



THE VICTORIAN BAR INCORPORATED

**SUBMISSION TO THE  
MEETING OF ATTORNEYS-  
GENERAL**

REVIEW OF MODEL DEFAMATION  
PROVISIONS – STAGE 2

## INTRODUCTION

1. The Victorian Bar (**the Bar**) welcomes the opportunity to provide submissions to the Meeting of Attorneys-General (**MAG**) in relation to the Stage 2 defamation reforms.
2. This submission adopts the acronyms used in the Discussion Paper.

## ACKNOWLEDGEMENT

3. The Bar acknowledges the contributions of its Defamation Law Working Group in the preparation of this submission, in particular Dr Matt Collins AM QC, David Gilbertson QC, Paul Hayes QC, Justin Hooper, Toby Mullen, Sally Whiteman and Holly Jager.

## COMMENTS IN RESPONSE TO THE INVITATION TO PROVIDE FEEDBACK

### Question 1: Categorising internet intermediaries

- (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?*
4. Yes. The Bar agrees with the analysis provided in the Discussion Paper.

### 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.*
5. The Bar agrees with the proposal in the Discussion Paper. That is, in order to be categorised as a basic internet service, the internet intermediary should 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.
- (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?*

6. The Bar is of the view that passivity and neutrality are appropriate bases on which to determine which internet intermediary functions attract liability. The Bar agrees with the analysis provided in the Discussion Paper.
  - (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?*
7. Matter published through the function of a basic internet service (based on passivity and neutrality), such as an ISP, should not be subject to liability.

### **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?*
8. Yes. The Bar agrees with the analysis provided in the Discussion Paper.
  - (b) *Do the common features listed above accurately reflect the functions of digital platforms?*
9. Yes.
  - (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?*
10. The liability of internet intermediaries should be determined by reference to the function or functions they perform in respect of the allegedly defamatory publication in question, rather than by reference to whether, for example, an internet intermediary falls within the definition of a search engine or some other category. This reflects that there may be some functions performed by search engines which ought not to attract liability, while others should. Liability is best determined by reference to the degree of (actual or constructive) awareness of the search engine of the impugned publication, as more precisely defined in an amended defence of innocent dissemination and the introduction of a safe-harbour, rather than a blanket rule.
  - (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?*
11. They should be considered a subset of digital platforms. The Bar agrees with the analysis provided in the Discussion Paper. It would introduce incoherence to the law to seek to create a distinct regime for search engines, having regard to the fact that many digital platforms that would not ordinarily be described as search engines incorporate some search functionality, and search engines provide functionality beyond the neutral provision of search results.

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

12. The Bar is not aware of any further new or emerging digital platform functions. However, it submits that a regime which determines liability of an internet intermediary having regard to the intermediary's actual or constructive knowledge of the impugned publication should be effective to adapt to new or emerging digital technologies. The possibility that future amendments may be required to adapt to emerging technology cannot, however, be excluded.

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

13. Functions of digital platforms which are neutral and passive should be excluded from liability. In the view of the Bar, a base requirement for liability for intermediaries, in respect of content they did not originate, should be actual or constructive knowledge of the impugned content. For reasons developed below, the Bar considers that the circumstances attracting liability should be more precisely defined by amendments to the defence of innocent dissemination, and the introduction of a safe-harbour.

(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?*

14. The Bar does not favour the development of distinct rules and defences by reference to the nature of the putative defendant, as opposed to the functions performed by the putative defendant in respect of the publication in question. Such an approach would introduce incoherence and anomalies to the law and, potentially, distort the market by favouring some platforms over others even where they are performing essentially the same function.

#### **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?*

15. As a general proposition, forum administrators have a greater degree of control over posted content they did not originate than other internet intermediaries. There are, however, no hard and fast rules. For the purposes of coherence of the law of defamation, the Bar considers the optimal approach is to impose liability in respect of particular content having regard to whether the putative defendant has actual or constructive knowledge of the content, as more precisely delineated through defences and safe-harbours, rather than by reference to categorisation of the putative defendant.

