

facebook

Facebook's response to the Review of Model Defamation Provisions

31 January 2020

Executive summary

Facebook welcomes the opportunity to provide comments to the Review of Model Defamation Provisions. We commend the Council of Attorneys-General (CAG) on the review to adapt Australia’s defamation laws for the digital age.

We share the objectives of the model defamation provisions: to “provide the statutory legal framework for balancing freedom of expression and freedom to publish information in the public interest on the one hand with the right of individuals to have their reputations protected from defamatory publications and the right to remedies for such publications on the other hand.”

In short, we support the recommended amendments to the model defamation provisions to modernise defamation law, and have made constructive suggestions in this submission to bring greater clarity that would benefit not only digital platforms but also news and media organisations, other secondary publishers, and the broader Australian community.

As our CEO Mark Zuckerberg said in October 2019, “People having the power to express themselves at scale is a new kind of force in the world — a Fifth Estate alongside the other power structures of society. People no longer have to rely on traditional gatekeepers in politics or media to make their voices heard, and that has important consequences.”¹

Millions of people in Australia choose to take advantage of technology and use their voice for self expression, to advocate for social causes or encourage political change. However, we know others may use their voice in ways that are problematic, including to defame others.

Facebook is subject to Australian defamation laws, but does not exercise editorial control over the content that is distributed on its services. Accordingly, if a user reports content for defamation, and an Australian court has found the content at issue to be defamatory, Facebook will disable access to that content in Australia.

However, Australia’s defamation laws are in many ways not fit-for-purpose in the digital world. The existing model defamation framework is primarily designed for a world where there are clear gatekeepers who control the flow of information, and some concepts in the model defamation framework are challenged by the increasing use of technology by Australians and the decentralised nature of the internet. The rapid pace of innovation and technological change since the introduction of the MDPs in 2005 has truly transformed the way information is published and transmitted, and that raises important questions about how people should be both empowered and protected.

¹ <https://about.fb.com/news/2019/10/mark-zuckerberg-stands-for-voice-and-free-expression/>

The current system has also not enabled efficient resolution for individuals who are the subject of defamatory material. And Australian defamation law risks discouraging large-scale social movements (like #MeToo) that increasingly originate and gain momentum through social media.

One recent judgement has generated much commentary about the shortcomings in defamation laws: the Voller decision, which held media companies liable for other users' comments on their Facebook pages.² An appeal has been brought forward and we await to see whether the decision will be upheld. In the meantime, it is fair to describe the initial judgment - as the Federal Attorney-General has - as a "curious decision".³ The decision demonstrates the uncertainty for secondary publishers (digital platforms and news organisations alike) under the current laws. Traditional principles of knowledge and editorial control need to be looked at closely in a world where people are increasingly communicating online, the volume of content is so much greater, and platforms are providing an avenue for self-publication. If the Voller decision is upheld, all secondary publishers could face disincentives to participate online and enable debate and free expression.

Facebook strongly supports the CAG's objectives to modernise Australia's defamation laws, and we agree with many of the sensible suggestions contained in the review's discussion paper. In particular, we believe enhanced pre-trial procedures, a new serious harm threshold and a single publication rule would provide clarity, improve efficiency of resolution for impacted users, and save the community the costs of unnecessary litigation. This submission makes some constructive suggestions for a selected number of recommendations, where we believe we can make a contribution.⁴

The background paper also initiates a new separate review process to address the responsibilities and liability of digital platforms for defamatory content online. We welcome the opportunity to participate in this discussion. While there are some common principles of defamation that should be harmonised and apply equally across digital platforms and other publishers, the review should account for the distinct differences in the role of digital platforms and the degree of control they have over any content shared over their platforms. We propose amendments to the innocent dissemination defence that we believe modernise the legislation. A clearer innocent dissemination defence would benefit not just digital platforms, but also news and media organisations, and any organisations who operate as secondary publishers.

² *Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd* [2019] NSWSC 766. Judgment on an appeal is pending.

³ Attorney-General, *Address to the National Press Club*, <https://www.attorneygeneral.gov.au/media/speeches/address-national-press-club-canberra-20-november-2019>, November 2019

⁴ Note: we have not provided a position in relation to recommendations where we have nothing further to suggest for CAG's consideration.

In short, we welcome the opportunity to participate in a conversation about how defamation law can be better adapted to changes in technology. Ultimately, Australians will be best served by smart defamation regulation – regulation that provides people with an avenue for redress of defamatory content that causes serious harm, and is effective, proportionate, pro-innovation, and supports Australians expressing their voice.

