



30 April 2019

Submissions to Council of Attorneys-General's Review of Model Defamation Provisions

1. INTRODUCTION AND EXECUTIVE SUMMARY

Google welcomes the opportunity to make submissions in relation to the Council of Attorneys-General's Review of Model Defamation Provisions (the **Review**).

In recent decades, communications technology, the internet and social media have created a new era of social interaction and engagement. The Review presents an opportunity to update defamation laws to create a workable process for resolving defamation claims that arise in the context of contemporary communications technology. Defamation laws should be reformed so they are adaptive and future ready, while resting on fundamental principles of authorship, intention and dispute resolution, and respecting the value of open communication.

We understand DIGI, a not for profit industry association representing the digital industry in Australia (including Google), will express support for certain reforms suggested by the Review's discussion paper, including introducing a serious harm threshold, removing certain corporations' right to sue, and reforms to qualified privilege. Although not addressed in this submission, Google also supports those reforms. They are sensible, in the public interest, and promote appropriate scrutiny of government and corporate bodies.

Google wishes to make more detailed submissions in relation to two of the reforms suggested by the Review's discussion paper: a single publication rule and innocent dissemination. Before making those detailed submissions, this response outlines why defamation law reform should be informed by the:

- a. value of open communication;
- b. public and economic benefits of search technology; and
- c. efficient resolution of disputes.

(a) The value of open communication

Freedom of speech, and the ability to research freely to obtain what others have written, is of fundamental importance to a democratic society and is partially protected (at least in respect of political communications) under our Constitution. The free flow of information and transparency are vital to the health of society and the prevention of corruption. United States Supreme Court Justice Louis Brandeis famously opined:

"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman...The most important political office is that of the private citizen."¹

Defamation laws should be framed in a way that minimises any chilling of free speech while striking a balance with other objectives. The potential for defamation laws to restrict free speech has long been recognised by courts in Australia, the United States, the United Kingdom and Europe. The European Court of Human Rights has reasoned that this chilling effect is detrimental

¹ Brandeis, Louis, *Other People's Money—and How Bankers Use It* (1914).

to society as a whole, inhibiting freedom of speech and freedom of the press.² Justice Brennan in *New York Times v Sullivan* ruled that the chilling effect threatens the viability of some mass media and undermines the First Amendment.³

The United Kingdom, formerly known as the defamation capital of the world, conducted a review and redraft of its defamation laws in 2013. Australia now has amongst the world's most restrictive defamation laws. Australia is "peculiar and now virtually unique amongst western countries because it does not have a constitutional or statutory protection of freedom of speech" (except for charters of rights in Victoria and ACT).⁴

The High Court of Australia has recognised that the public interest in freedom of speech (including the right to seek, receive and impart information) must be given effect in the development of the common law of defamation.⁵ Search engines are enablers of free speech and information, while defamation laws, as currently drafted, "can be fairly viewed as presenting the greatest challenge to freedom of speech".⁶

Reforms to defamation laws should aim to restore the balance between the benefits to the community of free speech and reputational interests. Requiring online intermediaries to remove links to allegedly defamatory content once on notice of its existence leads to the suppression of legitimate speech for fear of liability. Unlike other types of abhorrent content which might on its face be identifiable as illegal, it is not easy for intermediaries to differentiate actionable defamatory content from legitimate speech (particularly given the potential availability of defences such as justification). Defamatory content is not so damaging to society as to justify laws that encourage overcautious removal and suppression of potentially legitimate speech, particularly when the author or host of the allegedly defamatory content is a more appropriate defendant, who may have access to important and legitimate defences. This is particularly the case given the contexts in which allegedly defamatory content commonly arises, such as investigative journalism, reviews of businesses, and whistleblowing.

The detriment of ordering the removal of web content is demonstrated by a case recently brought by Australia's consumer affairs authority. On 18 April 2019, the ACCC announced that it had commenced proceedings against a particular business for breaches of consumer law.⁷ However, 18 months earlier, that same business had obtained ex parte interim Orders from the Federal Court requiring Google LLC to remove two critical reviews from customers which the business asserted were defamatory. This is a classic example of defamation laws leading to the suppression of information that would have prevented consumers suffering from unfair business practices.

