THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: LLP/ELC/CLC/HRC:JWas190521

19 May 2021

Mr Michael Tidball
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Law Council of Australia
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By email: john.farrell@lawcouncil.asn.au

Dear Mr Tidball,

Stage 2 of the Review of the Model Defamation Provisions

Thank you for the opportunity to contribute to a Law Council response to the Attorneys-General *Discussion Paper: Review of Model Defamation Provisions – Stage 2* ("Discussion Paper"). The Law Society's Litigation Law and Practice, Employment Law, Criminal Law and Human Rights Committees contributed to this submission. Our responses to specific aspects of the Discussion Paper are set out below.

PART A – Liability of internet intermediaries

General comments in response to questions 1-6

The Law Society's view is that in considering amendments to the Model Defamation Provisions ('MDPs') concerning the liability of internet intermediaries, there are three relevant threshold questions.

a) Whether it should be left to the courts to develop principles of common law and to provide guidance on the application of the MDPs (in their current form);
b) Whether the MDPs should be amended to state general principles on which the liability of internet intermediaries might be determined; and
c) Whether the MDPs should be amended to deal expressly with the detailed variety of circumstances covered in the Discussion Paper.

The Discussion Paper thoroughly describes the numerous different types of internet intermediaries and the different degrees to which such intermediaries may have control over content produced by 'originators'. Any amendments to the MDPs would not only need to accommodate that level of diversity in internet intermediaries today, but also future changes in the nature and role of internet intermediaries.

The Law Society's view is that, given the ever-increasing range of circumstances in which internet intermediaries may be sued for defamation, it is neither desirable nor possible to be overly prescriptive when legislating as to their liability. In particular, any attempt to categorise internet intermediaries in legislation might unduly constrain the ability of courts to deal with the

evolution of the internet and the intermediaries facilitating access to it. The Law Society therefore supports either a 'principles approach' to any amendments or, in the alternative, leaving it to courts to develop the law in response to these changes.

In so far as a principles approach is adopted in any amendments to the MDPs, it would need to assist a court to consider whether and why internet intermediaries should be liable for defamatory publications which they do not originate. An important aspect of defamation over the internet, compared with other defamatory publications, is the fact that defamatory publications on the internet can be downloaded for an indefinite period. The ability of internet intermediaries to remove defamatory material is therefore a significant reason for imposing liability on internet intermediaries. However, as pointed out in the Discussion Paper, if internet intermediaries are liable for defamatory publications which they fail to remove, then it would generally be in their interests to remove any material that is alleged to be defamatory.[1] This could have a significant chilling effect on free speech, as people and excluded corporations with access to legal advice and financial resources may be able to use the threat of litigation to remove commentary that would otherwise be in the public interest.

In terms of the potential features of a principles approach, the Law Society proposes that the provisions at Part 4, Division 2 of the MDPs be amended to provide courts with greater (and express) flexibility to reach the appropriate balance between the public policy considerations detailed above. For example, the MDPs might be amended so that:

a) an internet intermediary is not liable for a defamatory publication if the internet intermediary acted reasonably after becoming aware that the publication is allegedly defamatory;
b) they include a non-exhaustive list of factors to be considered by the courts in determining whether the internet intermediary has acted reasonably. These factors could include:
    i. the importance of allowing discussion of matters of public importance (including political discussion, allegations of criminal behaviour and examining the conduct of organisations and public figures);
    ii. the extent to which the internet intermediary profits from allowing publications by originators;
    iii. the size and resources of the internet intermediary;
    iv. the ability of the internet intermediary to prevent or remove the publication;
    v. the ability of the internet intermediary to comply with a court (or tribunal) order to identify the originator of the publication; and
    vi. the ability of the internet intermediary to form a view on whether the content was in fact defamatory and on the availability of any defences (including by having regard to the content of the publication and any communications with the originator and the person allegedly defamed).

These factors would need to be considered together. If the MDPs are amended to incorporate a principles approach to determine internet intermediary liability, we recommend that provision be made for a review to consider how courts are applying these provisions, the impact of the amendments on the objects of the MDPs, and whether any further amendments to the MDPs are required.

[1] Attorneys General Defamation Working Party, *Discussion Paper: Review of Model Defamation Provisions – Stage 2* (2021), [2.16].

8(a) Should the innocent dissemination defence in clause 32 of the MDPs be amended to provide that digital platforms and forum administrators are, by default, secondary distributors, for example by using a rebuttable presumption that they are?

8(c) Should a new standalone innocent dissemination defence specifically tailored to internet intermediaries be adopted the MDPs?

