THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission in response to the Attorneys-General Stage 2 Review of the Model Defamation Provisions Discussion Paper

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Policy Reform & Legislation,
Department of Communities and Justice,
GPO Box 6,
Sydney NSW 2001

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

Contact: **Simon Bruck**
President, NSW Young Lawyers

Ashleigh Fehrenbach
Chair, NSW Young Lawyers Communications, Entertainment and Technology Committee

Contributors: Olga Kubyk, Silje Andersen-Cooke, Taylah Spirovski, Kate Cockburn, Susan Murray, Tom Lee, Wei Shi, Bob Liang (Editor), Madeleine Gandhi (Editor) and Maria Menghua (Editor)

Managing Editor: Taylah Spirovski

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The NSW Young Lawyers Communications, Entertainment and Technology Law Committee make the following submission in response to the Attorneys-General Stage 2 Review of the Model Defamation Provisions (MDPs) Discussion Paper

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committee, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Communications, Entertainment and Technology Law Committee aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to information and communication technology (including technology affecting legal practice), intellectual property, advertising and consumer protection, confidential information and privacy, entertainment, and the media. As innovation inevitably challenges custom, the CET Committee promotes forward thinking, particularly with respect to the shape of the law and the legal profession.

Summary of Recommendations

In May 2019, the NSW Young Lawyers Communications, Entertainment and Technology Law Committee (**CET**) and the Civil Litigation Committee put forward their submission to the Attorneys-General Review of Model Defamation Provisions Discussion Paper. The CET Committee now welcome the opportunity to comment on the Attorneys-General Stage 2 Review of Model Defamation Provisions (**MDPs**) Discussion Paper ('**Discussion Paper'**) on behalf of NSW Young Lawyers.

The CET Committee (the **Committee**) has responded to a selected question from Part A and the entirety of Part B as outlined below and have otherwise not made submissions on the remaining questions.

1. **Question 5**: The Committee submits that search engines, as a sub-category of internet intermediaries, should not be treated the same as other publishers of third-party content under defamation law because the provision of search engines to users is purely incidental to the publishing of defamatory content.
2. **Question 18**: The Committee submits that the safeguards available through defamation law, to victims and witnesses of crimes, are insufficient and thereby carry a deterrence effect on these individuals when deciding whether or not to make their reports to police and other statutory investigative bodies. The Committee encourages the reform of the qualified privilege defence, the defence of triviality and damages for non-economic loss found in the *Defamation Act 2005* (NSW) (**the Defamation Act**).
3. **Question 19**: The Committee submits that the absolute privilege defence should extend to all statutory investigative agencies investigating criminal conduct. In that, clause 27 of the *Defamation Act* should be amended to include federal and state police bodies, and each state and territory should amend their Schedules to include any statutory investigative agencies that investigate criminal conduct.
4. **Question 21**: The Committee submits that absolute privilege should be extended to complaints of unlawful conduct, including sexual harassment and/or discrimination, that are made to employers and their agents or professional disciplinary bodies.

Part A: Liability of internet intermediaries

Question 5: (a) Should internet intermediaries be treated the same as any other publisher for third-party content under defamation law?

1. The Committee has only considered Question 5 (a) with respect to search engines as a subcategory of internet intermediaries and submits that internet intermediaries which are not search engines may need to be approached differently. Search engines have been defined as technological devices that assist users with locating content on the internet through crawling, indexing and ranking.[1] The Committee recognises that this definition may change over time as the internet continues to evolve. The Committee submits that search engines should not be treated the same as any other publisher for third-party content under defamation law.
2. Extending the concept of "publisher" to search engines does not accord to the principle of common law that no liability ought to ensue without fault.[2] Search engines do not participate in the making of defamatory content, but it is dissemination which is automated.[3] Ranking of webpages is determined by the provision of high quality content that is likely to be endorsed by others through linking it to their own pages.[4] As such, search engines are not technically "at fault" in the traditional meaning of the concept.[5]
3. Search engines are not associated with the wrongful publication closely enough or at all to contribute to the harm "caused" to victims and play a merely incidental role in harming the victim of defamation. The contribution to harm by a particular defendant is required to be "causally significant".[6] The role of search engines stands in a sharp contrast to, for example, republishing defamatory statements made by another on one's own website, which has been regarded as defamatory itself.[7] Search engines do not "cause" harm to the victims in the relevant sense of the law.
4. Knowledge of search engines of defamatory content is insufficient to found liability in defamation. There is no causal relationship between the knowledge of wrongdoing that is digested through a search engine algorithm and actions of the operator of the same search engine. With or without

