



Law Commission

**DEFAMATION AND THE
INTERNET**

A Preliminary Investigation

Scoping Study No 2

December 2002

The Law Commission was set up by the Law Commissions Act 1965 to promote the reform of the law.

The Law Commissioners are:

The Honourable Mr Justice Toulson, *Chairman*
Professor Hugh Beale, QC
Mr Stuart Bridge
Professor Martin Partington, CBE
Judge Alan Wilkie, QC

The Secretary of the Law Commission is Mr Michael Sayers and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

The paper was completed on 8 November 2002.

This preliminary investigation is the second of two scoping studies, carried out in response to a request from the Lord Chancellor dated 31 January 2002.¹ Comments may be sent to:

David Willink
Civil Law Development Division
Lord Chancellor's Department
Southside
105 Victoria Street
London SW1E 6QT

email: david.willink@lcdhq.gsi.gov.uk

It would be helpful if, where possible, comments could be sent by email or email attachment, in any commonly used format.

© **Crown copyright 2002**

¹ The first study, *Aspects of Defamation Procedure*, was published in May 2002, and is available on the Internet at: <http://www.lawcom.gov.uk>.

THE LAW COMMISSION

DEFAMATION AND THE INTERNET: A PRELIMINARY INVESTIGATION

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
PART I: INTRODUCTION		1
The issues	1.4	1
ISP liability for other people's material	1.5	1
The limitation period and online archives	1.6	2
Jurisdiction issues	1.8	2
Contempt of court	1.10	2
Summary of conclusions	1.11	2
Liability of internet service providers	1.12	2
Archives and the limitation period	1.14	3
Jurisdiction and applicable law	1.15	3
Contempt of court	1.18	4
PART II: LIABILITY OF INTERNET SERVICE PROVIDERS		5
Introduction	2.1	5
ISP liability: current law	2.6	6
An illustration: the <i>Godfrey</i> case	2.6	6
The Electronic Commerce Regulations	2.10	7
Consultees' views	2.27	11
Freedom of expression and the protection of reputation	2.36	13
Possibilities for reform	2.48	16
ISP immunity in the USA	2.49	16
Reforming the Defamation Act 1996, section 1	2.55	18
Notice and take-down procedures	2.61	19
Conclusion	2.65	19
PART III: LIABILITY FOR ONLINE ARCHIVES		21
The <i>Loutchansky</i> case	3.3	21
The limitation point	3.5	21
The privilege point	3.8	22
The debate surrounding the limitation period	3.10	23
The single publication rule	3.17	24
Conclusion	3.23	26

	<i>Paragraph</i>	<i>Page</i>
PART IV: JURISDICTION AND APPLICABLE LAW		27
Introduction	4.1	27
Complexity	4.4	27
Moves towards reform	4.7	28
Jurisdiction and applicable law: the traditional rules	4.9	29
Jurisdiction issues within the EU	4.10	29
Jurisdiction issues outside the EU	4.13	29
Striking out for abuse of process	4.19	31
Criticisms made of the traditional rules	4.21	32
Three criticisms	4.21	32
An intractable problem	4.25	33
A single publication rule: views for and against	4.31	34
Recent reforms	4.36	35
The Electronic Commerce Regulations	4.37	35
Draft proposal on non-contractual obligations	4.50	38
Conclusion	4.53	39
 PART V: CONTEMPT OF COURT: ONLINE SEARCHES FOR PAST CONVICTIONS AND FOREIGN COMMENTARY		 40
Introduction	5.1	40
Contempt of court: current law	5.7	41
The strict liability offence	5.7	41
Factors to be considered	5.9	41
Safeguards and defences	5.11	42
Consultees' views	5.23	45
Conclusion	5.25	45
 PART VI: LIST OF CONCLUSIONS		 47
ISP liability for other people's material	6.1	47
Archives and the limitation period	6.3	47
Jurisdiction and applicable law	6.4	47
Contempt of court	6.6	47
 APPENDIX A: QUESTIONNAIRE		 48
 APPENDIX B: LIST OF RESPONDENTS		 52

PART I

INTRODUCTION

- 1.1 On 31 January 2002, the Lord Chancellor's Department asked the Law Commission to undertake two separate studies into aspects of defamation law. The first, a scoping study into perceived abuses of defamation procedure, was published in May 2002.¹ In this second paper we investigate potential problems with the way the law of defamation and contempt of court affects internet communications.
- 1.2 We would stress that this paper is no more than a preliminary investigation to clarify the issues. We were asked to provide preliminary advice to Government on whether the existing law causes difficulties for online publishers, internet service providers, their customers or others, with a view to informing possible further work.
- 1.3 In February 2002 we sent a questionnaire to 31 interested parties, including online publishers, internet service providers, barristers and solicitors.² We received 11 responses.³ Most were detailed. All were helpful. They gave us a valuable insight into the issues that were causing concern and how they might be addressed. We subsequently met four internet service provider organisations to find out more about the volume and nature of the defamation complaints they received. We are extremely grateful to all those who responded to the questionnaire and who replied to our subsequent questions.

THE ISSUES

- 1.4 The responses highlighted four areas of concern: the liability of internet service providers (ISPs) for other people's material; the application of the limitation period to online archives; the exposure of internet publishers to liability in other jurisdictions; and the risk of prosecution for contempt of court. We discuss them in Parts II to IV, with a summary in paragraphs 1.5-1.19 below.

ISP liability for other people's material

- 1.5 ISPs frequently receive complaints that material on websites and newsgroups is defamatory. We were told that some ISPs receive over a hundred complaints each year. Particular concerns were expressed about the number of solicitors' letters sent on behalf of companies complaining about websites set up by their disgruntled customers. Under the present law, the safest course is for the ISP to remove such material, whether or not the alleged defamatory material is in the public interest or true.

¹ Law Commission, *Aspects of Defamation Procedure: A Scoping Study*, May 2002.

² A copy of the questionnaire forms Appendix A.

³ A list of respondents appears in Appendix B.

The limitation period and online archives

- 1.6 Almost all regional and national newspapers now have an online presence, and most are routinely archived online. There are problems in the way in which the limitation period applies to such archives. The standard English rule is that a cause of action accrues each time a libel is disseminated. Thus the limitation period runs from each occasion on which a “hit” is made on a website. This means that where a newspaper is placed in an online archive, a libel action may be brought many years after its original publication, when it is difficult to mount an effective defence.
- 1.7 In theory, a claimant could sue a traditional library archive, though in practice this appears to be extremely rare. The greater availability and prominence of online archives has led to recent litigation and has brought the matter to public attention. Even though any damages arising from archive publications are likely to be small, many publishers were concerned about the cost and difficulties of defending cases brought many years after original publication.

Jurisdiction issues

- 1.8 Until recently, the parties to jurisdiction disputes tended to be sophisticated, international celebrities, publishers or businessmen. With the growth of the internet, everyone now has the possibility of communicating internationally, as material placed on the world wide web may be accessed in any country in the world. People with little knowledge of foreign laws are faced with a wide range of potential liabilities.
- 1.9 We received complaints that the need to comply with the law of each country in which a website may be accessed imposed unacceptable levels of legal risk on internet publishers. There was a demand for greater levels of certainty and clarity over which laws should be applied to online publishers and their intermediaries.

Contempt of court

- 1.10 Publishers feared that articles on their sites may be held to be in contempt of court, even though they were unaware of the trial, or the potential effect of the article on the trial. Concern centred around the fact that local, regional or national newspaper archives may contain records of a defendant’s previous convictions or acquittals, which jurors could research during a trial.

SUMMARY OF CONCLUSIONS

- 1.11 The purpose of this preliminary investigation is to highlight areas that require further consideration. Our main conclusions are summarised below.

Liability of internet service providers

- 1.12 There is a strong case for reviewing the way that defamation law impacts on internet service providers. While actions against primary publishers are usually decided on their merits, the current law places secondary publishers under some pressure to remove material without considering whether it is in the public

interest, or whether it is true. These pressures appear to bear particularly harshly on ISPs, whom claimants often see as “tactical targets”. There is a possible conflict between the pressure to remove material, even if true, and the emphasis placed upon freedom of expression under the European Convention of Human Rights. Although it is a legitimate goal of the law to protect the reputation of others, it is important to ask whether this goal can be achieved through other means.

- 1.13 Several reforms have been suggested that require further examination. One possibility is to exempt ISPs from liability completely, as in the USA. Another is to consider possible extensions to the innocent dissemination defence, as set out in section 1 of the Defamation Act 1996. If this defence were extended, the legislation would need to be accompanied by clearer guidance to ISPs on how to deal with the practicalities of receiving and responding to complaints, possibly through an industry code.

Archives and the limitation period

- 1.14 We recommend a review of the way in which each download from an online archive gives rise to a fresh cause of action, and causes the limitation period to begin anew. We have argued previously that the present limitation period of one year may cause hardship to claimants, who have little time to prepare a case.⁴ However, it is potentially unfair to defendants to allow actions to be brought against archive-holders many years after the original publication. After a lapse of time, it may be difficult to mount an effective defence, because records and witnesses are no longer available. Online archives have a social utility, and it would not be desirable to hinder their development.

Jurisdiction and applicable law

- 1.15 The law in this area has always been complex, and attempts within the EU to create greater legal certainty have added new ambiguities. There are no easy answers. Potential defendants argued strongly that they should only be subject to the defamation laws of their own jurisdiction, which they knew and understood. Claimant representatives, on the other hand, argued - with equal force - that claimants should be able to claim in the country in which the damage to their reputation has taken place, according to the norms and customs of that jurisdiction.
- 1.16 Although we have some sympathy with the concerns expressed about “unacceptable levels of global risks”, any solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation. We do not think that the problem can be solved within the short to medium term. We do not therefore recommend reform in this area at the present time.

⁴ Limitation of Actions, Law Com No 270, paras 4.39-4.44.

- 1.17 There is a lack of readily accessible information about how the law of defamation impacts on the internet in other jurisdictions, to the detriment of both policy makers and practitioners. The Government could usefully sponsor research on the how other countries deal with this issue.

Contempt of court

- 1.18 We accept that it is not practically possible to monitor all criminal trials in the country and subsequently remove from internet archives any potentially prejudicial material. Jurors cannot be prevented from using the internet to search for detrimental material on criminal defendants if they are determined to do so.
- 1.19 However, the criminal justice system places trust in the good sense of jurors to decide cases on the evidence before them. Although in theory it is possible that contempt of court law could be applied inappropriately to an “unwitting” defendant, we think that there are already sufficient safeguards in the existing law to ensure that internet publishers are protected against inappropriate, arbitrary or trivial prosecution. We do not consider this area to be a priority for law reform.

PART II

LIABILITY OF INTERNET SERVICE PROVIDERS

INTRODUCTION

- 2.1 Internet service providers (ISPs) may offer a range of services to their customers, including e-mail accounts, website hosting, and newsgroups. They may also provide content, such as online magazines. Here we are concerned with those services in which the ISP does not exert editorial control over the material. The material is provided by their customer, or someone who wishes to communicate with their customer, without being read or moderated by the ISP themselves. However, the ISP does more than merely provide a communication network through which a message is sent.¹ Liability may arise if the ISP exercises some discretion over how long material is stored or has the power to remove material (as with newsgroups or websites).
- 2.2 In defamation law, ISPs in these circumstances would be considered “secondary publishers”. Although this term does not appear in the legislation, it is commonly used to describe those involved in disseminating a defamatory statement, other than the author, editor and commercial publisher.²
- 2.3 Under section 1(1) of the Defamation Act 1996, a secondary publisher is given a defence if:
- (b) he took reasonable care in relation to its publication; and
 - (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

The section builds upon the common law defence of “innocent dissemination”, and it is still often referred to by that name.

- 2.4 In our May 2002 scoping study we noted that the section 1 defence may cause problems, and that it raised issues that should be examined further.³ The defence is narrow. It applies only to those who are unaware that the publication contained

¹ See the definitions of “mere conduits” and “caching” in paras 2.12-2.15, below.

² Under the Defamation Act 1996, section 1(1) is available to those who are not the author, editor or publisher of the statement. Section 1(2) defines the terms author, editor and publisher. A “publisher” for the purposes of this section means a “commercial publisher” whose “business is issuing material to the public, or a section of the public” and who issues the material containing the statement “in the course of that business”. Section 1(3) sets out categories of those who are not to be taken as authors, editors or publishers. This includes those who are only involved “as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has not effective control”(s 1(3)(e)).

³ Aspects of Defamation Procedure: A Scoping Study, May 2002, para 5.

a statement with a defamatory meaning, in the sense that it would make reasonable people think worse of the claimant. There is no defence for secondary publishers who genuinely but mistakenly believe that the material is true, privileged or fair comment. Our previous study found that when a secondary publisher is put on notice that material is defamatory, they face a difficult choice.⁴ The safest option is usually to remove the material forthwith, even if it appears to be true. Alternatively, they may find themselves defending lengthy libel proceedings, on the basis of (potentially worthless) assurances or indemnities from the primary publishers.

