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Review of Model Defamation Provisions
c/o Policy, Reform and Legislation
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Google welcomes the opportunity to comment on the Working Party's Consultation Draft of the Model Defamation Amendment Provisions 2020 (the **Draft MDAPs**). Google appreciates the efforts of the Working Party in reviewing all of the stakeholder submissions, and preparing the Draft MDAPs, in a timely manner.

We note that the Working Party has not yet addressed the issues raised by stakeholders, including by Google, in relation to the application of the Model Defamation Provisions to digital platforms. While it is disappointing that the consideration of these issues has been put off, we hope that this delay will allow detailed consideration of these important issues which have become more pressing as a result of the recent decision in *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766. We will put on further submissions in relation to these issues at the appropriate time but encourage the Working Party to give this issue a high priority, given that the above decision highlights that increasingly the issues will affect all media and individuals.

These submissions set out Google's response to the Draft MDAPs. We note that these submissions respond only to the Draft MDAPs most relevant to Google. The fact a particular recommendation has not been responded to does not indicate that Google supports the amendment, nor does it indicate Google's opposition to it.

As set out in these submissions, Google supports the following proposals:

- Recommendation 3(a): introducing a single publication rule, if extended to secondary or digital publishers;
- Recommendation 6(a): amending Part 3 to provide that the aggrieved person specify the location of the publication, assuming the intent is to require specification of, for example, a URL rather than a website;
- Recommendation 11(a): introducing a new public interest defence, except in relation to the proposed list of considerations;
- Recommendation 11(b): clarifying the statutory qualified privilege defence to make clear that not all of the factors listed in section 30(3) need to be met;
- Recommendation 14(a): introducing a serious harm threshold;

- Recommendation 16(a) and 16(b): clarifying that there is a cap on damages for non-economic loss, regardless of whether aggravated damages apply, except insofar as the recommendation provides no limit to aggravated damages; and

- Recommendation 17: requiring leave of the court for further proceedings in relation to publication by the same or associated defendants.

Google has identified the following drafting as requiring some further consideration:

- the drafting of the single publication rule;

- the drafting of the requirement that an aggrieved person specify the location of a publication;

- the amendments to the qualified privilege defence;

- the drafting of the public interest defence, particularly in relation to the list of considerations for whether a publication was "responsible";

- the amendments to clause 35, where they include no limit on aggravated damages;

- the amendments to clause 23, given that search engines and other digital platforms displaying the matter are not protected from being sued in respect of the same matter previously sued upon.

Google does not support the abolition of the defence of triviality.

**CONCERNS NOTICE**

In Recommendation 6(a) the DWP recommend that the CAG:

> *Amend Part 3 to provide that the aggrieved person must specify in the concerns notice the location of the publication of the defamatory matter (for example the URL).*

This recommendation, which Google welcomes, is directed at ensuring that defamatory material identified in a concerns notice can be clearly and easily located. Achieving this objective is essential in relation to defamation online.

However, there is a risk that the language in the Draft MDAPs is capable of being interpreted in a way that is inconsistent with the stated purpose of the amendment.

The new clause 14(2)(a1) in the Draft MDAPs, which is intended to implement Recommendation 6(a), provides that a notice is a concerns notice if the notice, amongst other things, "specifies the location where the matter in question can be accessed (for example, a website address)". This is not a specific or clear method of identifying digital material.

First, the term "website" is generally understood to refer to a collection of individual web pages, with each web page being located at a different Uniform Resource Locator (or **URL**). The term "website address" is ambiguous in that it does not identify whether the statute requires specification of a web page (identified by a specific URL), or only of a “website”,

which could be comprised of any number of different web pages.[1] Under the current wording of the Draft MDAPs, the provision of a "website address" is unlikely to be sufficient for the recipient of a concerns notice to locate the defamatory material (ie, the individual web page that includes that material) in a timely manner. This is precisely the issue that Recommendation 6(a) is intended to address.

Second, the new clause 14(2)(a1) should also be amended to explicitly require a plaintiff to include the relevant URL in a concerns notice (rather than, as currently drafted, the "website address" being listed as an example of how an aggrieved person can specify the location of the publication of the defamatory matter). A URL is the only consistently reliable way to specifically identify the location of online material and this should be reflected in the new clause. Furthermore, an aggrieved person is easily able to identify the relevant URL, particularly when compared to online intermediaries such as Google that enable people to access trillions of unique third party URLs.

