Meeting of Attorneys-General:

Stage 2 Review of the Model Defamation Provisions

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

Summary Paper: Model Defamation Amendment Provisions 2022 (Consultation Draft)

August 2022

NSW GOVERNMENT

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Introduction

Australia has uniform defamation legislation, the Model Defamation Provisions (**MDPs**), enacted by each state and territory. The Stage 2 Review of the MDPs has two parts:

- Part A (led by NSW) addresses the question of internet intermediary liability in defamation for the publication of third-party content.
- Part B (led by Victoria) considers whether defamation law has a chilling effect on reports of alleged unlawful conduct to police and statutory investigative bodies. It looks at whether absolute privilege should be extended to these circumstances.

This summary is a short extract from the Background Paper for the consultation draft Model Defamation Amendment Provisions 2022 (**draft Part A MDAPs**) for Part A of the Stage 2 Review. The purpose of these documents is to explain the policy rationale behind the draft Part A MDAPs. This includes how they are intended to address the key points raised by stakeholders in response to Part A of the Stage 2 Discussion Paper, released in April 2021.

For more detail about the Part A policy recommendations and draft Part A MDAPs, please refer to the Background Paper.

On 12 August 2022, the Meeting of Attorneys-General (**MAG**) agreed that the draft Part A MDAPs and accompanying paper should be released for public consultation. This does not represent an endorsement of the policy recommendations or draft amendments by the MAG or the Defamation Law Working Party. A decision on this will be made following the exposure draft consultation process.

Consultation draft Model Defamation Amendment Provisions 2022 have been also prepared for Part B of the Stage 2 Review. Please refer to the separate policy paper for information about Part B.

Consultation process

Interested individuals and organisations are invited to provide written submissions in response to the draft Part A MDAPs.

Submissions should be sent:

- By email to: defamationreview@justice.nsw.gov.au, or
- By mail to Policy, Reform & Legislation, NSW Department of Communities and Justice, Locked Bag 5000, Parramatta NSW 2124

The due date for submissions is Friday 9 September 2022.

Please note that the contents of the submissions may be made published, unless otherwise advised. If you wish for your submission to remain confidential, please clearly identify this when you make your submission.

If you are interested in participating in the consultation but are unable to make a written submission, please contact us at: defamationreview@justice.nsw.gov.au.

Executive summary

Part A of the Stage 2 Review of the MDPs addresses the liability of internet intermediaries in defamation law for the publication of third-party content online. The premise of Part A is that due to the broad test for determining who is a publisher under the common law, an internet intermediary is anyone who participates in the facilitation of the publication other than the person who authors the content in the first place (**the originator**).

The term 'internet intermediaries' is used to cover a broad range of functions such as internet service providers, content hosts, search engines and social media platforms. It also includes those who use online platforms to host forums that invite third-party comments. This was considered in the High Court decision in *Fairfax Media Publications Pty Ltd & Ors v Voller* [2021] HCA 27. The High Court held, following the common law's traditionally broad approach to the element of publication, that the media companies were the publishers of third-party comments on their Facebook pages responding to news stories they posted.

The purpose of the Part A work is to reform the model laws to strike a better balance between protecting reputations and not unreasonably limiting freedom of expression in the various circumstances where third parties publish defamatory matter via internet intermediaries.

While stakeholder views on Part A differ, there is general agreement on the need to clarify the law in this area. Many were of the view that any reform should focus the dispute between the complainant and the originator of the matter in question. A common concern was the potential chilling effect on free speech of defences that require internet intermediaries to remove content to avoid liability. A number of stakeholders submitted that it is not fair to hold an internet intermediary liable for third-party content of which they are unaware.

At the same time, legal stakeholders emphasised that a complainant should not be left without a remedy, in particular that the matter in question should either be defended or removed from the internet. Otherwise, there is a real risk of failure to provide a remedy where the originator is unidentifiable or unwilling to respond. Many stakeholders emphasised that in the context of third-party content published online, the remedy most sought after by complainants is for the matter to be removed expeditiously, without the need for litigation.

A range of reforms are proposed to address the Part A issues comprehensively

For Part A, a range of potential reforms have been developed to respond comprehensively to the full spectrum of internet intermediary liability for third-party content. These recommendations are the basis of drafting instructions issued to the Parliamentary Counsel's Committee to prepare the draft Part A MDAPs for consultation.

Recommendations 1 & 2: Conditional, statutory exemption for a narrow group of internet intermediary functions

In the development of defamation law, it has been argued that certain traditional intermediaries (e.g.

telephone lines and postal services) are so passive in the facilitation of publication that they should not be considered publishers. They are 'mere conduits'.