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

16. As just stated, the Bar does not favour treating forum administrators as a distinct category of defendant. Different circumstances and scenarios which demonstrate that a one-size-fits-all categorisation is undesirable include:

- a. the variable degree of control of the forum administrator in respect of matter published in the forum;
- b. whether content is (or feasibly could be) pre-moderated or moderated at all;
- c. the size of the forum;
- d. the nature of the forum;
- e. any relevant commercial features of the forum, including whether the administrators are paid or volunteers; and
- f. the degree of commonality of the interests in matter published in the forum and those publishing within the forum.

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

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

17. No. The Bar considers that there should be a statutory immunity for mere conduits, such as ISPs. For other internet intermediaries, rather than an immunity, the circumstances attracting liability should be more precisely defined by amendments to the defence of innocent dissemination, and the introduction of a safe harbour.

*(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?*

18. Not applicable.

**Question 6: Immunity for basic internet services**

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

19. Yes, in the case of mere conduits, such as ISPs.

*(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?*

20. There is utility in providing ISPs with immunity by reference to their function as a mere conduit. If there are to be any other immunities, these should extend to functions of internet intermediaries which clearly operate in the same manner; in substance, where the intermediary merely transmitted information provided by some other party. The immunity should be available in only the clearest of cases, in order to avoid denying complainants a remedy in appropriate cases. Immunity should not extend to internet intermediaries beyond mere conduits. As noted above, the circumstances attracting liability should be defined by amendments to the defence of innocent dissemination, and the introduction of a safe harbour.

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

21. The Bar refers to its response to question 6(b).

*(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?*

22. No. In the case of mere conduits, they do not actively participate in the publication. Attributing liability would be unsound as a matter of policy, akin to imposing liability on telecommunications networks merely for carrying phone calls, or on postal delivery services for the content of the envelopes they deliver.

#### **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?*

23. The Bar considers that there should be a dedicated complaints notice process in relation to internet intermediaries, similar to the safe-harbour provision in s 5 of the *Defamation Act 2013* (UK) (see Question 9 below).

24. In light of that, the Bar is of the view that the concerns notice and offer to make amends provisions (as amended by the *Model Defamation Amendment Provisions 2020 (MDAP)*) should remain as they are.

25. The original intention of the concerns notice provisions was to trigger the offer to make amends process ("concerns notices" are now dealt with in clauses 12A to 12B of the MDPs; clause 14 of the MDPs is headed "When offer to make amends may be made"). While that remains an objective, the concerns notice provisions contained in the original MDPs were expanded by the MDAP. They now require a concerns notice to inform the publisher of the harm that the person considers to be serious harm to the person's reputation caused, or likely to be caused, by the

publication of the matter in question (cl 12A(1)(a)(iv) of the MDPs), and in the case of an aggrieved person that is an excluded corporation, to inform the publisher of the financial loss that the corporation considers to serious financial loss (cl 12A(1)(a)(v)).

26. A failure to adequately particularise those requirements (as well as those in cl 12A(1)(a)(ii) (location where the matter can be accessed) and cl 12A(1)(a)(iii) (defamatory imputations)), after being given a further particulars notice, will result in the aggrieved person being taken not to have given a concerns notice (cl 12A(5)).
27. In addition, an aggrieved person cannot commence defamation proceedings unless the person has given the proposed defendant a concerns notice (cl 12B(1)(a)) and unless the imputations to be relied upon by the person in the proposed proceedings were particularised in the concerns notice (cl 12B(1)(b)). A plaintiff cannot rely in the proceedings on imputations that are substantially different, unless the court grants leave in the circumstances referred to in cl 12B(3).
28. Some internet intermediaries, such as search engines, will be inherently unable to comply with the requirement that an offer to make amends includes an offer to publish, or join in publishing, a reasonable correction of, or a clarification of or additional information about, the matter in question (cl 15(1)(d)). For such intermediaries, the offer to make amends mechanism is of limited utility. An internet intermediary which complies with a safe-harbour provision modelled on s 5 of the *Defamation Act 2013* (UK), on the other hand, will have an immunity, and one which will not be constrained by the more stringent requirements attaching to a concerns notice which were introduced by the MDAP. The Bar considers that to be appropriate having regard to the limited information intermediaries will typically have relative to originators of defamatory content, and consistent with the objects in clauses 3(b), (c) and (d) of the MDPs.
- (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?*
29. The principal barrier is that identified in the Discussion Paper at paragraph 3.100: an internet intermediary may not be able to comply with the mandatory requirements of the offer to make amends provisions.
- (c) In the event that 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?*
30. If the DWP does not favour the introduction of a safe-harbour provision, then the offer to make amends provisions should be amended. There should be an alternative mandatory requirement to the requirement that the offer to make amends includes an offer to publish a

