THE SOCIETY OF MEDIA LAWYERS

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Rt. Hon Alex Chalk KC MP
Lord Chancellor and Secretary of State for Justice
Ministry of Justice
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By post and email: alex.chalk.mp@parliament.uk

Dear Lord Chancellor

Strategic Litigation Against Public Participation Bill

We write in relation to the Strategic Litigation Against Public Participation Bill (the "Bill") and in particular the letter to you dated 10 April 2024 (the "10 April Letter") from various parties and coordinated by the "UK Anti-SLAPP Coalition" relating to the Bill. Those parties are in favour of what they describe as an "anti-SLAPP law" but raise concerns with the current form of the Bill, which they ask you to address.

The Society of Media Lawyers comprises expert practitioners in the field of media law and many of our members represent both publishers and the subjects of media scrutiny and reporting, ie both potential defendants and claimants in media litigation. Our members are very much on the front line of media law and would have to deal with the consequences of the Bill on a daily basis. Our interest is not in maintaining or establishing any aspect of media law which is unduly favourable to claimants, but instead to ensure that the system of media law is both workable and fair, having regard to both the importance of a free press/media and the interests of prospective victims of press/media abuse were the law of defamation and privacy to be softened. For that reason, we hope that our contribution is balanced and adds expertise and experience which is useful to you.

The 10 April Letter principally highlights one issue with the Bill. That is the current requirement for a case to be designated as a SLAPP for it to be shown that there was an intention on the part of the claimant to cause distress, inconvenience etc to the defendant. However, no alternative wording for the Bill is included. It is thus unclear precisely what is being proposed.

We have previously corresponded with the Ministry of Justice (the "MoJ") in relation to the Bill both:

1. setting out our concerns with the workability of the Bill and that it will in fact be entirely counterproductive;[1] and also

2. asking for information relating to the evidence on which the rationale for the Bill is based. In particular, we have reviewed the Explanatory Memorandum relating to the Bill which we understand was prepared by the MoJ which we believe gives rise to a number of important factual questions. We have had no response to these requisitions. We consider that a response would assist not just ourselves but also Parliament and the wider debate relating to the Bill.

A brief summary of our concerns with the Bill is as follows.

1. The Bill would mean that a claim could be designated as a "SLAPP" on the basis of a single action on the part of the claimant. For example, an unsophisticated claimant without the benefit of legal advice may send just one email to the defendant which would by itself be sufficient to trigger the designation. The Court would have no discretion. The potential for injustice in such a situation is very substantial.

2. Under the Bill, the designation of a SLAPP arises where:

    a. the claimant takes a step which causes the defendant distress or inconvenience etc – but almost any step in litigation would meet this test; and

    b. that step must be "beyond that ordinarily encountered in the course of properly conducted litigation". But often litigants take innovative steps. That is how the law is developed. Why should claimants in media cases be at risk because they take an unusual step?

    It is true that on the present wording of the Bill, there is a safeguard in that the defendant would have to show that the claimant not only takes a step which causes the defendant distress or inconvenience etc but that they did so with the intention of so causing. But that of course is the very safeguard which the 10 April Letter is suggesting be removed. In this regard, we can see that it is true that determining such intention on the part of the claimant may create forensic difficulties (on which see further below) but by simply removing the requirement for such intention leaves the criteria for the designation of a SLAPP extremely broad.

3. Where under the Bill a case is designated as a SLAPP, it can be struck out unless the claimant can show that they are more likely than not to succeed in the case. That is likely to be very difficult for a claimant at an early stage of a case. It may be (indeed it very commonly is) the case that merits at this stage remain very uncertain on both sides, the defendant may not be able to show they have a strong case either. But that does not

[1] For convenience, the most detailed exposition of the concerns with the Bill appears in these online posts by Gideon Benaim here and here.

matter. The claimant, despite the inherent uncertainty, must show that they are more likely than not to succeed. That is a complete denial of access to justice, predicated on what is at most an alleged procedural misstep. There is no precedent in English law for such an approach.

4. The Bill will almost certainly entirely miss its main intended targets. In particular:

    a. well-resourced claimants will instruct experienced practitioners who will ensure that no step is taken in the litigation which would transgress the rules in the Bill. That does not mean litigation which can be highly onerous on defendants (and indeed claimants) can be avoided. The complexity of such litigation is inevitable. But it is very unlikely that such claims will be designated as SLAPPs.[2] Instead, these provisions are much more likely to be applied to unsophisticated and unrepresented claimants (quite possibly with meritorious underlying claims) and will simply add to the complexity and the likely cost of such proceedings; and

    b. these provisions do nothing in relation to the type of defamation case where a claimant brings proceedings in relation to allegations which are true and the claimant knows are true. Such claims are extremely unfortunate and should of course be deprecated. But the focus of these provisions is the conduct of the parties not the underlying merits nor any sanction for bringing unmerited claims.

5. The Bill is entirely one-sided. It is true that there is from time to time misconduct in media cases but our members have experienced this from defendants as well as from claimants. For no good reason, the Bill will entirely tilt the balance so that any misconduct on the part of claimants can lead to draconian outcomes but equal or even worse conduct on the part of media defendants has no equal consequence.

