SUBMISSION ON THE REVIEW OF MODEL DEFAMATION PROVISIONS – STAGE 2

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19 May 2021

Contents

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1 Introduction

The questions posed by Part A of the Discussion Paper[1] lean towards the proposition that defamation law negatively impacts internet intermediaries in a way that deserves reform. For the most part, I disagree with that proposition.

This submission proceeds by making general comments concerning the subject matter of Part A of the Discussion Paper, which inform the shorter answers to the Discussion Paper's questions that are provided below. I have focused on those questions on which I have the most to offer. I also briefly answer the questions posed in Part B concerning absolute privilege.

2 General comments on Part A – Liability of internet intermediaries

2.1 Publication and intermediaries

Part A of the Discussion Paper turns, in part, on assumptions about the principles concerning publication of defamation. For an account of the contemporary law on publication of defamation in Australian law, see:

- Michael Douglas and Martin Bennett, '"Publication" of Defamation in the Digital Era' (2020) 47(7) *Brief* 6

The article explains that the concept of 'publication' has been distinct from that of 'authorship' for many decades. The Discussion Paper makes a distinction between primary and secondary publishers;[2] other than for the purposes of analysis of an innocent dissemination defence, which distinguishes 'primary' from 'subordinate' distributors,[3] the distinction is one without a difference. Decisions to the contrary conflate the law on publication—which the High Court has described as 'tolerably clear'[4]—with the requirements of the defence.[5] Those decisions also misrepresent defamation as a tort other than one of strict liability.[6] The point is implicit in the transcript of the High Court hearing of the *Voller* appeal, of 18 May 2021:[7]

> MR YOUNG: But the point I was going to make, your Honour, is that it cannot be said, in our respectful submission, that the appellants, simply by operating this page have intentionally lent their assistance to the communication of this particular set of posts containing allegedly defamatory material. They did not have sufficient knowledge to have that sheeted home to them, in our submission. And it is really no different than the public noticeboard case.
>
> KIEFEL CJ: As in Byrne v Deane?
>
> MR YOUNG: As in Byrne v Deane.
>
> KIEFEL CJ: But there, the defamatory material was forced upon the alleged publisher. It is not a case of actively encouraging people to use facilities which enable publication. That is a distinction, is it not?

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[1] Referred to in footnotes as 'DP'.
[2] DP 16 [2.7].
[3] Eg, *Defamation Act 2005* (WA) s 32(2).
[4] *Trkulja v Google LLC* (2018) 263 CLR 149, [39].
[5] Eg, *Google Inc v Duffy* (2017) 129 SASR 304. The point is made by Basten JA in *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700, 712–4 [48]–[49]; see David Rolph, 'Before the High Court – Liability for the Publication of Third Party Comments: *Fairfax Media Publications Pty Ltd v Voller*' (2021) 43(2) *Sydney Law Review* (Advance) 4.
[6] See Alastair Mullis and Richard Parkes (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 12th ed, 2013) [1.8].
[7] *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCATrans 88 (18 May 2021).

> MR YOUNG: Yes – I mean, to some extent I agree with your Honour because the golf club rules did not permit - - -
>
> KIEFEL CJ: Made them a trespasser, in effect.
>
> MR YOUNG: - - - third-party comments. But the case turned on applying a concept of knowledge and inferred intention.
>
> KIEFEL CJ: But where you are coming close to here is really a discussion of whether or not a host of a site should be given some particular application of the innocent dissemination defence. We are not really in the realms of publication, are we? It is really what you are discussing is innocent dissemination defence and that is not really a matter – a topic for us, is it?

The Discussion Paper asks whether intermediaries should be shielded from liability unless they 'materially contribute' to the publication.[8] The premise implicit in that question is false. When an intermediary publishes matter according to common law standards—for example, by providing a social media platform which disseminates defamatory matter to users—the intermediary does materially contribute to the publication. When the matter is consumed via social media in this way, the intermediary is *the* cause of the publication, in the sense that publication could not have occurred in the way that it did but for the intermediary's service.[9]

The language of 'materially contribute' conflates causal concepts with what is essentially a normative issue.[10] **The real question is: *should* intermediaries be held liable for content they publish (according to common law principles) that they do not author?**[11] This is a question on which educated people can disagree. I have changed my position on the issue over time, after reading more analyses and witnessing Facebook's early 2021 tantrum in response in the proposed media bargaining code.

This normative issue is sometimes bound up with the doctrinal issue of when to allocate tortious liability for omissions.[12] The law of torts' classic response is to allow liability for an omission when the defendant fails to meet the requirements of a duty owed.

