Protect
The Green House
244 - 254 Cambridge Heath Road
London E2 9DA
Tel: 020 3117 2520
Email: whistle@protect-advice.org.uk
www.protect-advice.org.uk

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Response to SLAPPs Call for Evidence

1. This letter is Protect's response to the Ministry of Justice's urgent call for evidence on Strategic Lawsuits Against Public Participation ("SLAPPs").

2. Protect is part of the UK Anti-SLAPP Coalition ("the coalition"), established in January 2021. Protect is a signatory to the coalition's response to this call for evidence and we are supportive of the recommendations proposed by the coalition.

PROTECT – THE UK WHISTLEBLOWING CHARITY

3. Protect is the UK's whistleblowing charity and has the aim of protecting the public interest by helping workers to speak up to stop harm and wrongdoing. We support whistleblowers by providing free and confidential legal advice. We support employers to implement effective whistleblowing arrangements. We campaign for legal and policy reform to better protect whistleblowers. We want a world where no whistleblower goes unheard or unprotected.

REASON FOR SUBMITTING EVIDENCE

4. Protect is submitting our own response alongside the coalition's submissions. It is important that the experience of whistleblowers is not absent when considering reform to address SLAPPs. Like journalists, activists, authors and other public watchdogs, whistleblowers have been the targets of SLAPPs and/or pre-action letters threatening legal action.

5. As explained by Baroness Helena Kennedy QC at the Justice for Journalists Foundation ("JFJ") and Foreign Policy Centre's ("FPC") Anti-SLAPP conference last winter, SLAPPs are typically filed by powerful wealthy subjects, corporations, public officials and high profile business people against non-government individuals or organisations who express a critical position on a substantive issue of public interest, political interest and/or social significance.

6. SLAPPs are a form of reputation management: what is often being sought is either retraction or amendment of public interest reporting or a commitment not to publish in the first place. Various causes of action are utilised (including defamation, misuse of private information, data protection and copyright) to threaten parties into silence. It is important to note that the SLAPPs reported in the media are the tip of the iceberg and much of the silencing effect of SLAPPs happens behind closed doors, through excessive pre-action correspondence threatening legal action, other forms of harassment and/or claims that are settled before they reach a preliminary or full hearing.

7. By its very definition, whistleblowing involves raising concerns that are in the public interest. At Protect, we define whistleblowing as "a worker raising a concern with someone in authority – internally and/or externally (e.g. regulators, media, MPs) – about wrongdoing, risk or malpractice that affects others". This definition is in line with whistleblowing legislation, the Public Interest Disclosure Act 1998 ("PIDA"), which provides legal redress for workers who are treated negatively or dismissed for making a 'protected disclosure'.

8. Raising a concern that is in the public interest – internally to the employer, or externally to a regulator, an MP or the media– is a vital part of public participation. Whistleblowers are the eyes and ears of an organisation; they are in a unique position to witness and have a professional understanding of wrongdoing, risk or malpractice, and to raise this with their employer or with appropriate authorities.

9. External disclosures, including to the media, while usually seen as a last resort, are vital to ensuring that public interest concerns that have been ignored or improperly dealt with by an employer or prescribed person may be dealt with. However, making what PIDA terms 'wider disclosures' inherently comes with more risks, including the risk of SLAPPs.

10. While there is legal redress where retaliatory action is within the scope of employment (i.e., detriment or dismissal), sometimes whistleblowers may face SLAPPs in an attempt to discredit, silence and/or financially ruin them. Unfortunately, this can be easily achieved by letters threatening legal action if disclosures are made public i.e., via the media. This can place a tremendous amount of strain on whistleblowers, who often lack access to legal advice and, unlike journalists and authors (other SLAPP targets) who may have the backing of a newspaper

or publisher, are less likely to have institutional support.

11. Whistleblowing, as a means of exposing wrongdoing, will also suffer if the legal system allows SLAPPs to undermine the ability of journalists to publish stories. Disclosures made to the media are protected under PIDA, but the aim behind this protection will be undermined if media organisations deem it too risky to publish stories they feel are in the public interest, for fear of facing a costly SLAPP claim.

12. In our response, we have shared the case of Jonathan Taylor, a whistleblower who faced a SLAPP after raising his concerns, and the impact this had on him. We have also set out a couple of brief recommendations in answer to **Question 14: *'Are there additional reforms you would pursue through legislation?'*** but we refer you to the coalition's submission for a detailed response to the other consultation questions.