(b) Public and economic benefits of search technology

There is public benefit in providing a facility that allows the public to quickly and effectively search the internet. Google Search has made the internet a more orderly, navigable and usable space. Google Search takes seriously its responsibility as a significant channel through which the world's information flows in a way that would have been inconceivable at the time existing defamation law evolved.

Google Search and other search engines occupy a unique position on the digital landscape. Unlike social media platforms, they do not host the websites where content is posted, so lack the ability to have offending content removed from the internet. Often they do not even have contact

² Eg *Cumpana v Romania* (2005) 41 EHRR 14 at 225.

³ 376 US 279; 84S Ct 710 (1964) at 725.

⁴ *Coleman v Power* (2004) 220 CLR 1 at 81 (CLR) per Gummow and Hayne JJ.

⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 572 per curiam.

⁶ David Rolph, *Defamation Law*, Thomson Reuters, Sydney, 2016, p 5-6.

⁷ <https://www.accc.gov.au/media-release/australian-4wd-hire-in-court-for-alleged-breaches-of-consumer-law-0>.

information for the sites that host the offending content (let alone the authors who contribute to those sites), so when the material is challenged they cannot seek clarification from the author, and when it is removed, they cannot notify the author.

The digital economy has given individuals and businesses greater choice, by giving them access to more information. Search engines not only allow individuals to find the information they want, they also expand the range of goods and services available to them. Google Search and other search engines have added value to Australian businesses, by lowering the costs of obtaining inputs from suppliers, improving the productivity of employees and increasing the efficiency of advertising and marketing. In 2015, this value amounted to \$15.1 billion for Australian businesses.⁸

The community's access to internet search facilities can be likened to an interest for the purposes of the defence of qualified privilege. Where defamatory material is provided in the course of providing that access, the protection of reputational interests should be balanced against the community's interest in having that access. Search engines provide public benefit by directing individuals to the third party content they are seeking, and promote freedom of expression and an open, transparent democracy.

Law reform should proceed with the objective of promoting the social and economic benefits created by the digital economy, while balancing this objective with appropriate protection of individuals from reputational damage based on false, defamatory material. The issue of defining publication should be approached with a view to maintaining the utility of internet search functions, an appreciation of the crucial intermediate role that search engines occupy, and a desire to avoid significant chilling of freedom of communication.

(c) Efficient resolution of disputes

Defamation laws should aim to focus disputes between the originator of the defamatory matter and the complainant. Such an approach would provide individuals who believe they have been defamed with a more effective, efficient way of resolving their disputes. It is not in the interests of the public nor the legal system for legislation to enable or promote disputes with search engines, which are merely intermediaries between the originator and complainant, and lack the element of participation in publication of web hosts, let alone of the underlying authors of content.

It is incongruous and an inefficient use of public resources to force search engines to become parties to disputes, on the basis that they provide one of the mechanisms by which defamatory matter posted by a third party may be located. It is possible for a search engine to prevent a specific URL appearing in results for a given search query. However, it is important to recognise that the content remains accessible on the internet to anyone who knows where to find it. The underlying author or content host is able to amend, re-post, or remove the content of concern. Importantly, it is not feasible or desirable to require search engines to try to constantly monitor all of the 130+ trillion pages on the web for material that might be substantially the same as something previously found to be defamatory. Australian defamation laws proceed on the basis of meanings, which can be subtle, nuanced, colloquial, or based upon innuendo or extrinsic facts. Computers are not yet able to interpret the literal meaning of passages of text. Only the author of particular content can ensure that they do not repost it elsewhere on the web.

In addition, attributing an intention to publish to the corporate entity that provides a search engine overlooks some key features of communications technology:

- Search engines do not upload the documents on the web, they operate in an automated way and do not know the meanings conveyed by those documents; their effectiveness in indexing all the material on the internet depends on the efficient operation of those automatic functions, which in turn depends on minimal human interference;

⁸ AlphaBeta *Google Economic Impact 2015*, <https://www.alphabeta.com/wp-content/uploads/2016/08/Google-economic-impact-2015.pdf> pages 9, 11.

