

Response to Discussion Paper
Attorneys-General
Review of Model Defamation Provisions – Stage 2

Bennett + Co, Corporate and Commercial
Media Law Group

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ABOUT THE AUTHORS – BENNETT + CO, MEDIA LAW GROUP

Bennett + Co Corporate & Commercial Law

Bennett + Co is a pre-eminent Perth based legal practice and market leader in the area of litigation. Our practice spans a broad range of litigation expertise, including an established and specialist defamation practice.

The 2019 and 2020 edition of the Doyle’s Guide for Western Australia, ranked Bennett + Co as a first tier firm in the category “*Leading Commercial Litigation & Dispute Resolution Law Firms*”. Principal and leader of the firm’s Media Law Group, Martin Bennett was, for the third consecutive year, recognised as pre-eminent in the category “*Leading Commercial Litigation & Dispute Resolution Lawyers*”.

Our litigation experience is extensive. No other litigation practice in Australia appears as frequently before the defamation list judges in the Supreme Court of Western Australia.

Specialist defamation expertise - Media Law Group

Defamation is a key aspect of Bennett + Co’s practice. We have had conduct of some of the most prominent defamation cases in the Supreme Court of Western Australia (and arguably Australia), representing a variety of high net worth individuals, public officers and politicians, lawyers, sporting and other public personalities, business people and company directors.

Our defamation practice is predominantly, but not exclusively, focused upon advising plaintiffs, and others aggrieved by defamatory publications.

The contributing authors (Martin Bennett, Fabienne Sharbanee, Alex Tharby, Nikki Randall, Michael Douglas and Demi Swain) are all members of Bennett + Co’s specialist Media Law Group, which comprises 16 solicitors¹ with the conduct of defamation matters ranging in experience from 3 to 43 years. Our collective experience working on defamation matters exceeds 90 years.

Martin Bennett, the head of the Media Law Group, has been involved in defamation litigation since his articulated year in 1978 and has maintained a strong focus on defamation advice and litigation throughout his extensive career. Martin has been involved in 2 defamation matters which proceeded to appeals before the High Court of Australia, *Bridge v Toser*² in 1978 and *Coyne v Citizen Finance*³ in 1991, the latter of which stood as the highest award of damages for defamation in Western Australia until 2015. Bennett

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² [1978] WAR 177

³ (1991) 172 (CLR) 211



& Co, the firm of which Martin was the founding and Managing Partner from 1988 to 2006 was also recognised as a specialist defamation practice.

The Media Law Group maintains active group communications to ensure that new judgments, media stories and developments in the law are circulated and discussed amongst the group. We meet regularly to discuss the status and progress of current defamation actions within the firm, exchange ideas for the progress of those actions, discuss developments in the law and create methods of ensuring that the group's collective defamation knowledge is accessible to all practitioners in the group.

Since the inception of Bennett + Co in 2011, we have advised and provided representation to over 170 different clients regarding in excess of 200 defamation matters. In the same period we have been involved in 7 defamation trials before the Supreme Court of Western Australia⁴, and have obtained in excess of 100 interlocutory and final judgments in defamation proceedings before the Supreme Court of Western Australia.

With the extensive experience described above in mind, Bennett + Co's Media Law Group is uniquely placed to provide a detailed and considered view on how the proposed amendments to the Uniform Defamation Laws are likely to play out in actual practice, and their likely effect upon litigants and, in particular, plaintiffs in defamation actions.

⁴ *Jensen v Nationwide News & Anor* [2019] WASC 451; *Rayney v State of Western Australia (No 9)* [2017] WASC 367; *Kingsfield Holdings Pty Ltd v Rutherford* [2016] WASC 117; and *Sims v Jooste [No 2]* [2014] WASC 373; the matters of *Rayney v Reynolds* and *Green v Fairfax* for which we await the Court's reserved decisions; and *De Kauwe v Cohen & Ors* which is currently part heard.

PART A – LIABILITY OF INTERNET INTERMEDIARIES

1. Categorising Internet Intermediaries

- (a) **Is the grouping of internet intermediary functions into the three categories of ‘basic internet services’, ‘digital platforms’ and ‘forum hosts’ a useful and meaningful way to categorise internet intermediary functions for the purpose of determining which functions should attract liability? Why?**

Yes. Generally, the categories appear to capture the differences between intermediaries which merely facilitate access to information, those which are actively involved in the dissemination of information, and those who help curate it.

2. Categorising basic internet services

- (a) **What internet intermediary functions should be categorised as basic internet services? It is proposed that to be categorised as a basic internet service the internet intermediary must be a mere conduit (similar to telephone or postal services) in that they do not have an interest or involvement in the nature of the content they transmit or host.**

Basic internet services should include purely passive functions where the intermediary has no involvement in or control over the content. Internet service providers merely facilitate access to the internet and websites so may readily be considered ‘mere conduits’.

A potential issue with the inclusion of hosts and cloud service providers is that those intermediaries may not be purely passive. The current issues with determining who is an ‘internet content host’ for the purpose of the *Broadcasting Services Act 1992* (Cth) may continue if the definition of ‘basic internet services’ is to be extended to such service providers. The definition should be clear, and care should be taken to ensure that a publisher cannot avoid liability for publication of defamatory material simply because they host their own content.

The proposed definition of ‘basic internet services’ would be appropriate.

- (b) **What are the key concepts that should determine if an internet intermediary function is a basic internet service? Is passivity and neutrality an appropriate basis on which to determine which internet intermediary functions attract liability?**

Any person who participates in the communication of defamatory material may be found liable for it. Defamation is a tort of strict liability. The defence of innocent dissemination may be available where the person did not have a sufficient degree of knowledge of the defamatory content (or that defamatory content was likely) and control over a third party’s publication.

Knowledge or notice of and control over the defamatory material, such as the ability to remove (or remove access to) it, and a failure to remove (or remove access to) the defamatory material within a reasonable time may be sufficient to establish an inference that the defendant consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued availability of the defamatory material, and thus establish liability for its publication.⁵

⁵ See, for example, in respect of written and broadcast publications, *Byrne v Deane* [1937] 1 KB 818 (unauthorised notice pinned to a club noticeboard), *Urbanchich v Drummoynne Municipal Council* (1991) Aust Tort Reports 81-127 (posters affixed to bus shelters); *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 (live simulcast of another media outlet’s television broadcast).

The principles of knowledge of and control over (or over access to) defamatory online content are appropriate bases upon which to found liability in defamation for internet intermediaries. Recent cases involving digital platforms have been held liable have applied these principles.⁶

Whether certain types of internet intermediaries who participate in the communication of defamatory material should avoid liability is a policy decision. There is a sound policy basis to statutorily exclude internet service providers from liability. They are truly mere conduits and cannot be expected to moderate the internet. Passivity and neutrality are features of the service they provide but should not be used to delineate the bounds of internet intermediary liability. Passivity alone is not a sufficient basis to exclude liability.⁷ It is also likely that new arguments would emerge as to whether an internet intermediary's function is passive or active, neutral or positive where such issues may have been previously resolved by reference to the common law (such as Google's categorisation as a 'mere conduit' before the view that it was an active participant in publication became widely accepted⁸).

