



Law Commission

ASPECTS OF DEFAMATION PROCEDURE

A Scoping Study

May 2002

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Carnwath CVO, *Chairman*
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A SCOPING STUDY

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THE LAW COMMISSION

ASPECTS OF DEFAMATION PROCEDURE: A SCOPING STUDY

INTRODUCTION

1. On 31 January 2002, the Lord Chancellor's Department asked the Law Commission to undertake a scoping study into perceived abuses of defamation procedure. In particular the Lord Chancellor's Department was concerned to find out, first, whether "gagging" writs and letters cause a problem in practice, and secondly, whether claimants routinely target those secondary publishers of a defamatory publication who are less able to establish a defence (so-called "tactical targeting").¹
2. The purpose of this scoping study is to determine, by consulting organisations affected by this area of the law and defamation practitioners, whether any problems exist and, if so, their nature and extent. This information is then used to advise the Lord Chancellor's Department as to whether a full project, with recommendations for changes to be made to the law, is necessary.
3. We sent out over 30 questionnaires to a targeted sample of solicitors, barristers, newspapers, broadcasters and internet service providers.² We received 13 responses in total.³ Of these, six were from solicitors, two were from barristers and five were from organisations. This is a relatively small number of responses, from which it might be concluded that the issues for consultation are not seen as pressing by the people most affected by them.⁴
4. This study sets out the issues put to consultees and the various responses given by them. It then goes on to consider issues which we did not raise but which were thought to be important by our consultees. The findings are then summarised and a recommendation is made to the Lord Chancellor's Department.

Summary of conclusions

5. We have reached the view that there is no evidence of abuse of defamation procedures by way of "gagging", either by writ or letter. We also find that there is

¹ The Defamation Act 1996 does not use the term "secondary publishers", but those primarily responsible are the author, editor and commercial publisher, s 1(2); other participants in publication are commonly described as secondary publishers.

² A copy of the questionnaire forms Appendix A. Questionnaires were sent to firms based in both London and the provinces with a strong reputation in defamation work, and to a range of firms with expertise in representing both claimants and defendants.

³ A list of respondents appears in Appendix B.

⁴ This impression was borne out by newspaper reports following the announcement that we were to undertake this work: *The Guardian*, 1 February 2002, *The Law Society Gazette*, 7 February 2002.

no widespread problem of “tactical targeting” and that in most cases there are already sufficient safeguards in place to protect defendants. We have, however, recommended further examination of the defence available to secondary publishers under section 1 of the Defamation Act 1996.

PERCEIVED ABUSES OF DEFAMATION PROCEDURE

The use of “gagging writs”

6. A “gagging writ” may be defined as the commencement, in respect of already published statements, of proceedings for the purpose of preventing the further publication of similar statements, thereby stifling comment or debate. If the claimant wishes to vindicate his reputation, it is legitimate that he should want to deter others from making further defamatory comments, but where the sole purpose is to prevent unwanted criticism or exposure this conduct is an abuse of process.⁵
7. Our aim was to discover how widespread the practice of “gagging writs” is today. When the Defamation Act 1996 was going through Parliament concerns were raised about the use of “gagging writs”. The Lord Chancellor at the time, Lord Mackay of Clashfern, gave an undertaking to examine the extent of the problem and to consider whether a legislative solution was required.⁶
8. The procedural landscape of defamation claims has altered significantly since the passing of the Defamation Act 1996 and the introduction of the Civil Procedure Rules. We therefore asked consultees whether, in their experience, they have felt “gagged” by the commencement of defamation proceedings since the procedural changes came into force.
9. The view of the practitioners was unanimous. There is no evidence in practice of proceedings being commenced when the claimant has no intention of pursuing the case. Although two of the practitioners (one solicitor, one barrister) admitted that there had been a problem in the past, particularly with a few high-profile “gaggers”, all those in practice were now clear that this is no longer the case. The majority of consultees believed the main reason for this to be the introduction of the Civil Procedure Rules.
10. Many of the solicitors who responded took a robust view toward claims of “gagging”. One partner with a broad experience of both claimant and defendant work commented:

I do ... have the impression that there is an increased tendency for complaints to be pejoratively categorised as attempts to “gag” the media. ... I believe that the categorisation of letters and claims as

⁵ *Wallersteiner v Moir* [1974] 1 WLR 991. The case was struck out as an abuse of process on the ground of inexcusable delay. The court found that the main purpose of issuing the writ had been to prevent criticism of the plaintiff’s handling of his company’s affairs.

