Leigh Day

CONSULTATION: STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPs)

LEIGH DAY RESPONSE

MAY 2022

Submitted online via: https://consult.justice.gov.uk/digital-communications/strategic-lawsuits-against-public-participation/. Note that Leigh Day did not respond to every question in the consultation.

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Question 1: Have you been affected personally or in the conduct of your work by SLAPPs? If so, please provide details on your occupation and the impact SLAPPs had, if any, on your day to day activity including your work and wellbeing.

1. Leigh Day's International Department brings cases in the English courts against governments and multi-national corporations, on behalf of individuals and communities who allege human rights abuses and / or environmental harms. Through our work we are aware, and in some instances have direct experience, of numerous examples of litigation, or threats of litigation, worldwide, advanced by corporations against NGOs, activists, journalists, and lawyers, that have been primarily designed to silence complaints relating to the adverse human rights and environmental impacts of business activities.

2. Such legal actions have included claims based on racketeering and copyright infringement. However, the focus of this response is on (threats of) defamation actions. This is because misuse of defamation law by wealthy businesses (and sometimes, powerful individuals) presents, and is intended to present, a real threat of bankruptcy to those on the receiving end, and thereby threatens freedom of expression in critical areas of public importance. While businesses have a right to defend their reputations against erroneous and damaging statements, this right must be properly subject to the right of citizens and campaigners to highlight issues of public concern, especially in the areas of human rights and environmental protection. Businesses do not need to claim high damages (or any damages), or to engage in costly litigation, to protect their reputations. UK defamation law is presently weighted far too heavily in favour of business and against the freedom of expression rights of campaigners and citizens. In addition, this present state of affairs is not compliant with the United Nations Guiding Principles on Business & Human Rights ('UNGPs') to which the UK and businesses are subject. Neither are they consistent with the UK's National Action Plan on UNGPs.

3. Though most of the following SLAPPs were not directed at Leigh Day, they exemplify the dangers posed by SLAPPs to persons and groups we work for and with on human rights and environmental issues. Insofar as these have entailed foreign proceedings, they are relevant in the present context as they could easily translate into proceedings here.

4. Some years ago, Leigh Day represented, pro bono, a prominent international NGO (domiciled outside the UK) whose regional office in a developing country was highly critical of the human rights impact of a powerful foreign multinational. The company instructed prominent and expensive UK libel lawyers to threaten legal action against the NGO in the English courts on the grounds that

publication of the report on the internet meant that it had also been published in England. If carried out, this threat would have bankrupted an important NGO. While the NGO felt that it had valid grounds for complaint (albeit not to the extent alleged in the report), it was forced to apologise and withdraw all criticisms in the most grovelling manner in order to avoid financial ruin. Consequently, this powerful company was able, as a 'libel tourist', to utilise UK defamation law not simply to correct erroneous criticism but to stifle all criticism.

5. The longest-running libel case in English history, *McDonald's Corporation v Steel & Morris [1997] EWHC QB 366* ('McLibel'), exhibited all the hallmarks of a SLAPP. The European Court of Human Rights, in considering the inequality of arms between the fast-food behemoth and environmental activists Steel and Morris, held that a failure to provide legal aid to the Defendants amounted to a breach of Article 6 (right to a fair trial). Moreover, the court judged that there was a strong public interest in allowing criticism of corporations, and failure to uphold this democratic touchstone constituted a breach of Article 10 (freedom of expression).

6. SLAPPs have also been problematic in South Africa, a country with very similar defamation laws to those of the UK . In *Mineral Sands Resources (Pty) Ltd v Reddell [2021] ZAWCHC 22*, environmental lawyers and campaigners were targeted by onerous defamation litigation for criticising MSR's mining operations. Please note that our response to Question 11 discusses this case further.

7. In the US, the eventual dismissal in 2019 of a SLAPP brought by Energy Transfer Partners ('ETP') (the corporation behind the Dakota Access Pipeline) against environmental activists, including Greenpeace, heralded celebrations. Yet the concerted campaign of ETP to stifle civil society campaigning and protest via the courts, through recourse to anti-racketeering legislation, illustrates the ability of SLAPPs to weaponise the law, and place even the most well-established organisations, such as Greenpeace, under intense financial stress, distracting such groups from their actual and necessary role of pushing for environmental protections. That Netherlands-based organisation BankTrack was a defendant in this case highlights the cross-border nature of SLAPPs, and the consequent need to frame protections against them in the paradigm of *international* business and human rights law, not least the UNGPs.

