SUBMISSION ON THE REVIEW OF MODEL DEFAMATION PROVISIONS, STAGE 2 PART A, BACKGROUND PAPER REGARDING MODEL DEFAMATION AMENDMENTS 2022 (CONSULTATION DRAFT)

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9 September 2022

1 Introduction

I do not support the recommendations. The work underlying these proposals is based on an outdated understanding of the law. Even if that understanding were correct, the policy rationale of these recommendations is flawed.

This submission proceeds by making general comments concerning the subject matter of this stage of the review, which inform the comments made on specific recommendations that follow.

2 General comments

2.1 The new test for who is a 'publisher' in Australian defamation law

The Executive Summary of this latest Background Paper provides on p 4:

> 'The premise of Part A is that due to the broad test for determining who is a publisher under the common law, an internet intermediary is anyone who participates in the facilitation of the publication other than the person who authors the content in the first place (**the originator**).'

Prior to August, following the High Court's decision in *Voller*, that premise was correct. For an account of the *Voller* decision, see: Michael Douglas, 'Publication of defamation by encouraging third party comments on social media' (2022) 138(Jul) *Law Quarterly Review* 362.

Following the High Court's August 2022 delivery of the judgment in *Google LLC v Defteros* [2022] HCA 27, that premise is incorrect. The test for who is a publisher is no longer broad; it has been narrowed. Moreover, it has been narrowed as regards intermediaries in particular. Intermediaries do not need or deserve further statutory protections because they are no longer prima facie liable (ie, they are not 'publishers') in various circumstances. For a brief account the *Defteros* decision, see https://bennettlaw.com.au/the-limits-of-googles-liability-as-publisher-of-defamation/.

After attending the September 2022 roundtable regarding these recommendations, I came away with the impression that *Defteros* had not been adequately considered by fellow stakeholders or those public servants leading the reform process. The fact that it was barely discussed by participants was deeply concerning. Perhaps some stakeholders that had considered *Defteros* played down its significance in order to advance their own strategic objectives (ie, to advocate for further protections for their employers or clients).

My sincere view is that if this judgment had come a few years ago, the consultation preceding the recommendations of Stage 2 Part A would not have been made at all—the Council of Attorneys-General would have no reason to act on the issue. If it were up to me, and obviously it is not, Stage 2 Part A would go back to the drawing board. None of the recommendations proposed are justifiable following the fundamental change effected by *Defteros*.

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I note also that p 4 provides:

> 'A number of stakeholders submitted that it is not fair to hold an internet intermediary liable for third-party content of which they are unaware.'

Even under the pre-*Defteros* state of the law, that statement was not correct. In these circumstances, even prior to *Defteros*, the intermediary was arguably not a publisher. If they were a publisher, they would enjoy statutory defences of innocent dissemination and under the *Online Safety Act 2021* (Cth). Again, the rationale of these proposals is flawed.

2.2 The misrepresentation of stakeholders' views

The Executive Summary also provides on p 4:

> 'While stakeholder views on Part A differ, there is general agreement on the need to clarify the law in this area. Many were of the view that any reform should focus the dispute between the complainant and the originator of the matter in question. A common concern was the potential chilling effect on free speech of defences that require internet intermediaries to remove content to avoid liability. A number of stakeholders submitted that it is not fair to hold an internet intermediary liable for third-party content of which they are unaware.'

This is a gross misrepresentation of stakeholder views. There is no 'general agreement'. To the contrary: there is vigorous disagreement. The sharpest disagreement is between those practitioners who engage with defamation law as specialists and those advocating for some of these recommendations. To gloss over that disagreement is to attribute a false mandate to what are acutely divisive proposals.

Those arguing for 'clarity' (read: more defences for their employers and clients) do so as a chorus in stakeholder roundtables because they have the means and motivation to do so. But every Australian is a stakeholder in these reforms. Many want to say whatever they like online; many want every speech act with which they disagree to result in jailtime; many are in the sensible middle. These collective 'many' are millions of Australians whose perspectives have not been adequately ventilated in this consultation. Regular people rarely care about this area of law unless they or their loved ones need it. This is no fault of the public servants behind the process—it is logical.

