

**Submissions to the
Defamation Working Party, established by the Council of Attorneys-
General
24 January 2020**

1 Introduction

Microsoft Corporation (**Microsoft**) and its Australian operating subsidiary Microsoft Pty Ltd welcome the opportunity to provide comments and submissions in relation to the draft amendments to the model defamation provisions and accompanying background paper, prepared by the Defamation Working Party, established by the Council of Attorneys-General (**Working Party**).

In its submission, Microsoft comments upon the Model Defamation Amendment Provisions 2020 (**MDAP 2020**) which are of particular relevance to them.

1.1 The Microsoft Bing Search Engine

Microsoft operates the Bing search engine (**Bing**) in Australia and worldwide. Bing was launched in 2009, replacing prior Microsoft search engines such as MSN Search and Live Search operating since 1998.

Bing has the second-highest share of the Australian search engine market, by number of searches conducted.

Search engines help people find the information and content they seek on the web. Microsoft submits that this serves a substantial public purpose, allowing individuals to inform themselves in relation to matters that are of concern to them, matters of wider public interest or controversy and for fulfilment / entertainment.

Importantly, Bing does not host or author the material that appears on websites that are indexed in its search engine. As a result, it is not in a position to remove material of concern from the internet.

Notwithstanding Microsoft's inability to remove content online as a third-party intermediary service (as opposed to a publisher of content), Microsoft receives numerous defamation concerns notices in Australia in connection with its operation of the Bing search engine, and has been (and is) defendant to numerous Bing-related defamation claims actions in Australian courts.

Microsoft submits that reform of the model defamation provisions ought to proceed ought to proceed within a context that recognizes that online platforms are not uniform, but instead serve a variety of purposes for their users, which may require different interventions. For search engines, it is important to proceed with an appreciation of the social and economic benefits of search engine services and the contribution that this technology makes to free and open communication and access to published information.

There is a risk that the cost and exposure to unbalanced defamation law will diminish the capacity of Bing (and other search engines) to contribute to this free and open

exchange of and access to ideas and information. In particular, unbalanced defamation law may have the practical effect of requiring a search engine operator, in response to defamation concerns notices, to block from its search results third-party web page publications that are in the public interest and should be subject to defamation defences. The effect of this can be chilling on free expression, with important web content being suppressed from search results, and thereby effectively rendered unfindable. What's more, an imbalanced system allows bad actors to exploit the imbalance to achieve their individual ends at the expense of the free flow of information and ideas.

Microsoft is also concerned that, without reform, Australia's defamation regime may fall out of step with the laws in other nations which value and protect freedom of expression.

1.2 **Stage 2 Reforms to Address Digital Platform Issues**

In its background paper, the Working Party advises that there will be a separate "stage 2 review process to consider potential amendments to MDAPs that address the responsibilities and liability of digital platforms for defamatory content published online". The executive summary notes that questions about the application of defamation law to digital platforms are both technical and complex.

Microsoft respectfully submits that defamation reform ought to be considered in a holistic manner, without deferring these important questions.

Indeed, some of the draft MDAP 2020 provisions considered in this submission are inseparable from important digital platform considerations. For example, as outlined in this submission, the highly beneficial introduction of a single publication rule, which has been put forward as ensuring that "the limitation period for bringing an action will commence from the date material is uploaded rather than restarting each time it is downloaded"¹, may be frustrated unless careful consideration is given to ensure that the proposed new provision applies to search engine operators.

On the other hand, key questions put forward in 2019 for consideration (such as whether the innocent dissemination provisions need amendment to reflect the operations of search engines and other digital content aggregators as publishers and/or whether a statutory "safe harbour" protection ought be introduced for online intermediaries) have been deferred for an indefinite period.

The risk with that postponement is that the reform process is incomplete, or the impetus for consideration of issues relevant to all digital platforms may be lost.

At the time this round of reform was launched, NSW AG Mark Speakman pointed to technological and communications changes since 2005, when the present laws were agreed and enacted. He noted that more than half of defamation cases from 2013 to 2017 related to digital cases and that "the result is that [current laws] are no longer fit-for-purpose"².

A review of model defamation provisions cannot be considered to be extensive unless it deals with the digital issues that are integral to the modern paradigm of communications.

