



**LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO**

DEFAMATION IN THE INTERNET AGE

Call for Research Papers

The Law Commission of Ontario (LCO) is undertaking a project to review the law of defamation, both generally and as it has been affected by the emergence of the internet. A general description of the project, the LCO's mandate and associated resources may be found on the LCO's website at www.lco-cdo.org.

From November 2015 to May 2016, the LCO conducted preliminary research and consultations in order to understand the overall context in which defamation law operates and to identify particular issues that the project will address. Based on this initial work and our ongoing research, the LCO is now developing a consultation paper that will review and analyse a range of issues and set out questions for public consultation. We expect to release the consultation paper in early 2017 and this will form the foundation of the public consultations process that will follow.

The LCO also plans to fund a number of research papers that will inform our development of options for reform. A list of potential research paper topics, application requirements and terms for funding are set out below.

I. RESEARCH TO BE FUNDED

i. Objectives

The objective of this Call for Research Papers is to obtain expert input on some longstanding issues of defamation law as well as emerging issues involving the application of defamation law principles to the unique characteristics of internet communications. The resulting research will assist the LCO in developing reasoned, evidence-based and practical reform recommendations. The Call for Research Papers also aims to create critical debate and promote scholarly work on the subject matters at issue.

The LCO takes a holistic approach to law reform and we have adopted a relatively broad approach to this project. We seek to understand defamation law in its modern social and technological context. Is the nature of reputation changing? Is the nature of privacy changing? How does the technology of the internet affect the legal issues? These broader questions will underlie our legal analysis. Therefore, we encourage proposals for multidisciplinary research examining technological, sociological and other perspectives in addition to legal perspectives.

Researchers are encouraged to incorporate relevant quantitative or qualitative research that they have already completed or to undertake original quantitative or qualitative research, so long as it is feasible within the timelines set out below.

ii. Research paper topics

The LCO will fund a number of research papers to be determined after considering all of the proposals we receive. We have identified several potential research paper topics, described below, but also invite proposals that blend elements from one or more of these topics. We will also consider proposals on other topics that would make a demonstrable contribution to our understanding of the issues identified in the project scope statement on our website and that would benefit from external, expert knowledge that the LCO might not be able gain through internal research and consultations.

1. *Revisiting the Core Elements of Defamation Law, Too Late to Change?*

Defamation law has developed independently of other tort law principles in several significant respects. Defamation may be established without proof of fault, without proof that the words in issue were false and without proof that any harm to reputation has actually resulted. Most of the “work” of the tort takes place in determining which of a list of fairly technical defences might apply. These unique characteristics of defamation law doctrine are increasingly questioned in the *Charter* era with its constitutional protection of freedom of expression. In contrast, Quebec treats defamation like all torts as a fault under the Quebec *Civil Code*. The plaintiff must establish that a fault has occurred, that harm has resulted and that there is a causal connection between the two. This is a more contextual approach than in common law and some have argued that this approach is preferable in the modern social and technological context. The LCO wishes to understand the doctrinal foundation and policy considerations underlying these core features of common law defamation, as well as the civil law comparator, to inform our consideration of the desirability and feasibility of reform in this area.

The LCO seeks a research paper that will review and analyze

- **the historical, jurisprudential and/or policy foundation for the development of defamation as a strict liability tort with the presumption of falsity and presumption of harm;**
- **contrasting approaches to the development of defamation law in other relevant jurisdictions, including Quebec, as well as any legal or social factors limiting the use of those jurisdictions as comparators to the Ontario context;**
- **the balance struck by different models of defamation law between protection of reputation and the *Charter* guarantee of freedom of expression;**
- **the practical feasibility of reforming Ontario defamation law to reverse the presumptions and redefine it as a negligence-based tort (assuming it is desirable to do so), including possible consequences of Ontario law diverging from the law of other common law jurisdictions;**

- the degree to which defamation law doctrine remains relevant in the modern context where most disputes are resolved outside the courts and the extent to which reform is worthwhile in these circumstances; and
- other issues considered to be of significant relevance to a full analysis of this topic.

