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**MAKING THE CASE FOR ABOLISHING
CRIMINAL DEFAMATION LAWS**

JULY 2018

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INTRODUCTION

DEFAMATION IS GENERALLY DEFINED AS false statements that damage the reputation of another person or entity. Although defamation laws exist to protect individuals from having their reputations intentionally and falsely harmed, these laws should not be overreaching, over broad, criminal in nature, or misused to silence human rights advocates, including those fighting against human trafficking. Under international human rights law, restrictions on freedom of expression to protect the rights or reputations of others are typically only permitted when the restrictions are necessary and narrowly drawn.¹

Despite international human rights law, governments and corporations have sometimes used criminal defamation laws in certain countries to stifle the activities of human rights defenders, particularly those working on corporate accountability. In 2017, the Business & Human Rights Resource Centre tracked 388 cases of attacks on human rights defenders working on corporate accountability, some of which were in the form of judicial harassment.² This harassment, often a disproportionate response to statements sometimes as small as social media posts, has a chilling effect on activism and prevents corporate accountability.

Many international organisations have advocated for a repeal of criminal defamation laws. States should review legislation concerning freedom of opinion and expression and should amend or repeal any provisions that do not comply with relevant international human rights standards. These include provisions that impose undue restrictions for reasons of national security, public order and public health or morals beyond what is permissible under international standards.³ Defamation and similar offences – including those committed online – should be dealt with exclusively under civil law.⁴

The repeal of criminal defamation laws can help narrow the gap of power and resources between large corporations and grassroots human rights defenders, and thus, enhance transparency and accountability for human rights abuses. Some countries such as the US, UK and Australia have already taken positive steps by repealing criminal defamation laws. However, there remains a need to amend the laws in Southeast Asia to prevent, or at least restrict, defamation claims from being used to dampen or defeat human rights defenders' efforts, including anti-human trafficking efforts.

¹ Universal Declaration of Human Rights, Article 19; International Covenant on Civil and Political Rights (Article 19).

² See the Business & Human Rights Defenders Portal, <https://www.business-humanrights.org/en/bizhrds>.

³ OSCE/ODIHR (2014), Guidelines on the Protection of Human Rights Defenders, p. 9, para. 42.

⁴ OSCE/ODIHR (2014), Guidelines on the Protection of Human Rights Defenders, p. 9, para. 44.

BACKGROUND⁵

Defamation laws, particularly in the context of criminal defamation prosecutions, are often used to stifle important debates about human rights abuses in Southeast Asia. For example, these laws have been used to silence workers, human rights defenders, and those who advocate against human trafficking and other types of abuses, and they have been used to restrict legitimate forms of speech and infringe other fundamental rights.⁶

In **Thailand**, the criminal defamation provisions under Sections 326⁷, 327, and 328⁸ of the Criminal Code and the 2007 Computer Related-Crime Act (CCA),⁹ in some instances, have been applied to restrict the work of human rights defenders, journalists, and others.¹⁰ Of particular concern is the increased use of criminal defamation complaints against individuals who reported on or

spoke out about human rights abuses in business operations.

For example, between 2010 and 2017, Tungcum Ltd., a Thai-registered gold mining company, filed at least six criminal defamation and four civil defamation complaints against villagers, community leaders and a community-based organisation who were in opposition to its mining operation in the northeast of Thailand.¹¹ The company demanded 320 million Thai Baht (US \$8.93 million) in compensation from the villagers for having allegedly damaged its business operation and reputation.¹²

The company also brought a criminal and civil complaint against Thai Public Broadcasting Service (Thai PBS) and its four journalists.¹³ In addition to

⁵ The statements in this section are based on the author's honest opinion and are reasonable inferences drawn from the examples which are discussed herein.