8(e) Are there other ways in which the defence of innocent dissemination could be clarified?

In addition to our comments above, the Law Society recommends that if the MDPs are amended to expressly extend the innocent dissemination defence to internet intermediaries, including where they are given notice of a defamatory matter, care needs to be taken to ensure an appropriate balance between freedom of expression and the protection of personal reputation is struck.

The Law Society further suggests that any amendment to the innocent dissemination defence should reconcile s 32 of the MDPs with s 91 of the *Broadcasting Services Act 1992* (Cth), so that media publishers who act responsibly in monitoring reader comments are not held liable in defamation for comments that they do not endorse or adopt in any way.

16(a) Is it necessary to introduce specific provisions governing when a court may order that an internet intermediary disclose the identity of a user who has posted defamatory material online?

16(b) What countervailing considerations, such as privacy, journalists' source protection, freedom of expression, confidentiality, whistle-blower protections, or other public interest considerations might apply?

The Law Society is of the view that if amendments are made to the MDPs to provide for the identification of users by internet intermediaries, they should empower the court to reach an appropriate balance between competing considerations – including privacy rights, freedom of expression, harm to reputation, and the public interest of any matters disclosed – as with the principles approach to defences articulated above. For example, a court may decide that the threshold for granting an order to reveal the identity of a user is not met if the internet intermediary is facilitating whistleblowing on matters of public importance. In our view, such matters are best determined by the court considering the individual case at hand.

PART B – Extending absolute privilege

19(a) Should the defence of absolute privilege be extended to statements made to police related to alleged criminal conduct?

The Law Society notes that there are a range of views amongst its members regarding whether the existing application of the defence of qualified privilege is adequate, or extending the defence of absolute privilege to statements made to police is warranted. As such, the Law Society is not able to make a definitive statement on this question at present. We further note that many of the arguments cited by Law Society members in response to this proposal – both for and against – are outlined at Part B, Section 5 of the Discussion Paper.

20(a) Is fear of being sued for defamation a significant factor deterring individuals from reporting unlawful conduct such as sexual harassment or discrimination to employers or professional disciplinary bodies?

Law Society members advise that, anecdotally, defamation is occasionally used as a threat against people who have reported workplace sexual harassment. While such threats rarely

lead to legal proceedings, they may intimidate complainants at a vulnerable time, deterring them from proceeding with the complaint.

20(b) Are victims and witnesses of sexual harassment or discrimination being sued for defamation for reports of alleged unlawful conduct to employers or professional disciplinary bodies?

The Law Society is not aware of any research into the number, if any, of defamation proceedings in NSW in which the alleged defamatory publication occurred in the process of a report of alleged unlawful conduct to an employer or a professional disciplinary body.

We note for the Law Council's information *McLachlan v Browne & Fairfax Media Publications Pty Ltd; McLachlan v Browne & Australian Broadcasting Corporation*, which is currently before the NSW Supreme Court. In this matter, the plaintiff has brought defamation proceedings against the first defendant in relation to statements she made to media organisations regarding his alleged conduct in a workplace setting. The Law Society makes no comments regarding the merit of this case.

21(a)(ii) Should absolute privilege be extended to complaints of unlawful conduct such as sexual harassment or discrimination made to professional disciplinary bodies?

Under Schedule 1, cl 18 of the *Defamation Act 2005* (NSW), absolute privilege currently applies to matters published in the making or referral of a complaint, or the investigation, hearing or review of a complaint, under Chapter 5 of the *Legal Profession Uniform Law* (NSW). This applies to entities including the Law Society Council, the Law Society, the Legal Services Commissioner, and staff members of these entities.

We note that in June 2019 the NSW Office of the Legal Services Commissioner introduced a new process for reporting inappropriate workplace conduct, which includes sexual harassment and workplace bullying. Under the new process, people who have experienced or witnessed inappropriate workplace conduct but do not wish to make a formal complaint can complete a notification of inappropriate personal conduct in a law practice.[2] We suggest consideration of whether absolute privilege should be extended to this process, which is not currently covered by the *Defamation Act 2005* (NSW).

If you have any queries about the material in this submission, please contact Andrew Small, Policy Lawyer, on (02) 9926 0256 or andrew.small@lawsociety.com.au.

Yours sincerely,

Juliana Warner
President

[2] NSW Office of the Legal Services Commissioner, *Inappropriate personal conduct - sexual harassment and workplace bullying* < https://www.olsc.nsw.gov.au/Pages/inappropriate-personal-conduct/inappropriate-personal-conduct.aspx>.