

**COMMUNICATIONS
ALLIANCE LTD**



COMMUNICATIONS ALLIANCE SUBMISSION

to the

Council of Attorneys-General
Review of Model Defamation Provisions
Discussion Paper

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INTRODUCTION

Communications Alliance welcomes the opportunity to make this submission in response to the Council of Attorneys-General Discussion Paper *Review of Model Defamation Provisions*.

This submission reiterates many of the issues raised in a Communications Alliance submission on the same topic in 2011. It addresses the defamation liability of online intermediaries involved in the facilitation of the dissemination of information, including search engines, communication conduits such as ISPs, and online content hosts.



About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, search engines, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

1 SUMMARY OF SUGGESTED REFORMS

- 1.1 Communications Alliance submits that the Model Defamation Provisions (Provisions), and consequently existing law, should be amended to provide that merely indexing defamatory matter or facilitating its dissemination (such as occurs when a search result is generated automatically by a search engine, and when content is transmitted via a communication conduit such as an Internet Service Provider (ISP)), does not amount to publication of the defamatory matter, irrespective of whether the intermediary has knowledge of the defamatory content. In addition, the Provisions should be amended to protect content hosts, which simply act as platforms, and do not play a part in creating or publishing the hosted content.
- 1.2 In the event that an online intermediary is, prima facie, liable as a publisher of defamatory content, Communications Alliance submits that it is imperative that the Provisions contain a safe harbour that provides certainty to both defamed person(s) and online intermediaries. That safe harbour should include provisions as set out further below.
- 1.3 Communications Alliance submits that the Provisions should be amended to provide for a single publication rule.
- 1.4 Communications Alliance submits that the Provisions should be amended to provide that a matter the subject of complaint is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the plaintiff.

2 OVERVIEW

- 2.1 The position of online intermediaries with respect to liability for defamation under the Provisions is unclear.
- 2.2 In particular, the question of when an online intermediary will be treated as a publisher of defamatory content is unsettled, as are the circumstances in which an online intermediary will be found to have satisfied the requirements of the Schedule 5, Clause 91 of the *Broadcasting Services Act 1992* (BSA defence), or the defence of innocent dissemination in Section 32 of the Provisions.
- 2.3 Such uncertainty imposes an unreasonable burden on online intermediaries as well as potential plaintiffs, and is a barrier to speedy resolution of disputes about the publication of defamatory matters online. A lack of clarity is also bound to lead to uneven implementations of legal requirements, ranging from the removal of legitimate speech to harmful monitoring and surveillance of users, which invade privacy and unduly restrict speech.
- 2.4 The position under Australian law with respect to liability of online intermediaries is out of step with international developments, in particular with regard to the question of where and when publication occurs. Technology changes rapidly, and it is imperative for Australian laws to adapt so that the costs of compliance do not harm the pace of innovation.
- 2.5 Communications Alliance believes that the reforms proposed herein are necessary in order to create workable laws in the current online environment and to bring Australian defamation law in line with international developments.

3 ONLINE INTERMEDIARIES – IN WHAT CIRCUMSTANCES SHOULD THEY BE TREATED AS PUBLISHERS?

3.1 For the reasons set out below, Communications Alliance submits that the Provisions should be amended to provide that merely indexing defamatory matter or facilitating its dissemination (such as occurs when a search result is generated automatically by a search engine, and when content is transmitted via a communication conduit such as an ISP) does not amount to publication of the defamatory matter.

3.2 In addition, the Provisions should be amended to protect content hosts, which simply provide digital platforms, and do not play a part in creating or publishing the hosted content.

3.3 Search engines

3.4 With respect to search engines, the English High Court determined that the operator of a search engine was not a publisher of the snippets of content (*snippets*) that appear in response to a search conducted by a search engine user.

3.5 In *Metropolitan International Schools Ltd v Designt Technica Corp* [2009] EWHC 1765, Mr Justice Eady considered the automatic way in which the snippets were generated. When a search engine user conducts a search, there is no human input from the search engine operator. The search engine operator has no role to play in formulating search terms, and therefore has no power to prevent the snippet appearing in response to the user's request, unless it has taken some positive step in advance of the search request being made. Based on this, Justice Eady found that a search engine operator cannot be characterised as a publisher, at common law, of the snippets.