[1] David Harvey, "Collisions In The Digital Paradigm: Law and Rule Making in the Internet Age" (2017), 315
[2] Kylie Pappalardo and Nicolas Suzor, 'The Liability Of Australian Online Intermediaries' (2018) 40 *Sydney Law Review,* 476.
[3] Aleksandra Suwala, 'Content, Search Engines And Defamation Cases: Should The Developing Technology Of The Internet Affect Responsibilities And Duties Of Search Engines?' [2013] *SSRN Electronic Journal,* 19.
[4] See ibid.
[5] Pappalardo and Suzor (n 2) 476.
[6] Ibid 787.
[7] Susan Corbett, "Search Engines And The Automated Process: Is A Search Engine Provider 'A Publisher' Of Defamatory Material?" (2014) 20 *New Zealand Business Law Quarterly*.

knowledge, provision of search engine to users is purely incidental to the communication ("publishing") of defamatory content.

Part B: Extending absolute privilege

Defamation and reports of criminal conduct

Question 18:

In the paragraphs that follow, the following Terminology is employed:

- 'Reporter' refers to a victim, witness or journalist who reports an alleged criminal conduct.
- 'Defendant' refers to a victim, witness or journalist [publisher] who is sued for defamation.
- 'Victim' refers to a victim of an alleged criminal conduct [a crime].

(a) Are there any indications that defamation law is deterring victims and witnesses of crimes from making reports to police and other statutory investigative agencies charged with investigating criminal allegations?

5. The Committee submits that the lack of sufficient protections available within Australian defamation law, for victims and witnesses of crimes, has a large deterrent effect on these individuals as they decide whether or not to make their reports to police and other statutory investigative bodies.
6. The Committee notes the following shortfalls with the qualified privilege defence, absolute privilege defence, defence of triviality and damages for non-economic loss found in the *Defamation Act*.

Qualified privilege defence

7. The Committee submits that the section 30 of the *Defamation Act* qualified privilege defence operates to the detriment of reporters when relying on (or thinking to rely on) protection. Specifically, cases such as *Rush v Nationwide News Pty Ltd*[8] and *Dent v Burke*[9] represent the fact that the publication of sexual harassment and assault claims and details therein are often not *reasonable* as they are not of public interest. Further, subjects deemed to be of broad public interest are narrowly confined and in the past have excluded pertinent issues like corruption.[10]
8. The Committee notes that the courts have often construed the matters to be taken into account in section 30(3) as 'a series of cumulative hurdles' to be overcome, rather than matters that 'may' be taken into account.[11]

[8] *Rush v Nationwide News Pty Ltd* (No 6) [2018] FCA 357 [140].
[9] *Dent v Burke* No 20 [2019] ACTSC 259.
[10] *De Poi v Advertiser-News Weekend Publishing Company Pty Ltd* [2015] SADC 21.
[11] *Cummings v Fairfax Digital Australia & New Zealand* [2017] NSWSC 657.

(b) Are victims and witnesses of crimes being sued for defamation for reports of alleged criminal conduct to authorities?