- (c) Are there any functions that could be categorised as 'basic internet services' but should give rise to liability, or are there circumstances in which basic internet services should be liable?**

Noting the remarks made in response to 2(b) above, the definition of basic internet services in the Discussion Paper does not appear to leave much room for internet intermediaries other than internet service providers.

3. Categorising digital platforms

- (a) Is it appropriate to adopt the classification of digital platforms used in the ACCC's Digital Platforms Inquiry Final Report to understand their roles and functions for the purpose of considering liability in defamation for third-party content?**

Yes, it is desirable for defamation laws as far as possible to align with other areas of the law.

- (b) Do the common features listed above accurately reflect the functions of digital platforms?**

Yes, though the potential difficulty lies in the advent of new technologies and ways of using the internet that may leave such classifications outdated.

- (c) Should search engines be treated as a single function for the purpose of categorising intermediaries for defamation liability? Or do search engines have different functions, some of which should or should not give rise to liability?**

Liability in defamation should be founded upon the function being performed in the communication of defamatory material, not whether the internet intermediary performing the function may be classified as a 'search engine'.

For example, Google is known as a 'search engine' but also provides a language translation service. If the communication of defamatory material involves the use of Google Translate in order for the defamatory content to have been comprehended by the end-user, one should

⁶ See, for example, *Google LLC v Duffy* (2017) 129 SASR 304 (web links and 'snippets' of websites in internet search engine results); *Voller v Nationwide News Pty Ltd* [2020] NSWCA 102 (user comments on media outlets' articles posted to Facebook); *Defteros v Google LLC* [2020] VSC 219 (search engine links to online articles previously published by media outlets).

⁷ *Urbanchich*, *supra*.

⁸ *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 at [29] to [31].

look to the translation function performed and not merely to whether Google is a search engine to determine whether it is liable for defamation.

(d) Is it appropriate to consider search engines a subset of digital platforms, or should they be considered as a separate category that can have access to separate specific defences?

No. The function of search engines, like other digital platforms such as social media platforms, includes the active dissemination of information. Search engines play an active role in determining the content that the end-user reads through algorithms that are designed to collate, sort and display search results (many of which present ‘snippets’ of the underlying websites and may promote links to paid advertisements). If they have knowledge of and control over the display of defamatory search results, they should be subject to liability.

(e) Are there new and emerging digital platform functions that need to be considered?

Yes, any attempt at defining internet intermediaries must be flexible enough to include and accommodate new and emerging technologies and functions.

(f) Are there any publishing functions of digital platforms that should not attract liability? Why?

No, the current common law and statutory provisions provide an appropriate balance.

Search engines, social media platforms and internet forums all have the ability to moderate their content once they become aware of defamatory material. If they fail to do so it can have significant, long-lasting effects on an individual’s reputation and livelihood. It is appropriate that legal responsibility accompanies the power they have.

(g) Is it appropriate to consider digital platforms as having comparable functions to online media companies, or should they be considered as separate categories with different responsibilities and defences? Why?

Online media companies simply operate an online business and do not have comparable functions to digital platforms (except, perhaps, to the extent digital platforms provide their own media services).

The defences available to online media companies and digital platforms should be the same.

In this context, there is no proper legal or policy basis for having one rule for digital platforms and another for online media companies.

4. Categorising forum administrators

(a) Is it appropriate to consider ‘forum administrators’ as a separate category of internet intermediaries? If so, how should this be defined?

No. The proposed category of forum administrators is uncertain and unnecessary. The current principles for determining liability are appropriate.

(b) What are the different circumstances and scenarios involving forum administrators that need to be considered?

The level of knowledge the forum administrator has in respect of the content in, or likely to be posted in, the forum (which will be case-specific and may have the unattractive consequence that the larger the forum, and therefore the larger the potential harm, the less likely the forum administrator may be found liable).

The level of control that the administrator has over content in the forum (which will differ between digital platforms).

At a policy level, the different types of forum and forum administrator being considered (online media company, charity, community group, individual).

5. Treatment of internet intermediaries as publishers of third-party content

(a) Should internet intermediaries be treated the same as any other publisher for third-party content under defamation law?

Yes (save that common law and statutory defences of innocent dissemination should be available where appropriate). The principles established pre-internet have been able to distinguish between ‘primary publishers’ and ‘secondary publishers’ of third-party content.

(b) If yes, is this possible under the current MDPs, or are amendments necessary, in order to ensure they are treated the same as traditional publishers for third-party content?

Yes, this is possible under the current MDPs.

6. Immunity for basic internet services

(a) Is it necessary and appropriate to provide immunity from liability in defamation to basic internet services?

Yes, for reasons identified earlier, though immunity is already given under the *Broadcasting Services Act 1992* (Cth).

(b) If such an immunity were to be introduced, should it be principles-based or should it specifically refer to the functions of basic internet services?

The functions-based definition of basic internet services is appropriate so long as the functions identified reflect principle.

(c) Are there any internet intermediary functions that are likely to fall within the definition of basic internet services (as outlines in Issue 1) that should not have immunity?

As identified above, the definition of ‘basic internet services’ should be clear, and care should be taken to ensure that a publisher cannot avoid liability for publication of defamatory material simply because they host their own content.

(d) Is there a risk that providing a broad immunity to basic internet services would unfairly deny complainants a remedy for damage to their reputation? What risks exist and how could they be mitigated?

Yes, there are risks. For instance, a complainant may not be able to identify a publisher or the publisher may be in another jurisdiction, or both. The complainant may be left without a remedy.

Such risks could be mitigated, for example, by introducing complaint procedures for the blocking of websites being accessed within Australia or the removal of defamatory content from servers.



7. Amend Part 3 of the MDPs to better accommodate complaints to internet intermediaries

(a) How can the concerns notice and offer to make amends process be better adapted to respond to internet intermediary liability for the publication of third-party content?

The concerns notice and offer to make amends process is seldom effective. This is particularly true of defamatory material published online, or otherwise published to a substantial audience. Usually the originator of the content refuses (or would refuse) to remove the content or is unknown.

In our collective experience:

- internet service providers ('basic internet services' providers) have a complete immunity under the *Broadcasting Services Act 1992* (Cth);
- with one exception, where a response is provided at all, the digital platforms provide a pro-forma response by which they refuse to moderate the content or remove search result links citing freedom of expression and unhelpfully suggest the complainant engage with the originator;
- digital platforms do not make offers to make amends in response to a concerns notice;
- when received, responses from administrators of user-created online forums and pages (who cannot always be identified) are inconsistent.

The mandatory requirements in section 15(1)(d) to (f) (to offer to publish a correction, take steps to tell the person to whom the content was published that the matter is or may be defamatory and to pay the complainant's reasonable legal expenses) are likely prohibitive to internet intermediaries making an offer to make amends in respect of third-party content. The risk of the loss of an innocent dissemination defence has proven insufficient to incentivise the removal of defamatory content or to remove search result links to defamatory content.

