Review of Model Defamation Provisions - Stage 2 Discussion Paper

Attorneys-General

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its Defamation Working Group, the Law Society of New South Wales, the Law Society of South Australia and the Law Society of Tasmania in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to make a submission to the Attorneys-General, regarding the Discussion Paper released as part of Stage 2 of the Review of Model Defamation Provisions (**Discussion Paper**).

2. Part A of the Discussion Paper addresses issues related to the liability of internet intermediaries in defamation for the publication of third-party content. In this regard, the Law Council generally supports a legislative framework that shifts liability towards originators.

3. The Law Council supports the introduction of an immunity for internet services performing basic functions in circumstances where the internet service is acting as a mere conduit, such as an Internet Service Provider (**ISP**), or where the internet service is entirely passive in the publication. The Law Council provides a possible provision at Appendix 1 for consideration by the Attorneys-General.

4. As the internet evolves at a rate much faster than the development of laws, the Law Council's view is that attempting to classify internet intermediaries with any degree of specificity (particularly beyond the level of basic service) is a highly difficult task. The Law Council provides three possible approaches for appropriately capturing internet intermediaries including a 'broad definition approach' (an example provision is provided for consideration at Appendix 2), a 'principles approach' and a 'functions approach'. The Law Council considers the 'broad definition approach' to be the preferrable option.

5. The Law Council considers amendments should be made to the innocent dissemination defence to provide greater protection for internet intermediaries in certain circumstances and greater clarity and certainty for all parties involved. The Law Council generally favours the 'Alternative A' proposal in the Discussion Paper to amend the defence to create a default position that digital platforms and forum administrators are not primary distributors. Under such an approach, these intermediaries would still be required to satisfy the other limbs of the innocent dissemination defence but the position regarding their involvement in the publication would be clarified. Possible revisions to clause 32 of the Model Defamation Provisions (**MDPs**) are included in Appendix 3 for the consideration of the Attorneys-General.

6. The issue around identification of an underlying originator is a vexed and important one. The Law Council is of the view that the courts may be best place to reach an appropriate balance between competing considerations – including privacy rights, freedom of expression, harm to reputation, and the public interest of any matters disclosed. In this regard, the Law Council supports the Canadian approach described in the Discussion Paper.

7. Part B of the Discussion Paper considers whether complaints of alleged criminal conduct to police and statutory investigative bodies and of unlawful conduct to disciplinary bodies and employers should attract the defence of absolute privilege. The primary rationale for such a change would be to encourage reports of wrongdoing by removing the risk potential defamation action.

8. The Law Council strongly supports appropriate reforms to encourage reporting of issues such as workplace sexual harassment. However, there are divergent views among members of the profession as to whether the extension of the defence of absolute privilege is an appropriate reform. The Law Council's Defamation Working

Group and the Law Society of South Australia (**LSSA**) consider that the qualified privilege defence currently provides the appropriate level of protection to members of the general public in making genuine, honest complaints to appropriate recipients. However, the Law Society of Tasmania (**LST**) supports the expansion of absolute privilege, in the context of reports to employers and regulators within the legal profession, as a measure which may encourage greater reporting of issues such as sexual harassment. Both views are provided for consideration by the Attorneys-General.

Part A – Liability of internet intermediaries

Policy considerations

9. The Law Council's response below contemplates the issues raised in the Discussion Paper, including the policy objectives that underpin the proposed changes to the MDPs, as well as the approaches taken in other jurisdictions, primarily the United Kingdom (**UK**) and Canada.

10. Part A of the Discussion Paper focuses on the liability of internet intermediaries for defamatory material published online by third-party users. The reform options are considered in the context of the objectives of the MDPs, set out at 3.3 of the Discussion Paper, with an additional criterion set out at 3.4. Together these are:

    (a) to enact provisions to promote uniform laws of defamation in Australia;

    (b) to ensure that defamation law does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance;

    (c) to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter;

    (d) to promote speedy and non-litigious methods of resolving disputes; and

    (e) to ensure that defamation law does not stifle technological innovation or the emergence of new online services and activities that have both a social and economic benefit to society,

    (together, **the Policy Objectives**).

11. In the Law Council's view, when considering amendments to the MDPs concerning the liability of internet intermediaries, there are three relevant threshold questions.

    (a) whether it should be left to the courts to develop principles of common law and to provide guidance on the application of the MDPs (in their current form);

    (b) whether the MDPs should be amended to state general principles on which the liability of internet intermediaries might be determined; and

    (c) whether the MDPs should be amended to deal expressly with the detailed variety of circumstances covered in the Discussion Paper.

Greater responsibility for originators

12. The Law Council suggests that a legislative framework that shifts liability towards originators will assist in achieving the Policy Objectives. Under the current regime, the removal of content by internet intermediaries can assist in them avoiding liability for defamation. Both clause 32 of the MDPs and the immunity provided in clause 91 of schedule 5 of the *Broadcasting Services Act 1991* (Cth) (**BSA**) provide for defences, but turn upon an absence of knowledge or awareness of the defamatory nature of the content. In practice an internet intermediary would need to remove the alleged defamatory content to have the benefit of the provisions – a result that can stifle public discussion.