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[8] DP 63, Question 10.

[9] See, eg, *Civil Liability Act 2002* (WA) s 5C(1)(a). Anyway, the 'but for' test is not even necessary for defamation. The principles of causation of special damage in the context of defamation will be considered shortly in the appeal from: *Rayney v Western Australia [No 9]* [2017] WASC 367.

[10] See James Edelman, 'Unnecessary Causation' (2015) 89 *Australian Law Journal* 20. David Lewis recognised this in his scholarship on causation: 'We sometimes single out one among all the causes of some event and call it "the cause", as if there were no others… I have nothing to say about these principles of invidious discrimination': David Lewis, 'Causation' (1973) 70(17) *Journal of Philosophy* 556.

[11] This is analogous to the 'scope of liability' issue for negligence, which is bound up with principles of remoteness. See, eg, *Civil Liability Act 2002* (WA) s 5C(1)(b).

[12] But when it comes to intermediaries, the language of 'publication by omission' is misleading; see DP 30 [3.11]. The action–omission distinction is wobbly at the best of times. Here, we are talking about transnational corporate groups that depend on code and cookies to mine Australians for their data and advertising dollars. Arguably, there are enough so-called 'positive' acts on the part of the corporate entities behind intermediaries, or their agents, to say that the publications they facilitate via their platforms are the usual 'positive' kind, and not by 'omission' at all. Even if that were not the case, resting liability on the shoulders of 'intention' makes little sense for a non-human defendant of this character. The difficulties of attributing intention to corporations is explored by Professor Bant's submission to the ALRC, as part of her ARC Future Fellowship on corporate responsibility: https://www.alrc.gov.au/wp-content/uploads/2019/08/21-Public-E-Bant_Redacted.pdf.

If one were a stickler for coherence,[13] there is plenty to ground a duty, on the part of internet intermediaries, to avoid causing harm on their platforms, thus justifying attribution of liability for their publications 'by omission'. For example:

- Internet intermediaries should be responsible for the externalities of their business models.
- The prospect of the dissemination of damaging defamatory matter via internet intermediaries' platforms is reasonably foreseeable.[14]
- Internet intermediaries damage reputations via defamatory publications in a way that publications by other individuals do not. For example: discussion of the 'grapevine effect' in the context of publication via social media has considered how digital platforms have transformed the capacity of defamation to cause irreversible damage to individuals' reputations.[15]
- It is already the policy of Australian law that internet intermediaries commit an offence if they fail to expeditiously remove abhorrent violent material.[16] They have the capacity to comply with that law. Given that capacity, they ought to be amenable to civil liability[17] if they fail to expeditiously remove defamatory material.
- If the policy of the law of Australia is that Facebook et al should pay the likes of Newscorp due to the impact the former had on the latter's business,[18] then Facebook et al should also be ready to pay those persons whose reputations were destroyed via the foreseeable functionality of their platforms. Why is damage caused by intermediaries' participation in the free market worthy of compensation with the mandate of Australian law,[19] but damage caused by intermediaries' tortious conduct not worthy of the same?

2.2 Justifying a contingent shield for intermediaries

The starting point for analysis of any proposed amendments is that internet intermediaries ought to be liable for anything they publish, understood according to common law standards, unless there is a compelling reason for them to not be treated in that way.

Freedom of expression and access to information are important values that would justify relaxation of absolute strict liability.[20] The current law *almost* strikes an appropriate balance by providing defences where the intermediary lacks 'awareness', 'knowledge' or constructive knowledge.[21] It means that intermediaries can let their platforms freely disseminate content—and more importantly, Australian consumers can freely access content—unless a defamation risk is triggered.

Other considerations that favour a stronger shield for intermediaries are unpersuasive. For example: the historical business models of internet intermediaries, and the preferences of the executives within them, are grossly outweighed by the basic human rights of Australians with

[13] Which is not even necessary. The common law is messy.

[14] Compare the reasoning in *Voller* at first instance: media companies that post controversial content ought to know that there will be defamatory comments in response to a post of that content. Similarly, internet intermediaries ought to know that their platforms are littered with defamatory content.

[15] See generally Michael Douglas, '"Their evil lies in the grapevine effect": Assessment of Damages in Defamation by Social Media' (2015) 20(4) *Media and Arts Law Review* 367.

[16] *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth).

[17] To clarify: not criminal liability.

[18] See, eg, 'News Corp and Sky News reach pay deal with Facebook, weeks after media bargaining code became law', *ABC News* (16 March 2021) <https://www.abc.net.au/news/2021-03-16/news-corp-and-facebook-strike-pay-deals-for-news/13252208>.