⁶ See e.g., Fortify Rights, "News Release, Thailand: Dismiss Criminal-Defamation Charges Against Thai PBS and Journalists," 21 May 2018, available at <http://www.fortifyrights.org/publication-20180521.html> (accessed on 4 Jun. 2018); Fortify Rights, "News Release, Thailand: Uphold Decision to Dismiss Criminal-Defamation Complaint against Thai PBS and Journalists," 19 Mar. 2018, available at <http://www.fortifyrights.org/publication-20180319.html> (accessed on 10 Jun. 2018); Fortify Rights, "News Release, Thailand: Drop Criminal Defamation Lawsuits against 14 Myanmar Workers," 6 Feb. 2018, available at <http://www.fortifyrights.org/publication-20180206.html> (accessed on 4 Jun. 2018); Fortify Rights, "News Release, Myanmar: Drop Criminal Defamation Charges Against Kachin Activist," 14 Nov. 2017, available at <http://www.fortifyrights.org/publication-20171114.html> (accessed on 4 Jun. 2018); Fortify Rights, "Support Letter regarding Criminal Defamation Complaints Brought against Myanmar Migrant Workers and Labor Rights Advocate," 19 Sep. 2017, available at http://www.fortifyrights.org/downloads/Thammakaset_worker_support_letter_Sept%202017_English.pdf (accessed on 10 Jun. 2018); BBC News, "Andy Hall: Thai court finds UK activist guilty of defamation," 20 Sep. 2016, available at <http://www.bbc.com/news/world-asia-37415590> (accessed on 4 Jun. 2018); Committee to Protect Journalists, "Journalists face criminal defamation charges in Thailand," 17 Apr. 2014, available at <https://cpj.org/2014/04/journalists-face-criminal-defamation-charges-in-th.php> (accessed on 4 Jun. 2018).

⁷ Section 326 makes it a criminal offence to "impute anything" to another person "before a third person in any manner likely to impair [their] reputation ... or to expose such other person to hatred or scorn".

⁸ Section 328 makes it a criminal offence if the offence of defamation is committed by means of publication of a document, drawing, painting, cinematography film, picture or letters made visible by any means, gramophone record or another recording instrument, recording picture or letters, or by broadcasting or spreading picture, or by propagation by any other means.

⁹ The 2007 CCA prohibits computer-related offences, including the distribution of "forged computer data in a manner that is likely to cause damage to a third party or the public" or is against "national security and public order". The 2017 Amendment added a stricter punishment if the alleged computer data is "likely to damage the maintenance of national security, public safety, national economic security or public infrastructure serving national's public interest or cause panic in the public".

¹⁰ See e.g., Fortify Rights, "News Release, Thailand: Dismiss Criminal-Defamation Charges Against Thai PBS and Journalists," 21 May 2018, available at <http://www.fortifyrights.org/publication-20180521.html> (accessed on 4 Jun. 2018); Fortify Rights, "News Release, Thailand: Uphold Decision to Dismiss Criminal-Defamation Complaint against Thai PBS and Journalists," 19 Mar. 2018, available at <http://www.fortifyrights.org/publication-20180319.html> (accessed on 10 Jun. 2018); Fortify Rights, "News Release, Thailand: Drop Criminal Defamation Lawsuits against 14 Myanmar Workers," 6 Feb. 2018, available at <http://www.fortifyrights.org/publication-20180206.html> (accessed on 4 Jun. 2018).

¹¹ Tungcum Ltd. filed charges against Mr. Surapun Rujichaiyavat and Ms. Pornthip Hongchai at Phuket Provincial Court in 2014 and lodged another two complaints against Mr. Surapun Rujichaiyavat and Ms. Pornphattra Kaengjampa at Mae Sot Police Station and Mae Sot Provincial Court in 2015. See *Tungcum Co. Ltd. v. Surapun Rujichaiyavat*, Mae Sot Provincial Court, Black Case No. 1430/2558, Affidavit (Court of First Instance), 10 Jun. 2015; Royal Thai Police, Testimony of the 2nd Alleged Offender, Pattharaphon Kaengjampa at Mae Sot Provincial Police Station, 14 Jul. 2015. At the time of writing this paper, only the complaint against the school girl is still pending with Minburi Police in Bangkok. See Minburi Metropolitan Police Station, 1st Summon Order to (name withheld), 14 Dec. 2015; see also UN Special Rapporteurs Allegation Letter to Thailand, AL THA 3/2017, 10 Apr. 2017.