⁶ *Hansard* (HL) 16 April 1996, vol 571, cols 631–632.

“gagging” rests upon a misconception of the laws of libel and contempt.

“Gagging writs” were described as a “phantom menace”, while another solicitor stated that

The suggestion that actions may be started purely to “gag” defendants is an alien notion to my firm and me.

11. The organisations provided little evidence that they are victims of “gagging writs”. None of those who responded could pinpoint specific occasions when they have felt “gagged” by the commencement of proceedings, although four of the five complained that the law of libel more generally creates a “gagging” or “chilling” effect on the freedom of the press.
12. A number of reasons were suggested for the curtailment of the “gagging writ”. The main reason cited was the introduction of the Civil Procedure Rules. The majority of practitioners thought the increasingly pro-active role of the courts in the management of litigation to be a significant factor. Once a claimant commences proceedings he is no longer able to control the speed at which the action proceeds.
13. Further CPR provisions which were thought to have had a positive effect are:
 - (1) CPR Part 3.4 – Power to strike out a statement of case. The court may strike out where the statement of claim discloses no reasonable grounds for bringing the claim or where there has been an abuse of process or a failure to comply with a rule, practice direction or order. Five consultees (all practitioners) pointed out that Part 3.4 has been used to weed out claims without merit,⁷ and that the striking out can have serious costs implications for the losing party.
 - (2) CPR Part 24 and sections 8–10 of the Defamation Act 1996 – Summary disposal of claims. Two of the five consultees who dealt with summary disposal considered that these procedures are being used to resolve claims. One leading barrister stated that it is his “strong impression” that these mechanisms are being used “more and more frequently”.⁸

However, of the three other consultees, one solicitor stated that there was little evidence that the summary disposal procedures were being used in defamation cases. A large newspaper group commented that, in their opinion, these procedures are of “little importance” while another

⁷ An example cited was *Schellenberg v BBC* [2000] EMLR 296. In another context, the House of Lords dismissed the claimant’s action where the House was satisfied that the claimant had no intention of continuing the proceedings which he had commenced: *Grovit v Doctor* [1997] 1 WLR 640. That was a pre-CPR case, and a similar (or even more rigorous) approach might be expected under the new regime.

⁸ He referred us to *Milne v Telegraph Group Ltd* [2001] EMLR 760, in which it was held that the summary procedures were adequate to dispose of the case.

organisation stated that summary disposal procedures will not be effective until Masters and District Judges become more robust in using the powers available to them.

- (3) CPR Part 36 – Offers to settle and payments into court. It was suggested by two consultees that the effect of Part 36 is to hasten the resolution of disputes and to bolster the position of defendants, in which climate a claimant is less likely to issue a “gagging writ”.
14. In addition, two consultees (one solicitor, one barrister) stated that the Pre-Action Protocol in defamation cases should limit unmeritorious claims because a letter of claim should contain reasons, and if necessary evidence, why a publication is considered objectionable.⁹ This should not only discourage those who seek only to “gag” but also means that on the strength of a letter of claim a defendant should be able to judge whether or not to continue to publish.
15. The overall view was that the existing procedures are sufficient to deter or to weed out unmeritorious claims at an early stage. One consultee added that court fees in libel actions have risen in recent years from a writ fee of £60 to a claim fee of £620.¹⁰ Although this might not alone be enough to deter a wealthy claimant, it is worth noting that the number of claims issued in defamation cases has halved, from 452 in 1997 to 220 in 2001.¹¹

AGGRAVATED DAMAGES

16. We suggested in the questionnaire that one reason why “gagging” by means of commencing proceedings might be successful is a fear among publishers that further statements will lead to aggravated damages being awarded against them. Seven consultees responded on this issue. Even on the assumption that “gagging writs” are issued, all but one of these consultees were of the view that a defendant would be able to assess at an early stage the likelihood of having to pay aggravated damages at the end of a trial. If a defendant takes the view that proceedings have been started solely for the purposes of “gagging”, and the claim is devoid of merit, then he is unlikely to fear aggravated damages for two reasons. First, he suspects that the claimant will not proceed to trial and therefore the issue of damages will not arise, and second, he believes he has a defence.
17. On the other hand, if he believes that the claim is genuine, a fear of aggravated damages cannot be said to be contributing to a “gagging” effect. Two solicitors commented that the threat of aggravated damages can be met by taking particular care over the words used in any further publication and by checking the accuracy of the story. One leading barrister commented that it had been known for a newspaper to hesitate to “return to the attack” for fear of

⁹ Pre-Action Protocol for Defamation, PRO 5.3, CPR.