To address these issues, we suggest that clause 14(2)(a1) in the Draft MDAPs be amended as follows to better accord with the intention of Recommendation 6(a):

> *(a1) specifies the location where the matter in question can be accessed (including, if the matter in question is accessible on the Internet, the relevant Uniform Resource Locator at which the matter can be accessed).*

**SINGLE PUBLICATION RULE**

Google strongly supports the inclusion of a single publication rule, as proposed in Recommendation 3(a), if extended to secondary or digital publishers. The recommendation highlights the difficulty of not resolving the issues relating to digital and secondary publishers at the same time as the introduction of a single publication rule.

Google is concerned that the current drafting of the rule only explicitly protects primary publishers, and does not necessarily encompass secondary publishers who are not associates of the primary publisher.

It is common for secondary publishers like Google to be sued for defamation in respect of articles published by original authors and publishers that have been available through the secondary publishers' sites for years without any action being taken. It is therefore necessary that the single publication rule encompass secondary publishers, as set out in Google's submissions dated 30 April 2019, and the DIGI submissions dated 14 May 2019, amongst others, failing which the intention of the amendments will be easily circumvented. Rather than suing the original publishers of matter, plaintiffs will instead sue secondary publishers, which would only increase the burden on the courts.

The fact that such digital platforms are not the "creator" of the defamatory material should not be an argument against affording them protection: the way the internet now functions is that many users access online material via a digital platform, rather than directly through the creator's website. Google and other digital platforms' important role in hosting digital archives and making resources available for all to access at any point necessitates providing access to material over an extended period, not just the day or two a newspaper would once have been readily available.

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[1] For example, the website abc.net.au appears to comprise over 5,000,000 web pages.

It is unclear from the proposed drafting of the clause whether it will also apply to secondary publishers, like Google. The use of the term original publisher suggests that to rely on the rule, the person must be the person who first made the material available (e.g. the newspaper), or an associate of that person. A secondary publisher like Google could not be considered an associate of that first person.

The use of the term "original publisher" does not appear in section 8(1) of the *Defamation Act 2013* (UK), on which clause 1A is based:

> (1) This section applies if a person—
>
> (a) publishes a statement to the public ("the first publication"), and
>
> (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

Whereas the proposed clause 1A(1) states:

> (1) This section applies if—
>
> (a) a person (the ***original publisher***) publishes matter to the public that is alleged to be defamatory (the ***first publication***), and
>
> (b) the original publisher or an associate of the original publisher subsequently publishes (whether or not to the public) matter that is substantially the same.

The rule should be amended to alter the language or clarify that an "original publisher" need not be a primary publisher, so that secondary publishers, including Google and other digital platforms, can rely on the rule, such that the date of the first publication is date that the page is first indexed or included in search results.

If the Working Party does not agree with changing the language of "original publisher", the term "associate of the original publisher" should be changed to a term which more clearly incorporates Google and other secondary publishers, or the definition of "associate of the original publisher" should be clearly specified to include Google and other secondary publishers.

Alternatively, the "original publisher" language should be removed, to more closely align with the UK provision on which it is based.

Additionally, Google is concerned that the current drafting of clause 1B is too permissive, in that it will be relatively easy for plaintiffs to circumvent the 12 month limitation period and obtain an extension.

**SERIOUS HARM THRESHOLD / TRIVIALITY**

Google welcomes the introduction of a serious harm threshold for defamation claims.

However, it is essential that the Draft MDAPs clarify that the threshold may be addressed at an early stage of proceedings, particularly given the Federal Court's introduction of Defamation Practice Note (DEF-1). If assessment of the threshold is left to trial, neither the Court nor parties to defamation proceedings will realise the benefits intended by its introduction.

Google disagrees that the defence of triviality should be abolished.

The proposed serious harm threshold and the defence of triviality are conceptually different such that the introduction of the threshold should not be considered to replace the defence or otherwise justify its abolition:

(a) First, the proposed threshold would act as an element of the cause of action. The defence, as with other defences to defamation, is intended to excuse conduct which is otherwise defamatory.

