8 September 2022

Review of Model Defamation Provisions
Policy, Reform and Legislation
NSW Department of Communities and Justice
Locked Bag 5000
PARRAMATTA NSW 2124

By email only:
defamationreview@justice.nsw.gov.au

Dear Defamation Law Working Party,

Submissions on the Part A consultation draft Model Defamation Amendment Provisions 2022

We welcome the opportunity to make a submission in response to the Part A consultation draft Model Defamation Amendment Provisions 2022 (**draft Part A MDAPs**).

LawRight has previously contributed to the Stage 2 Review of the Model Defamation Provisions (**MDPs**) by:

- Providing a submission in response to the Stage 2 Discussion Paper on 17 May 2021; and
- Participating in a Stakeholder Roundtable on 8 September 2022.

Background

LawRight is an independent, not-for-profit, community-based legal organisation coordinating the provision of pro bono legal services for individuals and community groups in Queensland. We are a partnership of law firms, barristers, Community Legal Centres, the Queensland Law Society, the Queensland Bar Association, university law schools, government and corporate legal units.

LawRight undertakes law reform, policy work and legal education, and operates civil law pro bono referral schemes and direct legal services for selected disadvantaged client groups. Our Court and Tribunal Services provide assistance to self-represented litigants with current or prospective civil proceedings in Queensland courts and tribunals who are unable to afford other legal assistance. Further information about how LawRight provides assistance to eligible applicants in relation to defamation matters is contained in our submission in response to the Stage 1 Discussion Paper dated 30 April 2019.

PO Box 12217
George Street QLD 4003

ABN 52 033 468 135
IA 30188

P: 07 3846 6317
F: 07 3846 6311
E: admin@lawright.org.au
W: www.lawright.org.au

In the 2020-2021 financial year, LawRight's State Courts office provided advice or assistance to 36 clients in relation to defamation disputes, representing approximately 18% of our total clients for that year. Of those 36 clients, 86% disclosed an annual household income of less than $52,000, with 47% disclosing an annual household income of $26,000 or less and/or reliance on Centrelink benefits as their primary source of income.

In the 2021-2022 financial year, our State Courts office provided advice or assistance to 24 clients in relation to defamation disputes, representing approximately 12% of our total clients for that year. Of those 24 clients, 92% disclosed an annual household income of less than $52,000, with 71% disclosing an annual household income of $26,000 or less and/or reliance on Centrelink benefits as their primary source of income.

While we acknowledge that our client base is representative of only a portion of the total defamation matters that are dealt with in the Queensland courts, we consider that our work is indicative of a particular client group, being those individuals who are unable to afford legal assistance or representation, and who are typically in a lower socio-economic demographic with a low household income.

These submissions will focus on the aspects of the draft Part A MDAPs that we consider will have the biggest impact on this key client group, being Recommendations 3A and 3B regarding defences for digital intermediaries. We do not intend to provide comments in this submission on matters that relate to issues of broader law reform or that are otherwise beyond the scope of the draft Part A MDAPs and accompanying Background Paper, such as the challenges that self-represented litigants face in conducting defamation proceedings. These challenges and difficulties have already been discussed and commented on in previous submissions relating to the review of the MDPs. However, insofar as the draft Part A MDAPs relate to the making of interim orders or preliminary discovery orders, it is important to note that self-represented complainants and plaintiffs face significant barriers in seeking preliminary discovery, making interlocutory applications, or bringing proceedings against digital intermediaries that are international corporations, due to the complexities and costs of these processes.

Comments on Recommendations 3A and 3B – defence for digital intermediaries

We understand that the Defamation Law Working Party's recommendation is that a new defence be introduced which responds to the issue of digital intermediary liability for third-party content. Recommendations 3A and 3B have been proposed as alternative models for such a defence.

In our previous submissions, we expressed support for a 'safe harbour' defence subject to a complaints notice process. While we remain supportive of this concept, we have some concerns with the option that has been proposed.

In relation to Recommendation 3A, we are concerned that:

- The requirements of the complaints notice and the steps a complainant must take would be difficult for a self-represented complainant to understand and comply with, particularly the requirement to specify steps the complainant took to obtain sufficient identifying information about the poster of the matter;
- As the intent of the defence is to give digital intermediaries an 'automatic defence' where the originator is identifiable, complaints notices would only be issued in scenarios where the originator has posted the content to the relevant platform in an unidentifiable or anonymous way. Given that scenario, it seems very unlikely that the "anonymous" originator would consent to the digital intermediary providing identifying information about the originator to the complainant; and
- The complaints notice process is effectively unavailable when an originator can be identified. In our previous submission, we submitted that any complaints notice process should be available whether or not the originator can be identified, to promote speedy non-litigious methods of dispute resolution, particularly for complainants without ready access to private legal representation, and in scenarios where the originator is recalcitrant or refuses to engage.