THE CASE OF JONATHAN TAYLOR

13. Jonathan Taylor, a former in-house lawyer for oil firm SBM Offshore based in Monaco, blew the whistle in 2013 on a massive bribery scheme. His whistleblowing disclosures led to SBM Offshore paying over $800 million in fines in the US, Netherlands and Brazil and investigations which led to successful prosecutions of two former CEOs for fraud-related offences.

14. SBM Offshore brought a defamation claim in the Netherlands (and Monaco Prosecutors made criminal complaints) against Taylor in retaliation for the public interest concerns that he had raised. Taylor has described attempts by his former employer to ruin him financially, and to force him to rescind his concerns as untrue.

15. In an anti-corruption event Protect ran with human rights solicitors' firm Leigh Day earlier in the year, Taylor explained:

    They [SBM Offshore] *sought an injunction against me from ever speaking again through fear of being fined €10,000 per day for so long as the injunction was breached, and they were seeking damages of €630,000 from me. They got an ex parte illegality injunction against my house and my bank accounts.*

    Taylor managed with the help of pro bono lawyers to fight off these civil claims.

16. In his emotional testimony, Taylor concluded:

Now I sit here, my whistleblowing has cost me dearly. It has cost me a year of my life. It has cost me my marriage. It has cost me my career. I was a lawyer in the oil and gas industry. No one in the oil and gas industry will employ a lawyer who has been a whistleblower. The effects could not really have been much more dramatic upon me, and it spells out to the world how ill-equipped the world is for whistleblowers like me.

17. Protect also has experience of advising other whistleblowers on our advice line who have experience threats of litigation and pre-action letters in response to raising their concerns. These are cases that have not received media attention, but are valuable insights into the difficulties whistleblowers face when they raise their concerns. Protect can provide further examples on a confidential basis and with consent of callers if this would be of help when considering reform.

RESPONSE TO CONSULTATION QUESTION 14: *ARE THERE ADDITIONAL REFORMS YOU WOULD PURSUE THROUGH LEGISLATION? PLEASE GIVE REASONS.*

REFORM A: DEFENCE FOR PROTECTED DISCLOSURES

18. While there is a public interest defence available in defamation cases (Section 4, Defamation Act 2013), it is important to note that SLAPPs are not limited to defamation claims and may include other types of retaliatory litigation, for example, an allegation that a worker has breached the employer's confidence or committed a data breach by making, or preparing to make, a disclosure.

19. A more consistent way of defending whistleblowers from these types of actions needs to be introduced. This could take the form of immunity from civil litigation and a public interest defence to criminal proceedings for whistleblowers who have made protected disclosures.

20. For example, in Protect's Draft Whistleblowing Bill, we propose an amendment to the Public Interest Disclosure Act 1998 to include:

Section 43B(3) shall be substituted:

(3) “No cause of action in civil proceedings shall lie against a person in respect of the making of a protected disclosure.

(3A) In a prosecution of a person for any offence prohibiting or restricting the disclosure of information it is a defence for that person to show that, at the time of the alleged offence, the disclosure was, or was reasonably believed by the person to be, a protected disclosure.”

21. New subsection (3) provides immunity from civil proceedings for those who make a protected disclosure. New subsection (3A) introduces a public interest defence for persons disclosing information in accordance with the Act, in circumstances where they may face criminal prosecution. Wording for both provisions reflects the Irish legislation.

22. This will give whistleblowers more confidence when considering whether to raise concerns internally, in the workplace, or externally, to regulators, MPs and the media. It would also make SLAPPs a less attractive option for those hoping to threaten and intimidate whistleblowers. We hope such a measure would reverse the chilling effect of SLAPPs that we have seen worsen in the last ten years.

REFORM B: REFORM OF THE PUBLIC INTEREST DISCLOSURE ACT 1998

23. One way the government could minimise the risk of SLAPPs for whistleblowers is by strengthening whistleblowing law to make wider disclosures less necessary. Improving the current legal framework to ensure that whistleblowers can rely on strong legal protections and be confident that the concerns they raise will be addressed, will encourage internal disclosures and, if need be, external disclosures to prescribed persons, such as regulators. Placing mandatory standards for employers and prescribed persons to meet when dealing with concerns would minimise the likelihood that a whistleblower will have no other recourse but to make wider disclosures.

24. At Protect, we have our own Draft Whistleblowing Bill which makes several recommendations for legal reform to the Public Interest Disclosure Act 1998 – the law that protects whistleblowers (please see attached). This includes expanding the definition of ‘worker’ to include those who are currently unprotected by PIDA but have a relationship akin to employment like NEDs, trustees etc. We have also included clauses which place minimum standards on employers and

prescribed persons. Protect research has shown that standards are both good for workers and good for businesses.