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**Media Freedom Under Attack:  
Examining legislative threats to  
media freedom in the United  
Kingdom**

# Media Freedom Under Attack: Examining legislative threats to media freedom in the United Kingdom



The Centre for Freedom of the Media (CFOM) is an interdisciplinary research centre with global outreach on issues of media freedom, journalism safety, editorial standards and impunity.

We aim to inform and advise governments, policymakers and stakeholders internationally on these issues in order to bring about greater media freedom and create safer environments for journalists and journalism.

This report was written following the conclusion of a workshop hosted by CFOM in October 2023. The workshop saw attendees from academia, journalism organisations, and civil society organisations partake in discussions surrounding the legislative threats to journalism in the United Kingdom.

Following the conclusion of the workshop, this report was compiled by CFOM's Impact Fellow, Dr Gemma Horton, with input from attendees to document the main legislative threats that the workshop examined. CFOM thanks all the attendees of the workshop and everyone who provided feedback on the previous versions of this report.

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# Foreword

On 24 October 2023, the Centre for Freedom of the Media (CFOM) hosted a workshop with a representative group of media law academics, researchers, NGO representatives and media practitioners that focused on threats to media freedom in the United Kingdom (UK). The one-day workshop, held in person at the University of Sheffield, drew on a wide range of expertise on the weaknesses or failings in the country's current or prospective framework of laws and practices in this area. In January 2023 Index on Censorship published the worrying findings of a survey which categorised the UK's environment for media freedom as only 'Partially Open'. The negative ranking was based on modelling data from numerous sources, including the World Press Freedom Index published by Reporters without Borders (RSF), the Committee to Protect Journalists (CPJ), UNESCO's Observatory of Killed Journalists, the Global Cybersecurity Index, the Varieties of Democracy research project (V-Dem) and Netblocks' Cost of Shutdown Tool (COST).<sup>1</sup>

In the course of five thematic sessions participants examined the evidence for and against the proposition that the UK's record for ensuring the protection of media freedom falls short of the standards and norms in international law in four particular areas: Strategic Lawsuits against Public Participation (SLAPPs), the National Security Act 2023, the Online Safety Act 2023, and the regulatory and self-regulatory environment following the anticipated repeal of the controversial Section 40 of the Crime and Courts Act 2023, adopted following the Leveson Inquiry. Briefly, they considered the question of the extent to which the UK can or cannot rightfully claim (as the government sometimes does) that this country is a significant "standard-setter" on important media freedom issues in the wider European or international context. This report seeks to summarise the discussions and it records a number of recommendations for remedial action shared by those who took part.

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<sup>1</sup> Index on Censorship, 'Major new global free expression index sees UK ranking stumble across academic, digital and media freedom' (*Index on Censorship*, 25 January 2023) <<https://www.indexoncensorship.org/2023/01/major-new-global-free-expression-index-sees-uk-ranking-stumble-across-academic-digital-and-media-freedom/>>

## Strategic Lawsuits against Public Participation

The issue of Strategic Lawsuits against Public Participation (SLAPPs) was raised as being a particular issue to journalists. However, there was not a general consensus on the extent of the problem SLAPPs pose or how they can be best tackled. These issues discussed within this section reflect a range of positions, emphasising the debate surrounding SLAPPs.

The former Conservative government has defined SLAPPs in the following way:

SLAPPs are legal actions typically brought by corporations or individuals with the intention of harassing, intimidating and financially or psychologically exhausting opponents via improper use of the legal system. SLAPPs are typically framed as defamation cases brought by wealthy individuals (including Russian oligarchs) or corporations to evade scrutiny in the public interest. They can occur across a broad spectrum of issues including data protection, privacy and environmental law. Actions are typically brought against investigative journalists, writers and publishers, and are designed to silence criticism.<sup>2</sup>

The term SLAPPs is rooted in US law where it typically refers to lawsuits brought by corporations seeking to use spurious tort claims to prevent members of the public exercising lawful legal rights to scrutinise their activities. For example, it has been used by property developers who sought to stop members of the public from looking into their building plans.<sup>3</sup> It was invented in the US by Penelope Canan, a sociologist, and George W. Pring, a lawyer. The term first appeared in their 1988 *Social Problems* article which identified the use of ‘civil tort action to stifle political expression.’<sup>4</sup> Since then, it has been a prominent feature in certain state legislature across the US. In Californian law, for example, the position of SLAPPs was referred to in the following way:

SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff...Indeed, one of the common characteristics of a SLAPP suit is its lack of merit...But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant’s resources for a sufficient length of time to accomplish plaintiff’s underlying objective...As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished...Thus, while SLAPP suits “masquerade as ordinary lawsuits” the conceptual features which reveal them as SLAPPs are that they are generally

<sup>2</sup> GOV.UK, ‘Factsheet: strategic lawsuits against public participation (SLAPPs) (GOV.UK, 20 June 2023) <<https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-strategic-lawsuits-against-public-participation-slapps>>

<sup>3</sup> Kenneth J. Garcia, ‘Developers Slap Back at Their Opponents’ Housing: Critics say ‘SLAPP’ lawsuits are being used increasingly by builders to short-circuit opposition to their projects’ (*LA Times*, 10 July 1990) <<https://www.latimes.com/archives/la-xpm-1990-07-10-me-163-story.html>>

<sup>4</sup> Penelope Canan and George W. Pring, ‘Strategic Lawsuits Against Public Participation’ (1988) *Social Problems*, 35(5) pp. 506-519.

meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so...<sup>5</sup>

In recent years, however, SLAPPs have come to be discussed as an issue surrounding press freedom and the debate has become particularly polarised<sup>6</sup> between those who state that there is a SLAPP problem and it is threatening journalistic autonomy and those who claim that this problem has been overstated.<sup>7</sup>

The workshop focused on:

- the threats SLAPP pose and if the UK does have a SLAPP problem
- general issues with the current legislation
- concerns that the aims that anti-SLAPP legislation hopes to achieve are already provided for in law through, inter alia, procedural provisions to strike out unmeritorious claims.<sup>8</sup>

### Does the UK have a SLAPP problem?

#### *Quantifying SLAPPs*

One of the main issues raised is that it is difficult to quantify SLAPPs as official statistics on SLAPP cases are scarce and in some instances, the threat of a SLAPP is enough to stop a journalist from continuing their work without legal proceedings progressing.<sup>9</sup> The Coalition Against SLAPPs in Europe (CASE) have attempted to collect statistics through a 'snowball sampling' method, but have acknowledged that there are limitations to the data, such as through SLAPP victims not wishing to draw attention to their case or due to the sheer quantity of data.<sup>10</sup> A European Parliament report on SLAPPs also noted just how difficult it is to collect data surrounding SLAPPs, citing that 'it is not possible to capture the full extent of the SLAPP phenomenon since

<sup>5</sup> *Wilcox v Superior Court*, 816-7, affirmed in *Wilbanks v Wolk* 121 Cal App 4<sup>th</sup> 883, 890-1 (Cal Ct App 2004).

<sup>6</sup> Peter Coe, 'Strategic Lawsuits Against Public Participation (SLAPPs) and the Economic Crime and Corporate Transparency Act 2023' (*Inform's Blog*, 23 November 2023) < <https://inform.org/2023/11/03/strategic-lawsuits-against-public-participation-slapps-and-the-economic-crime-and-corporate-transparency-act-2023-peter-coe/>>; Peter Coe, Rebecca Moosavian and Paul Wragg, 'Addressing Strategic Lawsuits Against Public Participation (SLAPPs): a Critical Interrogation of Legislative and Judicial Responses', (forthcoming) *Journal of Media Law*

<sup>7</sup> Gideon Benaim, 'Misconceptions and Weaponisation of 'SLAPPs'' (*Simkins*, 19 May 2023) < <https://www.simkins.com/news/the-weaponisation-and-ambiguity-surrounding-slapps>>

<sup>8</sup> Meritorious claims can also be defended and cases should be able to have their day in court. However, concerns were raised that changes to law are likely to have the effect of excluding meritorious claims, which would be mislabelled SLAPPs, as even meritorious claims can have valid defences. It was also highlighted that there are a number of existing provisions in law that can be used to tackle SLAPPs, such as in defamation law. See Mark Hanna, 'SLAPPs: What are they? And how should defamation law be reformed to address them' [2024] *Journal of Media Law* 16(1) 118-145.

<sup>9</sup> Coe (n 6).

<sup>10</sup> Coalition Against SLAPPs in Europe (CASE) 'SLAPPs: A threat to democracy continues to grow' (CASE, July 2023) < <https://www.the-case.eu/wp-content/uploads/2023/08/20230703-CASE-UPDATE-REPORT-2023-1.pdf>>

claimants seek to have matters resolved at a pre-litigious phase without public scrutiny.<sup>11</sup>

A report by the Foreign Policy Centre and ARTICLE 19 noted that ‘it is the UK’s libel laws in particular that persist as a risk for media globally despite the introduction of the 2013 Defamation Act in England and Wales’.<sup>12</sup> Data revealed that there were 14 instances of SLAPPs in the UK in 2021.<sup>13</sup> Questions were raised in the workshop if we should change the law when 14 seems to be a minimal number. Others noted that the 14 cases were potentially just the tip of the iceberg as we are unaware of the number of stories that have not been published over the years due to threat of legal action because journalists have not come forward to share this information publicly.<sup>14</sup>

### *Impact of SLAPPs*

Workshop attendees also spoke about the power imbalance between journalists and publishers who are subject to SLAPPs and those who are bringing the claims against them. Journalists can struggle to raise the funds for a legal case. For example, journalist Carole Cadwalladr launched a GoFundMe page<sup>15</sup> for legal fees in her case after Arron Banks sued her for defamation following a TED talk she delivered in Canada where she made statements that he claimed were false.<sup>16</sup> The court found that her remarks were protected at the time she made them as they were in the public interest, but this public interest defence ceased in April 2020 when the Electoral Commission issued a statement confirming that there was no evidence Banks had broken the law.<sup>17</sup> Financial issues are further exacerbated when considering the financial challenges that publishers are facing, with Reach being one of the latest publishers to announce financial cutbacks.<sup>18</sup> Furthermore, individual journalists have also spoken of legal actions being brought against them personally and the financial

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<sup>11</sup> Justin Borg-Barthet and Francesca Farrington, ‘Open SLAPP Cases in 2022 and 2023: The incidence of Strategic Lawsuits against Public Participation, and Regulatory Responses in the European Union’, European Parliament, November 2023.

<sup>12</sup> The Foreign Policy Centre and ARTICLE 19, ‘London Calling: The Issue of Legal Intimidating and SLAPPs against media emanating from the United Kingdom’ (*Foreign Policy Centre and ARTICLE 19*, April 2022).

<sup>13</sup> CASE (n 10).

