

SUBMISSIONS FROM SOME DEFAMATION LAWYERS TO THE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE RE THE INQUIRY INTO THE SOCIAL MEDIA (ANTI-TROLLING) BILL 2022

A. INTRODUCTION

Purpose of defamation laws

1. Defamation laws should seek to balance the competing rights of members of the public to protect their reputation and privacy, to exercise their freedom of speech and to access accurate and true information. Defamation laws must protect and balance these fundamental individual rights in a liberal democracy.

State and Territory legislation

2. From 1 January 2006, model defamation laws were enacted in all Australian states. Those model provisions were adopted in the ACT on 23 February 2006 and on 26 April 2006 in the Northern Territory. Prior to the model defamation laws, parties to defamation proceedings could face different laws in eight different jurisdictions that could arise in a single proceeding. The model defamation laws to date have brought increased (but not complete) uniformity to defamation law in Australia that has otherwise reduced the legal time and cost to prosecute and defend defamation disputes throughout Australia.
3. The Uniform Laws were prepared haphazardly and without consultation and in many instances reflected compromised positions between the various jurisdictions. Those laws were intended to be reviewed and amended five years from the date of commencement and despite interested persons making submissions on potential amendments no review took place at that time.
4. Finally in 2020 the New South Wales Attorney-General proposed changes and sought submissions from interested parties. After the consultation process, New South Wales proceeded by passing reforms many of which were not the subject of that consultation process. The reforms have been the subject of substantial criticism. They were

simplistically adopted from reforms implemented in the UK, misleadingly branded as ‘international best practice’, and are conceptually flawed.

5. Importantly, no steps were taken to address changes in defamation litigation over the last decade specifically arising from publications over the internet including social media.
6. On 1 July 2021 a number of States and the Australian Capital Territory commenced amendments to the defamation laws. Those amendments have not been passed in Western Australia and the Northern Territory. That means that defamation laws are no longer uniform in Australia.
7. The 1 July 2021 amendments are, in many respects, misconceived and have increased the time and cost being expended on defamation litigation, particularly in so far as the changes to the Concern Notices provision are concerned. The changes relating to small companies and not-for profit organisations were not the subject of proper consultation and are inconsistent with some of the apparent purposes of the legislation.
8. The States intend to pursue further amendments to the defamation laws, including in relation to defences available to internet service providers in relation to material posted by third party originators and potential changes to the defence of absolute privilege. There has been a consultation process in relation to those Stage Two amendments which has involved submissions and round table discussions.

The Commonwealth and defamation laws

9. In 2004 the Commonwealth engaged in a process to pass defamation law that would be uniform throughout Australia including in the preparation of a discussion paper and draft bill. Prior to the proposed Commonwealth legislation being considered by parliament the states and territories passed the Uniform Defamation Law commencing on 1 January 2006.
10. The Commonwealth has broad powers under the Constitution to enact legislation that would regulate nearly all defamation claims. Commonwealth legislation could cover all matters relating to corporations, anything published over the internet, by radio, television or streaming broadcast, via any carriage, postal or telecommunication service, in any state or territory.

11. The liability of international corporations acting as internet intermediaries is plainly a federal issue requiring urgent reform, as is the ability of corporations to sue. In that regard, the changes made to the state uniform laws, are not fit for purpose particularly in relation to not for profit organisations such that the Commonwealth needs to intervene. The standing of companies to sue for defamation where harm is incurred would bring Australia in line with the common law and other jurisdictions. Such changes are important because otherwise companies have no redress for false statements made about them because of the information provider defence in the *Competition and Consumer Act 2010* (Cth).
12. A federal act will give the Commonwealth the ability to keep up with international standards on digital communications. Additionally, defamation legislation needs to be able to be amended from time to time to adapt to the ever-evolving digital world.
13. The best and most efficient way for that to occur is through the Commonwealth parliament because seeking the agreement of each state and territory has been a difficult process that has resulted in inefficiencies, unacceptable delays and unworkable compromises. For example, the overwhelming majority of jurisdictions were in favour of retaining public interest as a necessary element for the defence of justification but were forced to abandon that element because one jurisdiction would not take part in the uniform process unless it was removed. In a country where the tort of privacy is not yet recognised, compared to ‘international best practice’ in the UK with the tort of misuse of confidential information, the requirement of public interest is essential.
14. Further over recent years the Federal Court of Australia has recognised its jurisdiction in defamation claims and most significant defamation matters are now determined in that Court. That has given rise to difficulties where the state uniform law is inconsistent with federal legislation such as *the Federal Court of Australia Act 1976* (Cth) or the *Evidence Act 1995* (Cth). A federal defamation act will overcome these difficulties.
15. A further complaint that has been raised in connection with cases in the Federal Court is the availability of juries which in some jurisdictions a party is entitled to. The lack of uniformity on the question of juries has given rise to a number of concerns and disputes and has resulted in some instances in forum shopping. Federal legislation covering the field in defamation would solve that issue - so that like other torts, that

matter would be determined by the court hearing the matter in accordance with the provisions applicable to that court. Notably, if ‘international best practice’ from the UK reforms was adopted, juries would rarely be used in defamation proceedings (see s11 *Defamation Act 2013* (UK)).

