

## Episode 148: Summary

**Episode name:** Rebuilding the Town Square: Innocent Dissemination and the New Defamation Regime

**Guest(s):** Scott Traeger

**What area(s) of law does this episode consider?**

Amendments to defamation law; the internet intermediary defence.

**Why is this topic relevant?**

Defamation law has long-been a hotly debated topic in Australia and has become increasingly relevant in the digital age. As online platforms continuously become more and more integral to how we communicate and share information, the question of who qualifies as a "publisher" in defamation law - and thus who holds responsibility for defamatory content - has taken on new importance.

In July in NSW and the ACT, amendments came into effect addressing the liability of internet intermediaries, such as social media platforms and search engines, for defamatory material published by third-party users. These reforms introduced updates to the innocent dissemination defence but left open questions about balancing freedom of expression with protecting reputations online.

**What legislation is considered in this episode?**

[Defamation Act 2005 \(NSW\)](#); [Civil Law Wrongs Act 2002 \(ACT\)](#); [Defamation Act 2005 \(Vic\)](#); [Defamation Act 2005 \(Qld\)](#); [Defamation Act 2005 \(Tas\)](#) (**Defamation Act**)

[Communications Decency Act, 47 U.S.C. § 230](#)

[Securing the Protection of Our Enduring and Established Constitutional Heritage Act, 28 U.S.C. § 4101](#) (**SPEECH Act**)

[U.S. Const. amend. I](#)

**What cases are considered in this episode?**

[Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel v Dylan Voller \[2021\] HCA 27](#)

- Dylan Voller sued several media companies for defamation based on harmful comments made by third parties on their Facebook pages. The issue was whether the media companies could be considered publishers of those third-party comments for the purposes of a defamation claim. The High Court held that the media companies were indeed publishers, as they facilitated and encouraged the comments by maintaining Facebook pages and posting

content, even without direct knowledge or intent regarding the defamatory material.

[Google LLC v Deferos \[2022\] HCA 27](#)

- George Deferos sued Google for defamation, arguing that its search engine results, which displayed a snippet and hyperlink to an article from \*The Age\*, made Google liable for defamatory content in the article. The issue was whether Google, by displaying search results, was a publisher of the third-party content it linked to. The High Court held that Google was not a publisher, as its automated search results merely facilitated access to third-party content without endorsing or adopting it, distinguishing its role from that of active publishers.

**What are the main points?**

- Western Australian and Northern Territory are yet to introduce the Stage 1 defamation reforms, which came into force elsewhere in July 2021. This has resulted in delays in the implementation of Stage 2 reforms, with only New South Wales and Victoria being up to date.
- The defence of innocent dissemination was created to protect subordinate distributors, such as news agents and booksellers, who did not have the opportunity to review the material they were reselling for defamation. This defence has also been historically used by forum administrators or platform hosts who do not actively vet the content posted by third parties before publication.
- For those hosting or moderating sites like Facebook pages, there is a challenge in deciding whether to actively review and moderate content to avoid potential liability or to refrain until a complaint is made, risking exposure to defamatory posts.
- The stage two reforms in Victoria and New South Wales provide a new defence for internet intermediaries, such as social media platforms or individuals moderating online content, against defamation claims.
- The internet intermediary defence requires platforms and moderators to have an accessible complaints mechanism for defamatory content, and if they promptly act on complaints within seven days to remove or block such content, they will be protected from defamation lawsuits.
- If an internet intermediary chooses not to remove content after receiving a complaint, they can use the usual defences to defamation claims; truth, honest opinion, the new public interest defence, and qualified privilege.

- Paid search ads involve a third party paying Google to create content in response to user queries, making it an active process rather than passive dissemination. As a result, it is unlikely that the innocent dissemination defence would apply to these paid search results.
- Qualified privilege is a defence that allows publishing information to a limited audience of individuals who have a legitimate interest in receiving it, such as in a private Facebook group.
- The stage two reforms also brought in a requirement to show that there was serious harm to your reputation in addition to proving that the content is defamatory.
- The public interest defence allows mainstream media to report on stories that are in the public interest without facing defamation claims. The key requirement is to show that the publication was in the public interest and that the author reasonably believed so at the time.
- To stay current and become an expert in a field of interest, it is important to read new cases regularly. With defamation cases, understanding the personal aspects and complexities beyond the truth of statements is crucial in providing clients with appropriate advice and achieving their desired outcomes.

#### What are the practical takeaways?

#### Show notes

[Dr Matt Collins AM QC \(2019\), 'Nothing to write home about: Australia the defamation capital of the world', \*Law Council of Australia\*](#)