COMMUNICATIONS ALLIANCE LTD

COMMUNICATIONS ALLIANCE SUBMISSION

to the

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

31 May 2021

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INTRODUCTION

Communications Alliance welcomes the opportunity to make this submission in response to the Attorneys-General Discussion Paper *Review of Model Defamation Provisions – Stage 2* (Discussion Paper).

This submission reiterates some of the issues and arguments raised in a Communications Alliance submission on the Review of Model Defamation Provisions Discussions Paper in 2019.

We do not seek to address all questions raised in the Discussion Paper. Instead, we canvass our high-level position in relation to a future approach to defamation law in Australia with respect to internet intermediaries.

Members of Communications Alliance may make individual submissions.

For any questions relating to this submission please contact Christiane Gillespie-Jones on [redacted]

About Communications Alliance

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

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

1 EXECUTIVE SUMMARY

1.1 Communications Alliance submits that the Model Defamation Provisions (Provisions), and consequently existing law, should be amended. The option to retain the status quo is not acceptable as the current law does not provide sufficient certainty for subordinate third-party content distributors who are not the originators of content. Such uncertainty imposes an unreasonable burden on these third parties as well as potential plaintiffs in seeking to resolve disputes about the publication of defamatory matters online.

1.2 Recent developments in the law, particularly regarding the definition of who is considered a 'publisher' at common law, has seen defamation claims shift away from focusing on content originators – who are actually responsible for authoring or producing content – towards a variety of third parties who are not responsible for creating, and in most cases are unaware of, the content. We support reforms that shift the focus back to the real parties to the dispute: the content originators and the defamation complainant.

1.3 Principles, rather than specific functions in the online supply chain, ought to be used to determine whether a party who is not the content originator has access to immunity or a defence.

1.4 The appropriate principles for basic internet services are 'passivity' and 'neutrality towards the publishing of the defamatory content'. Awareness of allegedly defamatory content ought not play a role in the assessment of liability.

1.5 Basic internet services, due to their 'passivity' and 'neutrality towards the publishing of the defamatory content' ought to be immune from liability in defamation.

1.6 Search engine providers also ought to be immune from liability in defamation due to their high degree of 'passivity', their 'neutrality towards the publishing of the defamatory content' and, importantly, inability to provide practical relief to the complainant combined with the undue burden that de-listing defamatory content would cause (cost-benefit argument).

1.7 For other third parties that are not content originators (referred to herein as subordinate third parties and excluding search engines and basic internet services who should have total immunity), the current innocent dissemination provisions ought to be amended to ensure that make it clear that 'subordinate distributors' include any third-party service providers that make content available online in circumstances where they are not the originator of that content. In addition, the MDPs innocent dissemination defence ought to clarify that subordinate distributors of material online will only be deemed to have 'knowledge' of defamatory matter for the purposes of the defence if they have been served with a valid complaints notice.

1.8 Should the Defamation Working Party (DWP) be minded to favour a safe harbour subject to a complaints notice process, substantial deviations from the UK approach are required, including that complainants must be required to take reasonable steps to identify the originator and that the notice must be given legal status. A detailed description of the required components/characteristics of such an approach is given below.

1.9 No specific provision governing when a court may order that a subordinate third party, basic internet service or search engine disclose the identity of a user who has posted defamatory material online is required given the existing preliminary discovery process.

2 CURRENT UNCERTAINTIES AND LIABILITIES

2.1 The position of internet intermediaries with respect to liability for defamation under the MDPs remains unclear.

2.2 Recent developments in this area, particularly regarding the definition of who is a 'publisher' at common law, has seen defamation claims shift away from focusing on content originators – who are actually responsible for authoring or producing content – towards a variety of third parties who are not responsible for creating, and in most cases are unaware of, the content.

2.3 As a result of this shift, the current defamation framework exposes a variety of businesses that are not originators of content to liability for third-party content. It impacts not only digital platforms and internet intermediaries but a broad range of third-party services who make content available online. For the purposes of this submission, we refer to these parties collectively as 'subordinate third parties'.

2.4 This is a concerning development as it shifts the focus away from the real parties to the dispute: the content originator and the complainant.

