

# REFORMING DEFAMATION LAW FOR THE DIGITAL ERA: SUBMISSION TO THE DEFAMATION WORKING PARTY

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## 1 Introduction

The Model Defamation Provisions,<sup>1</sup> enacted in the Uniform Defamation Acts,<sup>2</sup> are ill-suited to the digital era. They fail to ‘ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance’.<sup>3</sup> That proposition depends on more than the text of the Uniform Defamation Acts. The legislation exists in a symbiotic relationship with ‘common law’ defamation

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<sup>1</sup> Model Defamation Provisions prepared by the Parliamentary Counsel’s Committee and approved by the Standing Committee of Attorneys-General on 21 March 2005 <<https://www.pcc.gov.au/uniform/pcc-279-94-d10.pdf>> (‘Model Defamation Provisions’).

<sup>2</sup> *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2006* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

<sup>3</sup> Model Defamation Provisions s 3(b).

law.<sup>4</sup> As uniform law, state courts should follow one another in their interpretation of the Uniform Defamation Acts according to an oft-quoted dictum of the High Court.<sup>5</sup> The common law of defamation, in turn, depends on the cases that make it through to a judgment, and so on the behaviour of litigants and their legal representatives. The issues described below are the creation of defamation lawyers who are maximising their clients' self-interest—and so their own. In my opinion the competition of opposing self-interest has produced a body of law which is of little good to anybody except celebrities, thin-skinned politicians, defamation lawyers, and legal academics like me. State legislatures should act so that the Australian public interest, rather than the interests of the legal services industry,<sup>6</sup> determines the shape of the Uniform Defamation Acts.

The submission answers a selection of the questions posed by the Discussion Paper<sup>7</sup>—see the Summary below. Part 2.1 provides answers to questions which are justified in Parts 3 to 7. Part 2.2 provides further recommendations which go beyond the scope of the questions posed in the Discussion Paper, which are also reasoned in Parts 3 to 7. For the sake of my workload I have focused on issues which I am either most interested in or I have written about. There are many other aspects of Australian defamation law worthy of reform, which I hope will be addressed in submissions of better-read colleagues at other institutions.

## 2 Summary

### 2.1 Answers to questions

- Question 2: Should the Model Defamation Provisions be amended to broaden or to narrow the right of corporations to sue for defamation? ANSWER: Yes. The right of corporations to sue for defamation should be narrowed. Corporations should have no right to sue in defamation. See Part 7.
- Question 3 (a): Should the Model Defamation Provisions be amended to include a 'single publication rule'? ANSWER: Yes. See Part 6.
- Question 14 (a): Should a 'serious harm' or other threshold test be introduced into the Model Defamation Provisions, similar to the test in section 1 (serious harm) of the Defamation Act 2013 (UK)? ANSWER: Yes. See Part 3.2.
- Question 15 (b): Are existing protections for digital publishers sufficient? ANSWER: No. See Part 4.
- Question 15 (c): Would a specific 'safe harbour' provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions? ANSWER: Yes. See Part 4.

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<sup>4</sup> *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31] (Gleeson CJ), quoted in Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room' (2013) 36(3) *University of New South Wales Law Journal* 1002, 1014.

<sup>5</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>6</sup> Cf the 2011 submission of the NSW Bar Association, noted at p 12 of the Discussion Paper.

<sup>7</sup> Council of Attorneys-General Review of Model Defamation Provisions, Discussion Paper, February 2019 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf>> ('Discussion Paper').

## 2.2 Other recommendations

- The Model Defamation Provisions should provide a statutory test for defamatory capacity, as distinct from defamatory meaning. The issue of defamatory capacity should be determined with reference to the standard of the ‘intelligent, not merely ordinary, reasonable person’, consuming the medium in issue with an understanding of that medium. See Part 3.1.
- The Model Defamation Provisions should be amended to include a provision similar to s 10 of the *Defamation Act 2013* (UK). See Part 4.
- The Model Defamation Provisions should be amended to give effect to a statutory defence of responsible communication on a matter of public interest, modelled on New Zealand law. See Part 5.1.
- The Model Defamation Provisions should be amended so that the choice-of-law rule for intra-Australian defamation applies to all defamation litigation in Australia. See Part 6.
- The Model Defamation Provisions should be amended to provide that, for the purposes of the operation of the Cross-vesting Scheme, it is in the ‘interests of justice’ to transfer proceedings in respect of intra-Australian cross-border defamation to the court of the Australian jurisdictional area with the closest connection to the harm occasioned by the publication. See Part 6.

## 3 Rethinking ‘defamatory’ for the digital era

The logical starting place for a discussion of defamation law reform is the concept of ‘defamation’. The cause of action for defamation will not be enlivened unless the relevant material is defamatory of the plaintiff. The question of whether a matter is capable of defaming the plaintiff is determined by the judge with reference to the body of law concerning defamatory capacity.<sup>8</sup> If the matter has defamatory capacity, then, typically, whether the matter has actually defamed the plaintiff is determined by a jury.

The Discussion Paper considers reforming the test for defamatory meaning<sup>9</sup> but overlooks defamatory capacity. Amending the Model Defamation Provisions in respect of the latter can put an end to unnecessary litigation over publication via modern technologies.

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<sup>8</sup> *Trkulja v Google LLC* (2018) 92 ALJR 619, 626–7 [30] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). The capacity issue can be broken down into two questions: ‘(1) is the matter complained of capable of conveying the pleaded imputations; and (2) are such imputations capable of being defamatory?’: *Google Inc v Trkulja* (2016) 342 ALR 504, 596 [386] (Ashley, Ferguson and McLeish JJA); David Rolph, ‘The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in *Trkulja v Google Inc*’ (2017) 39(4) *Sydney Law Review* 601, 607; Stephen Mills, ‘More Effective Management of Defamation Cases’ [2006] *New Zealand Law Review* 525, 527.

<sup>9</sup> Cf Discussion Paper, 34, Question 14.

### 3.1 Rethinking defamatory capacity

In this section I consider how changing the common law test for defamatory capacity by reforming the Uniform Defamation Acts could advance freedom of expression and encourage efficient resolution of defamation disputes.

Last year, in *Trkulja v Google LLC*,<sup>10</sup> the High Court warned that the judge must not determine capacity to defame based on the judge's own understanding of what the words or images say or depict because defamatory meaning is (ordinarily) a matter for the jury. The test is whether the publications are *capable* of conveying the alleged imputations. That question is answered with reference to the 'ordinary, reasonable person'—a hypothetical person whom the court creates to ensure that it remains focused on capacity rather than meaning.

Part of the novelty of the *Trkulja* case was that the capacity in question was that of Google search results.<sup>11</sup> The Court considered the characteristics of the ordinary, reasonable person who made the search in issue and said:

in the absence of tested, accepted evidence to the contrary, it must also be allowed that the ability to navigate the Google search engine, and the extent of comprehension of how and what it produces, whence it derives, and how and to what degree Google contributes to its content, may vary significantly among the range of persons taken to be representative of the hypothetical ordinary reasonable person...

Additionally, the question of law of whether the standard of knowledge and comprehension of the processes involved should be taken as some hypothetical midpoint in the range of understanding is yet to be authoritatively determined. It may well be that the answer will turn on evidence as to the standards of knowledge and comprehension among users of the Google search engine (be they first-time or experienced participants, and recognising that the two classes may require separate consideration for the purposes of the law of defamation), and on inferences to be drawn from that kind of evidence as to the implications, particularly derogatory implications, that a user with that degree of knowledge and comprehension would likely attribute to the results of a Google search of the kinds in issue.<sup>12</sup>

The High Court allowed the appeal, holding that the search results had the necessary capacity to defame. The Victorian Court of Appeal had obviously taken a different view. It held that the Google search results were incapable of conveying a defamatory meaning,<sup>13</sup> agreeing with Blue J in *Duffy v Google Inc*<sup>14</sup> who said that the:

ordinary reasonable person reading autocomplete predictions would understand that they are neither a statement by Google nor a reproduction by Google of a statement by someone else... Rather they comprise a collection of words that have been entered by previous searchers when conducting searches.

