



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

PROJECT SCOPE STATEMENT

The LCO has adopted a relatively broad approach to this project. We will reexamine some of the foundational principles of defamation law and the policies on which they are based with the goal of developing a new, principled conception of defamation law that makes sense in the internet age. The challenge for the LCO will be to balance competing principles and objectives in an appropriate and thoughtful manner.

I. Background

There are two particular catalysts that have motivated the LCO's project as well as reform initiatives elsewhere.

One catalyst for reform has been the constitutional enshrinement of freedom of expression in the *Canadian Charter of Rights and Freedoms*. Over the past few decades, incremental adjustments have been made to defamation doctrine with the effect of giving increased weight to freedom of expression. The LCO will consider whether these developments have gone far enough (or, alternatively, too far) in protecting freedom of expression given the countervailing interest in protection of reputation and taking into account the values underpinning both.

Another catalyst for reform is the emergence of the internet. The internet represents the future of human written communications and is an indispensable lens through which we will examine all the issues in this project, including issues specific to internet defamation as well as how traditional principles operate in this new context.

Ontario courts and, indeed, courts throughout the world, have been gradually adapting defamation law principles to contemporary circumstances. However, legislative reform in Ontario has been limited and Ontario's *Libel and Slander Act* is now significantly outdated. Ontario has the opportunity to learn from legislative and policy developments in other parts of the world. For example, the United Kingdom engaged in an extensive defamation law reform process over several years that culminated with the 2013 enactment of a new *Defamation Act*. Although an important advancement, the new UK Act in many respects responds to local circumstances and specific problems in the existing UK law. Notably, the UK reform did not undertake a re-examination of defamation law principles within their modern social and technological context. Therefore, it is clear that there is both ample room and, indeed, a need for thoughtful, comprehensive legislative reform of Ontario defamation law in addition to incremental advances in the common law.

II. Themes and Contexts

The LCO's analysis in this project will be informed by a number of important themes and contexts.

- **Social and Technological Implications of Internet:** The internet represents a technological and social revolution with far-reaching implications for human communications generally, including the use of law to regulate reputational harm. Of course, the nature of internet speech will vary significantly with the software or online platform through which it is communicated. It will be crucial in this project to have a strong understanding of how the internet and its various platforms and programs operate, as well as their resulting impact on privacy and reputation.
- **Charter Values:** The balance between freedom of expression and protection of reputation continues to be the core issue underlying any reform of defamation law. And there are values underpinning both freedom of expression and protection of reputation that inform this continual search for balance. This project will consider the balance between free speech and protection of reputation and if, or how, Ontario's defamation laws must adapt to meet changing social and cultural norms.
- **Access to Justice:** There are some unique aspects of civil defamation actions that arguably do not lend themselves to fair and equitable results for either party. In this project, the LCO will develop recommendations that promote access to justice for both plaintiffs and defendants; the LCO will also consider dispute resolution mechanisms beyond court actions.
- **Globalization:** The global reach of the internet has impacted defamation law in jurisdictions all over the world and internet defamation has quickly become an international issue that transcends geographic and doctrinal boundaries. Many of these jurisdictions hold lessons for defamation law reform in Ontario and the LCO will explore these accordingly. At the same time, defamation law is inherently grounded in local social norms and values around reputation and privacy. Foreign developments will inform, but not determine the LCO's analysis.
- **Defamation as a Form of Internet Speech:** 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 offensive internet speech that the law attempts to regulate in a variety of ways. Cyberbullying, hate speech, breach of privacy, online harassment, the right to be forgotten and breach of copyright, among others, share some similarities with defamation and we may learn from these other legal environments in considering how better to remedy online defamation.

III. Issues that the LCO May Address

With the above in mind, the LCO has identified a number of issues that may be addressed in the course of this project. Some issues will lead to specific recommendations. Others may arise in the course of analysis and will provide context for our recommendations but will not be the subject of recommendations. The list below is in no particular order.