3.6 However, it is worrying that some overseas jurisdictions have required search engines to limit access to content that they have indexed. It is even more worrying that in *Trkulja vs Google LLC* the High Court of Australia ruled in June 2018 that Google had the capacity to convey a defamatory meaning and could, consequently, be sued for defamation.

3.7 Communications Alliance submits that it would impose an unreasonable burden on search engine operators, and will often be of no practical benefit to defamed persons, to require search engine operators to respond to a "take down" request in order to avoid liability as a publisher of defamatory snippets.

3.8 As to whether imposing such a burden on search engine operators would be likely to benefit defamed persons, it is important to keep in mind that a search engine operator can block access only to certain identified URLs from its search engine. It cannot block access to related URLs, nor access to the identified URLs via other search engines, nor access to the identified URLs by typing those URLs into a browser. No action taken by a search engine operator will result in the content itself being removed from the Internet. The only result is that the content at the URL complained of will not appear in search results generated by the particular search engine that was the subject of the take-down request.

3.9 In addition, there would be nothing to prevent the author of the defamatory content from which the snippet was generated, nor the person making that content available, from posting the content at another URL, which would then be automatically indexed by search engine crawlers (without any knowledge on the part of the search engine operators) and available to be displayed in response to search requests.

3.10 As to the burden, major search engines automatically process more than a billion searches each day. Unless the process of responding to a take-down notice was itself automated – which would have serious implications for the free flow of information on the Internet – a search engine operator would be faced with a massive administrative burden. It is likely that search engine operators would be forced, for economic and administrative reasons, to err on the side of blocking access to content complained of,

with little or any regard to the merits of the complaint, which would itself have an undesirable chilling effect.

- 3.11 There are strong policy justifications for extending protection to search engines, quite apart from the need for legal certainty and the matters of burden versus benefit discussed above. Search engines provide the road map for the World Wide Web. Legal rules that impose potential liability on search engines for snippets of content (generated automatically as a result of search requests), have the potential to unduly fetter innovation and commercial competition with respect to a technology that has enormous social utility.
- 3.12 We note that it appears to be the intention of the recently enacted *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019* – which arguably deals with far more extreme material than what most defamation cases would consider – to exclude search engines, which merely index content and make it searchable, from the obligations to cease hosting such content and the criminal offence provisions. (Refer to paragraph 12, p. 14 of the Explanatory Memorandum to the Bill. We note, however, that the definition of 'designated Internet service' requires amendment to put beyond doubt that search engines are not captured by the definition.)

3.13 Internet Service Providers

- 3.14 Similar to search engines, ISPs that merely provide a carriage service that enables defamatory material to be accessed, warrant strong protection from liability for defamation claims.
- 3.15 UK courts have recognised this and have extended strong protection to such intermediaries. In *Bunt v Tilley & Ors* [2006] EWHC 407, Mr Justice Eady struck out a defamation claim against two ISPs on the ground that the ISPs had done no more than facilitate Internet publications, and on that basis were not publishers of the relevant Internet publications for the purposes of defamation law.

Bunt v Tilly & Ors [2006] EWHC 407 (QB)

Paragraph 9

"When considering the internet, it is so often necessary to resort to analogies which, in the nature of things, are unlikely to be complete. That is because the internet is a new phenomenon. Nevertheless, an analogy has been drawn in this case with the postal services. That is to say, ISPs do not participate in the process of publication as such, but merely Provisions as facilitators in a similar way to the postal services. They provide a means of transmitting communications without in any way participating in that process."

Paragraph 37

"I would not, in the absence of any binding authority, attribute liability at common law to a telephone company or other passive medium of communication, such as an ISP. It is not analogous to someone in the position of a distributor, who might at common law need to prove the absence of negligence: see Gatley on Libel and Slander (10th edn) at para. 6-18. There a defence is needed because the person is regarded as having "published". By contrast, persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers: thus they do not need a defence."

- 3.16 So far as Communications Alliance is aware, this question has not been determined by an Australian Court. While ISPs can use the innocent dissemination defence to defend defamation claims, it appears that the more appropriate way of providing legal certainty would be to put beyond doubt that the mere provision of a carriage service that can be used to access defamatory content does not amount to publication in the first place so that no further defence is needed for ISPs.