reasonable correction, etc. The alternative should be that the publisher, in the case of an intermediary of an online publication, offers to take down the matter in question within a reasonable time or to provide the complainant with information identifying the originator of the content sufficient to enable the complainant to commence defamation proceedings against the originator. In the case of a search engine, the operator should be required to offer to take reasonable steps to stop the matter in question from being indexed in search results delivered to Australian internet users.

31. If the publisher carries out the terms of an offer to make amends (including payment of any compensation under the offer) that is accepted, the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher in relation to the matter in question (cl 17(1)). If a reasonable offer to make amends is not accepted, the publisher will have a defence in the circumstances referred to in cl 18(1).
32. For those internet intermediaries who cannot take down the matter in question or provide identifying information about the originator to the complainant, the defence of innocent dissemination should remain available (see Question 8 below).

#### **Question 8: Clarifying the innocent dissemination defence**

- (a) *Should the innocent dissemination defence in clause 32 of the MDPs be amended to provide that digital platforms and forum administrators are, by default, secondary distributors, for example by using a rebuttable presumption that they are?*
  - (b) *In what circumstances would it be appropriate to rebut this default position?*
  - (c) *Should a new standalone innocent dissemination defence specifically tailored to internet intermediaries be adopted [in] the MDPs?*
33. In relation to Questions 8(a) and (b), the Bar favours Alternative B (paragraph 3.118 of the Discussion Paper). There should be a rebuttable presumption incorporated into clause 32 that a digital platform or forum administrator is a subordinate distributor. The presumption would be rebutted if the complainant shows that the digital platform or forum administrator acted so as to adopt, curate or promote content published by another.
  34. While this alternative has the disadvantages referred to at 3.122 and 3.123 of the Discussion Paper, the view of the Bar is that it is preferable to an irrebuttable presumption that digital platforms and forum hosts are subordinate distributors (Alternative A – paragraph 3.116).
  35. The Bar does not consider that there should be a new standalone innocent dissemination defence specifically tailored to internet intermediaries (Question 8(c)).



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

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

36. The Bar considers that there are further clarifications required, discussed below, even if a safe-harbour provision were adopted.

37. Considerable uncertainty has arisen, arising particularly out of recent cases, concerning the innocent dissemination doctrine at common law and the defence under clause 32 of the MDPs. The issues which arise include:

- a. Does innocent dissemination at common law go to the question of publication,<sup>1</sup> or is it a defence?<sup>2</sup>
- b. Are there differences between the knowledge requirement at common law and under clause 32?<sup>3</sup>
- c. Does knowledge on the part of a secondary publisher – or subordinate distributor in the case of the statutory provision – mean that the person:
  - i. is made aware of words that are alleged to be defamatory?<sup>4</sup>
  - ii. is made aware of words that are likely to cause the ordinary reasonable reader, viewer or listener to think less of the plaintiff?<sup>5</sup>
  - iii. is made aware of words giving rise to the imputations found to be conveyed?<sup>6</sup>
  - iv. knows or ought to have known that the words are actionable, ie that they are defamatory and that no defence is available?<sup>7</sup>

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<sup>1</sup> eg *Emmens v Pottle* (1885) 16 QBD 354; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170; see also *Google Inc v Duffy* (2017) 129 SASR 304 at [99] per Kourakis CJ; Peek J agreeing at [354] (“Google”).

