RESPONSE TO COUNCIL OF ATTORNEYS-GENERAL

REVIEW OF MODEL DEFAMATION PROVISIONS – STAGE 2

DISCUSSION PAPER

2 JUNE 2021

INTRODUCTION

ARTK welcomes the opportunity to make a submission to the *Council of Attorneys-General (CAG) Review of Model Defamation Provisions- Stage 2 - Discussion Paper* (**the Discussion Paper**).

The Discussion Paper raises a range of matters many of which do not concern the online activities engaged in by our members. That being the case, we do not believe it is necessary for us to respond to all of the questions asked in the Discussion Paper and have limited our specific responses to areas of concern. ARTK may wish to comment on future proposals advanced by the Working Party.

The comments below employ a number of defined terms such as "Owner" and "Operator" which have not been used in the Discussion Paper. These definitions have been used for brevity's sake. They are not suggested as terms that should be incorporated into the future legislation; nor are they intended to encompass all circumstances to which they might apply.

ARTK's PRINCIPLE CONCERNS

Liability for Third Party Comments

The most important issue the Discussion Paper raises from our members' perspective is liability for third party comments, namely comments having an Originator[1] who is not an employee, contractor, servant or agent of an ARTK member (**TP comments/TP commenter**). ARTK has always accepted that where TP comments are published on a website/platform owned and controlled by one of our members, the relevant member is a publisher of, and may be liable for, them. As the Working Party has already been informed, it is because we take that view that our members have the ability to moderate such TP comments before they are published, and pay significant sums each year to do so.

However, as some of our members have submitted in the *Voller* litigation, ARTK does not accept that our members are, or should be, liable for TP comments published on a website/platform that we do not own and in relation to which we are reliant on the goodwill of the website/platform owner (**Owner**) to control. We do not reserve that position for ourselves but maintain that any person or entity who does not own and control a website/platform should not be liable for TP comments on it even where that person/entity may invite such TP comments and/or is authorised by the Owner to exercise certain operational control over the website/platform (**an Operator**). This includes, but is not limited to, administrators of Facebook pages and equivalent social media platforms.

Even where a TP commenter's use of a website/platform is free of charge, he or she is always contractually bound by the terms of use of the site/platform. While we accept that some platforms allow Operators to impose their own more limited terms of use, it is only Owners who have the ability to deny service to a TP commenter who fails to comply with either the Owner's terms of use, the Operator's terms of use, or both. It is also Owners who determine how much control Operators can exercise over TP comments and they remain free to alter those arrangements at will. That superior level of control is what should attract liability accepting, perhaps, that liability should not be fixed until the Owner is notified about a defamatory TP comment and fails to take any steps to address such a complaint.

[1] Within the meaning defined in the Discussion Paper.

Complaints Notification System

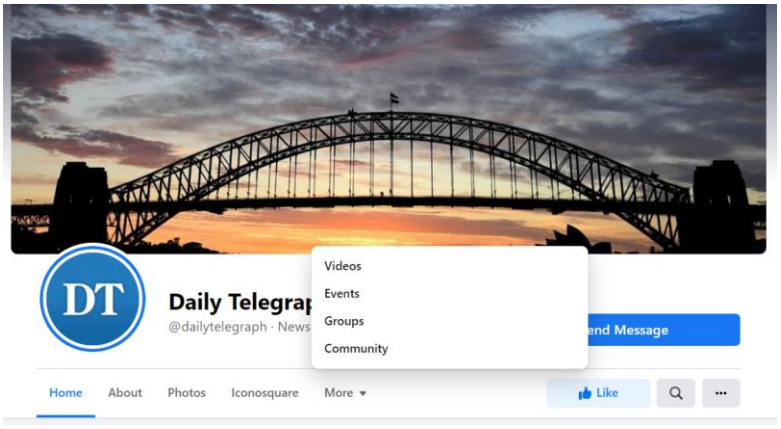
Complaints should be directed to Owners rather than Operators. As stated above, ARTK maintains that Owners should be liable for TP comments and, consequently, complaints should be directed to them. More importantly, complaints should be directed to Owners because they are more likely than Operators to have contact details for a TP commenter. In signing up to a website, creating an account on the platform or fulfilling whatever alternative preliminary steps are required by a website/platform before a TP commenter can post comments, TP commenters are usually required to provide contact details such as a mobile telephone number and/or email address. The Owner has access to and control over that information; an Operator does not. That being the case it is only logical that complaints be directed to the Owner.

