

**New South Wales Bar Association Committee Submissions in response to
the Attorneys-General Discussion Paper: Review of Model Defamation
Provisions – Stage 2**

31 MAY 2021

Question 1-4: categorising internet services

Question 1: Categorising internet intermediary functions

(a) Is the grouping of internet intermediary functions into the three categories of ‘basic internet services’, ‘digital platforms’ and ‘forum hosts’ a useful and meaningful way to categorise internet intermediary functions for the purpose of determining which functions should attract liability? Why?

1. Because of the changing nature and functions of internet intermediaries (Discussion Paper [3.23]), this Review should not aim to create categories that capture every conceivable type of internet intermediary, now or in the future. Rather, the Review should aim to consider the common categories of internet intermediaries currently available. Future internet intermediaries can be the subject of future reform. Further, the same ‘intermediary’ might perform a range of roles spanning the categories identified in the Discussion Paper.
2. ‘**Basic internet service**’ is not a useful or meaningful category. It leads to a debate about what is ‘basic’ or ‘essential’. If the category were intended to capture neutral or passive conduits (Discussion Paper [3.27], [3.28]), then the terms ‘internet service provider’ or ‘carriage service provider’ are more commonly used and better understood.
3. Beyond the internet service providers, what is ‘basic’ or ‘essential’ internet service depends on the needs and wants of users. It also varies over time. A businessperson might consider an email service to be a ‘basic internet service’. Somebody who deals in large electronic files might consider a file transfer service a ‘basic internet service’. A teenager might consider the TikTok social media service a ‘basic internet service’. During the pandemic, a video-conferencing service became a ‘basic’ need which many earlier would not have considered essential.

4. **‘Digital platforms’** may be a useful and meaningful category. Another label that appears to be conceptually closer to what the ACCC intended (Discussion Paper at [3.45]) is ‘user-generated content service’ or ‘UGC service’.
5. The MDPs may define a **‘UGC service’** as “an online service or Internet-enabled service that facilitates the publication of matter by a user of the service to one or more other users”. That definition would capture popular social media platforms, review websites, internet forums, instant messaging services, wikis and possibly content aggregators, but not search engines. It would also capture cloud-based file storage and transfer services (e.g., Dropbox) and web-based video-conferencing services (e.g., Zoom).
6. The operator of a digital platform may be identified as a **‘UGC service provider’**, being a “person who provides a UGC service”. As the ACCC’s enquiry illustrated, there is frequent uncertainty as to who relevantly ‘provides’ the ‘service’ and this illustrates the challenge of using the three identified categories to regulate and inform potential liability.
7. **‘Forum administrators’** may be a useful and meaningful category, given the prevalence of social media platforms and the ability of corporations, groups and individuals to create pages under their control.
8. If the term ‘UGC service’ is adopted, a forum administrator may be identified as a **‘UGC administrator’**, being “a person who administers, moderates or otherwise controls a discrete part of a UGC service, excluding a UGC service provider”.

Question 2: Categorising basic internet services

(a) What internet intermediary functions should be categorised as basic internet services? It is proposed that to be categorised as a basic internet service the internet intermediary must be a mere conduit (similar to telephone or postal services) in that they do not have an interest or involvement in the nature of the content they transmit or host.

9. The only internet intermediary function that should be categorised as a ‘basic internet service’ is the provision of an internet (or carriage) service. To go beyond, invites debate about what is ‘basic’ or ‘essential’, which in turn depends on the needs and wants of a particular user: see paragraph 3 above.

10. For consistency, the MDPs should adopt the definition of ‘internet service provider’ in the BSA, Sch 5, cl 8: Discussion Paper [3.32]. Ensuring this alignment will further the development of consistent jurisprudence, particularly between defamation and copyright.
11. The concept of ‘mere conduit’ is inapt. It invites debate into what is ‘mere’, and whether a provider of a conduit might become liable if additional circumstances obtain (e.g. notice by complainant; knowledge). *See* discussion in *Roadshow Films v iiNet* (2011) 194 FCR 285 at [217]-[218], [227]-[228] (Emmett J), [460]-[462] (Jagot J), [794] (Nicholas J) on s 112E of the *Copyright Act 1968* (Cth).
12. A lack of ‘interest or involvement in the *nature* of the content’ is also an unhelpful criterion. The same could be said of many digital platforms. In providing YouTube, Google does not care whether a user watches cat videos or famous defamation cross-examination re-enactments. It wants to serve advertisements while the user uses the service. Google wants someone to watch something on its YouTube platform: no one would argue YouTube is a mere conduit.

(b) What are the key concepts that should determine if an internet intermediary function is a basic internet service? Is passivity and neutrality an appropriate basis on which to determine which internet intermediary functions attract liability?

13. See previous answer.
14. For substantially the same reasons, ‘passivity’ and ‘neutrality’ are unhelpful. These terms raise more questions than they answer. For example:
 - a. Does an internet intermediary stop being ‘passive’ if it receives a notice of complaint or learns of the presence of potentially defamatory matter? This is much like the issue of ‘mere conduit’, discussed in paragraph 11 above. In applying these terms, is there an intention to remove long-established established tests in tort law as to liability.
 - b. Does an intermediary (particularly an internet service provider) stop being ‘neutral’ if it employs technologies to detect and act on certain internet traffic, and is thus in a position to know something? For example, ISPs that offer

network-level parental controls and antivirus/anti-malware or those that ‘shape’ or block certain traffic (e.g., BitTorrent traffic).

- c. Does the intermediary stop being ‘neutral’ if it algorithmically suggests user-generated content to a user, based on the user’s previous use?
- d. Is ‘neutrality’ lost if the intermediary disputes a notice of complaint or a demand to reveal the identity of an originator?

(c) Are there any functions that could be categorised as ‘basic internet services’ but should give rise to liability, or are there circumstances in which basic internet services should be liable?

- 15. Where the matter is published from an online location outside Australia; an Australian court has found the matter to be defamatory; and any local judgment cannot be practicably enforced against any potential defendant (a foreign author, originator, digital platform, forum administrator), including because of the content of foreign law or the unwillingness of the foreign court to enforce the judgment, a plaintiff should be permitted to apply to the Australian court to grant an injunction that requires an internet service provider to take reasonable steps (in Australia or beyond subject to a Court’s enlarged jurisdictional reach) to disable access to the online location.
- 16. Such a regime could be modelled upon the provisions in s 115A of the *Copyright Act 1968* (Cth), around which there is already a body of case law in the Federal Court.

Question 3: Categorising digital platforms

(a) Is it appropriate to adopt the classification of digital platforms used in the ACCC’s Digital Platforms Inquiry Final Report to understand their roles and functions for the purpose of considering liability in defamation for third-party content?

- 17. The kinds of digital platforms considered in the *Digital Platforms Inquiry* were search engines, social media platforms and content aggregation platforms. These were identified in the Terms of Reference, presumably because of their apparent impact “on the state of competition in media and advertising services markets”.

18. From the perspective of liability for defamation, however, other kinds of digital platforms are also relevant. The Discussion Paper identifies review websites and podcast aggregators as examples.
19. If the term ‘UGC service’ is adopted (paragraph 5 above), it is inappropriate to classify subcategories of UGC services and seek to create special rules for them. The future of digital platforms is unknown and unknowable. There was no Facebook before Facebook.

(b) Do the common features listed above accurately reflect the functions of digital platforms?

20. In our view, the Discussion Paper at [3.50], [3.52], [3.54], [3.61] and [3.62] accurately lists the common features of social media platforms, digital content aggregators, search engines, review websites and podcast aggregators.

(c) Should search engines be treated as a single function for the purpose of categorising intermediaries for defamation liability? Or do search engines have different functions, some of which should or should not give rise to liability?