Stakeholder views were sought on whether equivalent internet intermediary functions should have statutory protection from defamation liability for third-party content. A statutory exemption would apply irrespective of whether the intermediary is made aware of the defamatory content. A large number of stakeholders agreed that such an exemption should be based on the principle of passivity. Given the breadth of the protection, some stakeholders submitted that an exemption should be granted on a restrictive basis.

Two, statutory, conditional exemptions are recommended:

- **Recommendation 1**: A conditional, statutory exemption from defamation liability for mere conduits, caching and storage services
- **Recommendation 2**: A conditional, statutory exemption from defamation liability for standard search engine functions

Recommendation 1 would cover internet intermediary functions including Internet Service Providers (**ISPs**), cloud services and email. These internet intermediaries are not generally the subject of defamation claims and (in the case of ISPs in particular) are unlikely to be considered publishers under the common law test. While Recommendation 1 would not substantially change the law, it recognises that where internet intermediaries play an entirely passive role in the facilitation of a publication, they should not be liable.

Recommendation 2 would apply only to narrowly defined 'standard search engine functions', subject to conditions. Recommendation 2 presents an important change to the law. Search engines have been the subject of defamation claims in Australia and the High Court has confirmed that a search engine may be a publisher of search results. However, the treatment of search engines in Australia diverges from other comparable jurisdictions.

The rationale for Recommendation 2 is that in performing their standard functions, search engines have no interest in the content. The publication of the search results is prompted in the first instance by the user typing in a search query and the user is also the recipient. The search engines simply use an automated process to provide access to third-party content. The proposed exemption would not cover autocomplete functions provided by some search engines, or content that is paid advertising.

Stakeholder submissions in favour of an exemption for search engine functions also emphasised that search engines are unable to remove content from the internet, they operate on a massive scale and have no relationship with the originator. Another consideration is the significant social and economic value of search engines.

Recommendations 3A and 3B: Two alternative options for a new defence for internet intermediaries

For the most part, stakeholder submissions supported the introduction of a new defence for internet intermediaries, although there was a range of views regarding the right approach.

Two **alternative** models are considered the most viable:

- **Recommendation 3A:** Model A – safe harbour defence for internet intermediaries, subject to a simple complaints notice process, or
- **Recommendation 3B:** Model B – innocent dissemination defence for internet intermediaries, subject to a simple complaints notice process

A common goal for both models is to clarify the law for the benefit of complainants, internet intermediaries and originators. Both models would provide for:

- basic prescribed contents for the complaints notice to the internet intermediary

- a specific period of time in which the internet intermediary is to act
- an internet intermediary not being ineligible for the defence simply because it has a practice of monitoring for or taking down unlawful content (i.e. practising good behaviour)
- the internet intermediary being denied the defence if it is actuated by malice

The purpose of **Recommendation 3A** is to focus the dispute between the complainant and the originator. It provides a complete defence if the complainant already has sufficient information about the originator to issue a concerns notice or commence proceedings against the originator.

If the complainant does not have this information, the internet intermediary can avail itself of the defence if, with the consent of the originator, it provides that information to the complainant. Otherwise the intermediary must prevent access to the content within 14 days.

The purpose of **Recommendation 3B** is to recognise that internet intermediaries should not be liable for third-party defamatory content where they are merely a subordinate distributor and lack knowledge of the defamatory content. Once the internet intermediary has received a complaints notice, it must prevent access to the matter within 14 days in order to be able to rely on the defence.

One key difference between Model A and Model B is that Model B does not provide an automatic defence (or safe harbour) where the complainant has sufficient information about the originator to issue a concerns notice or commence proceedings.

Recommendation 4: Clarify interaction with the Cth *Online Safety Act 2021* immunity

Put simply, section 235(1) of the Commonwealth *Online Safety Act 2021* provides that a law of a state or territory, or common law or equity has no effect if it:

- subjects an Australian hosting service provider or ISP to liability where they are not aware of the nature of the online content or
- requires an Australian hosting service provider or ISP to monitor online content

Stakeholders have consistently submitted that the interaction between the *Online Safety Act 2021* immunity and defamation law is uncertain. Key reasons given for this are that it is not clear:

- which internet intermediaries are covered
- what constitutes 'awareness' of the online content that defeats the immunity

Recommendation 4 is that the Commonwealth Government should give close consideration to whether an exemption from section 235(1) of the *Online Safety Act 2021* for defamation law is desirable, in the interests of clarity of the law.