- 2.5 We start with the current law. The case of *Godfrey v Demon Internet Ltd*⁵ provides a useful illustration of how the Defamation Act 1996 applies in practice. A recently implemented EU Directive sets limitations on the liability of ISPs for a range of issues, including defamation. We then discuss the main criticisms of the current legal position, and consider the human rights implications, before indicating possible ways forward.

ISP LIABILITY: CURRENT LAW

An illustration: the *Godfrey* case

- 2.6 *Godfrey v Demon Internet Ltd* concerned a posting to a “newsgroup” on Thai culture, which was distributed to Usenet subscribers. Like other newsgroups, it operated as a discussion forum, allowing subscribers to contribute to the discussion and to read other people’s contributions. An unnamed USA resident posted a contribution purporting to come from the claimant, which the judge described as “squalid, obscene and defamatory”.⁶ The author sent the contribution to their own American ISP. From there, the posting was (as the judge put it) “distributed and stored on the news services of every (or nearly every) ISP in the world that offers Usenet facilities to its customers”. The claimant dialled up his own British-based ISP, Demon Internet, who transmitted the offending material to him.
- 2.7 On hearing of the posting, Dr Godfrey sent a fax to Demon Internet, informing them that the posting was a forgery, and asking them to remove it. They failed to do this, and the posting was left on the site for a further 10 days. When sued for libel, the defendants sought to establish that they were not responsible for the posting, but had a purely passive role, similar to that of a telephone company. The High Court gave short shrift to this argument. In a preliminary hearing, Morland J held that the ISP was in the same position as other secondary publishers, such as bookshops, libraries or magazine wholesalers. The defendants had chosen whether to store the material and for how long to store it. They could not be said, therefore, to have played only a passive role.

⁴ *Ibid*, para 32.

⁵ [1999] 4 All ER 342.

⁶ *Ibid*, at p 345.

- 2.8 Once Demon Internet had been informed of the defamatory nature of the posting, they could no longer avail themselves of the section 1 defence. In the absence of any other defence (such as justification or privilege) they were liable, although Morland J commented that “any award of damages to the Plaintiff is likely to be very small”.⁷ The defendants subsequently settled for undisclosed damages.
- 2.9 The case does not establish new law, but it does provide an illustration of the limitations of the section 1 defence, once the defamatory nature of the statement has been brought to the defendant’s attention. It does not deal with the question of “reasonable care” in relation to an internet publication, and at present there is little case law on this point.

The Electronic Commerce Regulations

- 2.10 Since August 2002, section 1 must be read subject to the Electronic Commerce (EC Directive) Regulations 2002. These implement an EU directive agreed in June 2000,⁸ designed to limit the liability of ISPs on a range of legal issues, including defamation, obscenity and copyright. The Regulations were laid before Parliament on 31 July 2002, and came into effect on 21 August 2002. It is difficult yet to be sure of their precise effect.
- 2.11 The Regulations follow the directive in distinguishing between three types of internet provision: acting as a “**mere conduit**”; “**caching**”; and “**hosting**”.

Mere conduits

- 2.12 “Mere conduits” are essentially no more than telephonic networks. They must not “initiate the transmission”, “select the receiver of the transmission”; or “select or modify the information”. Furthermore, the information must not be “stored for any period longer than is reasonably necessary for the transmission”.⁹ This would, for example, exclude websites, Usenet or web-based email, all of which are stored by the ISP.
- 2.13 A service provider who falls within the definition of a “mere conduit” is given immunity. Regulation 17 states that the service provider “shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission”.

Caching

- 2.14 “Caching” is a technical term for the process by which ISPs store information temporarily in order to allow the internet to work better. Matthew Collins explains that “ISPs frequently ‘cache’, or temporarily store, commonly accessed

⁷ *Ibid*, at p 352.

⁸ Directive 2000/31/EC of 8 June 2000.

⁹ The Electronic Commerce (EC Directive) Regulations 2002, reg 17 (1) and (2), adopting the wording of the E-Commerce Directive, art 12.

web pages on their computer systems, so that those pages will be more quickly accessible to their subscribers”.¹⁰ Regulation 18 describes the process as “the automatic, intermediate and temporary storage” of information, “for the sole purpose of making more efficient onward transmission of the information to other recipients... upon their request”.¹¹

- 2.15 The Regulations again provide immunity from liability. However, a court or administrative authority may order that the ISP removes the material. Furthermore, the immunity is lost if the ISP fails to “act expeditiously to remove or disable access to information” where they have actual knowledge that the initial source has been removed or that a court has ordered its removal.¹²

Hosting

- 2.16 Where an ISP stores information provided by a recipient of the service, this is treated as “hosting”.¹³ The term is wide. It obviously covers those who store web pages. Collins suggests that it may cover web-based email services such as Hotmail or AOL, where messages are stored, and can be accessed by the subscriber anywhere in the world.¹⁴ It could also cover the Usenet service, that was the subject of litigation in *Godfrey v Demon Internet*. The evidence was that Demon generally stored the information for around a fortnight, after which they removed it from their servers. Although the case preceded the Directive, the discretionary storage of information in this way would be nearer to “hosting” rather than “caching” within the meaning of the Directive.

- 2.17 Article 14 grants immunity to ISPs who host sites on condition that:

The provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent.¹⁵

Once a service provider obtains such information, they will lose the immunity unless they act “expeditiously to remove or to disable access to the information”.¹⁶

- 2.18 There has been some debate on how far this test differs from the test under section 1 of the Defamation Act 1996. One view is that article 14 mirrors section 1 by providing that once an ISP is aware that material is defamatory and fails to

¹⁰ M Collins, *The Law of Defamation and the Internet* (2001), p 215-6.

¹¹ This largely follows the wording of the E-Commerce Directive, art 13.

¹² The Electronic Commerce (EC Directive) Regulations 2002, reg 18(b)(v).

¹³ Reg 19, implementing the E-Commerce Directive, art 14.

¹⁴ M Collins, *The Law of Defamation and the Internet* (2001), p 213.

¹⁵ Art 14(1)(a).

¹⁶ Art 14(1)(b).

act, the protection is lost.¹⁷ The other view is that it may provide wider protection: it is not enough for the ISP merely to know that the material is defamatory. They would also need to know that it was “illegal” (or at least be aware of facts and circumstances from which the illegal activity was apparent). On this basis, the ISP would need to know that the material was not only defamatory but also libellous (i.e. that the potential defences of justification, fair comment or privilege were not available).¹⁸

2.19 When the Department of Trade and Industry (DTI) consulted on implementing the Directive, the “host exemption” drew considerable comment, with over fifty responses received. The DTI commented that “most wanted more clarity and definition - particularly on what would constitute ‘actual knowledge’ or awareness”.¹⁹

2.20 Despite the demand for clarity, the Regulations stay close to the wording of the Directive. Regulation 19 states that immunity is lost if the service provider has:

actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful.²⁰

2.21 This fails to give further guidance on whether knowledge of the “unlawful activity” consists only of knowledge of the issues that the claimant must prove (primarily the defamatory nature of the publication), or whether it also includes knowledge about the absence of possible defences.

2.22 In order to resolve this question, one needs to ask what constitutes an “unlawful activity” in defamation law. Under current English law, it is *prima facie* unlawful to publish a defamatory statement that refers to the claimant (though in some circumstances it may be open to a defendant to prove a defence, such as truth). On this basis, it would seem that an ISP has “actual knowledge of unlawful activity” as soon as they become aware that a publication has taken place that would make reasonable people think less well of a third party. The provider does not need to be aware that the material is false.

2.23 If this view is correct, then regulation 19, like section 1 of the Defamation Act 1996, fails to provide a defence to any ISP who has been notified that a statement bears a defamatory meaning.

¹⁷ See M Collins, *The Law of Defamation and the Internet* (2001), p 217.

¹⁸ See N Shanmuganathan, “Libel online: an update”, (2002) *NLJ* 1040.

¹⁹ DTI Consultation on Implementation of the Directive on Electronic Commerce (2000/31/EC): Summary of responses 2002.

²⁰ The Electronic Commerce (EC Directive) Regulations 2002, reg 19(a)(i).

Internet providers outside the scope of the Directive

- 2.24 The E-Commerce Directive is far from comprehensive. Many services would appear to fall outside its provisions. The Internet Service Providers Association (ISPA) expressed concern, for example, about the status of providers of hyperlinks and location tools. David Price has drawn attention to the nineteenth century case of *Hird v Wood*,²¹ in which a defamatory placard was placed at the side of the road. Although no evidence was available about who had erected the placard, the defendant sat by it all day, smoking his pipe and attracting the attention of passers-by by pointing at it. The Court of Appeal found that this was evidence of publication. By analogy, it could be argued that a hyperlink which “points” to a defamatory statement would amount to secondary publication. The person responsible for placing the link may be able to take advantage of the section 1 defence, but is not granted any additional immunities under the Directive or subsequent Regulations.
- 2.25 Nor does the Directive apply to those who “aggregate” information, by selecting and compiling information from other sources. An example would be Factiva.com, a Dow Jones and Reuters company, which provides its users with global news and business information. The content is derived from around 8,000 sources, including newspapers, magazines, and company reports. The service differs from its hard-copy equivalent in the scale of its operations, with over two million items placed on the website per month. In the course of consultation, Reuters expressed concern that the speed of operation made it virtually impossible for them to check the content of each item before it is placed on the site. They said that they were only able to exercise control once a complaint had been received.
- 2.26 A court would need to decide whether aggregating information in this way should be categorised as primary or secondary publishing. The Defamation Act 1996 defines as a primary publisher “a person whose business is issuing material to the public” and who issues the material “in the course of that business”.²² However, those who are only involved in “processing, making copies of, distributing or selling any electronic medium in which the statement is recorded” are defined as secondary publishers.²³ The key issue is therefore whether an aggregator is “issuing material” or “distributing a medium”. Those who select individual articles and extracts would appear to come nearer to selling material than a medium. If this view is correct, aggregators such as Dow Jones and Reuters would be considered primary rather than secondary publishers. They would therefore be directly liable for the content they distributed, whether or not they were aware that it was defamatory. Neither the innocent dissemination defence nor the Directive immunities would be available to them.

²¹ (1894) 38 SJ 234. See also D Price, *Defamation: Law Procedure and Practice* (2nd ed 2001), p 372.

²² Defamation Act 1996, s 1(2).

²³ Defamation Act 1996, s 1(3)(c).

CONSULTEES' VIEWS

2.27 Problems with secondary publication are by no means confined to the internet. Those involved in distributing traditional “paper-based” material have also complained about the limited nature of the innocent dissemination defence. As the Booksellers Association of Great Britain and Ireland put it, the provisions of section 1:

have encouraged plaintiffs or prospective plaintiffs with dubious claims who are unwilling to commence proceedings against the author or publisher of the allegedly defamatory publications to take or threaten action against booksellers to force them to remove such publications from their shelves. As those plaintiffs and their legal advisers clearly realise, booksellers are not in position to put forward a substantive defence of justification because they have no direct knowledge of the subject-matter of the alleged libel.²⁴

2.28 On the other hand, several consultees argued that the problems with section 1 are much more widespread and serious in internet publishing than in traditional publishing. The internet allows relatively penniless individuals and small groups to reach a much wider audience. In paper-based publishing, the claimant usually has the option of proceeding against a well-resourced newspaper or book publisher. In internet publishing, the ISP is often the easiest defendant to locate, and may be the only one with the money to pay damages. As one consultee put it, ISPs are “very much seen as tactical targets”. This, coupled with the sheer volume of internet communications, means that ISPs receive frequent complaints. In reply to the DTI consultation, two providers (Thus and Verizon) described receiving daily complaints about material on their servers, “some of them computer-generated and many turning out to be malicious or false”.²⁵ Another major provider told us that they received around ten complaints a month.

2.29 We were told that complaints fall into several different categories. Some concerned newsgroups. These often involve disputes between people who know each other, and tend to focus on relatively minor and ephemeral communications. Others are about websites. One ISP described regularly receiving solicitors’ letters on behalf of companies objecting to sites set up by disgruntled customers. Such sites need not be offensive or unreasonable: they often recounted personal experiences that may well be true. However, when faced with a solicitor’s letter sent on behalf of a well-resourced company, the ISP said that they would almost invariably remove the site rather than risk litigation. It was also suggested that campaigning groups might be particularly vulnerable to having their website removed: one ISP cited the example of an Anti-Nazi group. However, this is based on impression rather than hard evidence. At

²⁴ Memorandum sent in response to our consultation on Aspects of Defamation Procedure, February 2002.

²⁵ DTI Summary of responses (above), para 49.

present it is difficult to quantify the extent to which websites are removed following defamation complaints, or the types of parties involved.