2.5 In addition, the definitional model considered in the Discussion Paper, which focuses on particular services in the content supply chain (e.g. digital platforms) may introduce unnecessary complexity and face meaningful implementation challenges. For example, focusing on internet intermediaries and digital platforms does not account for the dynamic nature of the digital landscape, and excludes a range of services that are not internet intermediaries but who should be able to avail themselves of the protections on the basis they are also not content originators. This includes a wide range of subordinate third parties, who distribute content or make it available online. This approach is also subject to becoming dated if new categories form over time as business models continue to evolve.

2.6 Beyond the challenge of agreeing on definitions, there are challenges in its application: the nature of internet intermediaries means that some businesses may already fit in multiple categories creating confusion about their level of obligation in different circumstances.

2.7 In addition, the question of when a subordinate third party will be treated as a publisher of defamatory content is unsettled, as are the circumstances in which a subordinate third party will be found to have satisfied the requirements of the Schedule 5, Clause 91 of the *Broadcasting Services Act 1992* (BSA defence), or the defence of innocent dissemination in Section 32 of the Provisions.

2.8 Such uncertainty imposes an unreasonable burden on these parties as well as potential plaintiffs and is a barrier to resolving disputes about the publication of defamatory matters online. A lack of clarity may also lead to unintended consequences including the removal of legitimate speech to harmful monitoring and surveillance of users, which invade privacy and unduly restrict speech.

2.9 Given that the Discussion Paper expressly seeks to exclude the critical question of whether these subordinate third parties ought to be considered publishers, this increases the urgency with which a pragmatic and sensible approach to the liability of these parties has to be found.

2.10 The position under Australian law with respect to intermediary liability is out of step with international regulatory frameworks including the eCommerce Directive of the

European Union[1], although the introduction of a single publication rule in the first stage of the Review has addressed one of the areas of inconsistency.

2.11 Communications Alliance believes that the reforms proposed in our submission are necessary in order to create workable laws in the current online environment and to bring Australian defamation law in line with international developments.

3 INTERNET INTERMEDIARIES AS PUBLISHERS

3.1 For the reasons set out in our 2019 submission, we maintain that, unless a third party has actively taken on an editorial role for the defamatory content under consideration, they are not content originators, or authors, and, consequently, they should not be liable for the defamatory content.

3.2 We note that the Discussion paper states that "the question of who is and who is not a publisher is determined by common law. It is not proposed that a definition of publisher should be incorporated into the MDPs to address the question of internet intermediary liability for third-party content."[2] However we suggest that the DWP could consider opportunities to issue guidance to the judiciary on how this question could be approached in a way that both recognises the neutral role that subordinate third parties play and that defamation law is a civil law that seeks to address disputes between two individuals and not the medium through which those individuals are communicating.

3.3 Therefore, our arguments below are made on the basis that subordinate third parties, including internet intermediaries may be considered publishers at common law and, therefore, further considerations on immunity from or limitations of liability are necessary and appropriate.

4 IMMUNITY FROM AND LIMITATION OF LIABILITY

4.1 Communications Alliance is concerned that a complex model with too many distinct categories of varying responsibility may introduce more confusion than clarity.

4.2 We recommend a simple approach: basic internet services (including ISPs, cloud service providers and search engine providers) should receive total immunity, and all other third parties (who are not the content originator) should be able to avail themselves of the same safe harbour.

Basic internet services have total immunity

4.3 The Discussion Paper proposes to group internet intermediaries into three categories, i.e. basic internet services, digital platforms and forum administrators. It further proposes to use 'passivity' and 'neutrality towards content' as the basis for which to determine

[1] *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')*

[2] para 2.10, NSW Department of Justice, Attorneys-General Discussion Paper *Review of Model Defamation Provisions – Stage 2,* April 2021

what functions – i.e. online services that are, prima facie, considered publishers – should not attract liability.

4.4 We agree with the general proposition that key concepts or principles rather than functions within the online supply chain or similar ought to be used to determine whether or not limitations of liability apply.

4.5 While the proposed concepts of 'passivity' and 'neutrality towards content' at first glance appear to be sufficiently defined, we have concerns that, in their breadth, they may not be well-suited to deal with some technological advancements that are already on the horizon or at least-well conceivable and, therefore, ought to be able to be facilitated within the bounds of the proposed concepts.