[19] *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Cth).

[20] But the submissions of representatives of internet intermediaries with appeals to these values should be taken with a grain of salt. Intermediaries' support for human rights tends to fluctuate with public opinion and share prices. See 'Facebook's Trump ban upheld by Oversight Board for now', *BBC* (online), 5 May 2021 <https://www.bbc.com/news/technology-56985583>.

[21] *Broadcasting Services Act 1992* (Cth) sch 5 cl 91(1) ('BSA'); *Defamation Act 2005* (WA) s 32(1)(b), (c).

respect to reputation and freedom of expression. Given the inequalities of bargaining power between intermediaries and most Aussie users of digital platforms,[22] individuals should not need to go to the expense of obtaining a court order before their rights are expected.[23]

Moreover, appeals to the defamation law applicable in other nations are not compelling.[24] Australian law is often different to the law in other places; that does not mean we are 'behind'. Diversity does not mean deficiency. Australian law should achieve policy that advances the interests of the Australian people, whatever the policy of the laws of other places. If transnational groups behind intermediaries want to do business that depends on the data and dollars of Australia, they ought to adapt to Australian law.

An appropriate balance can be struck by accepting that, unless a person of standing complains about defamatory content, it should be left alone.[25] The current defences of innocent dissemination, and the BSA sch 5 cl 91(1), give effect to that position.

2.3 A process for putting intermediaries on notice

The trigger to put an internet intermediary on notice that they are publishing defamatory matter should be quick and inexpensive. A defamed person should not need to go to a lawyer like me before they can protect their reputation via defamation law.[26]

Relevant to Issue 3 of the Discussion Paper,[27] there are many different ways in which the value of a 'quick and cheap' defamation notice/trigger for intermediaries' publications could be put into effect in a way that puts the interests of Australian consumers first. Here is me roughly spitballing a potential process:

- Intermediaries are required to develop a tailored 'Report defamation of an Australian person' feature into every aspect of their platform.
- Natural persons, and those with capacity to sue under the incoming changes, can utilise the feature without going to a lawyer or issuing a concerns notice.
- The feature requires the reporting person to (1) briefly describe what is wrong with the content, and (2) provide their contact details.
- The impugned content is reviewed by an employee of the intermediary for basic legibility. If it makes sense, and seems genuine, the content is immediately taken down, pending review.
- An independent 'defamation commissioner' reviews the complaint ASAP and within 7 days. If it is prima facie defamatory (not having regard to defences), the intermediary's content stays down. Of course, if the intermediary's publication is linking to some other website, that content would remain online; but its visibility, and so propensity to cause damage via the grapevine effect, would be diminished.
- The intermediary then has an obligation to use best endeavours to notify the author of the removed publication of the outcome. The author has standing to challenge the defamation commissioner's decision via merits review, at that stage noting any defences to defamation. (Cf the process for challenging a decision of the Privacy Commissioner.)[28]

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[22] See, eg, *Digital Platforms Inquiry: Final Report* (2019) 488.
[23] *Contra* the position described at DP 18 [2.16].
[24] Cf DP 18–23.
[25] All other things being equal; not considering other legitimate bases on which it should not be left alone—eg, where the content is otherwise contrary to Australian law.
[26] On that issue, the new mandate that a concerns notice of a particular form be issued before proceedings can be commenced is a retrograde step that will inhibit access to justice for many Australians with legitimate claims.
[27] DP 64ff.
[28] Eg, *Ben Grubb and Telstra Corporation Limited* [2015] AICmr 35; *Telstra Corporation Ltd v Privacy Commissioner* [2015] AATA 991; (2015) 254 IR 83; *Privacy Commissioner v Telstra Corporation Limited* (2017) 249 FCR 24.

- ***If the intermediary does not take the content down after initial review, prior to determination of the defamation commissioner, it does not have a defence to defamation.**
- This whole system—and the office of the defamation commissioner—is funded by intermediaries.

The proposal is not that novel. It is a rough defamation version of the GDPR's right to erasure; we may see an equivalent law in the *Privacy Act 1988* (Cth) soon anyway.[29] Both privacy and reputation are human rights which Australia must protect as part of its international obligations.[30] The value of each lies in basic human dignity and personal autonomy. Businesses—like internet intermediaries—ought to adapt to ensure these values are protected.

