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Policy, Reform and Legislation
NSW Department of Communities and Justice

Email: defamationreview@justice.nsw.gov.au

Dear Sirs

South Australian Bar Association (SABA) Submissions – Review of Model Defamation Provisions – Stage 2

We refer to the Discussion Paper in relation to Stage 2 of the Review of Model Defamation Provisions. We provide some brief responses below.

Introduction

1. Generally speaking, SABA considers that:

   (1) it is desirable that there be statutory protection afforded to internet intermediaries so that there is reduced scope for:

      (a) liability to attach in circumstances where an intermediary has not encouraged or positively facilitated the making of defamatory publications by others, and where the intermediary cannot readily know that or assess whether matter which it may be taken to be publishing is defamatory; and

      (b) a chilling effect which may otherwise result because intermediaries with a measure of control over third party content are driven to remove content which in fact is not defamatory and thereby limit freedom of expression to a greater extent than is desirable;

   (2) whilst the common law defence of innocent dissemination may, to an extent, provide such protection, it is desirable that statutory protections be bolstered;

   (3) consistently with the approach described in the Discussion Paper, additional protections be provided by way of conferring defences or immunities rather than by attempting to alter or re-define the concept of publication, which is best left to the common law.

2. Further, whilst the SABA acknowledges that publications which are made on or disseminated by the internet are increasingly likely to be the forum in which defamation occurs, and that it is vital

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that any legislative intervention not frustrate the capacity of persons whose reputations are seriously damaged by on-line publication to defend themselves, it is well recognised that a major consideration affecting the utility of defamation law from the perspective of defamed individuals is the cost and complexity of litigation.

3. It is desirable, therefore, that any legislative reform not be unduly complex so that ordinary people and non-defamation specialist lawyers can readily comprehend the essential thrust of the reform. Secondly, to the extent that legislative reform may tend to restrict avenues for recovery in relation to intermediaries, it is desirable that it does so by encouraging intermediaries to facilitate the identification of the original publisher.

4. Furthermore, having regard to the essentially international nature of the internet, there is much to be said for attempting to adopt an approach that is consistent with existing regimes in other jurisdictions. Of course, uniformity is impossible, but that is not a reason to pursue an idiosyncratic local solution where a reasonably acceptable international model is available.

Responses to Part A

5. In response to Part A, SABA considers that there is likely a need to distinguish categories of internet intermediaries but recognises that the ever-evolving nature of internet services has the potential to render any categorisation inapt, incomplete or otherwise irrelevant if it is overly prescriptive.

6. To that end, there would appear to be merit in a fairly restrictively defined category of 'basic internet services', defined broadly in the manner proposed in the Discussion Paper (that is, by reference to concepts of passivity and neutrality), and in respect of which no liability should attach (that is, there should be a complete immunity).

7. However, beyond that relatively narrow category, SABA considers that maintaining a satisfactory distinction between the other two proposed categories ('digital platforms' and 'forum administrators') is likely to be difficult and SABA is mindful that a law that requires to be answered, as an additional step in the analysis in contested litigation an intermediate question which itself may require the leading of complex technical evidence is highly undesirable. Plaintiffs should not bear the burden of arguing about and proving distinctions that might be turn on detailed information about how a defendant conducts its operations which will not be readily known and may be commercially confidential.

8. In considering the extent to which, in this residual category, greater protection is required for internet intermediaries, two options mentioned in the Discussion Paper include clarifying or adding to the innocent dissemination provision (in the MDPs), or adopting a further, stand-alone 'safe harbour' type provision akin to that set out in s 5 of the *Defamation Act* 2013 (UK).

9. The SABA considers that it might be preferable to maintain the statutory formulation of the defence of innocent dissemination in an essentially medium or technology-neutral form (without amendment), and instead to adopt a provision in the same or similar terms to the United Kingdom provision. Although it is noted that that provision has not been the subject of decided case law, this at least suggests that the law has operated without giving rise to obvious inadequacies (which would likely have emerged in decided cases).

10. This seems a preferable solution to adopting or adapting s 230 of the *Communications Decency Act* 1996 (US). That provision would provide such a wide protection to internet intermediaries that it would work too significant a change to the balance hitherto struck by the law of defamation as it has developed in Australia.

11. In relation to Issue 4, the SABA is not persuaded that it is feasible at present to add to the powers of courts to order that on-line material be removed, nor that there be additional powers to order that internet intermediaries reveal the identity of originators. The value of a power to attempt to compel foreign internet intermediaries to disclose meaningful details of originators, even if within the technical capacity of the service provider, requires further and deeper consideration, and possibly even international agreement.

12. Apart from the question whether additional powers are needed, there are obvious practical problems in securing enforcement with such orders. Indirect as compensatory rights may be in discouraging or encouraging relevant behaviours might be, the complexity that would be involved in seeking to create a comprehensive regime that results in increased powers of this kind seems out of proportion with the present scope of the problem.

Responses to Part B

13. In relation to investigatory bodies, the SABA considers that there may be scope for the extension of absolute privilege to reports to particular public investigative bodies, but that should only be considered where there are criminal sanctions attending knowingly false reporting that will act as a sufficient safeguard and disincentive against abuse of the privilege.

In relation to reports to professional bodies and employers, the SABA is not persuaded that it is appropriate to extend the qualified privilege that presently balances the relevant interests by recognising absolute privilege.

Yours sincerely

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President