4.6 In our view, it is not so much 'passivity' and 'neutrality towards content' that is relevant, but rather 'passivity' and 'neutrality towards the publishing of the defamatory content'. The reason why it is important to draw out the nuance in this matter so finely is that it is conceivable that basic internet service providers, for example internet service providers (ISPs), prioritise content on the basis of technical identifiers, such as identifiers that could label certain content as pertaining to emergency services. It is equally conceivable that as a result of a major disaster (e.g. consider a far greater pandemic than the current COVID 19 pandemic) upon Government decree, certain internet traffic is to be prioritised if this was technically possible.

4.7 On the basis of the above, i.e. their 'passivity' and 'neutrality towards the publishing of the defamatory content', we submit that ISPs, content hosts, cloud service providers and other basic internet services such as those listed in the Discussion Paper (e.g. Microsoft Office 365, Google Docs suite, Outlook, Gmail) and many other services ought to be considered basic internet services. As the Discussion Paper sets out, their capacity to remove individual pieces of alleged defamatory content effectively is either non-existent or extremely limited. Consequently, basic internet services ought to be immune from liability in defamation.

4.8 We also submit that the Broadcasting Service Act defence (BSA defence) does not provide for a practical approach for immunity from liability for basic internet services and other services for the reasons outlines below.

4.9 Clause 91(1) of the *Broadcasting Services Act 1992* provides a defence for 'internet content hosts' and 'internet service providers'. It exempts these services from liability for defamatory content hosted, cached or carried by them in certain circumstances.

4.10 An internet content host, for the purposes of this defence, is a person who hosts internet content, or proposes to host internet content, in Australia. The defence cannot be relied on by services who host internet content outside of Australia. internet content is confined to content that is "kept on a data storage device", but does not include email. There is uncertainty as to whether internet content would include instantaneous internet communications such as instant messaging and chat services.

4.11 An internet service provider, for the purposes of the defence, is a person who supplies, or proposes to supply, an internet carriage service to the public. To take advantage of the defence, a service provider must show that it was "not aware of the nature of the internet content". It is unclear what kind of knowledge is required before a service will lose the benefit of the defence. In particular, it is not clear whether a service who is aware that particular content is being hosted or transmitted, but not aware of the facts and circumstances that result in that content being defamatory (or make it likely that a court would find the content to be defamatory), can rely on the defence. This uncertainty may lead to these services removing or blocking access to content that is unlikely ever to be found by a court to be defamatory.

4.12 The requirement that a service provider not be aware of the nature of internet content acts as a disincentive for intermediaries to respond to technological advancements that may allow for greater monitoring of internet content (to the extent legally

permissible, e.g. for child exploitation material). Responsible intermediaries should not be penalised, i.e. by loss of their limitation of liability, for engaging in voluntary measures to prevent illegal content from being accessed.

4.13 A further shortcoming of the BSA defence is uncertainty regarding the question of how soon after becoming "aware of the nature of internet content" a service provider has to remove or block access to such content before it loses the limitation on liability. Many removal processes require manual input and engineering. It will often be impossible to just 'press a button' and remove precisely the content complained of. In many cases, the service provider will need to exercise human judgment, discuss internally and even seek legal advice before making an informed decision. To deny service providers the opportunity to take these steps prior to any decision as to whether or not to remove content risks putting complainants in a position to censor content that would never have been found by a court to have been defamatory.

Search engine providers have total immunity

4.14 While search engines arguably could be seen to have a lesser degree of 'passivity' as there are technically some options to re-rank indexed content, the function of a search engine is to 'hold a mirror up' to all of the content that is available on the internet, without exercising any judgment of that content (with the exception of illegal content). We argue that it would impose an unreasonable burden on search engine providers, and will often be of no practical benefit to defamed persons, to require search engine providers to respond to a de-listing request in order to avoid liability as a publisher of defamatory snippets.

4.15 As to whether imposing such a burden on search engine providers would be likely to benefit defamed persons, it is important to keep in mind that a search engine provider can block access only to certain identified URLs from its search engine. It cannot block access to related URLs, nor access to the identified URLs via other search engines, nor access to the identified URLs by typing those URLs into a browser. In other words, no action taken by a search engine provider will result in the content itself being removed from the internet. The only result is that the content at the URL complained of will not appear in search results generated by the particular search engine that was the subject of the de-listing request. The search engine provider can also not connect the complainant with the originator of allegedly defamatory content.

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

4.17 Where content has 'gone viral' or has been published by multiple sources, it will be near impossible to de-list all sources of the allegedly defamatory content. Any de-listing may 'a drop in the ocean'.