2.4 The territorial issues

The elephant in the Discussion Paper's room is the transnational character of the corporate groups that underpin internet intermediaries. These issues shine through in Questions 15 and 16. They are the subject to principles of private international law.[31]

There is a need to reform Australian law to better adapt to internet intermediaries taking a recalcitrant approach to the jurisdiction and power of Australian courts, in whose geography these intermediaries derive millions of dollars. For examples of intermediaries' behaviour that warrants the reform I have in mind:

- *Australian Information Commission v Facebook Inc (No 2)* [2020] FCA 1307:[32] the American company challenged the court's jurisdiction over a claim related to the Cambridge Analytica privacy scandal, as it affected Australian Facebook users.
- *X v Twitter* (2017) 95 NSWLR 301: the American and Irish corporate defendants did not even bother to enter an appearance or make substantive submissions on the issue of jurisdiction.
- *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 867:[33] following the Supreme Court of Canada's judgment, the American Google obtained relief from a comparatively inferior US court purporting to nullify the effect of the judgment of Canada's top court.
- *KT v Google LLC* [2019] NSWSC 1015: the American Google was briefly in contempt after failing to comply with an interlocutory injunction that enjoined removal of defamatory reviews, following frequent requests by the defamed person to Google for the content to be removed.

These cases demonstrate how transnational businesses complex multi-national corporate structures to shield their operations from liability via a 'jurisdictional veil'.[34] These structures depend on the historical premise that 'jurisdiction is territorial'. That premise is a pre-internet creature. The law has moved on; it is now quite easy for an Australian court to claim jurisdiction over a company overseas. On that subject, see:

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[29] Australian Government, Attorney-General's Department, *Privacy Act Review – Issues Paper* (October 2020) 11; ACCC, *Digital Platforms Inquiry: Final Report* (2019) 470–1.
[30] See ICCPR art 17. See *Australian Associated Press Pty Limited and Secretary, Department of Home Affairs (Freedom of information)* [2018] AATA 741, [134].
[31] Or the 'conflict of laws'.
[32] Noted in: Michael Douglas, 'Facebook's further attempts to resist the jurisdiction of the Federal Court of Australia futile',*ConflictofLaws.net* (online), 18 September 2020.
[33] Noted in: Michael Douglas, 'A Global Injunction Against Google' (2018) 134 *Law Quarterly Review* 181.
[34] Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 66–9, quoting Peter Muchlinksi, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50 *International & Comparative Law Quarterly* 1, 17.

- Martin Davies, Andrew Bell, Paul Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2019) pt II
- Michael Douglas, 'The Decline of "Exorbitant Jurisdiction"?' (2019) 93(4) *Australian Law Journal* 278
- Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil Procedure Rules' (2017) 44(2) *Australian Bar Review* 160

The contemporary approach to generous long-arm jurisdiction of common law courts is represented by this dictum of Lord Sumption:

> In his judgment in the Court of Appeal, Longmore LJ described the service of the English court's process out of the jurisdiction as an "exorbitant" jurisdiction… This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation… Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries… It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.[35]

Sumption referred to 'modern commercial life'. In the *Digital Platforms Inquiry*, the ACCC described how digital platforms are now 'an integral part of life for most Australians'.[36] As part of the 'modern life' of most Australians, some Australians will suffer harm. They ought to be able to obtain a remedy for that harm, in a court of their own country, according to Australian law—no matter where the entities that caused that harm are based. Australian law should adapt to our modern digital lives.

For these reasons, in response to the questions below, I propose changes to deal with jurisdiction, exercise of jurisdiction, and applicable law for defamation claims against intermediaries. To avoid the situation we saw in the *Equustek* litigation, I also deal with enforcement of Australian court orders. See the responses to Questions 15 and 16 below.

[35] *Abela v Badraani* [2013] 1 WLR 2043, 2062–3 [53].
[36] ACCC, *Digital Platforms Inquiry: Final Report* (2019) 40.

3. Answers to questions posed by the Discussion Paper, Part A

Question 3: Categorising digital platforms

(f) Are there any publishing functions of digital platforms that should not attract liability? Why?

No. See above.

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

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

Yes.

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

See the discussion of a mandatory system of putting intermediaries on notice and taking down content, described at 2.4 above.

Question 6: Immunity for basic internet services

(a) Is it necessary and appropriate to provide immunity from liability in defamation to basic internet services?

It is neither necessary nor appropriate.

(b) If such an immunity were to be introduced, should it be principles-based or should it specifically refer to the functions of basic internet services?

It should not be introduced.

(c) Are there any internet intermediary functions that are likely to fall within the definition of basic internet services (as outlines in Issue 1) that should not have immunity?

No functions should have immunity.

(d) Is there a risk that providing a broad immunity to basic internet services would unfairly deny complainants a remedy for damage to their reputation? What risks exist and how could they be mitigated?

