SLAPPs—outcome to consultation published and reforms announced

TMT analysis: Persephone Bridgman Baker, partner at Carter-Ruck, considers the response to the government's Strategic Lawsuits Against Public Participation (SLAPPs) call for evidence.

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The supposed recent increase of SLAPPs has led to increasing pressure for reform.

The government issued a call for evidence in March 2022 (see: LNB News 17/03/2022 32). Deputy Prime Minister, Dominic Raab, in his introduction recounted 'increasing' usage of SLAPPs an 'abuse of the legal process, where the primary objective is to harass, intimidate and financially and psychologically exhaust one's opponent via improper means': the situation was described as 'urgent'.

The call for evidence sought responses from various legal professionals specialising in media and defamation law, in addition to media organisations and publishers. A total of 120 responses were received. On 20 July 2022, the response was published (see: LNB News 20/07/2022 81).

SLAPPs are an issue which go 'far beyond the rough and tumble of ordinary litigation'. Defendants and defendant practitioners reported the crippling costs, emotional toll and anxiety that SLAPPs claims can bring.

However, a 'number of law firms and barristers questioned this claimed increase in SLAPPs behaviour and the existence of SLAPPs at all. Their view was that lawyers do not tend to bring spurious or meritless claims and, on the rare occasions where these types of cases do arise, there already exist legislative and procedural mechanisms to stop them from reaching the courts'.

The call for evidence set out various possible reform options which included legislative reforms, changes to court procedure, practice and processes and regulatory reforms. It also sought suggestions as to how costs in SLAPP cases might be addressed.

The main difficulties identified in the call for evidence are:

- defining SLAPPs properly
- identifying and disposing of SLAPPs quickly and cost-effectively
- not preventing the pursuit of legitimate claims

Identifying a SLAPP

The starting point for identifying a SLAPP requires both a definition and an early procedural method for establishing whether a claim is a SLAPP. The response sets out proposals for the court to apply a three-part test to establish if a claim should be dismissed early as a SLAPP. This test will examine whether the litigation is on a matter of public interest, if there has been abuse of process, and if the case has 'sufficient merit' to proceed.

Although there is currently no definition of a SLAPP in this jurisdiction, most respondents recognised that while a definition would bring clarity, not having a 'fixed' definition as such is intended to safeguard against litigation falling between such 'criteria gaps'.

No definition has been provided in the response, nor even a checklist of possible factors indicating that a claim may be a SLAPP, as suggested by a number of responses to the call for evidence. Despite the response acknowledging that 'effectively dealing with SLAPPs is contingent on being able to appropriately identify them early on, thereby limiting the threat of time-consuming and costly litigation

while preserving access to justice for legitimate claims', the government proposals in respect of a definition are yet to be provided.

Costs

In addition to legislative reform, a key area of reform proposed as a result of the consultation is in relation to costs.

A number of responses to the call for evidence called for some form of costs protection regime to be introduced for SLAPPs. It is the government's view that a formal costs protection regime should be implemented to protect defendants from excessive costs risk, particularly in the early stages of litigation before and until a ruling on a SLAPP claim is obtained, while allowing meritorious claims to be properly litigated. It is suggested that such a costs protection regime could be created as part of the procedural reform under secondary legislation. A defendant cost cap has been proposed, with the government looking further at financial penalties for the bringing of SLAPP claims. Such proposed reform will have a significant practical impact on reputation management litigation, where each party's costs are likely to be at least £250,000 in taking a claim to trial.

However, any proposed costs reforms require 'more work' and rely upon reaching a definition and means of early disposal of SLAPP claims.

Pre-Action Protocol

Another practical implication of the proposed reforms is in relation to the current Pre-Action Protocol.

Various responses identified that a common feature of SLAPPs is the purported use of pre-action correspondence as a method of intimidating defendants. There were several responses calling for an amendment to the Pre-Action Protocol to require both claimants and defendants to append a statement of truth to letter of claims and responses. The consultation response noted that the government is interested in these suggestions for reform and will discuss with the senior judiciary the possibility of such an amendment.

Such an amendment may discourage parties making assertions which are not corroborated by evidence, or any assertions which a client, unbeknownst to a solicitor, knows to be false. The SRA has produced Guidance in respect of conduct in disputes, designed to address issues that could arise from solicitor conduct in SLAPPs.

Legislative reform

The call for evidence considered the need for legislative reform to defamation law. The most recent legislation is the Defamation Act 2013 (DA 2013), so this would be a short time period within which to be considering further reform.

The response however, concluded that, relatively, DA 2013 is still in its early days and more reform at this stage would be unwise.

Respondents from media organisations suggested that:

- the test for establishing serious harm under DA 2013 might be strengthened
- the burden of proof could be reversed in relation to defences of truth (ie requiring a claimant to prove that an allegation is false)
- the honest opinion and public interest defences could be amended, and,
- a statutory right to public participation could be introduced

However, the overall conclusion was that the present legislation is generally functioning well and the government did not think these proposals would particularly assist in dealing with SLAPP cases, particularly where the aim is to secure an early disposal of SLAPP claims.

Conclusion

The call for evidence contained a wide array of possibilities for reform, which has ultimately led to very few proposals for actual change and is a marked shift from the problem which was perceived in the consultation description.

The response made clear that there are two sides to this issue, with many specialist practitioners advocating for no change and significant change in equal measure. It is welcome that the government is looking to the judiciary from the Media and Communications List for their guidance in this specialist area.

The call for evidence has identified that SLAPPs are a growing concern in this jurisdiction, whether or not they are of increasing prevalence, and that consequently there is a need for some reform to ensure that they do not become more of a problem. However, the major proposals comprise primarily of the three-part test and some efforts at reducing costs in the early stage of proceedings–the proper detail of which is yet to be published.

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