- 2.30 ISPs told us that once they were aware that a website contained a defamatory statement, their common practice was to remove the whole site. Technically, it may be possible to remove only the page containing the statement, but the customer could respond by reinstating the material. The ISP would then run the risk of being found liable on the grounds that they had failed to take reasonable care. The preferred course was to remove the whole site, and only reinstate it once the customer had given a written undertaking not to repeat the defamatory statement.
- 2.31 The industry made three criticisms of the current position. The first was that receiving and reacting to defamation complaints was “costly and burdensome”. The first problem was to identify a defamation notification amidst the mass of communications an ISP received. Once a complaint had been identified, it needed to be acted upon quickly. This could be difficult: even in a straightforward case, it might be time-consuming to identify the material correctly. A further complication was that the original posting may have been referred to or copied in other postings, so that several separate items had to be removed. ISPs also felt that they were operating within a climate of legal uncertainty and risk, and there were frequent calls for the necessary procedure to be clarified.
- 2.32 Secondly, the industry felt uncomfortable about censoring material that may not in fact be libellous. The author may have a defence of privilege, justification or fair comment. Although these would also - in theory - be available to the ISP, ISPs were reluctant to “play judge and jury” by deciding on the merit or truth of the allegations. Furthermore, the practical difficulties and expense in putting forward such defences means that they are rarely a practical option. Some fears were expressed that by automatically taking down the material, the ISP could be faced with a claim from the author of the content in question, on the grounds of breach of contract, coupled with interference with the author’s freedom of expression. ISPs felt they were being forced to impose restrictive terms and conditions on their customers to prevent counterclaims for removal of material or the suspension of websites.
- 2.33 Finally, it was suggested that customers may be attracted to US providers, who had greater protection against being held liable for defamation, and could therefore offer their customers more attractive terms. The US approach is summarised below,²⁶ and the rules of jurisdiction are discussed in Part III. Under present rules, an English court has jurisdiction to find that an internet service provider based in the US was liable for damage caused by the publication of a defamatory statement in England and Wales. The advantage enjoyed by American ISPs lies not in jurisdiction rules but in the difficulties of enforcing judgments against them. As David Price comments, the American courts “have

²⁶ paras 2.49-2.54.

been unwilling to enforce English judgments which are said to be contrary to the guarantees of freedom of speech contained in the United States' constitution".²⁷

- 2.34 For example, in *Telnikoff v Matusевич*, the House of Lords held that a letter to a newspaper should be read as a stand-alone item, rather than in the context of a previous article.²⁸ On this basis, the defendant's fair comment defence was rejected, and the claimant was awarded substantial damages. The defendant then moved to the USA. When the claimant sought to enforce the judgment in the District of Columbia, the district court re-opened the original issue. The judge found that the words did amount to fair comment and refused to enforce the judgment.²⁹
- 2.35 In the light of the strong approach US courts take to free speech, it was argued that it may be difficult for a claimant to enforce an English defamation judgment against an ISP whose only assets were to be found the USA.

FREEDOM OF EXPRESSION AND THE PROTECTION OF REPUTATION

- 2.36 We have considered briefly the implications of the European Convention of Human Rights (ECHR) for this area of law. Freedom of expression, as enshrined in Article 10, is often said to be "one of the essential foundations of a democratic society and one of the basic conditions for its progress".³⁰ Internet users have the right "to receive and impart information and ideas".³¹ Although article 10(2) allows domestic states to impose restrictions "for the protection for the reputation or rights of others",³² exceptions must be narrowly interpreted.³³ They must be prescribed by law and necessary in a democratic society. "Necessary" has been taken to mean that there must be both a pressing social need for the requirement, and the requirement must be proportionate, relevant and sufficient to meet the need.³⁴
- 2.37 Different forms of expression have been accorded different levels of protection. The European Court of Human Rights' jurisprudence on article 10 has centred around the freedom of expression of the press, artistic expression or political expression. Much of the material in newsgroups, and some of the material in websites, will fall outside these protected categories. However, some websites may provide important information, in which the public has a legitimate interest. The information may be well-researched. It may be true.

²⁷ D Price, *Defamation: Law, Procedure and Practice* (2nd ed 2001), p 263.

²⁸ [1992] 2 AC 343.

²⁹ (1997) 347 MD 561.

³⁰ *Handyside v United Kingdom* (1979-80) 1 EHRR 737, 754.

³¹ Art 10(1).

³² Art 10(2).

³³ *Observer & Guardian v United Kingdom* 14 EHRR 153.

³⁴ *Sunday Times v United Kingdom (No 2)* 14 EHRR 229, 234.

- 2.38 Under defamation law, the author or primary publisher have several available defences. The law accepts that in some circumstances it may be in the public interest for a statement to be published, even if its truth cannot be proved. In *Reynolds v Times Newspapers*,³⁵ the House of Lords developed the common law defence of qualified privilege to give protection to a newspaper article that implied that the former Prime Minister of Eire had lied. Lord Nicholls set out ten factors that needed to be taken into account, including the extent to which information was a matter of public concern, and the reliability of the source of the information. It is important for the defendant to show that they abided by high journalistic standards, to verify the information, seek the claimant's comments and include the gist of the claimant's side of the story. The tone should also be moderate. As Lord Nicholls put it, "a newspaper can raise questions or call for an investigation. It need not adopt allegations as statements of fact".³⁶
- 2.39 Take the case of a small campaigning group that alleged that a multinational corporation polluted the environment. The subject matter may well be a matter of public concern. The group may also be able to show that the allegation was well researched, relying on reliable sources and verifying the allegation. However, an ISP would be unlikely to trust that they had done this. Furthermore, as we emphasised in our recent consultation paper on the publication of local authority reports, the *Reynolds* test is not easy to apply to other contexts.³⁷ The case concerned the freedom of the press and set out standards of investigative reporting that may not translate to other forms of expression. An internet service provider would be unlikely to welcome the prospect of an appeal to the House of Lords to resolve how the *Reynolds* test applies to campaigning websites.
- 2.40 The group may also be prepared to claim justification (namely that the statements are true). However, an ISP would have neither the means nor the inclination to prove each and every detailed allegation, which may involve lengthy, technical and contested proceedings.
- 2.41 The crux of the problem is that the present law results in internet service providers removing material that may be in the public interest and well-researched. They may also remove material that is true. This should only be done if there is a pressing social need to do so, and the removal of the material is the only way of meeting that need.
- 2.42 There is a much greater problem with removing true material when actions are brought against secondary publishers than when they are brought against primary publishers. Our previous paper on Aspects of Defamation Procedure found that actions against primary publishers are usually defended and decided on their merits. Since the introduction of the Civil Justice Rules in 1999, there is

³⁵ [2001] 2 AC 127.

³⁶ *Ibid*, at p 205.

³⁷ Publication of Local Authority Reports (2002), Consultation Paper 163.

no evidence that letters or writs are commonly issued to “gag” legitimate publications.³⁸ Thus issues over freedom of expression apply to the law on secondary publication in a way that they do not apply to the law on primary publication.

- 2.43 Of course, under the present state of the law, ISPs are not compelled to remove material that is true. They could, if they wished, defend actions for defamation on the grounds of justification. However, convention rights must be “practical and effective”, rather than “theoretical or illusory”.³⁹ In practice, secondary publishers will be understandably reluctant to incur the costs, risks and difficulties of mounting such a defence. This can be a problem with traditional paper printing. Actions against secondary publishers may sometimes prevent legitimate expressions from reaching their audience, but relatively rarely. Commercial publishers are usually able to indemnify distributors and bookshops. With internet publishing, far more complaints are made to secondary publishers, who represent an important gateway to the medium. The problem becomes more pressing.
- 2.44 The ECHR cannot oblige any individual ISP to carry any particular material. However, where both sides are willing to transmit information, there is a duty on States to ensure that their laws do not interfere unnecessarily with the free flow of information. This should be born in mind in any review.
- 2.45 Once a website has been removed, authors with a defence to a defamation action may find other ways of putting their material into the public domain. One possibility, discussed earlier, might be to use an American-based ISP. Alternatively, larger or better resourced organisations might be able to host their own sites. However, neither of these possibilities eliminates the possible interference with freedom of expression. On the first point, a breach of the ECHR is not removed by the refusal of a foreign jurisdiction to enforce English court judgments. On the second, it leaves smaller and less well-resourced groups and individuals unable to exercise the same freedom of expression as larger organisations.
- 2.46 Finally, we note that any restriction on freedom of expression must be “prescribed by law”. This has a practical as well as a formal element. As the Court put it in the *Wingrove* case,⁴⁰ the law must be:

formulated with sufficient precision to enable those concerned - if need be, with appropriate legal advice - to foresee, to a degree that is

³⁸ Law Commission, *Aspects of Defamation Procedure: A Scoping Study*, May 2002, paras 6-15.

³⁹ *Artico v Italy* 3 EHRR 1, 13.

⁴⁰ *Wingrove v United Kingdom* 24 EHRR 1.

reasonable in the circumstances, the consequences which a given action may entail.⁴¹

It is therefore important that the law and procedure in this area are clear and transparent. Both industry and consumer demands for clarity should be treated seriously.

- 2.47 To conclude, it would appear that the practical application of defamation law to secondary publishers in general - and to ISPs in particular - bears more harshly on freedom of expression than its application to primary publishers. It is important to consider whether there are alternative ways of protecting the reputation and others without encouraging the removal of true material. In conducting such a review, one should look at the practical effect of the law (as well as its formal element) and attempt to ensure that its application is reasonably certain.

POSSIBILITIES FOR REFORM

- 2.48 Most of those replying to our consultation considered the present situation unsatisfactory, and in need of reform. There was no shortage of ideas. Many different reforms were called for, including extending ISP immunity (as in the USA), reforming section 1 of the Defamation Act 1996, or introducing codes of practice for ISPs to follow, either voluntarily or with statutory backing. We consider each in turn.

ISP immunity in the USA

- 2.49 In the United States of America, federal law provides ISPs with extensive immunity. The matter generated concern after the 1995 case, *Stratton Oakmont, Inc v Prodigy Services Company*,⁴² in which an ISP was held liable for defamatory remarks posted on a bulletin board. Prodigy had promoted themselves as a different sort of ISP and had claimed that they would exercise editorial control over messages on bulletin boards. Prodigy used “Board Leaders” to enforce the content guidelines, and provided them with an “emergency delete” function to control content. In view of this, the New York Supreme Court found that Prodigy was a publisher rather than a distributor, and was therefore liable for the content in the same way as a newspaper publisher.
- 2.50 Deturbide notes that this decision “left many ISPs uncomfortable”.⁴³ The US Congress was urged to counter the decision through legislation. As a result a section was added to the Communications Decency Act of 1996 (an Act primarily about prohibitions on obscene material). Section 230(c)(1) states that:

⁴¹ *Ibid*, para 40.

⁴² [1995] WL 323710 (NY Sup Ct, 1995).

⁴³ Michael Deturbide, “Liability of Internet Service Providers for Defamation in the US and Britain: Same Competing Interests, Different Responses” [2000] 3 *Journal of Information Law and Technology*. See also M Collins, *The Law of Defamation and the Internet* (2001), pp 370-384.

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Further provisions stated that no actions taken by providers or users in good faith to restrict access to objectionable material on the internet should give rise to liability.⁴⁴

- 2.51 Section 230(c)(1) could be interpreted in several ways. On the face of it, it would only appear to apply to an ISP's liability as a publisher or speaker. An ISP could still be held liable as a distributor if, for example, they had knowingly disseminated a libel, or had failed to take reasonable care. This, however, was not the interpretation given to it in *Zeran v America Online*.⁴⁵ Here, the Court of Appeals held that in defamation law a distributor was merely a type of publisher. The immunity for publishers granted in section 230(c) also extended to distributors.
- 2.52 In *Zeran* the claimant had suffered real damage. A hoaxer advertised T-shirts bearing offensive slogans about the Oklahoma City bombing and invited readers to call Zeran's phone number to purchase the items. Zeran, who used his phone number to operate a business from home, was inundated with hostile calls and death threats, and eventually required protective police surveillance. He contacted AOL to tell them that the original "advertisement" was a hoax, and the first item was removed. However, the message reappeared several times and, despite repeated complaints, the defendants were unable to stop further reappearances.
- 2.53 Under English law, the main issue would be whether AOL had acted expeditiously to remove material following complaints, and (once they were aware of the unlawful activity) whether they acted with reasonable care to prevent its repetition.⁴⁶ This was not the approach of the US court. Instead, it held that service providers had immunity "to any cause of action that would make service providers liable for information originating with third-party user of the service". This was needed "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum".⁴⁷ Freedom of expression was thought to be paramount.
- 2.54 Several consultees urged us to follow a similar course. However, the *Zeran* decision gives very little weight to the protection of reputation. Zeran suffered real harm. The implication is that even if the ISP had ignored his requests completely, they would have incurred no legal liability towards him.

⁴⁴ Communication Decency Act 1996, section 230(c)(2).

⁴⁵ 958 F Supp 1124 (ED va, 1997), affirmed 129 F 3d 327 (4th Cir 1997).

⁴⁶ The Electronic Commerce Regulations 2002, reg 19 requires that the ISP is aware of the facts and circumstances from which it is apparent that the activity is unlawful. Once this test is met, the Defamation Act 1996, s 1 imposes a requirement of reasonable care.

⁴⁷ *Zeran v America Online*, n.49 above, at p 330.

