Stage 2 of the Defamation Reform Process:
A Can of Digital Worms is Opened

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Stage 2 of the national defamation reforms is officially underway. While the period for submissions in response to the discussion paper has closed, it remains to be seen which approach the Model Defamation Law Working Party will adopt.

The discussion paper seeks stakeholder input on the conundrum that is liability for the publication of defamatory material on the internet. There are no easy answers, and the submissions received are likely to diverge significantly in the solutions proposed. There is a reason why this issue has been left until Stage 2: it's tricky.

The Uniform Defamation Acts came into effect on 1 January 2006, at a time when social media platforms were only just emerging. Facebook was not open to the public until September 2006, having only had a university presence before that time. Twitter didn't take off in Australia until 2009. Australia's seminal appellate authority on publication was handed down by the High Court in 2002 – publication of the type engaged in on social media, where anonymous strangers behind keyboards can share their opinions very publicly, was not even within contemplation.

The law has not kept up with technological developments. The broad definition of publication under defamation law, espoused in the judgment of Isaacs J in *Webb v Bloch* [1928] HCA 50; 41 CLR 331, provides that a publisher is anyone who has "without reference to the precise degree in which the defendant has been instrumental to such publication, if he has intentionally lent his assistance to its existence for the purpose of it being published". This includes anyone who has assisted, conduced, concurred, assented to, approved, authorised, encouraged, induced and has been an accessory to the publication.

Online publication involves a range of actors, from the originator, to the host of the webpage or forum, to the platform owner or operator, to the search engine that provides searchable access to online content, each of whom may be liable as a publisher of defamatory material. Whether this is appropriate or desirable in practice is another matter. There are confusing policy-based and legal considerations involved in deciding what their respective responsibilities and liabilities should be.

To date, stakeholders representing internet intermediaries have argued that there is insufficient protection from liability for content that they have not authored. Internet intermediaries, it is submitted, are not and cannot be aware of all content posted by third parties that appears on their webpages or in search results and are not in a position to assess whether content is defamatory. There is a concern that intermediaries may simply remove content to avoid potential liability when notified of a complaint, which would have a chilling effect on freedom of expression. Even worse, intermediaries may be held liable without either notice or knowledge, as in *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102.

Other stakeholders, including academics and peak legal bodies, have argued that defamation law should be updated to reflect the nature of digital publications while balancing this with the need to ensure that complainants have access to a remedy. Others have submitted that, given the ease with which online material can spread or "go viral", there should be quick, easily accessible and low cost avenues for complainants to have content modified or removed, including where the originator's identity is unknown, or if the originator refuses to comply with a request or court order.

After considering the approaches that have been adopted in the United Kingdom, the United States and Canada, the discussion paper poses four options for reform (which are expressed to not be mutually exclusive and a number of options could potentially operate together):

- Option 1: Retain the status quo with some minor changes to the defamation legislation to clarify the role of internet intermediaries;
- Option 2: Clarify the innocent dissemination defence in relation to digital platforms and forum administrators;
- Option 3: Safe harbour – subject to a complaints notice process (such as that in effect in the United Kingdom and as per the recommendations of the Law Commission of Ontario); and/or
- Option 4: Immunity for internet intermediaries for user-generated content unless the internet intermediary materially contributes to the unlawfulness of the publication (such as the immunity under section 230 of the *Communications Decency Act 1996* (US)).

The option which is likely to be advocated for by many stakeholders is the introduction of a new defence to defamation actions brought against internet intermediaries where the intermediaries comply with a prescribed process for addressing complaints about third party defamatory content on their websites, including by acting as a go-between between a complainant and an originator or by removing the content.

The discussion paper states that the complaints notice procedure could apply to a broad range of

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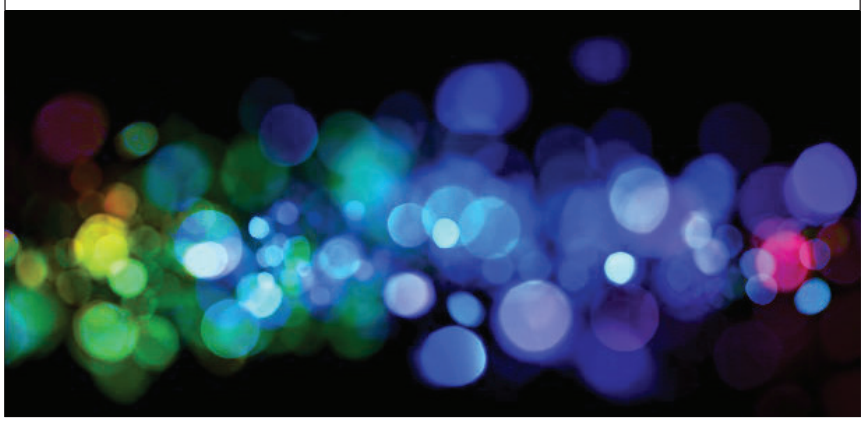

digital platforms, including social media services, search engines, digital content aggregators, messaging services and some forum administrators. Digital platforms that are not considered publishers, and therefore don't require a safe harbour, would not need to comply with the complaints notice process. It is noted that some digital platforms may not hold the relevant information required in order to complete the process, such as the contact details of originators of third party content, so would be unable to connect a complainant with an originator.

In the Working Party's assessment of this option, the discussion paper notes that the defence has the potential to provide a fast and simple path for a complainant achieve a solution when their reputation has been harmed online. The Working Party observes that the extent to which the defence and complaints notice process is effective would likely depend on how straightforward and cost effective it is to use. However, there is a risk that the complaints notice process could be abused by complainants who want to have content removed from the internet which is critical or unflattering (but not defamatory) of them. It is important that digital platforms, which are generally not in a position to assess the merits of a complaint, are not incentivised to simply remove content once a complaints notice is received rather than follow the requirements of the process, which may have a chilling effect on freedom of expression.

All of these issues would need to be considered in the design of any complaints notice process for Australia. The discussion paper notes that: "One of the key challenges of law reform in this area is to address the need for certainty at the same time as providing sufficient flexibility to accommodate the wide range of internet intermediary functions – both existing and emerging. Focusing on functions of internet intermediaries provides flexibility to address new and emerging technologies, while also outlining expectations on internet intermediaries if they want to gain the benefit of new defences and immunities. If designed well, the reforms may prompt reconsideration of business models to better protect users from the risk of harm to reputation, in order to reduce risk of liability of internet intermediaries."