Operational Tools

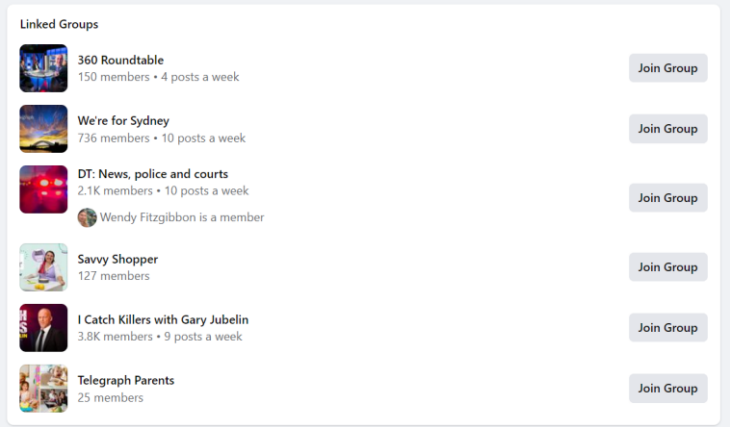
Despite the comments above about liability and notification, ARTK also submits that any legal framework which is introduced should require Owners to provide efficient and effective tools to enable Operators to manage TP comments. Even if we are not liable for publication, ARTK members and many other responsible forum administrators want to be able to pre-moderate TP comments, thereby minimising the chance that an Owner will ever have to take such content down in response to a complaint. It is vital that moderating tools must be available in all scenarios and the use of the tools must not hinder or be detrimental to the appearance of content on the platforms (including either demotion by algorithms or algorithms promoting other content which has higher levels of engagement).

By way of example, as the Working Party may be aware, Facebook has recently changed its functionality, purportedly to allow page administrators and editors to turn comments off on individual posts on public pages. That change has been effected differently depending on whether you are dealing with a Facebook page or a group linked to a page.

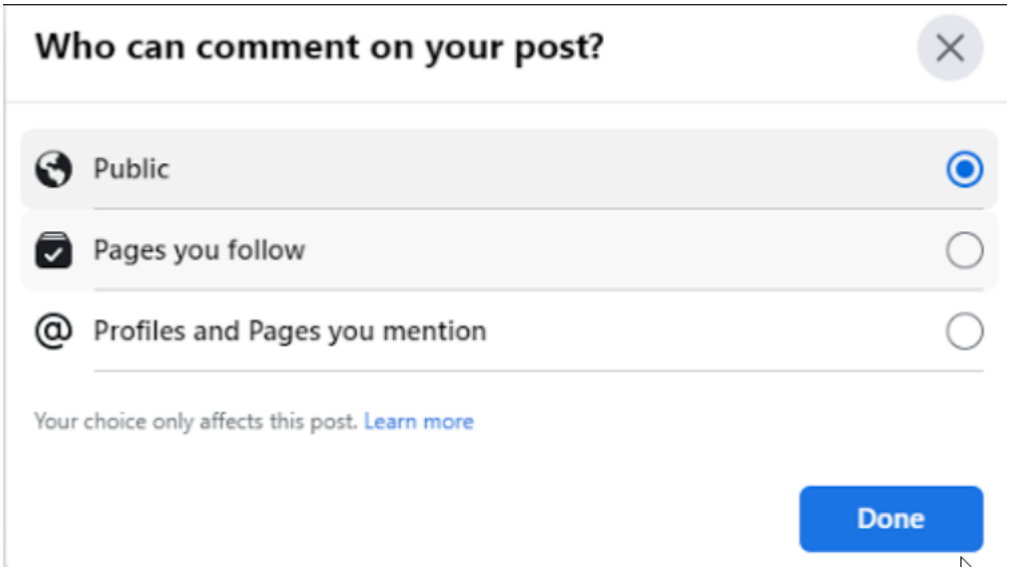
Following is a grab of the Facebook page for *The Daily Telegraph* newspaper:



"Groups" – which are included in the "More" tab above – allow Facebook users to sign-up areas of specific interest such as the following:



Posts made into Facebook Groups can be set to private, turning comments off entirely. Posts made to Facebook Pages do not have a simple comments on/comments off dichotomy but this instead:



In theory, provided there are no profiles or pages mentioned in a page post, selecting the third option above would effectively turn all comments off. However:

(a) Given ARTK members predominantly post news content to Facebook they will often refer to another profile or page simply by reporting the names of people and entities that feature in the news and run the risk that any such profile or page could comment on a page post; and

(b) If the page administrator leaves comments open on a page post, replies to a comment from a profile or page and then later changes the settings so that only "Profiles and Pages you mention" are able to comment on that page post, the profile or page who commented and to which the page administrator previously replied can continue to comment on that page post. So if "John Doe" adds a comment to a post on *The Daily Telegraph* Facebook page and the page administrator responds to John's comment, John is now "mentioned" for Facebook's purposes even if he was not referred to in the page post itself. John can continue to comment on the page post even if the page administrator changes the "Who can comment on you post?" settings.

The experience of ARTK members to date has also been that the audience size (otherwise known in social media terms as "**reach**") for posts which have comments disabled is significantly reduced when compared with posts that have no comments limitation. We are of the understanding that this is because Facebook's

algorithms promote and prioritise content which has higher levels of engagement, which means content which has comments turned off is less likely to appear in user's news feeds.