13. Furthermore, the current state of the law is uncertain and may leave internet intermediaries exposed, arguably unfairly, to liability in defamation for content they did not originate. In the recent decision of *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* (**Voller**), the New South Wales Court of Appeal found that hosts of third-party comments on Facebook were publishers of those comments.[1] It remains unclear whether hosts of third-party comments would be able to avail themselves of the defence of innocent dissemination pursuant to clause 32 of the MDPs or the immunity provided in clause 91 of schedule 5 of the BSA. At the very least, in the Law Council's view, the law should be clarified as to the circumstances in which internet intermediaries will be liable in defamation for third-party content, especially where they are unaware in practice of the defamatory content, or where it would be impracticable for them to have awareness of the defamatory content before it is published. The Law Council notes of course that Voller is presently before the High Court, and that it would be preferrable to await the outcome of that decision before commenting further.

14. In the Law Council's view, the law should not emphasise internet intermediaries as the primary entities to be liable in defamation. An internet intermediary who is not the originator of a defamatory publication is often unable to rely on defences that would otherwise be available to the originator, such as truth, as the intermediary does not have the information that is available to the originator. Furthermore, it may be easier and more attractive for a complainant to pursue an internet intermediary (who will usually be more readily identifiable than the originator of a defamatory publication), particularly when the originator is impecunious.

15. Shifting the focus of liability in defamation primarily to the originator of the defamatory publication would allow a more effective balancing of freedom of expression and a person's right to defend their reputation. By holding the originator accountable, the internet intermediary does not have to be the arbiter of which publications should or should not remain online – the content can remain online if the originator chooses to defend the publication (which is preferable, as the originator is often best placed to defend the publication). Similarly, holding the originator of a publication liable for any action in defamation emphasises the accountability of originators for their publications online. This may disincentivise antisocial online behaviour, such as abusive posts, as the originator can no longer hide behind a defenceless, third-party publisher defendant with deeper pockets.

Maintaining internet intermediary liability

16. However, the Law Council also recognises that it is important to maintain some form of recourse against internet intermediaries. As mentioned in the introduction to the Discussion Paper, intermediaries are responsible for the design of their platforms and often profit from the network effects of the platforms.

17. The Law Council recognises that it is also important, where a complainant is unable to pursue an originator, that they are still able to have defamatory content removed. An important aspect of defamation over the internet, compared with other defamatory publications, is the fact that defamatory publications on the internet can be downloaded for an indefinite period and typically across an unconstrained geographic area. The ability of internet intermediaries to remove defamatory material is therefore another significant reason for imposing liability on internet intermediaries.

[1] [2020] NSWCA 102 ('*Voller*').

18. However, as identified in the Discussion Paper, if internet intermediaries are liable for defamatory publications which they fail to remove, then it would generally be in their interests to remove any material that is alleged to be defamatory. This could have a significant chilling effect on free speech, as people and excluded corporations with access to legal advice and financial resources may be able to use the threat of litigation to cause the removal of otherwise lawful commentary of public interest.

Basic internet services

19. The Law Council supports the introduction of an immunity for internet services performing basic functions in circumstances where:

    - the internet service is acting as a mere conduit, such as an ISP; and
    - the internet service is entirely passive in the publication.

20. An immunity of this kind can be introduced by enacting a standalone section. A proposed amendment is set out in **Appendix 1** for consideration.

21. Appendix 1 is built around the concept of an 'internet service provider', which is defined by reference to the provision of 'internet connection services' and 'hosting or caching services'. This provision has been prepared for the consideration of the Law Council's Defamation Working Group. The Law Council provides this possible provision merely as a starting point as to how such a provision might be incorporated into the legislation.

22. In circumstances where the internet service performing basic functions is a mere conduit, there is no loss to a complainant of a cause of action in defamation. This is by virtue of the passive nature of the service provided by a basic internet service, analogous to a postal service or telecommunications provider. Immunity for internet services performing basic functions will provide a greater degree of certainty in the transmission of digital communications.

23. However, the Law Council acknowledges that even at this level, categorising internet intermediaries or particularising internet intermediary functions in statutory definitions is difficult.

Liability and immunity – a problem with definitions

24. Currently, the question of whether an internet intermediary is a 'publisher' with potential liability for a defamatory publication is determined based on common law principles, largely turning upon the evidence of knowledge/capacity for knowledge/control over what is published. This is the same approach that has been adopted for centuries when considering diverse roles in a traditional publication such as the author, publishing house, printer, bookshop owner, library and so on.

25. In this respect we note the authorities suggest the courts have been able, on a case-by-case basis, to address the varying manner of internet intermediaries and platforms such as internet service provider, website host, search engine provider, social media company, group administrator on a social media page, and individual or corporate social media user (all of whom sit in very different situations), and this has given rise to incremental development of the law. For example:

- search engines have been found to be liable for the extracts they display in search results only once they have been put on notice of those results;[2] and
- administrators of social media pages have been found to be liable for comments made on their pages where they did not take reasonable steps to monitor and either hide or remove defamatory comments (although it is noted that it can then be controversial on the evidence as to how much control they actually had).[3]

26. The Discussion Paper thoroughly describes the numerous different types of internet intermediaries and the different degrees to which such intermediaries may have control over content produced by originators. The Discussion Paper proposes a number of classifications for internet intermediaries, including 'basic internet services', 'digital platforms' and 'forum hosts', which are relevant to the operation of any potential safe harbour defence and/or innocent dissemination defence.