4.18 As to the burden, major search engines automatically process more than a billion searches each day. Unless the process of responding to a de-listing notice was itself automated – which would have serious implications for free and unbiased access to information on the internet – a search engine provider would be faced with a massive administrative burden. It is likely that search engine provider would be forced, for economic and administrative reasons, to err on the side of caution and de-list content

complained of with little or no regard to the merits of the complaint, which would itself have an undesirable effect on freedom of expression.

4.19 Importantly, other subordinate third parties would be much better placed to remove (rather than de-list) the content and/or to connect the complainant with the originator of the allegedly defamatory content.

4.20 There are strong policy justifications for extending immunity to search engines, quite apart from the need for legal certainty and the matters of burden versus benefit discussed above. Search engines provide the road map for the World Wide Web. Legal rules that impose potential liability on search engines for snippets of content (generated automatically as a result of search requests), have the potential to unduly fetter innovation and commercial competition with respect to a technology that has enormous social utility. We note that search engines have been held liable under the MDPs by several Australian courts as 'publishers' for including text extracts (or snippets) from websites that they neither host nor have any editorial control over within search results pages. These precedents create significant uncertainty not only for search engine providers, but also for other internet intermediaries who exercise more control over content that they host. This jurisprudence is also inconsistent with the treatment of search engines by international courts in the context of defamation law[3].

4.21 We note that it appears to be the intention of the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019* – which arguably deals with far more extreme content than what most defamation cases would consider – to exclude search engines, which merely index content and make it searchable, from the obligations to cease hosting such content and the criminal offence provisions. (Refer to paragraph 12, p. 14 of the Explanatory Memorandum to the Bill.

4.22 We also highlight that, as correctly indicated by the Discussion Paper in para. 3.123, the UK *Defamation Act 2013*, while not defining website operators and thereby expressly excluding search engines, the associated guidance by the UK Ministry of Justice notes that search engines are not affected by the safe harbour complaints notice process (as they do not need to avail themselves of the defence).

4.23 The Law Commission of Ontario (Canada) (LCO) came to a similar conclusion in its final report *Defamation Law in the Internet Age* where it proposed a new complaints notice scheme for Canada and excluded search engines from the scheme.

4.24 Consequently, we submit that search engines, on the grounds of function as well as practical considerations (cost-benefit), are basic internet services, and be immune from liability.

All other third parties should be eligible for a safe harbour

Minimalist, principle-based definition

4.25 We propose a more pragmatic and principles-based approach to determining liability for all other stakeholders: focussed less on trying to define how an organisation could be defined in the supply chain (e.g. digital platform, content aggregator etc.), and more focused on what they are *not* – the originator of the defamatory content under consideration.

4.26 Defamation law reform should not be limited to digital platforms and internet intermediaries; but include all online subordinate distributors who are not content originators. We do not believe further delineation between different types of

[3] See for example, Metropolitan International Schools Ltd v Designtechnica Corp & Ors [2009] EWHC 1765 (QB)

subordinate third parties is necessary (beyond the existing principles as secondary publishers).

4.27 Moreover, the framework for determining third-party liability for defamation should not start with determining which intermediaries can avail themselves of certain defences or safe harbours. Instead, it should start with the threshold question: "Who is the content originator, and can they be reasonably identified?" If this question is answered in the affirmative, anyone who is not responsible for authoring the content should be able to avail themselves of an absolute defence or safe harbour, irrespective of the type of service they offer, unless and until the content in question has been found to be defamatory at law.

Third parties cannot judge whether content is defamatory

4.28 The current defamation framework is flawed because it forces the subordinate third party to assume that a complainant's subjective view of a complaint is accurate and that the content complained of is, in fact, defamatory.

4.29 This places an unworkable burden on the subordinate third party who is ill equipped to determine the merits of a defamation claim, including whether a publication is defensible. This is not a question of resourcing, but simply a question of who is qualified to make this determination. In our view, the only party capable of making such a determination is the court. The reform should therefore be built on a clear acknowledgement that it is not appropriate for subordinate third parties, to determine whether a publication is defamatory at law.

4.30 As the Discussion Paper correctly notes, an approach that seeks to involve third parties in the decision-making over the merits of a defamation claim is likely to have a chilling effect on legitimate speech and public debate as it may incentivise businesses to remove legitimate content to avoid liability, even when the merits of the complaint, and the available defences are unknown. This provides complainants with what is in effect a procedural injunction, for an untested allegation. This is contrary to the well-established principle that injunctions for defamation will only be granted by courts in exceptional circumstances, having consideration to the importance of free speech.

