Law Council
OF AUSTRALIA

Stage 2 Review of the Model Defamation Provisions

Part A: Liability of internet intermediaries for third-party content

NSW Department of Communities and Justice (on behalf of the Meeting of Attorneys-General)

19 September 2022

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

1 Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council is grateful for the assistance of its Defamation Working Group, the Media and Communications Committee of the Law Council's Business Law Section, the Law Society of South Australia, the Law Society of Western Australia and the New South Wales Bar Association in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to make a submission to the Attorneys-General, regarding Part A of the Consultation Draft Model Defamation Amendment Provisions 2022 (**Draft Amendments**) and related Background Paper (**Background Paper**).

2. The Law Council has responded to these documents in the order of the provisions in the Draft Amendments rather than in order of the recommendations included in the Background Paper. On occasion throughout this submission, the Law Council notes the alternative view of some contributors to this submission. Where this occurs, the Law Council requests that those comments be attributed to the stated contributor rather than the Law Council as a whole.

3. Throughout the Draft Amendments there are a number of terms, such as 'online service', 'post' and 'poster' which require further consideration to ensure that they are technology-neutral and adaptable for emerging methods of digital distribution. Several terms including 'online service' and 'storage service' also require amendment to ensure that they capture the intended internet intermediaries.

4. The Law Council maintains its support for the introduction of an immunity for internet services performing basic functions in circumstances where the internet service is acting as a mere conduit and is entirely passive in the publication. However, the Law Council is not convinced that public policy supports the introduction of a statutory exemption from defamation liability for standard search engine functions. Rather, the Law Council considers that search engines should be treated in the same manner as other internet intermediaries (such as social media services) – that is, able to rely on other defences when appropriate, such as the innocent dissemination defence or the proposed Model A or B defences should one be implemented.

5. The Law Council has received differing views on the proposed insertion of new subsection 15(1B) to amend the required content of an offer to make amends. Should the Attorneys-General proceed with this revision to the Model Defamation Provisions (**MDPs**), the Law Council considers that amendment is required to ensure that the new provision does not dissuade originators and internet intermediaries from making offers to make amends that include corrections or clarifications in appropriate circumstances.

6. The Law Council does not oppose the insertion of proposed subsection 23A to permit a court to make orders for preliminary discovery about posters of digital matter but notes that this amendment may be somewhat unnecessary given the broad and discretionary nature of the jurisdiction which the courts already hold.

7. The Law Council notes that there is a range of views among members of the profession regarding the right approach to a new defence for internet intermediaries. As such, the Law Council does not hold settled preference for either Model A or Model B. Rather, the Law Council seeks to provide comments on a number of matters arising in relation to these models for the consideration of the Attorneys-General in determining a preferred option.

8. The Law Council does not oppose the introduction of proposed section 39A to allow courts to make orders to prevent or limit publication or republication of defamatory digital matter. It notes that such a mechanism may be particularly necessary if Model A proceeds.

9. The Law Council considers it appropriate for the Australian Government to consider the operation of subsection 235(1) of the *Online Safety Act 2021* (Cth) (**OSA**) in the interests of providing greater clarity and consistency between the laws of the Commonwealth and the states and territories

10. Finally, the Law Council submits that the Draft Amendments should be subject to a mandatory review after a fixed period of time.

Section 4 – Definitions

11. The Law Council notes that throughout the Draft Amendments, and in particular in relation to the proposed additional definitions, there is a reliance on terms which are not sufficiently technology neutral. In the Law Council's view, it is particularly important that technology neutral language is adopted so as to 'future proof' the Draft Amendments for emerging methods of digital distribution.

Online service

12. The Law Council considers that there is a fundamental flaw in the definition of 'online service' which affects the related definition of 'digital intermediary' on which the majority of the Draft Amendments are then based.

13. The Draft Amendments to section 4 of the MDPs define 'online service' to mean:

> *… a service provided to a person to enable the person to access, search or otherwise use the internet, and includes the following services:*
>
> *(a) a transmission or storage service,*
>
> *(b) a content indexing service,*
>
> *(c) a service to provide, encourage or facilitate social or other interaction between persons,*
>
> *(d) a service to allow the use of a search engine.*

14. The Background Paper notes that:

> *Online service is defined very widely to encompass all of the internet intermediary functions in the scope of the Stage 2 Review. So this includes social media platforms, review websites and forum administrators (to name a few).*[2]

15. Much of the consideration of liability for internet intermediaries has arisen as a result of the decision of the High Court in *Fairfax Media Publications Pty Ltd v Dylan Voller* (***Voller***).[3] The Law Council understands that it is the intent of the Attorneys-General that the Draft Amendments (in particular, the proposed alternatives for a new defence) would apply to intermediaries such as the media organisations in the *Voller* case, forum administrators (for example, the administrator of a community social media page) and other smaller parties (including individuals) where they are not the originators of the defamatory material.