In our experience, the vast majority of complainants who seek to engage with internet intermediaries in respect of third-party content do so not to seek compensation or redress, but because they want to prevent further harm to their reputation from the accessibility of defamatory material on the internet.

A potential adaptation to the current MDP process (as amended or to be amended) might be to provide an 'offer to remove' process for *digital platforms* in respect of third-party content, similar to the offer to make amends process (whether as part of the existing Concerns Notice regime, or a separate and yet to be introduced Complaints Notice regime) but:

- not including the mandatory requirements in section 15(1)(d) and (e) (and arguably the obligation to pay reasonable legal expenses at (f));
- requiring the removal of, and/or removal of links to, the defamatory material; and
- where reasonably sought by the complainant and available to the digital platform, the provision to the complainant of identifying information in respect of the third-party originator (for example, name, telephone number, email address, internet protocol address). The application of this requirement could be limited to circumstances where the third-party is or appears to originate within Australia and is not readily identifiable to the complainant.

This process should not be extended to all *internet intermediaries* (i.e. website operators and 'forum hosts' should not be included) as these should be considered at a micro level on a case by case basis, by reference to the function performed by the internet intermediary and the circumstances of publication.

Of course, it would remain open to internet intermediaries to remove defamatory material within a reasonable time having notice of it and thereby avail themselves of the defence of innocent dissemination if the circumstances otherwise allow.

- (b) What are the barriers in the concerns notice and offer to make amends process contained in Part 3 of the MDPs (as amended) that prevent complainants from finding resolutions with internet intermediaries when they have been defamed by a third-party using their service?**

See the answer to Question 7(a), above.

- (c) In the event the offer to make amends process is to be amended, what are the appropriate remedies internet intermediaries can offer to complainants when they have been defamed by third parties online?**

See the answer to Question 7(a), above.

8. Clarifying the innocent dissemination defence

- (a) Should the innocent dissemination defence in clause 32 of the MDPs be amended to provide that digital platforms and forum administrators are, by default, secondary distributors, for example by using a rebuttable presumption that they are?**

No, this is unnecessary as digital platforms and forum administrators already have the benefit of innocent dissemination defences.

Digital platforms and forum administrators may in fact be primary publishers, not secondary distributors, so the onus should not fall to a complainant to rebut the presumption. If a respondent seeks to rely on the defence, they should bear the onus of establishing the elements of the defence.

- (b) In what circumstances would it be appropriate to rebut this default position?**

Not applicable.

- (c) Should a new standalone innocent dissemination defence specifically tailored to internet intermediaries be adopted the MDPs?**

No.

- (d) If a standalone defence is created, should the question of what is knowledge or constructive knowledge of third-party defamatory content published by an internet intermediary be clarified? If so, how?**

No, whether the internet intermediary had a sufficient degree of knowledge should be determined on a case by case basis. The common law has already developed principles in respect of actual and constructive knowledge.

- (e) Are there other ways in which the defence of innocent dissemination could be clarified?**

No.



9. Safe harbour subject to a Complaints Notice process

(a) Should a defence similar to section 5 of the *Defamation Act 2013* (UK) be included in the MDPs?

It is difficult to gauge the practical utility of the potential defence, given that there have not yet been any cases decided in respect of section 5 of the *Defamation Act 2013* (UK).

The requirement that the third-party not be identifiable is objectionable. It is the reach of the operator to its 'followers', and the platform that the operator provides, that is significant and leads to the greatest harm. Even if the third-party is identifiable, the operator still has a moral and social responsibility (and should be legally compelled) not to allow the proliferation of defamatory material on the internet.

Further, the requirement that it be 'not possible' to identify the originator is too absolute. This is likely to lead to the need for various pre-action discovery applications (and therefore increased costs and delay to the complainant) to *attempt* to identify the originator in order to establish or ensure that it was not possible to identify them.

If introduced, the defence should therefore provide that it be not reasonably possible, by reference to information known or available to the complainant, to identify the originator.

(b) If so, should it be available at a preliminary stage in proceedings, where an internet intermediary can establish they have complied with the process?

Subject to the above, we would have no objection to internet intermediaries being able to absolve themselves of liability at an early stage of the process in circumstances where they are able to demonstrate proper compliance with an appropriate process.

This is especially in circumstances where the legislation is proposing to place upon such entities additional burdens in the event a complainant chooses to issue a Complaints Notice.

However, as with the UK legislation, if such a defence were introduced, it must be defeated if it is not reasonably possible for the complainant to identify the originator.

(c) Should a Complaints Notice process be available when an originator can be identified? For example, to provide for content to be removed where the originator is recalcitrant?

We are supportive of the utilisation of a Complaints Notice regime, even when an originator can be identified.

In our experience, there are instances where a complainant seeks to have defamatory material removed from publication quickly and economically in order to mitigate loss and damage without, necessarily, seeking to pursue the matter further or against the originator. The Complaints Notice regime may promote this.

Further, in the event that the originator is located outside of the jurisdiction – thereby presenting what might ordinarily be extra-jurisdictional issues – the Complaints Notice regime may result in the removal of defamatory comment in circumstances where publication may otherwise have remained.

(d) If such a defence were introduced, would there still be a need to strengthen the innocent dissemination defence?

The question raised for discussion assumes that there is an existing need to strengthen the defence of innocent dissemination. We disagree that this is the case.

The innocent dissemination defence, whilst related, is distinct in its potential application to

publishers generally and does not need strengthening – so long as appropriate systems for moderation are implemented the defence will remain available.

The safe harbour defence is focused upon operators of websites hosting user-generated content. However, practically, the safe harbour protections for internet intermediaries could also be incorporated into this section of the legislation.

(e) Should the defence be available to all internet intermediaries that have liability for publication in defamation? For example, could a separate Complaints Notice process be developed that could apply to search engines?

It would be of utility for search engines to also be subject to a Complaints Notice regime. Search engines should take some level of responsibility – consistent with their role as a publisher.⁹

An ‘offer to remove’ process, as we have described at 7(a) above (whether as part of the existing Concerns Notice regime, or a separate and yet to be introduced Complaints Notice regime) could be left open to *internet intermediaries performing search engine functions*. The requirements would again be similar to the offer to make amends process but:

- not include the mandatory requirements in section 15(1)(d) and (e) (and arguably the obligation to pay reasonable legal expenses at (f));
- require the removal of links to the defamatory material from search engine results; and
- where reasonably sought by the complainant and available to the digital platform, the provision to the complainant of identifying information in respect of the third-party originator (for example, name, telephone number, email address, internet protocol address). The application of this requirement could be limited to circumstances where the third-party is or appears to originate within Australia and is not readily identifiable to the complainant.

However, in our submission and for the reasons explained above, it would be inappropriate to have a separate rule for ‘search engines’ *per se* (or, differently expressed, for persons who publish defamatory material in the course of performing a search engine function).

(f) How can the objects of freedom of expression and the protection of reputations be balanced if such a defence is to be introduced?

Freedom of expression does not amount to a licence to defame to a wide audience.