21. Search engines should be treated as having different functions.
22. Take the most famous example, Google. Leaving aside its YouTube ‘product’, Google’s ‘search’. functions include:
 - a. a provider of trending and suggested search terms (Google Autocomplete);
 - b. a search engine function (Google Search);
 - c. a re-direction service (I’m Feeling Lucky);
 - d. an advertising service (Google Ads, formerly AdWords);
 - e. a news content aggregation service (Google News);
 - f. a review website in relation to searches for businesses and points-of-interest (Google Reviews).
23. If search engines are to be granted exceptions from liability, it should be for search engine functions because we recognise the social value that search engines provide.

24. If search engines are to be granted exceptions for non-search features, this may provide search engine providers (particularly Google) a substantial competitive advantage over other digital platform providers, and consideration would need to be given to a reasoned basis for this exemption.

(d) Is it appropriate to consider search engines a subset of digital platforms, or should they be considered as a separate category that can have access to separate specific defences?

25. It is appropriate to consider search engines (to the extent they provide search engine functions) as a separate category that can have access to separate defences because what is published to the recipient turns on: (i) the search query; (ii) the search algorithm; and (iii) the content of various websites that have been indexed. Search engines have no real control over the first and the third matters. Their only control is over the algorithm, including the power to de-list particular results.

26. This contrasts with providers of UGC services, who typically have very extensive powers to prevent, modify and remove matter published on the services.

(e) Are there new and emerging digital platform functions that need to be considered?

27. See paragraph 1 above.

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

28. We are unaware of any publishing functions of digital platforms that should not attract liability.

(g) Is it appropriate to consider digital platforms as having comparable functions to online media companies, or should they be considered as separate categories with different responsibilities and defences? Why?

29. Digital platforms should be treated separately from online media companies because the latter does not typically rely on user-generated content. The risk of vast and indeterminate secondary liability does not ordinarily arise with online media companies, unless they provide a facility for user comments (in which case they would function as a provider of a UGC service).

Question 4: Categorising forum administrators

(a) Is it appropriate to consider 'forum administrators' as a separate category of internet intermediaries? If so, how should this be defined?

30. See paragraph 7 and 8 above.

(b) What are the different circumstances and scenarios involving forum administrators that need to be considered?

31. While conceptually the same, the characteristics of individual forum administrators will differ. Some will be professional administrators who review forums several hours a day: see *Voller* [2019] NSWSC 766 at [32]-[33], [50], [166]. Others might be 'influencers' who make a living from social media. Others still might be volunteers for community or interest-based pages who are reviewing the page irregularly.

32. Another circumstance is the organisation of forum administrators themselves. Take the classic internet forum or bulletin board (e.g., Australia's largest student community forum, <https://boredofstudies.org/>). There might be one or several 'super-admins', who are volunteers. Each forum might have one or several 'moderators', also volunteers.

Questions 5-10: liability of internet intermediaries

Introduction

33. Questions 5 to 10 (inclusive) of the Discussion Paper addresses the liability of internet intermediaries in respect of third-party content.

34. The issue of whether internet intermediaries should be treated the same as other publishers for third-party content is understandably complex. In part, this arises because of the inherent tension that defamation law must resolve, namely the right of an individual to protect their reputation set against the public interest in protecting freedom of speech and expression. This tension is magnified by the role that internet intermediaries play in permitting anyone with a phone or computer to publish potentially defamatory material to individuals, networks, or the world at large. Online publications by an individual often go 'viral' and are read or viewed by an audience whose size used to be the reserve of an accountable mass media. Internet intermediaries are often best placed to remove defamatory material from the internet, particularly when

prospective plaintiffs find it difficult to identify or communicate with originators who are recalcitrant and/or anonymous. Understandably, internet intermediaries have become the focus of defamation law reform efforts throughout the common law world.

35. The view of the Committee is that the competing interests discussed below will be appropriately balanced by introducing a new defence in relation to Internet publication modelled on the defence of innocent dissemination and the ‘safe harbour’ defence provided by section 5 of the *Defamation Act* 2013 (UK). This is discussed below.

Submissions

Definition of ‘publisher’ (Question 5)

36. The Model Defamation Provisions (**MDPs**) do not purport to define the element of publication for the tort of defamation. Rather, it is the common law which operates in relation to this element of the tort of defamation (see section 6 of the MDPs). Accordingly, the common law test currently prevails.¹ The common law has adapted this test over many decades to all manner of scenarios, in the circumstances of both traditional forms of publication and (as technology has evolved) to online publications. Courts have demonstrated a history of capably applying the established test of publication to new technologies and circumstances, albeit not always in a strictly linear fashion.
37. Insofar as the question raises the suggestion that the MDPs should be amended to include, for the first time, a definition of publisher that excludes (certain) internet intermediaries, that suggestion should not be embraced. Rather than disturbing the well-established test of publication which is a required element to establish a cause of action in defamation, and seeking to eliminate from that test one sub-class of potential publishers (which could also foreseeably impact upon the established common law jurisprudence in the area beyond that sub-class), the Committee considers that it is preferable to remedy any policy concerns about the liability of internet intermediaries via the use of existing or new defences (such as a safe harbour provision) which can better focus on precise mischiefs.
38. Relevantly, we note that the NSW Court of Appeal in *Fairfax Media Publications Pty Ltd v Voller* [2020] NSWCA 102 (*Voller*) upheld a finding that the administrator of a

¹ See *Webb v Bloch* (1928) 41 CLR 331 at 363-364 per Isaacs J.

public Facebook page was a publisher of third-party comments made in response to its posted material. The appellant/defendant in *Voller* was granted special leave to appeal, and argument was heard by the High Court on 18 May 2021. The Committee is of the view that any recommendations made by the Model Defamation Law Working Party (DWP) on the liability of internet intermediaries as publishers *per se* of third-party material should not be made prior to the High Court handing down its decision in *Voller*, so that the DWP can benefit from the considered reasoning of the High Court on the topic.

39. If the view of the DWP is consistent with the opinion of the Committee, namely that the MDPs should not purport to define the element of publication, no amendments to the MDPs are required in this respect.

Competing interests

40. The issue whether internet intermediaries should be treated the same as any other publisher requires a balance to be struck between the competing interests of plaintiffs, defendants, the public interest and the internet intermediaries themselves. Plaintiffs, or prospective plaintiffs, should (subject to establishing their claim) be entitled to protect their reputation by seeking damages, take-down orders (being orders requiring the removal of online material), or permanent injunctions (where appropriate) in relation to defamatory matter, and have recourse available to them to seek to have those defamatory matter removed from the internet. Further, the Committee is of the view that the plaintiff should have a means of seeking to have removed online material that is capable of being defamatory if the online poster is determined to remain anonymous (including by maintaining an alias or ‘fake account’), or refuses to engage at all with the prospective plaintiff; this is considered further in the context of a possible safe harbour defence below. Whilst technology can be deployed to make its users untraceable, the law should adapt to enable (prospective) plaintiffs in those circumstances to meaningfully protect their reputation. The risk of defining the element of publication to exclude certain internet intermediaries, or providing immunity for certain internet intermediaries (discussed further below), is that internet intermediaries will refuse to engage with prospective plaintiffs such that even in cases of extreme and indefensible defamation such plaintiffs will be left without a remedy.