¹ Media release, Mark Speakman, 29 November 2019

² Speakman, Mark (2019) 'The Australian', 20 November 2019

2 Summary of Submissions

Microsoft addresses the following proposals:

- (a) **supporting Recommendation 3**, the introduction of a single publication rule, whilst **noting** some difficulties with the drafting of the proposed amendment and **opposing** the extension of limitation period to 3 years in certain circumstances;
- (b) **endorsing Recommendation 6(a)** to require an aggrieved person to specify in a concerns notice the location of the publication of the defamatory matter, whilst noting that the drafting of the proposed amendment does not meet that objective (or the example used in the recommendation) in that it does not require provision of a URL;
- (c) **supporting Recommendation 9**, to ensure that a defendant is able to plead as a contextual imputation any of the imputations pleaded by the plaintiff;
- (d) **supporting Recommendation 14(a)**, introducing a serious harm threshold similar to that in UK legislation;
- (e) **supporting Recommendation 16** which clarifies that the statutory cap sets an upper limit on the scale of damages for non-economic loss and that the cap is applicable regardless of whether aggravated damages apply;
- (f) **supporting Recommendation 17** that the leave of the court be required to bring further proceedings in relation to publication of the same or like manner by the same or associated defendants.

None of the recommendations that are likely to have a bearing upon Microsoft are opposed by it.

In summary, Microsoft is supportive of the recommendations of relevance to it, raises issue with some aspects of the proposed implementation/drafting and is hopeful that the balance of the Working Party considerations in Stage 2, including innocent dissemination and a statutory safe harbour provision be addressed without delay.

The following pages expand on the position in 2(a) to (f) above.

3 Supporting Recommendation 3, the introduction of a single publication rule, whilst noting some difficulties with the drafting of the proposed amendment and opposing the extension of limitation period to 3 years in certain circumstances

The introduction of a single publication rule is strongly supported by Microsoft.

The rationale for a single publication rule is clearly outlined in the Background Paper³.

It is also clear from the Background Paper and the drafting of the proposed clause 1A(1) of the MDAP 2020 that the proposal draws upon the UK legislation. However, there is a distinction in proposed clause 1A(1) which refers to the “original publisher”:

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 concern with the term “original publisher” is that it may be read as limiting the single publication rule to the original publisher of material (or an associate of the original publisher).

A search engine does not stand in that position. As a result, the proposed clause 1A(1) is likely to fall short of the rationale stated in the Background Paper. Once the initial limitation period has expired, a concerned party (barred from suing the “original publisher”) would instead sue Microsoft and/or other provider(s) of search services. This would impact upon on the ability of Bing to perform its important role in facilitating access to information on the internet.

Microsoft submits that the proposed clause 1A(1) should be amended so that it is clear that digital platforms and search providers can rely upon the rule. This might be achieved by including a third party intermediary that facilitates access to content online (a search engine) as an entity to whom the single publication rule applies or replacing the concept of “an associate of the original publisher” (which presently does not contemplate an entity in Microsoft’s position) with a description which includes a search engine.

If neither of these approaches are favoured, the exclusionary term “original publisher” should be removed, in keeping with the UK provision.

Further, the proposed extension provision for the limitations provisions in the statutes of limitation for each jurisdiction is a concern for Microsoft.

It is clear that 1B(2) has the effect of relaxing the requirements for an extension of the limitation period.

In doing so 1B(2) may effectively extend the limitations period to 3 years for any plaintiff who decides to sue Microsoft and says to the Court “I did not know about the Bing search result until recently”, thereby undermining the default 1 year limitations period and the single publication reform.

³ Background Paper Model Defamation Amendment Provisions 2020 (consultation draft), December 2019 at p. 10

4 Endorsing Recommendation 6(a) to require an aggrieved person to specify in a concerns notice the location of the publication of the defamatory matter, whilst noting that the drafting of the proposed amendment does not meet that objective (or the example used in the recommendation) in that it does not require provision of a URL

The Discussion Paper identifies the issue to be addressed in this reform (with emphasis added):

*Stakeholders reported difficulties with identifying the publication that is the subject of a concerns notice. The current provision in cl 14(2) requires that the aggrieved person specify the “defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question” but not the location of the matter – for example **its URL**. Stakeholders report that this can make it difficult to respond effectively to a concerns notice in a timely matter, as the publisher may need time to identify the matter in question.*

Microsoft supports an amendment to address this concern.

However, the proposed amendment in 14(2)(a1) of the MDAP 2020 only requires a concerns notice to specify (with emphasis added):

*...the location where the matter in question can be accessed (**for example, a website address**).*

The objective of the recommendation is to identify, with precision, material which is complained of and published online. Microsoft submits that this is also an essential reform. Microsoft is not the original publisher of material that is indexed by Bing and, without a specific URL, Microsoft cannot be sure that it is addressing the specific matter that is the subject of complaint. This places Microsoft (and the complainant) in an unsatisfactory and inefficient position. Microsoft is unable to consider an offer to make amends where the matter complained of is difficult or impossible to identify.

