

## **Economic Crime and Corporate Transparency Bill: Anti-SLAPP Amendment**

### **Analysis and Suggested Amendments**

The UK Government has announced an anti-SLAPP (strategic lawsuits against public participation) [amendment](#) to the Economic Crime and Corporate Transparency Bill. If adopted, the amendment would provide courts in England and Wales the power to strike out SLAPP claims before trial that relate to information about economic crimes that is disclosed in the public interest.

The UK Anti-SLAPP Coalition [welcomes this amendment](#) which, if brought into law, would be the UK's first legislative anti-SLAPP measure. It provides a robust new threshold test along the lines presented in the Coalition's [model UK Anti-SLAPP Law](#) and elevates the importance of free speech and public interest reporting relating to economic crime. However, given the limited scope of the Bill - as well as certain crucial shortcomings in the text itself - this amendment falls short of providing meaningful protection against SLAPPs. Its uneven handed approach creates inequality in the law for those subjected to SLAPPs that do not relate to economic crime and corruption. The Government has committed to additional legislation (beyond economic crime) and we call for this to be done as quickly as possible to ensure SLAPP protections are universally available.

While acknowledging these limitations, we encourage Parliament to work constructively to build on its promising framework. In the first instance, the Government's amendment can, and should, be strengthened in a number of crucial ways, as outlined in the suggested amendments overleaf.

### **Overview of the Government led amendment on SLAPPs**

#### Positives:

- Robust threshold test with the burden on the claimant to show that the claim is more likely than not to succeed at trial.
- Profile of the defendant is not prescribed - so can be used by anyone - journalist, whistleblower, activist, academic, etc - who is disclosing information in the public interest relating to economic crime and corruption.
- Recognises need to defer to courts to determine rules of admissibility as a means of managing costs
- Cost protections in place for SLAPP defendants if they lose the case.

#### Negatives:

- The scope of the amendment is limited by a restrictive definition of "SLAPP". Specifically it:
  - Restricts the application of the amendment to claims relating to the "public interest in combating economic crime".
  - Introduces an unnecessary element of uncertainty by making the operation of the law contingent on the belief of the defendant and the purpose of the disclosure.
  - Requires the court to identify the intent of the filer – a notoriously difficult, time consuming, and costly task. While this is given shape by illustrative examples of SLAPP conduct provided in the amendment, these examples only scratch the surface of known SLAPP tactics and would not cover many cases widely recognised as SLAPPs.
- Lacks any means of compensating the defendant or punishing the claimant.
- No provision to suspend proceedings, needed to avoid abuse pending resolution of any anti-SLAPP motion.

## **Suggested Amendments to Existing Provisions**

Additions to the text indicated in **RED**. Deletions with ~~strikethrough~~.

Below are a number of suggested changes to the proposed amendments that address certain shortcomings the Coalition has identified - shortcomings that may otherwise prevent the effective operation of the proposed anti-SLAPP mechanism.

### **PRIORITY 1: Reducing the need for a subjective enquiry into the mind of the filer**

#### **194. Meaning of “SLAPP” claim**

(1) For the purposes of section 193 a claim is a “SLAPP claim” if—

...

(d) any of the behaviour of the claimant in relation to the matters complained of in the claim **can be reasonably understood as** ~~is intended to cause the defendant -~~

- (i) harassment, alarm or distress,
- (ii) expense, or
- (iii) any other harm or inconvenience,

~~Beyond that ordinarily encountered in the course of properly conducted litigation~~

Explanation: If this test is purely subjective - requiring the courts to engage in a subjective enquiry into the mind of a filer - courts will be reluctant to make a finding in favour of the defendants, given the inherent uncertainties in *inferring* the purpose of the filer. This amended wording provides the court with a more objective means of deciding claims. Given how high legal costs are in England and Wales, meanwhile, it can be easy to financially ruin a SLAPP target “in the course of properly conducted litigation” - hence the preference for removing this line.

### **PRIORITY 2: Reducing the burden on the defendant**

#### **193. Strategic litigation against public participation: requirement to make rules of the court**

(1) The power to make Civil Procedure Rules must be exercised so as to secure that Civil Procedure Rules include provision for ensuring that a claim may be struck out before trial where the court determines—

- (a) that the claim is a SLAPP claim (see section 194), and
- (b) that the claimant has failed to show that is more likely than not that the claim would succeed at trial.

.....