2. ***Bridging the Technological/Doctrinal Divide: How the Technology Behind Internet Communications Impacts Defamation Law Doctrine***

The internet represents a technological and social revolution with far-reaching implications for human communication generally, including the use of law to regulate reputational harm. Therefore, an understanding of the technology behind internet communications is crucial to developing defamation law reforms that will operate successfully in the 21st century and beyond. For example, although lawyers tend to refer to “internet speech” as a single concept, in reality, the nature of internet speech will vary significantly with the platform through which it is communicated. Twitter, Facebook, blogs and email each facilitate different forms of speech with different implications for defamation law.

There is a growing body of case law and literature commenting on the technology of the internet from a legal perspective. However, the LCO wishes to understand the interaction between defamation law and the internet beyond a legal framework, from the perspective of one or more researchers with internet expertise. This study will explore from a technological perspective how the evolution in the means of transmitting defamatory communications in the 21st century affects doctrinal principles several hundred years old. It will assist the LCO in understanding, not only how the internet impacts defamation law, but also how defamation law fits into a technologically advanced world.

The LCO seeks a research paper that will review and analyze

- the technology of internet communications and the ways in which it affects the operation of defamation law (including but not limited to jurisdictional issues, motions to identify anonymous defendants and intermediary liability);
- different forms of internet speech facilitated by social networks and other software platforms and implications for defamation law;
- how internet speech is affected by the hardware or superstructure of the internet and implications for defamation law;
- possible future technological developments that may require further adaptation of defamation law principles and the extent to which these may or should be foreshadowed in current law reform; and
- other issues considered to be of significant relevance to a full analysis of this topic.

3. *Reassessment of Pre-trial and Post-trial Remedies in Defamation Actions*

In asking ourselves what we want from defamation law in the internet age, the issue of remedies is of primary concern. The law may apply differently to internet communications than in the traditional context of print or broadcast publications. Damages could possibly be greater due to the speed and distance that defamatory comments may travel over the internet. But a plaintiff may be able to mitigate his or her damages by posting a correction to the defamatory post. The measurement of damages may also be affected by the availability of internet metrics.

A broader issue is the extent to which damages is an appropriate remedy for internet defamation where harm to reputation cannot easily be monetized. Other traditional remedies such as injunctions can also be problematic in the context of internet defamation. What many plaintiffs really want is that the defamatory post be removed from the internet. But even that won't necessarily restore their reputation once the "horse has left the barn".

The LCO is inviting proposals for a paper that analyzes both pre-trial and post-trial remedies currently available in Ontario defamation actions, as well as remedies that have been adopted or considered in other relevant jurisdictions. The project will examine the *operation* of the notice and apology/retraction provisions in the *Libel and Slander Act* (but will *not* examine the class of *defendants* to whom these provisions apply). The project should focus on judicial remedies in the context of a defamation action rather than alternative dispute resolution or other extra-judicial remedies.

The LCO particularly welcomes proposals indicating that the researcher will rely on existing or new qualitative or quantitative evidence in addressing the issues in this project.

The LCO seeks a research paper that will review and analyze

- **existing case law, legislation and policies relating to pre-trial and post-trial remedies available in Ontario defamation actions and other potential court-based remedies;**
- **court-based remedies for internet defamation considered or adopted in other relevant jurisdictions including in UK's *Defamation Act*;**
- **theories and policy goals underlying remedies in defamation actions;**
- **the assessment of damages and causation issues in defamation law traditionally and in the internet age;**
- **novel issues in measuring damages for internet defamation; and**
- **other issues considered to be of significant relevance to a full analysis of this topic.**

4. ***Are We Asking Too Much from Defamation Law? Reputation Systems, Alternative Dispute Resolution, Industry Regulation and Other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age***

David Ardia asks this question, “Are we asking too much from defamation law?” in his article, “Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law”.¹ He suggests that since reputation is “contextual and community-created”, local communities should themselves play a role in protecting reputation. And, indeed, in the internet age there are several possibilities for resolving disputes over reputational harm in addition to bringing a court action. For example, online reputation systems such as eBay’s incorporate informal dispute resolution mechanisms. Google, Twitter and other social media platforms have complaint processes for resolving claims of offensive internet speech, including defamation. Press councils are a form of alternative dispute resolution that pre-dates the internet. And there are fledgling initiatives within the internet industry to proactively regulate offensive internet content.

