Appeal judge noted that "it is common ground that she [Carole Cadwalladr] is not able to control what the TED organisation does."[12] The targeting of an individual as opposed to the institution who published the statement must be seen as a clear attempt to widen the 'inequality of arms' between the parties and so should fall within the remit of this Draft Recommendation. This is also relevant due to definitional criteria included in Paragraph 5 of the Draft Recommendation, which includes, as part of the definition of SLAPPs, actions aimed at "draining the resources of the defendant." Other Council of Europe Member States have addressed this inequality. For instance, under Swedish law it is not possible to sue journalists independently of their publication.[13]

If this is the intended goal of this draft indicator, we would recommend amending the indicator to clarify this legitimate concern.

Recommended action: Delete Paragraph 8 (v) or amend as follows:

> *The legal action targets individuals* ***as opposed to, or in addition to, the*** ~~*or*~~ *organisations* ***ultimately responsible for the challenged action, where there is no reasonable justification for their inclusion.***~~*, or other individuals or organisations associated with them*~~

Procedural Safeguards

In Paragraphs 22 and 23, the Draft Recommendation outlines the importance of courts being able "to dismiss a claim as a SLAPP early in the proceedings" and "make an assessment and fully or partly dismiss the claim if it is unfounded, abusive or would otherwise have a disproportionate impact." This is a vitally important aspect of any anti-SLAPP mechanism, since it ensures SLAPPs can be disposed of without opening the targets to time-intensive and costly court proceedings.

In order for such a filter mechanism to be effective, however, it is crucial that a high enough threshold is in place for claimants targeting public participation to meet in order to proceed to trial. For this reason the UK Anti-SLAPP Coalition supports the threshold included in the Draft Recommendation of "unlikely to succeed in trial".

The importance of this wording is underscored by the inadequacy of the UK's existing mechanisms for disposing of a case pre-trial - something that is self-evident by the number of SLAPPs that make it to court in the UK. This, when paired with the cost of defending

[11] UK Anti-SLAPP Coalition (2023), Case: In focus - Carole Cadwalladr, https://antislapp.uk/project/carole-cadwalladr/
[12] Court of Appeal (Civil Division) (2023), Cadwalladr v Banks (Case No: CA-2022-001390), https://www.judiciary.uk/wp-content/uploads/2023/02/Banks-v-Cadwalladr-judgment-280223.pdf
[13] Foreign Policy Centre (2023), Realtid, a Swedish business publication, its editor and two investigative journalists, https://fpc.org.uk/realtid-a-swedish-business-publication-its-editor-and-two-investigative-journalists/

against a SLAPP and the lack of legal aid, has contributed to the UK's prominence in the field of SLAPPs, including those involving parties based outside the jurisdiction.

The absence of a robust filter mechanism in UK civil procedure is a major problem:

- Summary dismissal for cases that lack merit is only available in English civil procedure if the case is so lacking in substantive merit that it has no real prospect of success at trial. Given the complexity and ambiguity of relevant laws (e.g. defamation, privacy) and the judicial culture of preferring issues to go to trial, that is an extremely high threshold for a defendant to meet and as a result, is only rarely met in SLAPP cases. The threshold for dismissal of cases for lack of merit in Scotland is, if anything, even higher than in England.

- Cases can be dismissed on the ground of 'abuse of process', but this requires the defendant to show that the case is fraudulent, futile (an extreme case of disproportionality) or brought for an improper purpose. Motions to strike are therefore extremely rare on grounds of abuse of process: indeed, the UK Anti-SLAPP Coalition is not aware of any SLAPP lawsuit being filtered out pre-trial on the basis of improper purpose.[14]

Since an application to dismiss a case summarily can already be filed at an early stage in proceedings, an early dismissal mechanism that uses the same test (i.e. a "real" prospect of success) will be redundant. The higher threshold introduced in Paragraph 24 is therefore crucial.