9. The Committee submits that victims and witnesses of crimes are being sued for defamation, as well as being threatened with defamation action, for reports of alleged criminal conduct to authorities. Cases such as *Bechara v Bonacorso*[12] demonstrate the repercussions of speaking out - that is, financially and emotionally burdensome litigation as well as public humiliation.
10. Australia's defamation law has its roots seated in the UK's libel and slander law, yet its inheritance and adaptation has erred. Between 2014 and 2018, there were 577 examples of defamation cases in superior courts in Australia (with a population 25 million) in comparison to 268 examples in the UK (with a population 66 million).[13] The Committee submits that although these defamation cases are predominantly being brought against publishers, the victims and witnesses of the alleged crimes are observing the risks to the defendant in terms of personal costs, time and heavy financial burdens.

Absolute privilege for reports to police and investigative agencies

Question 19:

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

(b) Should the defence of absolute privilege be extended to statements made to statutory investigative agencies related to alleged criminal conduct? If yes, what types of agencies?

(c) What type of statutory investigative agencies should be covered and what additional safeguards, if any, may be needed to prevent deliberately false or misleading reports and to protect confidentiality?

(d) What is the best way of amending the MDPs to achieve this aim?

19. The Committee notes that the reforms being sought to the *Defamation Act* must balance the public interest in protecting witnesses and victims, with the right to adequate and fair remedies for persons whose reputations are harmed by the publication of a defamatory report.

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[12] *Bechara v Bonacorso* (No. 4) [2010] NSWDC 234
[13] Chris Merritt, 'Damages payouts that exceed cap 'to be the new normal: Matt Collins QC', *The Australian* (Sydney, 26 April 2019) 2.

20. The Committee supports the defence of absolute privilege extending to statements made to police in relation to alleged criminal conduct. The Committee submits that ensuring that police statements are covered by absolute privilege would bring Australian Defamation Law in line with UK Defamation Law, without unduly preventing remedies for persons whose reputations are harmed by defamatory publications. Under section 7(4)(2) of the UK *Defamation Act 2013*, governmental functions, including police functions, attract the protection of absolute privilege.[14]
21. The Committee submits that a priority is to incentivise and encourage victims and witnesses of crimes to report to the police. Section 314 of the *Crimes Act 1900* (NSW) states that a person who makes an accusation intending a person to be the subject of an investigation of an offence, knowing the other person to be innocent of the offence, is liable to imprisonment for 7 years.[15] Section 314 serves the purpose of discouraging false reports to the police. If the police were to investigate a person based on false information, it would be a matter for the police to determine whether the information they were provided was sufficient to warrant the investigation. If the police decide to act on the defamatory statement provided to them and arrest a person, the plaintiff would still have the burden to prove, on the balance of probabilities, that the person who made the statement caused the damage.
22. To further illustrate this, between 2007 and 2017, 140,000 sexual assault reports were made to the police. Around 12,000 of those reports were rejected on the basis that they were unfounded, and around 34,000 of those reports, or 25%, were resolved without an arrest or further legal action taken. In total, around 42,600 reports, or 30% of reports, led to an arrest, summons, formal caution, or further legal action.[16] This further illustrates the choice that police make to pursue any further action following a statement being given to them. The Committee submits that should the police receive a defamatory and false statement, it is their burden to investigate and ultimately reject the statement if they believe it to be unfounded. Ultimately, it is vital that people feel free to report crimes to the police without the risk of a threat of defamation proceedings. The criminal penalties that are already in place are the best way to disincentivise persons from making false reports or statements to the police.
23. The Committee submits that the absolute privilege defence should also extend to those statutory investigative agencies investigating criminal conduct. For the reasons provided above, it is important that people are incentivised to make reports of criminal activity without the fear of civil proceedings being instituted. The statutory investigative agencies that deal with these reports should, by each state and territory government, be added to the Schedule of their respective *Defamation Act,* in line particularly with NSW, which in Schedule 1, includes a number of important statutory agencies like the

[14] *Defamation Act 2013* (UK) s7(4)(2).
[15] *Crimes Act 1900* (NSW) s 314.
[16] Australian Broadcasting Corporation, *Rough justice: How police are failing survivors of sexual* (January 2020), <https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364?nw=0>.

Independent Commission Against Corruption. All states and territories have general criminal offences for making a false statement to a government agency.[17] The Committee submits that these would be sufficient safeguards against any false reports made to the statutory investigative agencies included in the Schedule.

