Submission by Professor Dan Jerker B. Svantesson to the Review of Model Defamation Provisions Policy, Reform & Legislation, NSW Department of Communities and Justice regarding:

The exposure draft Model Defamation Amendment Provisions for Part A of the Stage 2 Review

September 2022

Professor Dan Jerker B. Svantesson

Faculty of Law, Bond University
Gold Coast, Queensland, 4229
Australia
dasvante@bond.edu.au

Summary of major points

- The current work on Model Defamation Provisions must engage with the topic of 'scope of jurisdiction'; i.e., the geographical scope of a court's order of the type envisaged in Recommendation 5. Doing so is not optional. As is clear from the experiences overseas, failing to do so creates uncertainty leading to litigation.
- The Model Defamation Provisions should be amended in accordance with the proposal articulated on page 9 of these submissions.
- At the minimum, the proposal must consider four questions in much more detail:
    I. how does international law impact the new court powers for non-party orders to remove online content?
    II. why is it justified to give the new court powers for non-party orders to remove online content potential worldwide scope?
    III. under what circumstances will the proposed new court powers for non-party orders to remove online content be given such worldwide scope (surely not by default in all situations)?
    IV. what are the implications (e.g., for free speech) of the new court powers for non-party orders to remove online content having potential worldwide scope?
- 'Scope of jurisdiction' is equally relevant for take down orders as it is for de-listing orders and blocking orders, and the Model Defamation Provisions ought to carefully consider the role that so-called geo-location technologies may play in this context.
- If States manage to effectively impose orders with worldwide scope of jurisdiction as the default response to all violations of local content laws, the Internet will no longer function, and free speech is severely undermined.
- If misused, broad scope of jurisdiction claims constitute a threat to the balance struck in the private international law system.
- It is not possible to address online defamation in one silo while placing scope of jurisdiction for defamation orders in a different silo as the proposal seeks to do; the two are interlinked.

1. General remarks

1. I welcome the initiative taken to seek further input on the proposed reform.

2. These submissions regarding the proposed Model Defamation Provisions ('MDPs') are intended to be made public.

3. These submissions deal only with Recommendation 5 and does so with a focus on the neglected scope of jurisdiction issue. No views are expressed on any other matters.

2. Introductory observations

4. Recommendation 5 consists of a proposal for new court powers for non-party orders to remove online content.

39A Orders to prevent or limit publication or republication of defamatory digital matter

(1) This section applies in relation to defamation proceedings for the publication of digital matter if:

(a) the plaintiff has obtained judgment for defamation against the defendant in the proceedings, or

(b) a court grants an injunction or makes another order preventing the defendant from continuing to publish, or from republishing, the matter pending the determination of the proceedings.

(2) In defamation proceedings to which this section applies, the court may order a person who is not a party to the proceedings to take the steps the court considers necessary in the circumstances:

(a) to prevent or limit the continued publication or republication of the matter, or

(b) to comply with, or otherwise give effect to, the judgment, injunction or other order mentioned in subsection (1).

(3) Without limiting subsection (2), an order under this section may require:

(a) 1 or more access prevention steps to be taken, or

(b) a step to be taken in relation to all, or only some, of the users of an online service.

(4) The court may not make an order under this section against a person who is not a party to the proceedings unless the person has been given an opportunity to make submissions about whether the order should be made.

5. Regrettably, this proposal treats the issues of jurisdiction and enforcement as if they somehow were external to the issue at hand and as if there was an option to either attempt to 'fix' the inherent jurisdiction and enforcement issues that arise in the context of the global online environment via the MDPs or not to do so. In the few lines by which the background paper for the proposal engaged with the topic, it merely notes:

> "Some stakeholders raised concerns that any power to make orders to non-party intermediaries, particularly where such orders are framed as applying worldwide, may face difficulties of jurisdiction and enforcement in relation to foreign based intermediaries. Other stakeholders pointed out that to the extent that a court already has power, it is not the power that is in issue, but its enforcement, particularly in relation to worldwide orders. Stakeholders generally did not support any attempt to 'fix' the inherent jurisdiction and enforcement issues that arise in the context of the global online environment via the MDPs. Some considered that there may need to be international agreement to resolve this issue."[1]

6. This is a clear misunderstanding. It is also a conflation of issues as it lumps the scope of jurisdiction issue with the matter of practicalities standing in the way of effective enforcement. The latter may indeed be the type of issue that the MDPs cannot fix. However, the former is a matter that must be considered.

7. The MDPs can of course not solve – or 'fix' – all the inherent jurisdiction and enforcement issues that arise in the context of the global online environment. But we cannot ignore that the MDPs must confront their role in those jurisdiction and enforcement issues, as well as the fact that the proposed new court powers for non-party orders to remove online content either must have worldwide scope or not.

8. In creating new court powers for non-party orders to remove online content with potential worldwide reach, the MDPs are contributing to the current trend of States claiming worldwide scope of jurisdiction for their court orders. Unfortunately, Australia is here (again[2]) not even mentioning the need to comply with international law in this context.

