

## Strategic Litigation Against Public Participation Bill UK Anti-SLAPP Coalition Briefing, April 2024

Ahead of the Committee Stage of Wayne David MP's [Anti-SLAPP Private Members' Bill \(PMB\)](#), this briefing paper evaluates and provides analysis of the current draft. It focuses on the central problem carried over from the approach developed by the Government in the Economic Crime and Corporate Transparency Act (ECCTA) in October 2023: the subjective test applied to identify SLAPPs for the purpose of early dismissal.

### **PMB Definition of SLAPPs: the challenge of a subjective inquiry into the claimant's mind**

Mirroring the language in Section 195 of the ECCTA, the definition of SLAPPs in Clause 2(1) of the PMB:

*(1) For the purposes of section 1 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) the information that is or would be disclosed by the exercise of that right relates to a matter of public interest, and*
- (c) any of the behaviour of the claimant in relation to the matters complained of in the claim 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.*

**This requires the court to identify the *intent* of the claimant as a means of determining whether the legal action in question can be defined as a SLAPP, i.e. it places the threshold at what they are supposedly thinking rather than what they are doing and the impact of their actions.**

Proving intent is a notoriously difficult and costly task which - in the likely absence of any explicit statement of intent (at least any not subject to privilege) - requires the court to *infer* the state of mind of the filer. SLAPP claimants will always claim that they are pursuing litigation to redress wrongs or vindicate rights, and those with the money to hire decent lawyers will find ways to disguise the true purpose of the SLAPP. This is generally not difficult. Given the implications of inferring an improper purpose courts tend to approach such a task conservatively, avoiding any conclusion that would then entail pretrial dismissal.

While the UK Government has identified features of abuse in Clause 2(4)(a)-(c) in an approach similar to that proposed in the UK Anti-SLAPP Coalition's [Model UK Anti-SLAPP Law](#), this is only included as guidance as to the sort of thing the court *should* consider. Such guidance is unlikely to soften the reluctance of courts to strike out the claim on the basis of a subjective inference.

**A more objective approach, as advanced in the Model UK Anti-SLAPP Law, would trigger the early dismissal mechanism on the basis of these identified features of abuse alone** i.e. it would apply the heightened merits test (“more likely than not that the case would prevail at court”) whenever a claim targeting public interest speech was found to exhibit the features of abuse listed in 2(4)(a)-(c).<sup>1</sup> This would reduce the uncertainty inherent in the subjective test, allowing defendants greater confidence in fighting the SLAPP filed against them. This could be achieved without reshaping the approach deployed in the PMB as outlined below with a small but crucial amendment to Clause 2(1) (***bold and italicised*** text is the additional text, while ~~strike through~~ highlights text to be deleted):

- (a) the claimant’s behaviour in relation to the matters complained of in the claim ***can be reasonably understood as having, or as being*** ~~has, or is~~ intended to have, the effect of restraining the defendant’s exercise of the right to freedom of speech,
- (b) the information that is or would be disclosed by the exercise of that right relates to a matter of public interest, and
- (c) 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.~~

**This small but crucial amendment will shift the court’s focus away from what the claimant *thinks* to what the claimant *does*, allowing courts and judges to use objective *features* of abuse to trigger the early dismissal mechanism.** This position has been shared by the [Law Society](#) who have similarly called for “the inclusion of an objective test to define a SLAPP case.”<sup>2</sup>

**The ineffectiveness of the subjective test is evident from both national and international examples:**

- With 34 anti-SLAPP laws in the US alone, there are ample experiences worldwide that can be referred to when drafting anti-SLAPP laws. One conclusion that is unambiguously clear from examining international experiences is that subjective tests have proved to be ineffective.
- Of the 34 laws established by US states, none use the subjective test found in the current draft of the PMB. Georgia’s previous anti-SLAPP law included a similar approach, but in 2016, the state’s law was amended to more closely resemble the approach taken by California’s anti-SLAPP law.
- In England and Wales, CPR 3.4 already allows courts to strike out a claim where the statement represents an “abuse of the court’s process”, which has been held to include a use of the court process “for a purpose or in a way which is significantly different from the ordinary and proper use of the court process” (*Attorney General v Barker*). Since this has been held to include efforts to deliberately subject the defendant to harassment, inconvenience, and disproportionate extent, (1)(d) could to some extent be seen as a codification of existing law.