The High Court stressed that Blue J was making mixed findings of fact and law in a judge-alone defamation proceeding, colouring the precedential value of the dictum for the purposes of 'law only' questions of defamatory capacity in the Victorian context.<sup>15</sup> The High Court's unveiled critique of the Court of Appeal's process distracts attention from what was a genuine difference of opinion, which goes to the very heart of the philosophy of defamation law. What are the

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<sup>10</sup> (2018) 92 ALJR 619, 632 [52] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) ('*Trkulja*').

<sup>11</sup> Considered in Michael Douglas, 'Defamatory Capacity in the Digital Age' (2018) 26 *Tort Law Review* 3.

<sup>12</sup> *Trkulja* (2018) 92 ALJR 619, 632 [53]–[55].

<sup>13</sup> *Google Inc v Trkulja* (2016) 342 ALR 504, 593 [372] (Ashley, Ferguson and McLeish JJA).

<sup>14</sup> *Duffy v Google Inc* (2015) 125 SASR 437, 527 [375], quoted in *Google Inc v Trkulja* (2016) 342 ALR 504, 597 [393] (Ashley, Ferguson and McLeish JJA).

<sup>15</sup> *Trkulja* (2018) 92 ALJR 619, 628 [36] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

characteristics of the ordinary, reasonable person? The answer to that question will determine whether a publication has the capacity to defame; whether a publication has capacity to defame will effectively determine the scope of what we mean by ‘defamatory’, and in doing so, determine the kinds of speech we are willing to accept.

According to a classic formulation, the ordinary, reasonable person is of fair, average intelligence, ‘who is neither perverse ... nor suspicious of mind ... nor avid for scandal’.<sup>16</sup> Arguably, *Trkulja* stands for the proposition that the ordinary, reasonable user of Google does not properly understand how Google works. Outside of the thought experiments of defamation lawyers and judges, this issue is an empirical matter which could be the subject of evidence. But as Rolph explains, for the purposes of determining defamatory capacity, ‘[h]ow search engines operate need not be the subject of evidence before a test of the ordinary, reasonable search engine user can be applied’.<sup>17</sup> The level of understanding of this hypothetical person will remain a question for first-instance judges who, with the anxiety of a *Trkulja*-esque dressing-down gnawing away at them, will likely avoid attributing the average user of modern technology with too-comprehensive an understanding of that technology. Put another way: in my view, following *Trkulja*, judges should determine that the ordinary, reasonable person is not very tech savvy, even if they are savvy enough to use the tech in issue.

Why should we care about the intelligence and worldliness of this fictional character? Because those qualities determine defamatory capacity. If an imputation lacks defamatory capacity, then it is amenable to being struck out.<sup>18</sup> If all of the pleaded imputations lack defamatory capacity, then a defendant to defamation litigation can seek summary judgment, avoiding the time and expense of a trial.<sup>19</sup> Raising the standard of what is capable of being defamatory could ‘promote speedy ... methods of resolving disputes’, serving an objective of the Model Defamation Provisions.<sup>20</sup>

The High Court said that ‘the question of law of whether the standard of knowledge and comprehension of the processes involved should be taken as some hypothetical midpoint in the range of understanding is yet to be authoritatively determined’.<sup>21</sup> That question could be authoritatively determined by the Uniform Defamation Acts. Rather than tolerating some hypothetical everyman, we could frame the question of defamatory capacity with reference to the ‘intelligent, [not merely ordinary] reasonable person’ *consuming the medium in issue*: a person who uses Google with an understanding of the technology behind it; a person who reads a ‘clickbait’ Tweet from a newspaper’s account and knows that the text of the linked article will provide necessary context;<sup>22</sup> a person who is less quick to judge. Defamation law brings out the worst in people, but it doesn’t have to be like that. By adjusting the principles on defamatory capacity, we could use defamation law to set the standard for the sort of person we should aspire to be.

- The Model Defamation Provisions should provide a statutory test for defamatory capacity, as distinct from defamatory meaning. The issue of defamatory capacity should be determined with reference to the ‘intelligent, not merely ordinary, reasonable person’, consuming the medium in issue with an understanding of that medium.

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<sup>16</sup> *Lewis v Daily Telegraph Ltd* [1964] AC 234, 260 (Lord Reid).

<sup>17</sup> David Rolph, ‘The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in *Trkulja v Google Inc*’ (2017) 39(4) *Sydney Law Review* 601, 609.

<sup>18</sup> See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 14.28.

<sup>19</sup> Eg, *Trkulja v Google Inc* [2015] VSC 635.

<sup>20</sup> Model Defamation Provisions s 3(d).

<sup>21</sup> *Trkulja v Google LLC* (2018) 92 ALJR 619, 632 [55] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>22</sup> Cf *Hockey v Fairfax Media Publications Pty Limited* (2015) 237 FCR 33.

### 3.2 Rethinking defamatory meaning

The Discussion Paper asks whether a ‘serious harm’ threshold should be introduced into the Model Defamation Provisions.<sup>23</sup> Although considered under the heading of the ‘Defence of triviality’,<sup>24</sup> a serious harm threshold is better understood in terms of an amendment which would alter Australian defamation law in respect of the test for defamatory meaning. Arguably, such an amendment is unnecessary: the common law might already recognise the requirement for serious harm.

A certain level of harm is built into the concept of ‘defamatory meaning’. An imputation is defamatory if it injures a person’s reputation.<sup>25</sup> According to the majority of the High Court in *Radio 2UE Sydney Pty Ltd v Chesterton*, a person’s reputation is ‘injured when the esteem in which that person is held by the community is diminished in some respect’.<sup>26</sup> Put another way: if an imputation does not injure (ie, harm) a person’s reputation, then it is not defamatory. Arguably, then, Australian defamation law already recognises a serious harm threshold inherent within the common law concept of defamation.

Recent authority of the Supreme Court of New South Wales favours that view. In *Kostov v Nationwide News Pty Ltd*,<sup>27</sup> it was argued that, even if the matter had defamatory capacity, it did not meet the threshold of seriousness required for an action in defamation to be maintained. The defendant publisher of *The Daily Telegraph* relied on an English case—*Thornton v Telegraph Media Group Ltd*<sup>28</sup>—where Tugendhat J held that ‘whatever definition of “defamatory” is adopted, it must include a qualification or threshold of seriousness, so as to exclude trivial claims’.<sup>29</sup> Tugendhat J explained as follows:

If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant.<sup>30</sup>

The Discussion Paper notes<sup>31</sup> that New Zealand case law has adopted this view in *CPA Australia v NZICA*,<sup>32</sup> but it fails to mention that McCallum J had regard to that case law in *Kostov* in approving of the reasoning of Tugendhat J.<sup>33</sup> Her Honour concluded that ‘the principle stated in *Thornton* may appropriately be held to apply in Australia’.<sup>34</sup>

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<sup>23</sup> Discussion Paper, 34, Question 14(a).

<sup>24</sup> Discussion Paper, 32–4.

<sup>25</sup> *Brisiani v Piscioneri (No 4)* [2016] ACTCA 32, [56] (Murrell CJ, Refshauge and Jagot JJ).

<sup>26</sup> *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 466 [3] (French CJ, Gummow, Kiefel and Bell JJ).

<sup>27</sup> [2018] NSWSC 858, [31] (*Kostov*).

<sup>28</sup> [2011] 1 WLR 1985 (*Thornton*).

<sup>29</sup> [2011] 1 WLR 1985, 2009 [90].

<sup>30</sup> [2011] 1 WLR 1985, 2009 [94].

<sup>31</sup> Discussion Paper, 33 n 70.

<sup>32</sup> [2015] NZHC 1854.

<sup>33</sup> [2018] NSWSC 858, [37]–[38].

