

Mr Nick Emmerson
The President of the Law Society
The Law Society's Hall
113 Chancery Lane
LONDON
WC2A 1PL

27 October 2023

By post and email: nick.emmerson@lawsociety.org.uk

Dear Mr Emmerson

The Law Society's policy on the question of Strategic Lawsuits Against Public Participation ('SLAPP') reform

We write concerning the above subject.

The Society of Media Lawyers ('TSML') is an unincorporated association of lawyers and other individuals practising media law in England and Wales. Most of our members are solicitors, although our membership also includes both senior and junior members of the Bar. A full list of our members can be found at thesocietyofmedialawyers.org. Our Mission Statement is that "*our members wish to add fairness and balance, as well as their perspective, to the public debate surrounding media law in order to ensure that the debate is properly informed by the facts*".

The topic of so-called SLAPPs came to public prominence in March 2022 after the Russian invasion of Ukraine. Following media pressure, the government swiftly promised to take legislative action against SLAPPs. In turn, political pressure was placed on the SRA to clamp down on media law solicitors undertaking claimant work. Defamation defendants and journalists were encouraged to complain of any allegedly SLAPP-like conduct. As the term SLAPP is open to interpretation, many complainants came forward. In November 2022 the SRA rushed out a Warning Notice (halfway through a thematic review of 25 media law firms). In February 2023, the SRA announced that it was investigating 40 SLAPP matters.

Our members act for defamation and privacy claimants and defendants. They understand the importance of freedom of expression but also, in the words of Article 10 of the European Convention, the "duties and responsibilities" which it engages. However, they are concerned that the narrative advanced by certain elements in the media and by pressure groups is a false one, which grossly exaggerates the problem, and unfairly singles out media lawyers for criticism. This is concerning, not only because of the oppressive regulatory pressure being placed on our members, but also because media lawyers play an important role in providing access to justice for victims of unlawful misreporting and press intrusion, as well as in preventing serious press

abuse (phone hacking and the ‘blagging’ of financial and medical information being examples of this¹).

Naturally, our members oppose any form of abusive litigation. They do not deny that such abusive litigation does occasionally take place, but in our collective experience, it is rare and no more common in this area than any other. The SRA’s own thematic review which was published in February 2023 found no evidence of abuse.

TSM is deeply concerned that the Law Society’s policy on the question of SLAPP reform is lacking a proper evidential basis. Furthermore, it does not properly represent the views of the profession, or rather would not if they were properly apprised of the facts. Instead, the Law Society appears to have succumbed to media and political pressure and, as a result, to have advanced a one-sided and misleading account of the issues.

Moreover, the media/government’s position on SLAPP reform risks offending general principles of the rule of law and access to justice (as well as the need to protect Article 6 and 8 ECHR rights) for victims of press behaviour; principles that should be fiercely guarded by the Law Society even if this means disagreeing with the government of the day.

Whilst we recognise that there is a spectrum of views on the subject (including within the legal profession), public statements issued by the Law Society have all enthusiastically supported the media/government line, principally by accepting, as an established fact, that there is a SLAPP issue requiring a legislative response. This is despite there being a complete absence of independent evidence to support this view. Indeed, the most recent statements by the Law Society have indicated that the government is not going far enough.

By way of example:-

1. On 18 May 2022, the Law Society in a press release entitled “*MoJ call for evidence on strategic lawsuits against public participation (SLAPPs) – Law Society response*”, the following words were published: “*While we consider the current professional standards and regulatory regime in England and Wales to be robust, in principle we share the government’s view that there is a need for action against SLAPPs to prevent potential abuses of the administration of justice.*”²
2. Also on 18 May 2022, the Law Society published a press release entitled “*Action on SLAPPs needed to prevent abuses of justice*”³

¹ See the Report of the Leveson Inquiry into the culture, practices and ethics of the press (<https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press>) and *Gulati & Ors v MGN Ltd (un-redacted)* [2015] EWHC 1482 (Ch)

² <https://www.lawsociety.org.uk/campaigns/consultation-responses/moj-call-for-evidence-on-strategic-lawsuits-against-public-participation-slapps>

³ <https://www.lawsociety.org.uk/Contact-or-visit-us/Press-office/Press-releases/Action-on-SLAPPs-needed-to-prevent-abuses-of-justice>