<sup>14</sup> Aisha Majid, ‘UK is SLAPP tourism capital of Europe but scale of ‘iceberg problem’ not fully known’ (*Press Gazette*, 1 June 2022) <[https://pressgazette.co.uk/media\\_law/uk-slapp-libel-tourism-capital-europe/](https://pressgazette.co.uk/media_law/uk-slapp-libel-tourism-capital-europe/)>

<sup>15</sup> Charlotte Tobitt, ‘Carole Cadwalladr seeks funding to support her reporting during Arron Banks libel fight’ (*Press Gazette*, 2 August 2019) <<https://pressgazette.co.uk/news/carole-cadwalladr-seeks-funding-to-support-her-reporting-during-arron-banks-libel-fight/>>

<sup>16</sup> In *Banks v Cadwalladr* [2023] EWCA Civ 219 it was noted that the High Court judge had stated that the case could not be considered a SLAPP case. As per [21] of the judgment: ‘At [9] the judge addressed the fact that the defendant had “repeatedly labelled this claim a SLAPP suit, that is a strategic lawsuit against public participation, designed to silence and intimidate her.” The judge said that label was “neither fair nor apt” as the claimant’s “attempt to seek vindication through these proceedings was...legitimate.” However, members of the UK Anti-SLAPP Coalition disagreed and stated that the case should have been considered a SLAPP: ARTICLE 19, ‘UK: Anti-SLAPP Coalition reiterates its support for Carole Cadwalladr’ (*ARTICLE 19*, 1 March 2023) <<https://www.article19.org/resources/uk-anti-slapp-coalition-carole-cadwalladr/>>

<sup>17</sup> *ibid.*

<sup>18</sup> Dominic Ponsford and Bron Maher, ‘Reach restructure: 450 jobs to go, websites to close, print and online teams to combine’ (*Press Gazette*, 8 November 2023) <<https://pressgazette.co.uk/news/reach-450-redundancies/>>

and emotional toll that this has had on their lives, such as Eliot Higgins who was subject to a SLAPP personally as opposed to his employer, Bellingcat, which is based in the Netherlands.<sup>19</sup> While the method of dealing with SLAPPs was contested within the workshop, there was an overwhelming consensus that claims brought to bully or exhaust the financial resources of a journalist or publishers should not be tolerated in the courts.

### *Is the UK a 'libel hotspot'?*

SLAPP actions are seen as being particularly attractive to bring in the UK for a number of reasons:

The enduring challenges for members of the media defending themselves against libel cases include the high costs involved, the burden of proof, linked to a single legal meaning (now decided by the judge), and the lengthy periods of time taken for legal proceedings to come to fruition. All of these aspects continue to make England an 'ideal' jurisdiction for claimants, perpetuating the phenomenon of 'libel tourism'.<sup>20</sup>

However, the notion of England being a hotspot for 'libel tourism' has been contested. For example, in 2010 Sweet & Maxwell stated that there had only been three cases in 2009-10 that could be categorised as libel tourism and that 'the low number of libel tourism cases identified raises the question as to how widespread libel tourism now is.'<sup>21</sup> This was prior to the passing of the Defamation Act 2013 which was designed to reduce libel tourism. Section 9 of the Act was designed to address libel tourism<sup>22</sup> 'by tightening the test to be applied by the courts in relation to actions brought against people who are not domiciled in the UK, an EU Member State or signatories to the Lugano Convention.'<sup>23</sup> It did this 'by requiring that the court must be satisfied that England and Wales is clearly the most appropriate place to bring an action in respect of the statement complained of before accepting jurisdiction to hear the case.'<sup>24</sup> Additionally, the Royal Courts of Justice Tables for 2022 also noted that there had been a decrease in the number of defamation claims issued in London, but The International Forum for Responsible Media Blog (Inform) noted that there are doubts over the reliability of the actual figures, arguing that the Royal Courts of Justice Tables over-state the number of defamation claims actually issued.<sup>25</sup>

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<sup>19</sup> Juliette Garside, 'Designed to distress and deter': the impact of Slapp lawsuits on journalists and free speech' (*The Guardian*, 3 November 2023)

<<https://www.theguardian.com/media/2023/nov/03/designed-to-distress-and-deter-the-impact-of-slapp-lawsuits-on-journalists-and-free-speech>>

<sup>20</sup> The Foreign Policy Centre and ARTICLE 19 (n 12).

<sup>21</sup> Sweet & Maxwell, 'Jump in defamation cases driven by celebrities' (*Sweet & Maxwell*, August 2010) <<https://www.sweetandmaxwell.co.uk/about-us/press-releases/Defamation%20cases.pdf>>

<sup>22</sup> s.9 Defamation Act 2013

<sup>23</sup> Ministry of Justice, 'Post-Legislative Memorandum: The Defamation Act 2013' (*Ministry of Justice*, October 2019) <<https://assets.publishing.service.gov.uk/media/5d9f31ceed915d399eb2165f/post-legislative-memorandum-defamation-act-2013.PDF>>

<sup>24</sup> *ibid.*

<sup>25</sup> Inform, 'Judicial Statistics, 2022: A 60% decrease in issued defamation claims but doubts remain over the reliability of the figures' (*Inform*, 21 June 2023) <<https://inform.org/2023/06/21/judicial-statistics-2022-a-60-decrease-in-issued-defamation-claims-but-doubts-remain-over-the-reliability-of-the-figures/>>



## Tackling SLAPPs

Alongside there being a lack of consensus on whether SLAPPs are an issue, there is also a lack of consensus surrounding how, or even if, they should be tackled through standalone legislation. The former Conservative government responded to concerns surrounding SLAPPs and there is also cross-party support towards tackling SLAPPs. The Economic Crime and Corporate Transparency Act 2023 saw the introduction of amendments to tackle SLAPPs.<sup>26</sup> Despite these amendments, however, workshop attendees raised concerns that some issues are not addressed by the legislative amendment. For example, currently the focus of the legislation is on economic crimes.<sup>27</sup> The former Conservative government claimed that the focus should predominantly be on economic crimes given that ‘at least 70% of the cases references in a report about SLAPPs, published in April 2022 by the Foreign Policy Centre and ARTICLE 19, were connected to financial crime and corruption’.<sup>28</sup> However, it was noted by some workshop attendees that the legislation should focus on any issue that falls within the public interest. This is something that has been echoed by the UK’s Anti-SLAPP Coalition in a statement published following the amendment to the legislation<sup>29</sup> and is also emphasised in their Model UK-Anti SLAPP Law.<sup>30</sup> In response to these criticisms, a Private Member’s Bill was proposed by Wayne David MP which would broaden the focus to examine any issue considered to be in the public interest.<sup>31</sup> The Private Member’s Bill reached the Committee Stage, but the July General Election meant that it was discarded.<sup>32</sup>

### *Early dismissal mechanism*

The proposed addition of an early-dismissal mechanism through Civil Procedure Rules was also greeted at the workshop by some as a welcome addition to the amended legislation.<sup>33</sup> This would mean that a claim can be struck out before trial so long as two provisions are met: (1) ‘that the claim is a SLAPP claim’ and (2) ‘that the claimant has failed to show that it is more likely than not that the claim would succeed at trial’.<sup>34</sup> Discussions took place surrounding how the existing Civil Procedure Rules could be strengthened when it comes to early-dismissal. For example, Civil Procedure Rule 3.4 allows courts to strike out claims where there are no reasonable grounds and also

<sup>26</sup> s.194 and s.195 Economic Crime and Corporate Transparency Act 2023.

<sup>27</sup> s.195(1)(b) ‘any of the information that is or would be disclosed by the exercise of that right has to do with economic crime’.

<sup>28</sup> GOV.UK, ‘Crackdown on criminals silencing critics to be added to Economic Crime Bill’ (GOV.UK, 13 June 2023) <[<sup>29</sup> UK Anti-SLAPP Coalition, ‘A landmark moment – but we can’t stop here’ \(UK Anti-SLAPP Coalition, 26 October 2023\) <<https://antislapp.uk/2023/10/26/a-landmark-moment-but-we-cant-stop-here/>>](https://www.gov.uk/government/news/crackdown-on-criminals-silencing-critics-to-be-added-to-economic-crime-bill#:~:text=The%20move%20will%20enable%20the,to%20financial%20crime%20and%20corruption.></a>></p>
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<sup>30</sup> UK Anti-SLAPP Coalition, ‘UK Anti-SLAPP Coalition: Model Anti-SLAPP law’ <<https://antislapp.uk/wp-content/uploads/2023/05/Model-UK-Anti-SLAPP-Law-Final-Version.docx.pdf>>

<sup>31</sup> Strategic Litigation Against Public Participation HC Bill (2023) [21]

<sup>32</sup> UK Anti-SLAPP Coalition, ‘A Missed Opportunity: The July General Election leaves the UK Government’s commitment to stamping out SLAPPs unrealised’ (UK Anti-SLAPP Coalition, 31 May 2024) <<https://antislapp.uk/2024/05/31/a-missed-opportunity/>>

<sup>33</sup> s.194 Economic Crime and Corporate Transparency Act 2023.

<sup>34</sup> s.194(1)(a) and (b) Economic Crime and Corporate Transparency Act 2023.

when legal action represents an ‘abuse of the court’s process’.<sup>35</sup> The UK Anti-SLAPP Coalition noted that ‘a Practice Direction for such motions already exists, which explains that an abuse of process includes claims that are “vexatious, scurrilous or obviously ill-founded”’.<sup>36</sup> Discussion in the workshop also questioned if specific anti-SLAPP legislation is truly necessary when there are already procedural provisions to strike out claims in existence. Section 1 of the Defamation Act 2013<sup>37</sup> focuses on the serious harm test and the argument was made that, ‘to provide an adequate solution to SLAPPs...the serious harm threshold needs to apply at an early stage in proceedings’.<sup>38</sup> Provisions exist to strike out SLAPP cases based on the serious harm threshold under Rule 3.4(2)(1). However, difficulties do exist surrounding this, such as the fact that ‘applications to strike out under Rule 3.4 are normally advanced on the pleadings with ‘either no supporting evidence or very little supporting evidence’.<sup>39</sup> Rule 24.2<sup>40</sup> also allows the court to consider evidence on a summary judgment, but ‘the extent to which the court may examine evidence is still limited’.<sup>41</sup> However, it was stated that the courts have been cautious to strike out cases and deliver summary judgments in relation to the serious harm threshold. As noted:

Whether or not the court will do so, however, depends upon the particular facts of the case, and whether or not they are considered suitable to be tried at the preliminary stage. It may even depend on whether the court in question would take a traditional approach favouring the claimant’s right to access to justice, or whether it would be willing to ‘grasp the nettle’ in the interest of freedom of expression.<sup>42</sup>

In practice most contested serious harm applications are not dealt with until the full trial. One approach towards reconciling the serious harm test with the Civil Procedure Rules to produce an effective early dismissal mechanism could be by adopting a ‘proportionate approach – measuring serious harm in relation to the public interest in the defendant’s expression’ however, such an approach ‘has not yet crystallized into an established principle’.<sup>43</sup> However, there are concerns that this approach would be highly subjective, which could cause issues (as noted with subjective tests).

### *Vexatious conduct*

Concerns were also raised that, while this procedural provision exists, the question is whether or not a SLAPP would fall under being ‘vexatious’. The characteristics of ‘vexatious conduct’ were defined in the case of *Attorney General v Baker*<sup>44</sup> by Lord Bingham who stated the following:

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<sup>35</sup> Civil Procedure Rule 3.4(1)(b).

<sup>36</sup> UK Anti-SLAPP Coalition, ‘UK Anti-SLAPP Working Group: Proposals for Procedural Reform’ (*UK Anti-SLAPP Coalition*, 2021) <<https://fpc.org.uk/wp-content/uploads/2021/11/UK-Anti-SLAPP-Law-Proposals-for-Procedural-Reform.pdf>>

<sup>37</sup> s.1 Defamation Act 2013.