In its July 2022 announcement of a commitment to address SLAPPs, the UK Government identified an early dismissal mechanism as an aspect they are exploring. In the Anti-SLAPP amendment to the Economic Crime and Corporate Transparency Bill outlined above, the coalition supported the inclusion of a robust threshold test with the burden on the claimant to show that the claim is more likely than not to succeed at trial. However, it falls short in other respects that are significant. For instance, as highlighted earlier in this submission, the definition of SLAPP is too narrow to represent broad enough protections against SLAPPs. Further to this, while the claimant will be required to show that the claim is likely to succeed at trial, it will only have to do this if the court has already identified the case as constituting a SLAPP - a process that requires the court to undertake a subjective enquiry into the mind of the filer.

Since public participation is a democratic imperative, it merits an additional layer of protection irrespective of whether signs of abuse can be identified. That such protection is necessary has long-since been recognised by the European Court of Human Rights (ECtHR), and so should be reflected in Paragraph 24.

Recommended action: Amendment to Paragraph 24:

[14] For example, Amersi v Leslie [2023] EWHC 1368 (KB) was an extreme case in which the claim was eventually dismissed as lacking any real prospect of success on the merits (something which required a 241 paragraph decision (with another 128 paragraphs in an appendix) and huge legal costs to establish). But even then, despite the judge listing four strong indications (para 240) of improper purpose, he declined to strike out the case on that basis.

> *The conditions for the admissibility of applications for early dismissal should be determined by national law and could, for instance, include judicial consideration of the following ~~cumulative~~ criteria: (i) whether the claim is unlikely to succeed at trial, ~~and~~ **and/or** (ii) whether the proceeding amounts to abuse of process, in light of the SLAPP indicators set out in paragraph 8 (above).*

Remedies

The costs regime in the UK, especially in England and Wales, establishes a severely restrictive environment that deters defendants from being able to defend themselves. Even for targets who believe they have a defence upon which they can depend, the question as to whether they can afford to put it forward is sometimes enough for them to avoid court all together. According to research carried out by the Foreign Policy Centre, one of the UK Anti-SLAPP Coalition co-chairs:

> Mounting a libel defence in the UK today is still expensive, with leading defamation lawyer Mark Stephens stating that £500,000 is the 'absolute floor' for a full-scale libel trial, with most starting at £1 million. Even preliminary hearings, at which stage defendants might seek to get the case thrown out on meaning or jurisdictional grounds can run anywhere from £50,000-£100,000.[15]

Even if a defendant is successful, some of the costs incurred are not recoverable. In England and Wales, the winning party in civil litigation is entitled to recover costs from the losing party. However, sometimes there is a discrepancy between the actual costs of litigation, which are the costs that each party pays to its own lawyers for running the case, and the recoverable costs, which the winning party recovers from the losing party by order of the court or by agreement.

Costs can be significant even if the case does not make it to a full hearing. It has been reported that Catherine Belton and her publisher, HarperCollins, spent £1.5 million defending multiple SLAPP actions from multiple Russian oligarchs and a state oil company, none of which made it to a full court hearing.[16] Further to this, "it has been estimated that if the trial had gone ahead in the High Court and Australia the legal bill was likely to have exceeded over £5 million."[17] This also highlights how multiple claimants, SLAPP actions and jurisdictions can add time and complexity to cases, which, due to the cost regime in the UK, also adds to the cost.

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[15] Foreign Policy Centre & Article 19 (2022), London Calling: The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom, https://fpc.org.uk/wp-content/uploads/2022/04/London-Calling-publication-April-2022.pdf#

[16] Cohen, Nick (2022), Putin has used British rich man's law to avoid scrutiny, at a crippling cost to us all, The Guardian, https://www.theguardian.com/commentisfree/2022/feb/26/putin-british-rich-mans-law-avoid-scrutiny-crippling-cost

[17] UK Anti-SLAPP Coalition (2023), Case: In Focus - Catherine Belton, https://antislapp.uk/project/catherine-belton/

The longer a case continues the more expensive it is to defend, which will then inform the defendant's ability to mount an effective defence. This was highlighted in the 2018 - 2020 SLAPP action brought by Javanshir Feyziyev, an Azerbaijani MP and businessman against OCCRP's co-founder, Paul Radu after he was named in OCCRP's investigation, *The Azerbaijani Laundromat*. While defending the case, the media outlet had spent hundreds of thousands of dollars, as well as significant time, effort and stress diverting them from other investigations. As Radu himself put it: "Even if you win, you lose."[18]