Yes. Well, if they are immune from liability from defamatory publications, then the risk—or certainty—is that a defamed person cannot get a remedy for that defamatory publication. The risk should be mitigated by not providing any immunity.

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

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

See the discussion at 2.2 and 2.3 above. A concerns notice need not be provided to an internet intermediary.

The mandate of the 2020 Model Defamation Provisions that a concerns notice of a particular form be issued before proceedings can be commenced is a retrograde step that will inhibit access to justice for many Australians with legitimate claims. It will have a severe impact on working class and low-income people who cannot afford the services of a lawyer. LegalAid is not going to be dishing out defamation advice.

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

Intermediaries do not monitor their emails properly; see the facts described in *KT v Google LLC* [2019] NSWSC 1015.

The whole process is terrible for complainants. The only beneficiaries of the concerns notice reforms are large media companies.

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

See the proposal for an efficient take-down process described at 2.3 above.

The ordinary remedies for defamation are appropriate: compensation; an apology (which ought to be considered a remedy); an order (injunctive or otherwise) compelling the intermediary to ensure the defamatory matter is not shared again. Given that defamation is a tort, restitution for income derived from intermediaries' services that contained defamatory matter concerning the complainant would also be appropriate.

Question 8: Clarifying the innocent dissemination defence

(a) Should the innocent dissemination defence in clause 32 of the MDPs be amended to provide that digital platforms and forum administrators are, by default, secondary distributors, for example by using a rebuttable presumption that they are?

No. In some cases, they are not; for example, see the matter considered in *Trkulja v Google LLC* (2018) 263 CLR 149.

It does not need clarifying. Intermediaries should prove to a court that they are subordinate distributors; the question ought to turn on a fact-specific evaluation.

(b) In what circumstances would it be appropriate to rebut this default position?

I do not accept the premise of the question.

(c) Should a new standalone innocent dissemination defence specifically tailored to internet intermediaries be adopted the MDPs?

No.

(d) If a standalone defence is created, should the question of what is knowledge or constructive knowledge of third-party defamatory content published by an internet intermediary be clarified? If so, how?

It should not be created. But see the process described at 2.3 above.

(e) Are there other ways in which the defence of innocent dissemination could be clarified?

'Can be' and 'should be' are different issues. It should be left alone.

Question 9: Safe harbour subject to a complaints notice process

(a) Should a defence similar to section 5 of the *Defamation Act 2013* (UK) be included in the MDPs?

No.

(b) If so, should it be available at a preliminary stage in proceedings, where an internet intermediary can establish they have complied with the process?

It should not be available.

(c) Should a complaints notice process be available when an originator can be identified? For example, to provide for content to be removed where the originator is recalcitrant?

A complaints process should be available for all cases, not just those described in the question.

(d) If such a defence were introduced, would there still be a need to strengthen the innocent dissemination defence?

It should not be introduced.

(e) Should the defence be available to all internet intermediaries that have liability for publication in defamation? For example, could a separate complaints notice process be developed that could apply to search engines?

It should not be available at all.

(f) How can the objects of freedom of expression and the protection of reputations be balanced if such a defence is to be introduced?

The proposal would get the balance wrong.

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

(a) Should a blanket immunity be provided to all digital platforms for third-party content – even if they are notified about it, unless they materially contribute to the publication?

No.

(b) What threshold or definition could be used to indicate when an intermediary materially contributes to the publication of third-party content?

I do not accept the premise of the question. It is based on a misunderstanding of the law. See 2.1 above.

(c) If a blanket immunity is given as described above, are there any additional or novel ways to attract responsibility from internet intermediaries?

Blanket immunity should not be given.

Question 11: Complaints notice process for Australia

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

There should be a distinct process; see 2.3 above.

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

The concerns notice process should not apply to internet intermediaries. (It should not apply to anyone.)

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

A clause to the effect of 'this section applies to the exclusion of Part 3'.[37]

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

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

No.

[37] Referring here to the *Defamation Act 2005* (WA).

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

The complainant should not be compelled to identify the originator. This is an externality of intermediaries' businesses that ought to be borne by intermediaries via the orthodox legal concept that a plaintiff can choose to sue, or not sue, a person with respect to whom they have a cause of action.

Question 13: Complaints notice form and content

(a) What content should be required to be included in a complaints notice in order for it to be valid? Should this include an indication of the serious harm to reputation caused or likely to be caused by the publication, or should it be sufficient for the content to be prima facie defamatory?

See 2.3 above.

(b) Should there be a requirement for the intermediary to notify the complainant, within a certain time period, that the complaints notice does not meet the requirements?