<sup>2</sup> *Thompson v Australian Capital Television Pty Limited* (1996) 186 CLR 574 at 586 (Brennan CJ, Dawson and Toohey JJ) (“Thompson”); *Google* (2017) 129 SASR 304 at [99].

<sup>3</sup> See *Defteros v Google* [2020] VSC 219 at [56] and [244] to [247] (Richards J) (“Defteros”). An appeal from the decision in *Defteros v Google* is due to be heard in the Victorian Court of Appeal commencing on 27 May 2021.

<sup>4</sup> See *Defteros* [2020] VSC 219 at [56].

<sup>5</sup> *Defteros* [2020] VSC 219 at [245].

<sup>6</sup> Cf *Google* (2017) 129 SASR 304 at [98] with *Defteros* [2020] VSC 219 at [247].

<sup>7</sup> *Goldsmith v Sperrings* [1977] 1 WLR 478 at [487] per Lord Denning; see also *Google* (2017) 129 SASR 304 at [98] and *Defteros* [2020] VSC 219 at [244] – [245].

38. The only thing known with certainty about these issues is that innocent dissemination at common law is a defence.<sup>8</sup>
39. It is the view of the Bar that the defence of innocent dissemination at common law should be abolished. That would avoid any continuing uncertainty as to how it operates in conjunction with the statutory provision. Clarity in the law is not furthered by having overlapping defences directed at substantially the same mischief.
40. The Working Group responsible for preparing this submission on behalf of the Bar is divided as to the form that amendments to the statutory defence of innocent dissemination should take.
41. Some of the members of the Working Group consider that the knowledge requirement under clause 32 (clause 32(1)(b)) should be amended to provide that “the defendant neither knew, nor ought reasonably to have known, that the matter was likely to cause the ordinary reasonable reader, viewer or listener to think less of the plaintiff.”
42. That would clarify what is meant by “defamatory” in clause 32(1)(b) and it is consistent with the construction of that provision by Richards J in *Defteros*.<sup>9</sup> There her Honour had regard to the legislative context in construing clause 32.
43. It should not be sufficient for the subordinate distributor merely to be made aware of the words alleged to be defamatory. The defamatory nature of those words should be apparent.
44. This section of the Working Group considers that it would give the defence too wide an operation to require that the subordinate distributor knows, or reasonably ought to know, of imputations that are ultimately found to be conveyed, or that the matter is actionable.
45. As Kourakis CJ observed in *Google*,<sup>10</sup> the position adopted by Lord Denning MR in *Goldsmith v Sperrings Ltd*,<sup>11</sup> that the defendant knew or ought reasonably to have known that the publication was actionable, has not been accepted. Lord Denning MR dissented in the result and his remarks were obiter. An argument to the effect of Lord Denning’s position was rejected by Eady J in *Metropolitan Schools Metropolitan International Schools Ltd v Designtecnica Corp*.<sup>12</sup> Eady J observed that the other judges in *Goldsmith*, Scarman and Bridge LJ, “expressed their disagreement with Lord Denning MR in unusually strong terms”.
46. Other members of the Working Group, on the other hand, while supporting the clarification of the meaning of the word “defamatory” identified in paragraph 42 above, consider that the

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<sup>8</sup> *Thompson* (1996) 186 CLR 574 at [586]

<sup>9</sup> *Defteros* [2020] VSC 219 at [245]

<sup>10</sup> *Google* (2017) 129 SASR 304 at [98] (Kourakis CJ; Peek and Hinton JJ agreeing).

<sup>11</sup> [1977] 2 All ER 566 (“*Goldsmith*”).

<sup>12</sup> [2011] 1 WLR 1743 at [67] – [69]

amendments should go further, and that Lord Denning's formulation should be adopted in the statutory provision. The view of these members is that the difficulties referred to by Eady J are overstated and that properly considered, there is no majority view in *Goldsmith* as to the construction of the innocent dissemination defence.