The introduction of a safe harbour defence would not restrict or limit freedom of expression. Website operators are generally private enterprises with private end-user agreements that include terms that the user not publish content that is or is likely to be defamatory. If they breach the agreement they should hardly be heard to complain that their freedom of expression has been curtailed. If the users wish to exercise their freedom of expression, they may still do so by other means, for example, by publication on their own website.

On the other hand, the instantaneous, broad reach of websites – that are further disseminated through internet search results – requires that safeguards for the protection of reputation be implemented given the immense, immediate and irreversible damage that can be caused by internet defamation.

⁹ See *Defteros v Google LLC* [2020] VSC 219



10. Immunity for internet intermediaries unless they materially contribute to the unlawfulness of the publication

(a) Should a blanket immunity be provided to all digital platforms for third-party content – even if they are notified about it, unless they materially contribute to the publication?

No. The current state of the law strikes an appropriate balance of internet intermediary liability.

The significant harm done to individuals by defamatory material on the internet typically arises from the wide reach and longevity afforded to the publication by digital platforms. Without recourse to remedies against digital platforms, individuals may be left without a remedy of any substance.

(b) What threshold or definition could be used to indicate when an intermediary materially contributes to the publication of third-party content?

When they are involved in the process of publication to another person.

Search engines are potentially liable for defamatory search results or snippets, and social media platforms are potentially liable for promoting users' posts to other users. This is the result of how the digital platforms have tailored their offerings. It is appropriate that they be held liable where they actively communicate defamatory material to others, subject to existing defences.

(c) If a blanket immunity is given as described above, are there any additional or novel ways to attract responsibility from internet intermediaries?

This would depend on how the immunity were implemented and its content, but a *blanket* immunity of any kind is unlikely to permit the interests of claimants to be protected in all circumstances.

As indicated above, *internet intermediaries* perform a variety of functions. It is the function being performed at the relevant time, and therefore the intermediary's level of involvement in, and/or knowledge of, publication of the defamatory material that should remain the critical question.

11. Complaints notice process for Australia

(a) Should a Complaints Notice be distinct from the mandatory concerns notice under Part 3 of the MDPs, or should the same notice be able to be used for both purposes?

There is benefit in the Complaints Notice processes being distinct from the Concerns Notice regime, or for providing for different requirements of, for example, an 'offer to remove' as set out at 7(a) and 9(e) above.

In our experience, there are instances where an aggrieved party seeks to have defamatory material removed from publication quickly and economically in order to mitigate loss and damage without, necessarily, seeking to pursue the matter further. This may be for a variety of reasons, including costs or potential difficulties negotiating with an obstinate publisher.

If a new 'Complaints Notice' procedure were introduced, separate to the existing Concerns Notice regime, the Concerns Notice regime could remain available to the complainant who seeks to pursue an intermediary for compensation.

If the Concerns Notice regime were amended to provide for an 'offer to remove' from certain intermediaries, there would potentially be significant costs consequences for a claimant

wishing to pursue an intermediary (which has otherwise made an ‘offer to remove’) for compensatory damages. This is likely to arise in circumstances where the complainant – seeking compensation from an intermediary - issues a Concerns Notice and calls for an ‘offer of amends’ but receives only an ‘offer to remove’. The potential costs risk to the claimant in this situation could be cured by ensuring that the costs consequences of failing to accept a reasonable offer of amends, are not extended to circumstances where an ‘offer to remove’ is made.

(b) Are there any issues regarding compatibility between the mandatory concerns notice and a potential Complaints Notice process? Are there parts of either that might overlap or be superfluous if a mandatory concerns notice is already required?

There is potentially some overlap between the two regimes. Given the mandatory nature of the Concerns Notice process, in some instances, it may be necessary to issue to certain categories of publishers (for example, Website Operators that are unable to deliver up identifying details or Website Operators that do not respond) a Complaints Notice followed by a Concerns Notice.

However, any duplication created as a result of a distinct Complaints Notice regime is outweighed by its potential benefits in mitigating damage, provided that the regime provides for the swift removal of material and the delivery up of details identifying originators of defamatory material.

(c) What mechanisms could be used to streamline the interaction between the two notice processes?

We see no utility in confining the Concerns Notice regime to certain categories of publisher alone. The choice of to whom to send a Concerns Notice should remain at the complainant’s discretion.

Similarly, we see no sound basis to suggest that issuing one form of notice should precede or follow the other (though the circumstances in which both would be issued may ultimately be rare).

If the proposed Complaints Notice regime had no costs consequences (but merely compelled the recipient to take the necessary steps if the requirements of the Act were met, on threat of either (i) a pecuniary penalty, and/or (ii) a Court order compelling removal of the material and payment of the claimant’s costs, that the claimant is entitled as of right after issuing a valid Complaints Notice), the Concerns Notice regime would naturally become the process followed by those seeking compensation and intending, if necessary, to pursue their claim before the Court.

Absent any significant distinction in the costs or penalty consequences that follow the issuing of a Concerns Notice or a Complaints Notice, we consider it likely that efficiencies between the two regimes will ultimately be refined by solicitors in any event.

12. Steps required before engaging in the Complaints Notice process

(a) Should the complainant be required to take steps to identify and contact the originator before issuing a Complaints Notice? If so, what should the steps be and how should this be enforced?

No. This should not be a requirement.

To require a complainant to first “take steps to identify and contact the originator” is vague (what steps? Is pre-action discovery required?) and could be unfairly burdensome on the complainant.



It should remain open to an aggrieved person to seek to resolve the matter in whatever way they see fit based upon the various circumstances of the matter, including factors of efficiency and economy.

In most circumstances, the recipient of the Complaints Notice would be better placed to identify the originator in any event. There is no sound policy reason to place this burden on the claimant.

(b) Where the complainant can identify the originator, should there be any circumstances where the complainant is not required to contact the originator directly and could instead use the Complaints Notice procedure?

Yes. The decision should be left to the complainant.

The question for discussion implicitly suggests that the complainant should contact the originator, rather than using the Complaints Notice procedure, if they can be identified. In our view, this is quite wrong and unlikely to result in the swift disposition of claims. Further, it has the potential to prevent claimants from resolving a claim to their satisfaction without pursuing the originator in litigation before the Court. Amendments which promote unnecessary litigation should be avoided.

The complainant should not be shut out from pursuing all avenues – whether that be through the issue of a Complaints Notice, a Concerns Notice or otherwise. It should remain the choice of the aggrieved person as to the methods they choose to employ in order to attempt to resolve the dispute ahead of litigation (if they ultimately elect to pursue litigation).

There may be instances where for case specific reasons (perhaps, the relationship between the parties), a resolution is more likely by issuing a Complaints Notice to a Website Operator. As is also noted above, in our experience, there are many instances in which a claimant would prefer to stem the continued publication of the defamatory material, than commence costly and protracted litigation to pursue a claim for compensation arising from its publication.

13. Complaints notice form and consent

(a) What content should be required to be included in a Complaints Notice in order for it to be valid? Should this include an indication of the serious harm to reputation caused or likely to be caused by the publication, or should it be sufficient for the content to be prima facie defamatory?