<sup>34</sup> [2018] NSWSC 858, [42]; accepted by Davies J as *res judicata* in respect of a defamation claim in *Kostov v Nationwide News Pty Ltd (No 1)* [2018] NSWSC 1822, [73], and by Rein J in *Adriana Kostov v Nationwide News Pty Limited* [2018] NSWSC 1289, [9].

*Kostov* was a first instance decision and may not be followed around Australia. The long-term significance of the decision is thus unclear; as Gould says, ‘it is very early days’.<sup>35</sup> In my view, the decision ought to be followed, giving effect to a common law ‘serious harm’ threshold even in the absence of legislative reform. McCallum J’s reasoning is the logical extension of orthodox principles approved by the High Court.<sup>36</sup> The decision was sound in terms of both principle and policy.

A related principle was articulated by the Court of Appeal (England and Wales) in *Jameel (Yousef) v Dow Jones & Co Inc*.<sup>37</sup> The Court had regard to the objective of the forum’s *Civil Procedure Rules*—to deal with cases justly—in holding that the court was required to stay defamation proceedings where the costs of defending the claim were disproportionate to the harm actually suffered.<sup>38</sup> On this standard, defamation claims which fail to identify serious harm should be stayed in the exercise of the court’s inherent (or implied) jurisdiction.<sup>39</sup> The objectives of the procedural rules which informed that holding are shared by Australia’s superior courts.<sup>40</sup> (Even in the absence of express statutory provisions dealing with proportionality, every Australian court possesses the inherent, implied or incidental jurisdiction to stay disproportionately wasteful proceedings as an abuse of process, for a grant of power carries with it everything necessary for its exercise.)<sup>41</sup> Australian courts also share the concerns of English courts to take account of the public<sup>42</sup> and private interests involved in civil litigation when considering whether maintenance of proceedings is an abuse of process.<sup>43</sup> For example, in *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd*, Martin CJ held that where ‘the time and expense involved in the consideration and resolution of [an] interlocutory dispute is entirely disproportionate to its significance to the just and effective resolution of the case as a whole by mediation or trial’, such disputes ‘must be actively discouraged’.<sup>44</sup> In *Cronau v Nelson*,<sup>45</sup> McCallum J recognised the relationship between the *Jameel* principle and the de facto threshold of serious harm applied in *Kostov*.<sup>46</sup> Unfortunately, however, as Judge Gibson recognises in a recent article,<sup>47</sup> Australian judges have mostly refrained from applying *Jameel* to put an end to wasteful defamation litigation.<sup>48</sup>

In light of such common law principles, Collins has described the UK’s statutory serious harm threshold as perhaps of more symbolic than practical import.<sup>49</sup> Nonetheless, amending the Model Defamation Provisions to provide for a statutory serious harm threshold might still be desirable.

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<sup>35</sup> Kim Gould, ‘Small Defamation Claims In Small Claims Jurisdictions: Worth Considering For The Sake Of Proportionality?’ (2018) 41(4) *University of New South Wales Law Journal* 1222, 1231–2.

<sup>36</sup> Eg, *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 466 [3] (French CJ, Gummow, Kiefel and Bell JJ).

<sup>37</sup> *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946.

<sup>38</sup> *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946, 970 [70] (Lord Phillips).

<sup>39</sup> See, eg, *Bleyer v Google Inc* [2014] NSWSC 897.

<sup>40</sup> See, eg, *Civil Procedure Act 2005* (NSW) ss 56–8.

<sup>41</sup> Cf Discussion Paper, 33 [5.47]; see Michael Douglas, ‘Anti-suit injunctions in Australia’ (2017) 41 *Melbourne University Law Review* 66, 79–84.

<sup>42</sup> Such as the judicial costs of determining defamation disputes.

<sup>43</sup> *UBS AG v Tyne* (2018) 360 ALR 184; [2018] HCA 45, [70] (Gageler J), citing *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, 31 (Lord Bingham). As Gageler J observed, the doctrine of abuse of process is informed by considerations of fairness: [62].

<sup>44</sup> *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd* (2006) 33 WAR 1, 1 [2].

<sup>45</sup> [2018] NSWSC 1769, [10].

<sup>46</sup> But cf a recent decision of Gibson DCJ which notes that the doctrinal underpinning of *Jameel* is EU law not shared in Australia: *Burns v Gaynor* [2018] NSWDC 358, [75]–[79].

<sup>47</sup> Judith Gibson, ‘Identifying defamation law reform issues: A “snapshot” view of defamation judgment data’ (2019) 23 *Media & Arts Law Review* 4, 8–9.

<sup>48</sup> Cf *Farrow v Nationwide News Pty Ltd* (2017) 95 NSWLR 612 (Basten JA); see further David Rolph, *Defamation Law* (Lawbook Co, 2016) 169–71.

<sup>49</sup> See Matthew Collins, ‘Key Reforms in the Defamation Act 2013’, *YouTube – Oxford Academic (Oxford University Press)* (27 February 2014) <<https://www.youtube.com/watch?v=Rs86AgI69q0>>.

Australian defamation law depends on more than New South Wales; statutory reform could compel other Australian jurisdictions to follow the *Kostov* approach. Bringing the Australian statutes into line with the *Defamation Act 2013* (UK) c 26 would empower Australian courts to have regard to English case authority when considering the development of Australian doctrine and procedure.<sup>50</sup> By framing an Australian serious harm threshold with the same ‘clumsy’<sup>51</sup> language of s 1 of the *Defamation Act 2013*, and providing that a statement is *not* defamatory *unless XYZ*, we could avoid the risk identified by Judge Gibson that this threshold may be sidelined to create a merely ‘minor trial issue’.<sup>52</sup> Ideally, a statutory threshold of serious harm would increase the likelihood of defamation litigation being summarily dismissed.

On balance, the introduction of a statutory serious harm threshold into Australian defamation law should be welcomed. It would deter commencement of defamation claims of marginal merit and it would encourage courts to allow strike-out applications by defamation defendants.<sup>53</sup> In doing so, it would render the impact of defamation law on freedom of expression more reasonable.<sup>54</sup>

- Question 14 (a): Should a ‘serious harm’ or other threshold test be introduced into the Model Defamation Provisions, similar to the test in section 1 (serious harm) of the Defamation Act 2013 (UK)? ANSWER: Yes.

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<sup>50</sup> See David Rolph, ‘A critique of the Defamation Act 2013: Lessons for and from Australian defamation law reform’ (2016) 21(4) *Communications Law* 116, 116.

<sup>51</sup> Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 127 [6.47].

<sup>52</sup> Judith Gibson, ‘Identifying defamation law reform issues: A “snapshot” view of defamation judgment data’ (2019) 23 *Media & Arts Law Review* 4, 20.

<sup>53</sup> See Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 127.

<sup>54</sup> Model Defamation Provisions s 3(b).



## 4 Rethinking the responsibility of internet intermediaries

### 4.1 Proceed with caution

In the face of rapid technological change it is tempting—and fashionable—to declare that the law is ill-suited to modern conditions. The title of this submission is demonstrative of that kind of bandwagon reasoning. The great triumph of the common law, however, is its ability to mediate between continuity and change.<sup>55</sup> Common law principles of defamation law have adapted to vindicate damage to reputation caused by publications via technologies and platforms which did not exist a few years ago.<sup>56</sup> Much of our defamation law remains sound.<sup>57</sup> However, in my opinion, the responsibility of internet intermediaries is different.<sup>58</sup> In respect of this issue, the law has not accommodated the needs of modern Australia.

