MEMORANDUM

PUBLIC PARTICIPATION PROTECTION ACT

To: Members, Advisors, and Observers

From: Lane Shetterly, Chair
Robert T. Sherwin, Reporter

Date: October 21, 2019

Re: Issues raised at Anchorage reading

The floor reading before the Commissioners in Anchorage was quite active. Thirty-seven different Commissioners rose to speak on the act, and several spoke more than once. This memorandum is a generalized discussion of the concerns and suggestions raised during the reading. We've also attached an indexed summary of the specific comments we received, along with an annotated version of the act with summarized comments in their appropriate sections. Hopefully, both will assist us at our November meeting.

I. TITLE

Two commissioners suggested that we continue to work on the name of the act, and specifically, that it include the term or words "constitutional rights." One suggestion was "Act to Protect Constitutional Rights to Public Participation." A recurring theme we heard (*see* Section III, below) was that the act wasn't sufficiently clear that it was substantive in its operation, and although statutory titles obviously aren't "part" of the act itself, the apparent thought was that a bold reference to constitutional rights would better frame the act's objective.

II. DEFINITIONS

Our definition of "person" specifically excludes the government. And our definitions of "moving party" and "responding party" use the term "person," which suggests that the government could never be an anti-SLAPP movant or respondent. Section 4(c)(1), however, says that the act does not apply to governmental enforcement suits. By negative implication, 4(c)(1) seems to suggest that *other* actions by the government *would* be covered. This is confusing, at best, and conflicting, at worst. The Committee should discuss whether it wants to include government in the definition of

"person," or craft a different approach to when a governmental suit can be the subject of a motion to dismiss. More than one comment suggested that governmental entities need the power to enforce laws without falling subject to a motion to dismiss, and that their reelection prospects should serve as a sufficient deterrent to them filing SLAPP suits.

Another comment suggested that the definitions of moving party and responding party should require those "people" to be actual parties to the case; read literally, under our draft, one could file or respond to an anti-SLAPP motion as mere amici.

We also received questions about whether individual legislators and political action committees would meet the definition of "person," and why we have not defined "state," being that we use it in bracketed language throughout.

Elsewhere in the act, there was a voiced concern that we were using "cause of action" differently in different places—sometimes to refer to a specific claim, and sometimes to the pleading document. Relatedly, in Section 10 ("Proof"), where we refer to "pleadings," do we mean only the Complaint/Petition and Answer? Or do we intend to include the anti-SLAPP motion/responses and perhaps other court-filed documents?

III. SUBSTANCE VERSUS PROCEDURE

A good bit of discussion focused on Section 3—our "this act is substantive" language. Concerns ranged from "this is 'comment'-type language that shouldn't be in the act at all," to "whether it's procedural or substantive, no federal court would be swayed by such language." Most of the suggested fixes centered on being more clear about what kind of conduct the law should protect, or when it applies and when it doesn't. Another suggestion to make the act more substantive was to emphasize what determinations the court is supposed to make, as opposed to what showings the parties must make. Of course, doing so while also maintaining anti-SLAPP's familiar two- or three-step burden-shifting scheme might prove difficult, particularly given that other Commissioners seemed confused with our Section 9 ("Dismissal") and how the prima-facie-showing and dismissal-as-a-matter-of-law provisions worked in tandem. In that light, there were multiple concerns about how a court was supposed to know when the moving party has "established" that the law applies in the first place.

Relatedly, numerous Commissioners opined that the act would work better and be more palatable as a set of procedural rules. There seemed to be a fair amount of sentiment that our act was effectively a "summary judgment plus" mechanism, or that it wasn't sufficiently distinct from summary judgment and other types of existing procedural tools to warrant its existence as a statute. At one point, Chairman Shetterly

had to remind the floor that more than 30 states have enacted these statutes—and none via rules—*precisely because* their existing laws failed to sufficiently address SLAPP suits. It was clear that at a minimum, we need some robust comment language that explains why this has to be in statutory—and not rule—form. Also, switching Sections 9 and 10—"Proof" and "Dismissal," might be an easy way to make the act more sensical to someone not familiar with anti-SLAPP procedure.

IV. APPLICABILITY

Predictably, another topic of discussion was the "matter of public concern" language of Section 4(b)(2)(C). We have always known that we would need a robust comment to explain what that encompassed, and the floor reading reaffirmed that need. One commenter suggested the inclusion of language specifically protecting the media or "free press." A written comment we received actually suggested we remove the "matter of public concern" language altogether, as it unnecessarily limits the application of the act. And another Commissioner asked for the addition of more specific exclusions—types of cases, like family law, evictions, disciplinary proceedings—to which the act should not apply. That was consistent with others who raised concerns that the act was too broad. Multiple commenters wondered why the laws should extend to cross claims, counterclaims, and interventions, and one asked whether it would apply to class-action suits.

Speaking of exclusions, there was some confusion about our "commercial speech exemption" of Section 4(c)(2). Aside from general questions about what "goods and services" included (intellectual property? real property? real property brokerage services?), there was one concern that the exemption was too broad and covered anyone who sold goods or services, regardless of whether that sale had a connection to the claim. It's possible we could clear that up rather simply by adding the word "the" after "of" and before "goods and services" in the sentence's last few words. There was also a suggestion that we check with the ULC for early working drafts of the Revised Unclaimed Property Act, as that Committee at one point debated including a "business to business" transactions exemption.

V. TIMING AND HEARING; OTHER ISSUES

Several Commissioners seemed bothered both by the mandatory nature of the act's expedited hearing, stay and attorney's fees provisions, as well as the *lack* of any guidance about what happens if the court fails to act within prescribed timelines (for instance, should we include a denial-by-operation-of-law provision?).

Multiple Commissioners objected to our designation of the motion as "special," noting that it might create confusion and be linked to a special appearance.

There were (understandably) questions about what happens when only part of a claim is dismissed (the so-called "slice and dice" conundrum we've spent significant time discussing), and whether the case would have to continue piecemeal through trial. Robust comment language is certainly called for on that topic.

Finally, a question was raised about how this act would work with other protections—not necessarily anti-SLAPP statutes, but substantive-immunity-type laws—already in place in some states.

VI. CONCLUSION

Our consensus immediately after the floor reading was that many of the comments we received were borne out of a general unfamiliarity with the way anti-SLAPP statutes operate. Indeed, several Commissioners who opined that the act "wouldn't work" or weren't necessary in their states are from jurisdictions that already have anti-SLAPP laws. Many of these concerns can and will be cleared up through comments and legislative notes explaining how the act operates, including examples. That said, there were a number of legitimate issues raised by the reading that we must consider and fix. In sum, the Committee has a great deal of work ahead of it as we aim for a July 2020 final reading.