<sup>38</sup> Hanna (n 8) p.128.

<sup>39</sup> *ibid* p.129.

<sup>40</sup> Civil Procedure Rule 24.2.

<sup>41</sup> Hanna (n 8) p.129.

<sup>42</sup> *ibid* p.132.

<sup>43</sup> *ibid* p.133.

<sup>44</sup> *Attorney General v Evans* [2000] 1. F.L.R. 759.

The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involved an abuse of the process of the court, meaning by that a use of the court for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.<sup>45</sup>

Furthermore, the ‘vexatious’ test might not work because the test is too high a bar. This issue was raised by noting that judges might be hesitant to use the vexatious test as they may see that a case has potential, despite being a SLAPP, and would be reluctant to dismiss it without a full trial, as what could be said to have happened in the *Carole Cadwalladr* case. One issue raised was the idea that judges would only see a case as vexatious in clearly egregious cases. In many cases, claimants might have lawyers who are able to craft a persuasive claim for a case, even though it might be a SLAPP case. On the other hand, concern was raised that if the legislation went too far then the definition of what might be considered a SLAPP could be too wide. For example, in some cases even meritorious claims can have valid defences. For example, in the case of *Flood v Times Newspapers Ltd*<sup>46</sup> or *The Author of a Blog v Times Newspapers Ltd*<sup>47</sup>, it was found that in both circumstances there were valid defences after trials. Indeed, it was noted by workshop attendees that there are defences under the Defamation Act 2013 that would be applicable against a SLAPP, such as the public interest defence under section 4.<sup>48</sup>

### *Subjective test*

Additionally, the view of some of the attendees was that the requirement of a subjective test should be removed from the Economic Crime and Corporate Transparency Act 2023 as it raises a number of issues. For example, section 195 makes reference to the fact that a claim is a SLAPP due to ‘the claimant’s behaviour in relation to the matters complained of in the claim has, or is intended to have, the effect of restraining the defendant’s exercise of the right to freedom of speech’.<sup>49</sup> Discussion then turned to ‘intent’. It was stated by some that there is concern surrounding knowing the claimant’s intention, which is subjective and might be difficult to determine. Nonetheless, it was also recognised that the law on intention is clear in both criminal and civil law. In civil law, a person’s intention can be inferred from their actions, so long as there is evidence. Inferences in civil cases are a normal part of the evidential process in English law. Therefore, it should be possible to infer someone’s intent on whether or not their case is a SLAPP or not. However, for certainty and to remove any subjectivity, it has been argued by some that the test for dismissal should be objective and not require the court to know the purpose of the lawsuit, only that the court identify that the action is abusive.<sup>50</sup>

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<sup>45</sup> *ibid* [19].

<sup>46</sup> *Flood v Times Newspapers Ltd* [2012] UKSC 11.

<sup>47</sup> *The Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB).

<sup>48</sup> s 4 Defamation Act 2013.

<sup>49</sup> s 195(1)(a) Economic Crime and Corporate Transparency Act 2023.

<sup>50</sup> UK Anti-SLAPP Coalition (n 36).

Intention was also discussed in relation to the ‘single meaning rule’. The claimant bears the burden of making out a prima facie case and, once this has been done, it falls on the defendant to raise an applicable defence to prove its applicability. There are different defences available, for example if the Defamation Act 2013 is being used (which seems to be one of the main vehicles for SLAPP actions).<sup>51</sup> Concerns have been raised, however, that while these defences exist, ‘it falls upon a High Court judge to decide the true single ‘legal meaning’ of what was expressed in the publication under claim’.<sup>52</sup> It has been noted that this can be particularly problematic as it is subjective and ascribing meaning to words can be difficult as each individual will interpret things differently.<sup>53</sup> Indeed, the ‘single meaning rule’ has been discussed and criticised by judges and scholars. As noted, ‘statements invariably bear multiple (perhaps even infinite) meanings...and simply do not bear a single, objectively-determinable meaning’.<sup>54</sup> Judges have also said that the single meaning rule can be considered a ‘crude yardstick’ because individuals ‘vary enormously in the way they read articles and the way they interpret what they read’.<sup>55</sup> With these risks and the costliness and waste of time as a result of being involved in SLAPP actions, concerns were expressed by workshop attendees that journalists have self-censored in certain cases or have, potentially, dropped stories that they were considering as a consequence of being concerned about legal action that they might face and not be able to afford.

### Costs

The concern surrounding costs was also raised as being one that needs to be addressed. One of the reasons why SLAPPs are seen as being so popular in the UK is because of the high costs. It was suggested that fixed costs might be a way forward and this is something that the former government had been looking into.<sup>56</sup> One suggestion posed in the workshop would be to train some County Court judges to handle lower-level defamation claims, which are only triable in the High Court. Another suggestion put forward would be to alter the statutory rules surrounding judicial appointments to permit the appointment to (new) specialist tribunals of academics specialising in defamation law, but who are not qualified to practise which could benefit the judiciary by offering diversity and bringing specialist expertise in areas such as defamation and privacy.

Additionally, it is of the utmost importance that anyone subject to a SLAPP and who wins their case should have a full recovery of their costs and there should also be a basis for exemplary damages in cases ‘where the claimant has exhibited particularly egregious conduct’ and where the time and psychological harm caused to the defendant needs to be compensated.<sup>57</sup> Furthermore, it was acknowledged that costs

<sup>51</sup> See s2-8 Defamation Act 2013.

<sup>52</sup> The Foreign Policy Centre and ARTICLE 19 (n 12).

<sup>53</sup> Thomas DC Bennett, ‘Interpretation is opinion: realigning the fact/opinion distinction in English defamation law’ [2023] *Journal of Media Law* 15(1) 62-89.

<sup>54</sup> *ibid* p.66.

<sup>55</sup> *Charleston v NGN Ltd* [1995] 2 AC 65, [73-74].

<sup>56</sup> Ministry of Justice, ‘Strategic Lawsuits against Public Participation (SLAPPs) Government Response to the Call for Evidence’ (*Ministry of Justice*, 20 July 2023) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1093987/SLAPPs-call-for-evidence-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1093987/SLAPPs-call-for-evidence-response.pdf)>

<sup>57</sup> UK Anti-SLAPP Coalition (n 36).

should act as a deterrent towards wealthy individuals bringing SLAPP action and this could be done by ensuring that the costs are commensurate to the wealth and conduct of the claimant.<sup>58</sup> Costs in EU countries are often found to be much lower than in the UK. The Council of Europe's work on SLAPPs was also highlighted, particularly the MSI-SLP Committee of Experts on Strategic Lawsuits against Public Participation's Recommendation where section 37 focuses on costs:

Member states should introduce rules, in line with national law and practice, to ensure that in court proceedings against public participation, judicial and other authorities have the power to require the claimant to provide security for procedural costs, or for procedural costs and damages, if it considers such security appropriate in view of the presence of SLAPP indicators.<sup>59</sup>

### *UK and Europe*

The Council of Europe's Expert Committee on SLAPPs has concluded its Recommendation which has now been adopted by the Council of Europe. The Recommendation was designed 'with the widest possible scope to give member States the tools to tackle SLAPPs from every possible angle' which is not in line with the Economic Crime and Corporate Transparency Act which has a narrow focus on economic crimes.<sup>60</sup>

The European Commission has also been working on SLAPPs and a Directive to protect persons who engage in public participation from manifestly unfounded or abusive court proceedings was adopted in early 2024.<sup>61</sup> This Directive sits with the Council of Europe Recommendation as a dual pronged attack on SLAPPs. Within the Directive, the European Commission highlighted the importance of tackling SLAPPs and stated that the Directive sets out minimum rules 'thus enabling the Member States to adopt or maintain provisions that are more favourable to persons engaging in public participation'.<sup>62</sup> The Recommendation from the Commission stems from the concern that SLAPPs across Europe are a growing problem and need to be addressed in Member States. While the UK has begun to address, SLAPPs, it has been emphasised that there are still a number of existing issues in the existing legislation.

### Summary

- There is debate surrounding SLAPPs and how big of a problem they are in the UK as data is difficult to accurately obtain.
- There is also debate surrounding whether or not new standalone legislation is required or whether or not we should utilise existing legislation and Civil

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<sup>58</sup> *ibid.*

<sup>59</sup> MSI-SLP, 'Recommendation CM/Rec(2024)2 of the Committee of Ministers to member states on countering the use of SLAPPs (*MIS-SLP*, 2022) <<https://rm.coe.int/0900001680af2805>>

<sup>60</sup> Coe (n 6).

<sup>61</sup> Directive (EU) 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (Strategic lawsuits against public participation', <[https://www.europarl.europa.eu/doceo/document/A-9-2023-0223-AM-126-126\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/A-9-2023-0223-AM-126-126_EN.pdf)>

<sup>62</sup> *ibid* p.13.

Procedure Rules alongside granting judges the power to dismiss SLAPP claims.

- Costs are a particular issue that need addressing so that claimants are financially punished and defendants are financially compensated.
- The UK is somewhat out of step with the Council of Europe and their draft recommendations in relation to SLAPPs.

## Online Safety Act

The Online Safety Act was passed in October 2023. Its main purpose is to put in place new rules for social media and search engines that impose on them a duty of care to protect users from harmful content that is published online, as well as from certain types of harmful content as far as minors are concerned.<sup>63</sup> In the months leading up to the Online Safety Act's Royal Assent, there were a number of concerns that were raised by civil society organisations surrounding how it would impact media freedom and the work of journalists.<sup>64</sup>

In particular, concerns were raised around the following:

- protection of confidential sources
- protection of journalistic content
- who is protected under its remit
- the role of social media companies
- below-the-line comments

### Protection of confidential sources

The Online Safety Act went through a number of revisions in an attempt to strengthen the protections that were offered to news publisher content and journalistic content.<sup>65</sup> Nonetheless, concerns surrounding the Act persisted, particularly in relation to the protection of confidential sources and also the definitions within the act relating to what can be considered journalistic content.