4 A CERTAIN SAFE HARBOUR FOR ONLINE INTERMEDIARIES

- 4.1 Of course, an online intermediary will only need to take advantage of a safe harbour in the event that it is found to be a publisher of the content complained of.
- 4.2 As the law currently stands, an online intermediary that is held to be, prima facie, a publisher of defamatory matter, has two potential defences available to it: the BSA defence and the defence of innocent dissemination in Section 32 of the Provisions. For the reasons outlined below, there are significant shortcomings with each of these defences.

4.3 The BSA defence

- 4.4 This defence applies to 'Internet content hosts' and 'Internet service providers'. It exempts these intermediaries from liability for defamatory material hosted, cached or carried by them in certain circumstances. It is not clear whether the defence applies to search engine providers.
- 4.5 An Internet content host, for the purposes of this defence, is a person who hosts Internet content, or proposes to host Internet content, in Australia. The defence cannot be relied on by intermediaries who host Internet content outside of Australia. Internet content is confined to material that is "kept on a data storage device", but does not include email. There is uncertainty as to whether Internet content would include instantaneous Internet communications such as instant messaging and chat services.
- 4.6 An Internet Service Provider, for the purposes of the defence, is a person who supplies, or proposes to supply, an Internet carriage service to the public.
- 4.7 To take advantage of the defence, an intermediary must show that it was "not aware of the nature of the Internet content". It is unclear what kind of knowledge is required before an Intermediary will lose the benefit of the defence. In particular, it is not clear whether an intermediary who is aware that particular content is being hosted or transmitted, but not aware of the facts and circumstances that result in that content being defamatory (or make it likely that a court would find the content to be defamatory), can rely on the defence. This uncertainty may lead to intermediaries removing or blocking access to content that is unlikely ever to be found by a court to be defamatory.
- 4.8 The requirement that an intermediary not be aware of the nature of Internet content acts as a disincentive for intermediaries to respond to technological advancements that may allow for greater monitoring of Internet content (to the extent legally permissible). Responsible intermediaries should not be penalised, i.e. by loss of their limitation of liability, for engaging in voluntary measures to prevent illegal content from being accessed.
- 4.9 A further shortcoming of the BSA defence is uncertainty regarding the question of how soon after becoming "aware of the nature of Internet content" an intermediary has to remove or block access to such content before it loses the limitation on liability. Many removal processes require manual input and engineering. It will often be impossible to just "press a button" and remove precisely the content complained of. In many cases, the intermediary will need to exercise human judgment, discuss internally and even seek legal advice before making an informed decision. To deny intermediaries the opportunity to take these steps prior to any decision as to whether or not to remove material risks putting complainants in a position to censor content that would never have been found by a court to have been defamatory.

4.10 Innocent dissemination – Section 32 of the Model Defamation Provisions

- 4.11 The statutory defence of innocent dissemination contained in Section 32 of the Provisions can be relied on by a subordinate distributor who neither knew nor ought

reasonably to have known that the matter was defamatory, provided that that lack of knowledge was not due to negligence.

- 4.12 It is not clear whether a search engine operator could rely on this defence if sued in respect of a defamatory snippet.
- 4.13 Nor is it clear what matters will be relevant to determining whether an intermediary ought reasonably to have known that a matter was defamatory. In particular, there is no provision, as there is in the BSA defence, that for the purposes of the defence there is no obligation on an intermediary to monitor or make inquiries about content hosted, cached or transmitted by it.