- Search engines are not well-positioned to assess the truth or falsehood of content, or other factors that may bear on a defamation analysis such as how allegedly defamatory material should be interpreted. This is especially true when the search engine receives a one-sided complaint and does not have the context or supporting material underpinning the content at issue; and
- If a person is concerned that their reputation has been injured by imputations conveyed by a web page, they can achieve vindication by bringing an action against the person who uploaded that web page.

The consequence of treating search engines as publishers is that they would be forced to become gatekeepers, withholding access to material that is potentially defamatory, without knowing whether it is, in fact, defamatory. Search engines are not well placed to adjudicate on defamation cases because the validity of claims and availability of defences are highly fact-dependent and often involve complex questions of law. Verdicts in defamation trials can be difficult to predict, even for a person in Court who has heard all the evidence, let alone a search engine operator who has received a complaint, has none of the context and has heard none (or only a partial selection) of the arguments for and against the claim. Furthermore, the sheer size of the internet (it is made up of more than 130 trillion pages), makes the task even less viable. Blanket self-censorship would restrict the flow of large volumes of material (much of it legitimately published), imposing permanent injunctions in a way that courts, balancing the interests of freedom of speech, do not. The chilling effect and impact on the availability and further development of what are now essential tools of social life, education and commerce, would be significant.

Focus of submission

In light of the above approach, these submissions will focus on two of the questions posed by the discussion paper:

- Question 3, whether the Model Defamation Provisions should be amended to include a single publication rule; and
- Question 15, whether there should be amendments to the innocent dissemination defence, protections for digital publishers, safe harbour, and takedown procedures.

2. SINGLE PUBLICATION RULE

The multiple publication rule is based on the principle established by the English case of *Duke of Brunswick v Harmer* (1849) 14 QBD 185, which was applied by the High Court of Australia in 2002 in *Dow Jones v Gutnick* (2002) 210 CLR 575 to become the binding authority on the concept of publication in defamation law. The incongruity of the principle's application to a 21st Century internet case was highlighted by Justice Kirby:

*"The idea that this Court should solve the present problem by reference to judicial remarks in England in a case, decided more than a hundred and fifty years ago, involving the conduct of a manservant of a Duke, despatched to procure a back issue of a newspaper of miniscule circulation, is not immediately appealing to me."*⁹

In 2004, the former Standing Committee of Attorneys-General endorsed a 12 month limitation period for defamation claims, marking a significant decrease in the limitation period for such claims. This recognised that claims had to be brought in a timely fashion. However, the multiple publication rule frustrates that rule, thus undermining a sensible, considered reform.

The multiple publication rule means that a publisher can be sued for a decades-old article, if it has been recently downloaded. This creates open-ended liability for publishers, because the time limit on commencing proceedings restarts with every download. The digital equivalent of the Duke's

⁹ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 619.

manservant has become commonplace in defamation litigation, rendering the limitation period meaningless.

Indefinite liability goes against the interests of justice and creates evidentiary problems, because it is likely that a defendant will no longer have possession of materials to support defences such as justification and qualified privilege, where proceedings are commenced years after original publication. Indefinite liability also acts as a disincentive to the provision of online archives, thus limiting access to historical information and research.

Without a multiple publication rule, liability would be confined to the 12 months following communication of any defamatory material, creating certainty for publishers and removing the disincentive to maintain online archives. Google submits the limitation period should remain 12 months, for the following reasons:

- Courts can order an extension of that period of up to three years where it was not reasonable for the plaintiff to have commenced proceedings within one year;¹⁰ and
- The nature of defamation, compared to other torts, is such that any harm is usually most apparent upon first publication.

It is clear that taking an approach to publication other than the multiple publication rule requires legislative reform rather than judicial reinterpretation of existing principles.¹¹

Forum shopping

The law in its current form gives plaintiffs the opportunity to commence proceedings in a forum where neither it nor the publisher resides, but where publication has occurred, and which is perceived to be a plaintiff-friendly jurisdiction.¹² The principle has resulted in extensive forum shopping, principally designed to avoid a jury trial, by establishing publication in the federal jurisdiction.

