17 May 2021

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Defamation Working Party
C/O Policy, Reform and Legislation
NSW Department of Communities and Justice
GPO Box 31
SYDNEY NSW 2001

By email only: defamationreview@justice.nsw.gov.au

Dear Defamation Working Party,

Submissions on the Stage 2 Review of the Model Defamation Provisions

We welcome the opportunity to make a submission to the Council of Attorneys-General regarding the Stage 2 Review of the Model Defamation Provisions (**MDPs**).

LawRight has previously contributed to the Stage 1 Review of the MDPs by:

- providing a submission in response to the Stage 1 Discussion Paper on 30 April 2019 (**Previous Submission**);
- participating in a Stakeholder Workshop on 12 June 2019;
- providing a submission in response to the Model Defamation Amendment Provisions on 22 January 2020; and
- participating in a Stakeholder Roundtable on 26 May 2020.

LawRight has also provided a submission to the Queensland parliamentary committee in relation to the *Defamation (Model Provisions) and Other Legislation Amendment Bill 2021* (Qld).

Background

LawRight is an independent, not-for-profit, community-based legal organisation coordinating the provision of pro bono legal services for individuals and community groups in Queensland. We are a partnership of law firms, barristers, Community Legal Centres, the Queensland Law Society, the Queensland Bar Association, university law schools, government and corporate legal units.

LawRight undertakes law reform, policy work and legal education, and operates civil law pro bono referral schemes and direct legal services for selected disadvantaged client groups. Our Court and Tribunal Services provide assistance to self-represented litigants with current or prospective civil proceedings in a Queensland court or tribunal who are unable to afford other legal assistance. Further information about how LawRight

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provides assistance to eligible applicants in relation to defamation matters is contained in our Previous Submission.

In the 2019-2020 financial year, LawRight's State Courts office provided advice or assistance to 34 clients in relation to defamation disputes, representing approximately 25% of our total clients for that year. Of those 34 clients, 76% disclosed an annual household income of $26,000 or less and/or reliance on Centrelink benefits as their primary source of income, and 87% of those clients disclosed an annual household income of less than $52,000.

In the current financial year, to date, our State Courts office has provided advice or assistance to 31 clients in relation to defamation disputes, representing approximately 21% of our total clients. Of those 31 clients, 68% have disclosed an annual household income of $26,000 or less and/or reliance on Centrelink benefits as their primary source of income, and 83% disclosed an annual household income of less than $52,000.

While we acknowledge that our client base is representative of only a portion of the total defamation matters that are dealt with in the Queensland courts, we consider that our work is indicative of a particular client group, being those individuals who are unable to afford legal assistance or representation, and who are typically in a lower socio-economic demographic with a low household income.

Although we intend to make comments based on our expertise as legal practitioners in this area, our submissions will be focused on those aspects of the *Discussion Paper for the Attorneys-General Review of Model Defamation Provisions - Stage 2* (**Discussion Paper**) that we consider will have the biggest impact on this key client group.

Part A – Liability of internet intermediaries

Question 1: Categorising internet intermediaries
(a) Is the grouping of internet intermediary functions into the three categories of 'basic internet services', 'digital platforms' and 'forum hosts' a useful and meaningful way to categorise internet intermediary functions for the purpose of determining which functions should attract liability? Why?

Issue 1: Categorisation of internet intermediaries

While we do not have specific comments to make on the details of categorising internet intermediaries, we note that it does seem sensible and appropriate to group internet intermediary functions into the suggested categories, particularly considering that the functions of different internet intermediaries will allow different degrees of control or oversight over third-party content.

Question 4: Categorising forum administrators

(a) Is it appropriate to consider 'forum administrators' as a separate category of internet intermediaries? If so, how should this be defined?

(b) What are the different circumstances and scenarios involving forum administrators that need to be considered?