Firstly, with regard to source protection the European Court of Human Rights clearly considers that the protection of confidential sources is a cornerstone of protecting investigative journalism.<sup>66</sup> As noted in the case of *Goodwin*:

Protection of journalistic sources is one of the basic conditions for press freedom...Without such protection, sources may be deterred from assisting the press informing the public on matters of public interest. As a result the vital

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<sup>63</sup> GOV.UK, 'UK children and adults to be safer online as world-leading bill becomes law' (GOV.UK, 26 October 2023) <<https://www.gov.uk/government/news/uk-children-and-adults-to-be-safer-online-as-world-leading-bill-becomes-law>>

<sup>64</sup> ARTICLE 19, 'UK: Online Safety Bill is a serious threat to human rights online' (ARTICLE 19, 25 April 2022) <<https://www.article19.org/resources/uk-online-safety-bill-serious-threat-to-human-rights-online/>>; Madeline Earp, 'How UK Online Safety Bill threatens encryption, secure communication, and reporting on migration' (Committee to Protect Journalists, 27 January 2023) <<https://cpj.org/2023/01/how-uk-online-safety-bill-threatens-encryption-secure-communication-and-reporting-on-migration/>>

<sup>65</sup> Department for Science, Innovation and Technology and Department for Digital, Culture, Media & Sport, 'Fact sheet on enhanced protections for journalism within the Online Safety Bill' (GOV.UK, 23 August 2022) <<https://www.gov.uk/government/publications/fact-sheet-on-enhanced-protections-for-journalism-within-the-online-safety-bill>>

<sup>66</sup> *Financial Times v United Kingdom* (2010) 50 EHRR [59] 'Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect that an order for disclosure of a source has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest'.

public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.<sup>67</sup>

When it comes to the work that journalists undertake, particularly investigative work, concerns have been raised about how the Online Safety Act could threaten source protection. Confidential sources are important in helping journalists break news stories. Without the guarantee of confidentiality, these sources might not come forward and as a consequence of this, certain stories might not be broken.<sup>68</sup> Concerns about confidential sources and encryption were raised by a number of organisations, including the Committee to Protect Journalists who noted the following:

The Online Safety Bill doesn't ban encryption. However, the content restrictions it lays out apply to private and public communications...Ofcom could only ask platforms to scan private communications relating to child sexual abuse material...but that restriction doesn't matter too much because the processes involved undermine encryption across the board, not just for targets of a criminal investigation.<sup>69</sup>

While end-to-end encryption is not banned, the fact remains that Ofcom now has the power to ask platforms to scan private communications using accredited technology under s. 122 of the Act, which means that encryption is then broken.<sup>70</sup> While this might be used by perfectly legitimate companies to scan for offensive material, there have been concerns raised that such technology could then be used by other actors who wish to use it for other purposes. As noted, technology such as 'Pegasus was found on phones belonging to close associates of murdered journalist Jamal Khashoggi, something thought to have enabled his persecution.'<sup>71</sup> Concerns about the development of technology have been raised by platforms such as Signal, with President of the company, Meredith Whittaker, stating: 'If we are forced to undermine the technology that guarantees privacy for the people who rely on us in the U.K., then we cannot operate in the U.K.'<sup>72</sup> At this moment in time, the technology in the UK does not exist to scan private communications and the government has acknowledged this to be the case: 'If the appropriate technology does not exist that meets these requirements, then Ofcom will not be able to use Clause 122 to require its use.'<sup>73</sup> However, while it might be the case that no technology currently exists, the fact remains that s. 122 has the potential and the threat to break end-to-end encryption. This was summarised by Baroness Benjamin in the House of Lords:

The fact of the matter is that everybody knows that you cannot do what Ofcom is empowered by the Bill to do without breaching end-to-end encryption. It is as simple as that. My noble friend may say that is not the Government's intention

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<sup>67</sup> *Goodwin v United Kingdom* (1996) EHRR 123 [39].

<sup>68</sup> *ibid.*

<sup>69</sup> *Earp* (n 64).

<sup>70</sup> s122 Online Safety Act 2023.

<sup>71</sup> Matthew Linares, 'Online dangers of UK government assault on encryption' (*OpenDemocracy*, 12 December 2023) <<https://www.opendemocracy.net/en/digital liberties/online-safety-act-bill-uk-government-encryption-privacy-ofcom/>>

<sup>72</sup> Andrew Deck, 'Signal President Meredith Whittaker on resisting government threats to privacy' (*rest of world*, 17 October 2023) <<https://restofworld.org/2023/signal-president-meredith-whittaker-messaging-privacy/>>

<sup>73</sup> HL deb 6 September 2023, vol 832 col WA459.



and that it cannot be forced to do it if the technology is not there. None of that is in the Bill, by the way. He may say that at the Dispatch Box but it does not address the fact that end-to-end encryption will be breached if Ofcom finds a way of doing what the Bill empowers it to do.<sup>74</sup>

Clearly, the issue concerning encryption is one that will need to be monitored should the appropriate technology become available and the question then is if and/or how Ofcom will use it to look at private communications. This would then be a concern for journalists to consider as it could impact their ability to communicate with confidential sources.

### Journalistic Content

Despite having concerns with the Online Safety Act, protections offered to journalists are welcomed. These protections exempt news publishers' content from platforms' new online safety duties<sup>75</sup> and impose duties on platforms if they consider taking action against any news publisher content (including a 'must carry regime').<sup>76</sup> Additionally, all journalistic content should be safeguarded and, if content is moderated, there should be an expedited route of appeal for them to submit their appeal if their content is found to be moderated.<sup>77</sup> News publishers' content on their websites is also not in scope of online safety regulation and the Act also includes an exemption for below-the-line comments too.<sup>78</sup> Companies will either fall within Category 1 or Category 2 services within the Act. Category 1 services will include the largest platforms with the most users and news publisher content published on Category 1 services does not fall within the scope of the legislation.<sup>79</sup> It is also stated that a 'recognised news publisher can be an entity that publishes news-related material, that is created by different persons, and is subject to editorial control and, inter alia, which publishes such material in the course of a business, is subject to a standards code, has a registered office or other business address in the UK'.<sup>80</sup> Section 56(6) goes further and states that 'news-related material' means material consisting of (a) 'news or information about current affairs' (b) 'opinion about matters relating to the news or current affairs, or' (c) gossip about celebrities, other public figures or other persons in the news'.<sup>81</sup>

While additional protections have been lauded as being of the utmost importance to protect freedom of expression, it has been noted that there are still a number of concerns with the legislation, such as the lack of a concrete definition for 'journalistic content'. For example, it was suggested that the Act over-protects in certain situations as it might be possible to protect mis/dis-information. We have witnessed the rise of

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<sup>74</sup> HL deb 6 September 2023, vol 832 col WA471

<sup>75</sup> Department for Science, Innovation and Technology and Department for Digital, Culture, Media & Sport (n 65).

<sup>76</sup> Ricki-Lee Gerbrandt, 'Media freedom and journalist safety in the UK Online Safety Act' [2023] *Journal of Media Law* 15(2) 179-212.

<sup>77</sup> s19 Online Safety Act 2023.

<sup>78</sup> s55 Online Safety Act 2023.

<sup>79</sup> s180 Online Safety Act 2023.

<sup>80</sup> s56(2) Online Safety Act 2023; Peter Coe, 'Tackling online false information in the United Kingdom: The Online Safety Act 2023 and its disconnection from free speech law and theory' [2024] *Journal of Media Law* 15(2) 213-242, p.236.

<sup>81</sup> s 56(6) Online Safety Act 2023.

mis/dis-information in recent years.<sup>82</sup> It is a topic that has been widely studied, particularly in relation to COVID-19 and elections.<sup>83</sup> Concerns have been raised by The Guardian who have noted that there is a growing disinformation-for-profit market, which is the practice by which private contractors, employed by companies and politicians, use social media to manipulate elections worldwide.<sup>84</sup> With 2024 having been a big year for elections in countries such as the US and the UK, there were concerns that such a practice would only continue.<sup>85</sup> Additionally, it is noted that because of the protection of news-related material within section 56, there is the potential that the OSA ‘arguably provides an exemption for large swathes of our press and media to publish content that is very often, and largely based, on misinformation and, at times, disinformation – which goes to the core of the trade-in celebrity gossip’.<sup>86</sup> As a consequence of this, concerns have been raised that the OSA might protect news that can contribute to ‘the distortion of the public sphere, as these false stories may (and sometimes do) become the dominant view’.<sup>87</sup>

Concerns have been raised that the Online Safety Act could protect content that is considered mis/dis-information as it could be considered as being journalistic content under section 19.<sup>88</sup> Additionally, the role of Artificial Intelligence (AI) was also noted as being a potential challenge to the Online Safety Act. It could be argued that AI can be considered a news publisher as per section 19(15) which states the following:

- (15) The creator of content other than news publisher content is-
- (a) an individual who-
    - (i) created the content, and
    - (ii) is in the United Kingdom; or
  - (b) an entity which-
    - (i) created the content, and
    - (ii) is incorporated or formed under the law of any part of the United Kingdom

<sup>82</sup> Kamonwan Petchot, ‘Press provides antidote to ‘fake news’ epidemic’ (*UNESCO*, 26 November 2023) <<https://www.unesco.org/en/articles/press-provides-antidote-fake-news-epidemic>>

<sup>83</sup> Sacha Altay, Manon Berriche and Alberto Acerbi, ‘Misinformation on Misinformation: Conceptual and Methodological Challenges’ [2023] *Social Media + Society* 9(1) 1-13; Ema Kušen and Mark Strembeck, ‘Politics, sentiments, and misinformation: An analysis of the Twitter discussion on the 2016 Austrian Presidential Elections’ [2018] *Online Social Networks and Media* 5 37-50; Elizaveta Gaufman, ‘The Trump carnival: popular appeal in the age of misinformation’ [2018] *International Relations* 32(4) 410-429; May O. Lwin, Si Yu Lee, Chitra Panchapakesan and Edson Tandoc, ‘Mainstream News Media’s Role in Public Health Communication During Crises: Assessment of Coverage and Correction of COVID-19 Misinformation’ [2023] *Health Communication* 38(1) 160-168; Darina Sarelska and Joy Jenkins, ‘Truth on Demand: Influences on How Journalists in Spain, and Bulgaria Responded to Covid-19 Misinformation and Disinformation’ [2023] *Journalism practice* 17(10) 2178-2196.

<sup>84</sup> Stephanie Kirchgaessner, Manisha Ganguly, David Pegg, Carole Cadwalladr and Jason Burke, ‘Revealed: the hacking and disinformation team meddling in elections’ (*The Guardian*, 15 February 2023) <<https://www.theguardian.com/world/2023/feb/15/revealed-disinformation-team-jorge-claim-meddling-elections-tal-hanan>>

<sup>85</sup> Coe (n 80).

<sup>86</sup> *ibid* p.236.

<sup>87</sup> *ibid*.

<sup>88</sup> s19 Online Safety Act 2023.

The role of AI in journalism is one that is gaining traction since the launch of Chat GPT, with some newsrooms publishing experimental articles written by the platform.<sup>89</sup> If news content, in the future, is published via AI, will this also be classed as journalistic content that is protected by the Online Safety Act?

### Who is protected?

The Online Safety Act raises a number of questions about who is protected under its remit and also places a greater onus on certain entities to ensure that protection is guaranteed. An issue that was raised surrounding the Act concerns section 56 stipulating that recognised news publishers, in order to be exempt from the Act, must produce news related content that is ‘created by different persons’ and is ‘published in the course of a business’ and that business must have ‘a registered office or other business address in the UK’.<sup>90</sup> This creates an issue because the Act has the potential to exempt those who may work remotely and abroad, or publications that might be run by a single person.<sup>91</sup>

Because of these concerns, it was questioned by some workshop attendees if the Online Safety Act was truly needed due to the fact that there are other acts of legislation in place that offer similar protections from offensive speech, such as section 127 of the Communications Act 2003 which focuses on improper use of public electronic communications networks<sup>92</sup> and section 5 of the Public Order Act 1986 which focuses on harassment, alarm or distress.<sup>93</sup> While section 127 is in place as a piece of potential legislation that could be used to prosecute those who engage in the sending of a message for the purpose of causing annoyance, inconvenience or needless anxiety to another, it has rarely been used<sup>94</sup> and the Law Commission noted that section 127(2) offences are ‘infrequently prosecuted’.<sup>95</sup> This is as a consequence of the fact that it is difficult to prosecute, as explained below:

Setting aside the number of publishers that could theoretically be prosecuted for publishing such content, which in itself is resource-intensive, the transience of online publishers, the fact they can be located and/or operate in different jurisdictions, and the frequency with which they publish anonymously or pseudonymously, means that locating and identifying them is challenging. This is compounded for prosecutors by having to prove beyond reasonable doubt the defendant’s knowledge of falsity, which in itself can be complex and is an evidence-intensive task.<sup>96</sup>

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<sup>89</sup> David Caswell, ‘AI and journalism: What’s next?’ (*Reuters Institute for the Study of Journalism*, 19 September 2023) <<https://reutersinstitute.politics.ox.ac.uk/news/ai-and-journalism-whats-next>>

<sup>90</sup> s56 Online Safety Act 2023.