4.31 This can have the effect of stifling legitimate expression and public debate, while protecting a complainant whose allegations are untested.

4.32 It follows that a complaints process that incentivises the removal of content is also open to abuse by individuals or entities seeking to suppress legitimate criticism, including unfavourable reviews. This can be damaging for individual authors, independent publishers and content creators who use these services to monetise their content. In the context of product reviews, this can also be damaging to consumers who rely on such reviews to help them make purchasing decisions. It may also discourage the creation of new and innovative services.

4.33 Therefore, the obligation of the third party must be limited to – in the most extreme cases – facilitating the court's consideration of that question with the originator. There should not be a direct expectation that, or implicit incentive for, a third party to remove content that has not been judged to be defamatory by a court. Such an approach is inappropriate, and will be vulnerable to serious misuse and public criticism.

Creating a safe harbour to facilitate dispute between complainant and originator

4.34 Communications Alliance supports amendment to the MDPs to align more closely with the spirt (though not with all of its methodology and detail) of section 10 of the *Defamation Act 2013* (UK), where defamation claimants are encouraged to bring an

action against the primary publisher of a defamatory statement, namely the author, editor or publisher, unless it is not reasonably practicable to do so.

4.35 This type of regime intended to refocus the claim to the true content originators, being 'authors', 'publishers' and 'editors' who are responsible for creating the publication, or have an active role in determining the content of a work prior to publication, and to limit the involvement of a third party to only where it is not reasonable for the complainant to sue the originator (e.g. because the originator remains unidentifiable after taking reasonable steps to identify and contact them). To achieve this end, the definitions of 'publisher', 'author' and 'editor' should be narrowly focused to ensure only the true content originators, are excluded from protection.

4.36 However, we understand that the UK process entails substantial practical and operational challenges. Several member companies do not use the process codified within Section 5 of the *Defamation Act 2013* (UK), because it is simply unworkable. These organisations have developed their own process for responding to defamation complaints. **Consequently, while there are clear similarities to the UK model, in the following we propose substantial deviations from the UK process in its practical application.**

4.37 Where the content originator is identifiable or can be identified by the complainant taking reasonable steps, we support total immunity from defamation liability, unless and until the content in question has been found to be defamatory at law.

4.38 If the originator cannot be identified, we recommend the introduction of a safe harbor regime that incentivises subordinate third parties to facilitate the resolution of the primary dispute between the complainant and the content originator. This safe harbour will not apply to basic internet services and search engines, who should have total immunity.

4.39 The safe harbour should include at least the following requirements:

4.38.1. The complainant must take all reasonable steps to identify and contact the content originator before sending a complaint to a third party and the content originator must not be reasonably identifiable.

'Reasonable steps' in this context should be clearly defined to mean the complainant doing at least all of:

a. searching in online and offline directories for information regarding the originator; and

b. attempting to contact the originator directly through online methods (such as the chat or comment functions on which the originator has previously communicated).

If contact has been made:

I. the complainant should wait at least a week for a response.

II. If the originator responds but the complainant's concerns are not resolved, the complainant could be given a right to substituted service using the same contact method (for example, by email). This should not be used as the basis for escalating the complaint to the subordinate third party.

4.38.2. If the complainant cannot identify the originator even by taking reasonable steps:

(a) **Subordinate third parties should not be obliged to perform content flagging/removal; the consequence of failing to comply with the process set out below should at most be the loss of the safe harbour; subordinate third-party liability should not be greater than it already is today**; as a last resort, subordinate third parties should be able to perform a risk

assessment as an originator would (albeit they are in a much worse position to do so because they lack relevant factual information)

(b) **irrespective of the form of the notice (which yet to be determined), it must have legal status (e.g. a statutory declaration or other oath on the penalty of perjury), there should be penalties for wilfully false assertions in the takedown request and the complainant should be required to confirm the correctness, to the best of their knowledge, of the following statements, themselves or by their legal representative (not some by another third party)**:

I. the specific content at issue by URL or other unique identifier (not just the top-level domain);

II. which parts of the content they consider to be defamatory and not true, and why;

III. that they have a good faith belief that those parts are defamatory and not true;

IV. the legal basis for the claim, including the country in which the law applies (in this case, Australia);

V. that they require the content to be removed (so that it is clear that the service provider should handle the matter as a removal request);

VI. any relevant broader context around the content being complained about;

VII. how the allegedly defamatory content is causing, or is likely to cause, serious harm to the complainant; and

VIII. the 'reasonable steps' (refer to the discussion in para. 4.38.1 above) the complainant has taken to identify the originator.