16. Another difficulty that has been an ongoing problem in defamation litigation is its cost to litigants. The reforms carried out by the states have not in any way attempted to reduce those costs and it has been suggested have had the opposite effect by introducing reforms that will give rise to an increase of costs by reason of procedural disputes early in the proceedings.

High Court decision in *Voller*

17. The recent decision of the High Court in *Voller* has been the subject of public discussion. A proper reading of that case is that there has been no change to the law of publication and the innocent dissemination defence protects persons who are not the originators of defamatory material on their social media pages or accounts from liability so long as they delete the material after receiving notice of its defamatory nature. It is simply a restatement of the law.
18. No legislative change is needed to deal with the decision given it effectively has no impact on the law. Some commentators have mischievously caused alarm about the *Voller* decision and it seems, persuaded the Commonwealth Government to propose a flawed draft bill to overcome their unjustified concerns about the settled law applied by the High Court.

B. OBSERVATIONS ON THE BILL

19. The draft deals with the rights and responsibilities of three types of people:
 - a. Providers of social media services (“**providers**”);
 - b. Users of social media services who maintain or administer a page of a social media service (“**page owners**”);
 - c. Users of social media (“**commentators**”) who post comments on such pages (not being the relevant page owners themselves).

20. Under the existing law, commentators are treated as publishers (being authors), but so are providers and page owners, at least once they are on notice of the comment in question. Providers and page owners need to rely on defences (such as innocent dissemination).
21. This position is varied by the bill which provides that page owners are not publishers, while confirming the position of providers as publishers. exp
22. A further feature of the bill is that it confers a right on prospective plaintiffs to seek a court order against providers for the relevant contact details of commentators. The right is additional to existing rights. It appears to add little to the existing powers of the various courts to make such orders.
23. Another feature of the bill is that it requires an Australian based nominated entity for providers with more than a specified number of Australian account holders. This seems to be a generally helpful provision but does not really affect the main impact of the bill, which is now discussed.
24. The grant of immunity to page owners from liability for defamation (for that is what a provision is holding that they are not publishers) is a significant change to the law. Just how significant depends on the scope of the term “social media services” which is adopted from s.13 of the *Online Safety Act 2021* (Cth), in substance being an electronic service that has the sole or primary purpose of enabling online social interaction between 2 or more end-users, including posting material on the service and linking to, or interacting with some or all of the other end-users. At the least, this would capture Facebook pages, whether operated by media organisations as part of their profit-making business, or by community organisations on a voluntary basis.
25. It follows that the bill would immediately overturn *Voller*, giving immunity to media organisations and other businesses for carrying defamatory comments, **no matter how defamatory, and even once they had been put on notice of the defamatory character of the comments in question.**
26. It is difficult to see the need for such a provision. Whatever the rationale for protecting not for profit, small-scale, page owners, there seems no reason to immunise large corporations who publish defamatory material as part of their overall business model.

However, the importance of this change depends, in part, on the scope of the defence given to providers. Since providers have power to take down pages, effective remedies against providers may mean that immunity given to page owners will not work substantial injustice to prospective applicants.

27. Under the bill, the effectiveness of remedies against providers turns upon the terms of the prescribed requirements for a complaints scheme (see clause 15(2); 16(1)). Those requirements relevantly include disclosure by the provider to a complainant of the country location data of the commentator within 72 hours of complaint (cl 16(d)), but do not require the provider to provide the commentator's contact details, unless the commentator consents, or the applicant obtains a disclosure order under clause 18.
28. It can be seen, immediately, that the remedies against providers are ineffective. First, the only information required to be provided without court order, is a statement whether the commentator appears to have been located in Australia when the person posted the comment. Second, even the potentially more useful information (the commentator's contact details), which will likely require court proceedings to obtain, may not contain information which enables the applicant to identify the commentator sufficiently for the purpose of bringing proceedings, leaving the applicant at a dead end. There is no requirement in the bill (or the law generally) that providers obtain genuine details of a commentator's identity before allowing comments to be posted or liability for failure to do so.
29. Third, even if the applicant *is* able to identify the commentator (because the comment is not anonymous, or by means of supplied contact details or by other investigations), and the applicant brings proceedings against the commentator, those proceedings may be protracted, because the commentator may be obstructive. Fourth, even if (perhaps after considerable trouble and expense) orders are obtained against the commentator, those orders may not be able to be enforced. Even the bringing of contempt proceedings (requiring further time and expense) may not lead to the comments actually being taken down by a recalcitrant commentator.
30. These matters demonstrate the inadequacy of the prescribed requirements for a complaints scheme under the bill. As a result, applicants who are the subject of a defamatory post on social media may be left in the invidious position of having no

effective recourse against the provider (because of the defence given), the page owner (because of the immunity given) or the commentator (for the various reasons just set out). Most significantly, highly defamatory comments may remain online, no matter what steps the applicant takes, and despite the power of the relevant provider to remove them.