There is also no guarantee that any of the above functionality will be permanent. Given it is a commercial product, Facebook could revoke this functionality at any time. This is the case with all tools offered by all platforms.

Abuse of Any Notification System

ARTK agrees with the concerns expressed by the Working Party at various points throughout the Discussion Paper about potential abuse of the complaints notice process as an alternative means to have critical or unflattering (but not defamatory) content taken down. ARTK sees this is a significant issue which should be top of mind in considering any policy and/or legislative activity in this area.

Questions 1-3: Categorising internet intermediaries, basic internet services and digital platforms

ARTK makes no specific submissions about the categorisation but makes a general observation that due to the rapid rate of technological evolution and change any categorisation should be function-based and as flexible as possible.

Question 5: Treatment of internet intermediaries as publishers of third-party content

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

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

No. To expand, as stated above, ARTK maintains that Owners should be liable for TP comments and, consequently, complaints should be directed to them. More importantly, complaints should be directed to Owners because they are more likely than Operators to have contact details for a TP commenter. In signing up to a website, creating an account on the platform or fulfilling whatever alternative preliminary steps are required by a website/platform before a TP commenter can post comments, TP commenters are usually required to provide contact details such as a mobile telephone number and/or email address. The Owner has access to and control over that information; an Operator does not.

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

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

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

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

Concerns notices and any new notification system should not be conflated. Any new notification system should precede the concerns notice process.

Question 8: Clarifying the innocent dissemination defence

(a) Should the innocent dissemination defence in clause 32 of the MDPs be amended to provide that digital platforms and forum administrators are, by default, secondary distributors, for example by using a rebuttable presumption that they are?
(b) In what circumstances would it be appropriate to rebut this default position?
(c) Should a new standalone innocent dissemination defence be specifically tailored to internet intermediaries be adopted in the MDPs?
(d) If a standalone defence is created, should the question of what is knowledge or constructive knowledge of third-party defamatory content published by an internet intermediary be clarified? If so, how?
(e) Are there other ways in which the defence of innocent dissemination could be clarified?

ARTK makes no comment in relation to digital platforms but says "no" in relation to all Operators including, but not limited forum administrators. As stated above, the law should be clear that Operators are not publishers of TP comments and, consequently, Operators should have no necessity to turn to an innocent dissemination defence.

Question 9: Safe harbour subject to a complaints notice process

(a) Should a defence similar to section 5 of the *Defamation Act 2013* (UK) be included in the MDPs?
(b) If so, should it be available at a preliminary stage in proceedings, where an internet intermediary can establish they have complied with the process?
(c) Should a complaints notice process be available when an originator can be identified? For example, to provide for content to be removed where the originator is recalcitrant?
(d) If such a defence were introduced, would there still be a need to strengthen the innocent dissemination defence?
(e) Should the defence be available to all internet intermediaries that have liability for publication in defamation? For example, could a separate complaints notice process be developed that could apply to search engines?
(f) How can the objects of freedom of expression and the protection of reputations be balanced if such a defence is to be introduced?

As stated above, the law should be clear that Operators are not publishers of TP comments and, consequently, Operators should have no necessity to rely on a safe harbour.

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

(a) Should a blanket immunity be provided to all digital platforms for third-party content – even if they are notified about it, unless they materially contribute to the publication?
(b) What threshold or definition could be used to indicate when an intermediary materially contributes to the publication of third party content?
(c) If a blanket immunity is given as described above, are there any additional or novel ways to attract responsibility from internet intermediaries?

No. As stated above, we recommend the Working Party carefully considers the various ways the range of internet intermediaries contribute to the publication of TP comments. We re-state here that ARTK does not accept that our members are, or should be, liable for TP comments published on a website/platform that we do not own and control.

It should be noted that, in Australia, it is widely accepted that ISPs who merely transmit content (akin to "dumb pipes") are not liable as publishers in defamation. ISPs should therefore not be considered internet intermediaries in the context of this Discussion Paper.

Question 11: Complaints notice process for Australia

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

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

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

ARTK considers that the MDPs should provide that a concerns notice cannot be sent until the complaints notice process has been exhausted (where applicable) as the two processes should be separate steps.

Question 12: Steps required before engaging in the complaints notice process

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

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

No. Owners hold whatever personal information the TP commenter has supplied and are the best source of that information.

Question 14: Application and outcome of complaints notice

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

(b) What should happen to the content complained of following receipt of a complaints notice by the digital platform?

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

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

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

ARTK's views about liability are stated above. We have no further comment to make.

Question 15: Orders to have online content removed

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

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

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

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

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

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

As mentioned in the Discussion Paper, it is a well-established principle at common law in Australia that interlocutory injunctions will rarely be granted in defamation proceedings to restrain a publication prior to trial. ARTK does not consider that there is a sufficient basis to deviate from this position.

Question 16: Orders to identify originators

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

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

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

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

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

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

ARTK considers that this can be appropriately dealt with under the complaints notice process discussed above.