47. The concern is that it chills freedom of expression unduly to hold intermediaries liable for content they did not originate, other than in circumstances where the intermediary is fairly on notice not only that the content conveys defamatory meanings (that is, that the matter was likely to cause the ordinary reasonable reader, viewer or listener to think less of the plaintiff), but also that no defence would be available in respect of those meanings. Many publications are defamatory, but not unlawful. Defamatory statements that are true, or honest opinions, or published on an occasion of privilege are all examples. Intermediaries will generally not be in a position to prosecute defences of truth, honest opinion or privilege in respect of content they did not originate, and so are incentivised by a defence of innocent dissemination in its current form, and of the kind favoured by the other members of the Working Group, to remove defamatory content, whatever its value in free speech terms. This has a chilling effect on freedom of expression. The view of this section of the Working Group is that an innocent dissemination defence that protected intermediaries except where they know, or ought reasonably to know, that the content is unlawful would be more consonant with the objects in s 3 of the MDPs.

#### **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?*

*(As for (b) to (d), see below)*

- (e) *Should the defence be available to all internet intermediaries that have liability for publication in defamation? For example, could a separate complaints notice process be developed that could apply to search engines?*
- (f) *How can the objects of freedom of expression and the protection of reputations be balanced if such a defence is to be introduced?*

48. Subject to some changes (see below), the Bar favours the introduction of a defence similar to s 5, coupled with a provision modelled on the companion section in s 10 of the *Defamation Act 2013* (UK). Often complainants in relation to internet intermediaries are looking for a quick and effective remedy in the form of the material in question being taken down, or alternatively with a means of being connected with the originator of a defamatory post.

49. The safe harbour mechanism provides an appropriate balance between the responsibility of an internet intermediary for publication and the ability of a complainant to obtain a suitable remedy

from the intermediary for the protection of their reputation. In addition, if it is not possible for the claimant to identify the person who posted the statement, and the other requirements of s 5(3) are met, including that the operator failed to respond to the notice of complaint (s 5(3)(c)), the defence will be defeated. This provides an incentive to internet intermediaries such as the operators of social media networks to maintain accurate records of the users of their services and should, in turn, provide internet users with an incentive not to publish defamatory content via social media in the first place because they will know that, if they do, their anonymity may not be protected by the operator of the social media network.

50. The Bar considers that the provision should be expanded to all internet intermediaries, including search engines. Providers of basic internet services, such as mere conduit ISPs, would not need the protection of the safe-harbour, because they would be immune from liability. Nonetheless, basic internet service providers should not be excluded from the safe- harbour provision. The safe-harbour provision will provide an additional (if redundant) level of protection to basic internet service providers, but more importantly, extending the safe- harbour mechanism to basic internet service providers may also provide a useful mechanism enabling aggrieved persons to seek identifying information about the originators of defamatory content about them.
51. Search engines should be able to remove the ability of the search engine to produce the search results in question and hyperlinks to third-party websites, by ceasing to index sufficiently identified URLs for defamatory content. The Bar recognises, however, that this is a matter that may best be addressed with the benefit of expert technical advice, including from search engine operators.
52. ISPs should retain their immunity under the BSA. They operate as genuine "conduits".
53. The Bar favours the complaints notice process being set out in the MDPs, rather than adopting the UK approach of such process being set out in regulations.
  - (g) *If so, should it be available at a preliminary stage in proceedings, where an internet intermediary can establish that they have complied with the process?*
54. Yes. It would save significant time and costs. Most of the summary judgment provisions in Rules of Court should be able to accommodate such an application. The efficacy of a safe harbour mechanism would be further enhanced by the introduction of a provision modelled on s 10 of the *Defamation Act 2013* (UK).
  - (h) *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?*

55. Where an originator can be identified, the Bar considers that the appropriate course is for the complainant to take action against the originator, particularly where they are being recalcitrant. For that additional reason, the Bar favours the introduction of a provision modelled on s 10 of the *Defamation Act 2013* (UK).

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

56. See our discussion under Question 8 in relation to clarification of innocent dissemination, even if a safe-harbour provision were introduced.