Yes. See 2.3 above.

(c) Should a complaints notice require the complainant to make a 'good faith' declaration? Should there be any other mechanisms used to prevent false claims?

Yes. The complainant should be required to provide their full contact details. Eg, they cannot hide behind an alias. The complainant must ordinarily reside in Australia.

Question 14: Application and outcome of complaints notice

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

The former. I disagree with the premise that the process should have the goal of identifying the originator.

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

It should be removed, pending further review. See 2.3 above.

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

That should not be the focus at all. See 2.3 above.

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

None of them. The UK model is bad.

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

Yes. See 2.3 above.

Question 15: Orders to have online content removed

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

Prima facie defamatory without regard to defences, as explained at 2.2 and 2.3 above.

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

There is a distinction here between jurisdiction and power that should be considered when coming to a position on this question.

'Jurisdiction' is a term used in a variety of senses, including authority to decide. 'Power' is a distinct concept[38] that is sometimes confused with jurisdiction in scholarship.[39] Jurisdiction provides the anterior legal justification for the exercise of power; a court may use its powers in exercise of its jurisdiction.[40]

Superior courts are said to have auxiliary equitable jurisdiction in aid of the legal rights[41] the subject of a defamation action to enjoin removal of defamatory content. But this is better understood as a *power* of a court of equity. Some courts also possess statutory powers to the same effect;[42] and in many cases, inherent powers which may bind a third-party in order to protect the administration of justice.[43] Rules regulating injunctions are not a source of power; they are the court's regulation of a power, either express, inherent, or implied/incidental, that they would possess anyway, even if the rule were not there.

Whether a court has jurisdiction over a non-party is an anterior issue. It will be determined by jurisdictional rules concerning service, among other things.

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[38] *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 377 [6].
[39] Eg, Dan Jerker B Svantesson, 'Jurisdiction in 3D – "Scope of (Remedial) Jurisdiction" as a Third Dimension of Jurisdiction' (2016) 12(1) *Journal of Private International Law* 60.
[40] *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, 353 [31] (French CJ, Kiefel, Bell and Keane JJ); see further Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 14.
[41] See Michael Douglas, 'Anti-Suit Injunctions in Australia' (2017) 41(1) *Melbourne University Law Review* 66.
[42] Eg, *Federal Court of Australia Act 1976* (Cth) s 23.
[43] See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

(b)(i) The jurisdiction issue

For corporations, rules on service are affected by the *Corporations Act 2001* (Cth). It is easy to serve a local corporation. Foreign corporations that carry on business in Australia are required to register, which then makes it easy to serve them.[44]

Foreign companies behind intermediaries often do not consider that they 'carry on business' in Australia; see 2.4 above. They are wrong. By deriving data and income from Australia—either directly or through artificial corporate structures—they absolutely carry on business in Australia.

For examples of reasoning of courts on how foreign companies carry on business in the forum despite their objections, see:

- *Australian Information Commission v Facebook Inc (No 2)* [2020] FCA 1307.
- *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548.
- *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190; *ACCC v Valve (No 3)* (2016) 337 ALR 647 (Edelman J).
- *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 814; *Equustek Solutions Inc v Google Inc* (2015) 386 DLR (4th) 224; *Equustek Solutions Inc v Jack* (2014) 374 DLR (4th) 537; *Equustek Solutions Inc v Jack* [2012] BCSC 1490.

In the absence of registration, foreign companies are still amenable to the jurisdiction of Australian courts under long-arm rules. But these principles on service often lead to expensive jurisdictional fights.

Foreign companies behind internet intermediaries—like Google LLC—should be compelled to either register as carrying on business in Australia, or as accepting service in Australia. That would avoid jurisdictional fights that increase costs for people seeking access to justice.

(b)(ii) The power issue

Superior courts already have powers over non-parties to this effect, provided the non-party is subject to the court's jurisdiction. For the avoidance of a needless (and vexatious) dispute brought by an intermediary to the contrary, the point could be reinforced with an amendment to the Uniform Defamation Actions.

A further issue concerns exercise of power, which also relates to enforcement. A foreign company may simply ignore, or actively fight against such an order; see Google's actions in the *Equustek* litigation, described at 2.4 above. Australian courts will not be inclined to make an order that will be ignored, which means that some may decline to issue an injunction in these circumstances.[45]

Adopting the process described in 2.3 above, analogous to the right to erasure, would avoid these problems.

[44] *Corporations Act 2001* (Cth) s 601CD; *Corporations Act 2001* (Cth) s 601CX(1).
[45] See *Macquarie Bank Ltd v Berg* [1999] NSWSC 526.