6. The evidential basis for the Bill simply has not been made out. In particular, neither the supporters of anti-SLAPP reform nor the MoJ have identified a single case where the provisions of the Bill would have caused the case to be designated as a SLAPP. The Society has put in a detailed information request to the MoJ for this evidential basis under the Freedom of Information Act 2000 but at the time of writing, this information has not been provided. We believe this to be essential.

7. Much of the wording of the Bill is extremely unclear and/or inappropriate. For example:

    a. How is the Court to determine the "intention" of the claimant? In particular, to what extent will this require inroads into communications between the claimant and their lawyer which is subject to legal privilege? Absent these communications,

[2] It is notable that one of the signatories to the 10 April Letter was Catherine Belton. She was a defendant in well known media proceedings which were undoubtedly very onerous on her. However, it has never been suggested that any step was taken in those proceedings which would cause them to be designated as a SLAPP under these provisions (certainly no such step has been specifically identified).

how else can the intention of the Claimant be properly determined? But any derogation from legal privilege would be a major invasion into a fundamental legal protection.

b. How is the Court to determine whether the behaviour of the claimant is "beyond that ordinarily encountered in the course of properly conducted litigation"? Will that be a matter of evidence or is the Court to take its own view? If the former, this will significantly evidentially complicate any application. If the latter, given that different judges will have different experiences, that could lead to arbitrariness.

c. One matter which is deemed to be relevant (under clause 2(5)(d) of the Bill) for determining whether (under clause 2(4)(c) of the Bill) the claimant has complied "with a pre-action protocol, rule of court or practice direction, or to comply with or follow a rule or recommendation of a professional regulatory body" is a "failure [which] relates to ... responses to requests for comment or clarification". But responses to requests for comment or clarification at the pre-publication stage do not – and cannot sensibly – form part of any pre-action protocol, rule of court or practice direction or a rule or recommendation of a professional regulatory body. This simply does not make sense.

These (and many other problems) mean that the Bill will simply result in myriad satellite litigation to resolve the uncertainties, all of which will have little or no relevance to the underlying merits of the case, which will (or ought to be) the real concern of the parties.

8. The definition of public interest is so broad it is likely to encompass nearly all defamation claims. Clause 2(3) states "for the purposes of subsection (1)(b) the following matters, in particular, are of "public interest": (a) behaviour of the claimant or any other person that is, or is alleged to be, unlawful; (b) statements made by the claimant or any other person that are, or are alleged to be, false...". The statements complained of in defamation claims will often concern allegations of unlawfulness or dishonesty, but it cannot follow (without other characteristics) that they relate to matters of public interest. For instance, many defamation claims concern statements about individuals who are not public figures, do not concern the public at large and do not engage matters of public interest in any other objective sense. By way of example, the current definition would capture victims of sexual abuse who had been accused of fabricating their abuse and would wish to complain about it. It would also capture cases where an individual is being trolled and the subject of malicious, gratuitous and outlandish scattergun allegations designed to cause maximum embarrassment (e.g. Nazism, paedophilia etc.). Such conduct is common in 'harassment by publication' cases.

9. The Bill anticipates some claims being able to continue after being designated as a SLAPP, albeit with qualified one-way costs shifting in favour of the defendant. Indeed, the claimant may still be entitled to damages - i.e. a recognition that they have been unlawfully

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defamed (and, it can be implied, that the claim does not amount to an abuse of the process). However, given the current stance of the Solicitors Regulation Authority and the stigma attached to any case which could be considered to be a SLAPP, there would be a considerable risk that such claimants would be unable to find solicitors willing to act for them (not least because of the insurance position of practitioners). This will raise both logistical and access to justice issues.

10. There is a grave risk, given that it would deny access to justice for potentially meritorious claims, that the Bill is incompatible with Articles 6 and 8 of the European Convention on Human Rights. Again, if it is implemented, this will result in a significant amount of satellite litigation as well as the likelihood the UK will be liable to pay damages at Strasbourg. The Bill is the product of intensive lobbying by powerful media organisations and self-interested campaigners who have used a handful of emotive examples (many of which have been misrepresented) to push forward their agenda. The Government should heed the lessons of the Leveson Inquiry and be very slow to hand further litigation advantage to the unregulated press with poorly conceived measures which are likely to hinder rather than assist the delivery of justice in this area.

This is a list of serious concerns arising from the extensive experience of our members in media litigation. We have no doubt that the Bill if passed would be a regressive step, creating much more difficulty than it would resolve.

We hope that this letter is of assistance to you. We would ask that this letter be circulated to all the signatories of that letter and consider that it would be extremely helpful if they could engage with the points we have raised in this letter and the other materials we have sent to the MoJ. We also remain open to a broader dialogue with those parties and the Government in relation to sensible reform in this area.

In the meantime, we would be delighted to assist you in any way we can in respect of your consideration of the Bill.

Yours faithfully

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