UNSW SYDNEY

31 May 2021

Review of Model Defamation Provisions Stage 2
Email: defamationreview@justice.nsw.gov.au

Dear Members of the Working Party,

Re: REVIEW OF MODEL DEFAMATION PROVISIONS STAGE 2 – Submission of Dr Daniel Joyce in response to Discussion Paper

Thank you for initiating this second stage of the review into the current Defamation Provisions. This is an excellent Discussion Paper which illustrates the complexity of the issues involved, though where possible I have tried to keep my answers brief. One broader issue raised is that there are a variety of regulatory frameworks potentially applicable and it would be good to make sure that to the extent possible any reforms to defamation law are integrated with those other areas. I will target my submissions to those areas I am most concerned with in Part A. I make these submissions as an academic who teaches media law and defamation law.

Question 1

(a) Yes, as the jurisprudence is beginning to recognise, intermediaries are not all one and the same and there needs to be some differentiation between them. The three categories proposed will no doubt need further tweaking as new forms of intermediary emerge, but it is a useful and hopefully resilient framework.

Question 2

(b) Passivity and neutrality in relation to the publication of defamatory content are useful indicators, but there is a danger in ascribing neutrality and passivity to platforms which might otherwise be viewed as publishers. Some factual contexts will unsettle the active/passive binary but it is a useful analytical tool.

(c) No.

Question 6

(a) Yes.

(b) A functional approach is preferable.

(d) Not if basic internet services are defined clearly.

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Question 8

(a) Yes, I am in favour of clarifying the innocent dissemination defence. I prefer Alternative A inclusive also of the *Voller* forum administrator context (DP p. 53). This would be a relatively simple way to reform the law with minimal disruption to the broader framework and principles. Innocent dissemination developed as a policy-based response and ought to be further developed to ensure there is the kind of clarity around its application which the jurisprudence has so far failed to deliver. A broad approach should be taken in terms of expanding the current statutory list of subordinate/secondary publishers who might be able to rely upon the defence.

(b) It might be appropriate to rebut this default position if a plaintiff would otherwise be unable to pursue the content creator and there was no other mechanism available to enable removal of defamatory content. (See below on the need for a reformed innocent dissemination defence to interact productively with any new defence along the lines of s 5 of the *Defamation Act 2013* (UK)) There may be a role here for a Platform Ombudsman to help avoid the default de-listing of material from the point of notification (DP p. 54) which would involve a high cost in terms of freedom of expression.

(c) No.

Question 9

Broadly I am in favour of considering the introduction of a defence similar to s 5 of the *Defamation Act 2013* (UK), but it should be adapted so as to interact appropriately with the reform of innocent dissemination as a defence as addressed above in Question 8. If a choice must be made between the two areas I would prefer reform of innocent dissemination as a defence, but a way should be found to make the defences interrelate without issues.

Question 10

It would be a mistake to provide blanket immunity to all digital platforms for third-party content. In the US there are moves away from overly broad safe harbour provisions in light of the online harms generated and we should not move towards such a position given the contemporary regulatory mood.

Question 16

It is vitally important that any system to identify originators contains protections for journalists' sources, whistle blowers, privacy etc. Any framework here should be uniform and recognise the burden on platforms also.

Yours sincerely,

[redacted]

Dr Daniel Joyce
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