16. However, in the Law Council's view, the proposed definition of 'online service' is not drafted sufficiently clearly to ensure that all intended internet intermediaries are captured. There is an apparent disconnect between the intent to encompass the conduct of intermediaries and the restriction within the definition to the provision of 'services'. In particular, users of services that might otherwise be subordinate publishers do not appear to be adequately captured. Examples include forum administrators, page administrators or users who have published material – such as

[2] Meeting of Attorneys-General, Stage 2 Review of the Model Defamation Provisions, Part A: liability of internet intermediaries for third-party content, *Background Paper: Model Defamation Amendment Provisions 2022 (Consultation Draft)* (August 2022) 35 ('Background Paper').
[3] [2021] HCA 27.

a Facebook post, tweet, group message chat or discussion board thread – on which a third-party has then published potentially defamatory material. While an argument could be made that such internet intermediaries would be encapsulated by paragraph (c), that is, as 'a service to provide, encourage or facilitate social or other interaction between persons', it is also arguable that these intermediaries are simply users and not providing a service.

17. To ensure that the intent of the Draft Amendments is met in practice, and to ensure that the Draft Amendments do not result in unnecessary litigation, the Law Council submits that the definition of 'online service' should be amended – possibly by broadening the definition beyond reference to a 'service'.

Post and Poster

18. The Law Council is concerned that the terminology adopted in the Draft Amendments of 'post' and 'poster' may not be sufficiently technology neutral and may limit the application of the Draft Amendments. This language is currently used predominantly in relation to social media platforms and review sites but is not commonly used in connection with other digital intermediaries. This issue is particularly illustrated in the proposed subsection 9A(c), which applies to caching services, conduit services and storage services. For example, a storage service such as Dropbox would refer to 'uploads' or 'file sharing', not 'posts'.

Section 9A – Certain digital intermediaries not liable for defamation

19. The Law Council notes that the Proposed Amendments differentiate between limited categories of online intermediaries such as caching, conduit and storage services (which might be described as 'passive'), search engines, and other internet intermediaries (which will include, for example, social media organisations, forum hosts, and the owners/administrators of social media pages). Search engines are treated effectively as 'passive' intermediaries in relation to their 'organic' search results (i.e. not sponsored links, and likely also not news pages or so called 'Easter eggs').

20. The Law Council considers the need for reform regarding search engines to be the most consequential aspect of proposed section 9A. This is particularly the case following the very recent High Court decision in *Google LLC v Defteros* (***Defteros***),[4] because the manner in which the Judges split and the different approaches adopted increased rather than resolved uncertainty regarding the application of common law to search engines.

21. The Law Council considers the position of other internet intermediaries is relatively less problematic based on the authorities.

Recommendation 2 – Conditional, statutory exemption from defamation liability for standard search engine functions

22. In the case of search engines, proposed subsection 9A(3) would alter the common law so that a safe harbour would apply even in circumstances where the search engine provider had been notified that an automatically generated search result 'snippet' being returned was defamatory and had done nothing to remove it.

[4] [2022] HCA 27.

Presently, a search engine provider in that situation would be liable.[5] The *Defteros* decision addressed only a situation where the search result itself was not defamatory, but content on the page linked to was defamatory. The *Defteros* decision did not overrule previous cases to that effect. As such, it is necessary to consider the policy rationale for the change carefully, and whether the balance struck is appropriate.

23. The Law Council notes that there are some policy reasons in support of a safe harbour arising from the role search engines fulfil, the sheer volume and constant flux of web content, and the automation of the vast majority of their task. However, there is also a sound counterargument that the proposed amendment goes too far, given the power search engines have to bring material to the attention of an audience who would never otherwise see it, and similarly, their ability to override their automation and hide that material from their search results if they choose.

24. This issue presently seems to be addressed in the Draft Amendments by permitting a Court, following a defamation decision, to make an order requiring a non-party to take steps to assist in preventing access to material the subject of its decision online (see below discussion of proposed section 39A). As such, a Court can still order a search engine to hide material in its search results, but only after it has been found to be defamatory in inter-parties proceedings involving another publisher of that material.