Recommendations 5 and 6: Clarification and enhancement of court powers

Courts in defamation proceedings (as in other civil proceedings) will generally only grant orders against defendants that are party to the proceedings. In some circumstances though, even if a complainant has obtained judgment against an originator, it may be difficult to enforce a remedy. For example, where the originator is unable to remove content (it may have 'gone viral') or simply refuses to do so. In these circumstances, despite not being party to the proceedings, internet intermediaries may be in a good position to assist.

Recommendation 5 would empower courts to make orders against non-parties to prevent access to defamatory matter online. This would be in circumstances where the court grants interim or final judgment for the complainant in an action for defamation.

There would also be a requirement to give notice to the non-party internet intermediary. This is to

ensure that the internet intermediary has the opportunity to make submissions about whether the order should be made.

Recommendation 6 relates to preliminary discovery orders issued by courts against internet intermediaries to provide information about the originator. Some stakeholders raised concerns about the low threshold for such orders. There may be privacy and safety concerns where the location information of a dissident or domestic violence victim may be disclosed.

Australian courts can, and do, take into account considerations of proportionality, privacy and the risk of abuse of process in exercising the discretion to make preliminary discovery orders. However, there may still be a risk that such orders are abused or have a chilling effect.

Recommendation 6 is that where court rules allow a complainant to seek a preliminary discovery order from an internet intermediary in order to obtain information about an originator for the purposes of commencing defamation proceedings, the court should consider: the objects of the MDPs; and any privacy, safety or public interest considerations which may arise should the order be made. This recommendation does not provide a new avenue to seek preliminary discovery, it simply applies this requirement over the general rules.

Recommendation 7: Mandatory requirements for an offer to make amends to be updated for online publications

Part 3 of the MDPs establishes a process for parties to settle disputes without the need for litigation, by requiring the complainant to notify the publisher of the defamatory matter, and allowing sufficient time for the publisher to make a reasonable 'offer to make amends'.

There are a number of mandatory requirements for what a reasonable offer to make amends must include. One of these is an offer to publish a reasonable correction or clarification of the matter in question. Stakeholders have pointed out that internet intermediaries may simply not be able to comply with these mandatory requirements. For example, a search engine would be unable to publish a correction regarding a publication. They also submitted that in the context of third-party content published online, the remedy most sought after by complainants is to have the matter removed.

Recommendation 7 is to amend the mandatory requirements for the content of an offer to make amends to allow the publisher to prevent access to the matter in question. This would be instead of the mandatory requirement for an offer to publish a reasonable correction or clarification of the matter in question.

Part A policy recommendations

Seven recommendations for reform are proposed to address the issue of internet intermediary liability in defamation law for third-party content.

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

See draft Part A MDAPs Sch 1 [2], draft section 9A

Introduce a new statutory, conditional exemption from liability in defamation law for:

a) Mere conduits, including Internet Service Providers (**ISPs**) that supply internet carriage services to the public

b) Caching services

c) Services that enable the storage of data

The statutory exemption would apply irrespective of whether the internet intermediary is made aware of the allegedly defamatory content. This is a very broad protection so the exemption would apply on the condition that:

- The internet intermediary did not initiate the process of publication or select the intended recipient(s), and
- The internet intermediary did not encourage, edit or promote the matter*

*The draft MDAPs make clear that if a mere conduit, caching or storage service takes action in compliance with a Commonwealth, state or territory law, this does not preclude access to the exemption.

In any defamation proceedings, the statutory exemption is to be determined by a judicial officer. It should be determined as soon as practicable before the trial commences unless the judicial officer is satisfied there are good reasons to postpone the determination to a later stage.

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

See draft Part A MDAPs Sch 1 [2], draft section 9A

Introduce a new statutory exemption from liability in defamation law for:

- the use of automated tools to search the internet to return search results, identifying and linking to third-party websites, based on the search terms input by users

The statutory exemption would apply irrespective of whether the search engine is made aware of the allegedly defamatory content. This is a very broad protection so the immunity would apply on the basis that:

- the search engine's role in the process of publishing the matter is of a solely technical and automatic nature
- in performing its function, the search engine has no monetary or other particular interest in promoting the content outside of the search engine's normal functioning

In any defamation proceedings, the statutory exemption is to be determined by a judicial officer. It should be determined as soon as practicable before the trial commences unless the judicial officer is satisfied there are good reasons to postpone the determination to a later stage.

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

See draft Part A MDAPs Sch 1 [6], draft section 31A

Introduce a defence for publications involving digital intermediaries (Model A). The purpose of Model A is to focus the dispute between the complainant and the originator.