As noted in the Discussion Paper, the main focus and analysis of online intermediary liability focuses on the service providers; however, there is a growing category of intermediaries that fit into the suggested category of 'forum administrators'. This category may include small community groups or individuals who host websites, Facebook pages, online forums or instant messaging threads. Forum administrators typically retain more direct control over third-party content and are potentially more likely to be found liable as publishers for failure to remove defamatory content. In our casework, we are increasingly receiving requests for advice from these forum administrators about defending current or potential defamation proceedings; or from individuals seeking advice about their ability to commence proceedings or obtain relief against a forum administrator.

We consider that it is appropriate to consider forum administrators as a separate category of internet intermediaries. As a point of law, it is important to distinguish these individuals from other intermediaries in circumstances where they have different levels of control and in some cases, increased levels of engagement in the content being published (as is the case where an individual creates a group or discussion thread for a targeted reason). From a practical perspective, given the rapid increase in these types of online forums and the changing way in which individuals consume online media, we consider that there is utility in defining this category of intermediaries so that the law can be developed to both offer protections to those individuals that act as forum administrators, and to also offer a recourse for those individuals impacted by the actions of a forum administrator.

We note the following circumstances or scenarios (which our office has observed examples) that might involve individuals as forum administrators, which might give rise to liability as a publisher or should otherwise be considered for the purposes of any amendments to the MDPs:

- Where an individual has created an Instagram or Facebook page or account, and others may comment on posts made by that individual. For example, a local community group without a specific purpose, or a targeted group advocating or drawing attention to an issue such as public discussion about a proposed local development or changes to a local sporting/social group;
- Where a group or forum is moderated by an individual or a small number of individuals, who can approve posts to be added to the group/form or remove posts or comments made by other parties (e.g. Facebook groups, forum websites, Reddit, etc.); and

- Where an individual has created an instant messaging group or thread and can add or remove others to the group/thread or delete messages posted by others (e.g. message groups on Facebook Messenger, WhatsApp, etc.).

We do not propose to suggest a definition for the term 'forum administrators'; however, we note that a forum administrator's ability to control third-party content will depend on the particular limitations or rules of the relevant platform or application, and that forum administrators may not always know the specific identity of third parties posting content to that forum (e.g. where usernames/pseudonyms are used as a matter of course). Depending on any proposed amendments to the MDPs, any relevant definition should attempt to recognise this distinction. Some websites have strict rules against naming, targeting or 'doxing' specific individuals, and these posts are removed automatically sometimes without the involvement of the forum administrator. As we have seen in our casework, individuals often take on the role as forum administrators without appreciating the control or power they have over content, the relevant privacy settings for the relevant site or the potential legal implications of acting in this role. If significant amendments are proposed to the MDPs that change the legal position of forum administrators, we would recommend that a public education campaign take place to circulate information about this change.

As a final comment on the issue of defining internet intermediaries, we note that an increasing number of our clients are involved in defending defamation proceedings in circumstances where they have provided a comment on a longer discussion thread about a controversial public issue. As an example of the type of discussion thread we are referring to, we often see situations where an individual or corporation posts a photo or online article about a matter of public interest that is likely to involve heightened emotions or in circumstances where they know it will draw differing and potentially controversial opinions from members of the public. This post may invite members of the public to 'share their thoughts' or otherwise share any information they have about the topic so that they can increase public awareness about a particular matter. We consider that this type of forum administrator is acting in a very different capacity, and has greater involvement in future publications, than someone that moderates a community group for a local area. Accordingly, we believe consideration should be given as to whether they are defined differently from other forum administrators or alternatively have different liability or responsibilities under any proposed changes to the MDPs.

Issue 2: Immunities and defences

As raised at the start of our submission, LawRight provides assistance to a sub-group of the total number of individuals involved in defamation proceedings, that being self-represented litigants. We recognise that any proposed amendments may need to consider the impact on all stakeholders or impacted parties. On that basis, and given our limited resources, we do not propose to make a definitive recommendation in response to *Issue 2* at this stage, or provide commentary on specific legal drafting, but will instead provide commentary and examples from our casework on some of the specific issues that we believe should be considered when decisions are made in relation to this issue.