25. In the Law Council's view, while that power is reasonable in itself, there is a real risk that this would have the effect that search engines no longer have any incentive to maintain a complaints or reporting system voluntarily or to proactively remove material that they consider likely to be defamatory, as they have been doing recently. Instead, by these proposed amendments, search engines arguably receive statutory encouragement to insist on a Court order before taking any action, even in obvious cases. Complainants, in turn, are left with no option but to pursue primary relief against the original author of the content (if they can be found). As discussed further below in relation to proposed section 39A, waiting for a Court order (in this case requiring a search engine to hide defamatory material) may be costly both financially and in terms of exacerbating or prolonging the harm caused to the plaintiff.

26. On weighing the risks and benefits of providing a statutory exemption from defamation liability for standard search engine functions, the Law Council is not convinced that public policy supports such amendment to the MDPs. Rather, the Law Council considers that treating search engines in one of the manners proposed in respect of other internet intermediaries (i.e. the proposed section 31A alternatives in which potential for liability is linked to compliance with a prescribed notification process), or amending the definition of subordinate distributor in section 32 of the MDPs for the purpose of clarifying the availability of the innocent dissemination defence, is preferable.

27. The Law Council notes that there is some support from the Law Society of Western Australia and members of the Business Law Section's Media and Communications Committee for the proposed statutory exemption from defamation liability for standard search engine functions. It is noted that the proposed amendments in relation to search engines would be more consistent with the position in the United Kingdom and some other overseas jurisdictions.

[5] *Google Inc v Duffy* (2017) 129 SASR 304.

28. Should the proposed statutory exemption from defamation liability for standard search engine functions proceed, there are several drafting issues in relation to proposed section 9A which should be addressed. These are discussed further at paragraphs [33]-[36] below.

Recommendation 1 – Conditional, statutory exemption from defamation liability for mere conduits, caching and storage services

29. In its submission to the Attorneys-General in response to the previous Discussion Paper, the Law Council noted support for the introduction of an immunity for internet services performing basic functions in circumstances where the internet service is acting as a mere conduit and is entirely passive in the publication.[6]

30. The Law Council maintains this position. The Law Council considers that the passive nature of mere conduits, caching and storage services (when properly defined) is analogous to a postal service or telecommunications provider and as such, a conditional exemption is appropriate. Immunity for internet services performing basic functions may provide a greater degree of certainty in the transmission of digital communications.

31. However, the Law Council also notes that a statutory exemption for such services (or at least many such services) may already exist and that therefore proposed section 9A may in fact be unnecessary in relation to a number of services to which it purports to apply. This is as a result of section 235 of the OSA which grants an immunity in certain circumstances to an 'Australian hosting service provider' which is defined as 'a person who provides a hosting service that involves hosting material in Australia'. There is a risk that duplication will increase costs and confusion for parties in defamation disputes.[7]

32. Should the Attorneys-General proceed with the proposed conditional, statutory exemption from defamation liability for mere conduits, caching and storage services, the Law Council has identified several drafting issues in relation to proposed section 9A. These are discussed further below.

Drafting considerations

33. The Law Council notes that the drafting of proposed paragraph 9A(3)(a) regarding the phrase 'rather than terms automatically suggested by the engine' is problematic. The search results returned in response to a query manually input by a user are the same as when a user selects a term that has been automatically suggested by the search engine. The Law Council's understanding is that autocomplete suggestions are generated based on real searches that have been conducted by other users. To the extent that an autocomplete suggestion is itself defamatory, it would not be caught by the exemption in proposed section 9A(3). It is desirable that a technical understanding of the operations of search engines be gained before settling on a definition.

34. The Law Council is aware that the NSW Bar Association has raised a concern in its submission regarding the potential breadth of the term 'storage service'. The Law Council agrees with the NSW Bar Association and considers that this term could

[6] Law Council of Australia, Submission to the Attorneys-General, *Review of Model Defamation Provisions - Stage 2 Discussion Paper* (4 June 2021) 9.
[7] See further comments in relation to s 235(1) of the *Online Safety Act 2021* (Cth) in relation to Recommendation 4.

provide unintended protection to an organisation that provides remote storage of content (for example, social media services which store a user's content on a remote server). The Law Council recommends that the Attorneys-General amend the definition of 'storage service' to clarify that it applies only to a service with the primary function of storage.