41. On the other hand, it is trite to say that there is a public interest in ensuring that freedom of speech is adequately protected and not unduly minimised in the interests of protecting individual reputations. Freedom of speech is plainly an important feature of Australian society and an important value underpinning Australian law; the common law recognises freedom of speech as a fundamental freedom. The DWP should be slow to recommend any blanket incursions on such a freedom.
42. A related consideration is that a defendant is entitled to defend themselves against a defamation claim. Accordingly, any defence or approach which requires or incentivises third party intermediaries to simply remove online publications upon receipt of a complaint to avoid being liable for third party content, without at least giving the third-party creator of the material proper recourse to defend themselves, should be avoided. First, such behaviour might effectively provide a (prospective) plaintiff with a means of obtaining a de-facto injunction for a defamation claim which is contrary to well-established principles that injunctions are not readily granted because of the freedom of speech considerations to which they give rise.² Secondly, any such approach would risk weaponising defamation law as a means for people to attack those against whom they harboured an animus, or against whose personal or political views they disagreed with.
43. Finally, the role of internet intermediaries must be considered. Considering the different kinds of entities that constitute the landscape of internet intermediaries, it is apparent that any defence or approach which requires them to meaningfully determine whether or not a matter is defamatory should be avoided. This is because the experience of the Committee is that defamation law is complex and apt to be misunderstood by those who do not regularly practice in the area. Accordingly, third party intermediaries should be offered a means to defend themselves against liability in relation to third-party content in a way that does not require them to make detailed or sophisticated conclusions about how a court would determine a defamation claim about a particular matter, or in a way that would require them to adopt costly and inefficient business models to ensure that defamatory content is not published utilising forums or services they administer.
44. Further, given the inherently subjective task of determining whether something is defamatory and/or whether a defence applies, there is a risk that any particular bias that an internet intermediary may have on any particular issue (political or otherwise), may

² *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 (*O'Neill*).

affect the decision whether to take something down, or leave something online. Any tendency to make such decisions on the basis of a bias is contrary to the public interest in freedom of expression and should be avoided.

Immunity (Questions 6 and 10)

45. In the context of the foregoing considerations, the Committee does not recommend that any blanket immunity be granted to internet intermediaries, whether by reference to a functions-based approach or a principles-based approach.³ First, there is a real possibility that the application of any such immunity would, by virtue of the nature and speed of technological change, inevitably become outdated and therefore not operate according to its intended fashion. Secondly, whilst such an immunity (whether granted to internet intermediaries in either whole or part) would help protect freedom of speech and expression, it is likely to do so at the expense of a (prospective) plaintiff's ability to protect their reputation.

Complaints / Notices and the innocent dissemination defence (Questions 7 to 9)

46. The Committee agrees with the observations of the Discussion Paper that the concerns notice and offer of amends regime under Part 3 of the MDPs is not suited to internet intermediaries who receive a complaint about third-party content.⁴ Internet intermediaries are highly unlikely to be in a position to provide an offer of amends of the kind anticipated by the MDPs.
47. In light of those difficulties, and of the issues raised by the competing interests identified in these submissions, the Committee is of the view that there is significant merit in the introduction of a 'safe harbour' defence akin to section 5 of the *Defamation Act 2013* (UK).
48. Notwithstanding the above, the Committee would recommend at least two material changes to the UK's safe harbour defence if a similar system were adopted in Australia:
- a. first, in the UK an internet intermediary does not lose its safe harbour defence if it issues the requisite notice to the anonymous "originator" of the matter, and the originator responds stating that it does not want the material taken down - but refuses to provide their details such that they remain anonymous. That leaves the

³ Noting the suggestion in paragraph 3.88 of the Discussion Paper.

⁴ Paragraph 3.100 of the Discussion Paper.

prospective plaintiff in the unenviable position of having to commence preliminary discovery proceedings against the internet intermediary, which is often a foreign entity and is therefore either a difficult or impossible task. The plaintiff may be left with no recourse against the originator of the matter, and no ability to have it taken down in the absence of a Court order (which may be difficult to obtain or enforce, depending on other amendments to the MDP the DWP is considering). In those circumstances, the Committee is of the view that an originator who refuses to provide their real identity is no better than a person who entirely fails to respond to a notice – neither person should be able to retain their material online. Accordingly, to the extent a safe harbour defence is adopted in the MDPs, it should require an internet intermediary to take down an allegedly defamatory online publication if the originator responds to the internet intermediary’s notice but refuses to identify themselves so as to permit the plaintiff to commence proceedings against them;

- b. secondly, the UK safe harbour defence only applies to “the operator of a website”.⁵ This phrase is not defined in the UK statute, but is said to capture “operators of social networking sites, online newspapers, and bulletin boards that enable people to post and read messages, and the hosts of discussion forums. [It was] not intended to deal with internet intermediaries that ‘simply transmit information or provide access to a communication network’”.⁶ The UK manages this “gap” in the coverage of the safe harbour provisions because the common law there has evolved so as not to treat either internet service providers or search engines as publishers. Given that Australian courts have taken a different approach to at least the position of search engines⁷, further thought will need to be given as to how to accommodate other internet intermediaries (such as Google) to provide them appropriate and commensurate protection against liability. In this context, we briefly discuss the impact of s.91 of the *Broadcasting Services Act 1992* (Cth) (**BSA**) further below (see submissions re Question 17).

49. The Committee considers that there would be utility in amending the defence of innocent dissemination so far as it relates to internet intermediaries to appropriately

⁵ Section 5(1), *Defamation Act 2013* (UK).

⁶ Collins, M. (2014) *Collins on Defamation*, p. 320 [15.20].

⁷ *Trkulja v. Google LLC* [2018] HCA 25; 263 CLR 149.

balance the competing interests discussed above and to give effect to a safe harbour defence.

50. One of the difficulties with the defence of innocent dissemination contained in s. 32 of the MDPs as presently enacted is that assuming that an internet intermediary is a “subordinate distributor”⁸ it incentivises an internet intermediary to avail itself of the defence by simply removing matter that it knows, or reasonably ought to know, is defamatory.⁹ The threshold of knowing, or ought reasonably to have known, that a matter was defamatory is a low bar, does not take into account the likelihood or availability of any defences, and thus arguably incentivises “take-down” behaviour that promotes an undesirable incursion on freedom of speech.
51. A further difficulty is determining, in the context of internet intermediaries and ever evolving technology, whether a particular internet intermediary is a “primary distributor” or a “subordinate distributor”. The Committee recommends that this be clarified in relation to internet intermediaries.
52. After initially considering that a concerns notice might suffice, the Committee considers that it may confuse complainants to use the same terminology when a complaints notice already has a defined purpose which is quite separate to this one. The Committee puts forward the following proposed amendment for consideration of the DWP, which the Committee considers adequately balances and protects the competing interests discussed above, and addresses the concerns expressed with the current defence provided by s 32.
53. So as to not affect the operation of the defence of innocent dissemination so far as it relates to ‘traditional’ subordinate distributors, the Committee recommends a provision such as this be inserted as a new section to the MDP:

32A Defence of innocent dissemination in relation to Internet publication

(1) This section relates to the publication of defamatory matter on the Internet.

⁸ Defined in section 32(2) of the MDPs.

⁹ Section 32(1)(b) of the MDPs.

- (2) *It is a defence to the publication of defamatory matter if the defendant proves that the defendant was involved in the publication of the matter only in the capacity of an Internet intermediary.*¹⁰
- (3) *A defence under this section is defeated if, and only if, the plaintiff establishes that:*
- (a) *it was not possible for the plaintiff to identify the originator of the defamatory matter, and*
 - (b) *the plaintiff gave the defendant a complaints notice¹¹ 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; or*
 - (ii) *take down the defamatory matter.*
- (4) *For the purpose of subsections (3)(a) and (d)(i), it is not possible for a plaintiff to identify an originator unless the plaintiff had, or was given by the defendant, sufficient information to bring proceedings against the person.*

54. The DWG might also consider adopting a safe harbour based on the safe harbour for certain internet services in the *Copyright Act 1968* (Cth), which is in turn based on US

¹⁰ The Committee assumes that Internet intermediary will be defined in the MDPs (discussed in response to questions 1 to 4 above).

¹¹ The Committee assumes that complaints notice will be defined in the MDPs (discussed in response to questions 11 to 14 below).

copyright law: see *Copyright Act*, Part V, Division 2AA (ss 116AA to 116AJ) and *Copyright Regulations 2017* (Cth), Part 6 (regs 18-39).

55. The copyright safe harbour limits monetary relief (s 116AG(2)) but includes suggested types of injunctive relief based on the category of internet service activity (ss 116AG(3)-(4)). *See also* the pre-conditions for the safe harbour in s 116AH.

Questions 11-14: Complaints notice procedures

Question 11(a): Should a complaints notice be distinct from a mandatory concerns notice under Part 3 of the MDPs, or should the same notice be able to be used for both purposes?