8. Finally, Maltese journalist Daphne Caruana Galizia was the target of 42 libel suits at the time of her assassination, several of which had been launched by government officials in order to stifle her reporting on corruption. This onslaught of judicial harassment experienced by Ms Galizia catalysed the European Commission into taking action against SLAPPs, and its approach is discussed further in our response to Question 11.

Question 7: Do you agree that there needs to be a statutory definition of SLAPPs?

9. Yes. A definition would provide clarity to courts considering SLAPPs. Since defamation law is frequently utilised to stifle criticism of abuses of human and environmental rights associated with business (as discussed in our answer to Question 1) any definition could sensibly be inserted into existing defamation law legislation, namely the Defamation Act 2013. This could be supplemented through additional guidance for judges setting out certain well-known hallmarks of SLAPPs.

Question 8: What approach do you think should be taken to defining SLAPPs? For example, should it be to establish a new right of public participation? What form should that take?

10. As posited in response to Question 1, SLAPPs are strategic tools deployed most often to compound corporate human and environmental rights abuses, through stifling legitimate criticism of said abuses, and the framework of the UNGPs – with which the UK Government and business are meant to comply – is the appropriate prism through which to consider a definition.

11. The commentary to the first principle of Pillar 1 (The State Duty to Protect Human Rights) makes clear at the outset that "*States may breach their international human rights law obligations […] where they fail to take appropriate steps to <u>prevent</u>, investigate, punish, and redress private actors' abuse*." Since deployment of SLAPPs gives rise to abuse of the right to freedom of expression, legal reforms such as the ones proposed in our response are a means by which States can discharge their obligations under Pillar I. Moreover, Pillar III (Access to Remedy) also exposits steps the UK should take to ensure effective access to justice for human rights and environmental defenders.

12. For more on our proposed approach to a definition, see the answer to Question 10, below.

Question 9: If a new right of public participation were introduced, should it form an amendment to the Defamation Act 2013, or should it be a free-standing measure, recognising that SLAPP cases are sometimes brought outside of defamation law?

13. If a right to public participation were introduced, it should be free-standing, to ensure all citizens are engaged as rightsholders, and not only those who are brought into the orbit of defamation law. Also, since rights form part of public law, it is unclear to us how a right to public participation would be applied to private law defamation proceedings. Further, sole inclusion of

such a right in defamation law, rather than in all contexts, may obscure the fact that such rights place positive obligations upon the State, as well as negative obligations on, for example, parties bringing SLAPPs via defamation suits. However, if a right to public participation were introduced by the Government, we would support the insertion of a reference to such a right in the Defamation Act 2013, to make clear that corporations which bring SLAPPs are undermining rights.

Question 10: Do you think the approach should be a definition based on various criteria associated with SLAPPs and the methods employed?

14. Yes. As SLAPPs can be amorphous, any definition should contain a non-exhaustive list of elements typical to SLAPPs, rather than being prescriptive. We would support a definition which captured any case where a company uses defamation law against a human rights or environmental defender who has made statements criticising the human rights and / or environmental record of a company. We also recognise that legal arguments which might constitute a SLAPP in one context may well not be malicious in another, since SLAPPs exploit material inequalities to deploy (superficially) legitimate legal arguments in an unethical way. Therefore, any definition should direct courts to consider the (in)equality of arms between parties.

Question 11: Are there any international models of SLAPP legislation which you consider we should draw on, or any you consider have failed to deal effectively with SLAPPs? Please give details.

15. The UK's approach to SLAPP legislation should take heed of the EU-level discussions being had about anti-SLAPP measures, including the proposed EU Directive, to both ensure that the knowledge collected by the EU in its consultation is of benefit to the UK, and also to avoid a situation whereby disharmony between the EU and UK frameworks creates lacunas which can be exploited by European corporations, allowing them to bring SLAPPs in the UK which would have been quickly stymied in the EU.

16. Additionally, the Government should pay heed to developments in South African jurisprudence. In *Mineral Sands Resources (Pty) Ltd v Reddell [2021] ZAWCHC 22*, the Western Cape High Court recognised that defendants may in principle raise a SLAPP defence in defamation cases. Inclusion of a SLAPP defence (or, alternatively, an 'abuse of process' defence, in the event that no statutory definition of SLAPPs is introduced) in the Defences section of the Defamation Act 2013 would be an apt way to mirror this sensible development of South African case law and would provide protection to defendants, including when SLAPPs are brought by individuals. However, our view remains that prevention of SLAPP suits from

the outset is the most effective approach to SLAPPs brought by corporations. This is discussed further in our response to Question 12.