35. Relatedly, the NSW Bar Association has also raised concern with the way in which this definition would interact with proposed paragraph 9A(1)(b) which would require the role of a storage service in the publication of potential defamatory material to be limited to providing a service mentioned (i.e. in this case, a storage service). The NSW Bar Association considers a potential example, whereby a storage service also provides links from which a third person could download content and may therefore fall outside of the exemption. The Law Council agrees that further consideration of the drafting of these provisions may be required to ensure that they are correctly capturing the intended targets.

36. Finally, the Law Council considers that the wording of proposed section 9A(1)(c) should be amended to clarify that an intermediary must not do any of the actions listed in the section in order to qualify for the exemption. This could be achieved by adding the words 'the intermediary did not *do any of the following'*.

Section 15 – Content of offer to make amends

Recommendation 7

37. The Law Council supports the proposed amendment to paragraph 15(1A)(b).

38. However, the Law Council has received mixed views on the proposed insertion of new subsection 15(1B).

39. Under the current law, a publisher can defend a defamation claim if it offered to make amends as soon as reasonably practicable after being on notice of the defamatory content of a post. A key element (and one which is necessary) to succeed in such a defence is the publication of a reasonable correction or clarification (see paragraph 15(1)(d) of the MDPs).

40. Proposed paragraph 15(1A)(b) states:

> *(1B) If the matter in question is digital matter:*
>
> *(a) an offer to make amends may, instead of making the offer mentioned in subsection (1)(d), include an offer to take access prevention steps, and*
>
> *(b) the offer mentioned in subsection (1)(e) is not required to be made if an offer to take access prevention steps is made.*

41. The Background Paper indicates that the purpose of this amendment is to:

> *ensure there is an appropriate avenue for making amends in circumstances where it is not possible or meaningful for online publishers, including internet intermediaries to publish a correction or clarification.*

42. The Law Council has received general support for the view that the proposed insertion of section 15(1B) offers protection to intermediaries to an extent that is

unnecessary noting the availability of other defences. Where an internet intermediary removes defamatory material expeditiously it may have access to other defences such as innocent dissemination or the defences under the proposed section 31A alternatives. Many internet intermediaries may also have alternative options for publishing corrections or clarifications (for example, through a media release, posts on their social media accounts or on their website).

43. There is a strongly held view amongst several members of the Law Council's Defamation Working Group that the publication of a reasonable correction or clarification is a fundamental component to an offer to make amends and that removal of this requirement may be antithetical to part of the policy rationale underpinning the defence.

44. Under this view, part of the rationale of the defence is that it encourages the publisher to quickly take steps to counteract, mitigate and minimise the harm of the defamatory publication by publishing a correction or clarification of the defamatory material – not merely to prevent continued publication.

45. As has been identified by Chrysanthou et al in their submission,[8] because proposed section 15(1B) is not limited to online service providers and extends to all 'digital matter', it allows for a defence to any person who engages in a serious defamation online simply by offering to remove the post without any steps to mitigate the harm already caused. For example, where a person posts defamatory material on a social media account, they would have access to this defence by offering to remove the material even though they have the capacity to easily publish a correction or clarification (i.e. through another post) to substantially the same audience (i.e. their followers). Removing this requirement in such circumstances undermines the purpose and utility of providing the defence.

46. Alternatively, the Law Society of Western Australia and members of the Business Law Section's Media and Communications Committee support the proposed amendments as a practical solution which reflects the realities of what intermediaries can do with online material and what remedial action complainants generally seek (that is, to have the matter removed).

47. Should the Attorneys-General resolve to proceed with the proposed insertion of section 15(1B), the Law Council suggests redrafting the provision to ensure that it does not dissuade originators of online material and internet intermediaries from making offers to make amends that include corrections or clarifications where it would otherwise be appropriate and reasonable to do so.

[8] Sue Chrysanthou SC et al, Model Defamation Amendment Provisions 2022 - Submission by Defamation Lawyers (9 September 2022).

Section 23A – Orders for preliminary discovery about posters of digital matter

Recommendation 6

48. In its previous submission, the Law Council noted that there may be some 'utility in clarifying and simplifying the circumstances where an internet intermediary has obligations to disclose the identity of an originator'.[9] The Law Council further noted that if amendments are made to the MDPs to provide for the identification of users by internet intermediaries, the courts should be empowered to 'reach an appropriate balance between competing considerations – including privacy rights, freedom of expression, harm to reputation, and the public interest of any matters disclosed'.