3. On 19 May 2022 in a Law Society Gazette article entitled, "Equalising goal: **Law Society proposes SLAPP curbs**", the then president of the Law Society I Stephanie Boyce was said to "[echo] *calls for a clampdown on so-called 'lawfare'*".
4. On 25 May 2022, the Law Society published a press release "*Shaking up SLAPPs – time for action*", the following words were published: "*Action is needed on strategic lawsuits against public participation (SLAPPS) to level the playing field between parties and protect the administration of justice.*"⁴
5. On 21 July 2022, the Law Society published a press release entitled "*SLAPPS reform will help prevent abuses of justice*" which began with the following words, "*Strategic lawsuits against public participation (SLAPPS) are set to be overhauled in a move welcomed by the Law Society of England and Wales, as the UK government seeks to prevent potential abuses of the administration of justice.*"⁵
6. In a Law Society Gazette article published on 13 June 2023, the then president of the Law Society Lubna Shuja complained that government proposals did not go far enough, and was quoted as saying, "*We understand why the government is implementing these measures. However, as only cases related to economic crime are covered, this means that some claimants may still use SLAPPs to stifle scrutiny.*"⁶
7. On 27 June 2023, the Law Society published a press statement which included the following words "*While there were just 14 SLAPPs cases in the UK during 2021, the government believes that these cases are the tip of the iceberg and have a disproportionately chilling effect on individuals and organisations.*"⁷
8. Also on 27 June 2023, the Law Society published a parliamentary briefing paper in which it stated, "*The Law Society welcomes the approach the Government is taking to addressing SLAPPS in relation to economic crime via amendments 102 and 103' and "While we broadly welcome these amendments, they will only affect SLAPPs relating to economic crime. We recommend that the Government bring forward measures to tackle all types of SLAPP cases in addition to these proposals. Failing to do so risks leaving exploitable weaknesses in these provisions for both defendants and claimants alike."*"

We take it as axiomatic that the Law Society's position on the subject should be evidence-based. This was echoed by, then president, I Stephanie Boyce, who said on 18 May 2022:-

"Wider reforms should also be proportionate and evidence-based, and should strike the right balance between freedom of speech – particularly where matters of public interest are at stake – and the right to respect for private life, which includes the right to protection

⁴ <https://www.lawsociety.org.uk/topics/regulation/shaking-up-slapps-time-for-action>

⁵ <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/slapps-reform-will-help-prevent-abuses-of-justice>

⁶ <https://www.lawgazette.co.uk/law/government-acts-on-slapps-but-only-in-economic-crime/5116293.article>

⁷ <https://www.lawsociety.org.uk/topics/business-management/slapps-and-reputational-risks>

of reputation – which are conflicting elements under the European Convention of Human Rights”

(our emboldening)

There is a complete absence of credible evidence to support the Law Society's position on SLAPPs. The only evidence it has referred to in its public statements is the bald statement that there were 14 SLAPPs in the UK in 2021. This figure appears to have been taken from the government's misleadingly titled *Factsheet: strategic lawsuits against public participation (SLAPPs)*⁸. The government has in turn simply taken this figure without question from the Coalition Against SLAPPs in Europe ('CASE'). CASE is a campaigning group that appears to be based in Denmark, and whose members comprise various journalistic and other organisations, most (if not all) will naturally have a vested interest in strengthening the legal position of media defendants facing complaints in defamation and privacy. As the government, and seemingly the Law Society, place so much store in this statistic, we make some brief observations on it:-

1. It is meaningless without details of the 14 cases said to be SLAPPs. Cases are frequently mislabelled as SLAPPs and thus alleged SLAPPs need to be fairly and objectively scrutinised. The 14 cases have not been identified.
2. Even accepting the figure as accurate (which we do not), it represents a tiny proportion of UK defamation and privacy claims.
3. CASE state that there have only been 24 documented SLAPP lawsuits in the UK since 2010, during a period when thousands of defamation and privacy claims will have been issued and many more asserted.⁹
4. On CASE's own figures¹⁰, the UK has one of the lowest incidences of SLAPPs in Europe.
5. There is no accepted or universal definition of a SLAPP. Any attempt to quantify the number of SLAPP lawsuits in the UK will necessarily vary according to a party/pressure group's subjective definition. The Law Society appears to have accepted the government's/CASE's figures without interrogating its definition of what it says constitutes a SLAPP. CASE's definition¹¹ is hopelessly broad and would arguably capture *every* defamation claim.

Thus, on any view, the evidence suggests that there is **not** a significant SLAPP problem in the UK.

What we do know is that:-

⁸ <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-strategic-lawsuits-against-public-participation-slapps>