17. Finally, the Business & Human Rights Resource Centre database of global anti-SLAPP legislation (available here: https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/corporate-legal-accountablity-resource-sheet-anti-slapp-legislation/) has distilled the key recommendations of such interventions, which the UK Government should draw on.

Question 12: Would you draw any distinction in the treatment of individuals and corporations as claimants in drawing up definitions for SLAPP type litigation?

18. Yes. As proposed in response to Question 10, we would welcome a definition which focuses on corporate claimants. As made clear throughout our response, experience has shown us that these pose the greatest threat to human rights and environmental defenders. Identical pleadings may have different material implications and motivations when argued by a legal as opposed to a natural person, not least due to the financial resources of the claimant, their previous conduct, and the nature of any reputational harm (allegedly) suffered.

19. Despite this, we also recognise that individuals, especially those with immense wealth and power, are capable of launching SLAPPs as stifling as those initiated by corporations, and so a binary divide between the two classes of claimant is not necessarily the best approach. Introduction of a SLAPP defence, as suggested in our response to Question 11, would be an advisable way to ensure that SLAPPs brought by individuals can be effectively resisted.

Question 26: To what extent does the appropriate jurisdiction test assist as a defence to defamation in SLAPPs claims?

20. Section 9 of the Defamation Act will generally be of limited assistance to human rights / environmental defenders sued in the English courts by foreign corporations, first, because litigating forum disputes is invariably costly and secondly, because the burden of proof is on the defendant to prove that there is an alternative appropriate competing forum.

Question 27: Are there any reforms to the appropriate jurisdiction test that could be considered in SLAPPs cases?

21. A human rights / environmental defender sued for defamation by a foreign corporation should have an absolute defence if the statement(s) sued upon

concern matters of human or environmental rights; alternatively see answer to Question 30 below.

Question 30: Are there any other areas of defamation law that you consider may be reformed to address the problems SLAPPs cases give rise to?

22. Yes. Special rules should be implemented for defamation claims (i) made by a corporation (ii) against a human rights defender (such as an NGO, journalist, or individual member of civil society) that does not have financial support or legal insurance (iii) relating to a statement criticising the corporate claimant for an abuse of human and / or environmental rights.

23. Pure SLAPPs (i.e., suits which are totally and obviously unmeritorious) should be subject to early strike out. Where claims not pure SLAPPs, such as in the example of the unnamed international NGO provided in our response to Question 1, the only remedy available should be injunctive relief.

24. Costs in such claims should be subject to qualified one-way costs shifting as per CPR 44 or protective / capped very low costs. Our responses to Questions 43 to 45 provide more details on this.

25. Finally, defamation claims brought in this jurisdiction by foreign corporations should have an absolute defence if they relate to statements on matters of human or environmental rights.

Question 37: Do you have any other suggestions for procedural reform to be pursued either by the Government or considered by the judiciary or Civil Procedure Rule Committee in relation to SLAPPs cases? Should a permission stage be applied to SLAPPs cases?

26. See answers to Questions 43 to 45, below.

Question 38: If you are a solicitor, does the SRA guidance provided on SLAPPs help you understand your professional duties in conducting disputes? Please explain your answer.

27. Whilst providing a clear overview of the principles governing solicitors' conduct, the SRA guidance on conduct in disputes (published 4 March 2022) fails to include any case studies which accurately reflect the usual dynamic of a SLAPP suit, i.e. a wealthy natural or legal person pursuing a financially weaker defendant. A specific case study dealing with SLAPPs should be included.

28. Further, the SRA should set out how it will deal with firms which (repeatedly) represent claimants bringing SLAPPs. It should make clear that firms which weaponise the law on behalf of clients, to stifle the work of human rights and environmental defenders, are in breach of their obligations under Pillar II (The Corporate Responsibility to Protect Human Rights) of the UNGPs.

29. The SRA's policies on SLAPPs must be robust and stringently enforced, in order to effectively deter unscrupulous conduct, not least because parties bringing SLAPPs typically have the resources to fund large-scale litigation and may therefore appear to be attractive clients for firms. Law firms identified as repeat offenders should be flagged by the SRA to the Government, so they can be added to a list of vexatious firms (analogous to the list of vexatious litigants) and barred from initiating defamation claims against human rights / environmental defenders without the permission of the courts. The SRA should also show leadership through proactively engaging with the profession and public on the issue of SLAPPs, for example through running training on the ethical and regulatory frameworks which forbid SLAPPs, and through making clear to the public the requirement that firms not misuse the law at the behest of clients.

30. Finally, the Bar Standards Board should publish equivalent guidance, to ensure consistent enforcement across the profession.

Question 43: Do you agree that a formal costs protection regime (based on the ECPR) should be introduced for (i) all defamation cases, or (ii) SLAPPs cases only – please give reasons?