27. The following policy considerations may justify departure from the current common law regime:

    (a) increased certainty for internet intermediaries as to how the law of defamation applies to them, with a view to avoiding expensive test cases. The Law Council anticipates that some would be in favour of this approach as a matter of principle, but suggest it may be far easier said than done in practice. This is particularly so when the range of different types of internet intermediaries and the varying roles they play are taken into account, regular changes in platform technology and algorithms which may alter the manner in which any given entity is interacting with content at a factual level, and other competing policy considerations discussed below;

    (b) potentially, a reduced risk of liability for internet intermediaries who play a 'facilitative' role rather than being the authors of content, with a view to promoting freedom of speech by minimising the justification for those intermediaries to take an overly cautious approach to removing content which may put them at risk of liability; and

    (c) potentially (and in some ways as a countervailing consideration to the above), the facilitating of better options for individuals to secure removal of defamatory content in circumstances where the author is either unknown, or refusing to cooperate.

28. However, as the internet evolves at a rate much faster than the development of laws, the Law Council's view is that that attempting to classify internet intermediaries with any degree of specificity is a near-impossible task which is likely to produce anachronistic results. Any amendments to the MDPs would not only need to accommodate that level of diversity in internet intermediaries today, but also future changes in the nature and role of internet intermediaries.

29. Given the ever-increasing range of circumstances in which internet intermediaries may be sued for defamation, it is neither desirable nor possible to be overly prescriptive when legislating as to their liability. In particular, any attempt to categorise internet intermediaries in legislation might unduly constrain the ability of courts to deal with the evolution of the internet and the intermediaries facilitating

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[2] See, eg, *Google LLC v Duffy* [2017] SASCFC 130; *Trkulja v Google LLC* (No 5) [2012] VSC 533.
[3] See, eg, *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102, which is currently on appeal to the High Court of Australia: *Fairfax Media Publications Pty Ltd v Voller* [2020] HCATrans 214.

access to it. Despite potentially giving rise to temporary uncertainty in respect of new frontiers, the Law Council suggests that it is critical that the courts retain flexibility to consider new and presently unanticipated scenarios as they arise.

30. The approach taken by the UK in section 5 of the of the *Defamation Act 2013* (UK) illustrates the complexities lawmakers face when defining internet intermediaries. Section 5, as noted in the Discussion Paper, introduced a 'safe harbour' defence for operators of websites hosting user-generated content. The section refers to the 'operator of a website', which is not defined in the Act. It has been noted by commentators that not all online services to which people post statements are offered by 'operators of websites'.[4] For example, information services made available via applications on smart phones would not be caught by this definition.[5] It is foreseeable that certain internet intermediaries intended to receive the benefit of section 5 in the UK would not in fact be caught by its terminology.

31. The Law Council provides three alternative approaches for appropriately capturing internet intermediaries while avoiding some of the issues raised in relation to the UK approach as a result of specific legislative wording. The Law Council considers the 'broad definition approach' to be the preferrable option.

Broad definition approach

32. One possible option could be for legislation to introduce a broad definition that captures all internet intermediaries without trying to classify different kinds of intermediaries based on principles or function. This approach avoids, as best as possible, unintentionally granting or not granting certain internet intermediaries with the benefit of a defence. Similarly, it provides a simplified framework to be interpreted by the courts, which again will minimise, as best as possible, unintended consequences. This approach has been adopted in the framework set out in Appendix 2.

33. The framework uses a complaints notice process as a precondition for liability for internet intermediaries in defamation proceedings commenced by complainants. It provides an avoidance of liability for internet intermediaries, which draws on elements of the UK section 5 safe harbour defence and the innocent dissemination defence. The framework in effect emphasises the liability of originators for defamatory content, while preserving the ability of claimants to seek recourse against internet intermediaries where appropriate.

34. The framework also provides complainants with a relatively straightforward and timely takedown procedure, and facilitates the consensual disclosure of contact details of originators, which in turn may obviate the need to bring an application for preliminary discovery.

35. The framework set out in Appendix 2 may provide a useful example of how some of the identified issues might be addressed and as such is included for the consideration of the Attorneys-General. The Law Council and its Defamation Working Group would be pleased to discuss this option further.

Principles approach

36. Another approach to categorisation which has been suggested might avoid some of these definitional issues is a 'principles approach'. In so far as a principles approach

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[4] See,eg, Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) [15.23]-[15.25].
[5] Ibid.

is adopted in any amendments to the MDPs, it would need to assist a court to consider whether and why internet intermediaries should be liable for defamatory publications which they do not originate. In terms of the potential features of a principles approach, Part 4, Division 2 of the MDPs could be amended to provide courts with greater (and express) flexibility to reach the appropriate balance between the public policy considerations detailed above. For example, the MDPs might be amended:

(a) so that an internet intermediary is not liable for a defamatory publication if the internet intermediary acted reasonably after becoming aware that the publication is allegedly defamatory; and

(b) to include a non-exhaustive list of factors to be considered by the courts in determining whether the internet intermediary has acted reasonably. These factors could include:

  (i) the importance of allowing discussion of matters of public importance (including political discussion, allegations of criminal behaviour and examining the conduct of organisations and public figures);

  (ii) the extent to which the internet intermediary profits from allowing publications by originators;

  (iii) the size and resources of the internet intermediary;

  (iv) the ability of the internet intermediary to prevent or remove the publication;

  (v) the ability of the internet intermediary to comply with a court (or tribunal) order to identify the originator of the publication; and

  (vi) the ability of the internet intermediary to form a view on whether the content was in fact defamatory and on the availability of any defences (including by having regard to the content of the publication and any communications with the originator and the person allegedly defamed).