4.14 A safe harbour for online intermediaries

- 4.15 As already noted, Communications Alliance submits that an online intermediary that does no more than facilitate the dissemination of defamatory matter should be deemed not to be a publisher of that matter, whether or not the intermediary is on notice of the allegedly defamatory matter. That is the position in the US under Section 230 of the *Communications Decency Act* (47 USC § 230). The stated policy underlying Section 230 of the *Communications Decency Act* included a perceived need to "preserve the vibrant and competitive free market" in Internet service provision.
- 4.16 In the event that an online intermediary *is*, prima facie, liable as a publisher of defamatory content, Communications Alliance submits that it is imperative that the Provisions contain a safe harbour that provides certainty to both defamed persons and online intermediaries.
- 4.17 We believe that a safe harbour should include (at least) the following:
 - (a) A provision to the effect that there is no obligation on the part of an online intermediary involved in the facilitation of the dissemination of information to monitor that information, nor to make enquiries about content hosted, cached or transmitted by it.
 - (b) A provision to the effect that an online intermediary has no liability for damages or other monetary relief to any person in respect of defamatory matter complained of unless:
 - (i) the complainant has notified the online intermediary of the allegedly defamatory matter in accordance with the relevant provisions of the safe harbour, and
 - (ii) the online intermediary has failed to satisfy the relevant conditions of the safe harbour. This should include, at the very least, transmitting, hosting, routing, providing connections, indexing and caching content.
 - (c) A provision to the effect that a complainant seeking to trigger the operation of the safe harbour is required to make reasonable efforts to identify the author of the defamatory content prior to seeking to trigger the operation of the safe harbour.
 - (d) A provision to the effect that a complainant seeking to trigger the operation of the safe harbour provide at least the following information, in writing, to the online intermediary:
 - (i) A description of the efforts that the complainant has made to identify the author of the defamatory content;
 - (ii) The words or matters complained of and the person or persons to whom they relate;
 - (iii) The publication that contains those words or matters, identified by top level domain and specific URL;

- (iv) The facts and circumstances which have caused the complainant to consider that those words or matters are defamatory;
 - (v) The details of any matters relied on in the publications which the claimant considers to be untrue; and
 - (vi) Why the claimant considers the words or matters to be harmful in the circumstances in which they were published.
- (e) A provision to the effect that an online intermediary has no liability for damages nor other monetary relief to any person in respect of defamatory matter complained of if, on receipt of a notice in accordance with the terms of the safe harbour, the online intermediary:
- (i) where possible, forwards the notice electronically to the creator of the words or matters complained of ('notice and notice'). Then, if a Court rules that the content is indeed defamatory, the online intermediary has 15 business days from the date of receipt of the Court order, or such other period as the Court may specify, to remove or block access to the words or matters complained of; or in the alternative
 - (ii) has 15 business days from the date of receipt of all information required to be provided by the complainant, or such other period as the Court may specify, to remove or block access to the words or matters complained of ('notice and takedown'). In order to ensure legitimate speech is not wrongly removed, a person whose content is removed should have the ability to send a counter notice that requires the material to be reinstated. In this case, an online intermediary would have no liability for access to the material unless a Court order is issued for its (renewed) removal.
- (f) A provision to the effect that where notices are sent in bad faith or materially misrepresent that material or activity is defamatory, there should be appropriate penalties.
- (g) The online intermediary should not be liable where they follow this process in good faith, and the online intermediary would not be liable in any event, unless they have liability under applicable law.

5 SINGLE PUBLICATION RULE

- 5.1 Section 8 of the *Defamation Act 2013* (UK) introduces a single publication rule to UK defamation legislation with the intention to prevent an action being brought in relation to republication of the same material by the same publisher after one year from the date of first publication.
- 5.2 Communications Alliance notes that the current Australian position, where each communication of a defamatory matter is a separate publication giving rise to separate cause of action, is not suited to the modern Internet age.
- 5.3 One of the major factors that led to consideration of a single publication rule in the UK was the burden faced by intermediaries. A rule which provides for a fresh publication every time material is accessed online has the effect that the limitation period applying to defamatory publications online is, for practical purpose, endless. Intermediaries are

potentially liable for defamatory material published by them many years after the initial publication.

- 5.4 The US has, since 1952, had a single publication rule for defamation. The rule, which is set out at § 577A of the Restatement of Torts 2d, applies in at least 27 US States.
- 5.5 Communications Alliance submits that the Provisions should be amended to provide for a single publication rule.

6 REQUIREMENT TO SHOW SERIOUS HARM

- 6.1 The 2013 changes to the *Defamation Act 2013* (UK) also included a raised threshold of harm, i.e. a "statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant". This increased threshold reflects and builds on recent case law dealing with trivial defamation claims and claims where the statement complained of is unlikely to cause the plaintiff serious harm.
- 6.2 Communications Alliance submits that a requirement to show serious harm would discourage trivial claims from being brought. It would also result in unmeritorious actions being struck out at an early stage, before costs had accumulated on both sides.
- 6.3 Communications Alliance submits that the Provisions should be amended to provide that a matter complained of is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the plaintiff.



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