Reforming the Defamation Act 1996, section 1

- 2.55 An alternative approach would be to amend section 1 so as to extend the protection it affords to secondary publishers who believe that the material, although defamatory, was not libellous.
- 2.56 The protection could be extended in a number of different ways. In 1977, Lord Denning MR argued, in a dissenting judgment, that secondary publishers should have a defence unless they knew or ought to have known that the publication contained a libel that could not be justified or excused.⁴⁸ As he put it, “I should have thought it was for the plaintiff to prove this”.⁴⁹ On this basis, it may be possible, for example, to follow the approach of section 4(3) of the 1996 Act. This prevents a defendant from taking advantage of the offer of amends provisions if the claimant can show that the defendant knew or had reason to believe that the statement “was both false and defamatory”. The burden of proof is on the claimant.
- 2.57 The Booksellers Association proposed a slightly less radical change than Lord Denning’s formulation, and placed the burden of proof on the defendant. The Association suggested that a defendant should have a defence if he was able to show that “he had reasonable grounds for believing that there was a good defence to any action brought”.
- 2.58 If section 1 is to be changed, it will require legislation. Now that the innocent dissemination defence has been given statutory form, there is little scope for it to be re-interpreted in the way Lord Denning suggested. In *Godfrey v Demon Internet*, Morland J considered both the 1995 LCD consultation paper, and Lord Mackay’s parliamentary speeches. It is clear that the limitations of section 1 were intended by the Government of the time.
- 2.59 Support for extensions to section 1 was far from universal. As far as ISPs were concerned, their main criticism of the existing provisions was that they had to act as “judge and jury” in making difficult decisions over what to take down. In some ways, extending the section 1 defence would increase the difficulty of the decision. ISPA noted that the decision on whether material is defamatory is “subjective” and “often very difficult”. However, deciding whether something has a defamatory meaning is usually much easier than deciding whether it is true. In many cases, the defamatory meaning will be clear from a reading of the material. Deciding whether material is true, however, may involve detailed consideration of bulky and technical evidence.
- 2.60 From the claimant perspective, it was suggested that the law already provides sufficient protection. One solicitor’s firm acting regularly for claimants commented that “if the maintainer of a website chooses to retain offending

⁴⁸ *Goldsmith v Sperrings* [1977] 1 WLR 478.

⁴⁹ *Ibid*, at p 572.

material, after receipt of a complaint without qualifying the material... or removing it, they have only themselves to blame”.

Notice and take-down procedures

- 2.61 During the DTI consultation on ISP liability,⁵⁰ many organisations asked for clear-cut “notice and takedown” procedures. In our own consultation, several organisations made similar points. Such procedures were thought to be important under the existing law, and they would assume even greater prominence if section 1 of the Defamation Act were to be amended.
- 2.62 ISPA recommended that a code of practice should be developed, underpinned by statute. This would mean that ISPs who followed the procedures would be protected from liability. Codes would also provide those involved in the procedure with greater legal certainty. The owners of Demon Internet, Thus Plc, echoed this request, recommending that the industry, government and other interested parties should work together to devise a code of practice that would be fair to potential claimants, content providers and ISPs.
- 2.63 The most frequent demand was that the code of practice should contain guidance on what constitutes “notice”. ISPs reported that every day they receive large numbers of emails. It was difficult to train staff to recognise and deal with defamation complaints, especially if the complaint was worded unclearly, or failed to identify the site. The industry would welcome clarification on who is entitled to give such notice; what form it should be in; and what information it should contain.
- 2.64 A code of practice could also usefully contain guidance on seeking a response from the content provider. ISPA accepted that there would then need to be a procedure for “the resolution of disputes”, possibly including some form of independent adjudication. A firm that had acted for claimants asked that any code should also include provision for quick decisions, including ways of dealing with problems that arose out of normal working hours.

CONCLUSION

- 2.65 There is a strong case for reviewing the way that defamation law impacts on internet service providers. While actions against primary publishers are usually decided on their merits, the current law places pressure on secondary publishers to remove material without considering whether it is in the public interest, or whether it is true. These pressures appear to bear particularly harshly on ISPs, which are seen as tactical targets for those wishing to prevent the dissemination of material on the internet. There is a possible conflict between such pressure to remove material, even if true, and the emphasis placed upon freedom of expression under the European Convention of Human Rights. Although it is a

⁵⁰ DTI Consultation on Implementation of the Directive on Electronic Commerce (2000/31/EC): summary of responses 2002.

legitimate goal of the law to protect the reputation of others, it is important to ask whether this goal can be achieved through other means.

- 2.66 Several reforms have been suggested. It would not be appropriate, in a short project of this type, to reach a conclusion on the relative merits of the various proposals. One possibility would be to exempt ISPs from liability, as in the USA. Another is to extend the innocent dissemination defence, which could be done in a variety of ways. Any extension would need to be accompanied by clearer guidance to ISPs on how to deal with the practicalities of receiving and responding to complaints. Guidance could be provided through an industry code, negotiated with interested parties. There may also be a case for including some form of independent adjudication within such a code, so that the decision on whether material could be justified was taken out of the hands of ISPs.

PART III

LIABILITY FOR ONLINE ARCHIVES

- 3.1 It is now common for newspapers to make their back issues available to members of the public through an online archive. The Newspaper Society told us that 90% of regional newspapers have an online presence, and that they “are now routinely archived online”. Liability for archived material therefore generated considerable concern. The BBC stated that the questions we posed about online archives raise “some of the most important legal issues facing Internet publishers at the moment”.
- 3.2 Concern focused on the decision in *Loutchansky v The Times Newspapers*,¹ which reiterated the standard English rule that a cause of action accrues each time a libel is disseminated. It was feared that, where a newspaper was placed in an online archive, it would effectively remove the limitation period for bringing an action. We start by describing the case, and the criticisms made of it. We then consider views on the limitation period more generally, before discussing the most commonly advocated alternative to the English rule - namely the “single publication rule” used in the USA.

THE LOUTCHANSKY CASE

- 3.3 Dr Loutchansky, a Russian businessman, brought two actions for libel. The first concerned articles published in *The Times* in September and October 1999, which described him as a “suspected Mafia boss”, involved in money laundering and smuggling nuclear weapons. The defendants did not seek to justify the truth of the allegations, but put in a defence based on qualified privilege. Thereafter, the editions were placed in the online archive and continued to be available to the public. Anyone consulting the archive would have been unaware that the accuracy of the articles had been disputed or that the publishers did not seek to justify them. In December 2000, Dr Loutchansky brought a second action in respect of the online archive, which he started more than one year after the original articles had appeared.
- 3.4 The second action raised two issues relevant to the present discussion: the limitation period applicable to archives; and the nature of any privilege that should attach to them.

The limitation point

- 3.5 On the first issue, the Court of Appeal held that “it is a well established principle of the English law that each individual publication of a libel gives rise to a separate cause of action, subject to its own limitation period”. This follows a long line of authority, based on the nineteenth century case of *Duke of Brunswick v*

¹ [2002] 1 All ER 652.

Harmer.² Here the Duke's agent bought a back issue of a newspaper published 17 years earlier, which the court held constituted a separate publication, actionable in its own right. On this basis, each "hit" on an online archive effectively amounts to a republication, and the limitation period runs from the time the material was accessed.

- 3.6 *The Times* sought to argue that this would have a chilling effect on freedom of expression. They suggested that the English courts should instead follow the US example, by recognising a "single publication rule" in which a newspaper was said to be published only once, at the time of the original publication. The Court gave short-shrift to this argument and found no reason to introduce such a radical step. It held that although maintaining archives had "a social utility", it was "a comparatively insignificant aspect of freedom of expression".³ While permitting actions based on fresh disseminations of articles published long ago was "at odds with some of the reasons for the introduction of a 12 month limitation period", any resulting damages were "likely to be modest".⁴
- 3.7 The BBC, Press Association, Newspaper Society and others criticised this decision on the grounds that it would effectively remove the limitation period for newspapers placed in an archive. The BBC argued that by bringing an action in respect of the online archive, rather than the original publication, claimants could pursue actions many years after the article had been written. As memories fade and notes are destroyed, defendants will become incapable of mounting an effective defence.

The privilege point

- 3.8 The second issue was the privilege attaching to the online edition. The Court of Appeal held that once *The Times* had become aware of the criticisms of the article (and had not sought to justify them), they should have drawn readers' attention to the fact that the truth of the articles was hotly contested. To republish the same material without any qualification "could not possibly be described as responsible journalism",⁵ and *The Times* had lost any privilege attaching to the original articles.
- 3.9 Although two consultees expressed doubts about this decision,⁶ the issue was of less immediate concern. The question arises only once the defendant becomes aware that the original article was false, usually because they have been contacted by the claimant. The Court of Appeal did not state that an offending article had

² [1849] 14 QB 185. The principle was upheld by the House of Lords in *Berezovsky v Michaels* [2000] 1WLR 1004.

³ *Loutchansky v The Times Newspapers* [2002] 1 All ER 652, 676.

⁴ *Ibid.*

⁵ *Ibid.*, at p 677.

⁶ The BBC and the US-based Libel Defense Resource Center.

to be removed from the records - simply that a warning should be attached to it. Several claimant lawyers argued that this would be reasonably easy to do.

THE DEBATE SURROUNDING THE LIMITATION PERIOD

3.10 The limitation period in defamation claims has generated considerable debate. It has been reduced twice in the last twenty years. In 1985, it was reduced from six years to three years.⁷ The Defamation Act 1996 then made a further reduction, from three years to one. This was coupled with a wide discretion for the court to disapply the limit where it appears “equitable to allow an action to proceed”.⁸ The 1996 Act implemented the recommendation of the Neill Committee, which had drawn attention to the difficulties defendants faced in defending proceedings after several years:

Memories fade. Journalists and their sources scatter and become, not infrequently, untraceable. Notes and other records are retained only for short periods, not least because of limitations on storage”.⁹

3.11 However, in our own 2001 report on Limitation of Actions, we recommend increasing the limitation period from one to three years (whilst removing the discretion).¹⁰ This would bring defamation within the core regime. It would also remove anomalies between the law in England and Scotland (which remains at three years) and between the law of malicious falsehood and negligent misstatement.

3.12 The issue proved controversial. Respondents to the consultation paper were evenly divided: those representing defendants opposed the move, while those representing claimants argued that one year was insufficient time for claimants to prepare their case. In the end, we were convinced that the one year period did cause problems for claimants in defamation cases. This was especially the case where claimants were waiting for disciplinary proceedings to conclude or where they had difficulties obtaining funding.¹¹

3.13 On 16 July 2002, the Government accepted the report in principle, though they said they would “give further consideration to some aspects” of it.

3.14 There is clearly a difficult balance in defamation proceedings between enabling the claimant enough time to prepare their case, whilst ensuring that defendants

⁷ Administration of Justice Act 1985, following the recommendations of the *Report of the Committee on Defamation* (1975), Cmnd 5909 (the “Faulks Report”). For further discussion, see *Limitation of Actions, Consultation Paper No 151* (1998), para 13.38.

⁸ Limitation Act 1980, ss 4A and 32A, as inserted by the Defamation Act s 5.

⁹ Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation*, July 1991, p 81, para VIII 2.

¹⁰ *Limitation of Actions, Law Com No 270*. The report did not consider when the cause of action arises in a defamation action, or whether there were advantages to a single publication rule.

¹¹ *Ibid*, paras 4.39-4.44.

have the practical means to justify their statements. The present law (which combines a short one-year limitation period with a multiple publication rule) draws criticism from both sides. Claimants are still under pressure to rush to court if they wish to claim substantial damages for the main publications. However, defendants with archives face a potential liability which may extend for decades after a newspaper article first appeared, albeit for relatively minor damages.

- 3.15 It is important to note that the problem is not confined to online material. In theory, a traditional library archive would be treated in the same way.¹² However the greater accessibility of online archives gives the issue much greater prominence. The BBC stated that they were not aware of any current cases in which libraries were sued for making defamatory articles available.
- 3.16 Two alternative methods of reform were suggested. One would be to adopt the US “single publication rule”, that a publication happens only once, when it is first distributed. The second would be to provide a specific “archive defence”, for material that has been held for over a year. Given how often the single publication rule was recommended to us, it is worth examining it in more detail, below.

THE SINGLE PUBLICATION RULE

- 3.17 Under US law, a single edition of a newspaper or book is considered to be a “single publication”, however many copies are distributed. As the American Law Institute said in their Restatement (Second) of Torts, “any one edition of a book or newspaper, or any one radio or television broadcast... is a single publication”.¹³ This has two implications: first, only one action may be brought, in one jurisdiction, even if the defamation has been communicated to many different places. Secondly, the limitation period starts to run at the time of the first publication, even if copies continue to be sold several years later.
- 3.18 The rule has a long history. First developed in 1938 in respect of newspapers,¹⁴ it was applied to books in 1948, in *Gregoire v GP Putnam's Sons*.¹⁵ Here a book, originally put on sale in 1941, had been reprinted seven times, and was still being sold from stock in 1946. The New York Court of Appeals held that the limitation period started to run in 1941, when the book was first put on sale. The contrary rule, as set out in *Duke of Brunswick v Harmer*, had its origin “in an era which long antedated the modern process of mass publication”. It was no longer suited to modern conditions:

Under such a rule the Statute of Limitation would never expire so long as a copy of such book remained in stock and is made by the

¹² In *Vitzetelly v Mudie's Library* [1900] 2 QB 170, a lending library was sued for stocking a libellous biography that had been withdrawn from sale.

