Submission by Professor Dan Jerker B. Svantesson to the Council of Attorneys-General's Discussion Paper on:

Review of Model Defamation Provisions

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Summary of major points

- The stated aim of ensuring that Australia's defamation law does not place unreasonable limits on freedom of expression must apply to freedom of expression, not only in Australia but internationally. This should be a clearly articulated criteria and should be reflected on every level from the 'meta' goals to the detailed legal provisions.
- The Council of Attorneys-General's *Review of Model Defamation Provisions* represents an excellent opportunity to make clear that, whether online or offline, defamation under Australian law requires that the defamatory material enters the mind of a third person, which cannot occur by downloading alone.
- Australian law needs a detailed, clearly articulated, and clearly defined 'safe harbour' regime for those who deal with online content they have not created, such as social media, search engines, and other platforms. Schedule 5, clause 91 of the *Broadcasting Services Act 1992* (Cth) lacks clarity and its effect is largely untested.
- The Council of Attorneys-General's *Review of Model Defamation Provisions* represents an excellent opportunity to clarify how Australian law applies in situations where content that an Internet platform has removed is reposted, and where content that is similar to the content removed by a platform is posted after the initial removal.
- Any reform of Australia's defamation law must specifically and purposely engage with the topic of scope of jurisdiction.
- Australia could consider engaging more actively with the work carried out on the topic of Internet content by the Internet and Jurisdiction Policy Network.

1. General remarks

1. I welcome the initiative taken by the Council of Attorneys-General to seek input on the *Review of Model Defamation Provisions*.

2. These submissions are intended to be made public.

3. These submissions deal only with a small selection of the relevant issues.

2. Clarity of aims – an international issue with international obligations

4. The Discussion Paper makes clear that one of the objectives of the Model Defamation Provisions are to "ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance" (p. 11). This is an important aim. However, it is an aim that needs further refinement and/or clarification.

5. As also noted in the Discussion Paper: "Information flows are even less bound by territorial borders than they were when the Model Defamation Provisions were adopted." (p. 10) Consequently, the question arises whether the aim of ensuring that Australia's law of defamation does not place unreasonable limits on freedom of expression only relates to freedom of expression in Australia, or also internationally.

6. Australia has international obligations, and in the light of the nature of the online environment, and the need for international coordination and cooperation, it is submitted that the aim must be to ensure that Australia's defamation law does not place unreasonable limits on freedom of expression anywhere in the world.

7. This should be a clearly articulated criteria and should be reflected on every level from the 'meta' goals to the detailed legal provisions.

3. Question 3 Single Publication Rule – Need for conceptual precision

8. The High Court's decision in the *Gutnick* case has sparked a long-lasting conceptual confusion stemming from the majority judgment's observation that:

> "[h]arm to reputation is done when a defamatory publication *is comprehended* by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the

> publisher makes it available and a third party *has it available for his or her comprehension*."[1] (emphasis added)

9. In the first sentence, focus is placed on actual comprehension, while in the last sentence, focus is placed on the third person taking possession (downloading). Having something available for comprehension is, of course, not the same as actual comprehension, and this distinction is obviously not merely of academic interest.

10. Ever since this unfortunate statement, there have been misguided claims, such as that in the Discussion Paper, that: "In the case of internet materials, communication occurs whenever a third party downloads the material." (p. 14).

11. Whether online or offline, defamation under Australian law requires that the defamatory material enters the mind of a third person, which cannot occur by downloading alone.[2] The Council of Attorneys-General's *Review of Model Defamation Provisions* represents an excellent opportunity to make this clear once and for all.

4. Question 15 Defence of innocent dissemination and safe harbours – Generally

12. Australian law needs a detailed, clearly articulated, and clearly defined 'safe harbour' regime for those who deal with online content they have not created, such as social media, search engines, and other platforms. Schedule 5, clause 91 of the *Broadcasting Services Act 1992* (Cth) lacks clarity and is largely untested.