24. The Committee submits that clause 27 should be amended to include federal and state police bodies. The Committee also submits that each state and territory should then amend their respective Schedules to include any statutory investigative agencies that investigate criminal conduct.

Defamation and reports of unlawful conduct

Question 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?

25. The Committee has searched LexisNexis for defamation cases involving sexual harassment for the period between 1 January 2006 to the present date, and in that search there was one case where a reporter of sexual harassment was sued in defamation and three cases where those accused of sexual harassment sued publishers (i.e. media companies) for defamation. Notwithstanding this, the Committees invite the Commission to consider that many similar cases settle out of court.

    Our survey of other legal databases returned the following four relevant results:

    i. Rothman J of the Supreme Court of NSW in *Pan v Cheng; Zhou v Same* [2021] NSWSC 30 awarded damages (including aggravated damages) to an employer, Henry Pan, and the Chinese Australian Services Society Ltd, for damage to reputation sustained from publications made by an employee, Cheng, which stated that *inter alia* the employer covered up sexual harassment of staff and students.
    ii. White, Gleeson and Wheelahan JJ of the Full Federal Court of Australia in *Nationwide News v Rush* (2020) 380 ALR 432 unanimously dismissed the appeal and upheld the

[17] *Crimes Act 1900* (NSW) ss 574B, 314; *Summary Offences Act 1966* (Vic) s53; *Public Interest Disclosures Act 2012* (Vic) s 72; *Summary Offences Act 1953* (SA) s 62 in regards to reports to police; *Independent Commissioner Against Corruption Act 2012* (SA) s 22 in relation to reports to ICAC; *Police Offences Act 1935* (Tas) s 44A in regards to false reports to police.

decision of the primary judge to award Mr Rush damages for defamation proceedings he brought against Nationwide News in relation to an advertising billboard and article it published alleging Mr Rush engaged in acts of sexual harassment during the production of King Lear by the Sydney Theatre Company.

iii. In *McLachlan v Browne (No 8)* [2018] NSWSC 1968, McCallum J of the Supreme Court of NSW made interim orders in defamation proceedings relating to imputations accusing the plaintiff of sexual harassment.

iv. In *Haddon v Forsyth* [2011] NSWSC 123, Simpson J of the Supreme Court of NSW dismissed proceedings where the plaintiff alleged that two email communications contained imputations that he sexually harassed a female member of the Church of England.

Absolute privilege for reports to employers and professional disciplinary bodies

Question 21:

a) Should absolute privilege be extended to complaints of unlawful conduct such as sexual harassment or discrimination made to:

i. employers, or to investigators engaged by employers to investigate the allegation?

ii. professional disciplinary bodies?

36. The Committee submits that absolute privilege should be extended to complaints of unlawful conduct including sexual harassment or discrimination, that are made to employers and their agents or professional disciplinary bodies. The Committee notes that under Schedule 1 of the *Defamation Act*, absolute privilege already applies to the Law Society Council, the Law Society, and the Legal Services Commissioner among other professional disciplinary bodies.

37. The Committee notes that in respect of sexual harassment in Australia, 33% of people who had participated in paid employment in the last 5 years had experienced sexual harassment in the workplace and women were more likely than men to suffer from sexual harassment at rates of 39% and 26% respectively.[18] It should be noted that current research suggest that only approximately 5%

[18] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020), 158.

of sexual assault reports are false.[19] Therefore, it appears the overwhelming majority of complaints are genuine. A range of personal and contextual factors can influence whether someone falsely reports a sexual offence. Often motives are complex and stem from fear or a need for assistance rather than maliciousness.[20]

38. Hence, the Committee submits that to ensure that people who are subject to harassment or discrimination in the workplace feel encouraged to make a report, we must establish an extension to defence of absolute privilege.

(b) If so, to what types of unlawful conduct should be included providing this protection?