As to the potential form and content of a Complaints Notice, the UK version is supported except to the extent that a complainant must set out the aspects of the statement which the complainant believes are factually inaccurate or opinions not supported by fact.

At common law, the onus is not upon the defamed to establish falsity – which is presumed upon proof of publication. The new mandatory Concerns Notice regime (arising from the Stage 1 reforms, but not yet introduced in all jurisdiction) has already introduced a “serious harm” threshold requirement in contradistinction to the long established position at common law.

The Complaints Notice regime - if it is to be cost effective and efficient - should not impose a similar burden. This may prove duplicitous and potentially lengthen and complicate what could be an efficient and removals process capable of entirely mitigating damage at an early stage.

- (b) Should there be a requirement for the intermediary to notify the complainant, within a certain time period, that the Complaints Notice does not meet the requirements?**

Yes. The object of any regime included in the legislation that is aimed at resolution of disputes without recourse to litigation should have some reasonable temporal limitations to ensure that the Complaints Notice process can be completed effectively.

The UK legislation requires a 48 hour timeframe. Any aspect of the process that allows for potential delay is not in the spirit of the regime.

- (c) Should a Complaints Notice require the complainant to make a ‘good faith’ declaration? Should there be any other mechanisms used to prevent false claims?**

No. A “good faith” declaration by a complainant is unnecessary. In order to be of utility, the Complaints Notice regime should be as streamlined and as straight-forward as possible. Further, in our experience acting for complainants, persons do not seek to engage in pre-trial processes (all of which take time and cost) if the negotiations are not being made in good faith.

In the event that the aggrieved person is contemplating issuing proceedings and is first required to issue a Concerns Notice, the “serious harm” threshold overcomes, and is a sufficient safeguard against, any issues of “good faith” in any event.

14. Application and outcome of Complaints Notice

- (a) Should the Complaints Notice process be available to all digital platforms who may have liability in defamation or only those that can connect the complainant with the originator?**

Yes, it should apply to all digital platforms.

In the event that a digital platform, upon receipt of a Complaints Notice, has no means of contacting the originator, the publication should be removed or redacted from publication.

Whilst there must remain a balance between competing interests, in the event that an originator chooses to publish online without provision of meaningful contact details (such that they are incapable of being contacted), this lack of accountability on the part of the originator must result in a shift towards protection of the rights of the complainant whilst other identification processes (such as an application for pre-action discovery) run their course.

- (b) What should happen to the content complained of following receipt of a Complaints Notice by the digital platform?**

We are strongly supportive of an approach that results in the publication the subject of the dispute being removed or redacted. This would promote originators taking responsibility for their content and allow aggrieved parties to mitigate their loss and damage whilst they apply to the Court for orders requiring the production of identifying details – a process that is often productive of cost and delay.

This is especially in instances where originators post material on websites that are based out of the jurisdiction (for example: Facebook; Google Review) which can result in what are extra-jurisdictional hurdles with service of Court documents and enforcement of judgments. A balance must be struck, especially where originators refuse to account for publication.

The marking of defamatory material with the notation “under review” or “under dispute” is unsatisfactory but would be better than nothing.



(c) Should the focus of the Complaints Notice process be to connect the complainant with the originator? What other outcomes should be achievable through this process?

Redaction or removal of the material in dispute whilst it is the subject of dispute. In the online environment, the ability for originators to hide behind pseudonymous usernames with a view to avoiding responsibility for publication inhibits complainants from mitigating their loss and damage efficiently and economically. This is especially in circumstances where many of the more popular website operators (for example, Facebook) are based outside of the Australian jurisdiction. The complainant is often left with insurmountable hurdles in their pursuit of identifying details through the pre-action discovery processes and in the meantime, the material in question remains published.

(d) What steps from the UK process should be adopted in Australia?

There is no objection to the adoption of a process broadly consistent with the UK Complaints Notice. However, a complainant cannot be left in a position where a website operator, having complied with a Complaints Notice process can rely on the safe harbour defence whilst the originator of the publication has not consented to the removal of the publication or provision of contact details.

(e) Are there circumstances where the digital platform should be able to remove the content complained of without the poster's agreement?

In the event that an originator does not consent to having their contact details shared, we are strongly supportive of an approach where the digital platform is able to remove the content complained of.

Again, this will assist in promoting an online system whereby originators are required to take responsibility for the content they publish online. A balance must be struck.

15. Orders to have online content removed

General observations

The law would be greatly improved by introduction of a mechanism by which aggrieved persons can have defamatory content removed from digital platforms quickly and inexpensively.

This proposition holds for the vast majority of modern defamation cases. However, parties to so-called 'backyard disputes' would be the greatest beneficiaries of law reform in this area. These smaller value claims comprise an increasing proportion of the work of Australian courts of defamation jurisdiction. From 2013 to 2017, only 21% of defamation plaintiffs recorded in judgments were public figures, and only 25.9% of defendant publishers were media companies.¹⁰ Those 'traditional' defamation litigants—and especially large media defendants—have received disproportionate attention in this law reform process.

In our view, the sorts of everyday people who are party to 'backyard disputes' gained little from the 2020 Model Defamation Amendment Provisions. To the contrary, the introduction of a statutory serious harm threshold would give rise to a new species of interlocutory dispute, increasing the cost of taking a matter to trial. Changes to concerns notice procedures would further delay the availability of a judicial remedy and increase costs for plaintiffs. For plaintiffs to backyard disputes, the product of the 2020 Model Defamation Amendment Provisions is that taking a defamation case to trial will be grossly disproportionate to the value of a remedy. The serious harm threshold will entrench, rather than avoid,

¹⁰ UTS Centre for Media Transition, *Trends in Digital Defamation: Defendants, Plaintiffs and Platforms* (2018) 5.

that situation.¹¹

Rather than prospecting for damages awards,¹² many defamation plaintiffs simply want to protect their reputations. If the defamatory content can be removed from digital platforms quickly, the need for further court proceedings—and the concomitant expenditure of public resources—simply falls away.

The Uniform Defamation Acts should be amended to make the timely removal of defamation more cost-effective, especially where the matter is published by an internet intermediary. This would serve the objectives of the Acts:

- (c) to provide **effective** and fair remedies for persons whose reputations are harmed by the publication of defamatory matter; and
- (d) to promote **speedy** and **non-litigious** methods of resolving disputes about the publication of defamatory matter.¹³ (Emphasis added.)

(a) What should be the threshold for obtaining an order before a trial to require the defendant to take down allegedly defamatory material?

If the content is defamatory, and the defendant is an internet intermediary, then the threshold should be that the content is prima facie defamatory. The current law on point is unnecessarily harsh on plaintiffs. It was solidified 15 years ago with *ABC v O'Neill*;¹⁴ in the years since, the capacity of defamatory matter to spread on the digital grapevine has proliferated. The capacity of online defamation to destroy a person's life has also proliferated.

If the intermediary wishes to contest the take-down, then the publication via the intermediary can be reinstated after trial. If intermediaries are to earn millions dollars from Australian taxpayers via making content freely available, then at the very least, Australian law should intervene so that their business model minimises harm caused to Australians.