56. Yes. A complaints notice serves fundamentally different purposes from a Concerns Notice under the MDPs.
57. Broadly speaking, a complaints notice of the kind under discussion serves two purposes:
- a) It is the first step in a process by which a complainant who is unable to identify the author of defamatory content on a digital platform may be able to acquire that information from the operator of the platform, and may give the complainant other remedies, for example the takedown of the material where the author cannot be identified;
 - b) If the operator of the platform complies with its obligations in respect of the complaints notice it is protected from liability.
58. A complaints notice is therefore part of a mechanism by which an internet intermediary, not the author of the defamatory material, may avoid liability for the publication.
59. A Concerns Notice, on the other hand, is a communication before action. It is part of a mechanism by which a dispute between the complainant and a party liable can be resolved without litigation.

Question 11(b): Are there any issues regarding compatibility between the mandatory concerns notice and a potential complaints notice process? Are there parts of either that may overlap or be superfluous if a mandatory concerns notice is already required?

60. Both procedures are compatible, because they serve distinct purposes.

61. A complaints notice of the kind envisaged is not, as noted, a communication before action by which the complainant sets in motion a remedial process with an identified defendant to avoid litigation.
62. In theory, the contents of a complaints notice and a Concerns Notice could be incorporated into the same document. However, that is likely to lead to confusion and potential unfairness to the Internet intermediary. The question of the discharge of its obligations under the complaints notice, and accordingly its liability at all, ought to be determined before demands are made of the kind required by a Concerns Notice.

Question 11(c): What mechanisms could be used to streamline the interaction between the two notices processes?

63. The view of the Committee is that the two notices should be kept separate. If the Internet intermediary fails in its obligations in respect of answering the complaints notice, it may become liable as a potential defendant. At that point, a properly formulated claim, setting out the relief sought, could be made against it.
64. Under the *Defamation Act 2013* (“**the 2013 Act**”) and the *Defamation (Operators of Websites) Regulations 2013* (“**the 2013 Regulations**”), only a short time is permitted for compliance with a complaints notice. The issues a complaints notice raises are more confined than those raised by a Concerns Notice. A similar complaints notice procedure – which is directed to obtaining the identity of an unidentified poster to an electronic platform, rather than settling a dispute with a known defendant – is therefore unlikely to cause any significant delay in the resolution of the dispute.

Question 12(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?

65. The issue raised in the Discussion Paper is whether the complainant should be required to do more than the requirement in reg 2(d) of the 2013 Regulations, that is, simply “confirm that the complainant does not have sufficient information about the poster to bring proceedings against that person”.

66. If s. 5 of the 2013 Act is to be followed on this point, the Committee does not think that more needs to be done by the complainant at the stage of the complaints notice. The defeat of the defence under s. 5(3)(a) of the Act requires the complainant to prove at trial that it was not possible to identify the original author (and that is replicated in the proposed defence above). That is the challenge that ultimately hangs over the complainant. There is no point in putting a complainant to some quasi-evidentiary proof at the notice stage, especially given that in most if not all cases, it will be a simple matter for the operator either to identify the author by reference to an electronic address or otherwise. If the complainant cannot make good the proof required by s. 5, the defeat of the defence will fail.
67. The kind of content that ought to be required in a complaints notice is discussed further below in answer to question 13(a).

Question 12(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?

68. For the reasons explained above, the “complaints notice” procedure ought to be restricted, as under the 2013 Act, to circumstances where the complainant cannot identify the originator.

Question 13(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?

69. In addition to paragraph 12(a) above, the Committee notes that pursuant to s.5(6) of the 2013 Act and regulation 2(a)-(e) of the 2013 Regulations, a complaints notice is required to:
- (a) specify the complainants name and contact details, including the electronic mail address at which the complainant can be contacted;
 - (b) identify the online content complained of and specify where on the intermediary’s website it is posted;

- (c) set out the meaning which the complainant attributes to the online content complained of and why that meaning is defamatory;
- (d) set out the aspects of the statement which the complainant believes are factually inaccurate; or opinions not supported by fact;
- (e) confirmation that the complainant does not have sufficient information about the poster to bring proceedings against that person;
- (f) confirm whether the complainant consents to the operator providing the poster with the complainant's name; and the complainant's electronic mail address.

70. The Committee recommends a substantially similar approach be adopted by the DWP.

71. However, the Committee notes that the 'serious harm' threshold is characterised under the MDP as an "*element of the cause of action*". This is of course different to section 1 of the 2013 Act which states that:

"A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant".

72. Consequently, in addition to the above requirements set out in [14] above, the Committee considers that it would also be appropriate for the complainant to explain why the meaning contended for (at [14](c) above) is said to surmount the serious harm threshold.

Question 13 (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?

73. The Committee considers that such a time period requirement is appropriate.

74. If the DWP substantially adopts s.5 of the 2013 Act, then consistent with regulation 4(2)(b) of the of the 2013 Regulations, the Committee considers that 48 hours' notice is appropriate.

Question 13 (c) Should a complaints notice require the complainant to make a 'good faith' declaration? Should there be other mechanisms used to prevent false claims?

75. No. Given the content of the comprehensive requirements of a complaints notice set out above, the Committee considers that a 'good faith' declaration, statutory declaration, or similar is unnecessary. It is also noted that no such requirement is required under s.5 of the 2013 Act or in the 2013 Regulations.

Question 14 (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?

76. The committee considers that making a distinction between digital platforms that can connect complainants to the originator on the one hand and, on the other, those that cannot is unhelpful.

77. Such a complaints notice process should be available to all internet intermediaries (including digital platforms) that operate a website on which the online content complained of is posted. The Committee notes that under the 2013 Act and Regulations such a distinction is not adopted.

78. In accordance with the proposed defence set out above, if the website operator is unable to contact the originator the content complained of it may still avail itself of the defence if it takes down the content complained of. It is noted that a website operator is not obliged by the 2013 Act and 2013 Regulations to remove the content. However, the failure to do so is one of the matters that a complainant must prove to defeat the s. 5 defence: 2013 Regulations, Schedule, 3(1).

79. The Committee considers that there is no reason why the operators of search engines should not in principle be entitled to the same protection under a complaints notice procedure. It may readily be accepted that in most cases, the operator of a search engine will not be in a position to contact the originator, or provide useful information to the complainant, and that the procedure under Clause 2 of the Schedule to the 2013 Regulations will not be available to it. However, the search engine operator will have the choice to remove the content or not. If it does so, and complies with the other

applicable requirements of the complaints notice procedure, there is no reason why it should not be entitled to a defence similar to that under s. 5 of the 2013 Act.

Question 14 (b) What should happen to the content following receipt of a complaints notice by the digital platform?

80. Subject to what we have said above, the Committee recommends the adoption of the 2013 Regulations, and, subject to the answer to question 14(d) below, the procedure set out in the Schedule thereto, in answer to this question.

Question 14 (c) Should the focus of the complaints notice process be to connect the complainant with the originator? What other outcomes should be achievable through this process?

81. Consistent with what we have said above, the focus of the complaints notice process should be to provide complainants with sufficient information to identify the originator of the content complained of (where that information is available), and to enable digital platforms to protect themselves by taking positive action (such as removal or geo-blocking content), thereby receiving immunity from being sued in defamation.

Question 14 (d) What steps from the UK process should be adopted in Australia?

82. For the reasons explained above, the Committee recommends that the DFP adopts a defence akin to s.5 of 2013 Act and the 2013 Regulations, subject to the two matters referred to in of the answer to Question 9 (see [48] above):

- a) First, in order to maintain the protection, an internet intermediary should take down an allegedly defamatory online publication if the originator responds to the internet intermediary's notice but refuses to identify themselves so as to permit the plaintiff to commence proceedings against them;
- b) Secondly, given that the common law of Australia and England are no longer aligned on the issue of whether the operator of a search engine is a publisher, there is no reason why the operator of a search engine should not have the benefit of a complaints notice procedure. This matter is more fully developed above.