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

57. The Bar does not favour adoption of the US approach. Digital platforms should not be provided with a blanket immunity for third-party content, even if they are notified about it, unless they materially contribute to the publication. We consider that such an approach tilts the balance between freedom of expression and the protection of reputation too far in favour of the former. It provides circumstances for relief against internet intermediaries that are too restrictive. The American provision has proved, in the view of the Bar, to be a failure, in that it has discouraged internet intermediaries from acting responsibly, which was the very opposite of the original legislative intent.

#### **Question 11: Complaints notice process for Australia**

58. The Bar supports the introduction of a dedicated complaints process for complaints against internet intermediaries. It should operate in conjunction with the safe-harbour defence and be incorporated into the MDPs. The Bar considers that the complaints notice process should be distinct from the concerns notice process under part 3 of the MDPs.

#### **Questions 12 and 13: Steps required before engaging in complaints notice process, and complaints notice content and form**

59. It would be preferable for a complainant to take steps to seek to identify and contact the originator before issuing a complaints notice. However, the Bar considers that it would be difficult to enforce such a requirement (or for the recipient of such a notice to determine if such a requirement had been complied with), unless the requirement is simple and it is self-evident that the requirement has been complied with (or not).

60. The Bar supports the UK requirements relating to the contents of a complaints notice, including (despite its limited efficacy in practice) that a complaints notice must confirm that the complainant

does not have sufficient information about the identity of the poster of the defamatory material to commence proceedings against that person directly.

61. The Bar supports the timeframes in the UK process. They appear to recognise that time is needed by the various parties to take certain steps, while recognising anonymous indefensible defamatory content ought to be taken down as soon as is reasonably practicable. If the digital platform needs more time to contact the originator, the Bar considers that the content could be removed or flagged as under dispute in the interim.

#### **Question 14: Application and outcome of complaints notice**

*(As for (a) and (b) see below)*

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

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

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

62. The Bar favours the adoption of the UK process. This would facilitate the introduction of a safe-harbour defence modelled on s 5 of the *Defamation Act 2013* (UK) which the Bar also supports.

63. The focus of the process should be to connect complainant and originator. The Bar considers as a matter of policy, the law should encourage the complainant to take action against the originator in the first instance. However, in circumstances where an originator cannot be identified; does not respond to the digital platform in the timeframe mandated by the complaints notice process; or is otherwise recalcitrant, the digital platform should be able to remove the content complained of without the originator's agreement.

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

64. This process should be available to all digital platforms who may have liability in defamation, and not only those that can connect a complainant with the originator, as with the Bar's preferred approach to safe-harbour. For example, search engines may not be able to connect with the originator of material, but they can cease to index identified URLs containing defamatory content.

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

65. The content should be 'flagged' as under dispute within a reasonable time after receipt of a complaints notice (say, 7 days). To remove the content upon receipt of a complaints notice would unduly burden freedom of expression, and may have a chilling effect.

#### **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?*

66. The power to grant an interlocutory injunction in defamation matters is exercised with great caution and only in very clear cases,<sup>13</sup> in recognition of the importance of freedom of expression. They are rarely granted in cases involving mainstream media publications. In the Bar's experience, interlocutory injunctions are easier to obtain in social media cases where originator(s) of defamatory content have made vile personal attacks about a complainant without any conceivable justification.<sup>14</sup> The Bar considers that the current test to obtain an interlocutory injunction is adequate to enable a complainant to obtain relief in relation to vile and unjustified social media attacks.

*(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?*

67. Where vile and unjustified social media attacks are involved, it is always open to a complainant to make an internet intermediary a party to the interlocutory injunction application. The Court can grant relief in appropriate cases against an internet intermediary even if it plays no part in the application. Provided the material is removed relatively quickly, a complainant is unlikely to continue pursuing a remedy against the internet intermediary, and would be unlikely to recover substantial damages and be at risk of an adverse costs order, if they did. In the circumstances, the Bar considers the current powers to obtain an interlocutory injunction against an internet intermediary in such social media cases are adequate.