Also, the specificity of a notification may bear upon the availability of an innocent dissemination defence, particularly where a concerns notice is the first notification of a complaint.

Microsoft submits that the drafting in 14(2)(a1) in the MDAP 2020 should refer (as in the recommendation) to the **URL** instead of a **website address**.

Further, Microsoft submits that in the case of an online publication the provision of a URL should be a prescription, not merely an “example” of how the location of the matter in question may be specified.

Accordingly, Microsoft submits that clause 14(2)(a1) ought read:

(a1) specifies the location where the matter in question can be accessed, including, in the case of any online publication, by provision of the specific URL.

5 Supporting Recommendation 9, to ensure that a defendant is able to plead as a contextual imputation any of the imputations pleaded by the plaintiff

Microsoft supports recommendation 9 to amend clause 26 to ensure that it operates as intended, allowing a defendant to plead back imputations raised by the plaintiff.

6 Supporting Recommendation 14(a), introducing a serious harm threshold similar to that in UK legislation

Microsoft supports the introduction of a serious harm threshold, but submits that it ought not replace the existing defence of triviality.

In its experience of complaints and actions over Bing search results over the last 10 years Microsoft sees the serious harm threshold as being an important tool to respond, in a timely way, to actions that might satisfy the existing elements of defamation but have disproportionately high costs and demands upon court resources.

However, for certainty, being an addition to *Division 2 – Causes of Action for Defamation*, Microsoft considers that the serious harm threshold should allow a defendant to “bring forward” the consideration of whether a plaintiff who has not suffered sufficient harm to reputation can proceed with an action for defamation.

Microsoft submits that the proposed amendment should specify that the threshold may be determined by a court at an early stage in proceedings, at the application of a party or by the court of its own motion, with the onus to be borne by the individual / excluded corporation.

The Discussion Paper⁴ is correct in observing that the defence of triviality is challenging and largely ineffective. However, Microsoft submits that it ought to be retained, given that it differs from the serious harm threshold. It is a defence, considered at trial, with the defendant bearing the onus. Whilst it may have similar considerations, the triviality defence involves a different party doing a different job at a different point in time, and is typically a defence that involves a submission at trial, rather than any great demands in terms of time or cost.

⁴ Page 26

7 Supporting Recommendation 16 which clarifies that the statutory cap sets an upper limit on the scale of damages for non-economic loss and that the cap is applicable regardless of whether aggravated damages apply

Microsoft supports Recommendation 16 to clarify that the statutory cap gets an upper limit on the scale of damages for non-economic loss and that the cap is applicable regardless of whether aggravated damages apply.

Microsoft notes that there is no limit on awards for aggravated damages, so that the reform may not stem the increasing tendency for high awards.⁵

⁵ See for example *Wagner & Ors v Nine Network Australia Pty Limited & Ors* [2019] QSC 284 (currently under appeal) which saw a substantial separate award for “aggravated compensatory damages”.

8 Supporting Recommendation 17 that the leave of the court be required to bring further proceedings in relation to publication of the same or like manner by the same or associated defendants

Microsoft supports this recommendation.

A search engine indexes material on the internet without human review or intervention. It serves a user with search results from the material which is so indexed. As an online search engine, the primary objective of Bing is to connect users with the most relevant search results from the trillions of ever-changing websites on the web—providing easy access to quality content produced by web publishers. To do this, Bing automatically crawls the web to build an index of trillions of new and updated pages (or URLs) to display as a set of search results relevant to a user-initiated search or action. Search results are generated by using computer algorithms to match the user's search terms with results in our index.

As an algorithmically-driven service, Bing doesn't control the operation or design of the indexed websites, and has no control over what indexed websites publish. It is possible for material which has been the subject of previous court proceedings to be re-indexed, including where that material has been re-published at a different URL, re-constituted or copied by a primary publisher.

Microsoft is hopeful that recommendation 17 would prevent a plaintiff from commencing subsequent proceedings against Microsoft for new content appearing in Bing search results over subject matter that is the same or substantially similar to material that has been the subject of previous litigation. If this default provision gives rise to any injustice, the proposed reform allows the plaintiff to seek leave to bring proceedings. What's more, as a matter of practice Microsoft works with plaintiffs to allow them to submit new URLs if content that has already been deemed defamatory by a court of competent jurisdiction re-emerges online without the need for any additional judicial review.