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By email: defamationreview@justice.nsw.gov.au

Policy, Reform & Legislation, NSW Department of Communities and Justice

Dear Meeting of Attorneys- General,

Submission to Meeting of Attorneys-General: Stage 2 Review of the Model Defamation Provisions in response to the draft Part A consultation draft Model Defamation Amendment Provisions 2022

The Rule of Law Institute of Australia (the Institute) thanks the Meeting of Attorneys-General for the opportunity to make a submission regarding the draft Part A consultation draft Model Defamation Amendment Provisions 2022.

The Institute is an independent, non-partisan, not for profit formed to promote and uphold the rule of law in Australia. Its work is supported by over 1,000 members. The objectives of the Institute include promoting good governance in Australia by the rule of law and encouraging transparency and accountability in State and Federal Government.

Yours faithfully

[redacted]

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Vice President

This submission is primarily concerned with matters of principle as reflected in the alternative defences proposed in recommendations 3A and 3B of the background paper on the Model Defamation Amendment Provisions 2022 (Consultation Draft).

That paper, which was made public in August, says the purpose of recommendation 3A - the safe harbour defence - is to ensure disputes about material published online are focused between the complainant and the originator of that material. The stated purpose of recommendation 3B - the innocent dissemination defence - is to ensure internet intermediaries are not liable for third-party defamatory content where they are merely subordinate distributors and lack knowledge of the defamatory content.

The Rule of Law Institute supports this but believes a more direct approach is needed. The stated purpose of both options is in line with the principle that liability should rest with the originators of defamatory material, not those who are mere passive conduits of information much like telephone services. Close adherence to that principle would guarantee the fairness of the final amendments. Departing from that principle would have the reverse effect.

The institute is concerned that some aspects of the proposed scheme - outlined below - would, in practice, erode that principle and lead to unfair outcomes. This could open the way for plaintiffs to forgo taking proceedings against originators of defamatory material in order to pursue intermediaries who, although passive conduits, might have greater capacity to pay damages or reach financial settlements.

Such an approach would bring the law of defamation into disrepute by encouraging “greenmail” in which organisations that have engaged in no wrongdoing would be subjected to pressure to pay “go-away money” to plaintiffs. This might serve the financial interests of plaintiffs but it would be a regrettable departure from the principle that nobody should be held liable for the wrongdoing of others.

The problem appears to have its origin in the High Court decision in Fairfax Media Publications Pty Ltd & Others v Voller [2021] HCA 27 that gave an expansive interpretation of the meaning of “publisher” in defamation proceedings. By expanding the categories of potential publishers of online material, the court’s ruling expanded the categories of potential respondents for aggrieved parties.

The defences are an admirable attempt to ease the impact of the Voller decision. However they do not address the core of the problem. The Voller ruling has the effect of imposing potential liability on parties that are, in truth, mere conduits of information equivalent to telephone services.

The Voller decision means everyone who has a Facebook page is at risk of being considered the publisher of defamatory remarks that are left on those pages without their knowledge or consent. That

means community groups, businesses and government agencies are all potentially liable for the wrongdoing of third parties.

The problem is that the Voller doctrine is the starting point. That means parties who engaged in no wrongdoing will inevitably be dragged into litigation over the wrongdoing of others. Even if the defences are effective, innocent parties will still be put to the expense and trouble associated with litigation.

Expanding the reach of defamation litigation beyond the originators of defamatory material is the inevitable consequence of the Voller doctrine. The Voller decision is at odds with the principle that liability should rest with the originators of defamatory material, not those who are mere passive conduits of information.

Instead of accepting the Voller doctrine and seeking to modify its adverse impact, a more direct remedy is required. The Voller doctrine might be suitable for traditional "hard copy" publishing but the precedents that informed the High Court are clearly inappropriate for the complex world of online publishing.

A less problematic approach might involve a statutory departure from the Voller principle in order to avoid the necessity of modifying that principle with defences that, in some cases, would not be available to those who need them most. Overturning the Voller principle would be a way of returning defamation law to the legitimate role of bringing to account those who engage in wrongdoing instead of those who are mere innocent conduits of information.

If, however, that is not acceptable, the institute suggests that the following areas need attention:

1) Digital intermediaries

The defences in recommendations 3A and 3B apply to digital intermediaries. However that term has been defined in a way that appears to exclude the possibility that both defences would be available to media organisations, community groups and others who are not online "service providers" and are instead account holders with digital intermediaries such as Facebook.

If that is the case, it leaves open the possibility that the policy underpinning the proposed defences would be defeated. The principle from the High Court's decision in Voller is that those who hold accounts with intermediaries such as Facebook could be held to be publishers of defamatory comments that are left on their Facebook pages by third parties without their knowledge or consent. Yet it appears that those who hold such accounts would not have access to either defence because of the way in which the term "digital intermediary" has been defined.

To overcome this problem, changes are needed. It would be inconsistent to allow some digital intermediaries to have access to the proposed defences while excluding those who hold accounts with intermediaries and who could also be described as passive conduits.

2) Unrealistic conditions

In order to invoke the safe harbour defence outlined in recommendation 3A, the background paper proposes a number of conditions. They include the provision of sufficient information about the originator of the defamatory matter for the complainant to issue a concerns notice or commence proceedings. The paper proposes that this information should be provided with the consent of the originator of the defamatory material.

Our concern is that this condition is unrealistic. It could be defeated if the originator withholds consent or if the intermediary held no such information. The originator would seem to have no incentive to agree to the disclosure of information that would result in legal proceedings against the originator. Even if an originator agreed to the disclosure of information held by the intermediary, in some cases this would be limited to an email address which may or may not be legitimate. That would be insufficient to support the commencement of proceedings.

When this condition is not met, the onus falls to the intermediary to remove the material because, under the Voller principle, the intermediary would be considered a publisher of information posted by a third party without the intermediary's knowledge or consent.

In these circumstances, the safe harbour defence would be illusory. It would do little to address the vulnerability of intermediaries that results from the Voller decision.

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Vice-president
Rule of Law Institute of Australia