If there is a subsequent round of consultation in relation to a new proposed draft MDPs, we will consider more detailed commentary on specific wording and drafting at that point.

Question 6: Immunity for basic internet services
(a) Is it necessary and appropriate to provide immunity from liability in defamation to basic internet services?
(b) If such an immunity were to be introduced, should it be principles-based or should it specifically refer to the functions of basic internet services?
(c) Are there any internet intermediary functions that are likely to fall within the definition of basic internet services (as outlines in **Issue 1**) that should not have immunity?
(d) Is there a risk that providing a broad immunity to basic internet services would unfairly deny complainants a remedy for damage to their reputation? What risks exist and how could they be mitigated?

Option 1b: Immunity for 'basic internet services' from defamation liability

If 'basic internet services' are defined by their passivity regarding third-party content, we consider that an immunity for basic internet services could be useful to provide more clarity to complainants, particularly in circumstances, as has already been acknowledged, where it is less likely for such intermediaries to be considered publishers.

In response to the risk that a broad immunity to basic internet services would deny complainants a remedy, we note that in most circumstances we have seen involving self-represented parties, the complainant can usually identify the originator of the content, and if they cannot do so, then the forum administrator or digital platform is easier for a self-represented complainant to identify than the relevant basic internet service.

Question 7: Amend Part 3 of the MDPs to better accommodate complaints to internet intermediaries.
(a) How can the concerns notice and offer to make amends process be better adapted to respond to internet intermediary liability for the publication of third-party content?
(b) What are the barriers in the concerns notice and offer to make amends process contained in Part 3 of the MDPs (as amended) that prevent complainants from finding resolutions with internet intermediaries when they have been defamed by a third-party using their service?
(c) In the event the offer to make amends process is to be amended, what are the appropriate remedies internet intermediaries can offer to complainants when they have been defamed by third parties online?

Option 1c: Amend Part 3 of the MDPs to better accommodate complaints to internet intermediaries.

We acknowledge the shortfalls described in the Discussion Paper with the current concerns notice and offer to make amends process in relation to online publications by a third-party. We also note that it is important to consider the speed at which online material can be circulated and the distinction between the types of complaints that claimants will have against orginal creators and intermediaries; and the different relief sought.

On that basis, we support amendments being made to either the existing concerns notice provisions or alternatively the development of a discrete concerns notice and offer to make amends process. We also support the proposition that these amendments be pursued alongside other proposed amendments.

As we have already noted above, we provide assistance to a select group of individuals and our client examples and perspectives on the law are based on this client group. When we are approached by these clients for advice about commencing defamation proceedings, they are primarily concerned with removing the defamatory publication or preventing its further distribution; preventing future defamatory conduct from being published by the same individual or others; and,repairing the harm to their reputation, or if this is not possible, obtaining appropriate compensation. When our clients have asked about the liability of a third party or internet intermediary, it is usually in the context of preventing future publication, or removing the publication, rather than for the purposes of seeking a retraction, apology or compensation. We note that these remedies may be impossible or improper for the third party to provide and for that reason in may be desirrable to make amendments to the MDPs to reflect this.

Question 8: Clarifying the innocent dissemination defence

(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?

(b) In what circumstances would it be appropriate to rebut this default position?

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

(d) If a standalone defence is created, should the question of what is knowledge or constructive knowledge of third-party defamatory content published by an internet intermediary be clarified? If so, how?

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

Option 2: Clarify the innocent dissemination defence in relation to digital platforms and forum administrators – Potential changes, Alternative B: presumption that a digital platform or forum administrator is a subordinate distributor

The Discussion Paper raises an option to include a new section in the MDPs applying a presumption that a digital platform or forum administrator is a subordinate distributor,

which could be made rebuttable, e.g. where the complainant can show that the intermediary acted so as to adopt, curate or promote the content.