¹⁰ Supreme Court Fees Order 1999 (SI 1999 No 687), Sched 1, states that £500 will be charged for issuing a claim in any High Court case where an unlimited sum is sought, plus an additional £120 where any other remedy or relief is sought.

¹¹ Judicial Statistics, Table 3.2, 1997–2001.

aggravating the damages, but “it could be argued that this is no bad thing.” However, a leading claimant solicitor stated:

The truth of the matter is that Defendant media organisations, tabloids in particular, pay more attention to the commercial imperative of increased profits and sales than the legal risk of an award of aggravated damages, which is a small risk in any event.

Nevertheless, one of those defendant media organisations stated that there is “no doubt” that for them the threat of aggravated damages is real.

CONTEMPT OF COURT

18. It has been suggested to us that a “gagging writ” may be effective in stifling further publications because the subject matter becomes “out of bounds” for the press due to the risk that publication runs the risk of being in contempt of court. The five consultees who dealt with this issue rejected this suggestion. Under the Contempt of Court Act 1981, unintentional conduct will be regarded as being in contempt only if a publication creates a “substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced”.¹² The proceedings must be active for the issue of contempt to arise.¹³ Given that proceedings become “active” when arrangements for trial are made, and a person who issues a “gagging writ” has no intention of proceeding to trial, a leading claimant solicitor commented that contempt in a “gagging” context is “too far removed from reality ... to warrant serious consideration”.

CONCLUSION

19. We find no evidence of the practice of commencing proceedings where the sole aim of the claimant is to stifle unwanted exposure. Although it may be that certain individuals did in the past attempt to “gag” defendants, we are convinced that there are sufficient procedural safeguards now in place to deter or prevent any such attempts today.

The use of “gagging letters”

20. A “gagging letter” may be defined as a letter before action sent with the sole intention of limiting further damaging exposure and restricting the repetition of defamatory statements. Letters before action are a valid part of the litigation process when the claimant believes he has a genuine grievance which he is prepared to pursue to trial if necessary, but if the intention is to “gag” those in the distribution chain and the sender does not believe he has a good case, this is a cause for concern. We asked consultees whether they had experienced such letters in practice.
21. The vast majority of consultees responded by saying that in their experience letters threatening proceedings were not sent with the sole intention to “gag” the

¹² Contempt of Court Act 1981, s 2(2).

¹³ Contempt of Court Act 1981, s 2(3).

recipient. Nine consultees (five solicitors, two barristers and two organisations) said they had experienced no problem with “gagging letters”. The following points were raised.

22. First, the Pre-Action Protocol for Defamation dictates that a letter should be sent and further, that it should set out the complaint in detail. This should limit the possibility that a threatening letter might be sent without good grounds. As one solicitor commented, it is also usual for a letter to be sent notifying a potential defendant that a claim is being investigated. This is in accordance with the spirit of CPR, and should not be seen as an abuse. Another claimant solicitor stated that his clients are simply not advised to send letters before action where the merits of the case are weak.
23. Secondly, defendants are perceived to be robust enough not to be “gagged” by the arrival of a pre-action letter. The substantive and procedural protective mechanisms now available to defendants mean that they are unlikely to “cave in” when a claim form is issued, far less a letter sent. Three consultees pointed out that the requirement of “responsible journalism” should mean that research is conducted prior to publication and not once a letter of claim is received. If this is so, the recipient of a “gagging letter” should have nothing to fear.¹⁴
24. A number of consultees pointed out that it is right to send such a letter when claimants believe they are being defamed and defamatory material is being circulated. Third parties should also be put on notice that they are contributing to this circulation. One solicitor gave detailed examples of occasions when his firm has been accused of attempting to “gag” third parties in the course of trying to protect the reputation of its clients. For example, on one occasion it came to the attention of a number of police officers that a film was to be shown in cinemas which alleged that they were murderers. The film was promoted on the basis that it was going to reveal the identities of the officers involved. Consequently, a letter was sent to owners of the cinemas where the film was to be shown, pointing out that if the film did contain these allegations then the cinema owners were risking legal action. As a result a number of screenings of the film were “pulled”. Once the firm and the clients were given the opportunity to view the film, it was decided that no further action would be taken. This may have looked like “gagging” and was presented as such by the media, but the solicitor involved stated:

In the circumstances, it is difficult to see what other course of action our client could have adopted. The film-makers were certainly not “gagged” since they were given every opportunity to present their point of view in the media.