¹³ (1976) s 577A.

¹⁴ *Wolfson v Syracuse Newspapers, Inc* (1939) 279 NY 716.

¹⁵ (1948) 298 NY 119.

publisher the subject of a sale or inspection by the public. Such a rule would thwart the purpose of the legislature, clearly expressed... to bar 'completely and forever' all actions which... overpass the limitation... upon litigation.

3.19 In 2002, the New York Court of Appeals applied the same rule to a website publication. In *Firth v State of New York*,¹⁶ a report had been published at a press conference on 16 December 1996, and placed on the internet the same day. The claimant, however, did not file a claim for over a year. The Court found that the limitation period started when the information was first placed on the website, not from each "hit" received. Nor was it relevant that unrelated modifications had been made to other parts of the website. As "many Web sites are in a constant state of change", this was only to be expected. Levine J observed that the policies behind the original development of the single publication rule "are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet". The alternative would give "even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants":

Inevitably there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.

3.20 The definition of a single publication can give rise to some complexity. The morning and afternoon editions of a newspaper have been held to be separate publications,¹⁷ as have the hard cover and paperback editions of the same book.¹⁸ As the Restatement (Second) explains, reprinting the same article in the next edition of the magazine is a new publication, while reprinting the same magazine the following month, in response to a large order for extra copies, is the same publication.¹⁹ In general, however, the rule is well established and accepted.

3.21 The main problem of the single publication rule, from the claimant's point of view, is that they may be unaware of the original publication, or only start to suffer significant damage to their reputation some years after the original publication.

3.22 This, however, is a general problem with all limitation periods. Under the core regime recommended in our report on Limitation of Actions, we make provision for the claimant's lack of knowledge. The three year period would only start to run from the time when the claimant knows, or ought reasonably to know, the facts which gave rise to the claim, the identity of the defendant, and that the damage they had suffered was significant.²⁰ To protect defendants, this would be

¹⁶ (2002) NY int 88.

¹⁷ *Cook v Connors* (1915) 215 NY 175.

¹⁸ *Rinaldi v Viking Penguin, Inc* (1981) 52 NY2d 422.

¹⁹ s 577A, illustrations 5 & 6.

²⁰ Limitation of Actions, Law Com No 270, paras 3.5 to 3.92.

subject to a ten year long-stop, designed to prevent claims being brought so long after the original events that defendants can no longer mount an effective defence.²¹ Although the long-stop would fit well with a single publication rule, it is ineffective when combined with the present “multiplication rule”, because it would start to run each time material was downloaded.

CONCLUSION

- 3.23 There is a need to review the way in which the multiple publication rule interacts with the limitation period applying to archived material. As we have argued, the present period of one year may cause hardship to claimants, who have little time to prepare a case. However, it is potentially unfair to defendants to allow actions to be brought against newspapers decades after their original publication, simply because copies have been placed in an archive. After a lapse of time, it may be extremely difficult to mount an effective defence, because records and witnesses are no longer available. We agree with the Court of Appeal that online archives have a social utility, and it would not be desirable to hinder their development.
- 3.24 Further consideration should be given to this issue, either through the adoption of a US style single publication rule, or through a more specific defence that would apply to archives, whether held online or in more traditional libraries.

²¹ *Ibid*, paras 3.99-3.108.

PART IV

JURISDICTION AND APPLICABLE LAW

INTRODUCTION

- 4.1 Both publications and reputations may cross national boundaries. Thus it is not uncommon for traditional libel actions, based on the printed word, to raise disputes about which country's courts should hear a case, or which country's laws should be applied. Until recently, however, the parties to jurisdiction disputes tended to be sophisticated, international celebrities, publishers or businessmen, who had some ability to cope with the complexities of international litigation.
- 4.2 With the growth of the internet, everyone now has the possibility of communicating internationally, as material placed on the world wide web may be accessed in any country in the world. People with little knowledge of foreign laws are faced with a wide range of potential liabilities. The Newspaper Society, for example, noted that in the past regional newspapers rarely worried about foreign law. Now that almost all regional newspapers have a website, they have "increased their vulnerability" to legal action throughout the world. Furthermore, English customers frequently use internet service providers based overseas, without knowing where the server is located, or which law governs it. There is an increasing need for legal certainty and clarity about which laws govern internet publications.
- 4.3 The law in this area is complex, controversial and subject to change. Below we list some of the reasons for this complexity, and outline recent moves towards reform. We then look in more detail at the traditional rules governing jurisdiction and applicable law, and summarise the criticisms made of them. Finally we discuss two recent reforms (the E-commerce Directive and draft proposals on non-contractual obligations) before reaching a conclusion.

Complexity

- 4.4 Complexity arises from the fact that jurisdiction issues involve three separate but inter-related elements. The first element is the definition of where a defamatory publication takes place. In English law, each communication to a third party constitutes a separate tort, which takes place in the country in which the statement is heard, read or seen. Therefore an internet publication takes place in each country in which the material is downloaded, irrespective of where the server is based. This differs from the US "single publication rule" which states that each book or newspaper constitutes a single publication, giving rise to only one action for damages.¹

¹ See American Law Institute, Restatement (Second) of Torts (1976), s 577A(4), discussed in paras 3.17-3.22 above.

- 4.5 The second element is jurisdiction, that is the rules about which national courts have jurisdiction to hear the claim. The English courts apply different rules depending on whether the conflict takes place within the European Union, or whether it involves an element from elsewhere in the world.
- 4.6 Third is the issue about which body of law the court should apply. In respect of defamation, the English courts have traditionally applied a “double actionability rule”, which states that for an English court to give damages in respect of foreign publications the matter must be actionable both in England and in the country in which the publication takes place.² The claimant may rely on a presumption that the foreign law is the same as in England: it is for the defendant to prove otherwise, bringing expert witnesses if necessary.³

Moves towards reform

- 4.7 Recently, there have been moves within the European Union to reform the traditional rules on choice of law. One of the objectives of the E-Commerce Directive of June 2000 (discussed in Part II)⁴ was to reduce “legal uncertainty as to which national rules” apply to information society services.⁵ To this end, it introduced the principle that “information society services should be supervised at the source of the activity”:⁶ that is, unless exceptions apply, the law governing providers should be the law applicable in the country in which the service provider is established. So far, however, the Directive has not succeeded in reducing legal uncertainty. As discussed below, doubts remain about how far the Directive, as implemented, affects private international law rules about which law is applicable to defamation actions brought against ISPs.⁷
- 4.8 At the same time, the Directorate-General for Justice and Home Affairs is consulting about a draft proposal on the law applicable to non-contractual obligations (often referred to as “Rome II”). Contrary to the defendant approach embodied in the E-Commerce Directive, this proposal takes a claimant approach. The draft suggests that defamation actions should be tried according

² Although for most torts, this rule has now been amended by the Private International Law (Miscellaneous Provisions) Act 1995, defamation is specifically excluded from the 1995 Act: see s 13. The double actionability rule has some flexibility. Where both parties have a strong relationship with England, and only a weak relationship with the jurisdiction in which the publication took place, the court may have discretion to hear the case purely under English law: see *Church of Scientology of California v Commissioner of Police* (1976) 120 SJ 690.

³ *University of Glasgow v The Economist* [1997] EMLR 495.

⁴ See paras 2.10 - 2.23, above.

⁵ Directive 2000/31/EC, recital 5.

⁶ *Ibid*, recital 22.

⁷ See paras 4.37-4.49, below.

to “the law of the country where the victim is habitually resident at the time of the tort”.⁸

JURISDICTION AND APPLICABLE LAW: THE TRADITIONAL RULES

- 4.9 The present rules differ according to whether the action concerns jurisdictions within the European Union or outside it. Below we look at each, before considering the courts’ residual discretion to prevent trivial or oppressive actions, by striking out a statement of case for abuse of process.

Jurisdiction issues within the EU

- 4.10 The rules were first set out in the Brussels Convention of 1968, and incorporated in the Civil Jurisdiction and Judgments Act 1982.⁹ They have recently been considered in a defamation context by the European Court of Justice in *Shevill v Presse Alliance SA*.¹⁰
- 4.11 Fiona Shevill was an English student who had worked for a bureau de change in Paris, where a French newspaper, *France-Soir*, accused her of money laundering. Although *France-Soir* had a circulation of 237,000 in France and only 230 in England, the claimant decided to sue in England only in respect of the English distribution.
- 4.12 The Court held that where a victim had been defamed in two or more EU states, the Convention provided her with a choice. First, she could sue in the State in which the defendant was “domiciled” in respect of the whole distribution, and claim for damage for reputation wherever in the EU that damage occurred. In respect of publications that took place abroad, the double actionability rule would apply. Second, she could sue in each state in which a defamation took place and where harm was caused, but in respect only of the harm taking place in that State. Miss Shevill was therefore entitled to sue in England, provided she limited her claim to the harm caused to her by the English distribution.

Jurisdiction issues outside the EU

- 4.13 The English courts have a power to hear a broad range of defamation claims. They *could* entertain a claim where either the defendant is based in England and Wales or where a defamatory statement is communicated to one or more people here. However, this power is subject to an equally broad discretion under which the Court may refuse jurisdiction if it wishes. Procedurally, this can be done at two stages. First, the matter may arise if the claimant seeks leave to serve the

⁸ Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (2002), art 7.

⁹ From 1 March 2002, the Brussels Convention has been replaced by Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“the Brussels Regulation”). For the purposes of this initial discussion, there are no significant points of difference between the Convention and the Regulation.

¹⁰ [1995] ECR I-415.

claim out of the jurisdiction (under the Civil Procedure Rules Part 6). Secondly, once the claim has been served the defendant can seek a stay of the claim on the common law grounds that another jurisdiction would be more appropriate (referred to as *forum non conveniens*).

- 4.14 A series of cases have set out the factors that the Court will take into account in exercising discretion.¹¹ In very general terms, the Court will hear a case provided that the claimant has a sufficient connection with England for their reputation in England to be a concern to them. Also, there must have been a non-negligible number of publications within the jurisdiction, such that would be likely to damage a reputation. If, on the other hand, the defendant can show that they would suffer real evidential difficulties in bringing witnesses to England, the court will consider whether another jurisdiction would be more appropriate.

The Berezovsky case

- 4.15 A leading case in this area is *Berezovsky v Michaels*, which illustrates how these factors apply in practice.¹² A US publication, *Forbes Magazine*, alleged that a Russian politician and businessman, Boris Berezovsky, ran a Mafia-type organisation, responsible for murder. The magazine had sold 785,000 copies in the US, 2,000 in England and 19 in Russia. In the years leading up to the case, Mr Berezovsky visited England 31 times. His estranged wife and children lived in London and he had business interests here. The claimant decided to bring a libel action in England, but he confined his claim only to publications that took place in England.
- 4.16 The House of Lords decided, by a three to two majority, that the case should be heard in England. The claimant clearly had a substantial connection with England, while the circulation of 2,000 English copies was far from negligible. Although the defendants pointed out that bringing witnesses from Russia would be difficult, the Court did not feel that Russia would offer an appropriate jurisdiction, given that only 19 copies had been distributed there. As the case was confined to English publications, English law was applicable.

Applying the rules to internet publications: an Australian example

- 4.17 The *Berezovsky* case concerned a printed magazine. A recent example of international litigation over an internet publication is the Australian case of *Gutnick v Dow Jones & Co, Inc.*¹³ An American publication, *Barrons Magazine*, alleged that a well-known Melbourne entrepreneur, Joseph Gutnick, was involved in manipulating stock prices and had untoward associations with a

¹¹ See D Price, *Defamation: Law Procedure and Practice* (2nd ed 2001) pp 256-9. The general rules are set out in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 and have been applied to defamation in, for example, *Schapiro v Ahronson* [1999] EMLR 735, and *Chada v Dow Jones* [1999] EMLR 724. The leading case (*Berezovsky v Michaels*) is discussed below, paras 4.15 to 4.16.

¹² [2000] 1 WLR 1004.

¹³ [2001] VSC 305.

convicted money-launderer. At the same time, the publisher placed the article on the *Barrons Online* website, available on a subscription basis. The evidence was that 550,000 people subscribed to the site worldwide, of whom around 1,700 lived in Australia. Gutnick sued in Victoria for damage caused to his reputation by the publications that took place in Victoria. Although the defendants argued strongly that the case should instead be heard in New Jersey (where the Barron's Online server was based), the Supreme Court of Victoria held that it was an appropriate forum to hear the matter.

- 4.18 Given that Mr Gutnick was based in Victoria, had a substantial reputation in Victoria, and was suing in respect only of publications that took place in Victoria, this does not appear to be a surprising decision. It has, however, been appealed to the High Court of Australia. The case is notable mainly for the strength of the reactions it inspired in the USA.¹⁴ A wide range of American news organisations disputed the ruling and intervened before the High Court.¹⁵ They argued that internet material should be taken to have a "single point of publication", based on where the publisher last exercised control over the publication. A High Court decision is expected shortly.