37. These factors would need to be considered together. If the MDPs are amended to incorporate a principles approach to determine internet intermediary liability, provision should be made for a future review to consider how courts are applying these provisions, the impact of the amendments on the objects of the MDPs, and whether any further amendments to the MDPs are required.

38. The Law Council notes, however, that a principles approach may leave too much to judicial interpretation and could be read down in time to the point where it provides little effective protection to internet intermediaries. Such an approach may also make it difficult for legal practitioners to advise internet intermediaries as to the existence and extent of their liability with respect to publications and therefore may result in internet intermediaries taking down content as a matter of course.

Functions Approach

39. Finally, a 'functions based approach' may be preferable to a principles-based approach as it may limit the possibility of incoherence.

40. Unlike a principles-based approach which could become immediately outdated, a functions-based approach could be drafted in a way which would allow the immunity to adapt to new and emerging technologies. For example, in relation to categorising

‘basic internet services’ for the purpose of immunity, reference could be had to core functions which are analogous to those of an ISP.

Innocent dissemination defence

41. The statutory defence of innocent dissemination sought to ‘accommodate providers of internet and other electronic and communication services’ as it was considered ‘not realistic to expect an Internet service provider… to monitor the content of every transmitted item for potentially defamatory material’.[6] It was also considered that broadcasters and operators of communications systems would not generally be liable for publications by persons over whom they have no effective control.[7]

42. The Law Council considers that the defence as currently drafted does not clearly protect the different online intermediaries as was intended by parliament. Amendments should be made to the innocent dissemination defence to provide greater protection, clarity and certainty for internet intermediaries.

43. The Discussion Paper proposes that one approach, ‘Alternative A’, is to amend the innocent dissemination defence to create a default position that digital platforms and forum administrators are not primary distributors.[8] The Discussion Paper notes at paragraph 3.116 that this change would still require that internet intermediaries satisfy the other limbs of the innocent dissemination defence, but would clarify the position regarding their involvement in the publication.

44. The ‘Alternative B’ proposal is to introduce a standalone subsection to clause 32, or a separate new standalone innocent dissemination defence, which applies a presumption that a digital platform or forum administrator is a subordinate distributor, without reference to the general test in subclause 32(1). The Discussion Paper notes at paragraph 3.118 that the presumption could be rebuttable in certain circumstances and highlights an example that the presumption could be rebuttable if the complainant shows that the digital platform or forum administrator acted so as to ‘adopt, curate or promote content published by another’. The Discussion Paper notes that the standalone defence could also specify what constitutes notice in order to clarify when the defence applies. The Law Council notes that there is some support for this proposal, including from the Law Society of South Australia’s Civil Litigation Committee.

45. The Law Council also notes a proposal that the defence not be available in certain circumstances, the primary aspect of which being that the defendant was on notice of and failed to take down the defamatory matter, or (where possible) identify the originator, thus enabling the plaintiff to take direct action against the primary publisher (see further discussion of this proposal below).

46. The Law Council submits that care needs to be taken to ensure an appropriate balance between freedom of expression and the protection of personal reputation is struck. In evaluating the alternative approaches, a guiding principle should be to ensure that the reform adopted does not encourage the removal of public interest content or journalism, or the stifling of political speech online, by internet intermediaries. It is critical that internet intermediaries are not encouraged to alter

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[6] See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly (13 September 2005) 5.
[7] Ibid.
[8] Note: Appendix 2 proposes a definition for ‘internet intermediaries’. If something similar to Appendix 2 were to be adopted, then it may not be necessary to refer specifically to digital platforms and forum administrators in this context.

the algorithms of their platforms to delist, demote or ‘de-platform’ those that are engaging in political dialogue or disseminating news from a verified source.

47. In this regard, a key issue with the ‘Alternative B’ approach is that it leaves open for interpretation what constitutes actions of an internet intermediary that ‘adopt, curate or promote content published by another’. Digital platforms such as Facebook, Instagram, and Twitter each have algorithms that to some extent ‘curate’ or ‘promote’ the content that is published on their platform, unless the decision is made to actively demote or remove it.

48. The ‘Alternative A’ approach to reform provides the greatest level of certainty regarding the operation of the innocent dissemination defence. The default position that internet intermediaries are subordinate distributors accurately reflects the reality of their contribution to the dissemination of content they did not originate.

49. This ‘Alternative A’ approach also aligns with clause 91 of Schedule 5 of the BSA. The Law Council is of the view that any amendment to the innocent dissemination defence should reconcile section 32 of the MDPs with section 91 of the BSA.

50. A possible set of amendments that attempts to give effect to ‘Alternative A’ is set out in Appendix 3 for consideration by the Attorneys-General. This approach goes somewhat further than Alternative A as it provides slightly greater protection of and clarity to internet intermediaries. Instead of creating a default position that internet intermediaries are not primary distributors (which could be done by adding to the list set out in subclause 32(3)), Appendix 3 imports the concept of an internet intermediary directly into paragraph 32(1)(a). The advantage of this approach is that it removes the need to grapple with whether a given internet intermediary satisfies the condition set out in paragraph 32(2)(c), namely an absence of capacity to exercise editorial control. Moreover, the integers of subclause 32(2) are, to some extent, inherent in the concept of an internet intermediary, given the definition of internet intermediary set out in proposed clause 19A (see Appendix 3).