‘Internet intermediaries’ denotes a group of corporations—including ‘telecommunications providers, internet service providers (“ISPs”), content hosts, search engines, social media platforms, and e-commerce and payment providers’<sup>59</sup>—which are, for better or worse, indispensable to the function of the internet and to the lives of millions of Australians. These actors have great influence over how people communicate and access information.<sup>60</sup> They thus have great influence over societies. The legal responsibility of internet intermediaries (or simply ‘intermediaries’) for harm is ‘hotly contested and extremely messy’.<sup>61</sup> It is an issue which deserves its own substantial law inquiry.<sup>62</sup> Among other things, the fact that many of the intermediaries which are amenable to defending defamation litigation as so-called ‘secondary publishers’<sup>63</sup> are based in the United States means that the relevant principles of substantive defamation law must operate extraterritorially and across borders, giving rise to thorny problems of conflict of laws.<sup>64</sup> The Discussion Paper does not deal with the question of intermediary liability adequately at all; nor will the submissions which this review will receive. Given the timeline for this process, there is no way that this review of the Model Defamation Provisions will do the issue justice. Nonetheless, we must give it a crack.

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<sup>55</sup> See generally William Gummow, *Change and Continuity – Statute, Equity and Federalism* (Clarendon Press, 1999).

<sup>56</sup> Eg, principles of assessment of damages have accommodated the spread of information on the internet: see Michael Douglas, “‘Their evil lies in the grapevine effect’: Assessment of Damages in Defamation by Social Media” (2015) 20(4) *Media and Arts Law Review* 367.

<sup>57</sup> ‘Internet technologies have not caused a revolution in the principles of defamation law and it seems unlikely that they will do so in the future’: David Rolph, ‘Publication, Innocent Dissemination and the Internet after *Dow Jones & Co Inc v Gutnick*’ (2010) 33(2) *University of New South Wales Law Journal* 562, 579.

<sup>58</sup> Cf the origins of the innocent dissemination defence, and the importance of printing technology to development of the doctrine, considered in David Rolph, ‘Publication, Innocent Dissemination and the Internet after *Dow Jones & Co Inc v Gutnick*’ (2010) 33(2) *University of New South Wales Law Journal* 562, 574–5.

<sup>59</sup> Kylie Pappalardo and Nicolas Suzor, ‘The Liability of Australian Online Intermediaries’ (2018) 40(4) *Sydney Law Review* 469, 469.

<sup>60</sup> Kylie Pappalardo and Nicolas Suzor, ‘The Liability of Australian Online Intermediaries’ (2018) 40(4) *Sydney Law Review* 469, 474.

<sup>61</sup> Kylie Pappalardo and Nicolas Suzor, ‘The Liability of Australian Online Intermediaries’ (2018) 40(4) *Sydney Law Review* 469, 475.

<sup>62</sup> Eg, that carried out by the ACCC: Australian Competition and Consumer Commission, *Digital Platforms Inquiry - Preliminary Report*, December 2018.

<sup>63</sup> See, eg, *Duffy v Google Inc* (2015) 125 SASR 437, 496 [207] (Blue J) (‘*Duffy*’).

<sup>64</sup> AKA ‘private international law’. See, eg, Michael Douglas, ‘Extraterritorial Injunctions Affecting the Internet’ (2018) 12(1) *Journal of Equity* 34. See further Part 6 below.

The Working Party should treat any submission which makes generalised statements of principle in respect of intermediary liability with great caution. Whatever is done in other jurisdictions, in our tradition, the liability of internet intermediaries depends on the legal context in issue.<sup>65</sup> For example, while the Discussion Paper cited the Canadian *Google v Equustek* litigation,<sup>66</sup> it failed to appreciate that the substantive principles justifying the remedy—intellectual property, and breach of confidence—raise distinct policy considerations from those posed by defamation law. In an analogous local case, *X v Twitter*, the Supreme Court of New South Wales recognised that (foreign) corporate manifestations of the Twitter platform were directly responsible for breach of confidence caused by an anonymous author’s tweeting of confidential information.<sup>67</sup> Still, breach of confidence is not a tort,<sup>68</sup> to adapt principles of tort jurisprudence<sup>69</sup> to all cases of potential liability for internet intermediaries without appreciating the interests underlying the different substantive doctrines may lead to error. Conversely, the considerations which may favour imposition of intermediary liability (or otherwise) in other legal contexts may not neatly transpose to the context of Australian defamation law.

## 4.2 The current law on intermediary liability in defamation

While the Discussion Paper places primary emphasis on the current innocent dissemination defence,<sup>70</sup> the issue of liability of internet intermediaries is broader. The issue requires consideration of the elements of the cause of action because, as Rolph explains, the defence of innocent dissemination is intertwined with the principles of publication.<sup>71</sup>

‘Publication’ is an essential element of the cause of action in defamation,<sup>72</sup> which must be proved as a matter of fact. Although findings of fact are not binding on subsequent courts,<sup>73</sup> it would be a mistake to overlook the developing common law jurisprudence which considers how certain kinds of activities by intermediaries may constitute publication. The framework of law in which these findings of fact (or mixed findings of fact and law)<sup>74</sup> are made is not insubstantial—it is deserving of a chapter in a defamation law textbook.<sup>75</sup>

In defamation law the word ‘publication’ is used not in its natural and ordinary non-legal meaning, but as a term of art.<sup>76</sup> ‘Publication’ involves a bilateral act ‘in which the publisher makes it available and a third party has it available for his or her comprehension’.<sup>77</sup> Subject to defences, the law

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<sup>65</sup> For a recent comparison of important contexts, see Kylie Pappalardo and Nicolas Suzor, ‘The Liability of Australian Online Intermediaries’ (2018) 40(4) *Sydney Law Review* 469.

<sup>66</sup> Discussion Paper, 36. See further Michael Douglas, ‘A Global Injunction Against Google’ (2018) 134 *Law Quarterly Review* 181.

<sup>67</sup> *X v Twitter* (2017) 95 NSWLR 301, 305 [17].

<sup>68</sup> Cf Michael Douglas, ‘Characterisation of Breach of Confidence as a Privacy Tort in Private International Law’ (2018) 41(2) *University of New South Wales Law Journal* 490; *Kostov v Nationwide News Pty Ltd (No.1)* [2018] NSWSC 1822, [64].

<sup>69</sup> See Kylie Pappalardo and Nicolas Suzor, ‘The Liability of Australian Online Intermediaries’ (2018) 40(4) *Sydney Law Review* 469, 471, 466–8.

<sup>70</sup> Discussion Paper, 34–8.

<sup>71</sup> David Rolph, *Defamation Law* (Lawbook Co, 2016) 139 n 2.

<sup>72</sup> *Sims v Jooste (No 2)* [2016] WASCA 83, [6] (Martin CJ).

<sup>73</sup> See *Trkulja* (2018) 92 ALJR 619, 628 [36] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>74</sup> *Trkulja v Google Inc LLC* [2012] VSC 533, [18], [18] (Beach J).

<sup>75</sup> Eg, David Rolph, *Defamation Law* (Lawbook Co, 2016) ch 8.

<sup>76</sup> *Sims v Jooste (No 2)* [2016] WASCA 83, [8] (Martin CJ); *Tom & Bill Waterhouse Pty Ltd v Racing New South Wales* (2008) 72 NSWLR 577, 585–6 (Palmer J).