#### **194. Meaning of “SLAPP” claim**

(1) For the purposes of section 193 a claim is a “SLAPP claim” if—

- (a) the claimant’s behaviour in relation to the matters complained of in the claim has, or is intended to have, the effect of restraining the defendant’s exercise of the right to freedom of speech,
- (b) any of the information that is or would be disclosed by the exercise of that right has to do with economic crime,
- (c) any part of that disclosure is or would be ~~made for a purpose~~ related to the public interest in combating economic crime, and

(d) **[Amended as outlined above, under priority one]**

.....

(3) ~~For the purposes of this section, information mentioned in subsection (1)(b) “has to do with economic crime” if—~~

- ~~(a) it relates to behaviour or circumstances which the defendant reasonably believes (or, as the case requires, believed) to be evidence of the commission of an economic crime, or~~
- ~~(b) the defendant has (or, as the case requires, had) reason to suspect that an economic crime may have occurred and believes (or, as the case requires, believed) that the disclosure of the information would facilitate an investigation into whether such a crime has (or had) occurred.~~

Explanation: At the moment the burden is on the claimant under Clause 193 (1)(b) to meet the new threshold burden - but crucially Clause 193 (1)(a) still leaves it to the defendant to show the claim is a SLAPP. In addition to the difficulties inherent in establishing subjective intent (see priority one), Clause 194 (1)(c) presents another challenging and potentially resource-intensive hurdle for the SLAPP defendant to meet.

In particular, there is a danger that Clause 194 (3) will entail a lengthy enquiry into the beliefs of the defendant and whether they can be considered “reasonable”. Given the fact that abusive conduct must already be established in Clause 194 (1)(d), we believe this part of the definition should simply be removed. If it does remain, we suggest either that a presumption is instituted in favour of the defendant or a more objective standard is included as a new Clause 194 (3)(c).

### **PRIORITY 3: Strengthening indicators of abuse**

#### **194. Meaning of “SLAPP” claim**

- (4) *In determining whether any behaviour of the claimant falls within subsection (1)(d), the court may, in particular, take into account -*
  - (a) *Whether the behaviour is a disproportionate reaction to the matters complained of in the claim, including whether the costs incurred by the claimant are out of proportion to the remedy sought, **or if the remedies sought are excessively or unreasonably high;***
  - (b) *Whether the defendant has access to fewer resources with which to defend the claim than another person against whom the claimant could have brought (but did not bring **or brought in addition to proceedings against the defendant**) proceedings in relation to the matters complained of in the claim;*

Explanation: These edits are intended to cover two separate tactics used to intimidate the SLAPP target: the use of excessively high damage claims and the targeting of individuals *in addition* to the organisations of which they are part. Beyond the above, we would strongly recommend adding further features of abuse here in line with Clause 2(b) of our [model UK Anti-SLAPP Law](#). Given the subjective nature of *Clause 194 (1)(d)*, it is crucial that the court has a clear steer in how to infer the intent of the filer.

## **PRIORITY 4: Supplementary measures needed**

In order to ensure the effective operation of this early dismissal mechanism, it is crucial that provision is made to suspend proceedings pending resolution of any anti-SLAPP motion. This will ensure that the SLAPP claimant is not able to drive up costs (e.g. through the disclosure process) or otherwise harass the defendant prior to the disposal of the claim. An example of this could be:

### **193. Strategic litigation against public participation: requirement to make rules of the court**

**(3) (a) Rules made in compliance with subsection (1) must ensure that no further step may be taken in the proceedings by any party until any application under subsection (1), including any appeal against the application, has been finally disposed of.**

*(\*To note the current Clause 193 (3) would remain unchanged, but become Clause 193 (3)(b))*

Finally, in order to ensure full protection there also needs to be measures to sanction and deter the use of SLAPPs and to compensate those targeted by the use of SLAPPs. See Clause 4 of our [model UK Anti-SLAPP Law](#).

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For further information regarding this analysis and the suggested amendments, please contact the UK Anti-SLAPP Coalition on [info@antislapp.uk](mailto:info@antislapp.uk)

### About the UK Anti-SLAPP Coalition

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

The UK Anti-SLAPP Coalition's website - [antislapp.uk](http://antislapp.uk) - is a resource that serves as a repository for everything related to SLAPPs, including the model UK Anti-SLAPP Law, case studies, a resource library, and practical advice for those targeted with SLAPPs.