Striking out for abuse of process

- 4.19 One concern about the rules set out above, in both an EU and non-EU context, is that they could lead to multiple or trivial claims. However, the Civil Procedure Rules allow a judge to strike out a claimant's statement of case where it is "an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings".¹⁶ In applying this provision, judges must bear in mind the "overriding objective"¹⁷ which, among other things, considers whether the way in which the case is dealt with is proportionate to the amount of money involved and its importance. Price points out that since the Woolf reforms were introduced in 1999, the courts have shown a new determination to manage cases in a way that saves cost.¹⁸
- 4.20 An example of how the power may be used in an internet context is *Level 8 Systems (UK) Ltd v Abbas*.¹⁹ The claimant brought a claim for malicious falsehood against a US company on the grounds that their website included a defamatory footnote that may refer to him. Jacob J found that there was no

¹⁴ The Online News Association, for example, commented that "the free and robust flow of information - the very life blood of the Internet - is jeopardised": see <http://www.journalist.org/amicus.htm>. See also para 4.24 below.

¹⁵ The Libel Defense Resource Center told us that these organisations included: the New York Times, Associated Press, CNN, Time, Tribune Co, the Washington Post, Reuters, the Online News Association and others. A brief was filed on 17 May 2002: see <http://www.journalist.org/amicus.htm>.

¹⁶ CPR Part 3, rule 4(2)(b).

¹⁷ CPR Part 1, rule 1.

¹⁸ Price, *Defamation: Law Procedure and Practice* (2nd ed 2001), p 236.

¹⁹ 2001 WL 825678, 23 July 2001.

evidence that anyone in England had read the footnote or understood it to refer to the claimant. Even if they had, allowing the case to proceed would be disproportionate: the cost of the action would exceed any possible benefit. The Civil Procedure Rules therefore have the potential to act as a longstop in preventing multiple or trivial claims.

CRITICISMS MADE OF THE TRADITIONAL RULES

Three criticisms

- 4.21 Consultees directed three main criticisms at the jurisdiction provisions. First, several publishers expressed concern that the global nature of the internet increased their legal risks - raising the possibility that they might face actions throughout the world. ISPA commented that even material intended for a localised readership runs the risk of actions overseas. As PA News pointed out that, technically, it is extremely difficult to show that material has not been accessed in a particular jurisdiction. The BBC commented that it faced “unacceptable levels of business risk” in its need to comply with the law in every country.
- 4.22 The problem was usually put as one of potential risk. Few respondents referred to actual experiences of foreign law suits. However, two organisations mentioned the particular risks of libel actions in the Republic of Ireland, particularly in connection with articles about the IRA.
- 4.23 Secondly, it was suggested that too many foreign claimants were attracted to sue in England. This point was made by, for example, PA news, the BBC and Newspaper Society. They felt that foreigners with only a tenuous connection with the UK were attracted by our claimant-friendly laws, which placed the burden of proof on the defendant to show that any allegation is true.
- 4.24 The third criticism highlights the culture clash between American and English values in respect to defamation. The New York-based Libel Defense Resource Centre, for example, felt strongly that the threat of foreign actions would undermine the American approach to free-speech, as embodied in the US constitution. They wrote to us to say that allowing claimants to sue in their own jurisdiction “would functionally control conduct within the US and would impair the ability of the US to regulate Internet conduct in accordance with its own policy favouring extensive protection of speech”. The same clash occurs between American and Australian values. Writing in the Sydney Law Review, David Rolph has argued that the defendants’ arguments in *Gutnick* were “effectively seeking to entrench American libel law as the applicable law for the determination of Internet defamation proceedings”.²⁰ This, he suggested, eschewed engagement with foreign legal systems, attempted to place American

²⁰ D Rolph, “The Message, Not the Medium: Defamation, Publication and the Internet in *Dow Jones & Co Inc v Gutnick*” (2002) 24 Sydney Law Review 262, at p 273.

defamation law in a privileged position and reinforced the “international hegemony of American culture”.²¹

An intractable problem

- 4.25 The Law Commission considered some of these problems in our 1990 report on Private International Law. Although we did not comment on the specific issues raised by the internet, we pointed out that defamation frequently crossed national boundaries: “television and radio broadcasts may be received anywhere in the world, just as the major national newspapers are sold all over the world”.²² We found that “defamation had given rise to some particularly intractable problems”.²³
- 4.26 The first problem was that there were significant differences in the law of defamation and related issues in different jurisdictions. In many civil law countries, for example, defamation is regarded largely as a criminal matter, with only trivial awards of compensation to the victim. Other countries may also recognise rights which we do not, such as the right to privacy and the right to one’s own image.²⁴
- 4.27 Secondly, freedom of expression is an important issue of public policy. We commented that, “given the public interest in free speech and the proper functioning of public institutions, it is not desirable that those who make statements in this country should have their freedom of expression circumscribed by the application of foreign law”.²⁵
- 4.28 The 1990 report therefore recommended that, for defamation, choice of law issues should be subject to special provisions. Our preferred option was that statements published abroad that had originated from Britain (because the statement was previously or simultaneously published in the UK) should be tried according to English law. However, the report considered this issue only in the context of choice of law rules applicable within the United Kingdom Courts.²⁶ It did not address the *Dow Jones v Gutnick* type situation, where a statement that originated in the US was made in Britain and libelled a British citizen.
- 4.29 Our proposed solution was not in fact adopted. Instead, the Private International Law (Miscellaneous Provisions) Act 1995 preserved the existing law of double actionability. The Lord Chancellor, Lord Mackay, told the House of Lords that the idea of making UK law applicable for torts committed in foreign jurisdictions

²¹ *Ibid*, at p 274.

²² Law Com No 193; Scot Law Com No 124, para 3.29.

²³ *Ibid*, para 3.28.

²⁴ *Ibid*.

²⁵ *Ibid*, para 3.31.

²⁶ Although originally it had been intended that the English and Scottish Law Commissions would advise the UK government on a proposed international convention, negotiations on such a convention soon collapsed (see para 1.2).

was “objectionable in that it would reintroduce the nationalistic attitude which the Law Commissions are otherwise seeking to obviate”.²⁷ Furthermore, it would not protect defendants - as plaintiffs would be entitled to seek judgements abroad and enforce them in the UK (under the Brussels and Lugano Conventions).

- 4.30 Although international communications have become more widespread over the last decade, the underlying issues have not changed. The way that private international law applies to defamation continues to present intractable problems. Jurisdictions not only differ in the way that they view defamation: they also believe strongly in their own interpretation of the right to freedom of expression. It is therefore an area which is particularly likely to generate culture clashes.

A single publication rule: views for and against

- 4.31 The most commonly advocated reform was that the English law should follow the American example by redefining the meaning of publication, so that a website (or book, newspaper etc) is considered to be a “single publication”. Part III discussed the implications of this rule for the limitation period.²⁸ In the USA, the rule also ensures that only one action is brought, within one state, irrespective of the number of states in which distribution has occurred.
- 4.32 A commonly argued advantage for the “single place” publication rule is that it would prevent multiple actions over the same site. However, both the English²⁹ and Australian³⁰ courts already have considerable discretion to prevent multiple actions.
- 4.33 For most publishers, their main desire is not merely that they should face only one defamation action. Rather, they wish to remove the likelihood of *any* defamation action, by ensuring that they could only be held liable according to the law they are most familiar with, namely that of their home jurisdiction. This, they argue, would allow them to predict and avoid legal actions. They therefore advocated a single publication rule in which a website was deemed to be published in the place where the defendant is based.
- 4.34 Unsurprisingly, such an idea was vigorously opposed by claimant solicitors, who feared that under a single publication rule the US First Amendment would effectively be “exported to these shores”. It was pointed out that even a small number of “publications” may cause real damage if it is to someone who matters – such as the claimant’s employer or potential business partner. The nature of the damage, it was said, should be assessed in the country in which it takes place, according to the norms and culture of that country.

²⁷ Hansard (HL) 6 December 1994, vol 559, col 833.

²⁸ See paras 3.17 - 3.22, above.

²⁹ See paras 4.19 - 4.20 above.

³⁰ See, for example, *Maple v David Syne & Co Ltd* [1975] 1 NSWLP 97.

- 4.35 A final possibility would be to limit the claimant's choice to the law of their home jurisdiction. During consultation, this received relatively little discussion. It was felt to be an uncomfortable halfway house. Publishers would still be required to be familiar with the law of every domicile of every person discussed, expressly or by implication. On the other hand, claimants whose reputations genuinely crossed boundaries would be caught by technicalities of the law of the country in which they were said to be habitually resident.

RECENT REFORMS

- 4.36 These issues are not only complex and controversial: they are also subject to change. Below we consider two recent reforms: one implemented (the Electronic Commerce Regulations) and one proposed ("Rome II"). Unfortunately, attempts at reform have introduced new uncertainties into this already difficult area.

The Electronic Commerce Regulations

- 4.37 The Electronic Commerce (EC Directive) Regulations,³¹ which implement the E-Commerce Directive,³² came into effect on 21 August 2002. Part II discusses their effect on internet service provider immunity.³³ The Regulations also contain provisions on applicable law, although their effect is far from clear.
- 4.38 The Directive covers "information society service providers" (ISSPs), which includes internet service providers. It sets out, as a general principle, that ISSPs should be governed by the rules of the country in which they are established. As recital 22 puts it, "information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives". This has been described as "country-of-origin regulation".³⁴
- 4.39 There is uncertainty about the effect of country of origin regulation on matters of private law. Recital 23 of the Directive starts by saying that

"It neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts".³⁵

However, it then continues:

"Provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services".³⁶

³¹ SI 2002/2013.

³² 2000/31/EC.

³³ See paras 2.10 - 2.23 above.

³⁴ Department of Trade and Industry, *A Guide for Business to the Electronic Commerce (EC Directive) Regulations 2002*, July 2002.

³⁵ 2000/31/EC.

It is difficult to understand how one could introduce country-of-origin regulation and prevent such restrictions without making at least some changes to rules about applicable law.

4.40 The Department of Trade and Industry has commented that “the Directive as a whole does not make clear whether the role of private international law is retained or superseded”.³⁷ Initially, the DTI took the view that the Directive was *not* intended to affect the way that private international law provisions affected civil claims against ISSPs. Thus their draft Regulations, published in March 2002, explicitly stated that they did not change the rules on private international law or the jurisdiction of the courts. During consultation, however, many respondents argued that this was inconsistent with the idea of country-of-origin regulation. The final Regulations therefore removed this exclusion, and appear to have wide ranging effects on civil claims.

4.41 The new rules introduce country-of-origin regulation by providing that:

- (1) any requirement “which falls within the co-ordinated field” shall apply to a service provider established in the UK, “irrespective of whether that... service is provided in the UK or another member State” (reg 4 (1)); and
- (2) any such requirement shall not be applied to a service provider established in another member State if “its application would restrict the freedom to provide information society services to a person in the UK from that member State” (reg 4 (3)).

Thus regulation 4(1) appears to remove the “double actionability” rule by stating that any requirement within the coordinated field shall apply to all ISSPs established in the UK, whether the service was provided in the UK or another member state. Meanwhile, regulation 4(3) states that a court may not apply a requirement to a foreign ISP if its effect would be to restrict their freedom to provide a service.

4.42 In order to understand how these new rules affect defamation, one must ask whether:

- (1) defamation law is a “requirement which falls within the co-ordinated field”;
- (2) defamation is excluded from the scope of the Regulations;
- (3) a court may “derogate” from regulation 4 in an individual case;
- (4) defamation is a “requirement” that restricts a provider’s “freedom to provide information society services to a person in the UK”.

³⁶ Recital 23, above.

³⁷ Department of Trade and Industry, *A Guide for Business to the Electronic Commerce (EC Directive) Regulations 2002*, July 2002, para 4.8.

Below we discuss each in turn.

A “requirement which falls within the coordinated field”

- 4.43 The “coordinated field” is defined in regulation 2 in broad terms and covers a wide range of regulatory matters, including rules of qualification, authorisation, advertising and civil liabilities. It includes “requirements concerning the liability of the service provider”, whether “of a general nature or specifically designed” for ISSPs. In so far as defamation is a requirement of a general nature concerning publishers’ liabilities, it would appear to be covered.

The exclusions

- 4.44 There are several types of exclusions. Some matters (such as taxation, Data Protection, cartel law and betting) are excluded from the Regulations as a whole.³⁸ Others are excluded from the jurisdiction provisions in regulation 4 (including copyright, industrial property, real estate transactions and unsolicited commercial emails).³⁹ Thirdly, requirements to protect public health and consumer interests are specifically excluded from regulation 4(3), which means that they can be applied to ISSPs based overseas.⁴⁰ None of these exclusions, however, affects defamation.