The point is that when counting hands raised in favour of certain reforms, not all hands are of equal weight. Certain hands shake particularly aggressively because they are attached to humans who have met other humans whose lives have been destroyed by content on the internet. The views of tech advocates who bothered to get involved in the consultation are not the same as the views of the majority of actual stakeholders.

2.3 The flawed policy rationale

The primary beneficiaries of these proposals are for-profit corporate groups behind intermediaries. Many of these groups are headquartered in the United States. Their business-models reap hundreds of millions of dollars from Australian consumers and businesses while paying little tax; they take more from our community than they give. In that context, what is the policy rationale for providing intermediaries with effective immunity for the harm they cause to Australians? It makes no sense.

These recommendations would make Australians less safe online. They will eliminate the means for those who suffer genuine online harm to protect themselves through relying on defamation law. The policy rationale for these proposals is deeply flawed.

3. Comments on recommendations

3.1 Recommendation 1: Conditional, statutory exemption from defamation liability for mere conduits, caching and storage services

I do not support this recommendation.

Those entities captured by the recommendation, like ISPs, are not sued in defamation. They are not sued because they are not publishers, even under the law prior to *Defteros*; see *Bunt v Tilley* [2007] 1 WLR 1243.

The law does not need clarifying. These entities already have the certainty they need. I oppose piecemeal codification of the law of publication in a way that could produce incoherent results when compared to the application of common law principles to activities not captured by the recommendation.

3.2 Recommendation 2: Conditional, statutory exemption from defamation liability for standard search engine functions

I do not support this recommendation.

The recommendation is already achieved by the High Court's judgment in *Defteros*. The law does not need clarifying.

Arguably, and unfairly, the recommendation would go further than *Defteros*. For example, proposed s 9A(4) makes a distinction between content generated 'automatically' and content generated because of payment of other benefit given to the intermediary. The distinction ignores that even the so-called 'automatic' search results are returned in a priority that is part of the design of a for-profit system. The system does generate income for the intermediary; every search result, automatic or otherwise, is returned for the ends of profit. The policy rationale of this recommendation proceeds from an unduly shallow understanding of the functionality of the business-models of search engines.

Further, the ability to remove a damaging link from the results of a search engine is incredibly valuable to aggrieved persons—in many cases, it is more valuable than a damages award. Providing effective immunity for search results removes a lever by which removal may be achieved. (Other jurisdictions recognise the value of speedy removal of links that damage personality rights: see, for example, the success of the right to erasure in the GDPR, and the predecessor so-called 'right to be forgotten'.) This proposal would remove that ability, meaning the seriously aggrieved are forced to go through protracted litigation to vindicate themselves. This recommendation would therefore undermine the objects of the Uniform Defamation Acts by leading to additional litigation. A better recommendation would be to undo the majority decision in *Defteros*, for the policy reasons alluded to in the reasons of their Honours Keane J and Gordon J.

3.3 Recommendation 3A: Model A – Safe harbour defence for digital intermediaries, subject to a simple complaints notice process (Alternative to Recommendation 3B)

I do not support this recommendation.

The recommendation is seriously flawed in several respects, including the following. First, sufficient protection is provided by the law as to publication and the defences of innocent dissemination and under the *Online Safety Act 2021* (Cth).

Second, the prospect of a poster consenting to an intermediary providing their contact details to an aggrieved person (in proposed s 31A(1)(c)(i)) is laughable.

Third, the defence would lead to further incoherence by offering intermediaries—and so foreign corporations—with defences not enjoyed by Australian entities, eg news organisations, dealing with analogous problems.

Fourth, the interaction between this defence and the offer to make amends / concerns notice regime is unclear. Untangling the mess will lead to even more litigation.

Fifth, if the goal is to incentivise intermediaries to remove dodgy defamatory content, then that can be achieved without gifting intermediaries a gratuitous, incoherent defence: just compel them to do so on notice (cf the right to erasure).