5. Question 15 Defence of innocent dissemination and safe harbours – Similar and/or reappearing content

14. The Discussion Paper does not go into details about how Australian defamation law should address situations where content that an Internet platform has removed is reposted, or where content that is similar to the content initially removed by a platform is subsequently posted.

[1] *Dow Jones & Company Inc. v. Gutnick* (2002) 210 CLR 575, 600.

[2] See further: Dan Svantesson, *Private International Law and the Internet* 3rd Ed. (Kluwer Law International, 2016), and Dan Svantesson, "Place of Wrong" in the Tort of Defamation – Behind the Scenes of a Legal Fiction, *Bond Law Review* 17(2) (December 2005), pp. 149 – 180.

15. These questions are central in the – at the time of writing – ongoing dispute in Case C-18/18[3] heard by the Court of Justice of the European Union (CJEU) on 13 February 2019.

16. Not least given the deeply flawed[4] approach taken by Pembroke J in *X v Twitter Inc*[5] before the Supreme Court of New South Wales, it is essential that the Attorneys-General's *Review of Model Defamation Provisions* engages with this issue.

17. It is simply not acceptable for an Australian court to indefinitely ban a (potentially foreign) person from expressing themselves on a certain (foreign) platform regardless of what that user posts in the future.[6]

6. Question 18 Other issues – Scope of (remedial) jurisdiction

18. The Discussion Paper touches upon (p. 36), but does not engage with, the issue of 'scope of jurisdiction', or scope of remedial jurisdiction as Justice Groberman called it in a recent decision by the Court of Appeal for British Columbia.[7]

19. Scope of jurisdiction relates to the appropriate geographical scope of orders rendered by a court that has personal jurisdiction and subject-matter jurisdiction.[8] This is a central issue, for example, where an Internet platform is ordered to block, delist, deindex, de-reference, delete, remove, or take down content. Such orders may apply to the platform (1) locally, (2) for a selection of countries or (3) globally. The same issue also arises when a court determines the damage to be awarded for online publications; the court may award damages only in relation to effects felt in the state where the court sits, or to extend the damages order to other states (or perhaps globally).

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[3] http://curia.europa.eu/juris/document/document.jsf?text=&docid=202866&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1036875.

[4] See further: https://www.linkedin.com/pulse/sydney-become-internet-content-blocking-capital-world-svantesson/.

[5] [2017] NSWSC 1300.

[6] *X v Twitter Inc* [2017] NSWSC 1300, para 37.

[7] *Equustek Solutions Inc v Google Inc* [2015] BCCA 265, para 69.

[8] See further: Dan Svantesson, Jurisdiction in 3D – "scope of (remedial) jurisdiction" as a third dimension of jurisdiction, *Journal of Private International Law* Vol 12 No 1 (2016), pp. 60-76.

20. Scope of jurisdiction has gained considerable attention in the light of high-profile disputes such as the 2016 Supreme Court of Canada *Equustek* case[9], the CJEU's 2017 judgment in *Bolagsupplysningen OÜ*[10], the ongoing right to be forgotten – *Google France* – dispute,[11] and the *Glawischnig-Piesczek* case[12] currently before the CJEU.

21. While largely overlooked until recently, scope of jurisdiction in relation to Internet content is not a new issue. As early as 1999, the Supreme Court of New South Wales (Australia) expressed the view that:

> "[a]n injunction to restrain defamation in NSW is designed to ensure compliance with the laws of NSW, and to protect the rights of plaintiffs, as those rights are defined by the law of NSW. Such an injunction is not designed to superimpose the law of NSW relating to defamation on every other state, territory and country of the world. Yet that would be the effect of an order restraining publication on the internet."[13]

22. This type of judicial self-restraint as to scope of jurisdiction is unfortunately less common today. Indeed, the Supreme Court of New South Wales adopted a drastically different approach in Pembroke J's decision in *X v Twitter Inc* [2017] NSWSC 1300.[14]

23. Any reform of Australia's defamation law must specifically and purposely engage with the topic of scope of jurisdiction.