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

Prima facie defamatory, without regard to defences. If the power is not given to an independent commissioner (as proposed at 2.3), it should be given to all courts. Low and no cost jurisdictions should have the power.[46]

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

Yes, see 2.3. But courts already have this power, as explained in:

- Michael Douglas, 'A Global Injunction Against Google' (2018) 134 *Law Quarterly Review* 181
- Michael Douglas, 'Extraterritorial Injunctions Affecting the Internet' (2018) 12(1) *Journal of Equity* 34[47]

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

See answer to Question 15(b) above.

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

With enforceability, yes. See answer to Question 15(b) above. The issue of enforcement is further explored in relation to Question 17 below.

Question 16: Orders to identify originators

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

Courts already have these powers. Eg, rules on pre-action or preliminary discovery; *Norwich Pharmacal* orders; injunctions in equitable or inherent/incidental jurisdiction; and in some cases, subpoenas.

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

The existing principles concerning the orders described in Question 16(a) above sufficiently take into account countervailing considerations. The newspaper rule and journalists' Shield Laws provide sufficient protection for journalists' sources with respect to defamation.

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[46] See Kim Gould, 'Small Defamation Claims in Small Claims Jurisdictions: Worth Considering for The Sake of Proportionality?' (2018) 41(4) *UNSW Law Journal* 1222.

[47] Which was cited in: Law Commission of Ontario, *Defamation Law in the Internet Age* (Final Report, 2020); *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (Case C-18/18).

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

I do not accept the premise of the question.

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

Yes.

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

Yes. See the answer to Question 17 below.

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

The MDPs. Judges, informed by practitioners, should retain primary authority of the form of their courts' rules.

Question 17: Other issues regarding liability of internet intermediaries

(a) Are there any other issues regarding liability of internet intermediaries for the publication of third-party content that need to be considered?

(a)(i) Reform on enforcement

Foreign companies behind intermediaries compelled to remove content may ignore or actively challenge orders of Australian courts: see 2.4 above, and Google's campaign against Europe's right to be forgotten and subsequent right to erasure. That is the case both for take-down orders (eg, injunctions) and orders of compensation.

Enforcing a monetary remedy overseas is often difficult. It depends on the private international law of the foreign jurisdiction in which enforcement is sought. The HCCH Judgments Convention has sought to remedy this situation, but it is not in force and it would not apply to defamation.

The laws of the United States—where many intermediaries are based—make it particularly difficult, if not impossible, to enforce Australian orders made in a defamation proceeding in that jurisdiction.[48]

This situation could be remedied by law reform making enforcement easier. Options include:

- Explicit provisions allowing Australian subsidiaries of foreign companies behind intermediaries, and their employees, liable in contempt as if they were in the shoes of a

[48] See, eg, *Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act* 28 USC 4101- 4105 ('SPEECH Act'); First Amendment of the US Constitution. See further Richard Garnett and Megan Richardson, 'Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Freedom of Speech in Cross-Border Libel Cases' (2009) 5 *Journal of Private International Law* 47; David Rolph, 'Splendid Isolation? Australia as a Destination for "Libel Tourism"' (2012) 19 *Australian International Law Journal* 79.

foreign company that would otherwise be in contempt for failing to comply with an Australian court order.[49]

- Allowing money judgments against foreign intermediaries to be enforced against Australian subsidiaries.
- Requiring foreign parent companies of intermediaries to keep a percentage of liquid assets in Australia, taken from income derived from Australians, to be used to compensate those who are harmed by intermediaries' functions.[50] The assets could reside in an Australian subsidiary against whom the judgment is enforceable, making foreign anti-enforcement orders (eg, *Equustek*) more difficult.

(a)(ii) Reform on other aspects of private international law

The choice-of-law rule in the Uniform Defamation Acts may only apply to publications within Australia. That was assumed in Rebel Wilson's case.

If that is right, then the *lex loci delicti* rule[51] still applies to foreign publications, following *Gutnick*.[52] The profession's assumption of that situation may explain why individuals of transnational reputation—like Wilson and Gutnick—only rely on Australian publications in their pleadings. Given the principles on general damages and special damages for defamation, plaintiffs of transnational reputation can seek damages corresponding to harm occurring outside of the jurisdiction, provided there is a causal connection to Australia via a transnational grapevine effect.[53] There is no obligation on a plaintiff to plead foreign publication, in the same way there is not obligation for either party to plead reliance on foreign law.[54] (And indeed, in the same way that there should be no obligation on a party to sue an originator rather than an intermediary.)