Sixth, attributing 'malice'—a mental state—to a foreign tech giant is an odd endeavour, and an odd hook by which to ground the operation of an important provision.[1] Moreover, if a defendant intermediary refuses to remove content after being made aware of its defamatory content, would that not be malicious? If so, the defence would have no work to do beyond that achieved by the current law.

3.4 Recommendation 3B: Model B – innocent dissemination defence for digital intermediaries, subject to a simple complaints notice process (Alternative to Recommendation 3A)

Although I prefer this recommendation to that of recommendation 3A, I do not support this recommendation. The same concerns expressed in relation to recommendation 3A transpose here.

In relation to this model, the incentivisation of removal of defamatory content by intermediaries is a good thing. That mechanism should be divorced from the defence and given the force of law.

Even so, that aspect of the model is still problematic. What standards will determine what was 'reasonable' for the intermediary in the circumstances? I suspect courts will take a different view to Google et al. This provision will create more litigation.

Further, 14 days is too generous to intermediaries. Within 2 weeks, material may have permanently spread on the grapevine and into digital eternity. Many intermediaries have the resources to respond very quickly. Eg, a tech giant should deal with a complaint within 24 hours. Smaller local operations might justifiably be provided with longer.

3.5 Recommendation 4: Commonwealth Government to consider an exemption for defamation law from the Online Safety Act 2021 immunity

I do not support this recommendation. The current law is clear; see s 17 of the Act. Can those who take a different view point to a single case in which the 2021 statute did not operate as intended?

3.5 Recommendation 5: Empower courts to make non-party orders to prevent access to defamatory matter online

I tentatively support this recommendation but note the following.

[1] Cf the work of Professor Elise Bant on corporate misconduct and the problems of mental states for corporate persons in attributing fault to corporations. Her work on systems intentionality would be useful for this context. See the work product of her ARC-funded project: https://unravellingcorporatefraud.com/

First, the recommendation is unnecessary. A successful plaintiff could already obtain such an order under the current law. The recommendation would only have work to do if preceding recommendations—which ought to be rejected—are enacted.

Second, if the recommendation is to be accepted, then why should the successful plaintiff need to go to the effort and expense of seeking a further court order against an intermediary? The intermediary should simply be compelled to remove the content.

Third, the policy justification for this recommendation is incoherent. If removal is warranted in circumstances where an injunction would be obtainable against the so-called originator, and overcoming the high demands of *ABC v O'Neill* (2006) 227 CLR 57 as regards the importance of freedom of expression, then the intermediary would have aggravated the harm of the aggrieved person by leaving the content accessible via their platform. In those circumstances, justice demands that the aggrieved person should be able to retrieve damages from the intermediary, and not just an injunction (ie, an order under this provision). The only foreseeable circumstances in which this provision has work to do would involve unconscionable behaviour on the part of intermediaries. Equitable justice should not suffer a wrong without allowing a remedy. *Ubi jus ibi remedium*.

3.6 Recommendation 6: Courts to consider balancing factors when making preliminary discovery orders

I do not support this recommendation.

It is completely unnecessary. Courts already do this. Orders for preliminary or pre-action discovery are already discretionary. See, eg, UCPR (NSW) r 5.4(1): 'the court *may* order' (emphasis added).

Further, the recommendation would be pointless in that an aggrieved person could simply seek preliminary discovery in the Federal Court, where a State statute, like the *Defamation Act 2005* (NSW), would not apply in federal jurisdiction in application of s 79 of the *Judiciary Act 1903* (Cth), because the *Federal Court Rules 2011* (Cth) are federal law that 'provides otherwise' than the relevant State law. See: 'Forum Shopping in Australian Defamation Litigation' (PhD thesis, 2022).

I note that even if an aggrieved person wanted to sue in a State Supreme Court, they could go to the FCA to achieve preliminary discovery, then use that material in commencing in a State court.

3.7 Recommendation 7: Mandatory requirements for an offer to make amends to be updated for online publications

I do not support this recommendation. It should go in the bin, together with the rest of the 2021 amendments to the offer to make amends provisions that are in force in the eastern states (but not in glorious Western Australia).