<sup>77</sup> *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

imposes strict liability for voluntary publication of defamatory matter.<sup>78</sup> Liability focuses on publication, not authorship.<sup>79</sup> A failure to prevent dissemination of defamatory material authored by another person may result in liability.<sup>80</sup>

Intermediaries may thus face liability as publishers of defamation on application of basic principles.<sup>81</sup> They may be liable for defamatory matter they did not author if they have notice of defamation and fail to act within a reasonable time.<sup>82</sup> The level of knowledge required, if any, for intermediary liability in defamation has resulted in divergent views between common law legal systems.<sup>83</sup> In *Google Inc v Duffy*,<sup>84</sup> Kourakis CJ affirmed that it was not necessary, in order to prove an intentional act of publication, that Google had knowledge of or adopted the content of its search results.<sup>85</sup> Other Australian cases have suggested otherwise.<sup>86</sup> Arguably, despite recent High Court authority in adjacent space, the issue is still to be settled.<sup>87</sup>

In *Trkulja* the High Court confirmed that the results of a Google images search, which associated the plaintiff with the criminal ‘underworld’, were capable of defaming the plaintiff. Although the case is properly understood in terms of defamatory capacity, not publication,<sup>88</sup> the High Court’s decision does pave the way for the tribunal of fact to determine that Google published defamatory matter by enabling the download of those Google-image-search results. The Court held that the primary judge ‘was correct to hold that it is strongly arguable that Google’s intentional participation in the communication of the allegedly defamatory results to Google search engine users supports a finding that Google published the allegedly defamatory results’.<sup>89</sup> (This ‘considered *dicta*’ should not be lightly overlooked.)<sup>90</sup> Other cases have seen decisions to that effect; the fact that defamatory matter is published by the operation of an algorithm or a program without contemporaneous human input does not mean that the search provider is not a publisher.<sup>91</sup> In *Duffy*,<sup>92</sup> for example, Google was held responsible for presenting links to websites accompanied by snippets of the underlying defamatory text. Blue J held as follows:

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<sup>78</sup> *Godfrey v Demon Internet Ltd* [2001] QB 201, 207; cited in *Google Inc v Duffy* (2017) 129 SASR 304, 345 [142] (Kourakis CJ), 467 [598] (Hinton J); considered in *Google Inc v Trkulja* (2016) 342 ALR 504, 567–8 (Ashleigh, Ferguson and McLeish JJA).

<sup>79</sup> *Lee v Wilson* (1934) 51 CLR 276, 287 (Dixon J).

<sup>80</sup> *Byrne v Deane* [1937] 1 KB 818, considered in David Rolph, ‘Publication, Innocent Dissemination and the Internet after *Dow Jones & Co Inc v Gutnick*’ (2010) 33(2) *University of New South Wales Law Journal* 562, 569–70.

<sup>81</sup> *Google Inc v Trkulja* (2016) 342 ALR 504, 590 [348] (Ashley, Ferguson and McLeish JJA); see also Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 82 ff.

<sup>82</sup> See *Murray v Wishart* [2014] 3 NZLR 722, considered in David Harvey, *Collisions in the Digital Paradigm – Law and Rule Making in the Internet Age* (Hart Publishing, 2017) 76–84; *Defteros v Google Inc* (2017) 54 VR 592, 594 [5] n 3.

<sup>83</sup> For a comprehensive analysis, see Emily Laidlaw and Hilary Young, ‘Internet Intermediary Liability in Defamation: Proposals for Statutory Reform’ (1 February 2017)

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3044772](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044772)>. See also Corey Omer, ‘Intermediary liability for harmful speech: lessons from abroad’ (2014) 28(1) *Harvard Journal of Law & Technology* 289.

<sup>84</sup> (2017) 129 SASR 304, 352 [156].

<sup>85</sup> See also *Trkulja v Google Inc LLC* [2012] VSC 533, [18], [29]–[30] (Beach J).

<sup>86</sup> *Defteros v Google Inc* (2017) 54 VR 592, 594 [5] n 3; *Google Inc v Trkulja* (2016) 342 ALR 504, 590 ff (Ashleigh, Ferguson and McLeish JJA). Either way, the innocent dissemination defence may lead to the same result.

<sup>87</sup> *Rana v Google Australia Pty Ltd* [2013] FCA 60, [50] (Mansfield J); cf *Bolton v Stoltenberg* [2018] NSWSC 1518, [166] (Payne J).

<sup>88</sup> See David Rolph, ‘The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in *Trkulja v Google Inc*’ (2017) 39(4) *Sydney Law Review* 601, 607.

<sup>89</sup> (2018) 92 ALJR 619, 629 [38] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>90</sup> See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

<sup>91</sup> Kylie Pappalardo and Nicolas Suzor, ‘The Liability of Australian Online Intermediaries’ (2018) 40(4) *Sydney Law Review* 469, 489.

<sup>92</sup> (2015) 125 SASR 437; see also *Google Inc v Duffy* (2017) 129 SASR 304.

Google played an active role in generating the paragraphs and communicating them to the user. The mere fact that the words are programmed to be generated because they appear on third party webpages makes no difference to the physical element. It makes no difference to the physical element whether a person directly composes the words in question or programs a machine which does so as a result of the program.<sup>93</sup>

In my opinion, this passage highlights why, in the words of Pappalardo and Suzor, publication is a ‘relatively poor mechanism to delineate responsibility’ for intermediaries in defamation.<sup>94</sup> ‘Publication’ is a blunt instrument which falls heavily on the intermediaries Australians depend on every day.

### 4.3 Rethinking ‘publication’, not just innocent dissemination

Intermediaries present challenges of both principle and policy to the concept of ‘publication’ within defamation law.<sup>95</sup> The policy challenge is a function of the heavy-handed resolution of the challenge of principle described in the preceding section. In his monograph, Rolph characterises the common law’s approach to publication ‘as being very wide indeed’.<sup>96</sup> He explains the need for legislative intervention as follows:

The common law’s approach to publication may be too broad. By exposing subordinate distributors to the possibility that they might be sued, with the uncertainty as to whether they might be able to establish a defence of innocent dissemination – for all litigation is risky – defamation law’s current approach to publication arguably poses a threat to freedom of speech, causing the well-known “chilling effect” and leading such persons or entities to self-censor more than is necessary. The difficulty for courts is that the common law’s approach to publication is so well established that it would require legislative intervention to depart from it. These difficulties are likely to become particularly acute when dealing with the treatment of internet intermediaries, such as internet service providers, search engines and social media platforms, as publishers for the purposes of defamation law.<sup>97</sup>

The ‘chilling effect’ described by Rolph is not merely a theoretical concept. It is the reality caused by laws which impose liability on corporations for failing to remove content that self-interested individuals report as objectionable. According to Google’s *Transparency Report*, since 2014, over 1.1 million URLs have been delisted from Google search results pursuant to European privacy laws.<sup>98</sup> Although ‘delegating some responsibility for upholding the law and social standards to online intermediaries seems to be the only reasonable prospect we have for enforcing them’,<sup>99</sup> to outsource the judicial function to a for-profit multinational should be approached with hostility by all those who appreciate the rule of law.<sup>100</sup> I agree with the sentiment of the Communications

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<sup>93</sup> *Duffy* (2015) 125 SASR 437, 495–6 [204].

<sup>94</sup> Kylie Pappalardo and Nicolas Suzor, ‘The Liability of Australian Online Intermediaries’ (2018) 40(4) *Sydney Law Review* 469, 481.

<sup>95</sup> David Rolph, ‘The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in *Trkulja v Google Inc*’ (2017) 39(4) *Sydney Law Review* 601, 607.

<sup>96</sup> David Rolph, *Defamation Law* (Lawbook Co, 2016) 139 [8.10].

<sup>97</sup> David Rolph, *Defamation Law* (Lawbook Co, 2016) 142 [8.30].

<sup>98</sup> See Google, ‘Search removals under European privacy law’, *Transparency Report* (30 April 2019) <<https://transparencyreport.google.com/eu-privacy/overview?hl=en>>.

<sup>99</sup> Kylie Pappalardo and Nicolas Suzor, ‘The Liability of Australian Online Intermediaries’ (2018) 40(4) *Sydney Law Review* 469, 474.

<sup>100</sup> According to Ammori, ‘some of the most important First Amendment lawyering today is happening at top technology companies’ which ‘have an enormous impact on free expression globally through the policies they adopt for their millions of users’: Marvin Ammori, ‘The “New” New York Times: Free Speech Lawyering in the Age of Google and Twitter’ (2014) 127(8) *Harvard Law Review* 2259, 2262, 2263.