Summary response to recommendations

Recommendation	Facebook's Response
<i>Recommendation 3: Single publication rule</i>	Facebook supports the introduction of a single publication rule to better reflect the way that Australians use the internet.
<i>Recommendation 4: Pre-trial procedures</i>	Facebook supports the amendments to pre-trial procedures, particularly the introduction of a mandatory concerns notice scheme. The clear identification of concerns upfront will encourage the resolution of disputes without litigation.
<i>Recommendation 6: Specification of location</i>	Facebook supports the introduction of a requirement that an aggrieved person specify the location of the publication of defamatory matter (e.g. by URL) in the concerns notice as it would assist in the identification and assessment of reported content.
<i>Recommendation 11: New public interest defence</i>	Facebook supports the introduction of a new public interest defence modelled on the New Zealand common law defence of responsible communication on a matter of public interest.
<i>Recommendation 12: Proper material</i>	Facebook supports the proposed clarification of "proper material" for the defence of honest opinion as it reflects the way people provide contextual information when conveying opinions via social media.
<i>Recommendation 14: Serious harm threshold</i>	Facebook supports the introduction of a serious harm threshold so that only serious defamation cases are litigated. We propose further amendments to provide statutory clarification of the meaning of "serious" in this context, based on UK cases.
<i>Recommendation 15: Separate review process for digital platforms</i>	Facebook believes a separate review process is an opportunity to consider potential amendments to the MDPs to address the responsibilities and liability of digital platforms for defamatory content published online. We propose amendments to the innocent dissemination defence to clarify that digital platforms are 'subordinate distributors'.

Recommendation 3: Single publication rule

We support the introduction of the proposed single publication rule in Australia, to clarify the limitation period for online publication.

Liability in defamation arises when defamatory material is first communicated to a third party. Australian courts currently apply a multiple publication rule, whereby defamatory material is “communicated” online when it is downloaded.⁵ As a result, a new limitation period commences each time a person downloads potentially defamatory material, which raises significant challenges for defendants where publication occurs online.

The proposal to introduce a single publication rule is a reform fit for the digital age. The usual one-year limitation period for commencing defamation proceedings will commence on the “day of first publication”, meaning the day the material is first uploaded, and that any subsequent publications by that publisher are treated as accruing on that date (unless the publication is materially different).

This is a significant improvement on the law which recognises multiple publication - as information is shared and re-shared online, this change will remove the open-ended uncertainty and exposure for online publishers.

Recommendation 4: Enhanced pre-trial procedures

CAG proposes to amend the existing pre-trial procedures to require an aggrieved person to issue a concerns notice in writing to a publisher prior to commencing court proceedings, and to:

- amend the relevant period in which an offer must be made by the publisher from “as soon as reasonably practicable” to “as soon as reasonably practicable and in any event within 28 days of receipt of a concerns notice”;
- introduce a new requirement for an initial offer to make amends to remain open for acceptance for a period of not less than 28 days from the date of offer, but not necessarily until the first day of the trial; and
- introduce a new provision to extend the limitation period if a concerns notice is issued prior to the expiry of the limitation period, for the duration of the pre-trial process.

We support the proposed amendments, particularly the introduction of a mandatory concerns notice scheme. This will require potential plaintiffs to clearly articulate their concerns and identify content at a preliminary stage. We believe this will help publishers identify and assess reported content and encourage the resolution of disputes without litigation.

⁵ See *Dow Jones & Co v Gutnick* (2002) 2010 CLR 575

We also suggest that the proposed pre-trial procedures can be further enhanced to reflect the nature of digital publication. The proposed procedure for issuing a concerns notice / an offer to make amends does not distinguish the different positions of primary and secondary publishers. Indeed, the same procedure applies to "each proposed defendant" irrespective of their level of knowledge of, or control over, the allegedly defamatory user content.

This is a practical concern as, for example, a valid offer to make amends (in response to a concerns notice) requires that the publisher offer to publish, or join in publishing, a correction and pay the reasonable expenses of the aggrieved person. A primary publisher (such as a user of a digital platform posting content) is in the best position to determine whether the content is untrue or otherwise warrants a correction. However, as noted above, a secondary publisher cannot generally determine whether user content is true or whether other defences apply, and therefore cannot make an informed decision about whether to make an offer. The procedure, and the defence of having made an offer to make amends,⁶ is of little utility in resolving claims against secondary publishers.

Accordingly, we submit that further changes to the draft amendments are needed, to tailor pre-trial processes for secondary publishers, taking into account that secondary publishers do not create the material of concern and are generally not in possession of sufficient information to determine whether the material is unlawful (e.g. whether it is untrue).