49. Proposed subsection 23A(2) seeks to codify that the court, in making orders for preliminary discovery about posters of digital matter, must consider the objects of the MPDs and privacy, safety or other public interest considerations that may arise if the order is made.

50. Existing civil procedure rules enable a complainant to ascertain an originator's identity by way of preliminary (or pre-action) discovery, including where the entity holding that information is overseas.[10] It is likely the discretion provided by the current civil procedure rules is already broad enough for the Court to have regard to the matters raised in proposed subsection 23A(2).

51. The Law Council does not oppose the insertion of proposed subsection 23A but notes that this amendment may be relatively inconsequential given the broad and discretionary nature of the jurisdiction which the courts already hold. The Law Council recognises that the proposed insertion of this section is, in practicality, unnecessary save perhaps for the purpose of aligning the framework across jurisdictions for exercise of the court's discretion in making orders for preliminary discovery about posters of digital matter.

52. In terms of aligning the framework across jurisdictions, the Law Council notes that the inconsistency between proposed section 23A and rule 7.2.2 of the *Federal Court Rules 2011* (Cth) may mean that the proposed section would be 'picked up' by section 79(1) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**). Given that a large share of the most significant defamation matters is now being determined in the Federal Court, the proposed insertion of section 23A may have the effect of further increasing inconsistency, rather than increasing uniformity. The Law Council recognises that this is a matter that cannot be addressed in the provisions of the Draft Amendments to the MDPs and suggests that consideration by the Australian Government may be required should the states and territories proceed with this proposed amendment.

[9] Law Council of Australia, Submission to the Attorneys-General, *Review of Model Defamation Provisions - Stage 2 Discussion Paper* (4 June 2021) 16.
[10] See, eg, *Kukulka v Google LLC* [2020] FCA 1229; *Kabbabe v Google LLC* [2020] FCA 126; *Musicki v Google LLC* [2021] FCA 1393; *Lin v Google LLC* [2021] FCA 1113.

Section 31A – Defence for publications involving digital intermediaries

53. In relation to other internet intermediaries, the draft amendments propose two alternative options for consideration; the first referred to as a safe harbour defence (Model A); and the second as a modified innocent dissemination defence (Model B). Both Models include reference to compliance with a prescribed notification process and both essentially prevent liability if the intermediary maintains such a process and takes reasonable steps within 14 days of a compliant notification received in response to it.

54. There is a range of views among members of the legal profession regarding the right approach to a new defence for internet intermediaries.

55. The Law Council notes that there is some support for Model A as it would seek to focus the dispute between the complainant and the originator. This alternative provides greater protection to internet intermediaries who may not have sufficient information regarding a matter so as to defend its publication. For example, in circumstances where the publication complained of is a news story published by a reputable media organisation, it is usually more appropriate for a litigant to be encouraged to pursue the media organisation (who is likely to be in a position to determine whether or not to defend the substance of the publication) than the internet intermediary involved in its dissemination (who is unlikely to be in a position to do so). Model A may also reduce the risk that material considered by the originator to be true/an honest opinion/published in the public interest is taken down by an internet intermediary concerned about liability.

56. Alternatively, the Law Council notes that there is support for the Model B alternative as it would somewhat clarify the availability of the innocent dissemination defence for internet intermediaries while providing complainants with a greater ability (than under Model A) to protect their reputation.

57. The Law Council notes that there is also some support for amendment to the current innocent dissemination defence in section 32 of the MDPs to clarify its application to internet intermediaries.

58. Noting the different positions received by the Law Council in response to the possible models, the Law Council does not wish to express its preference for a particular model. Rather, the Law Council seeks to provide comments on a number of matters arising in relation to these models for the consideration of the Attorneys-General in determining a preferred option.

Recommendation 3A: Model A – Safe harbour defence for digital intermediaries, subject to a simple complaints notice process

The originator is known to or identifiable by the complainant

59. In circumstances where the originator is known to the complainant or where it was possible for the complainant to identify the poster, Model A provides a complete and automatic defence (safe harbour). The mechanics of this defence, as the Law Council understands would be:

    (a) under the Model A drafting of proposed paragraph 31A(3)(a), a complaints notice can only be given when after 'taking reasonable steps to obtain the

information', the plaintiff was unable to obtain sufficient identifying information about the originator;

(b) therefore, paragraph 31A(1)(c) of the proposed defence is not engaged as the plaintiff cannot give a valid complaints notice; and

(c) therefore, in order to obtain the defence to the publication of defamatory digital matter, the defendant need only prove that they were a digital intermediary in relation to the publication (proposed paragraph 31A(1)(a)) and had, at the time of the publication, a mechanism that was easily accessible by members of the public for submitting complaints notices (proposed paragraph 31A(1)(b)).