25. Against these comments, two organisations stated that in their experience threatening letters are sent by the subjects of unwelcome media attention in an attempt to deter publication. The first complaint was made on behalf of local and

¹⁴ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

regional newspapers. It was stated that letters warning of legal action are often sent to editors, who may deal with the complaint themselves or refer it to their solicitors. On the one hand, this is perfectly proper informal route for the subject of a story to take where he feels he has been or may be wronged. On the other hand, a warning letter which is sent solely with the intent to “gag” may lead to severe financial consequences for a local newspaper, which is unlikely to have either the money or the access to in-house lawyers of the national press.

26. The second organisation wrote on behalf of booksellers. It gave examples of instances where its members have had problems with individuals writing to booksellers threatening legal action if they distribute a particular book. This consultee commented that its members are routinely “targeted” by means of a letter threatening action.

CONCLUSION

27. We find little evidence of any routine practice of sending letters before action simply to stifle further publication. It is our view that letters before action are an important part of the civil process and that any alterations to current procedure might unduly limit the remedies available to a claimant who feels that he has been unfairly treated in the press.

Tactical targeting

28. In the case of most defamatory publications, there will be numerous potential defendants, and a claimant is entitled to choose whom to sue. However, there is a danger that a claimant may avoid threatening or bringing an action against those primarily responsible for the defamatory material, who are consequently in the best position to prove justification. He may instead adopt the tactic of targeting a defendant, such as a secondary publisher, who is less able to assess the strength of the claim, and therefore more likely to cease distribution. We wanted to discover whether this practice of “tactical targeting” is widespread.
29. Again, the majority of consultees who responded on this issue had had no experience of this problem.¹⁵ It was pointed out that there are deterrents against “tactical targeting”. First, the striking out provisions in the CPR may assist a defendant where a fair trial is rendered impossible. One solicitor referred us to a case in which the defendant newspaper successfully argued for the case to be struck out as an abuse of process on the ground that the claimant had obtained an affidavit from the source of the story in order to prevent the paper running the defence of justification in subsequent proceedings.¹⁶

¹⁵ One solicitor stated that his firm has been wrongfully perceived to have been engaged in this practice by issuing claim forms near to the end of the limitation period. He stated that such action is necessary to protect the client’s cause of action where the client has been involved in disciplinary or criminal proceedings up to or beyond the end of the limitation period.

¹⁶ *Carpenter v Associated Newspapers Ltd*, LTL 30/11/01 (unreported elsewhere).

30. Secondly, it is open to a secondary distributor to protect himself by seeking indemnities or contributions from the primary publisher. A primary publisher may also apply to be joined in the action as a defendant in order to provide the necessary evidence for a defence of justification.
31. Thirdly, and most importantly, section 1 of the Defamation Act 1996 provides a defence for parties other than the author, editor or publisher, who took reasonable care in relation to the publication of a defamatory statement and neither knew nor had reason to believe that they were causing or contributing to the publication of that defamatory statement.¹⁷ Those who may claim the protection of the section 1 defence include those who are involved only in printing, distributing, making copies of or selling the material.¹⁸
32. However, a number of consultees pointed out the limitations of the section 1 defence.¹⁹ It was argued by four consultees that the protection provided by the section is inadequate. A secondary publisher will be deprived of his defence under section 1 as soon as he is made aware of the defamatory nature of the publication in question. As one barrister pointed out, it may not be unjust that a secondary publisher should be at risk if he is aware of defamatory material, but continues to publish regardless. However, as another barrister put it:

The requirements of subsection (1)(c) are particularly stringent, and present a peculiar difficulty in relation to unmeritorious claims. For a claim's lack of merit will usually lie not in the fact that the publication is not *defamatory* (on the contrary, it usually will be), but in the fact that it is not *libellous* (because it is true, or susceptible of a defence of privilege or fair comment).²⁰

Once a secondary publisher is put on notice that material is defamatory, he faces a difficult choice. He can choose either to surrender in the face of a claim which may be without merit (a path his insurers may favour), or continue to publish on the basis of (potentially worthless) indemnities and assurances from primary publishers that the material, although defamatory, is not libellous. Two consultees went on to raise the issue of whether section 1 as it stands is compatible with Article 10 of the European Convention on Human Rights.²¹

¹⁷ Defamation Act 1996, s 1(1).