¹² See e.g., *Tungcum Co. Ltd. v. Samai Phakmee and 13 others*, Loei Provincial Court, Civil Case No. 859/2556, (Civil Court), 13 Dec. 2013; *Tungcum Co. Ltd. v. Surapun Rujichaiyavat and six others*, Loei Provincial Court, Civil Case No.132/2557, (Civil Court), 28 Apr. 2014; *Tungcum Co. Ltd. v. Surapun Rujichaiyavat and five others*, Loei Provincial Court, Civil Case No. 974/2556, (Civil Court), 13 Dec. 2013; *Tungcum Co.Ltd. v Surapun Rujichaiyavat and five others*, Loei Provincial Court, Civil Case No. 574/2558, (Civil Court), 29 May 2015.

¹³ Fortify Rights, "News Release, Thailand: Dismiss Criminal-Defamation Charges Against Thai PBS and Journalists," 21 May 2018, available at <http://www.fortifyrights.org/publication-20180521.html> (accessed on 4 Jun. 2018).

seeking 50 million Thai Baht (US \$1.4 million) in compensation, the company sought the revocation of Thai PBS's operating license for five years for having allegedly damaged the company's reputation and credibility.¹⁴ On March 20, 2018, the Appeal Court overturned an earlier decision to dismiss the cases and held that both the civil and criminal complaints may proceed to trial which was scheduled in May 2018.¹⁵

Another case that has garnered international outrage is the recent prosecution of Andy Hall, a British researcher, for criminal defamation and violations of the CCA for his work on labour rights abuses in Thailand.¹⁶ The Natural Fruit Co. Ltd. filed the initial complaint against Mr. Hall in 2013 for his work documenting alleged labour rights violations at the company's factory,¹⁷ and the court sentenced Hall to three years in prison and a 150,000 Thai Baht (US \$4,200) fine.¹⁸ In a separate civil defamation case related to Mr. Hall's interview with Al Jazeera about alleged labour rights violations in its fruit processing factory, the Phra Khanong Court ordered Mr. Hall to pay 10 million Thai Baht (US \$280,000) in compensation and legal costs of 10,000 Thai Baht (US \$330) to the Natural Fruit Co. Ltd.¹⁹ Recently in May 2018, Thailand's Appeals Court ruled in favour of Andy Hall in one of the criminal prosecutions and acquitted him of all the charges filed.²⁰ Notably, the

Appeals Court held that Finnwatch and Hall's research was in the public interest for the benefit of consumers and that given the Thai Government's 2017 amendments to its CCA, the computer crimes law retrospectively could not be used to prosecute Hall alongside a criminal defamation prosecution.²¹

Similarly, Thammakaset Co. Ltd., a Thai owned poultry company, filed a criminal defamation lawsuit under sections 137 and 326 of the Criminal Code against some of its migrant workers.²² Fourteen migrant workers filed a complaint to the National Human Rights Commission of Thailand alleging that the company paid workers less than minimum wage, failed to pay overtime wages, and confiscated their identity documents and passports.²³ The company alleged that the workers' complaint to the National Human Rights Commission damaged its reputation.²⁴ If convicted, the workers can face up to one-year imprisonment.²⁵ The company also filed a complaint against Andy Hall alleging that he committed criminal defamation and violated the CCA in connection with his use of social media calling for justice and adequate compensation for the 14 migrant workers.²⁶

In **Myanmar**, criminal defamation laws are frequently used to target human rights defenders. Criminal defamation is broadly defined under

¹⁴ Fortify Rights, "News Release, Thailand: Dismiss Criminal-Defamation Charges Against Thai PBS and Journalists," 21 May 2018, available at <http://www.fortifyrights.org/publication-20180521.html> (accessed on 4 Jun. 2018).

¹⁵ Fortify Rights, "News Release, Thailand: Dismiss Criminal-Defamation Charges Against Thai PBS and Journalists," 21 May 2018, available at <http://www.fortifyrights.org/publication-20180521.html> (accessed on 4 Jun. 2018); see also Fortify Rights, Trial Monitoring Notes (unpublished).