⁹ <https://www.the-case.eu/slapps/>

¹⁰ ibid

¹¹ibid

1. To date, no defamation case in England and Wales has been held to be a SLAPP by a judge.
2. The SRA's Thematic Review of 25 media law firms published in February 2023 (see above), after reviewing 50 files (chosen by the regulator), found no evidence of firms engaged in any form of SLAPP litigation or abusive litigation.
3. We are unaware of any solicitor who has been sanctioned, or even referred to the Solicitors Disciplinary Tribunal by the SRA, for engaging in SLAPP-like behaviour. Whilst the intense media focus on SLAPPs is relatively recent, the Principles [of the Code of Conduct] that SLAPP like behaviour is said to engage, and the concept of SLAPPs, are not new.
4. We are aware from our members that many of the complaints that have led to SRA investigations have been lacking in merit. Whilst it would be inappropriate to divulge specific details of complaints, we believe that many of these complaints were improperly triaged (by way of example, they included SLAPP complaints where the claimant recovered substantial damages and/or where a judge had expressly stated the litigation was not a SLAPP). In other words, the fact that the SRA has undertaken this number of investigations is not in itself necessarily evidence of a problem.
5. Several of the cases frequently cited by the media as SLAPPs have in truth been held by the judiciary **not to be SLAPPs**. The most prominent of these is *Banks v Cadwalladr*[2023] EWCA Civ 219, in which the claimant recovered substantial damages and costs from the defendant.
6. The law relating to liability for publication involves a careful balancing of rights and has been developed over many years by Parliament and the Courts. Anyone arguing for a substantial reform bears the burden of producing cogent evidence in support. At present such evidence is wholly lacking.

It is the experience of our members that the term SLAPP is being used by certain defendants, journalists and campaigners to attack any actual or threatened defamation claim. Pausing here, Parliament considered the law of defamation a decade ago and codified a number of defences that seek to strike a balance between freedom of expression and protection of reputation, including a statutory public interest defence (the Defamation Act 2013). Stating that the public interest needs to be considered when considering defamation claims/complaints ignores the fact that such a defence already exists and provides considerable protection for journalists who report a *prima facie* defamatory allegation in a responsible way.

We understand that the Law Society's view is that there is cross-party political support for SLAPP legislation and therefore opposing it is futile. We do not follow this logic. The Law Society should be putting access to justice, the rule of law and its members' interests above politics and media

sentiment (as it has done in the past with the Bill of Rights Bill, legal aid, the attack on immigration law and access to justice generally).

In summary, we do not understand why the Law Society is so enthusiastic in its support for SLAPP legislation. The media and regulatory frenzy that has been whipped up about SLAPPs has been particularly damaging to a number of lawyers and the profession generally. Our solicitor members expect the Law Society fairly to represent their views and to protect their interests.

Finally, we are also concerned about the decision-making process within the Law Society. Many of our members sit on the Law Society Working Group on SLAPPs and the Law Society's public position is sharply at odds with the views expressed in the Group's meetings. Whilst we acknowledge that the Group also contains some defendant lawyers who are broadly (and unsurprisingly) in favour of change, the majority view at most recent meetings has been in line with those expressed in this letter.

In conclusion, we understand that there will be a change in the law via the Economic Crime Bill and that the next stage in that process will be for the Civil Procedure Rules Committee to set out new rules to deal with that change. However, in our view that does not mean that changes should be prematurely made in other areas unless and until there is appropriate evidence to support such change(s), given that the dangers of legislation being passed in haste are legion and well documented.

In response to the issues raised in this letter, we request that the Law Society:-

1. Shares its analysis on the evidence of SLAPPs with TSML (we understand that during the meeting of the SLAPP working group on 12 October 2023 that it was agreed that the Law Society would share this information, but that it has not yet been circulated);
2. Agrees to support TSML in seeking to have a member appointed to the Civil Procedures Rules Committee to help shape the way in which the Economic Bill is implemented;
3. Agrees to support TSML in seeking to have a member appointed to the Taskforce dedicated to tackling SLAPPs established by the Department for Culture, Media and Sport; and
4. Commits to informing TSML of any future government or regulatory taskforces/committee meetings on the issue of SLAPPs ahead of time so that we may have an opportunity to attend or at the very least make representations.

We look forward to hearing from you.

Yours sincerely

TSM

The Society of Media Lawyers

Cc Chief Executive Officer, Law Society (ian.jeffery@lawsociety.org.uk)

Rob Cummings, Head of Regulatory Affairs and Economic Crime, Law Society (robert.cummings@lawsociety.org.uk)

David McNeil, Director of Policy, Law Society (david.mcneill@lawsociety.org.uk)

Hugo Forshaw, Public Affairs and Campaigns Manager (Hugo.forshaw@lawsociety.org.uk)

Jonathan Goldsmith, Chair of Law Society's Policy & Regulatory Affairs Committee, (jpgoldsmith@hotmail.com)

James Woolf, Policy Advisor, Law Society (james.woolf@lawsociety.org.uk)

Paul Philip, Chief Executive, Solicitors Regulation Authority (paul.philip@sra.org.uk)

Juliet Oliver, Deputy Chief Executive, Solicitors Regulation Authority (juliet.oliver@sra.org.uk)

Steven Bint, Head of Investigations, Solicitors Regulation Authority (steven.bint@sra.org.uk)

Paul Rogerson, Editor, Law Society Gazette (paul.rogerson@lawsociety.org.uk)

Eduardo Reyes, Features Editor, Law Society Gazette (eduardo.reyes@lawsociety.org.uk)