From the perspective of a self-represented complainant, while we recognise that the onus should appropriately be on the complainant, we note that it would be difficult to rebut such a presumption, as it is likely that such complainants would struggle to meet the evidentiary burden of establishing the necessary facts about the intermediary's actions, except in very clear situations (e.g. where the intermediary is a Facebook group administrator who must actively approve all third-party posts before they appear on the group page). As a qualification to this point though, this statement is true for almost all self-represented litigants in all proceedings who often do not have the resources to bring such evidence to trial.

Question 9: Safe harbour subject to a complaints notice process

(a) Should a defence similar to section 5 of the *Defamation Act 2013* (UK) be included in the MDPs?

(b) If so, should it be available at a preliminary stage in proceedings, where an internet intermediary can establish they have complied with the process?

(c) Should a complaints notice process be available when an originator can be identified? For example, to provide for content to be removed where the originator is recalcitrant?

(d) If such a defence were introduced, would there still be a need to strengthen the innocent dissemination defence?

(e) Should the defence be available to all internet intermediaries that have liability for publication in defamation? For example, could a separate complaints notice process be developed that could apply to search engines?

(f) How can the objects of freedom of expression and the protection of reputations be balanced if such a defence is to be introduced?

Option 3: Safe Harbour - subject to a complaints notice process

We agree with the proposition that the most appropriate defendant for defamation proceedings is the originator of the defamatory content, but acknowledge that the identity of the originator *cannot* always be known in all cases, and thus complainants may need another avenue to address damage done to their reputations as a result of an internet publication. We also acknowledge that there are situations where it may be desirable for the law to provide a remedy for a complainant even when the original creator *can* be identified.

We are supportive of the introduction of a 'safe harbour' defence subject to a complaints notice process, similar to the UK position. We note that this defence appears to be most applicable to digital platforms (and forum administrators) and could potentially work concurrently with a general immunity for basic internet services. From the perspective of the clients we assist, we believe this approach would best protect forum administrators

that are managing and operating online forums in good faith while also providing a complainant with an avenue to raise the issue with the administrator directly for the purposes of the removal or modification of the relevant publication.

As has been our position in previous submissions in relation to the MDPs, we consider that a complaints process and associated pre-commencement procedures are likely the best option to achieve a speedy resolution for many defamation disputes without the involvement of the court, particularly where the complaints process operates to connect complainants to the originators of defamatory content and provides an avenue for the quick removal of defamatory content.

The Discussion Paper raises the question of whether a complaints notice process should be available when an originator *can* be identified, for example, to provide for content to be removed where the originator is recalcitrant. One of the objects of the MDPs that informed the reforms from Stage 1 of the review, was to promote speedy non-litigious methods of dispute resolution. We believe that opening the complaints notice process to situations where an individual *can* be identified furthers the objects of the MDPs.

Under the current defamation laws, a complainant may serve a concerns notice on an originator regarding defamatory content that has been posted on the internet, and the originator may not respond or refuse to delete that content. The complainant would then need to bring proceedings to seek a remedy, during which time the content may remain online. For individuals without the means to pay for private legal representation, commencing proceedings may feel like an insurmountable task, even with discrete pro bono assistance of the kind offered by LawRight and other agencies. Many of our clients are also very concerned about the costs risk of commencing proceedings, and the impact that drawn out and contentious litigation will have on their health and well being. Allowing for the complaints process to be available when the original complainant both can and cannot be identified, provides these individuals, without ready access to private legal representation, with a secondary discrete and non-litigious alternative to protect their reputation.

Question 10: Immunity for internet intermediaries unless they materially contribute to the unlawfulness of the publication

(a) Should a blanket immunity be provided to all digital platforms for third-party content – even if they are notified about it, unless they materially contribute to the publication?

(b) What threshold or definition could be used to indicate when an intermediary materially contributes to the publication of third-party content?

(c) If a blanket immunity is given as described above, are there any additional or novel ways to attract responsibility from internet intermediaries?