<sup>91</sup> Coe (n 80).

<sup>92</sup> s127 Communications Act 2003.

<sup>93</sup> s5 Public Order Act 1986.

<sup>94</sup> s127(2) Communications Act 2003.

<sup>95</sup> Law Commission, *Modernising Communications Offences: A Final Report* (HC 547, Law Comm 399, 2021)

<sup>96</sup> Coe (n 80) p.220.

## The role of social media

Furthermore, the role of Ofcom and social media companies will increase. It was also noted in the workshop that criminal prohibitions meant to be enforced by police are insufficient and ineffective, and that regulatory enforcements of platforms was necessary to truly tackle the problem.<sup>97</sup> This includes significant concerns about online abuse and disinformation tactics targeting journalists.<sup>98</sup> Social media companies will have to ensure that there is more effective moderation than in the past.<sup>99</sup> However, concerns have been raised over this approach. In particular, campaign organisation Big Brother Watch has stated that this could be problematic:

Whilst some illegal content will always be clear and obvious to content moderators, it is inconceivable that they should be able to make determinations on what might legally constitute “stirring up hatred” or “malicious communication”, speech which can reach a criminal threshold but which the police and the courts frequently find hard to make judgments on. Silicon Valley’s content moderators can’t possibly fulfil the tasks of police, judge and jury, so when these difficult determinations are presented to them, under the threat of penalties, they will almost certainly censor lawful speech out of an abundance of caution.<sup>100</sup>

## Below-the-line comments

Below-the-line comments was another issue raised as a concern by workshop attendees. This is particularly the case when journalism safety is considered. Noticeably, online harassment of journalists has increased in recent years. For example, a survey by the Media Lawyers Association in 2020 noted that 92% of members who responded reported that abuse of journalists had increased, with the two most common forms of abuse being online abuse and harassment.<sup>101</sup> A report by the International Center for Journalists (ICFJ), *The Chilling*, commissioned by UNESCO, noted how women journalists are more likely to be subject to online harassment than their male counterparts.<sup>102</sup> Concerns have also been raised that online harassment leads to offline attacks against journalists too.<sup>103</sup> Below-the-line comments is one place where journalists can suffer from online harassment, as a study

<sup>97</sup> Gerbrandt (n 76) pp. 90-192.

<sup>98</sup> Gerbrandt (n 75) pp.185-190.

<sup>99</sup> Sarah Dawood, ‘Will the Online Safety Act protect us or infringe our freedoms?’ (*The New Statesman*, 17 November 2023) <<https://www.newstatesman.com/spotlight/tech-regulation/online-safety/2023/11/online-safety-act-law-bill-internet-regulation-free-speech-children-safe>>

<sup>100</sup> Big Brother Watch, ‘Five Things You Need to Know About the Online Safety Bill’ (*Big Brother Watch*, 3 October 2023) <<https://bigbrotherwatch.org.uk/2023/10/five-things-you-need-to-know-about-the-online-safety-bill/>>

<sup>101</sup> Beth Grossman and Caoilfhionn Gallagher QC, ‘Combating Online Abuse and Harassment: A Legal Guide for Journalists in England and Wales’ (*Media Lawyers Association*, June 2021) <<https://medialawyersassociation.files.wordpress.com/2021/06/combating-online-harassment-and-abuse-23.06.2021-09.10-5.pdf>>

<sup>102</sup> International Center for Journalists, ‘The Chilling: A global study of online violence against women journalists’ (*International Center for Journalists*, November 2022) <[https://www.icfj.org/sites/default/files/2023-02/ICFJ%20Unesco\\_TheChilling\\_OnlineViolence.pdf](https://www.icfj.org/sites/default/files/2023-02/ICFJ%20Unesco_TheChilling_OnlineViolence.pdf)>

<sup>103</sup> International Center for Journalists, ‘Online Violence Early Warning System’ (*International Center for Journalists*, 2023) <<https://www.icfj.org/our-work/online-violence-early-warning-system>>

examining below-the-comments on *The Guardian* noted,<sup>104</sup> as well as being raised in the first-hand evidence of journalists, scholars, and activists who endured online abuse in comments sections provided to parliamentary committees examining the Online Safety Bill.<sup>105</sup> It has been emphasised that more could be done to protect journalists from online harassment in the Act. In particular, the National Union of Journalists stated in written evidence in 2021:

The bill should be amended so that media employers are legally required to support staff and freelance workers when facing online abuse. The bill should introduce new measures that would compel media outlets to protect media workers when dealing with the full spectrum of online abuse including the “below the line” comments.<sup>106</sup>

However, the News Media Association has stated that below-the-line comments are best dealt with outside of the Online Safety Act, noting that they are subject to editorial control and if comments are found to be defamatory or harmful, then these should be dealt with through self-regulatory bodies such as the Independent Press Standards Organisation (IPSO) or other editorial processes.<sup>107</sup>

Others in the workshop raised the issue that many self-regulatory bodies, including IPSO, do not have a mandate over below-the-line comments, resulting in a self-regulatory lacuna.<sup>108</sup> Recent research examining the trajectory of the legislative process of the Online Safety Act 2023 has found that journalists and journalist unions are advocating for legislative action to tackle online abuse against journalists but that many legacy press employers and its supporters are not.<sup>109</sup> Clearly, online abuse is an issue that journalists face and is causing tension in the industry on how to best handle the problem.<sup>110</sup>

## Summary

- The confidentiality of sources needs to be afforded the utmost protection in order for investigative journalism to be preserved. Many stories concerning corruption have come from whistle-blowers who should be ensured protection.
- While the addition of protections for journalists has been welcomed, there are still parts of the Online Safety Act that are non-descript and vague in a climate of mis/dis-information and the growing role of AI.
- Social media companies will need to ensure that there are enhanced protections in place when it comes to the moderation of content.

<sup>104</sup> Scott Wright, ‘When Journalists Go “Below the Line”: Comment Spaces at *The Guardian* (2006-2017) [2019] *Journalism Studies* 21(1) pp. 107-126.

<sup>105</sup> Gerbrandt (n 76) pp. 202.

<sup>106</sup> National Union of Journalists, ‘Written evidence submitted by the National Union of Journalists (OSB0166)’ (*Parliament.uk*, September 2021)

<<https://committees.parliament.uk/writtenevidence/39385/pdf/>>

<sup>107</sup> News Media Association, ‘Online Safety Bill: Government Must Continue To Protect Press Freedom’ (*News Media Association*, 22 September 2022)

<<https://newsmediauk.org/blog/2022/09/22/online-safety-bill-government-must-continue-to-protect-press-freedom/>>

<sup>108</sup> Gerbrandt (n 76) p.201.

<sup>109</sup> Gerbrandt (n 76) pp.196-201.

<sup>110</sup> *ibid.*

- While there may be some existing legislative protections in place to protect individuals from harmful and offensive content, there are concerns that they may be insufficient to protect individuals from abuse given that online abuse is in large part proliferated across social media and search engine platforms and there is therefore a need to directly tackle the issue via platforms.

## National Security Act 2023

Replacing current espionage legislation, the National Security Act 2023 is another piece of legislation that has caused concern for media freedom. According to the former Conservative government, the Act provides ‘new and updated tools to deter, detect and disrupt modern-day state threats.’<sup>111</sup> The Act has created an offence of foreign interference, which means that it is illegal to partake in conduct that interferes with fundamental rights, such as voting and freedom of speech.<sup>112</sup>

Discussions surrounding the National Security Act focused on:

- it being considered a vague piece of legislation that could impact freedom of expression
- a lack of public interest defence
- weakening protections against the police accessing journalistic materials

### Impact on freedom of expression

The National Security Act is considered to be extremely vague and therefore has the potential to impact watchdog journalism. Prior to the Bill receiving Royal Assent, a coalition representing media from around the world warned that the legislation could have a potential chilling effect on journalism, noting the following:

Clauses intended to target spies acting on behalf of foreign states could also bring individuals working for international and NGO organisations, many of whom legitimately receive funding from foreign states, within scope of the Bill. This could have a chilling effect on the legitimate flow of public interest information to the UK general public and create a blueprint that could be used by authoritarian governments around the world as a means to threaten journalists, activists and whistleblowers with lengthy prison sentences.<sup>113</sup>

### *Assisting foreign intelligence*

These concerns still stand now that the Bill has received Royal Assent. In particular, there were concerns raised for individuals who work for non-governmental organisations and civil society organisations because, if their funding comes from a foreign country that could be considered hostile, then they could be accused of working against national security as a consequence of their funding. The punishment for this could be a maximum prison term of 14 years.<sup>114</sup> Indeed, it has been noted that ‘foreign agent’ style laws have risen in popularity in a number of authoritarian countries

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<sup>111</sup> Home Office, ‘On 11 July, the National Security Bill became law after being passed by both Houses of Parliament and securing Royal Assent’ (GOV.UK, 11 July 2023)

<<https://www.gov.uk/government/news/national-security-bill-becomes-law--2>>

<sup>112</sup> s13-16 National Security Act 2023.

<sup>113</sup> News Media Association, ‘Global Media Warns of ‘Serious Concerns’ with National Security Bill’ (News Media Association, 11 January 2023) <<https://newsmediauk.org/blog/2023/01/11/global-media-warns-of-serious-concerns-with-national-security-bill/>>

<sup>114</sup> s3(9) National Security Act 2023 – ‘A person who commits an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or a fine (or both)

to protect them from scrutiny and being held to account.<sup>115</sup> However, other democracies, such as the European Union ‘have entertained foreign influence style legislation as part of ill-conceived attempts to counter foreign interference’.<sup>116</sup> Hence, there are concerns with the UK introducing such legislation.