Alliance that search operators will err on the side of blocking access to content for commercial reasons, among others.<sup>101</sup>

Australian defamation law ought to be adapted to avoid the risk of the chilling effect which the current principles of publication present in relation to intermediaries. The current innocent dissemination defence does not go far enough, as it is only a defence; when threatened with defamation litigation, intermediary defendants might simply remove access to content to avoid the costs associated with mounting an innocent dissemination defence and engaging in an interlocutory squabble. While US-style blanket immunity for intermediaries may be going too far,<sup>102</sup> fortunately, we have a ready-made template for a sensible middle-path forward.

In England, the common law position in respect of publication has been displaced by s 10 of the *Defamation Act 2013*.<sup>103</sup> Rather than providing a defence, the section provides that the court lacks jurisdiction to hear and determine defamation actions brought against persons who are not an 'author', 'editor' or 'publisher' of the impugned material. Importantly, however, this provision does not apply if it is not reasonably practicable to sue the original author (etc).<sup>104</sup> So for example, if it is not possible to identify the author of a defamatory Tweet, a claimant may still proceed directly against the Irish and American corporate manifestations of Twitter under this section.

In my opinion, Australian defamation law would be greatly enhanced if the Uniform Defamation Acts incorporated a provision similar to s 10 of the UK's 2013 Act. The provision would strike a more reasonable balance between enabling freedom of expression of the internet and allowing defamed persons to obtain remedies for injury to their reputations.

- Question 15 (b): Are existing protections for digital publishers sufficient? ANSWER: No.
- Question 15 (c): Would a specific 'safe harbour' provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions? ANSWER: Yes.
- The Model Defamation Provisions should be amended to include a provision similar to s 10 of the *Defamation Act 2013* (UK).

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<sup>101</sup> See Michael Douglas, 'Questioning the Right to be Forgotten' (2015) 40(2) *Alternative Law Journal* 109; Michael Douglas, 'Google challenges the Supreme Court of Canada's global injunction in the United States', *Gazette of Law & Journalism* (online), 29 November 2017.

<sup>102</sup> An idea I flirted with in Michael Douglas, 'Protecting Google from defamation is worth seriously considering', *The Conversation* (online) (15 June 2018) <<http://theconversation.com/protecting-google-from-defamation-is-worth-seriously-considering-98252>>.

<sup>103</sup> Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 87.

<sup>104</sup> See Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 86 [4.68].

## 5 Enhancing protection for critics of public figures

In this section I argue that the Model Defamation Provisions ought to be amended to provide greater protection for those who criticise public figures.

### 5.1 Litigious politicians

In a recent piece of online commentary I considered the subject of politicians suing in defamation.<sup>105</sup> The context was the aftermath of the Christchurch massacre. *The Project* host Waleed Aly delivered an editorial—subsequently viewed over 4 million times<sup>106</sup>—in which he said the following:

I know there are reports going back eight years of a shadow cabinet meeting in which another senior politician suggested his party should use community concerns about Muslims in Australia failing to integrate as a political strategy... that person is now the most senior politician we have.

It was reported that, following the broadcast of Aly's editorial, the Prime Minister's press secretary contacted Network Ten, characterising the broadcast as effectively defamation of the Prime Minister. It was reported that the press secretary demanded an apology.<sup>107</sup> Against the backdrop of public discontent (including my own), the Prime Minister subsequently expressly stated that he would not be suing in defamation. There would have been a political cost in proceeding with defamation litigation over an issue of public importance, but that is not always the case. All sides of the aisle have threatened defamation litigation at some point; Hockey, Hanson-Young and Foley are notable recent examples. But the phenomenon is nothing new. For decades, Australian politicians have been using defamation litigation to silence critics. In 1994, in *Theophanous v Herald and Weekly Times Limited*,<sup>108</sup> Deane J said:

[T]he extraordinary development and increased utilization of the means of mass communication [has transform[ed] the nature and extent of political communication and discussion in this country and [done] much to translate the Constitution's theoretical doctrine of representative government with its thesis of popular sovereignty into practical reality.] These developments [like the universal adult franchise] have greatly enhanced the need to ensure that there be unrestricted public access to political information and to all political points of view. Yet, in the same period, the use of defamation proceedings in relation to political communication and discussion has expanded to the stage where there is a widespread public perception that such proceedings represent a valued source of tax-free profit for the holder of high public office who is defamed and an effective way to "stop" political criticism, particularly at election times (Indeed, the phrase "stop writ" has entered the language.). That widespread perception may well be exaggerated or unjustified. Its effect is, however, to intensify the chilling effect of a threat or perceived risk of defamation proceedings.<sup>109</sup>

Subsequent cases provided hope that the implied freedom of political communication in the *Commonwealth Constitution* could operate as a substantive defence.<sup>110</sup> What was realised was more

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<sup>105</sup> Michael Douglas, 'Politicians suing for defamation is usually a bad idea: here's why', *The Conversation* (online), 19 March 2019 <<https://theconversation.com/politicians-suing-for-defamation-is-usually-a-bad-idea-heres-why-113837>>.

<sup>106</sup> See 'The Project', *Twitter* (15 March 2019) <<https://twitter.com/theprojecttv/status/1106471346303754240?s=20>>.

<sup>107</sup> Samantha Maiden, 'Furious PM's office threatens Ten over Waleed Aly's emotional Christchurch plea', *The New Daily* (18 March 2019) <<https://thenewdaily.com.au/news/national/2019/03/18/morrison-waleed-aly-muslim/>>.

<sup>108</sup> (1994) 182 CLR 104 ('*Theophanous*').

<sup>109</sup> (1994) 182 CLR 104, 174.

<sup>110</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

like half a defence— ‘*Lange* qualified privilege’.<sup>111</sup> The defence will be defeated by a lack of knowledge or if the publisher was actuated by malice.<sup>112</sup> It is rarely successful.<sup>113</sup> As Gibson says, ‘[t]he failure of the *Lange* defence has long been acknowledged’.<sup>114</sup>

Australia’s weak approach to qualified privilege makes it an outlier in the common law world.<sup>115</sup> Recently, in *Durie v Gardiner*,<sup>116</sup> the New Zealand Court of Appeal recognised a defence of responsible communication on a matter of public interest. This ‘powerful’ new defence is made out if the publication (1) is in the public interest, and (2) is responsible.<sup>117</sup> The defence does not just apply to political or government speech, thus side-stepping the constitutional law characterisation problem (what is *political* communication?) recently grappled by the High Court.<sup>118</sup> For the purposes of the New Zealand defence, the Court determines whether the communication is responsible with reference to the following factors:

- (a) The seriousness of the allegation — the more serious the allegation, the greater the degree of diligence to verify it.
- (b) The degree of public importance.
- (c) The urgency of the matter. This requires asking whether the public’s need to know required the defendant to publish when it did, taking into account that news is often a perishable commodity.
- (d) The reliability of any source.
- (e) Whether comment was sought from the plaintiff and accurately reported. The Court noted that in most cases it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond. Failure to do so also heightens the risk of inaccuracy.
- (f) The tone of the publication.
- (g) The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.<sup>119</sup>

The Discussion Paper is anchored to the current formulation of statutory qualified privilege in s 30 of the Model Defamation Provisions. That is unfortunate. The New Zealand defence is better.

If we must continue with our current qualified privilege defence, it could be improved as follows: the ‘malice’ reply to the defence of qualified privilege could be explicitly excluded. News organisations ought to be able to call out politicians for selling their time to the highest bidder, for example; and if the reporting journalists have bad blood in respect of that politician, then perhaps the politician deserves it. Utilitarian considerations favour the enactment of a strong public interest defence at the expense of the feelings of politicians who have chosen to further their careers in the public eye. The law should protect those who speak truth to power.

- The Model Defamation Provisions should be amended to give effect to a statutory defence of responsible communication on a matter of public interest, modelled on New Zealand law.

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<sup>111</sup> See David Rolph, *Defamation Law* (Lawbook Co, 2016) 237 [11.110].

<sup>112</sup> See, eg, *Hockey v Fairfax Media Publications Pty Limited* (2015) 237 FCR 33.