Question 14 (e) Are there circumstances where the digital platform should be able to remove the content complained of without the poster's agreement?

83. The Committee considers that removal of content is a matter for the digital platform and its relationship with the originator of the content.
84. It should be borne in mind that the complaints notice procedure under the 2013 Act and Regulations is not a process under which it is at any point mandatory to remove defamatory content. It is a process under which the failure to follow it (if such is proved by the complainant at trial) defeats the defence.

Questions 15: orders to have online content removed

- (a) *What should be the threshold for obtaining an order before a trial to require the defendant to take down allegedly defamatory material?*
- (b) *Is there a need for specific powers regarding take down orders against internet intermediaries that are not parties to defamation proceedings, or are current powers sufficient?*
- (c) *What circumstances would justify an interim or preliminary take down order to be made prior to trial in relation to content hosted by an internet intermediary? Should courts of all levels be given such powers? For example, in some jurisdictions lower courts have limited powers to make orders depending on the value of the claim.*
- (d) *Should a court be given power to make an order which requires blocking of content worldwide in appropriate circumstances?*
- (e) *If such powers are necessary, is it appropriate for them to be provided for in the MDPs or should it be left to individual jurisdictions' procedural rules?*
- (f) *Are there any potential difficulties with jurisdiction or enforceability of such powers which could be addressed through reform to the MDPs?*
85. As noted in the Discussion Paper at [3.223], the power to grant interim injunctions in defamation cases (including orders compelling the removal of online material before trial) is ordinarily exercised with great caution and only in very clear cases.¹² This reflects the important public interest in the right of free speech. As noted below in relation to Question 17, it should not be overlooked that different causes of action may

¹² *O'Neill* at [16]-[18] (per Gleeson CJ and Crennan J) citing the decision in *Bonnard v Perryman* [1891] 2 Ch 269 per Lord Coleridge CJ.

sometimes be relied on in this context, including injurious falsehood, and that somewhat different considerations may apply in relation to interim injunctions in that context.¹³

86. The current “threshold” for obtaining an interim injunction is reflected in the organising principles to be applied having regard to the nature and circumstances of the case:

“In all applications for an interlocutory injunction, a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff’s entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy and has shown that the balance of convenience favours the granting of an injunction.”¹⁴

87. In the context of defamation proceedings, the application of those organising principles requires particular attention to, among other considerations, the public interest in free speech. The source and importance of freedom of speech was outlined in *Monis v The Queen* 249 CLR 92 by French CJ at [60]:

“Freedom of speech is a common law freedom. It embraces freedom of communication concerning government and political matters. The common law has always attached a high value to the freedom and particularly in relation to the expression of concerns about government or political matters. Lord Coleridge CJ in 1891 described what he called the right of free speech as “one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done”. The common law and the freedoms it encompasses have a constitutional dimension. It has been referred to in this Court as “the ultimate constitutional foundation in Australia.”

88. Another matter that requires consideration when applying for an interim injunction in a defamation case is the fact that the outcome of a trial is especially likely to turn upon issues that are unresolved (for example, facts matters and circumstances relied upon in support of a plea of justification). Further, it may be that a plaintiff’s general character

¹³ See, for example, *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 at [58]; *AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* [2010] NSWSC 1395 at [39]; *Menulog Pty Ltd v TCN Channel Nine Pty Ltd* [2012] NSWSC 247 at [21]; compare *Agustin-Bunch v Smith* [2021] VSC 158, per John Dixon J at [129]-[140], in relation to claims for relief under the Australian Consumer Law.

¹⁴ *O’Neill* at [19].

will be found to be such that, even if the publication is defamatory, only nominal damages will be awarded.¹⁵ If a defendant asserts that it will defend the defamatory statement as true then in all but exceptional cases, the court will exercise its discretion to refuse an injunction.

89. The question of the appropriateness or otherwise of the current “threshold” for a plaintiff to obtain an interim injunction compelling an originator to remove allegedly defamatory content posted online pending trial, appears to have been prompted by the findings of the review conducted by the Law Commission of Ontario (LCO).¹⁶
90. As disclosed in the final report of the LCO, the longstanding common law rule in Canada, referred to as the “rarest and clearest of cases” test, closely reflects the applicable principles for considering whether to grant an interim injunction in defamation proceedings in Australia. Relevantly, in Canada, so long as the defendant pleads that the statement is true or defensible on some other ground, freedom of expression is paramount and the statement must be allowed to stand pending judgment.
91. The LCO review concluded that the “rarest and clearest” test is outdated and overly restrictive in the case of interlocutory motions for the removal of allegedly defamatory online content.¹⁷
92. The LCO set out the following five reasons why it determined that the test was no longer an appropriate standard for online defamation cases and why a new test should be adopted:
 - a. That the test had been developed in a context that had involved traditional media publishers who were subject to journalistic standards and the public interest in the freedom of the press, whereas many individual online publishers are not bound by such standards and principles;
 - b. The potential reach and impact of online defamatory attacks was unimaginable at the time the traditional rule was adopted;

¹⁵ *O’Neill* at [19].

¹⁶ See the final report released by the Law Commission of Ontario in March 2020 following its *Defamation Law in the Internet Age* review at pp 54-59.

¹⁷ LCO final report at p 54.

- c. The high threshold of the traditional test is based on a presumption that damages following a trial are sufficient to vindicate the plaintiff's reputation whereas the reality today is that many individual publishers will not have the resources to satisfy a damages award;
 - d. The traditional test was premised on the basis that defamation trials were traditionally heard by juries;
 - e. Speed has become paramount in controlling the spread of reputational harm online.¹⁸
93. The new two-part test for interlocutory take down orders in defamation cases promulgated by the LCO involves the plaintiff establishing: *first*, that there is a strong prima face case both that a defamation has occurred and that the defendant has no valid defence and *secondly*, that the reputational harm resulting or likely to result from the impugned expression is sufficiently serious that the public interest in granting the takedown order outweighs the public interest in protecting the expression.¹⁹ The LCO described this new test as requiring a more contextual weighing of the balance between protection of reputation and freedom of expression.²⁰
94. We are of the view that the current "threshold" for obtaining an order before trial requiring a defendant to take down allegedly defamatory material remains appropriate and is suitably flexible to accommodate the particular issues that arise in respect of content posted online, including because:
- a. The current "threshold" applies equally to individual publishers as it does to mass media publishers who may be subject to particular standards. To the extent that an individual publishes material online that is untruthful and/or of a personal nature (i.e. with no public interest), those matters will be taken into consideration in the application of the existing principles. Simply because there may be greater opportunity to publish such material through social media and other online platforms (including anonymously) does not warrant a new threshold for obtaining an interim injunction in defamation proceedings, let alone one that has the potential

¹⁸ LCO final report at p 56.

¹⁹ LCO final report at pp 57-58.

²⁰ LCO final report at p 54.

to lessen the significance of the public interest in free speech in the balancing exercise;

- b. The application of the existing principles requires the plaintiff to establish not only a prima facie case (i.e. that there is a serious question to be tried as to the plaintiff's entitlement to relief) but also that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy. The second element necessarily involves a consideration of the nature and seriousness of the relevant allegations as well as the extent of the publication. To the extent that an online publication may have a greater reach and impact than other types of publication, such as more traditional print media, that is a matter that may be considered by the court as part of the application of the current organising principles. That is precisely what occurred in *Webster v Brewer* [2020] FCA 622, where the court determined that the vile nature of the allegations and the extent of their publication on Facebook were such that damages may not have been an adequate remedy and that an interim injunction was warranted (see in particular [15]-[16] of that decision);
- c. Simply because individual publishers of defamatory material may not have the resources to satisfy a damages award does not mean that the current "threshold" is inappropriate. Furthermore, the question of whether a defendant has the financial capacity to meet an award of damages in favour of the plaintiff has always been a relevant consideration in determining the balance of convenience in applications for interim injunctions in defamation proceedings;²¹
- d. Given that jury trials are still available in defamation proceedings²², it must be presumed that trials will be conducted as both judge-alone and jury trials. The mere fact that jury trials are less common is an insufficient basis to found an amendment to the current "threshold";
- e. The fact that online defamations may go viral and otherwise spread quicker than traditional print publications may mean that applications for interim relief will need

²¹ See, for example, *Doe v Dowling* [2017] NSWSC 1793 at [46].