In our view, although Recommendation 3B moves away from a safe harbour mechanic, it addresses some of these issues. For example:

- Since there is no automatic defence where the complainant cannot identify the originator, the complaints notice process provides a method of dispute resolution in circumstances where the originator cannot be identified or is recalcitrant;
- The requirements of a complaints notice are simplified and easier for a self-represented complainant to understand; and
- The digital intermediary's response to a complaints notice is either to defend the content or restrict access to the material, which also simplifies the options for a self-represented digital intermediary.

On the basis of the above, and with the Recommendations as currently drafted, we believe that Recommendation 3B provides a better balance between protecting freedom of expression and providing remedies for harm to reputation.

However, although we have a preference for Recommendation 3B, we also have concerns with the specific drafting of both proposed defences.

The way both defences are drafted, it appears that a digital intermediary will have a defence if it can establish that it is a digital intermediary (as defined), it has a mechanism by which complaints can be submitted (i.e. it can be easily contacted about any complaints), and the digital intermediary either:

- Did not receive a 'duly given' complaints notice (as that term is defined in relevant section); or
- Received a duly given complaints notice and took the appropriate action as set out in the relevant section.

The Background Paper specifies that the requirements for the defendant's complaint mechanism is intended to be broad, and would include, for example, a means of messaging a forum administrator on the relevant platform. The draft Part A MDAPs also define 'digital intermediary' as "a person, other than an author, originator or poster of the matter, who provides an online service in connection with the publication of the matter". This definition appears to capture a broad range of digital intermediaries which have varying levels of control or oversight over the content on their platforms.

Our concern is that digital intermediaries will essentially have an automatic defence where they can merely establish that they could be 'easily' contacted but were not notified of the relevant defamatory content in a specifically 'compliant' way, regardless of whether the intermediary had knowledge of or control over the content. This links a digital intermediary's liability for defamation to whether it is contactable and whether a complainant understands and follows the requirements for 'duly giving' a complaints notice, rather than linking liability to the digital intermediary's knowledge that the content is defamatory.

For example, a complaints notice could be considered not 'duly given' if it does not provide an exact location where the matter can be accessed, or specifically state that the complainant considers the matter to be factually inaccurate. Similarly, a complainant may not know they can give a complaints notice. The digital intermediary can rely on these procedural deficiencies, which are common for self-represented litigants, to access a complete defence, even where the digital intermediary was in fact made aware or had actual knowledge that the relevant matter was defamatory, may have actively participated in the publication of the matter (such as through moderation), or may have encouraged or enticed the publication of the defamatory matter. In our view, it is inappropriate that a digital intermediary can escape liability based merely on a procedural failure of the complainant alone in circumstances where the digital intermediary would not ordinarily be protected (e.g. by the defence of innocent dissemination).

In the examples described above, under both Recommendations, the broad protection of the defence can only be defeated if the plaintiff proves that there was malice in providing the online service. The Background Paper states that the intention of the malice exception is to cover circumstances where the digital intermediary "invited the publication of the defamatory matter with an improper motive or created, provided or administered the forum/platform with an improper motive"; however, the provisions as drafted do not make this intent very clear. It is also not clear if "providing the online service" means the provision/administration of the relevant platform or service *as a whole* (e.g. the creation of a Facebook page with a specific name and purpose), or the specific online service provided to publish the specific defamatory content (e.g. the approval of a specific post for publication from a queue of posts awaiting approval). We would recommend that further clarification, or even some examples, be provided in the legislation, rather than this being left open. Further, we also anticipate that a self-represented plaintiff would struggle to prove malice without more specific knowledge and

understanding of the operations and specific moderation/approval practices of the digital intermediary, except in the most obvious of cases.

Overall, both defences provide very broad protection for digital intermediaries, and this protection applies even where there may be substance to the complaint but a potential complainant does not know to make a complaint or does not make a complaint in the specific way set out in the relevant provisions. It also opens up the possibility for digital intermediaries to rely on mere technicalities to avoid liability for defamation.