<sup>113</sup> David Rolph, *Defamation Law* (Lawbook Co, 2016) 239 [11.110].

<sup>114</sup> Judith Gibson, ‘Identifying defamation law reform issues: A “snapshot” view of defamation judgment data’ (2019) 23 *Media & Arts Law Review* 4, 22.

<sup>115</sup> David Rolph, ‘Australia – the public interest backwater’, *Inform’s Blog* (5 September 2018) <<https://inform.org/2018/09/05/australia-the-public-interest-backwater-david-rolph/>>.

<sup>116</sup> [2018] NZCA 27.

<sup>117</sup> Ursula Cheer, ‘New Zealand adopted public interest defence in defamation’ (2019) 23 *Media & Arts Law Review* 105, 105.

<sup>118</sup> *Clubb v Edwards* [2019] HCA 11, [25] ff (Kiefel CJ, Bell and Keane JJ).

<sup>119</sup> Ursula Cheer, ‘New Zealand adopted public interest defence in defamation’ (2019) 23 *Media & Arts Law Review* 105, 105–6.

## 5.2 Litigious celebs?

The archetypal defamation case—which recent data is undermining<sup>120</sup>—is brought against a media company, like a newspaper publisher, and is brought by a public figure, like a celebrity. Such cases still occupy a significant position in the public consciousness; the recent *Rush* litigation is a prime example.<sup>121</sup>

One problem for defendants to such cases is that their reporting may not be in the public interest, and it won't attract protection of the implied freedom of political communication. In the United States, claims against celebrities are subject to a 'public figure' doctrine.<sup>122</sup> As seen in the Rebel Wilson litigation,<sup>123</sup> this makes it difficult for celebrities to succeed under US defamation law, tacitly encouraging forum shopping in favour of Australia.<sup>124</sup> The rationale for the doctrine is obvious: celebrities, like politicians, are individuals who (often) consent to being in the public eye and so invite some level of scrutiny. They also hold a platform to vindicate their own reputations, thus rendering the court's assistance less necessary.

Although the defence has some intuitive appeal, on balance, Australian law is better off without it. Determining who is a 'public figure' for the purposes of the doctrine is difficult. Moreover, every now and then, public figures are genuinely wronged and deserve judicial vindication. The conduct of Bauer Media in respect of Rebel Wilson, for example, was reprehensible. The decision of the Court of Appeal in respect of special damages<sup>125</sup> toned-down the position on aggravation of damage, but clearly, there was still some aggravation there.

The New Zealand-style public interest defence described above could have a significant impact for some defamation litigation involving celebrities. It would assist organisations who report when someone says #MeToo about a public figure and are then sued in defamation. A further matter for the Working Party's consideration is how those who blow the whistle—the women and men who actually say #MeToo—could be better protected by defamation law.

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<sup>120</sup> See Judith Gibson, 'Identifying defamation law reform issues: A "snapshot" view of defamation judgment data' (2019) 23 *Media & Arts Law Review* 4.

<sup>121</sup> See *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496.

<sup>122</sup> See, eg, *Masson v New Yorker Magazine*, 501 US 496, 111 S Ct 2419 (1991).

<sup>123</sup> *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [144].

<sup>124</sup> See Part 6, below.

<sup>125</sup> *Bauer Media Pty Ltd v Wilson* (2018) 361 ALR 642.



## 6 Reducing forum shopping

This part considers how Australian defamation law could be changed to address the phenomenon known as ‘forum shopping’. The issue depends on the multiple publication rule, considered in the Discussion Paper.<sup>126</sup>

‘Forum shopping’ in defamation matters—sometimes called ‘libel tourism’<sup>127</sup>—is possible in a dispute which has connections to more than one jurisdiction so that more than one court would possess authority to decide the dispute.<sup>128</sup> The term ‘forum shopping’ may be understood as ‘a plaintiff’s decision to file a lawsuit in one court rather than another potentially available court’.<sup>129</sup> It may be used in a more specific sense to denote the practice of commencing litigation in a particular jurisdiction to obtain a strategic advantage.<sup>130</sup> As Lord Glaisdale once said:

“Forum-shopping” is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be favourably presented: this should be a matter neither of surprise nor for indignation.<sup>131</sup>

The most important factor underpinning transnational forum shopping is a true conflict of laws:<sup>132</sup> a case where substantive principles of law differ between relevant legal systems in respect of the subject matter of the dispute.<sup>133</sup> A conflict of laws may determine the outcome of the substantive dispute; this is why litigation about where to litigate is often hotly contested.<sup>134</sup>

In Australian defamation law, there are two kinds of forum shopping worth noting. Firstly, plaintiffs may forum shop within the Australian federation. Litigating defamation in the Federal Court, rather than a State Supreme Court, is on trend at the moment;<sup>135</sup> in some cases, this forum shopping may be motivated by conflicts of procedural laws between Australian superior courts in respect of juries. Secondly, apart from that intra-Australian forum shopping, defamation plaintiffs may commence in Australia despite the fact that the dispute has strong connections to overseas jurisdictions.

These two kinds of forum shopping are treated differently. Australian defamation law is basically unified: there is a common law of Australia which addresses uniform legislation.<sup>136</sup> But procedural conflicts remain. Where publication occurs within more than one Australian jurisdiction, courts

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<sup>126</sup> Discussion Paper, 14–5.

<sup>127</sup> Peter Arnt Nielsen, ‘Libel Tourism: English and EU Private International Law’ (2013) 9(2) *Journal of Private International Law* 269, 269; see also Trevor C Hartley, ‘“Libel Tourism” and Conflict of Laws’ (2010) 59(1) *International & Comparative Law Quarterly* 25, 25.

<sup>128</sup> See generally Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003).

<sup>129</sup> Christopher A Whytock, ‘The Evolving Forum Shopping System’ (2011) 96 *Cornell Law Review* 481, 485.

<sup>130</sup> On the role of strategy in forum shopping, see Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2<sup>nd</sup> ed, 2015) 275–88 [7.01]–[7.46].

<sup>131</sup> *The Atlantic Star* [1974] AC 436, 471 (Lord Glaisdale).

<sup>132</sup> The term ‘true conflict’ can be distinguished from ‘false conflict’—the latter term denotes, amongst other things, cases where choice of law would make no real difference to the outcome of the dispute; see further Michael C Pryles, ‘Reflections on the False Conflict in the Choice of Law Process’ (1987) 11 *Sydney Law Review* 284.

<sup>133</sup> See, eg, Albert A Ehrenzweig, ‘Choice of Law: Current Doctrine and “True Rules”’ (1961) 49(2) *California Law Review* 240, 240.

<sup>134</sup> See *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61, [27] (Bell P).

<sup>135</sup> See *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583, [131] (Lee J).

<sup>136</sup> See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

must apply the substantive law of the jurisdiction with which the harm occasioned by the publication as a whole has its ‘closest connection’.<sup>137</sup>

The statutory choice-of-law rule for intra-Australian defamation departs from the otherwise applicable rule for choice of law for intra-Australian torts: substantive issues of tort are subject to the law of the place of the wrong, the *lex loci delicti*.<sup>138</sup> The High Court famously decided in *Gutnick* that the place of defamation is the place of publication which—in respect of publication online—is the place of download.<sup>139</sup> Irrespective of where the publisher is based, in the case of international online defamation, the tort occurs at the place of download. The multiple publication rule means that there is a distinct tort for each download; where those downloads occur in different jurisdictional areas, there will be a distinct system of applicable substantive law (a distinct *lex causae*) for each download. In light of these principles, in the modern media environment, publishers are thus forced ‘to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe’.<sup>140</sup>

Clever plaintiffs may avoid this ‘Zimbabwe factor’, and forum shop in favour of pro-plaintiff Australian defamation law, by simply limiting their pleadings before an Australian court to publications occurring within Australia. Careful pleading can ensure that the local court retains its jurisdiction (rather than stays proceedings on the basis of *forum non conveniens*),<sup>141</sup> despite the fact that the online publication was downloaded all over the world. But this does not mean that plaintiffs of global reputation are limited to claiming for damage suffered in Australia. In the *Wilson v Bauer Media* litigation, Wilson claimed damage in respect of lost opportunities which would have been realised overseas, while only relying on Australian publications. It was argued that the damage was suffered as the result of a global causal chain—a cross-border ‘grapevine effect’.<sup>142</sup> Although the Victorian Court of Appeal held that the primary judge erred on special damage, it was the lack of evidence, not the mode of causal reasoning, which was the focus of the criticism.<sup>143</sup> In my view, *Wilson’s* case provides a model for American celebrities to claim huge damages for defamation in Australia—provided that the defamatory sting originated here.<sup>144</sup>

I have previously argued that, where the substance of the damage caused by online defamation occurs in a place other than the place of download, the traditional choice-of-law analysis fails to serve its underlying policy objectives.<sup>145</sup> I remain of that view. The choice-of-law rule for intra-Australian defamation ought to apply to all defamation litigation in Australia. A single publication rule would simplify that choice-of-law rule while also serving valuable policy objectives not considered in this submission.