51. Liability should attach to internet intermediaries that are, or ought reasonably be seen to be on notice of the dissemination of unlawful publications. Of course, some publications can be ‘defamatory’ in the sense it carries an imputation that lowers a person’s standing in the community or is likely to cause the ordinary reasonable reader to think less of the person concerned, but not all defamatory publications are unlawful. Many publications contain defamatory statements that can be defended (in other words, it is lawfully defamatory), yet internet intermediaries who disseminate content they did not originate rarely are in a position to raise any substantive defence. They are vulnerable in circumstances where the originator is not known and may effectively be made liable for matters for which they had only limited publication responsibility.

52. To ensure the reforms do not unnecessarily burden internet intermediaries, including as to obligations to take down, the approach of Lord Denning MR in *Goldsmith v Sperrings Ltd*,[9] that the defendant knew or ought to have known that the defamatory publication ‘could not be justified or excused’, strikes an appropriate balance. This balance can be achieved by amending paragraph 32(1)(b) to require a defendant to prove that it neither knew, nor ought to have known, that the matter was ‘likely to be indefensibly defamatory’, as opposed to simply defamatory.

53. The Law Council recognises there may be other acceptable approaches to this issue, and that ultimately, a policy position needs to be adopted which offers a

[9] [1977] 2 All ER 566 (‘*Goldsmith*’).

preference as to whether the interests of claimants or defendants should hold the balance.

Alternative approach

54. The Law Council notes that an alternative approach may be that the innocent dissemination lost if, but only if:

    (a) it was not possible for the plaintiff to identify the originator of the defamatory matter, sufficient to bring proceedings, and

    (b) the plaintiff gave the defendant a complaints notice in respect of the matter concerned, and

    (c) the defendant was capable of taking down the defamatory matter, and

    (d) within 28 days after a complaints notice was given the defendant failed to either:

        (i) provide the plaintiff with information to identify the originator of the defamatory matter, sufficient to bring proceedings; or

        (ii) take down the defamatory matter.

55. This approach has some merit in encouraging the taking down of anonymous unlawfully defamatory materials because identifying originators, or taking down the materials, would be (in some circumstances) necessary for an internet intermediary to maintain its defence. The Law Council notes that this approach also has some support among members of its Defamation Working Group.

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

56. A key aim of the MDPs is to achieve balance between effective protection of reputation and of freedom of expression. If the innocent dissemination defence is reformed, it should not be necessary to provide a blanket immunity to all digital platforms for third-party content where they are notified but did not materially contribute.

57. The blanket immunity proposal is modelled off the immunity given under section 230 of the *Communications Decency Act 1996* (US) which provides that 'no publisher or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'. The immunity was designed to ensure that the 'interactive computer services' were only made liable if they 'materially contributed' to the publications alleged unlawfulness and were therefore not deterred from moderating the content on their platforms.

58. Although this approach has benefits, including greater legal certainty for internet intermediaries, it may result in there being no legal recourse against those platforms that have been put on notice of defamatory content, but have not materially contributed to its publication.

59. However, in light of the decision of the New South Wales Court of appeal in Voller,[10] there is a need for clarification on 'best practice' for digital platforms. The Law Council considers that this can be achieved through other means, including clarification of the innocent dissemination defence and the definition of publisher.

Power of courts to order that material be removed

60. Obtaining an order before a defamation trial compelling a publisher or internet intermediary to take down allegedly defamatory material is a significant imposition on free expression. There is a legitimate concern that too free an opportunity to obtain such an order would have a chilling effect on effective journalism, in particular investigative journalism. In the Law Council's view, the current threshold for the power to order an interim or interlocutory injunction of this nature is pitched suitably, and appropriately recognises the equitable principles behind such orders. The current test which is exercised in exceptional circumstances, such as where posts on Facebook were found to be 'vile', is appropriate.[11]

61. In the Law Council's view, there is no need for specific powers regarding take down orders against internet intermediaries that are not parties to defamation proceedings. Within the court system, the complainant is able to join an internet intermediary as a party to the application where the intermediary has not otherwise demonstrated a willingness to be bound by, or otherwise respect the inter-parties order of the court. Further, within the online realm, many digital platforms such as Facebook, Instagram, and Twitter have 'reporting' mechanisms which allow a user to request the content be removed from the platform which results in an effective removal of content online, and some platforms have a policy of recognising decisions of Courts and Tribunals restraining publications – although it is equally accepted that this is not a universal, or necessarily consistent, practice.

62. Australian courts have jurisdiction to hear complaints regarding defamatory content published in a state or territory of Australia. Although cross-jurisdictional difficulties are presented by the global nature of digital platforms, this does not justify a reform that would enable Australia's defamation laws to impact the publication of content in other sovereign countries. A proposal of this nature would particularly be at odds with First Amendment jurisprudence in the United States of America (**United States**).

Disclosing the identity of a user

63. The issue around identification of an underlying author is a vexed and important one, particularly noting countervailing privacy considerations, and the risk of offshore intermediaries simply not complying with orders.

64. Although there are currently methods available to a complainant to seek disclosure of the identity of a user who posted defamatory material online by way of preliminary discovery, they are not nationally uniform, and there is utility in clarifying and simplifying the circumstances where an internet intermediary has obligations to disclose the identity of an originator.