Elements of the defence

It would be a defence to the publication of defamatory digital matter if the defendant proves:

- it was a digital intermediary in relation to the publication (that is a person, other than the author, originator or poster, who provided an online service in connection with the publication of the matter),
- at the time of the publication, it had a mechanism that was easily accessible by members of the public for submitting complaints notices, and
- if the complainant duly gave the digital intermediary a complaints notice — within 14 days the digital intermediary either:
  a) with the poster's consent, provided the complainant with sufficient information to enable a concerns notice to be issued or proceedings commenced against the poster, or
  b) took the access prevention steps in relation to the publication, if any, that were reasonable in the circumstances.

In order to obtain the poster's consent, the internet intermediary would need to provide the poster with a copy of the complaints notice. This is so the poster has sufficient information based on which they can choose to defend the publication.

Safeguard for good behaviour

A digital intermediary would not be ineligible for the defence solely because it took steps to detect, identify or prevent access to defamatory content, unlawful content or content incompatible with its terms of service.

Malice exclusion

The defence would be defeated if the complainant establishes that the defendant was actuated by malice in providing the online service used to publish the digital matter.

Complete defence where complainant can identify the poster

A complaints notice may only be given if, after taking reasonable steps, the complainant was not able to obtain sufficient information to enable a concerns notice to be given to the poster or proceedings to be commenced. A complainant would not be expected to hire a private investigator or seek an order for substituted service or preliminary discovery to meet the reasonable steps requirement.

The complaints notice

The prescribed information for a complaints notice would be:

- the name of the complainant
- the location where the matter can be accessed (for example, a webpage address)
- an explanation of why the complainant considers the matter to be defamatory and if the complainant considers the matter to be factually inaccurate, a statement to that effect
- the serious harm to reputation caused, or likely to be caused by the publication of the matter
- the steps taken to identify the poster

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

See draft Part A MDAPs Sch 1 [7], draft section 31A

Introduce a new defence for publications involving digital intermediaries (Model B). The purpose of Model B is to recognise that internet intermediaries should not be liable for the publication of third-party defamatory content where they are merely subordinate distributors and are not aware of it.

Elements of the defence

It would be a defence to the publication of defamatory digital matter if the defendant proves:

- it was a digital intermediary in relation to the publication (that is a person, other than the author, originator or poster, who provided an online service in connection with the publication of the matter),
- at the time of the publication, it had a mechanism that was easily accessible by members of the public for submitting complaints notices, and
- if the complainant duly gave the digital intermediary a complaints notice — within 14 days the digital intermediary:
    - took the access prevention steps in relation to the publication, if any, that were reasonable in the circumstances.

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A digital intermediary would not be ineligible for the defence solely because it took steps to detect, identify or prevent access to defamatory content, unlawful content or content incompatible with its terms of service.

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- the serious harm to reputation caused, or likely to be caused by the publication of the matter

Recommendation 4: Commonwealth Government to consider an exemption for defamation law from the *Online Safety Act 2021* immunity

The Commonwealth Government should give close consideration to whether an exemption from section 235(1) of the *Online Safety Act 2021* for defamation law is desirable, in the interests of clarity of the law.

Recommendation 5: Empower courts to make non-party orders to prevent access to defamatory matter online

See draft Part A MDAPs Sch 1 [8], draft section 39A

Amend the MDPs to provide that where a court grants an interim or final order or judgment for the complainant in an action for defamation, the court may order a person who is not a party to remove, block or disable access to the online matter within the scope of such order or judgment.

The power should require notice to be given to the person who is not a party before the order is made.

Recommendation 6: Courts to consider balancing factors when making preliminary discovery orders

See draft Part A MDAPs Sch 1 [5], draft section 23A

Amend the MDPs to provide that, where court rules allow a complainant to seek a preliminary discovery order from an internet intermediary in order to obtain information about an originator for the purposes of commencing defamation proceedings against them, the court should take into account:

- the objects of the MDPs
- any privacy, safety or public interest considerations which may arise should the order be made

Recommendation 7: Mandatory requirements for an offer to make amends to be updated for online publications

See draft Part A MDAPs Sch 1 [3], draft section 15(1A)(b) and Sch 1 [4], draft section 15(1B)

Amend the mandatory requirements for the content of an offer to make amends in clause 15 to:

- provide an alternative to clause 15(1)(d) by allowing the publisher to offer to remove, block or disable access to the matter in question. This would be instead of the requirement for an offer to publish, or join in publishing, a reasonable correction of, or a clarification or additional information about, the matter in question.
- make clear that if the alternative is used by the publisher, clause 15(1)(e) would not be mandatory either

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