This research paper will explore the evolution in the concept of reputation into the 21st century, whether and how online reputational interests might differ from traditional notions of reputation and possible implications for protecting against reputational harm. With this foundation, the paper will turn to extra-judicial methods of addressing reputational harm, including their relative benefits and disadvantages, and evaluate whether and how they should be taken into account in designing a defamation action for the 21st century. The LCO is interested in understanding this issue from a variety of perspectives including, perhaps, theoretical, technological, sociological or behavioural science. However, the LCO is most particularly interested in this issue from the perspective of promoting access to justice in Ontario.

This research study will take into account that defamation is one of many forms of reputational harm that may occur through internet communications and that there may be lessons to be learned from extra-judicial regimes regulating other forms of reputational harm. However, the study will retain its focus on online defamation.

The LCO welcomes paper proposals indicating that the authors will rely on completed or new quantitative or qualitative research comparing judicial and extra-judicial mechanisms for addressing reputational harm.

The LCO seeks a research paper that will review and analyze

- **the concept of reputation and reputational interests in the internet age, as well as relevant implications for the nature of online reputational harm, particularly defamation;**
- **the history, theory and legal implications of extra-judicial mechanisms as a means of resolving reputational harm, particularly defamation;**
- **internet law, policy and governance perspectives on the legal regulation of internet speech in the context of defamatory communications;**

- **factors relevant to assessing the relative benefits and disadvantages of defamation actions and extra-judicial processes as mechanisms for resolving online reputational harm, particularly defamation;**
- **the purpose, characteristics, benefits and disadvantages of online reputation systems, online complaint systems and alternative dispute resolution mechanisms for resolving reputational harm, particularly defamation;**
- **internet industry regulatory initiatives for managing offensive online content, particularly defamatory content;**
- **access to justice considerations engaged by extra-judicial mechanisms for resolving reputational harm, particularly defamation; and**
- **other issues considered to be of significant relevance to a full analysis of this topic.**

5. *Defamation and Youth in the Digital Age*

A group of stakeholders who are deeply engaged in the use of technology in the internet age and may have opinions on its impact on reputation and privacy are not represented by any of the “traditional” stakeholder groups. Youth use technology at a much higher rate than adults and in different ways. It will be crucial for the LCO to connect with this stakeholder group in order to fully understand the social and technological environment in which a reformed defamation law will operate into the future.

We are interested in a sociological, qualitative study of how 21st century youth view: truth vs. falsehood over the internet, the nature of reputation and privacy, the risk of online defamation and possible mechanisms for remedying defamation. How do Ontario youth view the legality of protecting reputation? What implications might this have for defamation law reform?

This research paper topic is intended to capture the perspectives of those who most frequently interact with social media and other platforms through which online reputation is affected. As a result, successful applicants will be required to gather qualitative information that summarizes the viewpoints of diverse groups of youth, either from existing sources or through new research.

The LCO seeks a research paper that will

- **establish an appropriate definition of youth for the purposes of the study;**
- **review and analyze existing research addressing youth perspectives on online reputational harm, particularly in response to false statements;**
- **use appropriate methodological techniques to collect and analyze perspectives of youth on key issues in the project such as,**
 - **value placed on online reputation,**
 - **risks inherent in social media and other forms of online communication,**

- personal and observed experience with online reputational harm caused by false statements,
- significance of truth and falsity to legal consequences for online reputational harm,
- options for complaining about/resolving online reputational harm,
- preferred remedies for online reputational harm,
- benefits and risks of anonymity over the internet; and
- other issues considered to be of significant relevance to a full analysis of this topic.

6. *Anonymity and Online Defamation*

This research paper seeks to understand how the law of defamation is impacted by the reality that many online defamatory posts are made anonymously. Anonymous internet speech engages freedom of expression considerations as well as privacy interests. Balanced against these values is a concern for access to justice when a plaintiff is unable to proceed against unknown defendants. Ontario courts have only just begun to weigh these issues. It is not yet clear in what circumstances a web host or third party ISP should be required to release subscriber information. Identifying anonymous defamers also raises procedural issues. The LCO seeks to understand both procedural and substantive considerations affecting whether and in what circumstances plaintiffs should be entitled to subscriber information?

Another issue here involves the possibility that a plaintiff in a defamation action may wish to proceed anonymously where the defamatory content at issue is particularly prejudicial. The Supreme Court allowed this in very specific circumstances in *A.B. v. Bragg* but the Court recognized the importance of the open court principle generally. It remains unclear just how far the reasoning in this decision may extend in the defamation context.