¹⁶ See Finnwatch, "Q&A: Criminal and Civil Prosecutions - Natural Fruit vs. Andy Hall," 31 May 2018, available at http://finnwatch.org/images/pdf/NaturalFruitvsAndyHallQA_May312018.pdf?utm_source=Andyn+kontaktilista&utm_campaign=f01a295f04-EMAIL_CAMPAIGN_2018_04_23_COPY_01&utm_medium=email&utm_term=0_16dcaec6c-f01a295f04-200426337 (accessed on 4 Jun. 2018).

¹⁷ See *Natural Fruits Co. Ltd. v. Andy Hall*, Bangkok South Criminal Court, Black Case No. Aor. 517/2556 and Red Case No. Aor. 2749/2559, Judgment (Court of First Instance), 20 Sep. 2016., para 1-33; see also Andy Hall, "Exploring Migration and Human Rights Blog," <https://andyhall.wordpress.com/case/> (accessed on 10 Jun. 2018); Finnwatch, "Q&A: Criminal and Civil Prosecutions - Natural Fruit vs. Andy Hall," 31 May 2018, available at https://cdns.freedomunited.org/wp-content/uploads/2018/05/31064302/NaturalFruitvsAndyHallQA_May312018.pdf (accessed on 4 Jun. 2018); *Bangkok South Criminal Court*: <https://www.icj.org/wp-content/uploads/2016/11/Unofficial-translation-Andy-Hall-verdict.pdf> (unofficial translation); *PhraKhanong case*: <https://freedom.ilaw.or.th/yii/images/uploads/Andy%20Hall%20Civil%20Case%20Verdict.pdf> (unofficial translation).

¹⁸ The court suspended the sentence on the basis that Hall's work was "beneficial to Thai society." See *Natural Fruits Co. Ltd. v. Andy Hall*, Bangkok South Criminal Court, Black Case No. Aor. 517/2556 and Red Case No. Aor. 2749/2559, Judgment (Court of First Instance), 20 Sep. 2016, para 49.

¹⁹ See *Natural Fruits Co. Ltd. v. Andy Hall*, Phra Khanong Provincial Court, Black Case No. Por. 1150/2557 and Red Case No. Por. 843/2559, Judgment (Court of First Instance), 26 Mar. 2018.

²⁰ See Finnwatch, "Q&A: Criminal and Civil Prosecutions - Natural Fruit vs. Andy Hall," 31 May 2018, available at http://finnwatch.org/images/pdf/NaturalFruitvsAndyHallQA_May312018.pdf?utm_source=Andyn+kontaktilista&utm_campaign=f01a295f04-EMAIL_CAMPAIGN_2018_04_23_COPY_01&utm_medium=email&utm_term=0_16dcaec6c-f01a295f04-200426337 (accessed on 4 Jun. 2018).

²¹ *Ibid.*

²² See Fortify Rights, "News Release, Thailand: Drop Criminal Defamation Lawsuits against 14 Myanmar Workers," 6 Feb. 2018, available at <http://www.fortifyrights.org/publication-20180206.html> (accessed on 4 Jun. 2018).

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ See Fortify Rights, "News Release, Thailand: Protect Migrant Workers and Labor Rights Activist," 19 Sep. 2017, available at <http://www.fortifyrights.org/publication-20170919.html> (accessed on 4 Jun. 2018).

Section 499²⁷ to 502 of the Myanmar Penal Code and carries a sentence of two years imprisonment and/or a fine. Like Thailand, the Penal Code is used together with computer-related laws – Section 34(d) of the Electronic Transaction Law²⁸ and Section 66(d) of the Myanmar Telecommunications Law²⁹ – to target freedom of expression among human rights activists.³⁰

Many defamation cases in Myanmar involve defamation of either the Myanmar army or a political leader. In October 2017, the Lashio District Court convicted Dumdaw Nawng Lat, an ethnic Kachin religious leader, of criminal defamation for providing information about the Myanmar military's alleged airstrikes in northern Shan State during a phone interview he gave to Voice of America.³¹ He was sentenced to four years and three months of imprisonment on charges,

including criminal defamation.³² He spent more than 15 months in prison before being released by presidential amnesty in April 2018.³³