¹⁸ Defamation Act 1996, s 1(3)(a)–(e).

¹⁹ Although consideration of the substantive law is strictly beyond the scope of this study, the relationship between the section 1 defence and the issue of tactical targeting makes it convenient to mention it here.

²⁰ The italics are the consultee's. An amendment to the Defamation Bill, to allow a secondary publisher to rely on the defence if he believed that the statement, whilst defamatory, was not actionable, was rejected by Parliament: *Hansard* (HL) 2 April 1996, vol 571, cols 213–216.

²¹ There have been two applications to the European Court of Human Rights on the s 1 defence. The first, *McVicar v UK*, App No 46311/99, was declared inadmissible on the s 1 point, and the second, *Christopher Morris v UK*, App No 60220/00, has yet to be heard.

33. Two organisations in particular complained about the application of the section 1 defence. The first wrote on behalf of booksellers, stating that both large and small booksellers have been the targets of claimants who wish to prevent distribution, and that the law should be changed to give greater protection to secondary publishers. The second organisation was an internet service provider who, complained that ISPs are “very much seen as ‘tactical targets’”. Following the decision in *Godfrey v Demon Internet*,²² ISPs are regularly put on notice of defamatory material. The ISP then has to “play judge and jury” in deciding whether to take the article down. The ISP commented that

When it is common ground that the material is defamatory, but the publisher claims justification, then that judge and jury role becomes almost impossible to discharge.

Two other consultees, one solicitor and one barrister, agreed that ISPs are the subjects of the “most common manifestation” of the problem of “tactical targeting” and that the law in relation to their liability is in need of clarification.

CONCLUSION

34. The perception among consultees was that claimants are deterred from suing secondary distributors, given the existing protection available to these defendants. We believe therefore that “tactical targeting” is not a significant problem in practice. However, the defence available to secondary publishers under section 1 of the Defamation Act 1996, and the position of internet service providers, raise issues to which it is not possible to do justice in this study. We have concluded that these areas require further consideration.

THE HUMAN RIGHTS ACT 1998

35. We asked consultees whether the Human Rights Act 1998 raises any issues in relation to defamation procedure (as opposed to substantive defamation law).
36. Four consultees either did not address this issue or stated that they could see no issues arising under the current law. The remaining consultees raised the following points:
- (1) Four consultees raised the importance of achieving the right balance between the right of free speech and protection of the reputation of individuals. The ISP suggested that the removal of material which has been the subject of a complaint may be an unwarranted interference with their customers’ right to freedom of speech.

²² [2001] QB 201. The case decided that the defendant had published a defamatory posting, but was not a commercial publisher within the meaning of s 1(2) of the Defamation Act 1996 and therefore fell within a class protected by the s 1(1)(c) defence. However, the ISP could not rely on the defence because the claimant had notified it of the posting and it had failed to remove the offending article for a further 10 days.

- (2) Two consultees raised the issue of non-availability of legal aid for defendants as a potential breach of Articles 6 and 10 of the ECHR.²³
- (3) One consultee raised the issue of security for costs. The European Court of Human Rights rejected a claim by Tolstoy-Miloslavsky that the Court of Appeal's refusal to allow him to appeal because of his inability to provide security for costs was a violation of Article 6(1).²⁴ However, it is unclear whether the same view would be taken by the Court in relation to security for costs at first instance.²⁵
- (4) One consultee argued that Article 6 necessitated the retention of trial by jury in defamation cases.²⁶

CONCLUSION

37. Our view is that there is no indication from the case law of the European Court of Human Rights that any of these procedural points would be likely to lead to a finding of a breach of the Convention. We therefore suggest that no further action need be taken in relation to these issues at this stage.

