

Law Commission of Ontario recommends sweeping changes to law of defamation to address challenges of internet age

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On March 12, 2020, the Law Commission of Ontario (LCO) released its long-awaited final report on [Defamation Law in the Internet Age](#) [PDF] (along with an [executive summary](#) [PDF] of its recommendations). The LCO is a law reform agency with a mandate of improving access to justice and promoting legal reform in Ontario.

The final report is the culmination of a four-year process, in which the LCO considered how best to reform Ontario's defamation law in response to the social and technological revolution in communications brought about by the internet. The report recognizes that "the internet is now the arena in which much, if not most, defamation occurs," which "has had an unprecedented impact on the two core values underlying defamation law: freedom of expression and the protection of reputation."

After considering a wide range of substantive and procedural issues, the final report makes 39 recommendations designed to update defamation law, promote access to justice, and involve internet intermediaries in addressing defamatory internet speech.

The most noteworthy recommendations include:

1. repealing the existing *Libel and Slander Act (LSA)* and replacing it with a new *Defamation Act*;
2. placing positive obligations on internet intermediaries (e.g., Facebook and Twitter) to facilitate the provision of notices of complaint from the defamed party to the person who posted the content, and requiring takedown of the defamatory content where the poster does not respond to the notice within two days;
3. making it easier for parties to obtain interim and interlocutory court orders to take down or de-index defamatory content (orders which have historically been extremely difficult to get);
4. providing that an action in defamation can only be brought against a party that made an "intentional act" of communicating a specific expression (effectively removing potential liability for intermediaries who merely host the expression but take no role in actively publishing it); and
5. recommending the eventual establishment of an "online dispute resolution" governmental tribunal, which would provide a quick and inexpensive forum for resolving defamation complaints and other forms of online harm, as an alternative to expensive and protracted court proceedings.

The report also makes a number of less immediately dramatic but no less substantive

recommendations, including (i) eliminating the historical distinction between “libel” and “slander”, replacing them with a single new tort of “defamation”, and (ii) replacing the defence of “fair comment” with a new defence of “opinion”, which would remove the requirement for the defendant to demonstrate “objective honest belief” to establish the defence.

Summary of key recommendations

A new notice regime and limitation of claims

- **Expanded notice regime:** The *LSA* currently contains a notice regime which provides that no action lies for libel against a *newspaper* or *broadcaster* unless a plaintiff provides notice to a defendant within six weeks after the alleged libel has come to the plaintiff’s knowledge. There is no notice requirement for defamation actions outside of this context (e.g., for defamatory posts made by companies or individuals on social media). The LCO recommends that the existing notice requirement be scrapped, and a new notice regime be developed that is applicable to all publications, regardless of who makes them or whether they are online or offline publications. A complainant will not be able to commence a defamation action until four weeks after the notice of complaint is served on the publisher of the alleged defamation.
- **Enactment of a “Single Publication” rule:** The LCO recommends providing that a single cause of action exist for the publication of an expression and all republications of the same expression by the same publisher. The limitation period for a defamation action (discussed below) would begin to run on the date that the plaintiff discovered or should reasonably have discovered the *first* publication of the expression.
- **Establishment of a single limitation period:** Currently, defamation complaints relating to media publications have to be brought within three months. The LCO recommends removing that distinction such that the two-year limitation period under the *Limitations Act, 2002* would apply to all publications.

New legal responsibilities for intermediary platforms and a modern process to resolve online defamation disputes

As part of the new notice regime, the LCO recommends that new legal responsibilities be imposed on intermediary platforms. In particular, the LCO recommends that intermediary platforms will be required to establish a notice and takedown regime for defamation complaints by Ontario residents. A few key points:

- The notice and takedown obligations would be imposed on internet intermediary platforms directly hosting user-generated content, but not on Internet Service Providers or search engines (like Google), absent a court order to remove illegal content.
- Internet intermediaries (e.g., Facebook and Twitter) would have to provide a link on their site to where individuals can submit notices of complaint about defamatory posts, and would have a statutory duty to make all reasonable efforts to expeditiously forward a notice of complaint from a complainant to the poster/publisher (with no requirement to

assess the merits of the complaint).

- Intermediaries would be entitled to charge an administrative fee (set by regulation) for providing notice, but would be held liable for statutory damages if they fail to comply with the notice obligations.
- If the publisher does not respond to the notice of complaint within two days, the intermediary would have to take the content down.
- If the publisher responds to the notice within two days, then no takedown would occur. Publishers would not be required to justify their content. A response simply disagreeing with the complaint or asking that the content remain online would be sufficient to prevent takedown. At this point, if the complainant wanted to pursue the matter, he or she would be required to deal with the publisher directly.
- If the intermediary is unable to pass on the notice to the publisher, or if the publisher does not respond within two days, the intermediary would be required to take down the allegedly defamatory content.
- The takedown process would be designed to protect anonymous publishers. There would be measures in place to protect publishers from abusive complaints, including a put-back procedure where the publisher has compelling reason for having missed the deadline and it is technically feasible to do so. Furthermore, publishers would have a statutory damages remedy against complainants filing notices in bad faith or without a reasonable belief that the content in issue is defamatory.