A similar case involves Major Kyi Min Htun of Myanmar Army Light Infantry Division 101 who filed a criminal defamation complaint against Dashi Naw Lawn, the General Secretary of the Kachin National Development Foundation, for the distribution of pamphlets alleging that the Myanmar military raped and killed Kachin women and destroyed villages and religious sites during the conflict in Kachin State.³⁴ Under Section 500 of the Myanmar Penal Code, Dashi Naw Lawn faced up to two years in prison and/or a fine if convicted.³⁵ After Dashi Naw Lawn's appeals to drop the charges were rejected, the Hpakant Township Court convicted him of defamation and fined him 50,000 Myanmar Kyat (around US \$37.00) in May 2018.³⁶

²⁷ Section 499 provides that "[w]hoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

²⁸ An offence includes "creating, modifying or altering of information or distributing of information created, modified or altered by electronic technology to be detrimental to the interest of or to lower the dignity of any organization or any person."

²⁹ Whoever commits any of the following acts shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine or to both: (d) Extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to any person by using any Telecommunications Network.

³⁰ International Commission of Jurists, Myanmar: Briefing Paper on Criminal Defamation Laws, 26 Nov. 2015.

³¹ See Fortify Rights, "News Release, Myanmar: Drop Case against Kachin Religious Leader," 27 Oct. 2017, available at <http://www.fortifyrights.org/publication-20171027.html> (accessed on 4 Jun. 2018); Voices of America, "Myanmar Court Convicts Ethnic Kachin Religious Leaders," 27 Oct. 2017, available at <https://www.voanews.com/a/myanmar-court-convicts-ethnic-kachin-religious-leaders-in-war-torn-north/4088681.html> (accessed on 4 Jun. 2018).

³²Ibid.

³³ Fortify Rights, "News Release, Myanmar: Two Kachin Religious Leaders Freed in Amnesty," 17 Apr. 2018, available at <http://www.fortifyrights.org/publication-20180417.html> (accessed on 4 Jun. 2018).

³⁴ See Fortify Rights, "News Release, Myanmar: Drop Criminal Defamation Charge against Kachin Activist," 14 Nov. 2017, available at <http://www.fortifyrights.org/publication-20171114.html> (accessed on 4 Jun. 2018).

³⁵Ibid.

³⁶ Fortify Rights and Kachin Women's Association of Thailand (KWAT), "Joint News Release, Myanmar: Drop Defamation Cases Against Kachin Anti-War Protest Organizers," 21 May 2018, available at <http://www.fortifyrights.org/publication-20180521-2.html> (accessed on 4 Jun. 2018).

RECOMMENDATIONS

I. Abolition of criminal defamation laws

Defamation laws should balance the protection of reputation against the fundamental right of freedom of expression, upon which modern society places a very high value. This concept is recognised by Article 19 of the International Covenant on Civil and Political Rights.³⁷ Criminal defamation laws fail to strike that balance. They are unnecessary and subject to abuse, and thus, should be abolished.

In 2010 the **United Kingdom** abolished its remaining criminal defamation laws. This was the culmination of discussions that began in the 1970s. Lord Denning, one of the key British legal figures of the twentieth century, noted that criminal libel offences were too restrictive of “the full and free discussion of public affairs... So [they have] fallen into disuse for nearly 150 years”.³⁸

After the Human Rights Act 1998 was adopted, applying the European Convention on Human Rights, freedom of expression became a protected right in the UK. This had a significant effect on the application of the civil law of defamation and also contributed to the abolishment of the criminal regime. As highlighted by the Index on Censorship and English PEN in 2009:³⁹

"The continued presence of the laws of sedition and criminal defamation in the UK merely serves to condone and encourage those states which routinely abuse their citizens' rights in this way. In our dealings with officials overseas, the existence of sedition and criminal defamation laws in the UK are regularly cited as a reason to retain their own highly restrictive laws".