The recent costs order following the appeal in the SLAPP action against investigative journalist Carole Cadwalladr highlighted the financial implications of the UK's current system. On 17 May 2023, the Court of Appeal published the costs order after the court upheld Arron Banks' argument that the continued publication of the TED Talk had the potential to harm his reputation, but dismissed two other grounds of his appeal.[19] The order specified that Cadwalladr must, for instance, pay 60% of Banks's costs in the High Court and one third of Banks's costs before the Court of Appeal.[20] This could amount to over half a million pounds, as well as a significant amount that must be repaid to Arron Banks.

That high legal costs continue to fuel so many SLAPPs in the UK is particularly inexcusable given that it was on this basis that the ECtHR found a violation of Article 6 in perhaps the most famous SLAPP case to ever reach the Strasbourg court: *Steel and Morris v UK* (relating to the so-called "McLibel" lawsuit).[21] Almost 20 years after the ECtHR's decision in this case, legal aid remains unavailable in defamation cases, except in limited circumstances in Scotland. While Exceptional Case Funding (ECF) brought the UK into notional compliance with this judgement, the UK Anti-SLAPP Coalition has not been able to find a single documented case where a defamation defendant qualified for ECF.

One procedural safeguard which is missing from the Draft Recommendation is a capping of *costs*, in addition to the capping of damages in Paragraph 40. The recent Anti-SLAPP amendment to the Economic Crime and Corporate Transparency Bill includes a provision to cap costs. Clause 193 (4) states: "The power to make Civil Procedure Rules must be exercised so as to secure that Civil Procedure Rules include provision for securing that, in respect of a SLAPP claim, a court may not order a defendant to pay the claimant's costs except where, in the court's view, misconduct of the defendant in relation to the claim justifies such an order."[22] This is a vital amendment to limit the damage caused by increased costs even when a SLAPP claim in court is successful.

Paragraph 40 of the Draft Recommendation is limited to "immaterial damages". It is unclear why this is, and the UK Anti-SLAPP Coalition recommends the removal of the "immaterial"

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[18] UK Anti-SLAPP Coalition (2023), Case: In Focus - Paul Radu, https://antislapp.uk/project/paul-radu/
[19] UK Anti-SLAPP Coalition (2023), UK Anti-SLAPP Coalition reiterates its support for Carole Cadwalladr, https://www.indexoncensorship.org/2023/03/uk-anti-slapp-coalition-reiterates-its-support-for-carole-cadwalladr/
[20] Court of Appeal (2023), Cadwalladr v Banks (Case No: QB-2019-002507) Costs Order, https://www.judiciary.uk/judgments/banks-v-cadwalladr-costs-order/
[21] European Court of Human Rights (2005), Steel and Morris v. The United Kingdom (Application no. 68416/01) final judgement, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-68224%22]}
[22] UK Parliament (2023), Economic Crime and Corporate Transparency Bill Clause 193, https://bills.parliament.uk/publications/51963/documents/3729

qualification. As drafted it would represent a dilution of the existing English cap on damages (fixed by case law in the context of defamation at £300,000) which has no such limitation.

Recommended Actions: Amendment to Paragraph 40:

> *Member states should, within the possibilities of their national legal systems, provide for the capping of ~~immaterial~~ damages ~~to be recuperated by claimants~~, in order to pre-empt abusive or disproportionate financial penalties for the defendants, which would cause a chilling effect on their public participation, and to avoid creating financial incentives for filing legal action.*

Include a Paragraph to include a cap on costs:

> ***Member states should, within the possibilities of their national legal systems, provide for the capping of costs, to ensure defendants are able to mount an effective defence and protect against court procedures being drawn out to exhaust the financial resources of defendants, which would cause a chilling effect on their public participation.***

For more information

If you have any questions about this submission or the UK Anti-SLAPP Coalition, please contact: info@antislapp.uk