The LCO believes that this notice and takedown regime will offer complainants a quick and inexpensive method of containing reputational harm in cases where publishers are not invested enough in content to dispute its removal, while conserving court resources for higher value or more difficult cases.

Substantive elements of defamation law

The LCO does not recommend an extensive overhaul of substantive legal principles, finding that recent common law and legislative reforms to the substantive elements of defamation (e.g., the Supreme Court's establishment of the responsible communication defence and enhancement of the fair comment defence, and the [introduction of anti-SLAPP legislation](#)) strike an appropriate balance between protection of reputation and freedom of expression. Yet, it still makes a number of key recommendations on changes to substantive principles, including:

- **Narrowing the definition of “publisher”:** At common law, “publishers” are defined very broadly, to include individuals who repeat, republish, endorse or authorize a defamatory message – which, in the online context, could include internet intermediaries. The LCO recommends replacing the broad, common law definition of “publisher” with a narrower statutory definition limited to only those actors having the *intent* to convey a specific expression at the time of publication. This change would place liability for defamatory online content squarely on the shoulders of the individual posting the content, rather than on the intermediary hosting it.
- **Abolishing distinction between ‘libel’ and ‘slander’:** The LCO recommends that the current *LSA* should be repealed and replaced with a new *Defamation Act*, which will abolish

the distinction between libel and slander and establish a single tort of defamation.

- **Easing the requirements to establish the fair comment defence:** The LCO recommends replacing the common law defence of fair comment with a new statutory defence of ‘opinion’. The defence would have the same elements as the traditional fair comment defence, except that defendants would no longer have to demonstrate the objective test of whether a person could honestly express that opinion on the facts proven to be true (an element the LCO deemed superfluous).

Preliminary court motions

- **Establishing a test for an Interlocutory “Takedown” Order:** The LCO recommends an expansion in the ability of complainants to seek interlocutory relief in defamation cases, as the traditional restriction of this relief to the “rarest and clearest of cases” was seen to be overly restrictive in the online context. While recognizing that the courts should exercise this power sparingly, the LCO recommends that an interlocutory “takedown” order be available to plaintiffs where:
 - There is strong *prima facie* evidence that defamation has occurred
 - There are no valid defences; and
 - The potential for reputational harm is so serious that the public interest in taking down the expression outweighs the public interest in the defendant’s freedom of expression.
- **No change to Anti-SLAPP legislation:** One area where the LCO did not recommend substantive revision is to Ontario’s Anti-SLAPP legislation. [The legislation](#) was introduced in Ontario in 2015 to allow for early dismissal of strategic lawsuits having an undue impact on freedom of expression on matters of public interest. The LCO has observed the “significant and substantive effect” of this legislation on defamation law and has concluded that anti-SLAPP motions strike an appropriate balance between the protection of reputation and freedom of expression.

Jurisdiction

The internet has resulted in an increase in multi-state defamation actions, and has brought jurisdictional issues to the forefront of cases where the defamatory content appears on the internet.

- **Jurisdictional considerations:** On the question of jurisdiction in such actions, the LCO largely agrees with the reasons of the majority of the Supreme Court in *Haaretz.com v. Goldhar* to the effect that the current rules for the assumption and exercise of jurisdiction (which include the *forum non conveniens* analysis), when applied correctly, are able to address the challenges raised by multi-state defamation cases. However, it recommends that for such actions, the courts consider a further discretionary factor at the rebuttal stage of the jurisdiction analysis: whether the publication was targeted at an Ontario audience.
- **Choice of law:** The LCO recommends that the new *Defamation Act* provide that the law governing multi-jurisdictional defamation actions is the law of the place where the most substantial harm to the plaintiff’s reputation occurred.

Establishment of an Online Dispute Resolution Tribunal

As noted above, the LCO recommends that the government explore (as a longer-term reform) the establishment of an “online dispute resolution” tribunal as a means for informally resolving some online defamation disputes, along the lines of the Civil Resolution Tribunal that has been established in British Columbia. This regime would seek to deal with “high volume” but “low (monetary) value” online defamation matters, e.g., matters that may not otherwise be pursued given how lengthy and expensive a court action can be.

Conclusion

Reform to the law of defamation has been long overdue, to catch up to the dramatic impact the internet has had on the scope, manner and means by which society communicates. While it remains to be seen how many of the LCO’s recommendations are ultimately adopted, the report represents a bold series of proposals aimed at addressing the very real challenges that technology has introduced into the areas of reputation protection and freedom of expression.