60. In practice, this means that plaintiffs may have a potential remedy against digital intermediaries when the poster is anonymous (see discussion below) or 'sufficient identifying information' (for example, an address for personal service) is not available, but no remedy when the poster can be identified. The Law Council understands that the purpose of Model A functioning in this way is to encourage greater focus on the originator of material while still providing a potential avenue for remedy where the originator is not identifiable (or is not agreeable to being identified).

61. A safe harbour in circumstances where the originator is known to or identifiable by the complainant, will largely eliminate the current incentive for digital intermediaries to consider/remove potentially defamatory content on complaint by a plaintiff as there will be no threat of liability. The Law Council is concerned that the impact of Model A in such circumstances will be that internet intermediaries continue to publish highly defamatory material, in many cases providing a megaphone for material, even once they know, or should reasonably have known, that the material is false.

62. The Law Council understands from experienced practitioners within the defamation field, that the most common, and most problematic, circumstances in which defamation proceedings are brought (including against an intermediary) often involve known, rather than anonymous, originators. Therefore the impact of this safe harbour is likely to be particularly significant.

63. There are many imaginable examples where the material complained of would be published by an individual of limited means and questionable ethics (for example, unwilling to adhere to orders by a court) but who is nonetheless willing to put their name to the publication. In such cases (and many others) the plaintiff would be left in a position of continuing to be defamed online or otherwise be required to spend significant time and money bringing proceedings against the originator (perhaps for little practical benefit).

64. The Law Council notes that under proposed section 39A (discussed further below), the court could make orders against an intermediary to prevent or limit publication or republication of defamatory digital matter. However, Model A, even with the proposed introduction of section 39A, would likely lead to greater delays in material being addressed and require significantly greater costs for plaintiffs.

The originator is *not* known to or identifiable by the complainant

65. In circumstances in which the originator is *not* known to, or identifiable by, the complainant, Model A would provide a defence to the publication of defamatory digital matter if the defendant proves that they:

(a) were a digital intermediary in relation to the publication (proposed paragraph 31A(1)(a));

(b) had, at the time of the publication, a mechanism that was easily accessible by members of the public for submitting complaints notices (proposed paragraph 31A(1)(b)); and

(c) if the plaintiff duly gave the defendant a complaints notice under this section about the publication—the defendant, within 14 days after being given the complaints notice, either:

(i) provided the plaintiff with sufficient identifying information about the poster of the matter (with the poster's consent); or

(ii) took the access prevention steps in relation to the publication of the matter, if any, that were reasonable for the defendant to take in the circumstances.

66. The Law Council notes that practically, in cases where the originator is not known to, or identifiable by, the complainant, Model A will operate in much the same way as Model B. That is, once the intermediary is provided a complaints notice, it will need to take reasonable access prevention steps in relation to the publication in order to avail itself of the defence. This is because, in most circumstances, the originator will not agree to their information being provided to the plaintiff for the purpose of being sued by the plaintiff.

Other matters related to potential implementation of Model A

67. The Law Council considers that the application of the defence is unclear and could give rise to confusion in implementation. This is particularly the case in circumstances where a:

(a) complaints notice cannot be sent (for example, because the originator is sufficiently identifiable);

(b) plaintiff elects not to send a complaints notice; or

(c) complaints notice does not meet the criteria specified in the provision.

68. Should the Attorneys-General opt to proceed with Model A, the Law Council submits that the Attorneys-General should consider amending the drafting to clarify that if a complaints notice is not sent, or if it does not meet the criteria specified in the provision, then the digital intermediary still has the benefit of the defence.

69. Additionally, should Model A be selected, the Law Council submits that consideration could be given to enforceable consequences for non-compliance by the internet intermediary with the complaints notice process (in addition to potential liability). For example, an infringement-type penalty could be considered. Another consideration may be to require internet intermediaries to report information regarding their handling of complaints to an appropriate regulator.

70. The Law Council also notes that there is a policy question which should be considered by the Attorneys-General in contemplating Model A, that is, whether the act of simply providing identifying information of the originator (with consent) should be sufficient to provide a complete defence to the publication of defamatory material, particularly in circumstances where intermediaries are responsible for, and profit from, the design or use of an online platform which amplifies defamatory material.