65. The Discussion Paper notes at paragraph 3.238, that the current threshold for granting discovery orders to identify an originator is relatively low, compared to jurisdictions such as the UK and the United States. The current threshold, as

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[10] *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102 ('*Voller*').
[11] *Webster v Brewer* [2020] FCA 622.

demonstrated in *Kabbabe v Google LLC* [2020] FCA 126 (**Kabbabe**), requires that the applicant show that they wished to commence proceedings against the unknown originator (which in Kabbabe was the poster of a Google review) and that the internet intermediary 'may' have information which could identify the originator.[12] This threshold does not require consideration of any countervailing human rights which may be engaged in such an application.

66. The Law Council is of the view that if amendments are made to the MDPs to provide for the identification of users by internet intermediaries, the courts should be empowered to reach an appropriate balance between competing considerations – including privacy rights, freedom of expression, harm to reputation, and the public interest of any matters disclosed. Where material is posted anonymously, it is critical that the right of individuals to have their reputations protected is given due weight against some of the competing rights of the anonymous poster.

67. In the Law Council's view, such matters are generally best determined by the court considering the individual case at hand. However, the Law Council notes that this approach may be expensive and the development of an incentive plan for intermediaries to disclose the name of the originator or take down certain material without the need for involvement of the court could be beneficial.

68. If there is going to be the introduction of a specific provision that governs when a court may order that an internet intermediary disclose the identity of an originator, the Canadian approach described in the Discussion Paper at paragraph 3.240, strikes a reasonable balance. This test requires that the plaintiff take reasonable steps to identify the originator, and where there are not overriding privacy considerations, a 'Norwich Pharmacal' order may be granted where the 'public interest favouring disclosure outweighed the freedom of expression and privacy interests of the unknown alleged wrongdoers'. This approach recognises the value of the ability to have anonymity online, particularly, for example, through allowing people to report or express views in relation to matters of public concern.

69. Adoption of elements of the 'Norwich Pharmacal' orders,[13] will also assist with providing a balanced approach to the threshold by requiring proof of an arguable case in defamation.

70. The consideration of the countervailing interests against disclosure of the originator must be embedded in any proposed provision. In addition to what is outlined above, this should include journalists' source privilege protections under section 126K of the *Evidence Act 1995* (Cth) and whistleblower protections. Failure to do so would be contrary to the public interest.

71. Any adoption of elements of the 'Norwich Pharmacal' orders would need to be subject to existing statutory and common law protections for sources within a certain class (such as sources protected by whistleblower immunities and privilege).

What types of internet intermediaries should such provisions apply to?

72. There is no foreseeable benefit to limiting the types of internet intermediaries which the provisions should apply to, as long as there is inclusion of the element that the person against whom the order is sought is likely to be able to provide the information necessary. For example, it would be unlikely that an ISP or 'mere

[12] *Kabbabe v Google LLC* [2020] FCA 126.
[13] See *Norwich Pharmacal v Commissioners of Customs and Excise* [1974] AC 133.

conduit' of internet services is able to identify an anonymous originator who posted a review on Google. Such a request would have to be directed to Google itself.

Preservation of Records

73. As a matter of practicality, records should be preserved by an internet intermediary for the duration of the one year limitation period so as to avoid circumstances in which a complainant is unable to effectively progress a bona fide cause of action as a result of incomplete record keeping perpetrated by a third party. However, the Law Council notes that a requirement to preserve records may be at odds with clause 91(1)(b) of Schedule 5 to the BSA.

Overseas-based intermediaries

74. There may be jurisdictional issues that arise regarding the enforcement of orders against internet intermediaries, including notably where the company is based in the United States. However, as *Kabbabe* demonstrates, the Australian court system has been able to require companies such as Google LLC to comply with the court identification orders.

Dispute Resolution Regime

75. Further consideration could be given to exploring the creation of a dispute resolution regime targeted towards the online sector along the lines of the UK model, which requires:

- response within a specified timeframe;
- for complaints to be passed on to the original author of content if possible; and
- links compliance with the regime to availability of a defence.

76. If such an approach is taken, it is anticipated that there would still be a need to grapple with how it is intended to apply to different categories of internet intermediaries.

77. Alternatively, the possibility of creation of a statutory ombudsman or commissioner could be explored. This statutory officeholder could be empowered to receive complaints about non-action in response to take-down requests, facilitate dispute resolution processes, issue directions to prescribed internet intermediaries, and where appropriate, facilitate involvement/identification of an underlying author.

Part B – Extending absolute privilege

78. Part B of the Discussion Paper considers the potential benefits and risks of extending absolute privilege to circumstances of:

    - reports of alleged criminal conduct to police and statutory investigative bodies; and
    - reports of unlawful conduct to disciplinary bodies and employers.

79. The question that is asked is whether absolute privilege should apply (similar to the privilege that applies to things said in court or in Parliament) to encourage reports and avoid risk of the threat of defamation suits.

80. The Discussion Paper notes that there have been no authorities identified in which a defamation claim has been successfully pursued over a report to police or an investigative agency. The Law Council is similarly not aware of any such authorities.

81. However, the Law Council is advised that, anecdotally, defamation is occasionally used as a threat against people who have reported workplace sexual harassment. While such threats rarely lead to legal proceedings, they may intimidate complainants at a vulnerable time, deterring them from proceeding with the complaint.