39. The Committee submits that the types of unlawful conduct that should be including in this protection include conduct that is outlined in:
    - *Australian Human Rights Commission Act 1986* (Cth);
    - *Sex Discrimination Act 1984* (Cth); and
    - *Racial Discrimination Act 1975* (Cth).

(c) If yes to a), what is the best way of amending the MDPs to achieve this aim?

40. The Committee submits that all and any amendments to the MDPs require precise and clear drafting that lay people can understand and access.
41. The Committee further submits that the best way of amending the MDPs to achieve the aim of a) is by extending absolute privilege as follows:
    i. Amending clause 27 to allow absolute privilege to extend to reports made to employers and professional disciplinary bodies; and
    ii. Ensuring all jurisdictions adopt this amendment uniformly.
42. The Committee suggests the following changes to clause 27(2)(c):
    - *The matter is published in the course of reporting the:*
        - *conduct of an employee to their employer; or*
        - *conduct of a member of a profession to the professional disciplinary body that oversees their profession*.
    - *where the conduct alleged would be in breach of any law of Australia if the required elements were established.*

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[19] Victoria Police, 'Challenging misconceptions about sexual offending: creating an evidence-based resource for police and legal practitioners' (Australian Government resource, Australian Institute of Family Studies, 2017) <https://apo.org.au/sites/default/files/resource-files/2017-09/apo-nid107216_1.pdf>.
[20] Liz Wall and Cindy Tarczon, 'True or false? The contested terrain of false allegations' (Research summary, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2013) <https://aifs.gov.au/sites/default/files/publication-documents/false%20allegations.pdf >.

(d) Are there sufficient safeguards available to prevent deliberately false or misleading reports being made to employers or professional disciplinary bodies? If not, what additional safeguards are needed?

43. The Committee notes that there are misconceptions about sexual harassment and assault, and inconsistencies about the way reports of these experiences are classified by employers and professional disciplinary bodies.[21] The Committee submits that the Attorneys-General should examine structural approaches to workplace sexual harassment regulation as put forward by Elizabeth Shi and Freeman Zhong.[22] The Australian Human Rights Commission's Report on Sexual Harassment in Australian Workplaces found that 43% of people who formally reported sexual harassment at work felt that they were subject to negative consequences which included being 'labelled as a troublemaker' or 'ostracised, victimised or ignored by colleagues'. [23]
44. As such, the Committee submits that the MDPs should seek to rectify gaps in the definition and understanding of what false or misleading reports are in these instances by using clear plain English.
45. The Committee notes that notwithstanding criminal penalties for making false or misleading statements, there are sufficient safeguards utilized by some organisations that can be adopted and enhanced by employers and professional disciplinary bodies. For instance:
    - Some professional bodies have authorizing legislation that prohibit the making of false or misleading statements and proscribe penalties accordingly. For example, *Health Practitioner Regulation National Law* prohibits providing false and misleading information to investigators or a council and breaches carry financial penalties.[24]
    - There are internal workplace policies that can be designed to address the context of the workplace and any potential false or misleading reports therein, like for example the Code of Conduct of Coles Group.[25]

[21] Elizabeth Shi and Freeman Zhong, ' Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: a Structural Approach' (2020) 43(1) *UNSW Law Journal* 167.
[22] Ibid.
[23] Australian Human Rights Commission, Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces (Report, 2018) 73.
[24] For example see *Health Practitioner Regulation National Law* (NSW) No 86a of 2009 ss150J(3)(b), 164C(1)(d), 164G(2)(b), schedules 20-21; Health Practitioner Regulation National Law Act 2009 (Qld) schedule 5 part 2 ss 20 and 21.
[25] Coles Group, *Code of Conduct* (at 31 March 2021) 9.2.

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Concluding Comments

NSW Young Lawyers as well as the CET Committee thank you for the opportunity to make this submission.

If you have any queries or require further submissions, please contact the undersigned at your convenience.

Contact:

Simon Bruck

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:

Ashleigh Fehrenbach

Chair

NSW Young Lawyers Communications, Entertainment and Technology Committee

Email: cet.chair@younglawyers.com.au