9. This 'head-in-the-sand' approach is dangerous and represents a missed opportunity to engage with a topic of considerable importance for how the Internet develops.

---

[1] Background Paper: Model Defamation Amendment Provisions 2022 (Consultation Draft) August 2022, https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/background-paper--for-draft-part-a-model-defamation-amendment-provisions-2022.pdf, p. 49.

[2] Pembroke J's decision in *X v Twitter Inc* [2017] NSWSC 1300. See further: https://www.linkedin.com/pulse/sydney-become-internet-content-blocking-capital-world-svantesson/, and Dan Svantesson, Scope of jurisdiction online and the importance of messaging – lessons from Australia and the EU, *Computer Law & Security Review* 38 (2020) Article 105428.

3. The minimum

10. It is a fact that the proposed MDPs seek to introduce new court powers for non-party orders to remove online content, and it is a fact that such orders may be worldwide, local or something in between, in their scope. Consequently, one would expect the proposal to address this – the question of 'scope of jurisdiction' – in detail. But it fails to do so.

11. It may be tempting for some to take the view that, as a law made in Australia, for Australia, the only interests that need to be considered in the context of the MDPs are those of Australia. Under this logic, it may be argued that Australian orders should always be worldwide in scope.

12. Such an insular view is, however, untenable in an interconnected world. Australia does not exist in isolation. Australia is part of a global community, and Australia is subject to international law. This, unavoidably and appropriately, impacts how Australia formulates its laws, including the MDPs.

13. To this may be added that – unsurprisingly – the approach Australia adopts towards other States may impact the approach those States adopt towards Australia. This is explored in more detail below (Section 4).

14. At the minimum, the proposal must consider four questions in much more detail:

I. how does international law impact the new court powers for non-party orders to remove online content?

II. why is it justified to give the new court powers for non-party orders to remove online content potential worldwide scope?

III. under what circumstances will the proposed new court powers for non-party orders to remove online content be given such worldwide scope (surely not by default in all situations)?

IV. what are the implications (e.g., on free speech) of the new court powers for non-party orders to remove online content having potential worldwide scope?

15. It would be irresponsible to leave these questions – in particular question III – unanswered in the introduction of these new court powers. As seen in the experience overseas,[3] leaving this question unanswered creates uncertainty leading to litigation.

[3] Consider e.g., the decision by the Court of Justice of the European Union in Case C-507/17, Advocate General Szpunar's Opinion in Case C-18/18, and the Supreme Court of Canada's judgment in *Google Inc v Equustek Solutions Inc* 2017 SCC 34.

16. Furthermore, it is surprising indeed that the section[4] discussing the risks associated with the proposed new court powers for non-party orders to remove online content does not even mention the potential stifling of free speech. Instead, it mentions as a risk the possibility that Internet intermediaries may "geo-block" the content from Australian users of its service rather than fully implementing an order which purports to apply worldwide.[5] This, the background paper notes, may satisfy some complainants, but not others. True as that may be, it seems odd to only look at the potential use of geo-location technologies as a risk to the interests of some complainants. Rather, the work on the MDPs ought to carefully consider the role that geo-location technologies may play in striking an appropriate balance in this context.

4. The bigger picture

17. In addition to the questions noted above – that *must* be addressed in relation to the MDPs – the proposal *ought to* engage with the 'big picture issue' of how Australia adopting new court powers for non-party orders to remove online content with potential worldwide impacts (1), the operation of private international law, (2) the Internet, and (3) the conduct of other States that may impact the free speech of Australians. These are matters I have raised in earlier submissions, and they will, thus, merely be summarised here.

18. Scope of jurisdiction relates to the appropriate geographical scope of orders rendered by a court that has personal jurisdiction and subject-matter jurisdiction.[6] This is a central issue, for example, where an Internet platform is ordered to block, delist, deindex, de-reference, delete, remove, or take down content. Such orders may apply to the platform (1) only locally, (2) for a selection of jurisdictions or (3) globally.

19. The powerful nature of content-related orders with a worldwide scope is illustrated in the following. Imagine for example, that an Australian citizen in Australia posts something on a US social media site. The posting, while perfectly legal in both Australia and in the US, is seen to be offensive to the Communist Party of China and a Chinese court or authority orders its removal. If the US social media company complies, the removal is effective

[4] Background Paper: Model Defamation Amendment Provisions 2022 (Consultation Draft) August 2022, https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/background-paper--for-draft-part-a-model-defamation-amendment-provisions-2022.pdf, pp. 50-51.

[5] Background Paper: Model Defamation Amendment Provisions 2022 (Consultation Draft) August 2022, https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/background-paper--for-draft-part-a-model-defamation-amendment-provisions-2022.pdf, p. 51.