The LCO seeks a research paper that will review and analyze

- social and legal benefits of anonymity as an option in internet communications;
- access to justice considerations and the open court principle in relation to identifying anonymous defendants to defamation actions and plaintiffs seeking to bring a defamation action anonymously;
- substantive and procedural aspects of existing law in relevant jurisdictions on anonymity in defamation actions;
- internet law, policy and governance perspectives beyond the defamation context on identifying internet users; and
- other issues considered to be of significant relevance to a full analysis of this topic.

7. *Internet Intermediary Liability for Online Defamation*

When should internet intermediaries such as web hosts, search engines or ISPs be liable for defamatory content posted by others? Who is a publisher? When will a hyperlink, snippet or automatic completion amount to a secondary publication of online defamation? Courts have sought to answer these questions through the application of common law principles and, in some jurisdictions, governments have sought regulatory solutions. Canadian law in this area is relatively underdeveloped. In *Crookes v. Newton*, the SCC found that hyperlinks do not communicate content and, therefore, do not attract liability on their own. However, the issue of liability in respect of other forms of secondary internet communications has not yet been resolved. In some jurisdictions legislation has been enacted to protect intermediaries in certain situations. For example, the US has provided intermediaries with comprehensive protection under s.230 of the *Communications Decency Act*. The UK *Defamation Act* provides for a notice regime that protects website operators in certain circumstances. UK intermediaries are also subject to the European Union's *Electronic Commerce Directive* which provides protection to certain intermediaries such as hosts, caches and mere conduits. This research paper will examine these and other approaches to intermediary liability and will consider whether and how they might inform Ontario law reform.

The LCO seeks a research paper that will review and analyze

- **law and policy on what amounts to publication for the purposes of defamation and related defences such as the defence of innocent dissemination in all relevant jurisdictions;**
- **law and policy on intermediary liability for online defamation in all relevant jurisdictions;**
- **other issues considered to be of significant relevance to a full analysis of this topic.**

8. *The Relationship Between Defamation, Breach of Privacy and Other Legal Claims Involving Offensive Internet Content*

The LCO believes that it is important to understand defamation law in the broader context as a tool for regulating internet content. There are numerous forms of internet speech that the law attempts to regulate in a variety of ways. Cyberbullying, hate speech, breach of privacy, misappropriation of personality, online harassment, the right to be forgotten, data protection law and breach of copyright, among others, share some similarities with defamation law and there may be lessons to be learned from these differing legal environments. Currently, a key distinction between defamation and some of these other claims is based on whether or not the information communicated was true or false. But this distinction may be questioned in the internet age where true information transmitted online may cause just as much harm as false information.

This research study will examine in a targeted way various forms of legal regulation of internet speech insofar as they offer relevant analogies and possible lessons for the reform of defamation law. The LCO is *not* seeking a broad-based study mapping the relationship between different forms of internet speech.

The LCO is particularly interested in the protection of privacy, particularly around disclosure of private information, and its relationship to the protection of reputation. This relationship may have significance for the development of defamation law as well as for the fledgling tort of invasion of privacy. This paper will undertake a theoretical discussion of the concepts of privacy and reputation and how they relate. This will then be integrated into a comparative analysis of the constitutional protection of privacy and reputational rights and the implications for defamation law in the 21st century.

The LCO seeks a research paper that will review and analyze

- **forms of internet speech that are similar to or contrast with defamatory speech in relevant respects;**
- **legal and policy considerations in regulating these forms of internet speech and compare and contrast their relationship with defamation law;**
- **theoretical, social and legal dimensions of the values of reputation and privacy, particularly informational privacy, including comparisons and contrasts;**
- **the nature of truth and falsity and their legal significance in distinguishing between the torts of defamation and breach of privacy, particularly in the context of internet communications;**
- **varying degrees of legal and constitutional protection accorded to privacy and reputation in different jurisdictions;**
- **implications of recent developments in breach of privacy law for defamation law doctrine; and**
- **other issues considered to be of significant relevance to a full analysis of this topic.**

9. *Other paper topics requiring expert research that would make a demonstrable contribution to the LCO's project.*

The LCO will consider proposals on topics that have not been identified in this Call for Research Papers that would make a demonstrable contribution to our understanding of the issues identified in the description of the project on our website and that would benefit from external, expert knowledge that the LCO might not be able gain otherwise through internal research and consultations.