*(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.*

68. As noted above, vile and unjustified social media attacks are likely to result in the grant of an interlocutory injunction in defamation cases. The Bar considers that there are already sufficient powers to obtain an interlocutory injunction in both State and Federal courts.

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<sup>13</sup> *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, pp 66-68 at para [16] – [18] (Gleeson CJ and Crennan J).

<sup>14</sup> *Webster v Brewer* [2020] FCA 622, para [14] – [15] (Wheelahan J).

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

69. An Australian court can enforce Australian law in respect of publications in Australia; it has no role exporting its defamation laws worldwide.<sup>15</sup> To do so would be to require material to be taken down that is entirely lawful in countries with different defamation law traditions, particularly the US, but also other common law countries whose laws have evolved further than in this country.

*(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?*

70. As noted in question 15(d), the Bar considers that such powers should not be enacted.

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

71. As noted in question 15(f), the Bar considers that such powers should not be enacted.

#### **Question 16: Orders to identify originators**

*(a) It is 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?*

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

*(As for (c) to (e) see 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?*

72. Existing civil procedure rules enable a complainant to ascertain an originator's identity by way of preliminary discovery. Paragraph 3.235 proposes consideration of whether there is a more efficient method to obtain such orders, given the expense of the preliminary discovery process.

73. Existing civil procedure rules ordinarily require an application be made by way of summons or originating motion supported by an affidavit, often accompanied by submissions. Unless there is a

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<sup>15</sup> *Macquarie Bank Ltd & Anor v Berg* [1999] NSWSC 625 at [14].



substantial change to the procedure governing applications for such orders, those costs will not be avoided. Similarly, the costs of a hearing are unlikely to be avoided if a respondent seeks to be heard and the Court is not content to have the application determined on the papers. The resulting costs are not in the control of an applicant complainant.

74. While the *Norwich Pharmacal* approach has some appeal by requiring proof of an arguable case in defamation and consideration of the countervailing factors identified in 16(b), it would be unlikely in the view of the Bar to lead to any costs savings or efficiencies. Further, the introduction of a new process in the MDPs, whether adopting the *Norwich Pharmacal* process or otherwise, would add an additional layer to the different procedural rules existing in various jurisdictions. An effective introduction of a new method to obtain such orders would require uniform adoption in each jurisdiction.

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

75. Such provisions should not be limited to any particular type of internet intermediary.

*(h) 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?*

76. In the view of the Bar, amendments should be made to the MDPs requiring internet intermediaries to retain relevant records for 12 months from the date of posting of any material by a third party. That would also assist with the safe-harbour reforms that we favour (see Question 9 above). A 12-month period is appropriate having regard to the limitation period for defamation law.

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

77. Yes. The issues are, in the view of the Bar, intractable in so far as they relate to American-based intermediaries without assets in Australia, who have the protection of the US SPEECH Act. The Bar does not favour the introduction of laws interfering with the coherence of corporations law by, for example, attributing liability of foreign parent corporations to local subsidiaries. In any event, that would properly be a matter for the Commonwealth, not the States and Territories.

#### **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?*

78. No. The Bar considers that all of the principal issues are considered by the Discussion Paper.

#### **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?*

79. The Bar agrees with the analysis in the Discussion Paper.

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

80. The Bar is aware of two cases of relevance to the work of the DWP: *Bodenstein v Hope Street Urban Compassion*<sup>16</sup> and *Shiels v Manny*.<sup>17</sup>

### **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?*

81. Yes. The Bar is of the view that, given that it is a criminal offence to knowingly make a false statement to police, absolute privilege in respect of reports to authorities strikes the right balance between protection for the investigation and reporting of abuse allegations, while protecting against knowingly false statements. The Bar agrees with the analysis provided in the Discussion Paper.

(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?*

82. Yes, but only in respect of statutory investigative agencies which have adequate safeguards to prevent deliberately false or misleading reports and to protect confidentiality.

83. The defence of absolute privilege should extend to matter published to or by investigative agencies for the purpose of executing or administering their statutory complaints and/or investigative duties, subject to it being an offence to knowingly publish false statements to or by an investigative agency. That would provide a safeguard to the privilege.