OTHER ISSUES RAISED BY CONSULTees

Conditional fee agreements

38. Five consultees raised the issue of conditional fee agreements. Although two consultees recognised that the availability of CFAs in defamation cases gives a poor but deserving claimant access to justice where legal aid is unavailable, CFAs were thought to cause difficulty for defendants. Four consultees pointed out that a successful defendant is unlikely to receive any costs where a CFA is in place (although this is so also when an impecunious litigant in person brings an action). Coupled with this, a defendant who loses a defamation action funded by a CFA must not only pay the claimant's costs, but also finds himself saddled with insurance costs and the claimant lawyers' success fees. Given the expense of libel litigation this is a strong deterrent against both continuing publication and defending the case on its merits. One consultee suggested that the substantial costs which a defendant faces if he exercises his right to have the matter decided before a court are disproportionate to the aim of providing access to justice for

²³ In *McVicar v UK*, 7 May 2002, the European Court of Human Rights decided that the unavailability of legal aid to the applicant, who was a defendant in defamation proceedings, was not a violation of Art 6. Conditional fee agreements are available to defendants but are, for obvious reasons, rare. See also para 38 below.

²⁴ *Tolstoy-Miloslavsky v UK* (1995) 20 EHRR 442.

²⁵ CPR r 25.12 gives the court the power to order a claimant to pay a sum of money into court as security for the defendant's costs. However, the court may exercise its discretion to refuse security where the claimant has a good claim but insufficient funds to provide the security.

²⁶ In *Schellenberg v BBC* [2000] EMLR 296, Eady J stated that the CPR provisions should be applied no less rigorously, and judges should be no less interventionist, in cases that are to be tried by jury. The ECHR case law does not suggest that the right to a fair trial enshrined in Art 6(1) of the Convention guarantees the right to trial by jury.

claimants. The current arrangements may therefore constitute an infringement of Articles 6 and 10 of the ECHR.²⁷

CONCLUSION

39. The responses from our consultees suggest that, following the introduction of the Civil Procedure Rules and the Pre-Action Protocol in defamation cases, the incidence of “gagging writs” and “gagging letters” is rare. There is therefore, in our view, no need for further work to be done in this area. The majority of respondents had not experienced the “tactical targeting” of defendants and it would appear from the comments we have received that a project is not warranted in this area either.
40. However, two specific issues arose from our questions on “tactical targeting”. First, a number of respondents suggested that, although not strictly a procedural issue, the defence available to secondary publishers under section 1 of the Defamation Act 1996 ought to be re-examined. We therefore suggest that this question merits further consideration. Secondly, the position of internet service providers appears to require examination and clarification. We make no recommendation on the position of ISPs because we are currently carrying out preliminary work on internet publication, and we feel that it would be beneficial to consider all internet-related issues together.

RECOMMENDATION

We recommend to the Lord Chancellor’s Department that:

- **no project is required to examine “gagging writs” or “gagging letters”;**
- **no project is required to examine any general problem of “tactical targeting”; but**
- **there should be further consideration of whether the wording of section 1 of the Defamation Act 1996 strikes the right balance between claimants and defendants in defamation cases.**

(Signed) ROBERT CARNWATH (*Chairman*)
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE

MICHAEL SAYERS, *Secretary*

29 May 2002

²⁷ We are unaware of any challenge to conditional fee agreements under the Human Rights Act 1998 and make no recommendation on the adequacy of funding arrangements in defamation cases. These issues are beyond the scope of this study and are best dealt with by specialist funding bodies.

APPENDIX A

THE LAW COMMISSION SEEKS INPUT ON ASPECTS OF DEFAMATION PROCEDURE

INTRODUCTION

- 1.1 The Government has asked the Law Commission to carry out a short scoping study on perceived abuses of defamation procedure, identifying whether any problems exist and, if so, their nature and extent. The scoping study is to be completed by the end of March 2002.
- 1.2 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.
- 1.3 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.
- 1.4 We would welcome input on any points not raised in the questionnaire, but which consultees think are pertinent to the aspects of defamation procedure raised by the questionnaire.
- 1.5 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.

PERCEIVED ABUSES OF DEFAMATION PROCEDURE

The use of ‘gagging writs’

- 1.6 In the past it was suggested that a person sometimes started an action for defamation without intending to pursue the action, their intention being limited to preventing the publication of similar statements, or comments on what had already been said. It was said that starting an action might create an ‘immunity’ for the claimant due to concern that after the action had started:-
 - (1) The publication of further statements or comments might result in an award of aggravated damages.
 - (2) The ‘innocent dissemination defence’ might not be available to a distributor under the Contempt of Court Act 1981.
 - (3) The ‘innocent dissemination defence’ might not be available under the Defamation Act 1996.

(4) There was a risk of being found to be in contempt of court if a person repeated, or commented upon, the statements complained of.