71. The Law Council is aware that many plaintiffs are currently only able to bring claims where their lawyers have agreed to act on a 'no win, no fee' basis. This service is particularly important in allowing 'everyday Australians' without a high profile or significant resources in access to the justice system to seek resolution of their matter when they have been defamed. As noted by Chrysanthou et al in their submission, there is the potential for Model A to remove the incentive for lawyers to act on this basis.[11] In circumstances where the originator is impecunious any damages award and cost order made by the court may be of little benefit. If there is no real possibility of a meaningful award of damages (and costs) against another (subordinate) publisher, such as an internet intermediary, the service currently provided by many lawyers may cease to be available. The Law Council notes this potential access to justice issue for the consideration of the Attorneys-General.

Recommendation 3B: Model B – innocent dissemination defence for digital intermediaries, subject to a simple complaints notice process

72. In its previous submission, the Law Council noted that the innocent dissemination defence as currently drafted 'does not clearly protect the different online intermediaries as was intended by parliament' and amendments should be made to the defence to 'provide greater protection, clarity and certainty for internet intermediaries'.[12] In fact, the Law Council provided some draft amendments to the current innocent dissemination defence for consideration by the Attorneys-General.[13]

73. In the Law Council's view, the modified innocent dissemination defence in Model B would be a sensible clarification of the issues that presently fall for consideration in applying the existing innocent dissemination defence to internet intermediaries. It would increase certainty for both applicants and defendants. While it would likely improve the ease with which internet intermediaries can establish innocent dissemination, it would do so in a manner that seems broadly consistent with the balancing of competing interests presently sought to be achieved by the existing defence. The safe-harbour defence as an alternative goes further and would represent a much more substantive shift in policy.

Drafting considerations

Definitions of 'online service' and 'digital intermediary'

74. As discussed further at paragraphs [12]-[17] above, the proposed definition of 'online service' then picked up in the definition of 'digital intermediary' – a term used in both the Model A and Model B versions of proposed section 31A – could mean that a number of intermediaries intended to be covered by a new defence are, in fact, not covered. If the Attorneys-General decide to proceed with either Model A or B, additional clarification of the definition of online service is required.

[11] Sue Chrysanthou SC et al, Model Defamation Amendment Provisions 2022 - Submission by Defamation Lawyers (9 September 2022).
[12] Law Council of Australia, Submission to the Attorneys-General, *Review of Model Defamation Provisions - Stage 2 Discussion Paper* (4 June 2021) 13-4.
[13] Ibid 23-6.

Complaints mechanism

75. The Law Council considers that additional clarity is necessary in relation to what is necessary to comply with the requirement under both models for 'a mechanism that was easily accessible by members of the public for submitting complaints notices'.

76. The Background Paper contemplates that for some smaller intermediaries (such as a forum host) being able to receive public communications may be sufficient (for example, through the various forms of direct messages available on social media platforms).[14] However, the language chosen in the Draft Amendments appears to be focussed on larger intermediaries, such as social media platforms, which would be able to provide dedicated complaints mechanisms. As noted above, the Law Council submits that additional consideration should be given to the Draft Amendments to ensure that the provisions are technology neutral.

Access prevention step

77. Both Models A and B require that 'access prevention steps' be taken by a digital intermediary in certain circumstances in order to avoid liability. The Law Council supports the NSW Bar Association's recommendation that the provisions should also deal with a situation where another party takes access prevention steps before the digital intermediary. The Law Council also considers that the definition of 'access prevention step' should include where the digital matter is sufficiently altered to remove the defamatory sting.

Malice provision

78. In its submission in response to the Social Media (Anti-Trolling) Bill 2022 (Cth), the Law Council noted that internet intermediaries are 'not necessarily always "innocent bystanders" to defamatory material' published by a third-party.[15] The Law Council noted that there may be situations where, for example, the intermediary seeks or conduces defamatory material but does not post the material themselves.

79. Proposed subsection 31A(5) in the Model A alternative and proposed subsection 31A(3) in the Model B alternative, appear to respond to the concern previously raised by the Law Council by providing that:

> *defence under this section is defeated if, and only if, the plaintiff proves the defendant was actuated by malice in providing the online service used to publish the digital matter.*

80. Properly constructed, the Law Council considers a 'malice' provision to be an important safeguard, whether Model A or B is chosen. However, the Law Council is concerned that the proposed provision requires malice in 'providing the online service' rather than in publishing, or continuing to publish the digital matter. For example, if X is not malicious in making the service, Y, available, it is safe from a claim in relation to a seriously defamatory publication on Y by a third-party that it knows to be false and still does not take down upon receipt of complaint.