Additionally, the role of foreign correspondents was also raised as potentially being an issue that needed to be addressed as oftentimes journalists might be paid from a source that is not based in the UK, despite the fact that they themselves are stationed there. This particular concern was raised in an ARTICLE 19 and Campaign for Freedom of Information briefing document for the Commons:

A journalist working for another government’s state broadcaster – including that of a friendly state – who reports on a leak of protected information which is held to be prejudicial to the UK’s interests, would also commit an offence under the bill if they knew or ought to have known that the broadcast would prejudice the UK’s safety or interests. The fact that the journalist was paid for from the funds of a foreign government department or agency and that the broadcasting organisation itself was financed by such funds would satisfy the foreign power condition. They would also face a maximum sentence of life imprisonment.<sup>117</sup>

Additionally, there are issues with section 3 of the legislation, in particular section 3(2) where the following is stated:

### 3. Assisting a foreign intelligence service

#### (2) A person commits an offence if the person

- (a) engages in conduct that is likely to materially assist a foreign intelligence service in carrying out UK-related activities, and
- (b) knows, or having regard to other matters known to them ought reasonably to know, that their conduct is likely to materially assist a foreign intelligence service in carrying out UK-related activities.<sup>118</sup>

Baroness Jones of Moulsecoomb argued that this was a controversial section, noting the following:

...as it stands an offence punishable with heavy criminal sanctions and sentences is committed if someone “knows, or ought reasonably to know, that it is reasonably possible their conduct may materially assist a foreign intelligence service”. This would cover a wide range of reporting, whether about sexual assaults on board a nuclear submarine, Chinese influence in the UK, bullying by intelligence officers, an innocent photograph of a nuclear power station or huge investigations such as the Panama Papers. The problem is that, when journalists start investigating a story, they cannot possibly know where it

<sup>115</sup> Iskra Kirova, ‘Foreign Agent Laws in the Authoritarian Playbook’ (*Human Rights Watch*, 19 September 2024) <<https://www.hrw.org/news/2024/09/19/foreign-agent-laws-authoritarian-playbook>>

<sup>116</sup> *ibid.*

<sup>117</sup> Campaign for Freedom of Information and ARTICLE 19, ‘Briefing for Commons 2<sup>nd</sup> Reading of the National Security Bill’ (*Campaign for Freedom of Information and ARTICLE 19*, 6 June 2022) <<https://www.article19.org/wp-content/uploads/2022/06/2R-Briefing-on-National-Security-Bill.pdf>>

<sup>118</sup> s3(2)(a-b) National Security Act 2023



will lead and whether their reports might “materially assist a foreign intelligence service”.<sup>119</sup>

Another issue with section 3 is the fact that it does not require any interaction with foreign powers, just that they ought reasonably to know that their conduct would assist a foreign intelligence service. The issue here is that some stories that are published could fall under section 3 but are in the public interest to be reported. For example, the ‘Partygate’ story has been noted as a potential story that could assist a foreign intelligence service in carrying out UK-related activities as the story could have been viewed as being prejudicial for the UK.<sup>120</sup>

### *Risks the safety or interests to the UK*

The Joint Committee on Human Rights also expressed concerns surrounding the Act and the chilling effect it could have on journalism. This is as a consequence of the Act stating that a person commits an offence if, under section 1:

- 1(1)(a) the person-
- (i) obtains, copies, records or retains protected information, or
  - (ii) discloses or provides access to protected information,
- 1(b) the person’s conduct is for a purpose that they know, or having regard to other matters known to them ought reasonable to know, is prejudicial to the safety or interests to the United Kingdom.<sup>121</sup>

The key phrase that raises cause for concern here is ‘safety or interests of the United Kingdom’ as it has been found to be rather ambiguous and is in need of clarification. The government responded to concerns around this phrase by the Joint Committee on Human Rights, noting that:

The meaning of the term ‘safety or interests of the UK’ is established in case-law having previously been considered by the courts. In the case of *Chandler v DPP (1964)*, the House of Lords considered this test, concluding in summary that the interests of state meant the objects of state policy determined by the Crown on the advice of Ministers... We consider that the words used in this term, taken with the case-law that has interpreted it in the existing legislation, provide a sufficient level of certainty so as to enable the public to understand the nature and limits of the offence. The Government has carefully considered whether to define ‘safety of interests of the UK’ and has concluded that limiting this term by specifying certain conduct, or including an explicitly threshold, risks creating loopholes that sophisticated hostile actors could exploit.<sup>122</sup>

The government has stated that, even though they will not provide a definition as it has been explored in case law and they do not wish to limit the offence,<sup>123</sup> they have

<sup>119</sup> HL deb 1 March 2023, vol 828 col WA252.

<sup>120</sup> Joint Committee on Human Rights, ‘Legislative Scrutiny: National Security Bill’ HC 297, HL Paper 73.

<sup>121</sup> s1(a) and (b) National Security Act 2023.

<sup>122</sup> Home Office, ‘The government’s response to the Joint Committee on Human Rights report: ‘Legislative Scrutiny: National Security Bill’ (GOV.UK, 21 December 2022) para. 11-13

<sup>123</sup> *Chandler v DPP* [1964] AC 763

no desire to stifle freedom of expression and that the Act targets ‘harmful activity by states, not leaks, whistleblowing or public interest journalism.’<sup>124</sup>

### *Defining protected information*

Another phrase that was raised as needing further clarification under section 1(a)(i) and (ii) is ‘protected information’.<sup>125</sup> The legislation states under section 1(2):

1(2) In this section “protected information” means any information, document or other article where, for the purpose of protecting the safety or interests of the United Kingdom –

- (a) access to the information, document or other article is restricted in any way, or
- (b) it is reasonable to expect that access to the information, document or other article would be restricted in any way<sup>126</sup>

The former Conservative government, in further guidance, notes that they consider it would be clear when information is restricted, ‘such as through classification markings or password protected information in a government building.’<sup>127</sup> They also give the example of documents being stolen from an intelligence officer as such an instance of knowing when information should be restricted as ‘the context of the theft would mean it would be reasonable for the person to expect that information to be protected.’<sup>128</sup> While this guidance has been issued, Campaign for Freedom of Information and ARTICLE 19 noted that it would include ‘unclassified information which is ‘restricted in any way’ to protect the UK’s interests’ and therefore ‘this would include unclassified information which it is in the government’s practice not to disclose.’<sup>129</sup> It is argued that this definition is considered to be too broad and could hinder whistle-blowing from taking place.

### A lack of public interest defence

Another concern is the failure to introduce a public interest defence into the Official Secrets Act 1989 which the then Conservative government stated is unnecessary in their response to the Joint Committee on Human Rights.<sup>130</sup> This decision is much to the dismay of the News Media Association and also The Guardian News and Media<sup>131</sup> and contrary to the Law Commission who noted the importance of a public interest defence.<sup>132</sup> Under the 2023 Act, it is irrelevant to the offences created if the disclosure

<sup>124</sup> Home Office, ‘Journalistic freedoms: National Security Bill factsheet’ (GOV.UK, 13 July 2023) <<https://www.gov.uk/government/publications/national-security-bill-factsheets/journalistic-freedoms-national-security-bill-factsheet#:~:text=It%20is%20right%20that%20we,the%20requirements%20of%20this%20offence.>>

<sup>125</sup> s1(1)(a)(i-ii) National Security Act 2023.

<sup>126</sup> s1(2)(a-b) National Security Act.

<sup>127</sup> Home Office (n 122).

<sup>128</sup> *ibid.*

<sup>129</sup> Campaign for Freedom of Information and ARTICLE 19 (n 117)

<sup>130</sup> Home Office (n 122)

<sup>131</sup> William Turvill, ‘National Security Bill threatens to ‘criminalise’ public interest journalism and whistleblowing’ (*Press Gazette*, 7 November 2022) <<https://pressgazette.co.uk/news/national-security-bill-threatens-to-criminalise-public-interest-journalism-and-whistleblowing/>>

<sup>132</sup> Law Commission, *Protection of Official Data* (Law Com No 395, 2020) paras 11.6-11.81

of protected information is in the public interest. As a consequence of this, Protect (a UK whistleblowing charity) noted that a lack of public interest defence could ‘create uncertainty for whistleblowers which may in turn inhibit their ability to raise international corruption, fraud or bribery public interest concerns.’<sup>133</sup> Lord Marks did table an Amendment to the Bill to introduce a public interest defence, for any offence under sections 1 to 5 of the National Security Act 2023 or 5(6) of the Official Secrets Act 1989, but it was not added.<sup>134</sup> Concern that prosecution could be brought against people who are acting in the public interest and have no defence available to them is still very much an issue that the Act does not consider.<sup>135</sup>

### Weakening protections against police accessing journalistic materials

The Act also raises other concerns, such as weakening protections against the police being able to access journalistic materials<sup>136</sup> and also the expansion of what is considered prohibited sites which will then criminalise, accessing, entering, inspecting, photographing or videoing a prohibited place or using an unmanned vehicle or device to do this. In an article for the Press Gazette, The Guardian shared concern over this:

The news group believes the law could “make it a criminal offence if journalists are merely overlooking a prohibited place from public property which journalists have a legitimate right to access or ‘inspecting’ a prohibited place (taking photographs or videos of a prohibited place or inspecting photographs of a prohibited place including photographs taken by drone or even possibly by other people) if the conduct is for a purpose ‘that the person knows or ought reasonably to know is prejudicial to the safety or interests of the United Kingdom’”.<sup>137</sup>

An issue here is that this could be a criminal offence even if there was no intent to harm the national interests of the UK as long as the defendant reasonably knew that their conduct might have this effect. Again, the issue here is, as noted, that ‘when journalists start investigating a story, they cannot possibly know where it will lead’.<sup>138</sup> Therefore, they might be in a location, or simply be overlooking a location, which they do not know is prohibited at the time and could be prosecuted for this.

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<sup>133</sup> Phoebe Mather, ‘National Security Bill – Lords’ (*Protect*, 26 January 2023) <<https://protect-advice.org.uk/national-security-bill-lords/>>

<sup>134</sup> Lord Marks of Henley-on-Thames, ‘Lord Marks of Henley-on-Thames’ amendment, After clause 38 National Security Act’.

<sup>135</sup> Campaign for Freedom of Information, ‘National Security Bill – public interest defence is essential’ (*Campaign for Freedom of Information*, 28 February 2023) <<https://www.cfoi.org.uk/2023/02/national-security-bill-public-interest-defence-is-essential/>>

<sup>136</sup> News Media Association, ‘Media Organisations Warn of Danger to Public Interest Journalism From National Security Bill’ (*News Media Association*, 17 November 2022) <<https://newsmediauk.org/blog/2022/11/17/media-organisations-warn-of-danger-to-public-interest-journalism-from-national-security-bill/>> and Turvill (n 131).

<sup>137</sup> Turvill (n 131).

<sup>138</sup> HL deb 1 March 2023 (n 119).

## Summary

- Legislation to update the National Security Act is necessary due to the developmental changes in threats that are present in the country, i.e. increase in cyber warfare and intelligence with elections.
- However, the current National Security Act lends itself to ambiguity for journalists, particularly those with foreign sources of funding who might not be based in the UK or civil society organisations and non-governmental organisations who also receive foreign funding.
- The Act also contains ambiguous phrases and questionable terminology that could lead to a chilling effect on journalism, i.e. 'protected information' and 'safety or interests of the United Kingdom.'
- There are also concerns surrounding weakened protections for journalists against the police and the widening of locations considered protected sites.
- There is a need for a public interest defence that is not currently included in the Act, but is widely endorsed by civil society organisations.