(c) In addition, the notice must be in a form that provides sufficient detail about the complaint, including:

I. the name and contact details of the complainant and confirmation that the complainant consents to having those details provided to the content originator;

II. evidence of the serious harm suffered by the complainant; and

III. a declaration signed by the complainant verifying the matters in the complaint.

(d) consistent with the current common law**, subordinate third parties should be given 'a reasonable time' to respond expeditiously to valid notices**; fixed or short turn-around times are problematic, particularly because difficult cases reasonably require more rather than less time to assess; multinational platforms will be challenged by time zones and start-ups and smaller platforms will have limited resources;

I. **if the subordinate third party has information that would enable it to contact the originator, it should be permitted (i.e. not required) simply to forward the complainant's notice to the originator.** It should also be permitted to notify the originator that it intends to provide the originator's contact details to the complainant.

(e) if the subordinate third party does not have information that would enable it to contact the originator:

I. **if another subordinate third party is likely to have such information, the complainant should be directed to them by the first subordinate third party, with both subordinate third parties retaining their safe harbour;**

II. **otherwise, if the complainant has provided a statutory declaration (or other or other oath on the penalty of perjury) with the information in 4.38.2(b) and (c) above and sufficient content to precisely identify the content that is sought to be removed, the first subordinate third party would lose the safe harbour if it does not within 'a reasonable time' flag the respective content as being under a defamation dispute (or remove it, as within the subordinate third party's discretion) to address the complainant's legitimate concerns.** Flagging content strikes an appropriate balance between clearly stating that the content is subject to a dispute while simultaneously not unduly limiting freedom of speech and not transferring judgement from the courts to subordinate third parties.

(f) **a flawed attempt at notice that does not meet the statutory requirements cannot defeat the safe harbour;** otherwise the purpose of the regime is defeated.

4.40 In addition, it should be mandatory for complaints notices under a safe harbour regime to comply with particular requirements specified in the MDPs to ensure complaints meet the serious harm threshold; and third parties are provided sufficient notice of the details of the complaint to enable them to consider facilitating contact between the complainant and the content originator.

4.41 A regime with these features would strike the appropriate balance between requiring third parties to take active steps to facilitate resolution of the dispute, whilst maintaining an emphasis on the resolution of the issues between the complainant and the content originator.

Innocent dissemination

4.42 Communications Alliance also supports extension and clarification of the existing innocent dissemination defence in clause 32 of the MDPs to make it clear that 'subordinate distributors' include any third-party service providers that make content available online in circumstances where they are not the originator of that content.

4.43 This appropriately reflects the fact that these service providers are only passive distributors of content created by others and that the focus, for liability purposes, should be on the content originator who is responsible for authoring and uploading the content.

4.44 **This amendment would mean the separate requirement under clause 32(2)(c) that a defendant establish that it did not have any capacity to exercise editorial control over the content before it was first published would not apply to third-party services whose role is limited to making the content of other originators available online.** This change is appropriate as the touchstone for liability under the innocent dissemination defence should be whether the defendant knew, or ought to have known, that the matter was defamatory.

4.45 **Importantly, such an amendment must go hand in hand with amendments to the innocent dissemination defence to clarify that subordinate distributors of material online will <u>only</u> be deemed to have 'knowledge' of defamatory matter for the purposes of clause 31(1)(b) if they have been served with a valid complaints notice, which meets the requirements set out above**.

5 ORDERS TO IDENTIFY ORIGINATORS

5.1 The Discussion Paper raises the question (Question 16) whether it is necessary to introduce specific provision governing when a court may order that a service provider (here meaning to include basic internet services and search engines) disclose the identity of a user who has posted defamatory material online.

5.2 **We do not believe that such specific provisions concerning disclosure of identity of a user of a subordinate third party ought to be made. We deem current law is sufficient to deal with requests for preliminary discovery and provides the protections to ensure this process is not used to inappropriately 'fish' for information**.

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