International reforms

Google supports the notion expressed by Justice Kirby in *Gutnick*, that the issue of internet publication requires "international discussion in a forum as global as the internet".¹³ In the absence of such co-ordinated discussion, consistency between comparable jurisdictions is desirable, especially in relation to provisions that have consequences for where proceedings can be commenced.

A single publication rule has been introduced in the United Kingdom, through section 8 of the *Defamation Act 2013* (UK) which provides that a one-year limitation period commences on the date of first publication by a given publisher.

Like in Australia, it is necessary to obtain leave to bring proceedings outside the 12 month period. However, under section 32A of the *Limitation Act 1980* (UK), there is a different test: whether it would be "equitable" to permit the case to go forward in the circumstances. Regard must be given to any prejudice that would be caused to either side. The exercise of this discretion is exceptional,

¹⁰ *Limitation Act 1969* (NSW) section 56A.

¹¹ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at [136].

¹² For example, *Berezovsky v Michaels* [2000] 1 WLR 1004; *Loutchansky v Times Newspapers Ltd* (Nos 2-5) [2002] QB 783 cited in *Splendid Isolation? Australia as a Destination for 'Libel Tourism'* (2012) Australian International Law Journal 80 at [85].

¹³ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 643.

because time is treated as being of the essence in defamation claims.¹⁴ As outlined above, the Australian requirement is that it was not reasonable for the plaintiff to commence proceedings within the first 12 months after publication. In both jurisdictions, ignorance of the limitation period is insufficient grounds to extend the limitation period.¹⁵

3. INNOCENT DISSEMINATION, PROTECTIONS, SAFE HARBOUR, TAKEDOWN

Question 15 of the discussion paper asks:

- (a) Does the innocent dissemination defence require amendment to better reflect the operation of Internet Service Providers, Internet Content Hosts, social media, search engines, and other digital content aggregators as publishers?
- (b) Are existing protections for digital publishers sufficient?
- (c) Would a specific 'safe harbour' provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions?
- (d) Are clear 'takedown' procedures for digital publishers necessary and, if so, how should any such provisions be expressed?

(a) Innocent dissemination

Although the statutory defence of innocent dissemination is expressed in terms that are technology-neutral, in practice defendants using modern technology have had difficulty relying on it.¹⁶

The conduct of a search engine operator in connecting a user to search results has been held ineligible for protection, where the search engine operator was on notice of the matter complained of. The defence, contained in section 32 of the *Defamation Act 2005* (NSW), requires that the defendant not know that the material was defamatory, and the defence has failed in circumstances where Google disputed that the matters complained of were in fact defamatory.¹⁷ In many cases, these decisions have turned upon contested interpretations of language, with courts finding that the material in question made factual assertions that were not obvious on the face of the material.

It is inappropriate for this defence to depend on lack of knowledge of whether content is defamatory because, even where a search engine is notified of the existence of search results relating to defamatory content, a search engine will typically be unable to assess defamatory meaning (which is often disputed and may involve, for example, innuendo, extrinsic facts, and specific knowledge) or assess whether the underlying publisher has a good defence. Further, a search engine cannot remove a page from the internet, it can only prevent a link to that page appearing in its results.

The innocent dissemination defence should focus on whether material is actionable rather than merely defamatory, as well as a subordinate publisher's ability to remove the offending content. It should be clarified to provide a defence for search engines where they are notified of the existence of defamatory search results, but are unable to know whether the underlying publication is actionable or comprehensively prevent those or similar results being returned in the future.

¹⁴ *Austin v Newcastle Chronicle and Journal Ltd* [2001] EWCA Civ 834; *Bewry v Reed Elsevier* [2015] 1 WLR 2565 at [5]-[8].

¹⁵ *Bewry v Reed Elsevier UK Ltd (CA)* [2015] WLR Sharp LJ.

¹⁶ David Rolph, *Publication, Innocent Dissemination and the Internet After Dow Jones & Co Inc v Gutnick* [2010] UNSWLAWJl 24; (2010) 33(2) UNSW Law Journal 562 at 575.