Option 4: Immunity for internet intermediaries for user-generated content unless the internet intermediary materially contributes to the unlawfulness of the publication (the USA approach)

While we generally agree with the proposition that intermediaries are not the original creators of content and should not generally be held responsible in place of the originator, we consider that a blanket immunity such as that proposed in *Option 4* is too broad.

Where an originator cannot be identified, a blanket immunity would mean that a complainant would not be able to sue an intermediary even where that intermediary might otherwise have been considered a publisher, and where there is also no clear and easy path for the complainant to be connected to the originator or have defamatory content removed.

While a blanket immunity may serve to foster the proliferation, development, and financial success of internet companies, it also removes all requirements for those companies to develop their programs and software in a way which mitigates the risk of harm to the reputation of others. Online media is very often an echo chamber of the views of the individuals that frequent the particular site. Individuals are encouraged to post and share their views, often by like-minded individuals. In the majority of situations, where positive discourse is taking place, there is a social benefit, however, it is uncontroversial to suggest that contentious topics attract a large amount of engagement online. Our casework indicates that those contentious discussion topics are the starting place for many publications which become the subject of defamation proceedings.

In our view, providing a blanket immunity for online intermediaries is less desirable than the other alternatives proposed, which have more measured balancing of the responsibilities and protection of a complainant, an original creator, and the intermediary.

It may also ultimately be difficult to define what a “material contribution” to the unlawfulness of a publication would be – for example, would this include a forum administrator’s decision to allow a post to be published on a moderated Facebook page? Or, would it require active participation and driving of content? We further note that, as with Option 2, Alternative B, the evidentiary burden of establishing a material contribution would likely be difficult for a self-represented complainant.

Issue 3: Complaints notice process

As noted above, we support of an approach that includes a complaints notice process due to the ability of that process to connect complainants to originators and provide an option for a speedy resolution to a defamation dispute.

Question 11: Complaints notice process for Australia

(a) Should a complaints notice be distinct from the mandatory concerns notice under Part 3 of the MDPs, or should the same notice be able to be used for both purposes?

(b) Are there any issues regarding compatibility between the mandatory concerns notice and a potential complaints notice process? Are there parts of either that might overlap or be superfluous if a mandatory concerns notice is already required?

(c) What mechanisms could be used to streamline the interaction between the two notice processes?

Given that internet publications involving intermediaries is a specific type of issue, requiring a specific type of response due to the nature and speed of communications via the internet, we consider that it would be difficult to have the same notice used for both the complaints notice and concerns notice processes. As has been noted in the Discussion Paper, and in our submissions above, a concerns notice does not necessarily provide a method for a complainant to ask for material to be easily removed or for the identification of the original creator.

In relation to the compatibility of the complaints notice process with the concerns notice process in Part 3 of the MDPs, paragraph 3.179 of the Discussion Paper raises three scenarios of how the complaints notice might interact with the concerns notice. We note that *scenario 3*, where the internet intermediary does not comply with the complaints notice process, may be the most potentially problematic for a self-represented complainant, as it adds further time and complexity to the process of seeking a remedy.

We note that if the complaints notice process is introduced with a safe harbour defence, which operates to shield an intermediary from liability where they have complied with the process, then it follows that a concerns notice or court proceedings should only be issued after there has been failure to comply with the complaints notice.

The Discussion Paper raises the suggestion that provisions could be introduced enabling a complaints notice to serve as a concerns notice for the purposes of bringing proceedings against an intermediary. However, the drawback of this approach is that after receiving the complaints notice, the intermediary is not otherwise put on notice that proceedings may be started against them. Where the intermediary might be a self-represented individual who may not fully understand the process, such as in the case of a forum administrator, this could be particularly problematic. There is also the possibility that the required content of the concerns notice is different from the necessary content of a complaints notice given the different relationship between the intermediary and the content in question, and the outcome being sought by the complaint (removal of content, apology, damages etc).