If the defendant is an author of content, then a different standard could be justified; one closer to the current law. For example, when suing a newspaper or a journalist, the test for interlocutory injunction could coherently apply. The current law recognises that failure to remove defamatory material on request is an aggravating factor; the prospect of a large award of aggravated damages could motivate media defendants to seriously contemplate the value of leaving defamatory matter online.

(b) Is there a need for specific powers regarding take down orders against internet intermediaries that are not parties to defamation proceedings, or are current powers sufficient?

Current powers are largely sufficient. Superior courts of equitable jurisdiction possess auxiliary jurisdiction to enjoin removal of matter in aid of legal rights (i.e., in aid of a defamation action). Moreover, given the law on publication, internet intermediaries are publishers, and thus often *are* defendants—as the law reports show us.

However, there is an important difference between jurisdiction and power. For example: an Australian court has the power to issue an *in personam* injunction against the foreign entities underlying Twitter¹⁵ that would require global removal of matter, thus taking extraterritorial

¹¹ Given how easy it is to overcome. See *Lachaux v Independent Print Ltd* [20120] AC 612; *Armstrong v McIntosh [No 2]* [2019] WASC 379, [79]ff.

¹² The value of defamation remedies is often disproportionate to the cost of proceeding to judgment.

¹³ For example, *Defamation Act 2005* (WA) s 3(c)–(d).

¹⁴ (2006) 227 CLR 57.

¹⁵ See *X v Twitter* (2017) 95 NSWLR 301.

effect.¹⁶ An anterior step to such an order is that the court possesses long-arm jurisdiction over the relevant foreign companies.¹⁷ This is the case whether or not the internet intermediary is a party to proceedings.

Many intermediaries will dispute the Australian courts' jurisdiction. Plaintiffs seeking a practical outcome against an internet intermediary often have to go to the additional effort, and so additional cost, of applying for orders to serve entities outside of the jurisdiction, then defending an application contesting service. This could be avoided if internet intermediaries were required to simply accept service in Australia as the price of deriving income by providing services in Australia. See also the response provided at 15(f) below.

- (c) What circumstances would justify an interim or preliminary take down order to be made prior to trial in relation to content hosted by an internet intermediary? Should courts of all levels be given such powers? For example, in some jurisdictions lower courts have limited powers to make orders depending on the value of the claim.**

See the remarks set out at 15(a), above.

All courts should have this power. For example, intermediate courts should have the power; currently, they are inappropriate vehicles for transnational litigation.¹⁸ Arguably, however, if internet intermediaries were required to submit to the local jurisdiction, then the issue of power would not matter for intermediate courts. They already have the power to make *in personam* orders over individuals over whom they possess personal jurisdiction.

Even smaller claims jurisdictions should be empowered to hear defamation; they should be given equivalent powers to those of intermediate courts, via statute.¹⁹

- (d) Should a court be given power to make an order which requires blocking of content worldwide in appropriate circumstances?**

Most courts of defamation jurisdiction already possess this power.²⁰ Inferior courts and tribunals should also be given the power.

The real issues here are (1) long-arm jurisdiction, and (2) discretion. The former is addressed below. As to the latter, the law would be enhanced by altering the current law on discretion as regards internet intermediaries. See the answer to Question 15(a), above.

- (e) If such powers are necessary, it is appropriate for them to be provided for in the MDPs or should it be left to individual jurisdictions' procedural rules?**

The MDPs can amend Acts dealing with procedure. In fact they already do; for example, with respect to limitation periods. Rules are a different kettle of fish. The process for their amendment varies between jurisdictions, but judges typically drive the process (as an aspect of the court's inherent power). Rather than treading onto the judiciary's turf, the issue should be addressed in the Uniform Defamation Acts.

¹⁶ See Michael Douglas, 'Extraterritorial Injunctions Affecting the Internet' (2018) 12(1) *Journal of Equity* 34.

¹⁷ See generally M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019).

¹⁸ See *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268.

¹⁹ See: Kim Gould, 'Small Defamation Claims In Small Claims Jurisdictions: Worth Considering For The Sake Of Proportionality?' (2018) 41(4) *UNSW Law Journal* 1222.

²⁰ See *X v Twitter* (2017) 95 NSWLR 301; *Webster v Brewer* [2020] FCA 622, [17]; *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 867; *ZXC v Bloomberg LP* [2019] EWHC 970 (QB); [2019] EMLR 20. See further Michael Douglas, 'A Global Injunction Against Google' (2018) 134(April) *Law Quarterly Review* 181.

(f) Are there any potential difficulties with jurisdiction or enforceability of such powers which could be addressed through reform to the MDPs?

Yes, on each account.

Internet intermediaries comprised of transnational groups will often construct a jurisdictional veil²¹ in the hopes of shielding themselves from the reach of the courts of jurisdictions in which they derive largely tax-free income. This is the jurisdictional equivalent of base erosion and profit shifting and should be met with hostility by Australians who value the Australian rule of law.

Companies carrying on business in Australia are already required to register in Australia, and then may be served via a local agent.²² The foreign companies behind internet intermediaries *do* carry on business in Australia by providing services here, even if they have a separate Australian subsidiary and lobby persuasively to the contrary.²³ Older decisions to the contrary do not reflect modern conditions and are no longer good law.²⁴

Foreign entities behind internet intermediaries will not register as carrying on business in Australia of their own volition. They will rely on separate legal personality doctrine to shirk responsibility while maximising profit—a modern analogue of asbestos companies constructing a corporate veil to shield themselves from responsibility for their actions.

Accordingly, these foreign entities should be compelled to accept submission in Australia, whether or not they ‘carry on business’ here according to artificial standards.

If an Australian court then later makes a monetary order against one of these companies, and if the company is based in the United States, the company may (and probably will) take action²⁵ in the United States to render the order unenforceable under US law.²⁶ Those foreign laws are underpinned by values which are not shared in Australia.

A solution to the enforcement problem is to pierce the corporate veil further and allow enforcement against a local-subsiary of the foreign parent via statutory amendment. Intermediaries may respond by transferring assets offshore. That danger could be avoided if local intermediaries were required to keep a certain percentage of the income they derive from Australians in an Australian-based fund; the proceeds of which were used to provide remedies for the harms their business model causes to Australian, including defamation.

²¹ Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 66–9.

²² *Corporations Act 2001* (Cth) s 601CD, 601CX.

²³ See *Australian Information Commission v Facebook Inc (No 2)* [2020] FCA 1307; *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548; *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190; *ACCC v Valve (No 3)* (2016) 337 ALR 647 (Edelman J); *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 814; *Equustek Solutions Inc v Jack* (2014) 374 DLR (4th) 537; *Equustek Solutions Inc v Jack* [2012] BCSC 1490.

²⁴ *Adams v Cape Industries* [1990] 1 Ch 433, 529; *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch)

²⁵ See, for example, the fallout of the *Google v Equustek* litigation: Michael Douglas, ‘Google challenges the Supreme Court of Canada’s global injunction in the United States’, *Gazette of Law & Journalism* (online), 29 November 2017.