31. Defamation suits are intense and costly. Companies pursuing defamation claims employ top lawyers, whereas NGOs are often unable to afford legal representation and depend on lawyers willing to act on contingency. There is therefore a huge inequality of arms. The level of damages which may be awarded by a court, plus the risk of substantial adverse costs, results in NGOs having to concede even if they have a meritorious defence. Claimants pursuing SLAPPs may make their withdrawal of claims or non-enforcement of damages and / or costs contingent upon onerous concessions and undertakings by NGOs, including refraining from further criticisms. The result may be to stifle legitimate criticism of corporate conduct that contravenes human rights and environmental protection about which the public has a right to be informed. This state of affairs is contrary to the State duty to Protect human rights and the corporate duty to Respect human rights pursuant to the UNGPs.

32. A formal costs protection regime based on the ECPR should therefore be introduced for defamation cases. As SLAPPs exploit the inequality of arms between parties, the proposed regime below, which inverts that set out in

the current ECPR, would take strides towards countering SLAPPs, whilst leaving the costs regime for the majority of defamation litigation unaffected.

33. When transposing across elements of the ECPR to the SLAPPs context, it should be recognised that the role of parties in SLAPPs litigation is inverted. The Claimant is not in actuality the aggrieved party, but rather the party that has deployed the law as a tool of intimidation, and whose material resources typically eclipse those of the Defendant. The Defendant in a SLAPPs case is therefore the party which requires protection by way of a cost cap.

34. In line with the new ECPR, as found in CPR Part 45, we would therefore recommend setting the costs cap at £5000 (assuming that our proposal for effective prohibition of SLAPPs by corporate claimants is not implemented).

35. To obtain the benefit of a cost cap, a Defendant would have to file and serve a schedule of their financial resources, as specified.

36. If a Claimant wanted to challenge the imposition of a cost cap, a threshold requirement for such challenge would be for the Claimant to file an equivalent schedule of financial resources.

37. Provision of this information would empower a court to sensibly determine whether the challenge was a valid one, or whether it sought to compound the financial pressure heaped by a Claimant on a Defendant, in order to stifle civil society activity.

Question 44: If so, what should the default levels of costs caps be for (i) all defamation cases, or (ii) SLAPPs cases only – please give reasons?

38. The default levels of costs cap for defendants should be aligned with current ECPR caps for claimants, namely £5000. This will afford protection to civil society actors, including activists and journalists, as well as financially constrained NGOs and news outlets. The costs of the claimant (i.e., the party weaponizing the SLAPP) should not be capped, in order to deter SLAPPs.

Question 45: Do you have any other suggestions as to how costs could be reformed in (i) all defamation cases, or (ii) SLAPPs cases only – please give reasons?

39. Yes. First, whilst the framework we have suggested in response to Question 43 would go a long way to mitigating the impact of SLAPPs on civil society actors, there remains the possibility that the Claimant bringing the SLAPP is successful, with the SLAPP Defendant consequently ordered to pay onerous damages. Therefore, in cases where an inequality of arms has

been identified via the mechanism proposed, damages should be abolished or substantially capped. This reformation should prove uncontroversial, not least because the unlawfulness of excessive damages has been recognised by the European Court of Human Rights since McLibel as a violation of ECHR Article 10 (freedom of expression).

40. Additionally, in accordance with Pillar III UNGPs, a fund should be established to pay for legal representation of defendants in environmental and human rights SLAPP claims. Where a corporation loses a defamation claim against a human rights or environmental defender, it should be required to pay into this fund.

41. Further, the Commentary to UNGP 26 requires that States "*should also ensure that the provision of justice is not prevented by the corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that legitimate and peaceful activities of human rights defenders are not obstructed*." Examples of "*practical and procedural barriers to accessing judicial remedy*" are then listed, and include difficulties funding legal representation due to a lack of resources and situations where costs "*cannot be reduced to reasonable levels through Government support*".

42. As highlighted previously, no legal aid was provided in the McLibel case, and we urge the Government to implement reforms to avoid such situations in future and to ensure compliance with the UNGPs. Though eventually vindicated, this meant that environmental activists Helen Steel and David Morris fought the litigation from a position of financial precarity and depended on pro bono legal representation. As later determined by the European Court of Human Rights, non-provision of legal aid amounted to a breach of the Applicants' right to a fair trial under Article 6 of the European Convention of Human Rights.

43. These reforms would ensure that the human rights to a fair trial and to freedom of expression are protected, and that the UK is acting in accordance with the UNGPs.

Leigh Day
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