81. The current drafting would severely limit the utility of the provision. In the Law Council's view, the Attorneys-General should consider expanding the application of this provision.

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[14] Background Paper, 38.
[15] Law Council of Australia, Submission No 1 to Senate Legal and Constitutional Affairs Legislation Committee, *Social Media (Anti-Trolling) Bill 2022* (28 February 2022) 13.

Alternative approach – amending current section 32

82. The Law Council is aware that Chrysanthou et al, in their submission, have proposed potential amendments to the innocent dissemination defence in section 32 of the current MDPs.[16] The authors of that submission consider that many of the issues sought to be addressed by proposed sections 9A, 31A (both versions) and 39A can be fairly dealt with by amendments to section 32.

83. The Law Council notes that there is some support for this proposal among the members of its Defamation Working Group. The benefits of this approach include that it would provide clarity around the application of the defence to online intermediaries and it would place all intermediaries on the same playing field – that is that they would be liable for third-party material, once they have been put on notice.

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

Recommendation 5

84. Proposed section 39A allows for a court to make orders to prevent or limit publication or republication of defamatory digital matter by an internet intermediary in particular circumstances. These are if the plaintiff has obtained judgment for defamation against the originator or a court has granted an injunction or makes another order preventing the originator from continuing to publish, or from republishing, the matter pending the determination of the proceedings.

85. The Law Council does not oppose the introduction of proposed section 39A and notes that such a mechanism may be particularly necessary if Model A proceeds. It is important for the administration of justice that successful complainants in defamation proceedings can vindicate their rights.

86. However, the Law Council does raise a number of matters in relation to the provision as currently drafted.

87. Proposed subsection 39A(4) allows an internet intermediary, having obtained the benefit of the exemption in proposed section 9A or the defence in proposed 31A, and despite the fact that the court has found against the originator or made an injunction/order against continued publication, is provided with the 'opportunity to make submissions about whether the order should be made'. The Law Council notes that there is potential for this process to increase the costs to a plaintiff and delay effective resolution of their issue potentially resulting in further damage to their reputation.

88. The Law Council also notes a potential shortcoming in proposed paragraphs 39A(1)(a) and (b). As drafted, it would permit an order to be made against non-parties where there is judgment against the defendant, or where an interlocutory injunction has been granted. Notably, there is no requirement for a final injunction to have issued. The fact a non-party may be ordered to prevent or limit continued publication in circumstances where no such order is made against the defendant has an appearance of unequal treatment.

[16] Sue Chrysanthou SC et al, Model Defamation Amendment Provisions 2022 - Submission by Defamation Lawyers (9 September 2022).

89. The Law Council is aware that the NSW Bar Association has raised concern that on the current drafting an argument may be available that an order cannot be made against a digital intermediary who would have the benefit of a defence. The Law Council supports the NSW Bar Association's recommendation as to the insertion of a new subsection (7) clarifying that the court may make an order under this section against a digital intermediary notwithstanding that the intermediary may be exempt from liability under section 9A or have a defence under section 31A.

90. The NSW Bar Association has also raised concern that the current drafting of proposed subsection 39A(4) may inhibit a court's ability to make urgent *ex parte* orders and the ability of a complainant to obtain urgent and effective relief. The Law Council supports the NSW Bar Association's recommendation that that proposed subsection 39A(4) be replaced with a power to make interim orders on any *ex parte* basis for a short period, subject to a condition that the non-party be given a right to be heard and to seek to have the orders revoked or varied.

91. The Law Council is also aware that, as noted above in relation to proposed section 23A, it may be the case that proposed section 31A would not be 'picked up' by the *Judiciary Act*, and that therefore this provision would not apply to proceedings in the Federal Court. This has the potential to limit consistency of the provisions across jurisdictions.

Clarify interaction with the Online Safety Act 2021 (Cth) immunity

Recommendation 4

92. The Law Council notes the recent establishment of the OSA and paucity of judicial consideration of the new legislation to date. The Law Council considers it appropriate for the Australian Government to consider the operation of subsection 235(1) of the OSA in the interests of providing greater clarity and consistency between the laws of the Commonwealth and the states and territories.

Additional recommendation

93. The Law Council considers that the Draft Amendments should be subject to a mandatory review after a fixed period of time. Such a review should also consider the Stage 1 amendments introduced in most jurisdictions in 2021.