²⁶ For example, *Securing the Protection of our Enduring and Established Constitutional Heritage* (SPEECH) Act 28 USC 4101- 4105.

16. Orders to identify originators

- (a) **Is it necessary to introduce specific provisions governing when a court may order that an internet intermediary disclose the identity of a user who has posted defamatory material online?**

Current law already includes specific provisions; see rules of superior courts concerning pre-action and preliminary discovery.

It would be helpful if there were a mechanism by which plaintiffs could obtain these orders from intermediaries without going to the cost of making an application for pre-action discovery and putting on affidavit evidence. The greatest beneficiaries of such reform would be working class people being victimised by anonymous trolls.

- (b) **What countervailing considerations, such as privacy, journalists' source protection, and freedom of expression, confidentiality, whistle-blower protections, or other public interest considerations might apply?**

The current law already covers those countervailing considerations via journalists' Shield Laws. Individuals who wish to blow the whistle on wrongdoing should do so via reputable journalists rather than merely dumping damaging content into the digital abyss.²⁷

A cogent defence of freedom of express does not entail freedom to defame. If individuals wish to express themselves freely then they ought to put their name to it and accept the consequences of their actions where those consequences entail harm.

In any event, just because a previously-anonymous person is identified does not mean that they will be held liable for defamation.

- (c) **What types of internet intermediaries should such provisions apply to?**

All internet intermediaries with the capacity to identify those who have published matter giving rise to a prima facie cause of action in defamation.

- (d) **Is it necessary to provide for reforms to ensure that records are preserved by intermediaries where a complainant may wish to uncover the identity of an unknown originator?**

Yes. Whilst, many would already be keeping those records for commercial or legal reasons, many organisations purge such records at regular (sometimes relatively short) intervals to avoid storing large volumes of material.

- (e) **Do any enforcement issues arise in relation to foreign-based internet intermediaries who may not accept jurisdiction? How could this be overcome?**

See the answer to Question 15(f) above.

- (f) **Is it appropriate to provide for these types of orders in the MDPs, or should this be left to each jurisdiction's procedural rules?**

See the answer to Question 15(e) above. These orders should be in the MDPs.

²⁷ Compare Edward Snowden's approach to that of Chelsea Manning; the former was more defensible.

17. Other issues regarding liability of internet intermediaries

17(a) Are there any other issues regarding liability of internet intermediaries for the publication of third-party content that need to be considered?

The transnational character of defamation actions involving internet intermediaries will give rise to private international law issues. These issues are an impediment to Australians obtaining just and meaningful relief for defamation, and so are an impediment to the achievement of the objects of the Uniform Defamation Acts.

Apart from jurisdiction,²⁸ there are two issues worth addressing: (1) exercise of jurisdiction, and (2) applicable law.

An Australian court with *in personam* jurisdiction over an internet intermediary in a defamation matter may then face an argument for a stay of proceedings on the basis of the doctrine of *forum non conveniens*.²⁹ This will increase costs for litigants. The common law doctrine should thus be ousted by statutory amendment in the Uniform Defamation Acts to the effect that ‘an Australian court is not a *forum non conveniens* for hearing of a matter brought by a person in Australia³⁰ against a foreign online intermediary³¹ if the matter involves, or is related to, a claim in defamation’.

As for applicable law: arguably, the provision in the Uniform Defamation Acts concerning choice of law³² only applies to intra-national defamation, and not transnational defamation. As much was assumed in the course of the Rebel Wilson litigation. If this is right, then the *lex loci delicti* rule continues to apply to transnational cases; following *Gutnick*³³, litigants have thus sought to avoid foreign law by pleading only publication in Australia, even if resulting damage straddles international borders, and even if a great deal of publication occurred overseas. The situation is incoherent and bad policy.

Rather than extending the existing intra-national rule to transnational cases, a different rule should be applied to transnational cases; or rather, the existing rule should be adapted. We should recognise that the better policy is for Australian norms to apply to people in Australia, even when they are being defamed via a global digital service, or by content that is being consumed offshore. Australian law should apply to any defamation case in a competent Australian court. A rule for transnational cases might read as follows:

11A. Applicable law for transnational defamation proceedings

- (1) If there is a multiple publication of matter in more than one jurisdictional area, the substantive law applicable in the Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection must be applied in this jurisdiction to determine each cause of action for defamation based on the publication.
- (2) For the avoidance of doubt, the Australian applicable law per subsection (1) applies whether or not the harm occasioned by the publication as a whole has a stronger connection to a non-Australian jurisdiction.

²⁸ See Question 15(f) above.

²⁹ See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

³⁰ Given that jurisdiction is territorial and not based on citizenship or allegiance.

³¹ Relevantly defined to take account of transnational corporate groups.

³² For example, *Defamation Act 2005* (WA).

³³ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575

(3) The doctrine of *renvoi* does not apply to defamation.

This statutory rule would be consistent with the existing policy of Australian private international law. By treating defamation law as mandatory law, fundamental Australian values—namely, the balance struck between the human rights of freedom of expression and reputation—will be properly regarded in the policy of our law.³⁴

³⁴ Consistent with *ordre public* doctrines; see M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) Ch 18.

PART B – EXTENDING ABSOLUTE PRIVILEGE

18. Defamation and reports of criminal conduct

- (a) **Are there any indications that defamation law is deterring victims and witnesses of crimes from making reports to police and other statutory investigative agencies charged with investigating criminal allegations?**

No.

It is now well understood that victims of crime (and other misconduct of sufficient gravity), and often witnesses, are sometimes reluctant to make reports to police or other authorities due to their fear of having to become embroiled in the legal process associated with any prosecution, and the resultant need to speak publicly about their experience and face the wrongdoer (often, their ‘aggressor’) in Court. In our submission, this is the primary deterrent preventing victims, and witnesses, of crime from making reports to police and other statutory agencies.

An entitlement to claim absolute privilege from defamation claims arising from such reports does not therefore have any realistic prospect of affecting victims’ and witnesses’ willingness to report crimes and other misconduct.

- (b) **Are victims and witnesses of crimes being sued for defamation for reports of alleged criminal conduct to authorities?**

No. In our collective experience, this is not the case.

In the circumstances which originate from reports of alleged criminal conduct to authorities, our experience is that claimants rarely seek to issue proceedings in respect of the publication to the authorities.

More frequently, claimants seek to bring defamation proceedings in relation to some subsequent publication (whether by the media, the police, or some form of spokesperson) which disseminates the sting of the original report to a broader audience. This is frequently because the more substantial damage to the claimant’s reputation occurs when a subsequent publisher elects to disseminate the subject matter of the original report to a wider audience, often with material inaccuracies, unfair emphasis and no proper opportunity given to the claimant to respond to the report.