In respect of intra-Australian defamation forum shopping: the procedural diversity of Australia’s superior courts<sup>146</sup> can be maintained while still guarding against forum shopping to avoid a jury. (Whether that is desirable is a question best posed to those who research juries. A recent decision of the Federal Court suggests that at least some defamation cases in the

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<sup>137</sup> See, eg, *Defamation Act 2005* (WA) s 11(2).

<sup>138</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

<sup>139</sup> *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

<sup>140</sup> *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 609 [54] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>141</sup> See *Regie Nationale Renault v Zhang* (2002) 210 CLR 491.

<sup>142</sup> *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [143]–[152].

<sup>143</sup> *Bauer Media Pty Ltd v Wilson* (2018) 361 ALR 642.

<sup>144</sup> See further Michael Douglas, “‘Their evil lies in the grapevine effect’”: Assessment of Damages in Defamation by Social Media’ (2015) 20(4) *Media and Arts Law Review* 367.

<sup>145</sup> David Rolph and Michael Douglas, ‘Rebel Wilson’s Pitch Perfect Defamation Victory’ (2018) 29(2) *Entertainment Law Review* 37, 40; see also David Rolph and Michael Douglas, ‘Movie Star Wars: Bauer Media strikes back, or a lost hope?’ (2018) 29(8) *Entertainment Law Review* 265.

<sup>146</sup> Cf the arrogantly titled ‘Uniform’ Civil Procedure Rules.

Federal Court ‘ought more properly to have been brought elsewhere’.)<sup>147</sup> This can be achieved by adjusting the law on exercise of jurisdiction. The Cross-vesting Scheme provides a system of transfers between State Supreme Courts and the Federal Court where the proceeding is better heard in another forum in the ‘interests of justice’.<sup>148</sup> If the Uniform Defamation Acts determined what was in the ‘interests of justice’ for intra-Australian defamation matters, it would disincentivise intra-Australian forum shopping in defamation matters.

- The Model Defamation Provisions should be amended so that the choice-of-law rule for intra-Australian defamation applies to all defamation litigation in Australia.
- The Model Defamation Provisions should be amended to provide that, for the purposes of the operation of the Cross-vesting Scheme, it is in the ‘interests of justice’ to transfer proceedings in respect of intra-Australian cross-border defamation to the court of the Australian jurisdictional area with the closest connection to the harm occasioned by the publication.
- Question 3 (a): Should the Model Defamation Provisions be amended to include a ‘single publication rule’? ANSWER: Yes.

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<sup>147</sup> *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583, [132] (Lee J).

<sup>148</sup> See generally M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 10<sup>th</sup> ed, 2019, forthcoming) ch 6.

## 7 Rejecting expanded corporate defamation

This section argues that no corporation should have standing to sue in defamation in Australia.

The fact that the Discussion Paper entertains the prospect of allowing large corporations to sue in defamation is understandable in light of submissions which have been made on that issue.<sup>149</sup> The appeal to the laws of other jurisdictions, in which corporations may have a cause of action, is also understandable. But in many different ways, Australian law is different to the law of other jurisdictions, and this is not a problem. Our position on corporate defamation is different, and we ought to be proud of that fact. Unlike in the United States,<sup>150</sup> in Australia, corporations do not have human rights, despite the fiction of corporate personhood. Companies do not enjoy privacy rights, for example.<sup>151</sup> Reputation is a human right, which defamation law protects;<sup>152</sup> corporations lack the underlying interest deserving of that protection. They lack the dignity and honour fundamental to personality rights.<sup>153</sup>

This is not to say that corporate ‘reputations’ are not valuable. To the contrary, reputation inheres in the ‘good will’ which may be the subject of an empirical financial evaluation of a company. The law provides plenty of mechanisms for companies to protect that good will, like the prohibition on misleading or deceptive conduct in s 18 of the Australian Consumer Law. Defamation law can deny standing to any corporation to sue in defamation and corporations will be fine.

If all corporations had standing to sue in defamation it would inevitably lead to a chilling effect on freedom of speech. Public advocacy groups would risk defamation every time they called out a business for unethical or unlawful activity. Consider the resources behind a listed company, like a major bank. Those resources can buy the services of a major law firm. The mere threat of litigation from one of those firms would be enough to persuade many would-be critics to hold their tongue.<sup>154</sup> I wonder whether we would have ever seen the Banking Royal Commission if expanded corporate defamation had the force of law.

On the other hand, the NSW Bar Association was right to point out that the current approach to small corporations is problematic. The framing of standing with reference to the number of employees of a corporation is somewhat arbitrary.<sup>155</sup> These companies may similarly chill freedom of speech: for example, by suing (or threatening to sue) those who criticise their offerings on online review websites.<sup>156</sup>

From the pro-freedom side of the debate, the downside of denying standing to corporate plaintiffs is that it may funnel them to other causes of action which are even less protective of freedom of speech, and more amenable to enjoining removal of content by injunctive relief.<sup>157</sup> That argument is unpersuasive: rather than accepting second-class defamation law to respond to our second-class

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<sup>149</sup> Discussion Paper, 12.

<sup>150</sup> See, eg, *Citizens United v Federal Election Commission*, 558 US 310 (2010).

<sup>151</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 239 [84] (Gummow and Hayne JJ).

<sup>152</sup> David Rolph, *Defamation Law* (Lawbook Co, 2016) 19 [2.70].

<sup>153</sup> See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17; David Rolph, *Defamation Law* (Lawbook Co, 2016) 81 [5.110].

<sup>154</sup> See Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 26.

<sup>155</sup> See Bar Association 2011 submission, 6–15

<[https://www.justice.nsw.gov.au/justicepolicy/Documents/defamation\\_act\\_submission\\_-\\_nsw\\_bar\\_association.pdf](https://www.justice.nsw.gov.au/justicepolicy/Documents/defamation_act_submission_-_nsw_bar_association.pdf)>.

<sup>156</sup> See Michael Douglas, ‘Defamation action over scathing online reviews is more serious than you think’, *ABC News* (online), 21 March 2018 <<https://www.abc.net.au/news/2018-03-20/before-you-write-that-scathing-online-review-beware-defamation/9566400>>.

<sup>157</sup> See David Rolph, *Defamation Law* (Lawbook Co, 2016) 83 [5.110].

'non-defamation' law, we should demand first-class defamation law, then make the rest of the law first class too. Another law reform body, on another day, should ensure that injunctions awards to corporations which have the effect of silencing speech are few and far between. In the meantime, we should not give up the dream of avoiding a dystopian Australia in which major companies can control what we say.

- Question 2: Should the Model Defamation Provisions be amended to broaden or to narrow the right of corporations to sue for defamation? ANSWER: Yes. The right of corporations to sue for defamation should be narrowed. Corporations should have no right to sue in defamation.