

At his Wednesday [address to the National Press Club](#), Attorney-General Christian Porter said the federal government is pursuing “immediate” defamation law reform.

The announcement seemed a bit odd, as defamation is a subject for state and territory governments to legislate on. A NSW-led law reform process has been ongoing for years.

Last June, the NSW Department of Justice [released a report](#) on its statutory review of the NSW legislation. In February, a further [discussion paper was published](#) by a NSW-led Defamation Working Party.

The theme of these documents, and the various [public submissions that followed](#), is that Australian defamation law is not suited to the digital age.

Holding social media companies responsible as publishers

Porter suggests we should “level the playing field” by [holding social media companies responsible for defamation](#).

Under current laws, liability depends on an entity being a “publisher” of defamatory content. A publisher is not the same as an author.

Read more: [***Can you sue someone for giving you a bad reference?***](#)

For example, a newspaper can be held liable for publishing a defamatory letter to the editor. This is why they have lawyers on staff, to ensure defamatory content is filtered.

Porter's proposal seems to be that Facebook, Twitter and other social media companies be held to the same standards as traditional media companies such as [News Corp](#).

This means, if you write something defamatory on Facebook, not only could you be sued, but Facebook could be too.

One way the government could make this happen is by amending the [Broadcasting Services Act 1992](#). The Act essentially provides that state and territory laws have no effect to the extent they make "internet content hosts" liable.

This could mean "[internet intermediaries](#)", including social media companies, have some protection from defamation law.

The potential hurdles

The proposal to make social media companies responsible for defamation is problematic for a few reasons.

First, it assumes these companies cannot currently be held responsible. If the recent [Dylan Voller case](#) is anything to go by, perhaps they can.

In June, the [NSW Supreme Court held](#) media companies such as Nationwide News (a News Corp subsidiary) could be responsible in defamation for posts by users on the Facebook pages of newspapers such as The Australian. The [contentious decision](#) is currently [being appealed](#).

Read more: [Can you be liable for defamation for what other people write on your Facebook page? Australian court says: maybe](#)

Second, even if Australian defamation law allowed Facebook and Twitter to be held liable, how would you enforce such a judgement?

The companies behind these platforms are based overseas. Some are based in the United States, where [section 230 of the Communications Decency Act](#) states “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”.

Relying on this law, a US company subject to an Australian defamation judgement may simply ignore it. Or worse, it may get an order from an American court declaring it doesn't have to comply. Google [has done this before](#) .

Third, a common theme of defamation reform rhetoric is that current laws are harsh on freedom of speech. If this reform goes through, plaintiffs will have high incentive to litigate: they'll be able to reach into the deep pockets of tech companies.

Defamation lawyers will be licking their lips. Meanwhile, the change wouldn't stop the average citizen who posts defamatory content from being sued. It may actually increase litigation against members of the public, sued in tandem with tech companies.

Less trivial defamation claims

Another reform flagged by Porter is the introduction of a threshold of serious harm, inspired by [UK legislation introduced in 2013](#)

. This means people who aren't actually [seriously harmed](#) by defamation would no longer be able to sue.

This may see fewer petty claims clogging up the courts, which is good.

Disputes between regular people over social media mudslinging [form an increasing share of courts’ defamation work](#)

. The law should assume we have thicker skin.

But arguably, we don’t need it. [A few cases have already held](#) a publication that doesn’t cause serious harm is not “defamatory”. This proposal’s value is largely symbolic.

More substantive reforms to look out for

Porter flagged some other reforms that could have consequences. The way current legislation “caps” defamation damages, theoretically preventing huge awards of money, [is controversial](#) . If that is changed, smaller damages awarded will mean less incentive to sue.

Porter also flagged a “public interest defence”, protecting responsible communication on a matter of public interest.

But [we kind of already have one](#) , called “qualified privilege”. How a new defence interacts with what we already have could pose tricky issues even lawyers may struggle with. When it comes to law reform, trickiness is not a virtue.

Read more: [***Defamation in the digital age has morphed into litigation between private individuals***](#)

In my view, the biggest issue to address is corporate defamation. Currently [only small companies can sue](#)

. This means McDonald’s can’t sue you for defamation over a harsh happy meal review. If this

changes, freedom of speech could be massively curtailed.

Getting the balance right is not easy

There's a lot of technical detail in defamation law, reflecting centuries of development.

Even Chief Justice Susan Kiefel [describes it as complex](#) . We all agree this area of law needs an update, but disagree on the best way forward.

In my view, enhancing media freedom is an important goal of the reform process. But that doesn't mean we should get rid of defamation altogether.

In an environment where media power is dangerously concentrated in the hands of a few, defamation law is one of the few tools people have to protect themselves from destructive media commentary.

As Porter acknowledged, striking a balance between competing values, like freedom of speech and reputation, can be difficult. Whether these reforms will get it right remains to be seen.

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