One option for consideration could be limiting the existing and proposed pre-trial procedure to primary publishers and establishing a complementary procedure for secondary publishers whereby:

- an aggrieved person cannot commence proceedings against a secondary publisher unless they have given it a concerns notice (which, per Recommendation 6, must include URLs identifying the content etc.);
- an aggrieved person cannot issue a concerns notice to a secondary publisher until the matter of concern is held to be unlawfully defamatory (e.g. by judgment against the primary publisher, noting that such proceedings could not be commenced without a concerns notice to the primary publisher); and
- the content of a secondary publisher's offer to make amends reflects the above, and aligns with the innocent dissemination defence, by:
 - removing mandatory requirements to publish a correction;

⁶ Where an offer to make amends (i) is accepted and carried out, the aggrieved person cannot assert, continue, or enforce an action for defamation in relation to the matter in question, or (ii) is not accepted, it is a defence to an action for defamation against the publisher if the offer was reasonable, made within the required time, and the publisher was ready and willing to carry out its terms (sections 17 and 18 MDPs).

- inserting an option to offer to take-down the content within 28 days of acceptance of the offer; and
- permitting an offer in this form to be pleaded as a defence.

Recommendation 6: Offer to make amends

CAG proposes to make it mandatory that an aggrieved person issuing a concerns notice must include the location of the publication of the defamatory material in the concerns notice (e.g. by URL).

We support the introduction of a mandatory requirement to include the URL of allegedly defamatory content in a concerns notice as it is the most efficient way to identify reported content on Facebook, and online generally, and avoids potentially protracted communications with complainants to accurately identify the allegedly defamatory material.

Recommendation 11: Public interest defence

The existing qualified privilege defence applies where:

- the recipient has an interest or apparent interest in having information on some subject;
- the matter is published to the recipient in the course of giving the recipient information on that subject; and
- the conduct of the defendant in publishing that matter is reasonable in the circumstances.

In response to submissions that the “reasonableness” test in the existing qualified privilege defence is overly restrictive, the paper relevantly proposes to:

- introduce a new public interest defence modelled on the New Zealand common law defence of responsible communication on a matter of public interest (established in *Durie v Gardiner* [2018] NZCA 278) in circumstances where publication is (i) in the public interest, and (ii) responsible;
- amend the existing qualified privilege defence to remove the public interest factors listed in the “reasonableness” test in s 30(3)(a) and (b) model defamation provisions to avoid overlap with the new defence.

To succeed on the new defence of “responsible communication in the public interest”, the defendant must show that the publication was “responsible”. The proposed amendments insert a non-exhaustive list of nine factors that the court must consider when determining whether the publication is “responsible”. These factors substantially mirror the seven “reasonableness” factors that the court may consider for the qualified privilege defence, as amended (six of which are common between the two tests).

There is a possibility this new defence may be limited in its intended goal of providing a broader defence to protect responsible journalism as, on its face, the term “responsible” in the context of the new defence appears similarly narrow to “reasonable” under the existing qualified privilege defence.

Subject to this reservation, Facebook supports the introduction of the defence of “responsible communication in the public interest” and subsequent amendments to the existing qualified privilege defence.

Recommendation 12: Proper material

DWP proposes to clarify that “proper material”, for the purpose of the defence of honest opinion, must be:

- set out in the publication in specific or general terms;
- notorious;
- linked in the publication; or
- otherwise apparent from the context of the publication.

We support the proposed clarification of “proper material” for the purpose of the honest opinion defence as this reflects how people provide context in conveying opinions on social media.

Recommendation 14: Serious harm threshold

CAG proposes to abolish the triviality defence and introduce a serious harm threshold, similar to s 1 of the Defamation Act 2013 (UK), whereby a plaintiff must demonstrate that, in order for a statement to be defamatory, it has caused or is likely to cause serious harm to their reputation.

We support the introduction of the proposed serious harm threshold as proposed. Unlike the triviality defence, a serious harm test enables the seriousness of a complaint to be determined at an early stage of a proceeding with complaints that do not meet the threshold proceeding no further, with a resultant saving in court resources and costs.

We agree this approach is preferable to the triviality defence, as the proposal places the burden on plaintiffs to establish harm to their reputation, which should be the heart of the matter. This also avoids costs incurred by defendants proving that content is, in fact, “trivial”. In doing so, the serious harm threshold assists in striking a balance between defamation law and freedom of expression by confirming harm as an essential element in establishing that a statement is capable of defaming the plaintiff.

Two additional suggestions could assist in improving the efficacy of this recommendation:

- expanding the proposed pre-trial procedures to require the aggrieved person to identify the “serious harm” to their reputation in the concerns notice; and
- inserting guidance on what constitutes “serious” in the MDPs.

Requiring an aggrieved person to identify the “serious harm” to their reputation in the concerns notice would further enhance pre-trial procedures by:

- encouraging the aggrieved person to consider and assess the extent of any harm at an early stage;
- providing the recipient of a concerns notice with important information to assist them in framing any offer to make amends; and
- further limiting the number of insubstantial cases being litigated.

Second, inserting guidance about “serious harm” would not only assist defendants and the courts in applying the threshold but would also provide an aggrieved person with a clear foundation from which to assess whether their claim is likely to meet the threshold if litigated.

