

# **ISPA Response to the Ministry of Justice Consultation on the Draft Defamation Bill**

## **About ISPA**

The Internet Services Providers' Association (ISPA) UK is the trade association for companies involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry.

ISPA's membership includes small, medium and large Internet Service Providers (ISPs), cable companies, content providers, web design and hosting companies and a variety of other organisations. ISPA currently has over 200 members, representing more than 95% of the UK Internet access market by volume. ISPA was a founding member of EuroISPA, the European Internet Services Providers Association based in Brussels, which is the largest umbrella organisation of ISPs globally.

## **Introduction**

ISPA welcomes the opportunity to respond to the Ministry of Justice consultation on the Draft Defamation Bill. Defamation and how it should be treated online is a long running issue and ISPA has engaged with numerous consultation exercises on the subject of defamation over the last ten years. We feel that the current consultation goes beyond previous attempts to reform the law so encourages the MoJ to use this opportunity to make UK libel law fit for the Internet age. ISPA generally supports the proposals made in the consultation document, particularly the increased protection for responsible publishers, such as the new public interest defence. However, our response focuses on those aspects that are most relevant to ISPA's members and we hope our views are of value to the MoJ.

Summary of our main points:

- ISPA supports the inclusion of a clause in the Bill for a single publication rule. The status quo fails to take into account the different nature of Internet publications and puts online publishers at a disadvantage compared to their offline counterparts.
- Under the current legal framework difficulties arise because ISPs feel that there is a lack of clarity with regard to how the current legal framework applies to ISPs. ISPA would welcome the MoJ updating and clarifying the legal framework to ensure that the judiciary, claimants and defendants adhere to the law.
- ISPA urges the MoJ to align and update the Defamation Act and the e-Commerce Regulations so that both offer the same level of protection.
- Libel law should provide a clear definition of what constitutes a valid notice so that ISPs have an objective set of criteria on which they can base their decision on whether they take down content. The status quo puts ISPs, which generally do not have expertise in libel law, in a position where they are judge and jury.
- The decision on whether content is actually defamatory should be made by an independent body, ideally a court, so that ISPs have certainty whenever they take down content.
- Libel cases should be directed at the entity that is closest to the publication. Only if publishers cannot be identified, should ISPs be expected to take action.
- The issue of access to justice should be addressed by a separate working group that would need to make a comprehensive assessment of the benefits of moving to a court-based system and balance them against any effects on access to justice.

## Single publication rule

**Q16. Do you agree with the inclusion of a clause in the Bill providing for a single publication rule?**

**Q17. Do you have any views on the substance of the draft clause? In particular,**

- a) **do you consider that the provision for the rule to apply to publications to the public (including a section of the public) would lead to any problems arising because of particular situations falling outside its scope?**
- b) **do you agree that the single publication rule should not apply where the manner of the subsequent publication of the material is materially different from the manner of the first publication? If not, what other test would be appropriate?**

**Q18. Do you consider that any specific provision is needed in addition to the court's discretion under section 32A of the Limitation Act 1980 to allow a claim to proceed outside the limitation period of one year from the date of the first publication?**

ISPA supports the inclusion of a clause in the Bill for a single publication rule. The status quo fails to take into account the different nature of Internet publications and effectively creates open-ended liability for online publishers. This puts online publishers at a severe disadvantage compared to their offline counterparts, a situation which is not appropriate for an age where public debate takes place online as much as offline.

We support the selection of "publication to the public" as a trigger. Online conversations can, similar to a telephone conversation, be held in private and people should only be liable if they choose to publish these essentially private conversations at a later stage.

## Problems with the current legal framework

**Q25. Have any practical problems been experienced because of difficulties in interpreting how the existing law in section 1 of the 1996 Act and the E-Commerce Directive applies in relation to internet publications?**

**Q26. Do you consider that clause 9 of Lord Lester's Bill (at Annex C) is helpful in clarifying the law in this area? If so, are there any aspects in which an alternative approach or terminology would be preferable, and if so, what?**

ISPA members feel that section 1 of the Defamation Act 1996 and the e-Commerce Regulations are insufficiently aligned and contrary to the statement made in the consultation paper do not "provide[] protection along broadly similar lines [...] to certain types of online intermediary services (namely hosting, caching and mere conduits)."<sup>1</sup>

For example, the 1996 Act offers a defence to a secondary publisher if it "did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement" The e-Commerce Regulation 19, however, offers a defence to a hosting provider if it "does not have 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. The trigger for Regulation 19 is the unlawful nature of a statement and accordingly, it can be argued that Regulation 19 offers a broader defence than section 1 of the 1996 Act which just relies on the claim that a statement is defamatory.

ISPA believes that clause 9 of Lord Lester's Bill does not necessarily provide any greater clarity than the e-Commerce Regulation. Under the e-Commerce Regulations, ISPs are generally treated as mere conduits, hosting providers and cachers and the Regulations provide a different liability regime for each type of ISP. In this context ISPA would also like to point out that question 23 of the consultation paper is slightly misleading. Unlike the e-Commerce Regulations, question 23 treats all ISPs as secondary publishers which creates confusion and assigns them a level of editorial control that they generally do not have.

<sup>1</sup> Ministry of Justice. 2011. Draft Defamation Bill Consultation, p.44.

Overall, ISPA members would welcome the defences of the e-Commerce Regulations being replicated in the Defamation Act as far as possible. This would make the regulatory system more accessible and streamline the process for all parties involved as it would remove the need to consult multiple sources.

The consultation document raises the issue that not all types of internet services are protected. There may be a case for extending the existing defence to search engine providers that are currently only protected under common law.