24. In my 2017 book – *Solving the Internet Jurisdiction Puzzle*[15] – I attempt to outline a coherent framework for scope of jurisdiction and describe five key factors to be considered:

1. the strength of the connection to the forum;

2. the connection between the party and the dispute;

3. the impact on other countries and persons in other countries;

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[9] *Google Inc v Equustek Solutions Inc* 2017 SCC 34.

[10] Case C-194/16 Bolagsupplysningen OÜ Ingrid Ilsjan v Svensk Handel AB.

[11] https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-01/cp190002en.pdf.

[12] Case C-18/18 Glawischnig-Piesczek.

[13] *Macquarie Bank Limited & Anor v Berg* [1999] NSWSC 526, para 14.

[14] See further: https://www.linkedin.com/pulse/sydney-become-internet-content-blocking-capital-world-svantesson/.

[15] Dan Svantesson, *Solving the Internet Jurisdiction Puzzle* (Oxford University Press, 2017).

4. the type and effectiveness of the order compared to alternatives; and

5. the level of fault of the party.

25. While the appropriate scope of jurisdiction is highly context-dependent, I argue that where account is taken of all these factors we have a sufficiently flexible framework to approach scope of (remedial) jurisdiction as one issue rather than approaching it in a sectoral sense.

26. The great importance of scope of jurisdiction issues stem, in part, from the fact that what may be defamatory in Australia may be perfectly legal in another country, and *vice versa*. In extreme cases, the defamation laws of one country may require Internet platforms to remove certain content that the laws of other states demand that those platforms do not remove.[16]

27. The Council of Attorneys-General's *Review of Model Defamation Provisions* ought to carefully consider the role that so-called geo-location technologies[17] may have in addressing such conflicts of colliding laws.

7. Question 18 Other issues – A call for better international engagement

28. As noted in the Discussion Paper: "international legislation and jurisprudence have developed rapidly", and it is therefore important that Australia engages in all important international discussions. Doing so ensures that: (1) Australian law-making is based on international best practice, and that (2) Australia has a voice where decisions are made.

29. One obvious arena for moving this area of law forward is the important work of the Internet and Jurisdiction Policy Network (I&J)[18] – a Paris-based global multi-stakeholder policy network addressing the tension between the cross-border Internet and national jurisdictions. I&J has brought together a Contact Group[19] consisting of experts from academia, industry, government, and policy groups. On 24 April 2019,

[16] See further: Daphne Keller, (2019, January 29). Who do you sue? State and platform hybrid power over online speech. *Aegis Series* Paper No. 1902. https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf.

[17] See further: Dan Svantesson, *Solving the Internet Jurisdiction Puzzle* (Oxford University Press, 2017) and Dan Svantesson, Geo-location technologies and other means of placing borders on the 'borderless' Internet, *John Marshall Journal of Computer & Information Law*, Vol XXIII, No 1, Fall 2004, pp. 101 – 139.

[18] https://www.internetjurisdiction.net/.

[19] https://www.internetjurisdiction.net/news/content-jurisdiction-contact-group-members-2018.

I&J published an Operational Approaches document[20] canvassing a range of policy options and considerations. Australia should consider engaging more actively with the work of the Internet and Jurisdiction Policy Network.

30. For example, the Discussion Paper notes that guidance could be developed as to: “how complainants should notify a publisher of a complaint about a digital publication and make formal takedown requests”; “what information should be included in a takedown request”; and “how, and the timeframes within which, publishers are to respond to takedown requests.” (p. 38) These are all matters that I&J have worked on for some time.

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Professor Svantesson held an ARC Future Fellowship 2012-2016, has written extensively on Internet jurisdiction matters and has won several research prizes and awards including the 2016 Vice-Chancellor's Research Excellence Award.

The views expressed herein are those of the author and are not necessarily those of any organisation with which Professor Svantesson is associated.

[20] https://www.internetjurisdiction.net/uploads/pdfs/Papers/Content-Jurisdiction-Program-Operational-Approaches.pdf.