31. **That is an unacceptable result:** reasonable notions of free speech do not require that a person's reputation may be destroyed by false claims by anonymous, and often malicious, publishers.
32. There are many recent decisions in which persons have been ordered by Courts to remove such material. If the originator of the material cannot be identified or such person refuses to comply with Court orders to remove that material, then remedies should be available against internet intermediaries whose services enable individuals to post offensive and defamatory content that becomes available on the world wide web, directly or indirectly aiding the provider's business model.
33. One further important point, in the context of online and social media defamation, is that 'commentators' often do not make 'comments', as might apply under the defence of comment or honest opinion. Instead, they make accusations of fact which are false and extremely harmful to an applicant's good reputation. They know they can post lies, in order to be widely and instantly disseminated by social media. For this reason, the *Voller* decision is just and reasonable as those who make and/or facilitate such false and malicious accusations **should be held liable particularly once on notice of them**, unless they can show they have a reasonable excuse as provided by the defence of innocent dissemination. Categorical immunity to page owners or defence to providers is in this context misconceived and incongruous with the public statements of the [Prime Minister](#) and [Deputy Prime Minister](#) on 7 October 2021 which focussed on the liability of providers.
34. It inescapably follows that the combined effect of the grant of immunity to page owners and of the defence to providers is unjust and oppressively weighted against applicants.
35. It is not possible to see how legislation intended to address the problem of "trolling" could be regarded as addressing that destructive problem, **when it would likely leave many victims of such conduct without any remedy, including the most important**

remedy of having the material in question taken down from the social media service. It is also against the public interest to leave indefensibly defamatory material online, where it may mislead the public generally.

36. It is suggested that there are two main ways to address this problem. The first is to adjust and rebalance the provisions referred to above to better protect the position of applicants. The second is to enact a more general “anti-bullying” regime, which would address the apparent concerns of the bill.

C. SUGGESTED AMENDMENTS TO THE BILL

37. If there is to be a defence for providers, it seems to us that it would be best addressed by a provision such as the following, in place of the defence provided by the bill:

“Internet intermediary” is a company that facilitates the use of the internet and includes –

- (a) social media platforms,
- (b) websites on which reviews can be posted about people, business, products or services, and
- (c) internet service providers;

who are not the author or originator of the matter and did not exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.

Defence of innocent dissemination in relation to internet publication

- (1) This section relates to the publication of defamatory matter on the internet.
- (2) It is a defence to the publication of defamatory matter if the defendant proves that:
 - (a) the defendant participated in the publication of the matter only in the capacity of an internet intermediary, and
 - (b) the plaintiff gave the defendant a concerns notice in respect of the defamatory matter, and
 - (c) the defendant was capable of taking down the defamatory matter, and
 - (d) within 7 days after a concerns notice was given the defendant either:

- (i) provided the plaintiff with information to identify the originator of the defamatory matter sufficient to bring proceedings against the originator and agreed to comply with any court order to take down the defamatory matter made against the originator within 24 hours of notice of any such order; or
 - (ii) took down the defamatory matter and did not republish it.
 - (3) The defence is defeated if the plaintiff establishes that the defendant did not comply with a court order to take down against the originator within 24 hours of notice of any such order or the defendant acted with malice in publishing the defamatory matter.
38. As a matter of drafting, it would be possible to accommodate such an approach within the “prescribed requirements” provisions of clause 16 of the bill. The key element, lacking in the present draft, is that the defence for providers should be conditional on the provider agreeing to take down the offending material upon a relevant finding against the commentator, after provision of contact details sufficient to permit such a finding to be obtained, or alternatively taking down the material.
39. Such an approach seems to strike a fairer balance between important competing considerations. It does not mandate that providers seek or maintain any particular contact details from commentators, but in circumstances where a provider does not in fact obtain sufficient details, that may prevent a defence for the provider if it declines to remove the material in question. With such a change in place, the immunity given to page owners does not appear greatly unfair, given the differing positions of page owners and providers.