[6] See further: Dan Svantesson, Jurisdiction in 3D – "scope of (remedial) jurisdiction" as a third dimension of jurisdiction, *Journal of Private International Law* Vol 12 No 1 (2016), pp. 60-76.

worldwide without the need for any enforcement action in neither Australia nor in the US. In fact, the laws and legal systems – including the public policies – of these States do then not feature in the equation at all. In effect, the need for recognition and enforcement that ordinarily provides balance in the system created by private international law is completely displaced. This calls for a cautious approach to scope of jurisdiction in relation to the proposed new court powers, and ought to have been addressed amongst the discussion of the risks with the current proposal.

20. If States manage to effectively impose orders with worldwide scope of jurisdiction as the default response to all, or most, violations of local content laws, the Internet will no longer function. The only content available in such a scenario is that that is lawful in every single State in the world. Much of what Australians post online would then be blocked to the detriment of free speech and to the detriment of democracy. Also this ought to have been addressed amongst the discussion of the risks with the current proposal.

21. The starting point in this context must be the realisation that such worldwide orders are enormously powerful tools that must be reserved for a limited number of particularly serious circumstances. Indeed, if misused, broad scope of jurisdiction claims constitute a threat both to the Internet as we know it, and to the balance struck in the private international law system.

22. The great importance of scope of jurisdiction issues stem, in part, from the fact that what may be defamatory in Australia may be perfectly legal in another State, and *vice versa*. In extreme cases, the defamation laws of one State may require Internet platforms to remove certain content that the laws of other States demand that those platforms do not remove.[7]

23. The reality is that if Australia adopts the position that its court orders have worldwide scope as default, other States may be encouraged to do so as well. That increases the risk of international tension and is a generally harmful direction. This ought to have been addressed amongst the discussion of the risks with the current proposal.

24. The steps necessary to finalise the MDPs ought to recall the findings of the 2019 Internet and Jurisdiction Global Status Report *Internet & Jurisdiction Global Status Report*. The expert stakeholders that were interviewed for the Report and that took part in the Report's survey generally were of the view that:

> *"1. Global content restrictions are justified for certain content, at least for child abuse materials.*

[7] See further: Daphne Keller, (2019, January 29). Who do you sue? State and platform hybrid power over online speech. *Aegis Series* Paper No. 1902. https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf.

2. Apart from such content, the violation of local law should not, by default, be met with global content restrictions.

3. The appropriate scope of jurisdiction for content restrictions is context-specific. One size does not fit all.

4. There is value in monitoring content restrictions in order to provide transparency and opportunities to challenge content restrictions."[8]

25. These are important observations that ought to guide Australia.

5. Proposed solution

26. Elsewhere,[9] I have canvassed ten rules for 'scope of jurisdiction' that may usefully guide how the law develops in this field.

27. Guided by those ten rules for 'scope of jurisdiction', I propose the following amendment to the proposed MDPs:

[8] Dan Svantesson, *Internet & Jurisdiction Global Status Report 2019*, Paris, Internet & Jurisdiction Policy Network 2019, at p. 152.

[9] Dan Svantesson, "Scope of Jurisdiction" – A Key Battleground for Private International Law Applied to the Internet, *Yearbook of Private International Law*, Volume 22 (2020/2021), 245-274, pp. 265-273.

Section 4 Definitions [Part A, consequential amendments]

Insert in alphabetical order in section 4—

[…]

geographical scope, in relation to section 39A, means the geographical area in relation to which an order made under that section applies. The geographical scope of such an order may be:

(a) limited to Australia;
(b) limited to Australia and a selection of specified foreign states; or
(c) worldwide.

39A Orders to prevent or limit publication or republication of defamatory digital matter

[…]

(5) [The default position is that the application of an order made under this section is limited to Australia.] Determining the geographical scope of an order made under this section, requires the court to take account of all the relevant circumstances.

(6) Without limiting subsection (5), the following matters are relevant in deciding the geographical scope of an order made under this section:

(a) the principles of necessity, proportionality, and scalability;

(b) the need to avoid placing unreasonable limits on freedom of expression;

(c) whether the matter to which the order relates may be lawful and protected speech in other jurisdictions;

(d) the extent to which the person, against whom an order is made under this section, is required by an applicable foreign law not to prevent or limit the continued publication or republication of the matter;

(e) the strength of the connection between Australia and the the person against whom an order is made under this section; and

(f) Australia's obligations under international law, including obligations under human rights law.

Professor Dan Jerker B. Svantesson

Professor Svantesson is based at the Faculty of Law at Bond University. He is also a Researcher at the Swedish Law & Informatics Research Institute, Stockholm University (Sweden), a Visiting Professor, Faculty of Law, Masaryk University (Czech Republic) and serves on the editorial board on a range of journals relating to information technology law, cyber security, cybercrime, data privacy law and law generally.

He held an ARC Future Fellowship 2012-2016, has written extensively on Internet jurisdiction matters and has won several research prizes and awards including the 2016 Vice-Chancellor's Research Excellence Award. Professor Svantesson has been identified as the field leader in 'Technology Law' in The Australian RESEARCH magazine four years in a row (2021, 2020, 2019 and 2018).

The views expressed herein are those of the author and are not necessarily those of any organisation with which Professor Svantesson is associated.