



**Australian
Privacy
Foundation**

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9 September 2022

Mark Speakman
NSW Attorney General
c/- Policy, Reform & Legislation
NSW Department of Communities and Justice
Locked Bag 5000
Parramatta NSW 2124
defamationreview@justice.nsw.gov.au

Dear Mr Speakman

**Re: Review of Model Defamation Provisions
Meeting of Attorneys-General
Stage 2 Review of the Model Defamation Provisions (MDPs)**

Background

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. A brief backgrounder is attached.

We welcome the opportunity to make submissions in response to the Model Defamation Amendment Provisions 2022 Consultation Draft ('Consultation Paper') on the Proposed Changes.

We have no objection to the publication of our submission.

Please note that we have used the terms as defined by the Consultation Paper.

General Comments

With any law reform focused on consumer's rights, it is important, in our view, to ensure that the reforms ensure that consumers are protected, and that they have a right of recourse if their rights are infringed. With respect to the Model Defamation Provisions, we acknowledge the intent to clarify the application of defamation laws while responding to identified gaps in protections. Complainants should not be left without a remedy, in fact they should have clear and appropriate avenues for redress whether that is having content removed from the internet or participating in legal process to defend their rights.

Terminology

As with much reform in the ever-growing digital world, terminology is incredibly important to get right so that consumer's rights are protected in the manner and at a level that they expect.

One of the aims of the 'principles-based' approach of the *Privacy Act 1988* has been to remain 'technology neutral'. This is important guidance for this reform which needs to address the issues but without being compromised by being too specific to technologies.

Where legislation in this domain is too prescriptive in terms of defining which digital entities are included or excluded, there can be unexpected consequences which impact consumer's rights.

In particular, our view is that when determining which entities should be excluded from the operation of the Model Defamation Provisions, it is important to describe the activities or actions that should be excluded rather than attempting to identify categories of entity, based on a broad description of their operations. This is particularly so because of the dynamic way that the online environment operates.

Determination of the question of whether an entity is subject to an exception should be the subject of a Court determination where there is a question about how the provisions operate or apply. The consumer's rights should be at the centre of any decision about jurisdiction based on the circumstances of an individual complaint or circumstances.

Complaints Notice Process

We support the proposed introduction of a Complaints Notice process that enables consumers to provide Internet Intermediaries with notice of the subject matter in issue, and the potential harm that may result from the subject matter. Our view is that this cost effective alternative to the Courts will empower consumers.

Non-Party Orders

While we support the proposed introduction of non-party orders to remove online content, we consider that there should be supporting guidance for the Courts which outlines the matters for the Courts to consider when making such orders.

Those considerations should include consumer protection, consumer privacy, consumer safety and the public interest. The guidance could be provided in the form of Regulations or supporting protocols which provide the Court with the relevant factors to consider subject to the relevant facts in question.

Another supporting factor to introducing a regime for non-party orders is to ensure that decision making isn't left to the Internet Intermediaries to decide what might be relevant considerations for the provision of information which might identify an Originator. We have seen in the technology space where there is no regulation a vacuum is created which has been filled by large technology companies rather than in the public interest.

Preliminary Discovery Orders

While the Courts have made preliminary discovery orders requiring Internet Intermediaries to release information in potential defamation proceedings, there has been an inconsistent approach to the Protection of Personal Information that is released under such orders.

We support additional requirements for the issuing of Preliminary Discovery Orders in relation to proposed defamation proceedings including that Personal Information released under such orders be subject to limitations for use and disclosure as applies to discovery in the course of usual litigation.

Protection of Personal Information

Once a complainant has received access to information which identifies the Originator, it is important that they are required to implement reasonable data protection measures. It is possible and indeed likely, in the circumstance of an individual complainant, that a complainant will not be subject to the obligations of the Privacy Act to protect and appropriately handle Personal Information.

We recommend that any information released under the Model Defamation Provisions, whether through the Complaints Notice process, Non-Party Orders or through making amends, that those in receipt of Personal Information are required to protect the information that they receive appropriately.

Other issues

Recent cases in the Federal Court¹ where Complainants have brought proceedings against Google Inc seeking preliminary discovery to enable identification of the originator of content posted on its platforms raises several issues for complainants which the Model Defamation Provisions do not address.

Google in practice refuses to provide information about originators without a Court Order requiring the release of that information.

In *Wushu*² however, Google also then refused to submit to the jurisdiction of the Court. It did however agree to comply with Orders made on a voluntary basis. This situation is untenable and doesn't resolve the goal of the Model Provisions against intermediaries, which is to give complainant's an avenue to have their matter dealt with expeditiously in an appropriate manner.

Please let us know if we can provide any clarification about our response.

We appreciate the opportunity to respond to the Proposed Changes and look forward to reviewing the outcome of the process.

Thank you for your consideration.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D Vaile', written in a cursive style.

David Vaile
For the Board of the Australian Privacy Foundation
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¹ *Kabbabe v Google LLC* [2020] FCA 126; *International Wushu Federation v Google LLC* [2021] FCA 904

² *International Wushu Federation v Google LLC* [2021] FCA 904

Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, Committees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby and Elizabeth Evatt, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policy Statements <https://privacy.org.au/policies/>
- Policy Submissions <https://privacy.org.au/publications/by-date/>
- Media Releases <https://privacy.org.au/media-release-archive/>
- Current Board Members <https://privacy.org.au/about/contacts/>
- Patrons and Advisory Panel <https://privacy.org.au/about/contacts/advisorypanel/>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <https://privacy.org.au/about/history/formation/>
- Credit Reporting (1988-90) <https://privacy.org.au/campaigns/consumer-credit-reporting/>
- The Access Card (2006-07) <https://privacy.org.au/campaigns/id-cards/hsac/>
- The Media (2007-) <https://privacy.org.au/campaigns/privacy-media/>
- My Health Record (2010-20) <https://privacy.org.au/campaigns/myhr/>