**Q23. Do you consider that it would be appropriate to change the law to provide greater protection against liability to internet service providers and other secondary publishers?**

**Q28. Have any difficulties arisen from the present voluntary notice and takedown arrangements? If so, please provide details.**

Under the current legal framework difficulties arise because ISPs feel that there is a lack of clarity with regard to how the current legal framework is applied to ISPs. This ultimately undermines the level of protection that legislators initially intended to supply to ISPs. ISPA would welcome a change to the law to clarify the legal framework and accommodate the online world.

On a general level, current libel law relies on a voluntary notice and takedown regime that does not sufficiently define key terminology, fails to provide ISPs with guidance to assess the validity of a takedown notice and ultimately forces ISPs to make an ill-informed judgement call whenever they receive a libel related notice. This not only creates a secondary liability for ISPs, thereby undermining the intended level of protection, but also has implications for freedom of speech.

Voluntary notice and takedown has, to a certain extent, been quite successful. In relation to child abuse images, for example, the Internet industry helped to set up the Internet Watch Foundation which provided an effective solution to the problem of child abuse images hosted in the UK. The issue of defamation, however, provides for a different set of problems. In relation to child abuse images, even a lay person can clearly identify that the content in question is unlawful, so that ISPs only have to assess the validity of a takedown request. In relation to allegedly defamatory content, lay persons and, to a certain extent legal experts, are unable to clearly identify whether content is actually defamatory and unlawful.

The e-Commerce Regulations, for example, protect hosting providers from liability as long as they do not have "actual knowledge of unlawful activity." However, the Regulations do not provide a clear definition of what "actual knowledge" actually means and expect that ISPs, which generally do not have expertise in libel law, to assess whether content is unlawful. The lack of legal certainty and the limited legal expertise are aggravated by the fact that ISPs generally do not have full knowledge of the underlying facts to assess whether content is actually defamatory. Faced with legal uncertainty, limited legal expertise and little knowledge of the underlying facts ISPs tend to err on the side of caution by taking down content when they are faced with a libel related takedown request.

This, however, has potentially negative consequences both from a public policy and ISP perspective. ISPs are essentially acting in good faith and assume that the takedown notice is valid and that the content in question is defamatory. This, however, may not be the case which not only puts the publisher of the allegedly defamatory publication in a position to take legal action against the ISP, but also removes legal content from the Internet.

ISPA believes that the law needs to be updated, clarified and changed to provide ISPs with the level of protection that legislators intended to provide to them and to remove them from a position where they are forced to be judge and jury without having the necessary level of knowledge and legal expertise to make fair and just decisions on taking down content.

## **Solutions**

**Q24. If so, would any of the approaches discussed above provide a suitable alternative? If so, how would the interests of people who are defamed on the internet be protected? Do you have any alternative suggestions?**

Of the various approaches that are outlined in the consultation paper, requiring a “claimant to obtain a court order for removal of allegedly defamatory material before any obligation could be placed on the ISP” would be ISPA’s preferred solution.

As outlined above, ISPs are generally not in a position where they are able to make an informed decision on the defamatory nature of content. ISPA believes that the best solution to this problem would be to ask a competent legal authority, ideally a court, to assess the validity of a takedown request. In this context, “actual knowledge” under the e-Commerce Regulations 18 and 19 would be defined as being served with a court order that states that an online publication is unlawful under the Defamation Act.

Upon receipt of a court order ISPs would be required to act according to the e-Commerce Regulations, e.g. to act “expeditiously to remove or to disable access to the information” if the ISP is a hosting provider. However, in order to provide clarity for all parties involved, the court order should further provide ISPs with clear instructions of what they are required to do and timescales for how quick they are required to act. ISPs who comply with the process set out in the court order should be exempt from any liability for the actions they have taken in order to comply with the order.

Claimants should be required to confirm that they were unsuccessful in pursuing another entity with greater editorial control (e.g. the primary publisher) to take down the allegedly defamatory material before pursuing action against the intermediary. The claimant should further provide details about the allegedly defamatory material in a standardised format and ISPA believes that, in addition to the notice requirements set out in clause 9 of Lord Lester’s Bill, claimants should be required to specify the specific URL to facilitate identification of the allegedly defamatory material.

The court-based process should ensure that online publishers are given the right to defend themselves against claims that are brought against them. It must also be ensured that any request to disclose communications data or the identity of a user goes through the normal legal process.

ISPA is aware that the MoJ expressed concerns that a court-based notice and takedown system “could be costly for claimants and could add significantly to the volume of urgent applications for injunctions brought before the courts.”<sup>2</sup> However we would urge the MoJ to consider that applications for injunctions that currently are not brought before courts are effectively processed by ISPs which do not have the resources and expertise to deal with them in a just and fair manner. Bringing these applications before a court would ensure that they are assessed by a competent authority rather than an ISP, that online publishers are guaranteed a right to defend themselves and that only actually unlawful online content will be taken down.

Given the importance of getting this right ISPA, proposes that the MoJ makes this area the subject of a separate working group of interested parties to ensure that more time and expertise is given to this important area. This working group could for example explore whether something akin to a small claims court for minor defamation cases could solve the problem of access to justice. ISPA is also aware that the Libel Reform Campaign has provided the MoJ with a detailed proposal of a court-based notice and takedown system and we believe that this proposal could be a starting point for the discussions of the working group.

**Q29. Would a statutory notice and takedown procedure be beneficial? If so, what are the key issues which would need to be addressed? In particular, what information should the claimant be required to provide and what notice period would be appropriate?**

As outlined above, ISPs are not in a position to properly assess the defamatory nature of online content and a notice would need to clearly identify whether the content is actually defamatory. This, however, points again to a system where a takedown notice is assessed by an independent body before an ISP is required to act.

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<sup>2</sup> Ministry of Justice. 2011. p.44.