Derogations from regulation 4

- 4.45 The courts are not necessarily bound by regulation 4(3). Where there are good reasons of public policy, a court may apply a UK requirement to an ISSP based in another member state. Regulation 5(1) allows a court to apply a requirement if it is necessary to, for example, prevent crime or protect public health or consumers.⁴¹
- 4.46 The only public policy reason applicable to defamation is the one that allows measures necessary to prevent “violations of human dignity concerning individual persons.”⁴² The violation must either have prejudiced a person’s dignity or present “a grave and serious risk of prejudice”.⁴³ The requirement must be both necessary and proportionate to the objective.⁴⁴
- 4.47 This suggests that the courts could, for example, prevent a foreign based ISP from carrying information that called a named individual a paedophile, if this was a necessary and proportionate means to prevent that person’s human dignity

³⁸ Reg 3.

³⁹ See the schedule to the Regulations.

⁴⁰ Reg 4(5).

⁴¹ Reg 5(1).

⁴² Reg 5(1)(a).

⁴³ Reg 5(3).

⁴⁴ Reg 5(2).

from being violated. They could not, however, restrict a site that made allegations against a company.

A restriction on freedom to provide a service?

- 4.48 The final question is how far imposing liability for defamation on a foreign ISP restricts their ability to provide a service. For example, in the case of *Godfrey v Demon Internet*,⁴⁵ how far does holding Demon Internet liable restrict their ability to provide the service? “Restrict” is not defined in either the Directive or the Regulations. It is unlikely to mean “any law which impedes a chosen course of action”, as almost all laws do this in some way. A more probable meaning is “a restriction relative to the law in the country-of-origin” of the provider. Thus, if a French-based ISP were providing usenet services, the imposition of liability would amount to a restriction if such liability would not have been imposed in France. However, neither the Directive nor the Regulations are clear on this point.

The effect of the Regulations: conclusion

- 4.49 The Regulations, as drafted, have not succeeded in their avowed aim of reducing the legal uncertainty over which national rules apply to ISPs. Confusion remains about how far they prevent an ISP based in another member state from being held liable under English law for a defamation that takes place in England. It would appear that foreign ISPs are not subject to any additional restrictions imposed by English law unless the defamation is sufficiently severe so as to violate an individual’s human dignity.

Draft proposal on Non-Contractual Obligations

- 4.50 The EU is currently proposing to pass a new Regulation on the conflict of laws rules to be applied to non-contractual obligations. This initiative, known as “Rome II”, would not be confined to conflicts that arise within the member states but would have “universal application” to resolve conflicts throughout the world.
- 4.51 The first draft, produced by the Directorate-General for Justice and Home Affairs, takes a very different approach from the E-Commerce Directive, by basing the relevant law on the home state of the claimant rather than the defendant. The draft states that “the law applicable to a non-contractual regulation arising from a violation of private or personal rights or from defamation shall be the law of the country where the victim is habitually resident at the time of the tort or delict”.⁴⁶
- 4.52 If passed, this may have the unfortunate effect that the law applicable to defamation actions would depend on the medium through which the defamation

⁴⁵ [1999] 4 All ER 342, discussed in paras 2.6-2.9, above.

⁴⁶ Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (2002), art 7.

took place. Suppose that a English claimant was defamed by a French magazine that existed both as a printed version and on a subscription website. The action in respect of the printed version would be decided according to English law (“where the victim is habitually resident”). However, under regulation 4(3) of the Electronic Commerce Regulations 2002 the action against the online version may be barred under English law. This is because the effect of imposing liability would be to restrict the freedom of the French site to provide an information society service within the UK. Given that newspapers and magazines increasingly exist in both hard and soft copy, this could introduce considerable complication into the law.

CONCLUSION

- 4.53 The law in this area has always been complex, and attempts within the EU to create greater legal certainty have added their own ambiguities. There are no easy answers, and attempts at reform through compromise can too easily lead to greater uncertainty. Potential defendants argued strongly that they should only be subject to the defamation laws of their own jurisdiction, which they knew and understood. They said it was unrealistic to expect compliance with the laws of multiple states. Claimant representatives, on the other hand, argued that claimants should be able to claim in the country in which the damage to their reputation had taken place, according to the norms and customs of that jurisdiction.
- 4.54 Although we have some sympathy with the concerns expressed about the levels of “global risk”, any solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation. We do not think that the problem can be solved within the short to medium term. We do not therefore recommend reform in this area at the present time.
- 4.55 In this short study, we have not been able to review or compare how defamation law impacts on internet material in each of the EU member states. Although this information would be useful to websites authors and intermediaries, it does not appear to be readily available. Both policy makers and practitioners would benefit from more accessible information over how the law of defamation impacts on the internet in other jurisdictions. The Government could usefully sponsor research in this area, possibly using existing academic networks.

PART V

CONTEMPT OF COURT: ONLINE SEARCHES FOR PAST CONVICTIONS AND FOREIGN COMMENTARY

INTRODUCTION

- 5.1 Several consultees suggested that online publishers ran an increased risk of liability for unwitting contempt of court. Concern centred around the Scottish case of *HM Advocate v Beggs*.¹ William Beggs was facing prosecution for murder when his defence team discovered that a newspaper internet archive contained an article detailing his previous (quashed) conviction for murder. Although jurors were highly unlikely to stumble across such an article, they could have found it had they made a specific search for it. Initially, the trial judge, Lord Osborne, ruled that by making such material available the newspaper was open to a charge of contempt of court, as each hit on the website amounted to a new publication of the material. The Press Association commented that this “raises a serious issue” with possible far-reaching consequences.
- 5.2 That said, the defence later failed to have the publishers ordered to appear before the bar of the court. The judge ruled that, in the absence of any evidence that the jury had located the site, a *prima facie* case had not been made out.
- 5.3 It was consultees’ unanimous view that it would not be possible to prevent determined jurors from finding online material. The task of monitoring all archived articles to ensure that they do not conflict with any case being held anywhere in the UK was considered immense by some and simply impossible by others. One publisher suggested that the only cost effective way to protect themselves from contempt actions arising out of archived material was to close down the archives completely.²
- 5.4 Reuters also expressed concerns about extra-jurisdictional material. They told us that in reporting some trials they may operate a “two-tier” system, filing both a domestic report and a report for the overseas market, marked not for dissemination in the UK. They feared that if the overseas report were placed on a newspaper website and found its way back to England, it could leave Reuters open to contempt proceedings. Yet if they ensured that all their overseas reports complied with English contempt law, they would not be competitive with foreign organisations.

¹ 2002 SLT 139.

² Des Hudson, managing director of *The Herald*, *The Sunday Herald* and *The Evening Times* in Glasgow: see Press Association response, pp 11-12.

- 5.5 Contempt of court is a strict liability offence³ and the penalties upon conviction can be severe.⁴ It is therefore understandable that publishers should be concerned about the risks of being found guilty in respect of material that they did not realise was there. However, we think that in practice this risk is remote. Sufficient safeguards are in place to ensure that contempt proceedings are not brought inappropriately.
- 5.6 Below we describe the current law and the fears expressed before reaching a conclusion.

CONTEMPT OF COURT: CURRENT LAW

The strict liability offence

- 5.7 The Contempt of Court Act 1981 governs situations where publishers may commit a contempt without being aware of it.⁵ It creates a strict liability offence in respect of “a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.”⁶
- 5.8 The meaning of “substantial risk” and “serious prejudice” were considered in *Attorney-General v English*.⁷ Lord Diplock followed the recommendations of the Phillimore Committee⁸ by holding that the words “substantial risk” were intended to exclude a risk which was only remote. Similarly, serious prejudice meant real prejudice: “the adjective ‘serious’ has from time to time been used as an alternative to ‘real’ to describe the degree of risk of interfering with the course of justice.”⁹

Factors to be considered

- 5.9 The leading recent English authority on the Contempt of Court Act 1981 is *Attorney-General v MGN Ltd*.¹⁰ Schiemann LJ stated that, when assessing the risk of prejudice, the following factors need to be taken into consideration:
- (1) the likelihood of the publication coming to the attention of a potential juror, including
 - (a) whether the publication circulates in the area from which jurors are likely to be drawn, and

³ Contempt of Court Act 1981, s 2(1).

⁴ An unlimited fine and up to two years in prison.

⁵ Common law jurisdiction remains to deal with intentional contempts.

⁶ Section 2(1).

⁷ [1983] 1 AC 116.

⁸ See para 313 where the Committee considers “the law should aim at preventing serious prejudice not serious risks”.

⁹ *A-G v English* [1983] 1 AC 116, 142.

¹⁰ [1997] 1 All ER 456.

- (b) how many copies are circulated.
- (2) the likely impact of the publication on an ordinary reader at the time of the publication, including
 - (a) the prominence of the article in the publication, and
 - (b) the novelty of the content of the article in the context of likely readers of that publication.
- (3) the residual impact of the publication on a notional juror at the time of trial, including
 - (a) the length of time between the publication and the likely date of trial,
 - (b) the focusing effect of listening to prolonged evidence in the case,
 - (c) the likely effect of a judge's directions to a jury.¹¹

5.10 The *MGN* case concerned a newspaper. It is difficult to know how these factors would be applied to an online archive, where one cannot count the number of copies circulated or assess the prominence of an article in the same way.¹² However, Schiemann LJ was more concerned with media bombardment of potential jurors than with active searches. The emphasis on the number of publications and their likely impact is to stop material from being forced onto a juror's attention. Contempt laws cannot stop jurors who go out of their way to research an issue.

Safeguards and defences

Knowledge of active proceedings

5.11 The Contempt of Court Act 1981 states that proceedings in question must be active at the time of publication.¹³ Concern has arisen over the ruling in *Beggs* that a publication takes place when the material is accessed from, rather than placed on, a website. Nevertheless, a publisher is given a defence if he can show that "at the time of the time of publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active".¹⁴

5.12 It is not clear how far a publisher needs to go in monitoring active trials. However, the defence would, for example, prevent a local newspaper from being

¹¹ [1997] 1 All ER 456, 460.

¹² *HMA v Beggs* 2002 SLT 139, 148 *per* Lord Osborne.

¹³ Section 2(3).

¹⁴ Section 3(1).

found guilty in respect of a low-profile trial in another part of the country, if they had taken reasonable care and had no reason to suspect that it was taking place.

Innocent dissemination

- 5.13 Contempt of court is a much greater worry for primary publishers (such as newspapers running online archives) than for secondary publishers (such as ISPs). Distributors are granted an “innocent dissemination” defence if they can show that “having taken all reasonable care”, they did not know that the publication contained prejudicial material and had “no reason to suspect” that it was likely to do so”.¹⁵

Good faith discussion

- 5.14 The Contempt of Court Act 1981, section 5 offers a further defence where the comments complained of are made “as or as part of a discussion in good faith of public affairs or other matters of general public interest ... if the risk of impediment or prejudice ... is merely incidental to the discussion.”
- 5.15 In *English*, the section 5 defence was held to protect a publisher from contempt for publication of a genuinely discursive article in spite of the fact that it could easily have been taken to be a discussion of an existing criminal prosecution. The Court was keen to emphasise that the defence was not lost merely because the argument could have been made in a different and less prejudicial way. Lord Diplock stated that

the test was not whether the article could have been written as effectively without the passage ...; it is whether the risk created by the words ... was merely incidental to the discussion which I take to mean no more than an incidental consequence of expounding the main theme.¹⁶

- 5.16 It would therefore be open to a publisher to argue that a discussion of a previous trial held in a newspaper archive was part of a discussion in good faith of matters of general public interest, and that any affect on a trial was merely incidental to that discussion. The publisher would need to show, however, that the article amounted to a genuine discussion, rather than a mere report of the proceedings.

Trust in jurors

- 5.17 The courts have put considerable trust in jurors’ ability to focus on the evidence before them to the exclusion of other material. As Lawton J put it, the drama of a

¹⁵ Section 3(2).

¹⁶ *A-G v English* [1983] 1 AC 116, 142. By comparison another publisher was fined £10,000 for contempt, in respect of another article about the same case. The article in question, in the absence of a discussion of wider issues, directly criticised the defendant on the basis of facts subsequently proved incorrect: see *Robertson & Nicol on Media Law* (4th ed 2002) p 372.

trial “almost always has the effect of excluding from recollection that which went before”.¹⁷ Lord Denning MR made a similar point:

Judges at a trial were not influenced by what they might have read in the newspapers ... Nor are the ordinary folk who sit on juries. They are good, sensible people. They go by the evidence that is adduced before them and not by what they may have read in the papers.¹⁸

5.18 Schiemann LJ also noted that jurors would be influenced by “the focusing effect of listening over a prolonged period to evidence in a case, and the likely effect of a judge’s directions.”¹⁹

5.19 More recently Lord Hope stated that

the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence.²⁰

5.20 This suggests that the problem can be solved by issuing juries with appropriate directions to concentrate on the evidence before them, rather than by attempting to remove material from their grasp. In our report on Evidence of Bad Character in Criminal Proceedings,²¹ we recommended that, in appropriate cases, with the agreement of the defence, the judge should warn the jury not to speculate about why no evidence of the defendant’s character had been adduced. We thought such warnings would largely solve the problem.²² If the defence raises particular concerns about internet material, judges could, if necessary, extend this to include a direction to jurors not to carry out their own research.