In **Australia**, only an independent prosecuting authority can bring charges of criminal defamation. Even then, there are many defences, and the onus is on the prosecution to negate lawful excuse. Prosecutions are exceptionally rare. As academic Craig Burgess observed in 2013:

“Australia-wide the numbers of prosecutions for criminal defamation have been few over the last 100 years... criminal defamation is practically insignificant in Australian society”.⁴⁰

In the **United States**, prosecutions for criminal defamation were already rare by 1964, when the U.S. Supreme Court struck down the conviction of a sheriff who had criticised local judges as lazy and corrupt. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court held that the state’s criminal defamation statute violated the First Amendment’s guarantee of freedom of speech. The Court held that public officials seeking redress for defamation via criminal sanctions may not do so unless they establish that the defendant’s statement was made with “actual malice”—that is, with knowledge that it was false, or reckless disregard of whether it was false or not.

The standard that must be satisfied to establish defamation of a public official—actual malice—has since been extended to “public figures.” These are persons who, through broad exposure to the public, have become well known or who have become embroiled in particular controversies.

In the wake of *Garrison v. Louisiana*, many states have repealed their criminal defamation statutes or had them invalidated by the courts. Other states retain their criminal defamation statutes, but they are very rarely enforced.

³⁷ Article 19 provides that: (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals.

³⁸ Lord Denning, *Landmarks in the Law* (London, Butterworths: 1984), p. 295.

³⁹ Index on Censorship and English PEN, *A Briefing on the Abolition of Seditious Libel and Criminal Libel* (The Free Word Centre: 2009), p. 9.

⁴⁰ “Criminal Defamation in Australia: Time to Go or Stay?”, Craig Burgess, *Murdoch University Law Review* (2013) 20(1).

As the experience of the UK, Australia, and the US demonstrates, there is little utility in maintaining criminal defamation laws in a modern society that values free speech. This is particularly so in relation to publications concerning modern day slavery, human trafficking and forced labour. Such abuses are so intolerable that observers should be comfortable shedding as much light as possible on breaches without fear of criminal prosecution. Given the lack of freedom to associate for migrant workers in some Southeast Asian nations, it should not be possible to use criminal defamation laws to frustrate the enforcement of workers' legal rights, potentially rendering those rights inaccessible to workers and reducing the scope for the involvement of human rights defenders. The existence and use of criminal defamation laws aimed at interfering with the enjoyment of rights such as labour rights for vulnerable workers must serve as a warning sign to those leading brands and retailers with supply chains in such jurisdictions. The role that leading brands and businesses can play in leading advocacy efforts to abolish criminal defamation laws, particularly where these laws stand to silence the enforcement of rights by workers, must not be underestimated.

II. Restricting large corporations from suing for civil defamation

Large and powerful corporations do not need the same level of protection from attacks on their reputation as do individuals and smaller corporations. These entities can readily protect their reputation by alternative means, including advertising and publicity campaigning. They should not be able to use threats of defamation actions to silence public criticism or debate or to silence employees seeking to enforce their rights. In the latter context, in the absence of the freedom to associate, it is especially important that corporations do not use defamation claims to frustrate attempts to resolve grievances in a court of law.

In **Australia**, only corporations having fewer than 10 employees (and corporations which were formed to operate "not-for-profit") are entitled to sue for defamation.

Although not as restrictive as the Australian position, in the **UK**, a claimant in a defamation case must prove, on the balance of probabilities, that the

statement has caused or is likely to cause serious harm to the reputation of the claimant. Where the claimant is a "body that trades for profit" (i.e., a corporation), the serious harm requirement is not satisfied unless the publisher has caused or is likely to cause the body "serious financial loss".

Southeast Asian nations should prohibit civil defamation actions being commenced by corporations with more than 50 full-time employees (or equivalent part-time employees) or corporations with an annual turnover of US \$250,000 or more, unless the corporation operates "not-for-profit" or is a registered charitable organisation.

III. Improving defences to civil defamation claims

Civil defamation laws should provide a range of robust defences to those accused of defamation. Those defences must encourage freedom of expression and discourage the use of defamation claims to silence legitimate public debate and discussion. Key features of those defences should include the following:

Public interest and public officials

A defence should be afforded to publishers⁴¹ where there is a public interest in the material being published, or where the material relates to the behaviour of public officials, so long as the publisher was not motivated by malice (that is, ill-will or spite).