D. A MORE GENERAL “ANTI-TROLLING” PROVISION

40. The publication of online defamatory material or social media abuse is one significant aspect of “trolling”. Online trolling and bullying is a matter encountered by lawyers practising in defamation frequently. It is a particular problem for young adults and teenagers, but it is not limited to those groups.
41. Defamation involves publishing material (a) to third parties, which (b) damages their reputation. Many online posts may amount to defamation, but others may not, yet still amount to “trolling”, either because the posts are only visible to the victim, or because

they are, of their nature, recognisable as “mere vulgar abuse” –not actually affecting the reputation of the victim.

42. From the point of view of the victim however, non-defamatory trolling may still be deeply hurtful, especially where it is part of a pattern of bullying conduct. The term ‘mere vulgar abuse’ may appear to understate the problem of trolling by use of the word ‘mere’. Often the conduct amounts to criminal or aggravated abuse. While s474.17(1) of the *Commonwealth Criminal Code* 1995 prohibits the use of a carriage service to menace, harass or offend, there seems to be every reason to provide an effective civil remedy to persons affected by such conduct, analogous to the rights such persons presently have to seek “*take down*” orders in respect of defamatory posts, including against providers.
43. The issues are now partly addressed by the commendable provisions of the *Online Safety Act* 2021 (Cth). Under that Act, the eSafety Commissioner may order providers (and commentators) to take down particular material if the Commissioner is satisfied that it amounts to cyber-abuse material targeted at an Australian adult or child: see ss 6-7, 36, 88-89. Failure to comply with such a notice attracts a substantial civil penalty: s91.
44. Helpful as these provisions are, the Commissioner has no power to injunct future publications, but only to order removal of particular material presently online. In addition, there is no time frame within which the Commissioner must investigate and resolve any complaint made.
45. In those circumstances, it seems appropriate to confer an injunctive power on Federal Courts in respect of cyber-abuse material, to supplement the power of the Commissioner to proceed in respect of individual comments, on application by an aggrieved person. That power would appropriately be placed in the *Online Safety Act*, along the following lines:

Part 7A – Power of Federal Court in relation to Cyber-abuse material

- 93A (1) If:
- (a) material is, or has been, provided on:
 - (i) a social media service; or
 - (ii) a relevant electronic service; or
 - (iii) a designated internet service; and

- (b) the Court is satisfied that the material is or was cyber-abuse material targeted at an Australian adult or an Australian child; and
- (c) the material was the subject of a complaint that was made to the provider of the service; and
- (d) if such a complaint was made—the material was not removed from the service within:
 - (i) 48 hours after the complaint was made; or
 - (ii) such longer period as the Court considers reasonable in the circumstances; and
- (e) a complaint has been made to the Commissioner under section 36 about the material;

the Court may, on application by the maker of the complaint, order the provider of the service to:

- (f) take all reasonable steps to ensure the removal of the material from the service; and
 - (g) do so within:
 - (i) 24 hours after the order was served on the provider; or
 - (ii) such longer period as the Court allows;
 - (h) take all reasonable steps to ensure material to the same or like effect is not in future (or for a specified period) provided on the service.
- (2) So far as is reasonably practicable, the material must be identified in the order in a way that is sufficient to enable the provider of the service to comply with the notice.
- (3) In this section, “the Court” means the Federal Court of Australia, and that Court shall have power to make the orders referred to in subsection (1).”

E. CONCLUSIONS

46. The proposed “Anti-trolling” Act has many significant defects and should not proceed in its current form. The draft bears no relationship to the objectives announced by the Government in October 2021 and in fact, does the opposite by offering providers immunity - not accountability.
47. The legislative interference by the Commonwealth on the question of internet publication in circumstances where defamation is presently a State matter is likely to cause confusion, potentially raise a Constitutional issue, and substantially increase costs in defamation claims and also be a waste of Court time. In particular abolishing a State legislated defence (such as innocent dissemination) is ill-advised.
48. If the Commonwealth intends to legislate to deal with bullying online, it should do so without interfering in defamation laws. The present draft legislation does nothing to address that issue.
49. If the Commonwealth intends to legislate to provide a defence for internet service providers, it can do so by amending the *Online Safety Act* (Cth) (which will shortly

replace the relevant provision of the *Broadcasting Services Act*). Such a defence should be far more limited than what is presently proposed.

50. The Federal Court and State and Territory Courts presently have broad powers to order preliminary discovery against internet service providers in order to determine the identify of anonymous originators of defamatory material. There is no need to legislate further on that question and the proposed legislation would only serve to cause confusion and cost.
51. If the bill achieves something constructive, it is to compel the conclusion that in a federation of states and territories, the Commonwealth has the responsibility and the power to legislate uniform and consistent laws and therefore should do so in relation to defamation law applicable to online publications.
52. Please contact if you require any clarification or assistance in relation to the above matters.

Sue Chrysanthou SC

Patrick George, solicitor Kennedys

Rebekah Giles, solicitor Company Giles

Nicholas Olson, barrister

Richard Potter SC

Kieran Smark SC

9 March 2022