²² Section 21 of the *Defamation Act 2005* provides for either a plaintiff or defendant to elect for defamation proceedings to be tried by jury. The proposed amendments to that section set out in the *Defamation Amendment Act 2020* relevantly provide for the circumstances in which an election may be revoked, but otherwise preserves the right to elect for a jury trial: see the proposed omission of section 21(3) and insertion of new sub-sections 21(3) and (4) under the new legislation.

to be made with greater expediency. However, those matters do not warrant any changes to the current “threshold” for interlocutory injunctions. The extent to which allegations have been published and re-published on social media and other online forums, as well as the likelihood that such allegations will be re-published elsewhere on the internet, are all matters that may be taken into consideration by the court in applying the current “threshold” when determining applications for interim injunctive relief in defamation proceedings.

95. Further, in weighing the LCO’s proposals, it is important to take into account other changes which may be made as part of the “Stage 2” reviews. Above, we have referred to the prospect of a “safe harbour” defence for internet intermediaries, and suggested that, subject to certain important conditions, such a defence may be appropriate. That provides an important context in which to consider the principles which should apply in relation to pre-trial orders requiring an internet intermediary to take down defamatory material, because the conditions attached to such a “safe harbour” defence will likely provide substantial encouragement to internet intermediaries to remove offending material. Finally, there would seem to be practical difficulties in the new two-part test promulgated by the LCO insofar as the plaintiff being able to establish at an interlocutory stage, especially ex-parte, that the defendant has no valid defence.
96. We note the observation at [3.217] of the Discussion Paper that it is currently unclear whether and when courts would be in a position, or would exercise discretion to make orders requiring *internet intermediaries* to “take down”, “de-list” or disable access to content that has been found to be defamatory. We further note and agree with the proposition at [3.217] of the Discussion Paper that courts in defamation (and other civil) proceedings will generally only grant orders against defendants joined to proceedings.
97. In the United Kingdom, section 13(1) of the *Defamation Act 2013* provides that where the court gives judgment for a claimant, it may order the operator of a website to remove the statement of any person who was not the author, editor or publishers of the statement to stop distributing, selling or exhibiting it.
98. It appears that there are no reported cases in which such an order has been made. That may be because in practice Google and social media platforms have voluntary procedures by which they will remove material that is the subject of a judgment for a

plaintiff in defamation proceedings (even if they are not joined to the proceedings and/or such a judgment has been given outside the jurisdiction of the relevant intermediary).

99. Further, even though an order for the removal of material found to have been defamatory may not have been made against an internet intermediary (as opposed to the originator of that material), the law of contempt may encourage such intermediaries to take down or otherwise disable access to such material in circumstances where, although not the subject of any order, they may be still be liable for contempt to the extent they have knowledge of the order and assist in its breach by permitting the material to remain online.
100. In the absence of an issue that needs to be addressed through the enactment of legislation providing the court with a specific power to order internet intermediaries that are not parties to defamation proceedings to remove material, we are of the view that there is no need for such power.
101. We are otherwise of the view that the same approach should be taken towards applications for interlocutory injunctions in relation to content hosted by an internet intermediary as the approach referred to above in respect of content published by the originator of that content, namely the approach referred to by the High Court in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.
102. It is noted that that was the approach taken by the District Court of Queensland in relation to an application for orders requiring Twitter Inc to remove user posts in *Kowca v Twitter Inc* [2020] QDC 252.
103. Accordingly, and assuming that it could be shown that the relevant application had come to the attention of the relevant intermediary or that service had been properly effected, the circumstances in which the court would be justified in making an interim injunction against such an intermediary would be where (i) the plaintiff had made out a prima facie case and (ii) where the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighed the injury the defendant would suffer if an injunction were granted, having regard to the cautious approach taken by the court to such applications and the primary consideration in the public interest in free speech.

104. Finally, there does not appear to be a present need for the courts to be given specific power to make orders requiring the blocking of content worldwide so long as internet intermediaries continue to abide by the orders and judgments of Australian courts. To the extent they do not do so in the future, further consideration could be given to the issue. However, on present experience, there is no mischief requiring redress by further legislation. The application of such a power would inevitably raise complicated issues concerning jurisdiction and enforceability, matters which we do not intend to address given our view that there is no current mischief warranting the provision of that power either in the MDPs or otherwise.

Question 16: power of courts to order internet intermediaries to reveal identity of originators²³

105. The issue of anonymous defamation is not new, or limited to online publications. However, it assumes particular significance in the online context, because of the ease with which such publication occurs, and the potential reach of such publication.

106. Apart from giving rise to the familiar conflict between principles of freedom of expression and protection of reputation, this particular area also involves a third competing consideration which is the protection of privacy. In that respect however, it may be thought that the private interests, and public benefits, of preserving anonymity may be significantly attenuated in relation to anonymous public statements as opposed to confidential ones (e.g. in a “whistle blower” context).

107. One of the greatest areas of concern in recent times has been the making of “review” posts, especially on the Google Reviews platform. Unlike, for example, some travel review platforms, Googles Reviews appears to operate on a substantially unmoderated basis, meaning that there is no real barrier preventing posts being made in bad faith, for example by trade rivals or those seeking to exert improper pressure on a business. The underlying challenge, of course, is to allow people and businesses to protect themselves from such abuse of the review platforms, while providing a proper basis for good faith posts to be made, even if critical in content.

108. In a series of recent cases, partly noted at DP [3.232], the Federal Court has ordered international service on an internet intermediary of preliminary discovery process. In

²³ DP pp.78-81; paras 3.231-3.244.

addition to the cases there noted, see *Allison v Google LLC* [2021] FCA 186; *Seven Consulting Pty Ltd v Google LLC* [2021] FCA 203; *Sydney Criminal Lawyers v Google LLC* [2021] FCA 297.

109. In general terms, those cases illustrate an appropriate and relatively simple way of seeking information about anonymous postings, at least where they are arguably defamatory, and appropriate inquiries have otherwise been made. As the DP observes [3.235], such proceedings are attended with some expense, although as the potential lifting of anonymity is not a trivial matter, some sort of filtering process appears appropriate.
110. Addressing the matters raised at DP [3.235] and [3.239], it does not seem to the Committee that there is an obvious better procedure for the obtaining of such orders. Any non-court based process is likely to be attended with at least as much (and probably more) delay than preliminary discovery and will likely involve an assessment of the defamatory (or other actionable) characteristics of the publication in question, which will lead to the involvement of lawyers in any event. Conversely, it seems to the Committee that a generally appropriate balance is struck by the requirements for preliminary discovery, so far as privacy concerns are concerned, at least in relation to publications to the public at large.
111. It appears to the Committee, that the best way to encourage internet intermediaries responsibly to disclose, and perhaps collect, identity information is to make appropriate provision on the issue as part of the innocent dissemination defence (see above in relation to questions 7 to 9).

Question 17: Other matters regarding liability of internet intermediaries

The Broadcasting Services Act, s91, and successor legislation

112. The Discussion Paper states that the CAG includes the AG from the Australian Government as well as state and territory AG's (Glossary at page 3) and it is presumed that the Commonwealth AG will also consider the issues in this paper as well as responses to it. The elephant in the room so to speak, is of course clause 91 of Schedule 5 of the BSA introduced way back in 1999, which arguably continues to render

defamation law to be of no effect if it subjects an ‘internet content host’²⁴ to liability where it was not aware of the nature of the content or where it was required to monitor content.