The current situation regarding choice of law for defamation is silly. Rather than relying on complex causal arguments, a plaintiff should be able to sue on all publications, wherever occurring, under Australian law—provided the court is otherwise competent. The statutory choice-of-law rule should be adapted so that it applies to foreign publications. The Australian jurisdiction with closest connection to the damage occasioned by the publication should supply the *lex causae*, even if a non-Australian jurisdiction has the closest connection overall.

That is: Australian defamation law should apply as mandatory law to every defamation claim in which an Australian court has jurisdiction. Australians' rights on the internet should be determined by Australian law.

That amendment should be combined with amendments to the principles concerning exercise of jurisdiction. An Australian court should not stay proceedings via *forum non conveniens*, or otherwise on the basis of abuse of process, either because (a) a foreign individual, like an intermediary, is involved; or (b) the claim depends on foreign publication.

The Uniform Defamation Acts ought to be amended to the effect that: 'where a person in Australia brings a defamation action against an internet intermediary in an Australian court, the court must not decline jurisdiction on the basis that the claim has strong connections to foreign jurisdictions, or on any basis that depends on the presence of a foreign element in the proceedings'.

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[49] Courts may have this power in a variety of contexts; see, eg, *KT v Google LLC* [2019] NSWSC 1015.
[50] A hybrid of an insurance scheme deployed for other torts and the Media Bargaining Code.
[51] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.
[52] (2002) 210 CLR 575.
[53] See David Rolph and Michael Douglas, 'Movie Star Wars: Bauer Media strikes back, or a lost hope?' (2018) 29(8) *Entertainment Law Review* 265; David Rolph and Michael Douglas, 'Rebel Wilson's Pitch Perfect Defamation Victory' (2018) 29(2) *Entertainment Law Review* 37.
[54] *Palmer v Turnbull* [2019] 1 Qd R 286.

4. Answers to questions posed by the Discussion Paper, Part B

Question 18: Defamation and reports of criminal conduct

(a) Are there any indications that defamation law is deterring victims and witnesses of crimes from making reports to police and other statutory investigative agencies charged with investigating criminal allegations?

It is hard to say. How could you measure that? Anecdotally, yes. You should be consulting with experts on violence against women.

(b) Are victims and witnesses of crimes being sued for defamation for reports of alleged criminal conduct to authorities?

They are collateral damage. For examples of complainants to **alleged** offences suffering as a result of defamation claims, threats, or risk, see, eg, Porter, Foley, Rush.

Question 19: Absolute privilege for reports to police and investigative agencies

(a) Should the defence of absolute privilege be extended to statements made to police related to alleged criminal conduct?

Yes.

(b) Should the defence of absolute privilege be extended to statements made to statutory investigative agencies related to alleged criminal conduct? If yes, what types of agencies?

Yes. Any statutory agency.

(c) What type of statutory investigative agencies should be covered and what additional safeguards, if any, may be needed to prevent deliberately false or misleading reports and to protect confidentiality?

All of them. Complaints should be treated as confidential until investigations are (promptly) completed.

(d) What is the best way of amending the MDPs to achieve this aim (for example, by amending clause 27 and/or by each jurisdiction amending its Schedule 1)?

Amend the MDPs to create new defences in a separate and additional section.

Question 20: Defamation and reports of unlawful conduct in the workplace

(a) Is fear of being sued for defamation is a significant factor deterring individuals from reporting unlawful conduct such as sexual harassment or discrimination to employers or professional disciplinary bodies?

Yes.

(b) Are victims and witnesses of sexual harassment or discrimination being sued for defamation for reports of alleged unlawful conduct to employers or professional disciplinary bodies?

Usually claims concern whistleblowing more broadly rather than an initial report; eg Craig McLachlan re. Christie Whelan-Browne.

Question 21: Absolute privilege for reports to employers and professional disciplinary bodies

(a) Should absolute privilege be extended to complaints of unlawful conduct such as sexual harassment or discrimination made to: i. employers, or to investigators engaged by employers to investigate the allegation? ii. professional disciplinary bodies?

Yes. To all.

(b) If so, to what types of unlawful conduct should be included providing this protection?

Any unlawful conduct.

(c) If yes to a), what is the best way of amending the MDPs to achieve this aim (for example, by amending clause 27 and/or by each jurisdiction amending their Schedule 1)?

A new section in the MDPs.

(d) Are there sufficient safeguards available to prevent deliberately false or misleading reports being made to employers or professional disciplinary bodies? If not, what additional safeguards are needed?

Complaints should be treated as confidential until investigations are (promptly) completed.