**It is worth emphasising, therefore, that existing law has been entirely inadequate at filtering SLAPPs out of the court process. Indeed, the UK Anti-SLAPP Coalition is unaware of *any* case which has been struck out on the basis of an inferred purpose alone. In practice, this is because courts apply a very high standard as to what constitutes harassment or expense “*beyond that ordinarily encountered in the course of properly conducted litigation*”.**

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<sup>1</sup> UK Anti-SLAPP Coalition, Model UK Anti-SLAPP Law,

<https://antislapp.uk/wp-content/uploads/2023/05/Model-UK-Anti-SLAPP-Law-Final-Version.docx.pdf>

<sup>2</sup> Law Society, (2024), “More needs to be done to make SLAPPs legislation workable”,

<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/more-needs-to-be-done-to-make-slapps-legislation-workable>

- The case of *Amersi v Leslie* [2023] was an extreme case in which the claim was eventually dismissed as lacking any real prospect of success (something which required a 241 paragraph decision and huge legal costs to establish). Even then, despite the judge listing four strong indicators (para 240) of improper purpose, the court declined to strike out on that basis.
- Even the recent case of *Kelly v O'Doherty* [2004], in which the High Court of Justice in Northern Ireland recognised Gerard Kelly's claim to constitute a SLAPP, was found to be an abuse of process primarily on the basis that the claim was untenable in light of the publication of Kelly's book *The Escape*.
- In the case of *Kings Security Systems Ltd v King & Anor* [2021], the court explicitly said that "the bringing of legal proceedings for the purpose of achieving... the defendant's financial ruin is not an improper purpose".

Without statutory underpinning there is therefore little prospect that the courts will themselves filter out such claims.

### Concerns raised regarding the existing anti-SLAPP provisions in the ECCTA

As the approach taken in this PMB is the one developed in the ECCTA (2023) it is important to highlight responses from civil society and the legal profession to the anti-SLAPP provisions already in law.

Following the Bill's passage, the [UK Anti-SLAPP Coalition welcomed it](#), as "a stepping stone to addressing SLAPPs" but highlighted the Act's shortcomings.<sup>3</sup> **Coalition co-chair, Charlie Holt** stated "*The new law offers a promising framework for tackling the problem, but is undermined by an excessively restrictive definition of SLAPP – one that, by requiring the court to identify the intent of the filer, introduces an unnecessary element of uncertainty into the process.*"

As well as uncertainty, a number of experts have raised concerns that this aspect of the approach will do little to address the increased costs, time and stress associated with SLAPPs. **Dr Peter Coe of the University of Birmingham and a member of the Council of Europe MSI-SLP Committee of Experts on SLAPPs** warned that "*determining intent could add to the complexity, and therefore the length and cost, of the early dismissal process, thereby defeating its purpose.*"<sup>4</sup>

This point was also addressed by **Travers Smith, a UK law firm**, which stated "*it appears that the definition of a SLAPP could offer several avenues for a claimant to argue that their claim does not meet the definition, whether legitimately or otherwise. ... the effectiveness of this approach will likely depend on the way in which judges choose to interpret the provision.*"<sup>5</sup> This latter point was also highlighted by a blogpost by **Inform (International Forum for Responsible Media)**, which stated "*There are no clear established standards as to what level of these consequences is 'ordinarily encountered in the course of properly conducted litigation'. Different judges will have different views.*"<sup>6</sup> The lack of consistency or ease by which this standard can allow

<sup>3</sup> UK Anti-SLAPP Coalition (2023), "A landmark moment – but we can't stop here", <https://antislapp.uk/2023/10/26/a-landmark-moment-but-we-cant-stop-here/>