82. The Law Council strongly supports appropriate reforms to encourage reporting of issues such as workplace sexual harassment. However, the Law Council notes that there are a range of views among the legal profession regarding whether the existing application of the defence of qualified privilege is adequate or whether or extending the defence of absolute privilege to statements made to police is warranted. Many of the arguments cited by members of the profession in response to this proposal – both for and against – are outlined at Part B, Section 5 of the Discussion Paper.

83. The Law Council notes that reports of alleged wrongdoing already attract qualified privilege, provided they are made reasonably and without malice. In many cases they are also confidential and, in some cases, subject to extensive and strict statutory confidentiality requirements. A claimant would bear the onus of proving malice in order to defeat the defence. Some complainants might also be able to take the benefit of an absolute privilege defence if the publication is made, for example, to a parliamentary body, or is made the subject of evidence before a court.

84. The Law Council's Defamation Working Group and the LSSA are of the view that there is not a reasonable or proper basis for the expansion of the absolute privilege defence. Pursuant to this view, the qualified privilege defence balances protection for complainants/whistleblowers with the significant reputational harm that could be caused by false and malicious reports or allegations. These bodies consider that the current state of the law appropriately protects the general public in making genuine, honest complaints to appropriate recipients.

Additional views of the Law Society of Tasmania

85. The LST has considered the issue of extending absolute privilege within the context of sexual harassment and bullying in the legal profession only. In response to Question 21 of the Discussion Paper, the LST's response is that the extension should be applied in both circumstances.

86. The LST's Employment, Diversity and Inclusion Committee (**Committee**) has previously provided a comprehensive report to the LST in relation to sexual harassment and bullying in the legal profession (**the Report**). The Report identified that barriers to reporting of sexual harassment and bullying including a lack of clear pathways for a complainant to be able to report alleged incidents and concern by a complainant that a complaint will not be investigated or taken seriously (particularly if the alleged perpetrator has greater influence or authority).

87. The Committee's recommendations in the Report, most of which have been adopted by the LST, are that there should be a range of clear options available to a complainant in terms of being able to report an incident, including to an employer or a professional disciplinary body.

88. In the LST's view, it is important that the complainant have the freedom to make a complaint without being restricted or inhibited by whether the defence of absolute privilege would apply depending on which option the complainant chooses. An extension of the privilege would also reduce the likelihood that a perpetrator is able to escape scrutiny or disciplinary action by relying on defamation laws as a shield where a complaint has a legitimate basis.

89. The LST recommends that harassment and discrimination as defined by legislation such as the *Anti-Discrimination Act 1998* (Tas) and the *Sex Discrimination Act 1994* (Tas) should be included. Conduct which is taken to be unlawful pursuant to the Australian Solicitors Conduct Rules in the LST's view should also be included. The LST recommends that 'unlawful conduct' be defined in the interpretation or definitions section of the MDPs.

90. The LST submits that amendment by each jurisdiction of their Schedule 1 would potentially address the issue. However, this relies on each jurisdiction including the appropriate amendment to ensure continuity and consistency across the states and territories. It therefore would also be appropriate to add an additional sub-section to clause 27, which would apply if 'the matter is published to an employer, an investigator engaged by an employer, or a professional disciplinary body, as a complaint of unlawful conduct.'

91. The LST's view, based on its own research (such as its 2019 survey of the legal profession) as well as consistent findings across other jurisdictions is that the number of false or malicious reports of sexual harassment in the workplace are very low in comparison to the number of reports which have a legitimate basis. The LST does not consider that an extension of the privilege would lead to an increase in false reports. Rather, an extension of absolute privilege may lead to an increase in genuine complaints because of the protection it will afford to complainants. In the LST's view, the public interest in ensuring that complainants feel safe to report their experiences of harassment, bullying and discrimination outweighs the risk that a small number of false reports may be made.

Schedule 1 of the *Defamation Act 2005* (NSW)

92. Specific to the situation in New South Wales, the Law Society of New South Wales (**LSNSW**) has noted that in June 2019, the NSW Office of the Legal Services Commissioner introduced a new process for reporting inappropriate workplace conduct, which includes sexual harassment and workplace bullying. Under the new process, people who have experienced or witnessed inappropriate workplace conduct but do not wish to make a formal complaint can complete a notification of inappropriate personal conduct in a law practice.

93. The LSNSW suggests that consideration be given to whether absolute privilege should be extended to this process, which is not currently covered by the current drafting of Schedule 1 of the *Defamation Act 2005* (NSW).

Appendix 1

New section 33A – Possible immunity from liability for internet service providers

Insert after section 33—

33A Immunity from liability for internet service providers

(1) In this section, an ***internet service provider*** is a person who carries on a business (whether for profit or otherwise) of:

(a) providing internet connection services, or services ancillary to internet connection services; or

(b) providing hosting or caching services with respect to content made or to be made available on the internet, or services ancillary to such hosting or caching services.

(2) A person who publishes defamatory matter is not liable in defamation for publication of that defamatory matter if that person published that defamatory matter in the capacity of an internet service provider and in no other capacity.

Appendix 2

New section 19A – Possible pre-action protocol for internet publications

Insert after Part 3, Division 1:

Division 1A Pre-action protocol for internet publications

19A Internet complaints notices and takedown demands

(1) In this section:

(a) an ***originator*** of an internet publication is a person who has:

(i) submitted content to a third party for publication as an internet publication (***submitted content***); or

(ii) authored the submitted content or part of the submitted content;

(b) an ***internet intermediary*** is a publisher of an internet publication who is not:

(i) an originator of that internet publication;

(ii) a person who would be liable in defamation as an employer or principal for the publication by the originator of that internet publication; or

(iii) an excluded publisher of that internet publication.