Other safeguards

5.21 Robertson and Nicol point out that “there is no mechanical rule that reference to a defendant’s previous conviction will constitute contempt”.²³ In the *MGN* case, the newspaper had published an exaggerated account of a previous crime by the defendant. However, the Court found that this was not of itself a contempt of court.²⁴ The Court had to assess the impact of the article in question, over and above the other already present publicity. It was not a contempt to publish one out of many articles whose overall effect was to prejudice a trial. If, for example,

¹⁷ *Kray* (1969) 53 Cr App R 413. See also *A-G v News Group Newspapers Plc* [1987] 1 QB 1, and the discussion in *Arlidge, Eady and Smith on Contempt*, p 78.

¹⁸ *R v Horsham Justices ex parte Farquharson and Another* [1982] 2 All ER 269, 287.

¹⁹ *A-G v MGN Ltd* [1997] 1 All ER 456, 461.

²⁰ *Montgomery v HMA* [2001] 2 WLR 779, 810; 2001 SLT 37, 55.

²¹ Law Com No 273.

²² See paras 6.23-26 and 17.17-20.

²³ *On Media Law*, (4th ed 2002), p 362.

²⁴ See *A-G v MGN Ltd* [1997] 1 All ER 456.

the internet contained numerous accounts of previous convictions, it would be difficult to find that any individual publisher was in contempt.

- 5.22 Finally, proceedings for strict liability contempt require the consent of the Attorney-General, or a motion from the court having jurisdiction to deal with it.²⁵ This is intended as a safeguard to prevent prosecutions from being brought for petty or frivolous cases.

CONSULTEES' VIEWS

- 5.23 It was generally agreed to be very difficult or impossible for newspapers to monitor all the trials that were taking place in the country and then cross-check that their own archives contained no material relating to them. Rather than incur the costs of doing this, it would be easier to remove archives altogether. The BBC commented that “whilst it is relatively easy to remove direct links to content which editors believe might be relevant to ongoing criminal proceedings *of which they are aware*, it would be considerably more difficult to ensure that archives contained no information which might present some - limited - risk.” The benefits online archives offered to users had to be balanced against their “potential for rare but detrimental impact”.²⁶ Other consultees went further by suggesting that removing risky archives would be not merely difficult but practically impossible. PA News described the task as “prohibitively expensive”.
- 5.24 The point was also made that, in practice, jurors were unlikely to spend their leisure time looking for material on the internet (especially as many sites require payment). If they did happen to come across this material, it was felt that jurors were more than capable of excluding prejudicial external material from their minds, especially if they had been given appropriate warnings at the beginning or end of the case.

CONCLUSION

- 5.25 We accept that it is not practically possible to monitor all criminal trials in the country and subsequently remove from internet archives any potentially prejudicial material. We accept that this is also true for foreign material.
- 5.26 It is clear that jurors cannot be prevented from using the internet to search for detrimental material on criminal defendants. It is a characteristic of society today that it is not possible to prevent people from finding information, whether on the internet or otherwise. However, much of the prejudicial effect of such material could be removed by appropriate warnings to the jury to try the case on the evidence before them. Where the defence perceives a danger and asks for the jury to be given a specific warning not to carry out internet research, we would expect judges to be sympathetic to the request.

²⁵ Contempt of Court Act 1981, s 7.

²⁶ BBC response (emphasis added).

- 5.27 Inherent in the jury system is a certain amount of trust that jurors will make their decisions based on the information put before them in the courtroom, rather than swayed by external publicity. This approach should be applied to the information on the internet.
- 5.28 We understand the fear that rules of contempt of court could be applied inappropriately to an “unwitting” defendant, so as to impose obligations which are very difficult to meet. There is no single defence that would apply in all circumstances to give, for example, a local newspaper immunity for a report of a previous trial held on its website. That said, however, there are many safeguards in the existing law to ensure that internet publishers are protected against inappropriate, arbitrary or trivial prosecution (including the need to obtain the consent of the Attorney General to prosecution).
- 5.29 We think that the current safeguards in contempt law, taken together, are sufficient to protect internet publishers from being found guilty for publishing material that they did not believe to be prejudicial. This does not appear to be a priority for law reform.

PART VI

LIST OF CONCLUSIONS

ISP LIABILITY FOR OTHER PEOPLE’S MATERIAL

- 6.1 There is a strong case for reviewing the liability of internet service providers for material over which they have no editorial control but which they store on behalf of others. Although freedom of expression may legitimately be restricted in order to protect the reputation of others, it is important to ask whether this goal can be achieved without the regular removal of material which deals with matters of public interest and which may be true.
- 6.2 There are several possible reforms. One is to follow the US example by exempting ISPs from liability. Another is to consider extensions to the innocent dissemination defence contained in section 1 of the Defamation Act 1996. If the defence were extended, it would need to be accompanied by clearer guidance to ISPs on how to deal with the practicalities of receiving and responding to complaints, possibly through an industry code.

ARCHIVES AND THE LIMITATION PERIOD

- 6.3 We recommend a review of how the definition of a ‘publication’ in defamation law interacts with the limitation period when applied to archived material. Possible reforms include the introduction of some form of “single publication rule” or the development a separate archive defence.

JURISDICTION AND APPLICABLE LAW

- 6.4 The law in this area has always been complex, and attempts within the EU to create greater legal certainty have added new ambiguities. Although we have some sympathy with the concerns expressed about “unlimited global risks”, any solution would require an international treaty. We do not think that the problem can be solved within the short to medium term, and do not recommend reform at the present time.
- 6.5 There is a lack of readily accessible information about how the law of defamation impacts on the internet in other jurisdictions, to the detriment of both policy makers and practitioners. The Government could usefully sponsor research on the how other countries deal with this issue.

CONTEMPT OF COURT

- 6.6 We accept that it is not practically possible to monitor all criminal trials in the country and subsequently remove from internet archives any potentially prejudicial material. Instead, the criminal justice system should continue to trust the good sense of jurors to decide cases on the evidence before them.
- 6.7 We conclude that there are already sufficient safeguards in the existing law to protect internet publishers from inappropriate, arbitrary or trivial prosecution. We do not consider the matter to be a priority for law reform.

APPENDIX A

QUESTIONNAIRE ON DEFAMATION AND CONTEMPT OF COURT ISSUES ARISING FROM PUBLICATION ON THE INTERNET

INTRODUCTION

- A1. The Government has asked the Law Commission to carry out preliminary work on defamation and contempt of court issues arising from publication on the internet and to advise whether a scoping study should be carried out.
- A2. To assist in its work (which is limited to England and Wales), the Law Commission is seeking input from those affected by these issues, and from defamation practitioners. We set out below (in bold type) the issues on which we seek input from consultees.
- A3. Consultees need not answer all the questions; they may wish to limit responses to the issues of which they have actual experience. We appreciate that it may not always be possible to give full details, particularly in relation to recent claims.
- A4. We would welcome input on any points not raised in the questionnaire, but which consultees think are pertinent to the defamation or contempt of court issues raised by the questionnaire.
- A5. It may be useful for the Law Commission to be able to refer to, and to attribute, comments received from consultees. Any request to treat all, or part, of a response in confidence will, of course, be respected. If no such request is received the Law Commission will assume that the response is not intended to be confidential.

DEFAMATION ISSUES

'Forum shopping'

- A6. It is said that the global nature of publication on the internet may increase a defamation claimant's choice of jurisdictions in which to start an action. Their reason for choosing a particular jurisdiction may be entirely unobjectionable. It may however be objectionable, for example if a claimant chooses a particular jurisdiction in an attempt to hinder the other party's access to witnesses or to documents.
- A7. **Do you believe that the global nature of the internet has given rise to, significant 'forum shopping' issues? If so, please identify those issues.**
- A8. **Do you have any suggestions as to how those issues could be resolved without restricting the access of genuine claimants to the courts? For example, would you favour English law adopting a 'global publication rule' (this would mean that an internationally**

disseminated defamatory statement would be treated as giving rise to a single, global, tort rather than a separate tort in each relevant country)?

Liability for on-line publication of new material

A9. There are a number of types of commercial services which may give rise to a defamation liability arising from on-line publication of new material (archive material is covered below). These include:-

A10. There are a number of types of commercial services which may give rise to a defamation liability arising from on-line publication of new material (archive material is covered below). These include:-

A11. The posting of information by a commercial entity on its own website (for example a newspaper publishing its material on-line).

A12. Commercial news and information services which receive onto their websites a large number of items from numerous sources world-wide.

A13. ISPs which host a service on which allegedly defamatory material appears.

A14. Do you believe that the on-line nature of such services exposes their providers to a potential defamation liability which does not arise in relation to the publication of similar material in 'hard copy'? If so, please explain the reasoning that leads to that conclusion.

A15. Do you believe that the providers of such services are sufficiently able to protect their position by taking appropriate action upon being notified that a published item is alleged to be defamatory? How easy is it to remove, or to add a sufficient 'warning' to, material published on-line?

A16. Do you believe that the provision of such on-line services will be adversely affected in the absence of reform? If so, do you have any suggestions as to how the law might be reformed?

Liability for on-line archives

A17. Material in on-line archives is constantly re-published: there is not a 'single publication' when the material is initially placed in the archive. This means that:-

A18. A separate limitation period applies to each re-publication. (The current limitation period is one year. In its Report on the Limitation of Actions, published in 2001, the Law Commission recommended this be increased to three years from the date of knowledge, with a ten year 'long-stop'.)

A19. The position of the archive provider may differ in respect of the original publication and subsequent re-publications, or in respect of different re-publications. For example, their position may alter following notification that an article is alleged to be defamatory.

- A20. If re-publication of material in on-line archives effectively extends the limitation period indefinitely, will this have a significant practical impact upon the ability of archive providers to defend defamation claims? If so, please explain the reasoning that leads to that conclusion.**
- A21. Do you believe that the on-line nature of such archives exposes their providers to a potential defamation liability which would not arise in relation to 'hard copy' archives? If so, please explain the reasoning that leads to that conclusion.**
- A22. Do you believe that on-line archive providers are sufficiently able to protect their position by taking appropriate action when notified that a published item is alleged to be defamatory? How easy is it to remove, or to add a sufficient 'warning' to, material in an on-line archive?**
- A23. Do you believe that the provision of such on-line services will be adversely affected in the absence of reform?**
- A24. If so, do you have any suggestions as to how the law might be reformed? For example, would you favour English law adopting a 'single publication in a single format rule' (this would mean that publication of a defamatory statement in a particular format would give rise to a single liability at the time of first publication in that format, rather than an ongoing liability)?**

CONTEMPT OF COURT ISSUES

- A25.** Where reporting restrictions are in place we understand that it has been the practice of news services to prepare separate reports for domestic and overseas markets. Technological developments mean that information from overseas may be rapidly disseminated to people in this country and that, for example, prejudicial material could come to the attention of a juror. A juror might also be able to access prejudicial material contained in an on-line archive.
- A26. Do you (or your clients) believe that the dissemination of information from overseas exposes your (or their) organisation to the risk of being found to be in contempt of court on the basis that your (or their) organisation originally provided that information to the overseas market? If so, please explain the reasoning that leads to that conclusion.**
- A27. Do you believe that the nature of on-line archives exposes their providers to a risk of being found to be in contempt of court which would not arise in relation to 'hard copy' archives (for example, in respect of material relating to the previous convictions of a person facing criminal charges)? If so, please explain the reasoning that leads to that conclusion.**

A28. Do you have any suggestions as to how the law might be reformed to alleviate any such concerns, without compromising the position of jurors?

A29. Technological developments (for example satellite television and the internet) mean that the news and information services available are no longer limited to those originating from this country.

A30. Do you believe that this has given rise to any further issues in relation to contempt of court or the position of jurors? If so, please identify those issues. Do you have any suggestions as to how the law might be reformed to address those issues?

Law Commission

February 2002

APPENDIX B LIST OF RESPONDENTS TO QUESTIONNAIRE

Sandra S. Baron and David Heller, Libel Defence Resource Centre (New York)

Desmond Browne QC, 5 Raymond Buildings

Mike Dodd, PA News Limited

Nicholas Eldred, BBC

Mark Gracey, Thus Plc

Stephanie Harris, The Internet Service Providers Association

Henry Manisty, Reuters

Guy Martin, Peter Carter-Ruck and Partners

Santha Rasaiah, The Newspaper Society

Andrew Stephenson, Peter Carter-Ruck and Partners

Peter Stone, Cobbetts Solicitors

OTHER COMMENTS RECEIVED FROM:

Dr. Yaman Akdeniz, Cyber-Rights & Cyber-Liberties
<http://www.cyber-rights.org>

Karen Banks, Green Net

Dr. Stephen Collins, Yahoo Europe

Arvin Lee

Jonathan McCoy, Yahoo Europe

Michael Nathanson, RadcliffesLeBrasseur, acting for The Book Sellers
Association of Great Britain and Ireland

Philip Whall, AOL