In the UK, “serious harm” is not defined and no definition or guidance (such as a list of factors for the court to consider) is proposed. Instead, the background paper notes that it may take some time for the Australian courts to analyse what constitutes “serious”, with reference to UK decisions.

UK decisions have identified several relevant factors⁷, including:

- the scale of the publications;
- whether the statements complained of had come to the attention of at least one identifiable person in the relevant jurisdiction who knew the complainant;
- whether publications were likely to have come to the attention of others who either knew the claimant or would come to know the claimant in future; and
- the gravity of the statements.

As the proposed amendments intend that the question of “seriousness” be defined by the Australian courts with reference to UK decisions, it may expedite the process and create greater clarity for the courts and litigants if existing factors are expressly incorporated into the draft amendments. To ensure that these factors are not prescriptive and can be expanded and applied on a case-by-case basis, these could be included in a non-exhaustive list which specifies that not all factors must be met.

⁷ *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 2

Recommendation 15: Separate review process for digital platforms

The background paper commits to a separate review process to consider potential amendments to the model defamation provisions to address the responsibilities and liability of digital platforms for defamatory content published online.

The review will consider responses to question 15 of the background paper and broader considerations raised in the Australian Competition and Consumer Commission (ACCC) Digital Platforms Inquiry.

We welcome the opportunity to participate in that discussion.

To assist with the establishment of that review, we have provided some additional information below on areas that could be covered by the separate review.

Digital platforms

The Digital Platforms Inquiry Report published on 26 July 2019 considers defamation law in the context of media regulatory framework, and concludes that:

“The ACCC recommends that media regulatory frameworks be updated, to ensure comparable functions are effectively and consistently regulated. The framework should, as far as possible, be platform neutral, clear and contain appropriate enforcement mechanisms and meaningful sanctions.”

Facebook submits that, for defamation law, digital platforms and media organisations are currently on an equal footing where media organisations provide comparable functions, as a secondary publisher. The model defamation provisions afford the same protections to both digital platforms and media organisations operating online.

The Digital Platforms Inquiry Report acknowledges this on page 188, stating that:

“Digital platforms are regulated by Australian defamation law in a broadly similar way to media businesses which perform comparable functions. That is, digital platforms that distribute defamatory materials on their platforms may be liable as ‘secondary publishers’ under defamation law, much like any media business which distributes defamatory material on its website or via another channel.”

Digital platforms play a role in relation to content that shares some similarities with media organisations and other publishers, but also has some important distinctions. Although digital platforms make content broadly available, digital platforms do not have prior knowledge of or editorial control over that content.

Accordingly, Facebook supports amendments of the MDPs to confirm the position of digital platforms as 'secondary publishers'.

Innocent dissemination

We also believe - as identified in the background paper - that the review is an opportunity to consider amendments to the innocent dissemination defence to better reflect digital publication and to clarify the application of the defence to digital platforms.

The innocent dissemination defence in the model defamation provisions requires that:

- the defendant published the matter merely in the capacity, or as an employee or agent, of a "subordinate distributor" (i.e. a person who was not the first or primary distributor of the matter, was not the author or originator of the matter, and did not have any capacity to exercise editorial control over the content or publication of the matter before it was first published);
- the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and
- the defendant's lack of knowledge was not due to their negligence.

Assessment of whether the innocent dissemination defence applies requires a factual inquiry about whether the platform's technical capability to detect and action defamatory content meets the essential elements of knowledge and editorial control. The constant evolution of technical capabilities has resulted in a lack of clarity about how the innocent dissemination defence applies online.

Further, Australian courts have held that the innocent dissemination defence applies until such time as the digital platform has knowledge (e.g. notice) of the defamatory publication and the power to remove it but fails to do so within a reasonable time.⁸ Currently, the knowledge requirement and what constitutes a "reasonable time" are not clear. Even if a platform whose many users post large volumes of content receives sufficient details to locate and identify the content, location and identification of content does not equate to knowledge that the content is defamatory (i.e. that defences do not apply). A platform is generally not in a position to assess potential defences (e.g. truth) so will not know whether user content is unlawfully defamatory until the matter is decided by a court.

⁸ See, for example *Google Inc v Duffy* [2017] SASFC 130.

Greater clarity benefits Australians by avoiding the risks of incentivising digital platforms to over-censor online debate and comments. A lack of clarity risks fostering an environment where digital platforms and online publishers censor user content to avoid potential liability, resulting in a chilling effect on communications and free expression.

One way the model laws could grant greater clarity is by amending the innocent dissemination defence to:

- broaden the definition of "subordinate distributor" to capture any person other than the author, editor, or employer of the author or editor, of a publication; and
- make the defence available until such time as the subordinate distributor knew or ought to have known that the matter is unlawful (as opposed to simply knowing that the user alleges the content to be prima facie defamatory).