If the desired outcome is to keep the processes separate, one option could be to include provisions that reduce the amount of time a complainant must wait before commencing proceedings after issuing a concerns notice in circumstances where a complaints notice

was issued first and not complied with. This would address the issues of potential delay, but also give the intermediary notification that proceedings may be started against them.

Question 12: Steps required before engaging in the complaints notice process

(a) Should the complainant be required to take steps to identify and contact the originator before issuing a complaints notice? If so, what should the steps be and how should this be enforced?

(b) Where the complainant can identify the originator, should there be any circumstances where the complainant is not required to contact the originator directly and could instead use the complaints notice procedure?

In relation to the question of whether a complainant should be required to take certain steps to identify or contact the originator before issuing a complaints notice, we note that it would be difficult to clarify what 'reasonable steps' would be in every circumstance, as this might depend on the platform or application where the content has been published. For example, it would be easier for a complainant to identify an originator on Facebook than it would be on a forum website where users are anonymous.

If the safe harbour defence itself requires the complainant to establish that they were not able to identify the originator as an element to defeat the defence, we would expect that the complainant would need to produce, at the appropriate time in the proceedings, some evidence as to the steps they took to try to identify the originator. The defence could be worded such that in order to defeat the defence, the complainant would need to establish that "despite taking reasonable steps," they were unable to identify the originator. This would mean that there would be no onerous requirement for a complainant to actually contact every originator (or similar). If the complainant ultimately brings proceedings against an intermediary, that is the appropriate point to demonstrate that they took reasonable steps to identify the originator in order to defeat the safe harbour defence.

There is also the scenario where a large number of publications have been made by different originators, and asking the intermediary to remove the 'parent' or initial post or topic is the most efficient and fastest method of obtaining the removal of the offending content. In that situation, it may be that the parent post is not defamatory but that it has encouraged commentary or publications that are. A simple example of this are online news articles or forum topics reporting the facts of a situation without further context or explanation, which then prompts 'opinions' from the public about the relevant context or matter generally. The intermediary may have powers to efficiently and broadly moderate comments (such as those comments that have already been flagged by other service users) or may be able to lock or delete the topic to prevent further publications or distribution of the original publications. To account for this scenario, the safe harbour defence could be worded to allow for situations where 'it is not reasonable to contact the originator before issuing a complaints notice'. Such situations could be where the volume of originators is significant, the intermediary is better placed to remove the content, or to urgently act to prevent further distribution of the content. We note that this amendment

would put greater responsibility on intermediaries for the prevention and removal of defamatory conduct and this would need to be considered further.

Question 13: Complaints notice form and content

(a) What content should be required to be included in a complaints notice in order for it to be valid? Should this include an indication of the serious harm to reputation caused or likely to be caused by the publication, or should it be sufficient for the content to be prima facie defamatory?

(b) Should there be a requirement for the intermediary to notify the complainant, within a certain time period, that the complaints notice does not meet the requirements?

(c) Should a complaints notice require the complainant to make a 'good faith' declaration? Should there be any other mechanisms used to prevent false claims?

To the extent that the MDPs are amended to include a complaints notice process, we agree that adopting the form and content of the UK process appears to be a sensible approach. Given the recent amendments to the MDPs and the introduction of a serious harm threshold, we also agree that any complaints notice should require articulation of the serious harm caused by the publication. We also support a requirement that an intermediary notify the complainant that the complaints notice does not meet the requirements as this will assist self-represented parties that may be unaware that their document is technically not compliant and may also prevent the commencement of inappropriate or premature proceedings.