113. The purpose of the 1999 Act, which introduced Clause 91²⁵ was to provide an effective regime to address the publication of illegal or highly offensive material which may be harmful to children.²⁶ It was not introduced to limit the operation of the law of defamation and yet its spectre has remained present throughout.
114. This provision amongst others is to be replaced by the provisions of the Online Safety Bill 2021 which at the time of writing had passed through the House of Representatives and has been read for the first time in the Senate and is presently being considered by the Senate Standing Committee for the Scrutiny of Bills.
115. In the Discussion Paper at 3.19, the application of clause 91 is said to be ‘unclear’, for example it is unclear what ‘aware of the nature of’ the Internet content means (does it mean actual awareness or constructive awareness?) However, the new proposed section 235 of the Online Safety Bill 2021 proposes identical wording with all its lack of clarity and the only change is that an ‘Internet content host’ is now an ‘Australian hosting service provider’. This in turn is defined as a person who provides a hosting service that involves hosting material in Australia and ‘Hosting service’ has its own definition under section 17 which includes a person who hosts stored material provided on a social media service, and so would presumably include both Facebook itself and also a public Facebook page operator or administrator.
116. As with the 1999 Act, the 2021 Bill has all of the noble purposes set out at paragraph 2.50 of the Discussion Paper, none of which are to restrict the operation of the law of defamation. As with Clause 91, the new section 235 contains a provision permitting the Minister to exempt a specified law of a state or territory or rule of common law.
117. The Committee considers that whatever changes are proposed and are eventually enacted to amend state and territory legislation concerning the liability of internet intermediaries, it may have no effect if such laws would have the effect even indirectly,

²⁴ A definition of such wide import that it includes any operator of a website or other platform which is able to control content it makes available to internet users – Voller (CA) at [21] per Basten JA.

²⁵ *Broadcasting Services Amendment (Online Services) Act 1999*.

²⁶ Explanatory Memorandum that pages 1 – 3 and repeated in the Second Reading Speech of 21 June 1999.

of imposing liability where the host has no knowledge of actual content or must monitor content generally.

118. If the review involves the participation of the Commonwealth, then, in order to have workable provisions (if they are to remain at state and territory level, where every other online regulation is at a federal level) the Minister should give serious consideration to either amending the current Bill or exempting the law of defamation from the operation of section 235(1).
119. As discussed above in relation to a 'safe harbour' defence for internet intermediaries, in circumstances where an online poster is either anonymous or alternatively refuses to engage with the plaintiff for the purposes of a defamation hearing, it is the view of the Committee that any safe harbour defence should require take down of the material if it is reasonably capable of being deemed defamatory.

Other causes of action

120. The DP is concerned with defamation, although the issues relating to anonymous publications would apply equally, or at least substantially, to other related causes of action, such as injurious falsehood or misleading or deceptive conduct. A good example is the problem with anonymous publications.
121. In general terms, it is respectfully suggested that the impact of any changes should also be considered having regard to those other causes of action, which may be advanced in respect of substantial damage, including in a business context. Thus, it may be noted that any new or expanded defence of innocent dissemination would seem to have no direct application to an action brought in injurious falsehood. It may be that that is because the element of malice may be assumed to be incapable of proof, but it is a matter for consideration.

Complaints procedure

122. To the extent not otherwise dealt with, it should be incumbent on digital platforms to provide a clear indication on their websites of (a) the complaint procedure available in respect of postings considered objectionable and (b) the name and address of the entity which takes legal responsibility as the publisher of the website. It is not appropriate that prospective applicants for relief should face the risk of commencing proceedings against the wrong legal entity.

Questions 18-19: reports of criminal conduct; absolute privilege for reports to police and investigative agencies

123. The Committee is not aware of evidence that defamation law is deterring victims and witnesses of crimes from making reports to police and other statutory agencies charged with investigating crimes.
124. While on occasion persons have been sued for a communication to the police, there is no evidence proceedings of this kind have increased in number nor of any pattern in the outcome of such proceedings.²⁷
125. The UK common law has extended absolute privilege to statements made to the police.²⁸ That approach has not been followed in Canada.²⁹ In *Mann v O'Neill*, the High Court had this to say on the issue:³⁰

It is not necessary that statements to prosecuting authorities be absolutely privileged. The function of an authority charged with investigation and prosecution, whether in the courts or elsewhere, is not to ascertain the truth and justice of the matter in a final or binding way, but to decide whether the circumstances warrant the institution of proceedings to ascertain the truth of the matter. Absolute privilege is not required for the effective discharge of that function. Nor is it required for complaints inviting investigation of a special magistrate's ability to discharge his duties of office.

126. The ACT Court of Appeal endorsed the approach in *Shiels v Manny*.³¹

²⁷ See for instance:

- *Coles Myer Limited v Webster, Coles Myer Limited v Thomson* [2009] NSWCA 299 (The case involved communications by a K-Mart manager concerning fraud by customers. The defence of qualified privilege failed and malice was established in circumstances where the manager was found to have fabricated the allegation.)
- *LVMH Watch & Jewellery Australia v Michael Lassanah & Ors* [2011] NSWCA 370 (Communications by staff of a watch shop to police, and then communications by police - on a public street - in the course of speaking to the customers about who the allegations were made. The allegation of defamation by staff settled. The case against the police proceeded and defence of qualified privilege was upheld on appeal).
- *Bechara v Bonacorso (No 4)* [2010] NSWDC 234 (report to police alleging plaintiff or associate drive stolen vehicle into defendant's property which was then set alight. Defence of qualified privilege made out and allegation of malice rejected).
- *Bodenstein v Hope Street Urban Compassion* [2014] NSWDC 126 (The case involved communications by a Hope Street Urban Compassion counsellor to the Police concerning the taking of his mobile telephone. Defence of qualified privilege made out and allegation of malice rejected.)
- *Shiels v Manny* [2012] ACTCA 22 (letter to police alleging plaintiffs involved in assault and paedophilia. Malice was found and the allegations were fabricated. The Court of Appeal held the defence of absolute privilege was unavailable).

²⁸ *Westcott v Westcott* [2008] EWCA Civ 818; [2009] QB 407, *Taylor v Serious Fraud Office* [1999] 2 AC 177.

²⁹ *Caron v A* 2015 BCCA 47.

³⁰ *Mann v O'Neill* (1997) 191 CLR 204 at 216.

³¹ *Shiels v Manny and Manny Pty Ltd; Manny v Shiels* [2012] ACTCA 22 at [46].

In this approach, we are strengthened by our view that the reasons expressed in the English authorities cited for extending absolute privilege to all statements made to prosecuting authorities, with respect, are not compelling. We find it difficult to see why there is any public interest in extending absolute privilege to the making of false and malicious statements simply because they are made to Police. In our respectful opinion, the High Court's approach in Mann v O'Neill achieves a better balance between issues of free speech and the desirability of encouraging the proper administration of justice on the one hand, and the interests of individuals not to be the subject to malicious, untruthful and potentially damaging statements on the other.

127. Some of the difficulties extending the blanket protection of absolute privilege to communications to police concerning crimes are illustrated by the facts in *Coles Myer Limited v Webster*.³² In that case the store manager had fabricated an allegation leading to the detention of the plaintiffs. The two young men (described in the matter complained of as being of “Lebanese appearance”) suffered serious psychological harm from the experience. Similarly in *Shiels v Manny* fabricated allegations of child abuse were circulated about a police officer amongst other police officers.³³
128. While the communication of a false complaint to the police may be an offence, the laying of such charges will always be affected by available resources and police and prosecutorial discretion. The point is that an individual who is the victim of a false complaint may find themselves with no redress or ability to vindicate their reputation. Those persons may be comparatively powerless and suffer significant harm as in *Coles Myer Limited v Webster*.
129. Whilst Schedule 1 of the *Defamation Act 2005* (NSW) extends absolute privilege to certain types of communications involving investigative agencies, at least in some cases that does not include the complaint itself³⁴ and the relevant agencies where complaints might be included tend to undertake a quasi-judicial function. Furthermore, statutory regimes, including those designed to encourage the reporting of child abuse, tend to extend protections to volunteered communications only made in good faith.³⁵ These

³² *Coles Myer Limited v Webster* [2009] NSWCA 299.