(b) Second, the defendant bears the onus of establishing triviality. Conversely, the plaintiff would bear the onus of establishing that their claim meets the proposed serious harm threshold.

(c) Third, the proposed serious harm threshold is likely to be interpreted to focus on the consequences of publication.[2] The defence of triviality focuses on the circumstances of publication.

In practical terms, the proposed threshold and defence are also likely to function very differently. The threshold is likely to be used by defendants at an early stage in proceedings to seek to dismiss claims they consider do not meet the threshold. The defence of triviality is ordinarily considered with any other defences at trial.

Furthermore, circumstances may arise where a defendant fails to have proceedings dismissed at an early stage on the basis of the serious harm threshold only to succeed on triviality after a full hearing (e.g. after cross-examination of key witnesses or the preparation of complete damages evidence). This is particularly likely given the differences in emphasis between the two highlighted above. To deny defendants the ability to rely on the triviality defence in these circumstances would be inappropriate, particularly when it could dictate whether or not the defendant is required to pay damages.[3]

Google's preference would also be to introduce concepts of proportionality and case management into the MDAPs. However, even if not introduced into the MDAPs, these principles remain an appropriate tool for managing defamation claims in certain circumstances (such as *Bleyer v Google* [2014] NSWSC 897).

If the triviality defence is to be maintained, Google agrees with submissions made in response to the February 2019 Discussion Paper that section 33 should be amended by:

(a) deleting the term "any" before the words "serious harm"; and

(b) clarifying that the harm referenced in that section is harm to reputation.[4]

This is necessary to ensure that the triviality defence is workable, does not set an impossible burden on defendants and effectively strikes a balance between the interests of the plaintiff in protecting their reputation and free speech interests.

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2 Following *Lachaux v Independent Print Ltd* [2019] UKSC 27, [14].

3 By way of example, if analogous, consider *Smith v Lucht* [2017] 2 Qd R 489 discussed at page 47 of the Defamation Law Committee of the NSW Bar Association's submissions to the February 2019 Discussion Paper.

4 *Smith v Lucht* [2017] 2 Qd R 489.

## QUALIFIED PRIVILEGE

The qualified privilege defence (and, by extension, the new public interest defence) may apply to Google where it receives a complaint in respect of a search result (thereby removing the application of the innocent dissemination defence), and determines it should leave the result in place, considering that its users have an interest in receiving the information contained within the relevant web page.

However, there has historically been a very high threshold applied for a publication to be considered "reasonable". As set out in Google's submissions dated 30 April 2019, and the DIGI submissions dated 14 May 2019, Google and other digital platforms face additional difficulties in meeting the threshold, as they have not been involved in the preparation of the content, unlike traditional media defendants.

Google supports amending the defence so that the threshold is lower and the defence is more available. However, the amendments made in the Draft MDAPs to section 30 are unlikely to impact the availability of the defence.

While the amendments to subsection (3) and the addition of subsection (3A) are intended to ensure that the factors set out in subsection (3) are not used as a checklist, the existing drafting already stated that the listed factors "may" be taken into account, rather than requiring they all be taken into account. The courts have taken the approach that all of the factors should be considered. In practical terms, it is difficult to see how the proposed amendments will alter the court's application of the defence.

Further amendments to the defence are necessary in order to give effect to the original intention of the defence. The defence should encourage the court to consider all the circumstances surrounding the publication in each particular case to determine whether it is reasonable. For example, the court should recognise Google's role in providing users with access to the information available on the world wide web, and its users' interest in it continuing to do so and providing relevant results when they are searched for, in determining whether its publication of a search result was reasonable.[5]

## PUBLIC INTEREST

Google welcomes the introduction of a new public interest defence. However, the new public interest defence in clause 29A of the Draft MDAPs is likely to suffer from the same difficulties as the existing statutory qualified privilege defence.

The considerations for whether publication is "responsible" are largely the same as the existing considerations for reasonableness under section 30. Six of the nine considerations listed in clause 29A(2) are the same as those listed in section 30(3) of the existing model provisions.

The drafting of clause 29A(2) is in fact stricter than the drafting of section 30(3), as the clause states that the court **must** take into account the listed factors, to the extent they are relevant, whereas section 30(3) states the court **may** take into account the listed factors.