## Self-Regulation

Since the conclusion of the Leveson Inquiry, the Press Complaints Commission (PCC) has closed down and two new self-regulatory bodies have emerged. The first is the Independent Monitor for the Press (Impress) and the second is the Independent Press Standards Organisation (IPSO). The former is recognised as an official self-regulator by the Press Recognition Panel (PRP) for meeting the criteria of the Royal Charter. The PRP, established by Royal Charter, has the main job of ensuring that any organisation that regulates the press and wants official recognition as a press regulator is properly funded, able to protect the public, and is independent.<sup>139</sup> There is a list of criteria that each regulator must meet, and IPSO has not met these criteria. However, it states that it does not intend to seek recognition.<sup>140</sup> While there is no legal requirement to be recognised as an official regulator by the PRP, Lord Justice Leveson, in his report following the conclusion of the Leveson Inquiry, stated that there should be some incentives towards joining an official regulator, such as protection from legal costs in cases involving defamation, privacy and harassment.<sup>141</sup>

Discussions at the workshop focused on:

- the scrapping of section 40 of the Crime and Courts Act 2013
- how the press should be regulated

### Section 40 of the Crime and Courts Act 2013

Under proposals for section 40 of the Crime and Courts Act 2013, publishers who did not belong to a recognised regulator might have found themselves forced to pay the other side's costs, even if they won their case.<sup>142</sup>

Since then, section 40 has been scrapped by the former Conservative government who have noted that 'there has been a raising of standards across industry and commencement of section 40 is no longer required to improve regulation of publishers'.<sup>143</sup> Additionally, it has been noted that publishers are facing financial challenges and the passing of section 40 would make those publishers not signed up to a PRP-approved regulator vulnerable.<sup>144</sup> The scrapping of section 40 has been met with approval by certain sectors of the press. The Guardian, for example, stated that it 'was not fit for purpose and would hurt the sort of investigative journalism that produced its own reporting on the Panama Papers, as well as that which uncovered

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<sup>139</sup> Natalie Fenton, 'Regulation is freedom: phone hacking, press regulation and the Leveson Inquiry – the story so far' [2018] Communications Law 23(3) 118-126.

<sup>140</sup> IPSO, 'IPSO response to Press Recognition Panel annual report' (IPSO, 2021) <<https://www.ipso.co.uk/media/1999/response-to-prp-annual-report-21.pdf>>

<sup>141</sup> Lord Justice Leveson, *The Leveson Inquiry: The Report into the Culture, Practices and Ethics of the Press* (The Stationery Office, London, 2012).

<sup>142</sup> s40(3) Crime and Courts Act 2013.

<sup>143</sup> GOV.UK, 'Assessment of Impacts: Repeal of Section 40 of the Crime and Courts Act 2013' (GOV.UK) <

[https://assets.publishing.service.gov.uk/media/653fbef146532b000d67f548/Annex\\_B\\_\\_S40\\_Assessment\\_of\\_Impacts\\_-\\_Published\\_Version\\_\\_2\\_.pdf](https://assets.publishing.service.gov.uk/media/653fbef146532b000d67f548/Annex_B__S40_Assessment_of_Impacts_-_Published_Version__2_.pdf)>

<sup>144</sup> *ibid.*

the phone-hacking scandal that prompted the Leveson Inquiry'.<sup>145</sup> This sentiment was echoed by a number of other national publications too.<sup>146</sup> The Society of Editors also welcomed the decision to scrap the section,<sup>147</sup> alongside the News Media Association who stated that section 40 would:

...amount to effective state licensing of newspapers and constitute an undemocratic attack on free speech which would have a chilling effect on reporting on matters of public interest. It would cost the national and local press an estimated £100 million a year for telling the truth. This would be particularly devastating for local publishers.<sup>148</sup>

With regard to the press regulators, IPSO welcomed the decision to repeal section 40, with Chief Executive Matt Tee stating that it was a 'hugely significant victory for press self-regulation and an endorsement for the role IPSO has played in helping to restore trust to the industry'.<sup>149</sup> Impress stated that they 'look forward to working with Government, policy makers and other stakeholders to consider alternative approaches' to section 40 as it is important that there is a mechanism to ensure proper regulation of the press.<sup>150</sup> Campaign group Hacked Off, however, have criticised the decision to repeal section 40, stating that its enactment 'would encourage newspapers to become independently regulated, and ensure that the public are protected from intrusion, lies and abuse in the press'.<sup>151</sup> Section 40 proved to be a contentious issue at the workshop. Some in the workshop stated that, had section 40 been enacted, then it would have provided a mechanism capable of dealing with press complaints in a way that avoided the costs of litigation, which was raised as a particular issue with SLAPPs. Some attendees, however, noted that section 40 had been tarnished and sullied as a consequence of the number of times it had been criticised. There were some points about it that were commended, such as highlighting the importance of efficient arbitration at a low cost as if enacted it would have likely had the effect of reducing the quantity of litigation which publishers find themselves embroiled in, since it would have provided for non-judicial resolution in many instances. It is worth noting, however, that both IPSO and Impress offer arbitration without the passing of section 40. The importance of arbitration was also emphasised when discussing how there can sometimes be a power imbalance between publications and those who are

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<sup>145</sup> Haroon Siddique, 'Section 40: government to repeal controversial media law' (*The Guardian*, 10 May 2022) <<https://www.theguardian.com/media/2022/may/10/section-40-government-to-repeal-controversial-media-law>>

<sup>146</sup> *ibid.*

<sup>147</sup> Claire Meadows, 'Society welcomes government commitment to repeal Section 40 in King's Speech' (*Society of Editors*, 7 November 2023) <[https://www.societyofeditors.org/soe\\_news/society-welcomes-government-commitment-to-repeal-section-40-in-kings-speech/](https://www.societyofeditors.org/soe_news/society-welcomes-government-commitment-to-repeal-section-40-in-kings-speech/)>

<sup>148</sup> News Media Association, 'Media Bill: Time to Repeal Section 40 of the Crime and Courts Act 2013' (*News Media Association*, May 2023) <<https://newsmediauk.org/wp-content/uploads/2023/05/2023.05.17-Media-Bill-Time-to-Repeal-Section-40-of-the-Crime-and-Courts-Act.pdf>>

<sup>149</sup> Vikki Julian, 'IPSO statement on decision to seek repeal of Section 40 of the Crime and Courts Act' (*IPSO*, 1 March 2018).

<sup>150</sup> Impress, 'Impress has released a statement on the Government's Draft Media Bill and the repealing of Section 40' (*IMPRESS*, 29 March 2023) <<https://www.impressorg.com/impress-releases-statement-following-governments-draft-media-bill/>>

<sup>151</sup> Hacked Off, 'King's Speech: Section 40 repeal "a cynical attempt to bribe national newspaper owners ahead of the next election"' (*Hacked Off*, 6 November 2023) <<https://hackinginquiry.org/kings-speech-section-40-press-release/>>

defamed by their words. It was noted that the cost of access to legal resources can also have an impact on claimants who do not have the funds to bring a case to court but might have found that something published about them was a violation of privacy or defamatory. For example, some sectors of the press were criticised for their reporting of the disappearance of Nicola Bulley<sup>152</sup> and the treatment of her family. It has been noted that these individuals also need to be protected as, in many cases, ordinary members of the public do not have the funds to bring cases to court. The Leveson Inquiry noted the harm that was caused to ordinary people by such reporting and stated that they should be better protected.<sup>153</sup> However, the former Conservative government and the current Labour government have not put forward any alternative incentive for publishers to be regulated as a matter of policy or in its legislative agenda. There was consensus, in general, on the fact that the costs of litigation, particularly in defamation, are far too high and work needs to be done to try to address this – as mentioned within the section concerning SLAPPs.

### How to regulate the press

Despite these arguments, section 40 will not be enacted and it has been emphasised that there is no general consensus on how the press should be regulated. While some have argued for mandatory regulation of the press<sup>154</sup>, there are concerns about what this might mean for the growing body of independent and citizen journalists as these individuals might ‘dip in and out of journalism and may publish in an irregular or ad hoc manner’ which ‘would make it impossible for a regulatory to implement a system of regulation that...is able to monitor their journalistic activity’.<sup>155</sup> Furthermore, there was discussion surrounding whether or not self-regulation of the press actually works. The workshop highlighted how press regulation had historically failed to provide justice for the victims of press intrusion. For example, the PCC closed down because it was found to be failing members of the public. Additionally, the 2023 PRP Annual Report noted that the public are still at risk because of ‘how standards are interpreted or applied by different news publishers’ which means that ‘the public remains at risk from intrusive or inappropriate press practices’.<sup>156</sup> Clearly, there are conflicting opinions on the role of regulation in the UK, demonstrating that there is no clear agreement.

This is emphasised by the fact that in the UK there are 217 publications regulated by Impress<sup>157</sup> and over 2,500 publications are regulated by IPSO.<sup>158</sup> As noted, ‘unlike IPSO, with its large multi-title publishers like Reach and News UK, most Impress

<sup>152</sup> Liz Gerard, ‘Villains of Nicola Bulley media coverage were on social media, but press has lessons to learn’ (*Press Gazette*, 22 February 2023) <<https://pressgazette.co.uk/comment-analysis/villains-of-nicola-bulley-media-coverage-were-on-social-media-but-press-has-lessons-to-learn/>>

<sup>153</sup> Paul Wragg, ‘Leveson and Disproportionate Public Interest Reporting’, [2013] *Journal of Media Law* 5(2) 241-252.

<sup>154</sup> See arguments in Paul Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart Publishing, 2020).

<sup>155</sup> Peter Coe, *Media Freedom in the Age of Citizen Journalism* (Edward Elgar Publishing, 2021) p.271.

<sup>156</sup> Press Recognition Panel, ‘Annual Report 2023’ (*Press Recognition Panel*, 2023). <<https://www.pressrecognitionpanel.org.uk/wp-content/uploads/2023/12/DIGITAL-PRP-Annual-Recognition-Report-Feb-2023-FINAL.pdf>>

<sup>157</sup> Impress, ‘Member directory’ (*IMPRESS*, October 2024) <<https://www.impressorg.com/join-us/our-members/member-directory/>>

<sup>158</sup> Information Commissioner’s Office, ‘IPSO’ (*Information Commissioner’s Office*, January 2023) <<https://cy.ico.org.uk/for-the-public/data-protection-and-journalism/complaining-to-ipsa/>>

members are small, independent publications. Among them are many niche news media outlets.<sup>159</sup> In addition to this, there are publications that have not signed up to either regulator. For example, The Guardian News & Media has an internal ombudsman called ‘the readers’ editor.’<sup>160</sup>

Concerns surrounding the fact that there are different types of regulators were raised in the workshop as it is noted that, from a public perspective, it makes the system even more complex. Furthermore, the UK is seeing an erosion of trust in journalism. For example, research conducted by King’s College London noted that the UK has one of the lowest levels of trust in news at just 13% of those surveyed saying they have a ‘great deal/quite a lot of confidence in the press.’<sup>161</sup> Additionally, we have witnessed politicians criticising journalists on social media<sup>162</sup> and journalists being denied asking questions at certain briefings, such as the daily Covid briefings during the pandemic.<sup>163</sup> While publications subscribing to a self-regulator would not be able to solve the issue concerning mistrust, it was regarded by those who believe self-regulation to be the most effective type as regulation as being an important step to take in gaining public trust. For this to happen, it is imperative that any self-regulator is seen as being effective and avoiding the pitfalls that befell the PCC as it was seen as a toothless regulator.<sup>164</sup> However, the chances of all publications coming together under one regulatory umbrella is slim. Nonetheless, continued conversations surrounding regulation, as they took place at this workshop, are necessary.