II. SUBMISSION PROCESS

i. Selection criteria

Proposals will be evaluated on the degree to which they achieve the following:

- Further the objectives of this Call for Research Papers and of the project.
- Maintain coherence with the mission of the LCO.
- Demonstrate professional qualifications and expertise in the area to be studied.

- Demonstrate a sound analytical framework and research methodology.

ii. Format of proposals

Submitted research proposals must contain the following materials:

1. A statement outlining the proposed research, how the research would support the objectives of the project as outlined in this Call for Research Papers, and the scope and the type of work envisioned.
2. A work plan that outlines
 - the proposed research methodology, including any proposed original quantitative or qualitative research;
 - the use of any relevant quantitative or qualitative research already undertaken by the researcher;
 - the steps required to complete the assignment on the dates listed below; and
 - an estimate of the resources required to complete the assignment.
3. A cover letter detailing the applicants' qualifications, including their experience with past research on issues raised in the proposal or analogous issues, and the reasons why the applicants are interested in undertaking the research.
4. A Curriculum Vitae for each principal researcher.

PLEASE NOTE THAT INCOMPLETE PROPOSALS MAY NOT BE CONSIDERED.

iii. Proposal deadlines

Research proposals must be submitted by midnight on **September 16, 2016**. Proposals received after this date will not be considered. Authors of successful proposals will be notified by **October 3, 2016**.

iv. Questions about proposals

Questions about proposals should be submitted at the latest by **August 26, 2016**. The LCO will post responses to such questions on our website as quickly as possible. We will ensure that identifying information is kept confidential to protect the applicants' privacy. Questions must be directly addressed to the project head, Sue Gratton, at sgratton@lco-cdo.org or (416) 650-8437.

v. Contact Information

Please forward your proposals to the attention of the project head, Sue Gratton, through one of the means indicated below:

Mail: Sue Gratton
Research Lawyer
Law Commission of Ontario
2032 Ignat Kaneff Building
Osgoode Hall Law School, York University
4700 Keele St., Toronto, ON M3J 1P3

Fax: (416) 650-8418

E-mail: LawCommission@lco-cdo.org

III. TERMS OF THE CALL FOR RESEARCH PAPERS

The Terms of the Call for Research Papers are as follows:

i. Budget guidelines

The selected applicants will be paid a total of \$15,000 (plus HST) for the paper, as allocated to each stage of the paper, when completed in accordance with the agreement as determined by the LCO. Approved expenses will be reimbursed to a maximum of \$2,500 (plus HST).

ii. Timelines and deliverables

Applicants who are successful in contracting to provide a research paper will be required to complete (a) a detailed outline, (b) an interim research paper and (c) a final research paper (the “Deliverables”). The interim research paper must be a substantially complete version of the final research paper and subject only to slight revisions. The interim research paper must be formatted and include citations in accordance with the LCO’s formatting policy. The interim research paper and the final research paper must assess and analyze all of the issues described under the appropriate paper topic in section I above, “Research to be Funded”, except as revised by agreement with the project head. The LCO reserves the right to determine whether the paper has met the requirements at each stage as explained above and is not obligated to provide payment if those requirements are not met and to terminate the agreement. The LCO will not take this step until after a discussion with the researcher.

Selected applicants must provide the LCO with the Deliverables in accordance with the agreement by these dates:

DEADLINE	DELIVERABLES	PAYMENT
November 4, 2016	Detailed outline	\$2,500
January 13, 2016	Interim research paper	\$5,000
February 24, 2016	Final paper	\$7,500

Compliance with the above deadlines is of critical importance to the LCO. In the event that a deadline is not met, the LCO may choose to terminate the agreement. Where the agreement is terminated, the LCO is not obligated to provide payment for any Deliverable that has not been provided to the LCO at the time of termination.

iii. Copyright

Contract researchers are expected to assign copyright to the LCO, but will retain moral rights to their work. Contract researchers will be given credit for their work when the LCO publishes materials resulting from their work in any format. Contract researchers may write separate materials, such as articles, arising out of their research for the LCO with acknowledgement that the work was originally carried out for the LCO. Applicants are encouraged to review the LCO's *Policy on Copyright & Attribution*, available on the LCO website at <http://www.lco-cdo.org/en/copyright-attribution-policy>.

¹ (2010) 45 *Harvard Civil Rights – Civil Liberties Law Review* 261.