1. **When is Internet Speech Defamatory:** It has been argued that the nature of online speech is materially differently than print or broadcast speech and that the legal determination of what amounts to defamation should change accordingly. When should online speech be considered defamatory in the internet age?
2. **Fault:** The tort of defamation is traditionally “strict liability” in that there is no need for a plaintiff to prove malice in order to establish defamation. Evidence of malice becomes relevant only in determining whether particular defences are established. The question is whether this presumption of fault remains appropriate in the *Charter* era.
3. **Presumption of Falsity:** Another element of current defamation doctrine is the presumption of falsity. The plaintiff is not required to prove at first instance that the defamatory statement is false. The appropriateness of this presumption is also questionable in the *Charter* era.
4. **Presumption of Damage/Serious Harm:** A third presumption, the presumption that the plaintiff has been harmed by the defamatory statement, is also in question. This presumption has been legislatively reversed in the UK, giving rise to the suggestion that Ontario should also introduce a serious harm requirement.
5. **Hyperlinks and Other Secondary Forms of Online Communications:** The internet makes it possible for content to be instantaneously replicated, forwarded or hyperlinked by users other than the original poster. It is not yet clear in what circumstances these secondary forms of internet communications will be considered a publication attracting liability for online defamation.
6. **Intermediary Liability:** When should internet intermediaries such as web hosts, search engines and internet service providers (ISPs) be liable for defamatory content posted by others? Given the essential role of intermediaries in the functioning of the internet, should Ontario provide them with some form of legislative protection as exists in the US, UK and EU?
7. **Anonymity:** How should the law of defamation account for the reality that many defamatory posts are made anonymously? Should there be procedural reforms making it easier for plaintiffs to obtain subscriber information in order to proceed with a defamation action against an anonymous defendant?
8. **Defendants (Media):** The media are traditionally accorded some degree of legal protection against defamation actions in recognition of their social responsibility to report in the public interest. With the emergence of the internet, it has become increasingly difficult to distinguish between media and bloggers or other laypeople engaging in public interest commentary. Should the law continue to distinguish between media and other internet publishers or is this distinction no longer appropriate in the internet age?

9. **Plaintiffs (Public Figures, Corporations, Public Institutions):** Are there pertinent distinctions between the types of reputation that may be at stake in a defamation claim? Should the reputation of a public figure be entitled to the same protection as a private individual? What about the reputation of corporations and public institutions?
10. **Single Publication Rule:** The limitation period in the Ontario *Libel & Slander Act* (LSA) is meaningless in relation to online publications that, under the traditional rule, are republished every time they are forwarded. Does Ontario need a single publication rule as adopted in the US and UK?
11. **Procedural Issues:** Many of the procedural provisions of the LSA are outdated and there is a general concern for barriers to access to justice in the current process for bringing (and defending) defamation actions.
12. **Damages and Alternative Remedies:** The unique nature of the harm that may result from internet defamation may require a fresh look at the remedies available in defamation actions. A successful plaintiff may have less interest in a traditional damages award than in an apology and retraction for example. The UK has provided for take-down orders in its new legislation and this may be something to be considered in Ontario.
13. **Jurisdiction:** The internet creates novel jurisdictional challenges for courts hearing multistate defamation actions. Currently the Ontario test for asserting jurisdiction is relatively liberal compared to other jurisdictions such as the UK. We will consider whether there is a need to harmonize Ontario law with the law in other provinces and countries in order to avoid Ontario becoming a libel tourism destination.
14. **Choice of Law:** The traditional test is based on the place where the tort occurred but this is problematic in the context of multistate defamation claims. An alternative test based on the location of the most substantial harm to reputation has been proposed but the law remains unsettled.
15. **Possible Extra-Judicial Mechanisms for Addressing Harm to Online Reputation:** Given the cost and other practical limitations of litigation as a means of vindicating online reputation, is there an extra-judicial mechanism that would be appropriate as an alternate route for resolving some of these disputes? Possible lines of inquiry include an ADR process or a framework building on self-regulatory initiatives within the internet industry. There may even be lessons to be learned from online reputation systems such as eBay and Uber.

IV. Issues Excluded from the Project Scope

The following issues are excluded from the scope of the project.

1. **Criminal Defamation:** Criminal defamation under section 300 of the *Criminal Code* is a matter of federal jurisdiction and outside the mandate of the LCO.
2. **Related Claims Involving Internet Speech:** Generally speaking, the LCO will not address other legal claims for harm caused by internet speech (such as the right to be forgotten and cyberbullying). However, these related claims may be indirectly relevant to the project as part of the context in which internet defamation operates. The LCO may examine breach of privacy claims involving disclosure or publication of information to the extent that these are inextricably linked with defamation claims.