The factors listed in clause 29A(2) also deviate from those the New Zealand Court of Appeal considered relevant circumstances when developing the defence in *Durie v Gardiner*:[6]

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5 Kourakis CJ considered this relevant to reasonableness in *Google Inc v Duffy* (2017) 129 SASR 304 at [310]-[322].

6 [2018] 3 NZLR 131 at [67].

1. the seriousness of the allegation;
2. the degree of public importance;
3. the urgency of the matter;
4. the reliability of any source;
5. whether comment was sought from the plaintiff and accurately reported;
6. the tone of the publication; and
7. the inclusion of defamatory statements which is not necessary to communicate on the matter of public interest.

Given the substantial similarity with the existing qualified privilege defence, courts are likely to consider the public interest defence analogous to the qualified privilege defence and apply the existing qualified privilege authorities in considering whether the defence is available, and the almost-impossibly high threshold applied in the past is likely to apply to the new defence. Given the stricter terminology used ("must"), courts may determine they need to hold defendants to an even higher standard than previously applied for the qualified privilege, given the courts have already demonstrated they consider the list of factors in section 30(3) a checklist.

The drafting of clause 29A(2) should be amended to set it further apart from the existing qualified privilege defence, and to ensure it is more accessible than the existing qualified privilege defence. The drafting should ensure that all relevant circumstances (including, for example, the public interest in the continued operation of search engines) are considered in determining responsibility, not just those listed in clause 29A(2). In that respect, Google suggests the drafting should more closely echo the drafting of the public interest defence in section 4(2) of the *Defamation Act 2013* (UK):

> (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

**DAMAGES**

Google supports clarifying the drafting of clause 35 to ensure that damages for non-economic loss are capped, as recommended in Recommendation 16(a). Google also welcomes the changes to the drafting to clarify that awards for damages for non-economic loss should be on a scale, with the cap being the upper end of the scale.

However, the current amendments to clause 35 in the Draft MDAPs allow for an award to be made up to the maximum damages amount for non-economic loss, and then a separate amount to be awarded for aggravated damages, with no restriction or guide as to amount. This seems counter to the intention of the cap.

The drafting seems to have fixed one problem (that created by *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154, whereby the cap on damages for non-economic loss no longer applied once it was determined that an award of aggravated damages should be made), and replaced it with another: allowing for uncapped aggravated damages. The effect is the same, in that awards well over the statutory cap will continue to be made.

The failure to limit aggravated damages in any respect is also contrary to the intention of the uniform law, which aimed to abolish exemplary damages. Uncapped aggravated damages bearing no relationship to the loss suffered are more in the realm of punitive damages.

An example of how the amendments as drafted could continue the trend for very high awards comes from the recent decision in *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284. Having been asked to consider what his award would be if the statutory cap did apply to non-economic loss, Applegarth J stated at [412] that his award of $600,000 in that case could be broken down into $400,000 for damages for non-economic loss (approximately at the statutory cap), with a further $200,000 for aggravated damages. Aggravated damages amounting to 50% of damages awarded for non-economic loss is in such a range that it could be considered punitive, and the total award was well in excess of the cap, despite damages for non-economic loss being limited to the capped amount.

Either the drafting should be amended, so that the statutory cap applies to both damages for non-economic loss and aggravated damages together, or the amount awarded for aggravated damages should be limited: either by capping it at a percentage of the damages awarded for non-economic loss (e.g. 20%) or by providing a fixed cap for aggravated damages.

**MULTIPLE PROCEEDINGS**

Google supports the proposal in Recommendation 17 to amend section 23 to require leave of the court be obtained before further proceedings can be brought in respect of the publication of same or like matter by the same or associated defendants.

However, Google considers the definition of "associate of a previous defendant" should be expanded to include search engines or other digital platforms who make the matter available through their sites. A plaintiff should not be able to bring an action against the original creator of the matter for defamation, then bring a separate action for defamation against Google in respect of the same matter. If a plaintiff is able to do so and succeeds in both actions, they are effectively being compensated twice in respect of the same material.

**CONCLUSION**

Google welcomes further opportunities to engage with the Working Party in relation to the topics discussed above, and looks forward to reviewing and responding to the Working Party's recommendations in relation to digital platforms as soon as they become available.

Yours faithfully

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