The Discussion Paper raises a concern expressed by some digital stakeholders that complaints notices may encourage individuals to make wilfully false accusations. While we acknowledge the risk of 'false claims', such risk already exists under the existing concerns notice process, or for demands made outside the proposed complaints process, and requiring a complainant to swear to a statutory declaration seems overly burdensome when no such requirement exists for the concerns notice process or indeed, for most other legal causes of action. Alternatively, the Discussion Paper proposes the inclusion of a 'good faith' clause into complaints notices in an effort to reduce or avoid the rise of intentionally false claims, however we do not consider this will have the desired effect for the following reasons:

1. Although the complaints notice and the threat of legal liability may motivate an intermediary to remove content, in and of itself, this creates no increased risk that can be cured by a "good faith" clause. A party could make a demand for removal of a publication outside of the complaints notice process, circumventing the requirement of a good faith clause.
2. As the complaint notice must set out the meaning which the complainant attributes to the statement and the aspects which they believe are inaccurate, legal practitioners are unlikely to send a complaints notice without a reasonable basis for asserting that a cause of action exists, in which case a good faith clause is redundant.

3. A self-represented party drafting an otherwise compliant complaint notice, is unlikely to be denied or deterred from making the complaint due to the requirement of a good faith clause. In our experience, self-represented litigants are typically either confident of the merits of their case or are otherwise acting with inadequate or insufficient information about their legal rights or their proposed cause of action.
4. If a complaints notice is properly constructed and in compliance with the relevant clause relating to content, it should be apparent to the intermediary whether the complaint is valid or not, making a good faith clause redundant. The intermediary will have sufficient information to decide whether to defend any proposed proceedings or to simply remove the relevant content.

If the introduction of a good faith clause is designed to limit or prevent court proceedings from being commenced, we find it similarly ineffective. We assume it would be necessary for the court to determine whether or not the relevant good faith declaration is true, and the Discussion Paper puts the onus for proving this on the originator. If the court makes this finding, the proposed remedy is that the complaint notice is struck out. If the matter is already before the court in order to make this determination, and the complaint is otherwise found to be inaccurate, it seems logical that the proceeding would be struck out in any event, whether or not the original complaint was made in good faith. In those circumstances, it is difficult to understand how the existence of a good faith clause would act to limit and prevent court proceedings from being commenced.

PART B – Extending absolute privilege

Part B of the Discussion Paper concerns statements made to police and statutory investigative agencies and complaints of unlawful conduct made to employers and professional disciplinary bodies.

We have analysed our data and do not have any reliable data or anecdotal evidence to support or challenge some of the assertions made in Part B in relation to the individuals being prevented or dissuaded from reporting conduct to various bodies due to defamation law.

We have provided advice or assistance to several individuals to respond to defamation proceedings commenced against them on the basis of reports of alleged criminal conduct to police or other authorities, and in one instance, proceedings commenced on the basis of a complaint made about unlawful conduct in the workplace. As was foreshadowed in the Discussion Paper, where those matters have been resolved, in all of these matters the proceedings were resolved by agreement, typically after a qualified privilege defence was raised. We also note that in some of these situations where reports were being made directly to authorities and not to other individuals, the introduction of a serious harm threshold into the MDPs would likely have also operated to prevent such proceedings from being commenced.

Conclusion

In summary, in response to Part A of the Discussion Paper; for Issue 1, we are supportive of the introduction of a definition for various internet intermediaries including that of a 'forum administrator'. Our submissions in relation to the other aspects of Part A are in reference to this proposed category of a forum administrator and the corresponding liability and protection of this group. In response to Issue 2, although we do not propose to make definitive recommendations; we are on balance supportive of greater clarity about the liability of internet intermediaries and support the introduction of qualified defences such as the introduction of a rebuttable presumption or a safe harbour defence. We are not supportive of proposed blanket immunity, particularly as this relates to forum administrators. In response to Issue 3, we are broadly supportive of the introduction of a complaints notice process, particularly for the potential for fast, non-litigious resolution of disputes that such a process would create, particularly for those individuals without the ability to afford private legal representation. In relation to Part B of the Discussion Paper, while we have had a small number of clients impacted by the matters discussed in this section, given our limited data pool, we do not propose at this stage to make any specific recommendations or comments.

If you have any questions about this submission or require further information, please do not hesitate to contact me at [redacted]

Yours faithfully

Ben Tuckett
Managing Lawyer
Court and Tribunal Services