1.7 **Since the introduction of the Defamation Act 1996 and the Civil Procedure Rules is there any evidence of the defamation process being abused by the use of ‘gagging writs’? Do the summary disposal procedures (in section 8 of the Act and Part 24 of the CPR) and the power to strike out for abuse of process (in Part 3 of the CPR) provide a practical mechanism for weeding out unmeritorious claims at an early stage?**

1.8 **Can you give examples of occasions, since the introduction of the CPR, when you (or your clients) felt ‘gagged’ because a defamation action had started? If so, please explain the reasoning that led to that conclusion. What steps were taken to protect your (or your clients’) position?**

1.9 **Since the introduction of the CPR, have you (or your clients) been accused of starting an action in an attempt to ‘gag’ another party? If so, how did you (or your clients) view the matter?**

1.10 **Do you have any suggestions as to how any continuing use of ‘gagging writs’ might be prevented, without diluting the protection afforded to genuine claimants (and their access to the courts)?**

The use of ‘gagging letters’

1.12 In the past it was suggested that a letter before action was sometimes sent even if the complainant did not believe that they could establish that the statement complained of was defamatory, their intention being limited to restricting the publication of similar statements. It was said that this ‘restriction’ arose due to concern that, after a retailer had become aware of such a letter, the ‘innocent dissemination defence’ under the Defamation Act 1996 would no longer be available to it.

1.12 **Since the introduction of the CPR (and the Pre-Action Protocol) is there any evidence of the defamation process being abused by the use of ‘gagging letters’?**

1.13 **Can you give examples of occasions, since the introduction of the CPR, when you (or your clients) felt ‘gagged’ after a letter before action had been sent? If so, please explain the reasoning that led to that conclusion. What steps were taken to protect your (or your clients’) position?**

1.14 **Since the introduction of the CPR, have you (or your clients) been accused of sending a letter before action in an attempt to ‘gag’ another party? If so, how did you (or your clients) view the matter?**

1.16 **Do you have any suggestions as to how any continuing use of ‘gagging letters’ might be prevented, without adversely affecting genuine claimants?**

The use of 'tactical targeting'

- 1.17 In the past it was suggested that unwelcome exposure was sometimes curtailed by the selective targeting of defendants. For example, a person might start a defamation action against secondary publishers, but omit the author, editor and publisher (who may be best placed to respond to the defamation allegation). It was also said that the same effect might be achieved by the 'tactical targeting' of letters before action.
- 1.18 **Since the introduction of the CPR (and the Pre-Action Protocol) is there any evidence of the defamation process being abused by the use of 'tactical targeting'?**
- 1.19 **Can you give examples of occasions, since the introduction of the CPR, when you (or your clients) felt that a claimant used 'tactical targeting' to curtail unwelcome exposure? What steps were taken to protect your (or your clients') position?**
- 1.20 **Since the introduction of the CPR, have you (or your clients) been accused of using 'tactical targeting' in an attempt to curtail unwelcome exposure? If so, how did you (or your clients) view the matter?**
- 1.21 **Do you have any suggestions as to how any continuing use of 'tactical targeting' might be prevented, without diluting the protection afforded to genuine claimants (and their access to the courts)?**

The Human Rights Act 1998

- 1.22 The impact of the Human Rights Act upon substantive defamation law has been considered by the courts in a number of cases.
- 1.23 **Do you believe that any HRA issues arise in relation to defamation procedure (as opposed to substantive defamation law)? If so, please identify the issues and the reasoning which leads to that conclusion.**

FUTURE WORK BY THE LAW COMMISSION ON DEFAMATION AND CONTEMPT OF COURT ISSUES ARISING FROM PUBLICATION ON THE INTERNET

- 1.24 The Government has also 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. The Law Commission has prepared a three page questionnaire for the purpose of obtaining input from those affected by these issues.
- 1.25 **Would you, or another member of your organisation, be willing to assist the Law Commission in respect of these issues?**

LAW COMMISSION
1 February 2002

APPENDIX B

LIST OF RESPONDENTS

SOLICITORS

Peter Stone, Cobbetts Solicitors.

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ORGANISATIONS

Santha Rasaiah, The Newspaper Society

Mark Gracey, THUS plc (Demon Internet)

Michael Nathanson, Radcliffes Le Brasseur, on behalf of The Bookseller's Association

Charles Collier Wright, Trinity Mirror plc

Mike Dodd, The Press Association