In the **UK**, for example, a publisher has a defence where the statement was, or formed part of, a statement on a matter of public interest, and the defendant reasonably believed that publishing the statement was in the public interest. In **Australia**, statements made in the course of discussion of government and political matters are usually protected if the publisher is not motivated by malice.

In the **US**, approximately 20 states have adopted anti-SLAPP statutes. The acronym stands for "Strategic Lawsuit Against Public Participation." Some anti-SLAPP laws focus specifically upon protecting speech about public affairs and the right to petition government for redress of grievances. Some states (e.g. California) take a much more expansive view, protecting any act or conduct that

⁴¹ Protections for "publishers" are meant to encompass speakers, i.e., persons who express their views orally as well as in writing or print.

further free speech. And public officials in the US seeking redress for defamation may not do so unless they establish that the defendant's statement was made with "actual malice"—that is, with knowledge that it was false or reckless disregard as to whether it was false or not.

Discussion and debate concerning human rights abuses, modern slavery, and related topics is always in the public interest and should be protected from defamation actions except where the real motivation for the publication is to deliberately and maliciously injure the reputation of another. Similarly, in the interests of promoting open, transparent, and good governance on all matters, including in relation to human rights, a defence should be afforded to publishers where the publication relates to the activities of public officials.

Duty to publish

Sometimes an observer has a legal, moral, or social duty to publish information to others with an interest in that information. In such circumstances, a publisher ought to be afforded a defence, in some countries known as "privilege". The defence should be absolute where the recipient of the report is a public servant who is responsible to act in response to such complaints. Otherwise, the defence should be qualified (*i.e.* the publisher can lose the defence if its real motivation was malice, ill-will, or spite).

Such a privilege defence exists in the **UK**. In the **US**, a qualified privilege attaches to statements made in good faith where the speaker and recipient share a common interest. Similarly, in **Australia**, it is a defence if the publication in question was made to a person who had an interest in receiving the information conveyed by the publication, the publication was made in the course of giving that person information on that subject, and the conduct

in publishing the material was reasonable in the circumstances.

This defence should be available to publishers in Southeast Asia, particularly where an observer wishes to make a report of potential human rights abuses to the government, police, or international human rights monitors.

Expressions of opinion

Encouraging and facilitating free debate, even where opinions may be controversial, is critical to making progress in addressing important public policy challenges, especially in the area of human trafficking and modern slavery. There must be discussion before there can be change. The voices of those the laws are designed to protect must not be silenced using defamation laws, and the work of those seeking to protect the rights of vulnerable persons must not be frustrated by the use of laws.

The **UK**, **Australia**, and the **US** all provide publishers with various defences protecting expressions of opinion on matters of public interest where those opinions are based on facts and other "proper material".⁴²

Southeast Asian nations should strengthen and where necessary introduce a defence of "honest opinion" (also known as "fair comment") in cases where a publisher is expressing an opinion on a matter of public interest, provided the opinion is based on facts or other proper material, and the publisher is not motivated by malice.

Requiring the plaintiff to prove falsity

No plaintiff should be able to recover damages from someone who has disclosed the truth. If a plaintiff believes that the person sued said or wrote something that was false and defamatory, the plaintiff should be required to prove both.

⁴² In Australia, an opinion is based on "proper material" if it is based on material that is substantially true, or was published on an occasion of absolute or qualified privilege, or was published on an occasion that attracted the protection of a defence under other sections of the legislation.

CONCLUSION

Many nations now compel companies operating within their borders to publicly account for steps they are taking to eliminate modern slavery in their businesses and supply chains. A key aspect of this increased public accountability is the ability of observers to critique the steps being taken by companies to eradicate modern slavery and human rights abuses. If companies that commit such abuses can bring criminal defamation cases against observers, efforts to hold them to account will be stymied. Therefore, laws enabling criminal defamation actions should be abolished, along with the ability of large and powerful corporations to sue for civil defamation. This will enable workers to confidently exercise rights under labour law and find protection in anti-trafficking laws, especially in jurisdictions which limit rights of workers to associate.

Civil defamation laws give aggrieved individuals and smaller corporations adequate protections. But those laws should be reformed to recognise the enhanced defences suggested in this paper, so that they strike the proper balance between free speech and protection of reputation.