¹⁷ *Duffy v Google Inc* [2015] SASC 170 [356].

Such an approach would be just, and also reflect the principles underpinning the development of the defence, proceeding as it did on an understanding of the way printing technology functioned in the late 19th Century when printers manually constructed composite boards, reviewing each word and having the opportunity to intervene before clearly defamatory content was printed.¹⁸

(b) Existing protections for digital publishers

The only legislative immunity specifically targeting online services is contained in schedule 5, clause 91 of the *Broadcasting Services Act 1992* (Cth), which provides that a State or Territory law has no effect to the extent that it subjects an internet content host or internet service provider to liability for hosting or carrying particular content in Australia where the internet content host was not aware of the nature of the content.

This provision does little to promote the efficient resolution of disputes because, while it clearly has the potential to exclude the operation of defamation law, the focus on the knowledge of the host or provider is unhelpful. As with innocent dissemination, knowledge does not equate to an ability to adjudicate on the validity of a claim or prevent the communication of offending content. Clause 91 does not adequately focus defamation disputes between the originator and the complainant; it does not prevent passive intermediaries becoming entangled in those disputes. It is also limited to Australian service providers, which is not sufficient in the context of a global internet.

(c) Safe harbour

The most sensible, effective course is for a complainant to take action against the originator and the Review should encourage this course.

The most effective means of encouraging a targeted approach to dispute resolution is through the concept of a safe harbour. This concept has been applied in other parts of the world, in recognition that such a measure promotes the effective resolution of disputes between originator and complainant, encourages individuals to take responsibility for the content they post online, and minimises unnecessary restrictions on the flow of information around the world. Examples include section 5 of the *Defamation Act 2013* (UK), Article 14 of the *EU Electronic Commerce Directive*, *Shreya Singhal v. Union of India*, AIR 2015 SC 1523 (Supreme Court of India), and section 230 of the *1996 Communications Decency Act* (US).

There should be a statutory safe harbour for search engines and similar service providers, such that they are protected from liability for third party content, in certain circumstances. We would be happy to provide example drafting if it would be of assistance, similar to section 10 of the *Defamation Act 2013* (UK) which provides that a court has no jurisdiction to hear and determine an action brought against a person who is not the author, editor or publisher of a matter complained of, unless the court is satisfied it is not reasonably practicable for an action to be brought against the author, editor or publisher.

As in most cases, search engines are not authors, editors or publishers (notwithstanding what we submit is a strained interpretation of the definition of publisher in Australian case law in relation to search results provided by a search engine), this reform would allow dispute resolution to focus on the true parties in a defamation matter: the originator and the complainant. Legal resources could be used to resolve disputes effectively and efficiently, rather than constantly re-litigating questions of publication and innocent dissemination by search engines, which typically sidelines the question of whether the underlying material is actually defamatory and indefensible.

¹⁸ David Rolph, *Publication, Innocent Dissemination and the Internet After Dow Jones & Co Inc v Gutnick* [2010] UNSWLWJL 24; (2010) 33(2) UNSW Law Journal 562 at 574.

There is evidence that potential exposure to liability is causing some Australian media and internet services to take a conservative approach to third party content.¹⁹ If true, this would mean Australians' access to information is being restricted and public debate stymied. Indeed, imposing potential liability on search engines encourages them to remove links to reputable news sources' content which the source itself might prefer to defend.

As well as achieving public interest benefits, a safe harbour would accord with a principled approach to the issue of publication. Search engines such as Google Search cannot properly be regarded as publishers, for the following reasons:

- The defendant must have an intention to publish the matter complained of, which the plaintiff must prove;²⁰
- The objective test formulated by *Oliver Wendell Holmes*,²¹ that a man is presumed to intend the "natural and probable consequences" of his actions, is not appropriate as a means of inferring intention²² because of the origins of defamation as an action on the case, the affinities of defamation with sedition and criminal libel (where intention to publish was critical), and the desire to achieve the right balance between protection of reputation and freedom of speech;
- Search engines should be regarded as having no intention to publish search results that are automatically returned to a user who has entered a query into a search engine; and
- Search engines are unable to control the underlying content found through their search functions so should not be regarded as having published it.