### Summary

- Self-regulation is important because the press enjoys certain rights, but with those rights come responsibilities.
- A self-regulatory body needs to ensure that there is effective oversight of the press. The main issue in the UK is the fragmentation of the self-regulatory landscape.
- Section 40 of the Crime and Courts Act 2013 was seen by some as adopting a coercive approach that was never going to sit well with publishers who viewed it as a form of control. Some viewed it as a mechanism that would help deal with press complaints to avoid costs of litigation. Despite these disagreements, arbitration was noted as being important for the public.

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<sup>159</sup> Bron Maher, ‘IPSO v Impress: Ten years after Leveson, how are the press ‘watchmen’ faring’ (*Press Gazette*, 30 September 2022) <<https://pressgazette.co.uk/news/ipso-v-impress-how-are-the-uks-press-regulators-doing/>>

<sup>160</sup> The Guardian, ‘How to make a complaint about Guardian or Observer content’ (*The Guardian*, 12 September 2014) <<https://www.theguardian.com/info/2014/sep/12/-sp-how-to-make-a-complaint-about-guardian-or-observer-content>>

<sup>161</sup> King’s College London, ‘UK has internationally low confidence in political institutions, police and press’ (*King’s College London*, 30 March 2023) <<https://www.kcl.ac.uk/news/uk-has-internationally-low-confidence-in-political-institutions-police-and-press>>

<sup>162</sup> Peter Walker, ‘No 10 defends minister who criticised HuffPost journalist on Twitter’ (*The Guardian*, 1 February 2021) <<https://www.theguardian.com/politics/2021/feb/01/no-10-defends-minister-criticised-huffpo-journalist-twitter-kemi-badenoch>>

<sup>163</sup> Mary Fitzgerald, ‘Boris Johnson and his government are attacking press freedom. We must not let them win.’ (*OpenDemocracy*, 2 February 2021) <<https://www.opendemocracy.net/en/boris-johnson-and-his-government-are-attacking-press-freedom-we-must-not-let-them-win/>>

<sup>164</sup> Lord Justice Leveson, *The Leveson Inquiry: The Report into the Culture, Practices and Ethics of the Press* (The Stationery Office, London, 2012) 1595.



- Trust in the press is another issue that self-regulators have to grapple with in a post-Leveson landscape and a rising climate of mis/dis-information. They need to ensure the public is protected and this needs to be done via a self-regulator they can trust.

## Public Order Act 2023

Concerns surrounding the Public Order Act 2023 had been raised prior to the Act gaining Royal Assent, in particular in relation to the chilling effect it could pose on protests and the reporting of journalists on them. For example, the UN High Commissioner for Human Rights, Volker Türk, warned that it is incompatible with the UK's international human rights.<sup>165</sup> Concerns surrounding the Bill also escalated following the arrests of journalists who were covering protests focused on climate change.<sup>166</sup> In light of these arrests, amendments were made to the Bill and section 17 focuses on police powers in relation to journalists, with section 17(1) noting:

17(1) A constable may not exercise a police power for the sole purpose of preventing a person from observing or reporting on a protest.<sup>167</sup>

The section also states that the police cannot use their power to prevent someone from reporting on a protest-related offence and undertaking activities related to a protest.<sup>168</sup> The addition of this section is something that was noted as being of the utmost importance by JUSTICE as it would protect 'journalists, legal observers, academics, and bystanders who monitor or record the police's use of powers related to protests.'<sup>169</sup> While protections have been added for journalists that have been welcomed to protect their freedom to report, the Act has received criticism for stifling freedom of expression as it has been criticised for giving the police extended powers to restrict protest.<sup>170</sup> Following the Bill's Royal Assent, protesters from the anti-monarchy group Republic were arrested during the coronation in May 2023, despite them meeting with police liaisons to discuss their planned activities for protest during the coronation. Police arrested members of the group after they were found to be carrying straps that could be used to chain themselves to a road. Under the Act, it is an offence to carry materials that 'may be used in the course of or in connection with the commission by any person of an offence' of locking on.<sup>171</sup> It was only after the coronation when the Met police stated that: 'Those arrested stated the items would be used to secure their placards, and the investigation has been unable to prove intent to use them to lock on and disrupt the event.'<sup>172</sup> Arrests such as these have sparked

<sup>165</sup> United Nations Office of the Human Rights Commissioner, 'UN Human Rights Chief urges UK to reverse 'deeply troubling' Public Order Bill' (*UNHR*, 27 April 2023 <<https://www.ohchr.org/en/press-releases/2023/04/un-human-rights-chief-urges-uk-reverse-deeply-troubling-public-order-bill>>

<sup>166</sup> Rowena Mason, 'Public Order Bill to be amended to protect journalists covering protests' (*The Guardian*, 8 February 2023) <<https://www.theguardian.com/world/2023/mar/05/suella-braverman-public-order-bill-amended-protect-journalists-covering-protests>>

<sup>167</sup> s17(1) Public Order Act 2023.

<sup>168</sup> s17(2) Public Order Act 2023 'A constable may not exercise a police power for the sole purpose of preventing a person from observing or reporting on the exercise of a police power in relation to- (a) a protest-related offence, (b) a protest-related breach of an injunction, or (c) activities related to a protest.

<sup>169</sup> JUSTICE, 'Public Order Bill: Impact on Journalists and Others Monitoring Protests' (*JUSTICE*, January 2023) <<https://files.justice.org.uk/wp-content/uploads/2023/02/06162901/JUSTICE-Public-Order-Bill-Journalist-Protection-Amendment-January-2023.pdf>>

<sup>170</sup> Oliver Feeley-Sprague, 'UK: passing of controversial Public Order Bill is 'alarming' (*Amnesty International UK*, 26 April 2023) <<https://www.amnesty.org.uk/press-releases/uk-passing-controversial-public-order-bill-alarming>>

<sup>171</sup> s2 Public Order Act 2023.

<sup>172</sup> Ian Dunt, 'We've seen the danger of the Public Order Act. Now it must be repealed' (*iNews*, 10 May 2023) <<https://inews.co.uk/opinion/weve-seen-the-danger-of-the-public-order-act-now-it-must-be-repealed-2330438>>

concern that the Act could be used to crack down on protests and, therefore, stifle freedom of speech. The chilling effect could also come from individuals who are then deterred from taking part in protests as a consequence of these extended powers and the concern that they themselves could be arrested.

While provisions have been made for journalists, and indeed anyone else covering elections, to be protected, the Act has been criticised by numerous groups, alongside the UN Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, who stated that the Act ‘appears to be a direct attack on the right to the freedom of peaceful assembly.’<sup>173</sup>

### Summary

- Protections for journalists are welcome in the Public Order Act 2023 in order for them to effectively report on protests without police exercising powers against them.
- The Act, however, raises concerns for freedom of expression in general and the potential chilling effect it has on protests.

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<sup>173</sup> Justin Rowlatt, ‘UN criticises ‘sever’ Just Stop Oil sentence’ (*BBC News*, 21 November 2023) <<https://www.bbc.co.uk/news/articles/cn0p6ll3jjgo>>

## Concluding Remarks: The UK as a Media Freedom Standards Setter

Reporters Without Borders Press Freedom Index places the UK outside the world's twenty best-performing countries, and critics point to many shortcomings in its domestic laws and practices.<sup>174</sup> In a report by Parliament's Foreign Affairs Committee, it was said that the former Conservative government spoke out too softly against political abuses and is sometimes seen as 'trading away its values' for commercial or political gain.<sup>175</sup> In 2019, the then Conservative government took a lead in establishing a global Media Freedom Coalition<sup>176</sup> of 51 countries committed to defending the rights of journalists, but the initiative's effectiveness has been questioned.<sup>177</sup> In 2020, the UK also set up a UK National Committee for the Safety of Journalists which brings together government and journalist representatives, in a move which reflects the ways in which journalism safety and media freedom have risen up on the international policy agenda.<sup>178</sup> In their Annual Report from 2023, the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and the Safety of Journalists highlighted the key threats across Europe and these included themes such as: attacks, harassment and intimidation campaigns; SLAPPs; surveillance and spyware; impunity; public service media; and media capture.<sup>179</sup> Clearly, a number of issues that are threatening press freedom across Europe are also taking place in the UK, as this report has emphasised.

Despite initiatives being introduced in an attempt to protect press freedom, the CFOM workshop on 'Threats to Media Freedom' highlighted how there were a number of legislative changes that had impacted media freedom in the UK in 2023. While not all legislative changes have been criticised by the news industry, there are concerns that some do not go far enough in offering comprehensive protection, such as the amendment to the Economic Crime and Corporate Transparency Act 2023, while others are perceived as a threat due to their vague phrasing, as witnessed in the National Security Act 2023. More could also be done to protect media freedom in the Online Safety Act 2023. With the UK priding itself on upholding media freedom and developing a range of initiatives to ensure this, these legislative changes are concerning and the concern surrounding SLAPPs has been noted by a number of organisations. As a consequence of these threats, this places doubt on the UK as being a standard setter in media freedom.

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<sup>174</sup> Reporters Without Borders, 'Press Freedom Index 2023' (*Reporters Without Borders*, 2023) <<https://rsf.org/en/index>>

<sup>175</sup> House of Commons Foreign Affairs Committee, "'Media Freedom is under attack": The FCO's defence of an endangered liberty: Government Response to the Committee's Twenty First Report of Session 2017-19' HC 269.

<sup>176</sup> Media Freedom Coalition, 'About the MFC' (*Media Freedom Coalition*, 2023) <<https://mediafreedomcoalition.org/>>

<sup>177</sup> Mary Myers, Martin Scott, Mel Bunce, Lina Yassin, Maria Carmen (Ica) Fernandez and Rachel Khan (2022) 'Reset required: Evaluating the Media Freedom Coalition after its first two years' (*The Foreign Policy Centre*, 2022) <<https://fpc.org.uk/wp-content/uploads/2022/02/Reset-Required-Evaluation-Report-2022.pdf>>

<sup>178</sup> GOV.UK, 'National Committee for the Safety of Journalists' (*GOV.UK*, 2023) <<https://www.gov.uk/government/groups/national-committee-for-the-safety-of-journalists#slapps-taskforce-workplan>>

<sup>179</sup> Partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists, 'War in Europe and the Fight for the Right to Report' (*Council of Europe*, 2023) <<https://rm.coe.int/prems-019323-gbr-2519-annual-report-by-the-partner-organisations-to-th/1680aa743d>>

It is welcoming to see that the current Labour government and the Prime Minister, Sir Keir Starmer, have made a pledge towards protecting journalism and journalists. As emphasised in an opinion piece in *The Guardian*, the Prime Minister noted that journalists are facing numerous challenges and that his government is keen to ensure that media freedom is protected as 'journalism is the lifeblood of democracy'.<sup>180</sup> In the piece, he recognised the challenges journalists face, such as SLAPPs and online harassment and it is welcome to hear him state that he intends to tackle these issues, particularly as a number of them have featured within this report. However, how these issues will be tackled remains to be seen and, as discussed, there is often a lack of clear consensus on how this should be achieved.

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<sup>180</sup> Sir Keir Starmer, 'Journalism is the lifeblood of British democracy. My government will protect it', *The Guardian*, 28 October 2024 at <<https://www.theguardian.com/commentisfree/2024/oct/28/keir-starmer-journalism-lifeblood-british-democracy-labour>>