(c) ***identified matter*** is the internet publication(s) identified in an internet complaints notice;

(d) an ***excluded publisher*** of an internet publication is a person who is not liable in defamation for that publication because of section 33A of this Act;

(e) an internet intermediary is ***unable to remove identified matter*** if:

(i) it can only remove part of the identified matter;

(ii) it cannot remove the identified matter without also removing or altering an internet publication that is not the identified matter; or

(iii) the identified matter has already been removed by another person.

(2) A person cannot commence defamation proceedings in respect of an internet publication against an internet intermediary:

(a) if they have or can reasonably obtain information sufficient to commence defamation proceedings against an originator of that internet publication;

(b) unless that person has first given an internet complaints notice in respect of that internet publication to that internet intermediary; and

(c) until after 28 days have elapsed from the date an internet complaints notice was given, or deemed to have been given in accordance with subsection (6), by that person to that internet intermediary.

(3) For the purpose of this Act, a notice is an ***internet complaints notice*** if it:

(a) is readily identifiable as being an internet complaints notice pursuant to section 19A of this Act;

(b) identifies the internet publication(s) it is given in respect of;

(c) is also a concerns notice pursuant to section 12A of this Act in respect of that internet publication(s);

(d) describes the information the person serving the internet complaints notice (***complainant***) has for the purpose of commencing defamation proceedings against the originator(s) of that internet publication(s), and the steps which have been taken by

the complainant to obtain information sufficient to commence defamation proceedings against that originator(s).

(4) An internet intermediary complies with an internet complaints notice if and only if it does (or is deemed in accordance with subsection (5) to have done) one of the following within seven days of being given that internet complaints notice:

(a) the internet intermediary removes the identified matter;

(b) the internet intermediary:

(i) seeks and obtains the consent of the originator(s) of the identified matter to make their contact details available to the complainant; and

(ii) provides the contact details of the originator(s) of the identified matter to the complainant;

(c) in the case of an internet intermediary:

(i) who is unable to remove the identified matter; and

(ii) who does not have or cannot reasonably obtain the contact details of the originator(s) of the identified matter—

the internet intermediary gives the internet complaints notice to another internet intermediary:

(iii) who is or may reasonably be expected to be able to remove the identified matter; or

(iv) who has or can obtain, or may reasonably be expected to have or be able to obtain, the contact details of the originator(s) of the identified matter.

(5) An internet intermediary who removes identified matter after publication of the identified matter but prior to being given an internet complaints notice is deemed to have removed the identified matter within seven days of being given that internet complaints notice.

(6) An internet complaints notice provided to an internet intermediary in accordance with subsection (4)(c) above is deemed to have been given by the complainant to that internet intermediary on the date it was so provided, unless an identical internet complaints notice has already been given to that internet intermediary, whether by the complainant or by an internet intermediary in accordance with subsection 4(c).

(7) For the avoidance of doubt, nothing in subsection (4) requires an internet intermediary to monitor, make inquiries about, or keep records of the identified material, or the contact details of the originator(s) of the identified material.

(8) Except in the circumstance described in subsection (9), a complainant has no cause of action in defamation in respect of the identified matter against an internet intermediary who has complied with a corresponding internet complaints notice.

(9) Subsection (8) does not apply to a complainant if and only if each of the following conditions are satisfied:

(a) the internet intermediary is an internet intermediary that is able to remove the identified matter;

(b) the identified matter has not been removed by that internet intermediary or any other person within seven days of that internet intermediary being given an internet complaints notice;

(c) the complainant has received in response to an internet complaints notice given by him or her the contact details of the originator(s) of the identified matter;

(d) the complainant serves a valid takedown demand on that internet intermediary; and

(e) that internet intermediary does not, within seven days of being given a valid takedown demand, remove the identified matter.

(10) A takedown demand given to an internet intermediary is not valid unless it is:

(a) given to that internet intermediary within 14 days of the complainant being provided with contact details of the originator(s) of identified matter by an internet intermediary;

(b) attaches a copy of the corresponding internet complaints notice given to that internet intermediary; and

(c) attaches a statutory declaration made by the complainant serving the takedown demand stating that the contact details provided to the complainant, together with any other information the complainant has or can reasonably obtain, are insufficient for the purpose of commencing defamation proceedings against that originator(s).

(11) An internet intermediary can only be required:

(a) to contribute to any damages or contribution recovered from any other publisher of the internet publication(s) in respect of a defamation claim brought by a complainant in respect of that internet publication(s); or

(b) to indemnify any other publisher of that internet publication(s) in respect of liability arising out of a defamation claim brought by a complainant in respect of that internet publication(s),

if that internet intermediary is an internet intermediary in respect of whom that complainant would have a cause of action in defamation, and would be able to commence defamation proceedings, in respect of that internet publication(s).

Appendix 3

Revised section 32 – Possible amendments to the innocent dissemination defence

Section 32(1)(a)

Insert "or an internet intermediary (as per the definition of internet intermediary in section 19A)" after "a subordinate distributor".

Section 32(1)(b)

Insert "likely to be indefensibly" after "that the matter was".