84. A minority of the Working Group responsible for this submission had misgivings about this proposal, even with the addition of the offences proposed. In their view, such investigative agencies should not have a defence of absolute privilege.

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<sup>16</sup> [2014] NSWDC 126.

<sup>17</sup> [2012] ACTCA 22.

(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?*

85. The defence of absolute privilege should extend to matter published to or by statutory investigative agencies for the purpose of administering their statutory complaints and/or investigative duties, subject to the creation of the offences referred to. The privilege should extend only to those statutory investigative agencies which have appropriate safeguards.

86. The Bar favours statutory criminal penalties for knowingly false or misleading reports to or by statutory investigative agencies.

(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)?*

87. Given the consequences of absolute privilege, it is important that the privilege is limited and well adapted to the investigative functions of the statutory investigative agency. One way to achieve this is to have each jurisdiction amend its Schedule 1 and relevant enabling legislation.

#### **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?*

88. The Bar agrees with the analysis in the Discussion Paper.

(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?*

89. The Bar is not aware of such cases beyond those cited in the Discussion Paper.

90. The Bar notes the matter of *Adams v Cramond*.<sup>18</sup> While it does not concern a sexual harassment or discrimination complaint, it is an example of a defamation action in the context of a bullying complaint made by an employee to his employer (see *Construction, Forestry, Mining and Energy Union (CFMEU) v BHP Coal Pty Ltd (No 4)*).<sup>19</sup>

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

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<sup>18</sup> (unreported, District Court of Queensland, McGill DCJ, 24 June 2011).

<sup>19</sup> [2013] FCA 762).

*(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?*

**Question 21(a)(i) – employers**

- 91. No, unlike reports to Police, there are insufficient safeguards to protect against knowingly false or misleading reports to employers. However, measures should be considered to address the deterrent effect of the risk of defamation litigation on victims with genuine complaints.
- 92. One such measure may involve initiatives to increase awareness of the protections afforded by defences (i.e., qualified privilege) in respect of making such complaints.
- 93. Another measure might entail employers publishing clear policies setting out their commitment to the eradication of all forms of harassment in the workplace, and offering an indemnity to employees in respect of the costs of defending defamation proceedings brought against them in respect of genuine complaints.

**Question 21(a)(ii) – professional disciplinary bodies**

- 94. Yes, but only in respect of professional disciplinary bodies which have adequate safeguards to prevent deliberately false or misleading reports and to protect confidentiality, akin to those available in respect of such reports when made to police and statutory agencies.
- 95. The defence of absolute privilege should extend to matter published to or by the professional disciplinary body for the purpose of administering its statutory complaints and/or investigative duties, subject to the creation of offences of the kind referred to in relation to investigative agencies.

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

- 96. See above – there appears to be no rationale as to why the privilege should be limited to sexual harassment, discrimination or alleged criminal conduct. The privilege should attach to complaints which have a nexus to the purpose or functions of the disciplinary body.

*(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)?*

- 97. Given the consequences of absolute privilege, it is important that the privilege is limited and well adapted to the investigative and disciplinary functions of the professional disciplinary body.

One way to achieve this is for state and territory legislators to amend Schedule 1. NSW has adopted such an approach in respect of matters under the *Legal Profession Uniform Law (NSW)* and *Legal Profession Uniform Law Application Act 2014* (see schedule 1 of the *Defamation Act 2005 (NSW)*).

*(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?*

98. In respect of reports made to employers, there are insufficient safeguards available to prevent deliberately false or misleading reports being made. For that reason, the Bar considers that qualified privilege defences strike the appropriate balance in cases involving such reports.

99. There are variable safeguards available to prevent deliberately false or misleading reports from being made to professional disciplinary bodies. The Bar favours a defence of absolute privilege in respect of reports made to such bodies where there are criminal sanctions for the making of deliberately false or misleading reports. In cases where there are no such sanctions, qualified privilege defences strike the appropriate balance.