³³ *Shiels v Manny* [2012] ACTCA 22.

³⁴ See for instance *Hunter v Hanson* [2017] NSWCA 164 at [28]-[30], *Lucire v Parmegiani* [2012] NSWCA 86.

³⁵ Section 237 of the *Health Practitioner Regulation (National Law)* (NSW), section 96(2) of the *Health Care Complaints Act 1993* (NSW), section 40A of the *Veterinary Practice Act 2003* (NSW), section 29 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), section 316A (Concealing Child Abuse Offence) of the *Crimes Act 1990* (NSW), section 68 of the *Children's Guardian Act 2019* (NSW).

sort of regimes are not consistent with any extension of absolute privilege to cover all complaints made to agencies investigating crimes.

130. In any event there is a difference between a protection accorded to a complaint that is part of an organised statutory process (with all the attendant privacy and procedural protections) and a communication to police which may occur publicly in the presence of others or otherwise lead to immediate and (potentially very dire) consequences for the target.
131. The Committee does not believe that absolute privilege should be extended to protect all communications to police and if the Attorneys General are considering such an extension it ought to be as confined as possible. If the Attorneys General are of the view that the law requires further clarification, then the appropriate response would be to introduce a new defence protecting a person (the complainant) who reports information that a serious indictable crime may have been committed to the police or other agencies responsible for the investigation of crime. Under such a defence the complainant would be immune from liability in defamation for their report unless the plaintiff could establish that the complainant did not make the report in good faith.

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

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

132. Whether a 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 is not a question which is susceptible of any definitive answer.
133. What can be said, however, is that defamation proceedings in respect of complaints made to employers or professional disciplinary bodies are very rare. The Committee's searches have identified only one published decision under the 2005 national uniform defamation laws relating to such complaints – *Lucire v Parmegiani* [2012] NSWCA 86. In that case, the defendant, a psychiatrist who had given expert evidence in personal injury proceedings, sent a letter to the New South Wales Medical Board accusing the plaintiff, a fellow psychiatrist who had given expert evidence on the opposite side of the personal injury proceedings, of negligence and perjury in relation to her evidence.

134. Searches of published decisions would not, of course, identify any cases which may have been commenced but settled before judgment. In anecdotal terms, however, the Committee's experience is that it is not at all common for complainants to be sued for defamation in respect of their complaint to an employer or disciplinary body.
135. The reason why such reports rarely become the subject of defamation proceedings is that the making of a complaint of unlawful conduct is an undoubted occasion of qualified privilege at common law. An occasion of qualified privilege arises at common law when a person communicates information which he or she has a legal, moral or social duty or interest in communicating, to a person who has a reciprocal legal, moral or social duty or interest in receiving that type of information.
136. When a person makes a bona fide complaint of misconduct, such as sexual harassment or discrimination, and that complaint is made to a person or organisation who is appointed to receive such complaints (for example, a professional disciplinary body or an employer's human resources department), an occasion of qualified privilege plainly arises. Authority for that proposition includes, for example, *Lloyd-Jones v Allen* [2012] NSWCA 230 at [68] per Nicholas J (Beazley and McColl JJA agreeing).
137. This means that if a person sues a complainant for defamation in respect of the making of a complaint to an employer or disciplinary body, they do so in the face of a clear prima facie defence. This prima facie defence is available no matter how trivial or unmeritorious the complaint is in substance, because qualified privilege attaches to the occasion of making a complaint to an appropriate recipient and is not conditioned by the intrinsic quality of such complaint.³⁶
138. A defence of qualified privilege is defeated if the plaintiff proves that the defendant was actuated by malice in publishing the matter complained of. The possibility of proving malice, however, affords only a limited safeguard against the making of deliberately false or misleading complaints.
139. In order to prove that the publication of the matter was "*actuated by*" malice, the plaintiff must prove that malice was *the* dominant motive for publication, not merely

³⁶ The limited exception to this proposition is that if the matter published contains too much material which is irrelevant to the occasion giving rise to the privilege, the proper conclusion may be that the matter "*exceeds*" the privileged occasion, rendering the defence unavailable. Such cases are comparatively rare.

one motive among others: *Horrocks v Lowe* [1975] AC 135 at 149-151. The meaning of malice was explained in *Roberts v Bass* (2002) 212 CLR 1 at [75]-[77]. The key principles are:

- a) The defence of qualified privilege exists for a specific purpose – the sharing of information between people with reciprocal duties or interests in relation to the subject of that information. Malice exists when the publication of the defamatory matter is motivated primarily by a purpose or motive which is foreign to the occasion of privilege;
- b) Ill-will, spite, prejudice, bias, recklessness or the defendant's lack of belief in the truth of the defamatory statement may provide a partial basis for inferring that the publication was motivated by an improper purpose, but they are not in themselves proof of malice;
- c) Evidence that the defendant knew that a defamatory statement was untrue is usually conclusive evidence that the publication was motivated by malice.

140. Malice is a serious allegation which is generally difficult to prove, but a prospective plaintiff who wishes to commence defamation proceedings in respect of a complaint made to an employer or disciplinary body is faced with a particular difficulty. Because the making of a complaint to such bodies is a clear occasion of qualified privilege, and there is therefore a prima facie defence, the prospective plaintiff needs to be confident, prior to commencing proceedings, that he or she would be able to prove malice, in order to be satisfied that the proceedings would have reasonable prospects of success. In other words, the prospective plaintiff is forced to make a decision on the likelihood of being able to prove malice before forensic processes such as discovery, interrogatories and subpoenas have occurred. In many cases, this is simply not possible.

141. Practitioners who regularly advise and appear in defamation cases are well aware of this, and for those reasons, experienced practitioners advise prospective plaintiffs *against* commencing defamation proceedings in respect of complaints to employers or disciplinary bodies for the reasons set out above.

142. Absolute privilege is a radical defence which protects even knowingly false, malicious publications from liability in defamation. The Committee's strong view is that such a defence *should not* be extended to complaints about unlawful conduct made to

employers or to investigators engaged by employers. Doing so would strip away the limited safeguards which exist against the making of deliberately false or misleading complaints. The clear availability of a defence of qualified privilege in this context is sufficient protection for the making of bona fide complaints.

Addendum: need for changes to the “Stage 1” reforms

143. Although these submissions are in response to the Discussion Paper concerned with possible Stage 2 reforms, some members of the Committee consider it should briefly address some difficulties with the Stage 1 reforms. Those reforms have led to legislation being enacted (but not yet proclaimed) in some Australian jurisdictions, including New South Wales.
144. The first is the concerns notice provisions (found in ss12-19 of the *Defamation Act 2005* (NSW), as amended, and its counterparts). Those provisions, for the first time, (a) make service of a concerns notice a mandatory prerequisite to the commencement of defamation proceedings (s12B(1)(a)); and (b) limit the imputations to be raised by the plaintiff in the proceedings to those specified in the concerns notice, or imputations that do not differ in substance, unless leave of the Court is given to rely on different imputations (s12B(1)(b), 12(2), 12(3)).
145. Some members of the Committee are concerned that such provisions, no doubt enacted with the laudable aim of reducing costs and encouraging offers to make amends, and therefore encouraging settlements, will actually have a reverse effect in practice. That is, that these new provisions will cause substantially greater legal costs to be incurred at the very start of the dispute process, thereby giving rise to an impediment to early resolution of disputes.
146. The second is the serious harm element of the cause of action (found in s10A of the *Defamation Act 2005* (NSW), as amended, and its counterparts). While steps to discourage disproportionate defamation litigation are appropriate, it seems to some members of the Committee that, in its present form, provisions such as s10A will likely cause further substantial costs to be incurred early in proceedings, likely with little additional benefit in terms of protecting potential defendants from the consequences of unmeritorious or disproportionate defamation suits. A step more likely to achieve such protection would be to address the costs recovery for plaintiffs in cases where damages awards are low.

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