A review of recent Australian authorities confirms that there are relatively few claims for defamation arising from reports to police. Those that were identified support the view that the defence of qualified privilege as presently exists (at both common law and under the Uniform Defamation Law) adequately meets the needs of society and end of justice, and that reports to police should not be absolutely protected.³⁵

³⁵ In *Wells v Cossari* [2020] VCC 988, the plaintiff successfully sued for defamation arising from statements made to the police about a Facebook post by a rival candidate in the 2018 Victorian state election. In *Hudson v Mellis* [2015] QDC 284, the defendant succeeded in justifying the truth of statements he had made to the police about the plaintiff’s conduct. In *Bechara v Bonacorso (No 4)* [2010] NSWDC 234, a matter involving statements alleged to have been made to the police by which the victim identified the plaintiff as responsible for a car bombing, the claim failed because the claimant failed to establish that the matter was published by the defendant at all. In *Webster v Coles Myer Ltd; Thomas v Coles Myer Ltd* [2009] NSWDC 4, a matter involving statements made to

19. Absolute privilege for reports to police and investigative agencies

(a) Should the defence of absolute privilege be extended to statements made to police related to alleged criminal conduct?

No.

Whilst there is sound policy in seeking to ensure that reports of such conduct are not hampered or deterred, for the reasons set out above at 18(a) and (b), there is neither the need nor any realistic utility in extending the operation of absolute privilege in this way.

The existing defence of qualified privilege (both at common law, and under statute) provides an adequate defence to claims of defamation arising from publications of alleged criminal conduct to police, and critically, preserves the requirement for the report to the police to be based on reasonable grounds, and the ability of the claimant to defeat the defence by proof of malice.

(b) Should the defence of absolute privilege be extended to statements made to statutory investigative agencies related to alleged criminal conduct? If yes, what types of agencies?

No.

As is the case with statements made to the police, whilst there is sound policy in seeking to ensure that complaints of such conduct are not hampered or deterred, for the reasons set out above at 18(a) and (b), there is neither the need nor any realistic utility in extending the operation of absolute privilege in this way.

As with reports to police, the existing defence of qualified privilege (both at common law, and under statute) provides an adequate defence to claims of defamation arising from publications of alleged criminal conduct to statutory agencies, and critically, preserves the requirement for the report to the police to be based on reasonable grounds, and the ability of the claimant to defeat the defence by proof of malice. The difficulty of establishing malice is already a significant hurdle to claimants.

An absolute privilege would only serve to shut out claimants with meritorious claims.

(c) What type of statutory investigative agencies should be covered and what additional safeguards, if any, may be needed to prevent deliberately false or misleading reports and to protect confidentiality?

The question posed for discussion presumes that absolute privilege should be extended (presumably to police and certain, if not all, statutory investigative agencies). In our view it should not.

One of the primary reasons for our view is that the operation of qualified privilege is adequate to address these circumstances. The recognised need to address deliberately false or misleading reports is also met by the defence of qualified privilege in that such publications are defeated by proof of malice.

If anything, some amendment could be made to s 24(2) of the Uniform Defamation Law³⁶ to make express that proof of deliberately false or misleading publications shall be proof of malice.

If absolute privilege were to be bestowed by legislation, it should only extend to reports to statutory investigative agencies with a statutory duty or responsibility to investigate the alleged conduct being reported, in circumstances where the report is made to a person in the course of their duty as an officer of the agency. To take an extreme example, care must be taken to ensure any privilege did not extend to a report of criminal conduct made at a barbecue to a person who happens to be an off-duty police officer.

(d) What is the best way of amending the MDPs to achieve this aim (for example, by amending clause 27 and/or by each jurisdiction amending its Schedule 1)?

For the sake of uniformity, amending the MDPs would be the best way to introduce any proposed privilege.

20. Defamation and reports of unlawful conduct in the workplace

(a) Is fear of being sued for defamation a significant factor deterring individuals from reporting unlawful conduct such as sexual harassment or discrimination to employers or professional disciplinary bodies?

We consider that the factors operating as deterrents to these types of reports are similar to those affecting victims' and witnesses' reports to police and statutory agencies. That is, if a person is deterred from making such a report, it is not the risk of defamation proceedings which deters them, but rather a reluctance (or on occasion, fear) to become involved, to speak publicly about their experience or face the person about whom they are complaining in relation to their allegations.

(b) Are victims and witnesses of sexual harassment or discrimination being sued for defamation for reports of alleged unlawful conduct to employers or professional disciplinary bodies?

No, in our collective experience, there are relatively very few instances of claimants wishing to commence action against a person for making a complaint of misconduct about them to an employer or disciplinary body.

In such instances in which we have taken instructions, it is invariably the case that the claimant also instructs that the publisher has acted with malice.

21. Absolute privilege for reports to employers and professional disciplinary bodies

(a) (i) Should absolute privilege be extended to complaints of unlawful conduct such as sexual harassment or discrimination made to: employers, or to investigators engaged by employers to investigate the allegation?

No.

Whilst there is sound policy in seeking to ensure that complaints of such conduct are not hampered or deterred, for the reasons set out above there is neither the need, nor any practical utility, in extending absolute privilege to cover the publication of complaints of

³⁶ Thereby impacting the interpretation of 'malice' as it appears in s 30(4) of the Uniform Defamation Law.

unlawful conduct to employers or their investigators. There are also fewer safeguards in place to ensure that only proper complaints may be made to employers as opposed to investigative agencies.

The existing law of qualified privilege provides an adequate defence.

(a) (ii) Should absolute privilege be extended to complaints of unlawful conduct such as sexual harassment or discrimination made to: professional disciplinary bodies?

No.

Whilst there is sound policy in seeking to ensure that complaints of such conduct are not hampered or deterred, for the reasons set out above there is neither the need, nor any practical utility, in extending absolute privilege to cover the publication of complaints of unlawful conduct to professional disciplinary bodies.

The existing law of qualified privilege provides an adequate defence.

(b) If so, to what types of unlawful conduct should be included providing this protection?

We do not consider additional protections are required.

If additional protections were to be introduced, it would be inappropriate to provide protection to reports only of some forms of conduct and not others. This would be unsatisfactory from a policy perspective and may also lead to disputes over whether certain conduct falls within definitions, whether parts of a report is protected and other parts are not. This might also lead to a view being formed by claimants that reports have been tailored to ensure any privilege is engaged.

(c) If yes to a), what is the best way of amending the MDPs to achieve this aim (for example, by amending clause 27 and/or by each jurisdiction amending their Schedule 1)?

For the sake of uniformity, amending the MDPs would be the best way to introduce any proposed privilege.

(d) Are there sufficient safeguards available to prevent deliberately false or misleading reports being made to employers or professional disciplinary bodies? If not, what additional safeguards are needed?

Sufficient safeguards exist in the terms of s 30(4) of the Uniform Defamation Law, whereby a publisher's defence of qualified privilege will be defeated by malice.

If anything, some amendment could be made to s 24(2) of the Uniform Defamation Law³⁷ to make express that proof of deliberately false or misleading publications shall be proof of malice.

If absolute privilege were to be bestowed by legislation, it should only extend to reports to a person appropriate to deal with the report on behalf of the employer, in circumstances where the report is made to a person in the course of their duty as the employer or an officer, employee or agent of the employer.

³⁷ Thereby impacting the interpretation of 'malice' as it appears in s 30(4) of the Uniform Defamation Law.