Courts have been reluctant to exclude online services from the application of the rules of publication in defamation law,²³ suggesting that any such exclusion will need to come through legislative reform. This reform would help protect essential channels of information, promote growth of the digital economy, and uphold freedom of communication. It would also be consistent with reforms that have already been introduced in the United Kingdom, United States and Europe.

(d) Takedown procedures

Google LLC's existing process for handling search result removal requests based on claims of defamation is as follows:

1. A member of the public contacts Google LLC to complain about a particular search result or results;
2. Google LLC refers that complaint to its Removals Team;
3. The Removals Team asks the complainant to provide the specific URL of the web page complained of, if it has not already been provided;
4. The Removals Team views the complained of web page/s;
5. Unless a third party adjudicator, such as a court, has issued a ruling in relation to particular material, it is difficult for the Removals Team to ascertain whether the

¹⁹ Council of Attorneys-General, Review of Model Defamation Provisions, Discussion paper, February 2019, 5.59.

²⁰ The submission is made without distinction between a "first or main publisher" and a "subordinate publisher" (cf *Oriental Press Group Ltd v Fevaworks Solutions Ltd [2013] HKEC 1025* at [29]-[32]).

²¹ See the first three chapters of Holmes, *The Common Law* (1881).

²² *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 630 [124].

²³ *Duffy v Google Inc* [2015] SASC 170 [356], *Trkulja v Google* [2015] VSC 635 [75], *Google v Trkulja*, [2016] VSCA 333 [414].

complained of material is defamatory and, if it is, whether any defences would apply, without knowing the individuals the subject of and involved in the publication and the factual context of that publication;

6. Notwithstanding the problematic nature of any assessment by Google LLC, the Removals Team decides whether there is sufficient risk that the URLs provided link to material that is defamatory and indefensible;
7. The Removals Team in some cases might seek legal advice;
8. The Removals Team in some cases considers whether there is public interest in taking greater than normal risk, such as where the underlying web page is published by a reputable news source;
9. If the Removals Team decides there is sufficient risk that the material is defamatory and indefensible, it will block the specific URL from appearing in search results for that particular country;
10. The Removals team then communicates their decision to the complainant;
11. It is not possible for Google LLC to prevent the webmaster of the complained of website reposting the offending material (or a variant of it) under a new URL;
12. If the offending material is reposted and a new complaint received, the removals process outlined above from 1 to 10 recommences.

Google LLC cannot "take down" a web page that has been uploaded by a third party. All that it can do is, following provision of a specific URL, prevent that URL from being returned as part of search results.

There is limited utility in forcing Google LLC to comply with a legislated takedown procedure in relation to search results, given that the offending content would remain on the internet and could be accessed by going directly to the host's website, or through other search mechanisms.

Legislators should exercise caution in this field, as creating a mandatory removals process that can be triggered quickly and easily – without a final resolution on the question of defamatory capacity and defences – could have a chilling effect. For example, powerful individuals could use the procedure to have critical material (which may have been legitimately published in the public interest) taken down. Care should be taken to avoid "over blocking" and censorship of the internet.

Google submits that takedown procedures should only be implemented following a court order. To legislate takedowns in the absence of judicial review would require Google LLC to act as a court, reaching a verdict on whether particular content is defamatory and whether valid defences (such as truth) apply. Google LLC is not well placed to do this. A mandatory takedown procedure could lead to virtually all negative content being removed from the internet, including useful negative content, such as whistleblowing, business reviews and investigative journalism.

Once an Australian court order requiring the removal of a particular web page is brought to its attention, Google LLC acts promptly to remove that web page from its search results for Australia.

4. CONCLUSION

Google respects Australian laws and the role of legislators in adapting those laws to suit contemporary circumstances. Google would welcome coherent reforms that support the development of a workable response to defamation disputes. Google wants to play its part in ensuring that the internet is a safe, lawful and fair place. This does not mean that no-one is ever criticised. Rather, it means that citizens are free to express their views and communicate with each other, and that any disputes about whether those communications are defamatory are resolved in an orderly manner, wherein the attainment of justice is the fundamental objective.