<sup>4</sup> Coe, Peter Dr. (2023), "Strategic Lawsuits Against Public Participation (SLAPPs) and the Economic Crime and Corporate Transparency Act 2023", Birmingham Law School Research Blog, <https://blog.bham.ac.uk/lawresearch/2023/11/strategic-lawsuits-against-public-participation-slapps-and-the-economic-crime-and-corporate-transparency-act-2023/>

<sup>5</sup> Lee, Stephanie (2023), "New UK measures to address SLAPPs: a panacea or a missed opportunity?", Travers Smith, <https://www.traverssmith.com/knowledge/knowledge-container/new-uk-measures-to-address-slapps-a-panacea-or-a-missed-opportunity/>

<sup>6</sup> International Forum for Responsible Media (2023), "SLAPPs and the Economic Crime and Corporate Transparency Bill: ill thought out amendments risk increased costs and injustice", Inform,

SLAPP claims to be discarded early (before legal costs have accrued) can undermine the efficacy or accessibility of this protection and so should be avoided for any standalone Anti-SLAPP Law.

**The Law Society** [confirmed](#) its view that "[t]here are weaknesses in the current provisions that will need to be addressed in further legislation."<sup>7</sup> It is unlikely these weaknesses will be addressed if further legislation, such as a standalone anti-SLAPP law, replicates the approach established in the ECCTA.

## **European Anti-SLAPP Standards - Council of Europe and the European Union**

On 5 April 2024, the Committee of Ministers of **the Council of Europe formally adopted a Recommendation on SLAPPs**. The UK was a member of the MSI-SLP Committee of Experts that helped to draft this Recommendation, and was often referred to during the drafting process for its experiences in tackling SLAPPs. As a member of the Council of Europe, of course, the conclusions of the Recommendation are applicable to the UK and should be considered in relation to its national laws.

This Recommendation calls for the adoption of a number of anti-SLAPP remedies and measures that are absent from the PMB - compensatory damages, dissuasive sanctions, and security for costs, among other things - but it's in relation to the early dismissal mechanism that the Council of Europe recommendation is perhaps most instructive.

The Recommendation provides a wide range of ten "SLAPP indicators", some of which mirror the PMB's own list in Clause 2(4) and (5). While it suggests that these indicators may be used as a condition for the application of the early dismissal mechanism - along with the question of whether the claim is "unlikely to succeed at trial" - it is the *presence of these indicators alone* that triggers early dismissal, and not the identification of the purpose driving them (see Para 31).

The **European Union Anti-SLAPP Directive**, formally signed into law on 11 April 2024, likewise avoids the use of a subjective test. Indeed, the application of the law's early dismissal mechanism does not require *any* such referral to features or indicators of abuse. Rather, if a lawsuit targets public participation it will immediately be dismissed should it be found to be "manifestly unfounded" (which is left undefined in the directive and therefore left to member states to clarify).

While this law is obviously not binding on the UK, it's important to note the implications of this law: namely, that over the course of the next two years 27 European states will introduce national anti-SLAPP laws that will - given the standards established by the EU and the Council of Europe - be considerably more robust than the mechanism currently found in the PMB.

Despite all its progress over the last few years, the UK therefore risks finding itself being left behind in the fight against SLAPPs - reinforcing its status as a country that provides fertile ground for SLAPPs. Indeed, given that Chapter V of the EU Directive provides measures to protect EU citizens from SLAPPs in third-countries, the UK will face the humiliating prospect of having the enforcement of its court judgements blocked in EU member states - and EU citizens compensated for having suffered harm in our courts as a result of our weak procedural protections.

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<https://inform.org/2023/06/30/slapps-and-the-economic-crime-and-corporate-transparency-bill-ill-thought-out-amendments-risk-increased-costs-and-injustice/>

<sup>7</sup> Law Society (2024), "Economic Crime and Corporate Transparency Act: What's Changing", <https://www.lawsociety.org.uk/topics/anti-money-laundering/economic-crime-and-corporate-transparency-act>