As presently drafted, in our view, both recommendations struggle to balance the protection of freedom of expression over providing remedies for harm to reputation. This is particularly the case where some digital intermediaries may be more actively involved in the publication of defamatory content, or may actively encourage the publication of defamatory matter by the nature of the relevant platform, the content policies, or the moderation used.

Suggested approach

Based on our reading of the draft Part A MDAPs and the Background Paper, the overall intent of Recommendations 3A and 3B is to limit liability for digital intermediaries that do not have active involvement in the publication of defamatory material or that do not otherwise encourage or entice publication of defamatory material, and to provide a way for complainants to bring defamatory third-party content to the attention of digital intermediaries so that disputes can be resolved early without need to resort to litigation. There also appears to be an intention to clarify that when a digital intermediary has actual notice of defamatory content (in the form of a complaints notice), they must take certain actions to be protected from liability, as they have more responsibility to exercise control over content once actual notice is received. We note that these aims are fairly consistent with recent case law such as *Fairfax Media Publications Pty Ltd & Ors v Voller* [2021] HCA 27 and *Google LLC v Defteros* [2022] HCA 27, which indicate that the question of digital intermediary liability for defamation is linked to the level of 'participation' the digital intermediary has in the publication of the defamatory matter.

If that is the case, then in our view the current wording of Recommendations 3A and 3B would have the effect of providing a much broader protection to digital intermediaries than intended. The Recommendations create a complete defence for digital intermediaries that can merely establish they can easily be contacted and either were not contacted or were not contacted 'properly', regardless of the extent to which the digital intermediary participated in the publication of the defamatory content.

As stated in our previous submission, individuals without the means to pay for private legal representation are generally reluctant to commence proceedings due to the technical difficulty and costs risks of litigation and are concerned about the impact that drawn out and contentious litigation will have on their health and wellbeing. Many of our complainant clients have indicated that their preferred outcome is to simply have defamatory content removed from the relevant forum or website, rather than to receive

compensatory damages. For these reasons, we are generally supportive of the concept of the complaints notice process to provide a non-litigious option for resolving disputes. We suggest that, to balance this purpose with the aim of limiting liability for 'innocent' digital intermediaries, the new defence for digital intermediaries could be approached in a similar way to the defence available under section 18 of the MDPs (offer to make amends defence), with clarifications made to the defence of innocent dissemination in section 32 of the MDPs.

The defence in section 18 of the MDPs is linked to the publisher's response to a concerns notice, where the defence is available if the publisher made a reasonable offer to make amends as soon as reasonably practicable which was subsequently not accepted. The availability of the defence in this context therefore strongly encourages publishers to make reasonable offers to make amends at an early stage. This is particularly so given that the issuing of a concerns notice is now a compulsory step before starting litigation.

We infer from the content of the Background Paper and draft Part A MDAPs that there is no intention to make the issuing of a complaints notice a compulsory step before litigation. However, we suggest that the defence for digital intermediaries can still be framed in a similar way to the offer to make amends defence, where the defence is made available only if a digital intermediary received a complaints notice and responded to it in a particular way, rather than as currently framed where the defence can be available whether or not a complaints notice is received. We suggest that the defence would:

- state that a person can give a complaints notice to a digital intermediary (and specify any requirements of such a notice);
- set out the actions the digital intermediary may take upon receipt of the complaints notice and the relevant timeframes for doing so (e.g. take reasonable access prevention steps or provide identifying information about the poster with the poster's consent); and
- state that it is a defence to an action for defamation against the digital intermediary if the digital intermediary took one of the specified actions within the relevant timeframe.

To address concerns about potentially deficient complaints notices, provisions allowing the digital intermediary to issue a further particulars notice could also be included, similar to the existing provisions for concerns notices.

A digital intermediary that does not receive a complaints notice at all would still be able to rely on the existing defence of innocent dissemination, provided that there are no other circumstances that indicate the digital intermediary had editorial control over the matter prior to publication, or knew or ought reasonably to have known that the matter was defamatory (which may depend on the nature and purpose of the relevant platform, moderation and content policies, etc.). Section 32(3) of the MDPs could be amended to clarify that a digital intermediary is not the first or primary distributor of a matter, with the questions of whether a particular digital intermediary had editorial control over the

content or knowledge that the matter was defamatory left to the courts to assess. In our view, this approach to the innocent dissemination defence may be preferable since there is already a great deal of variance in the ways different digital intermediaries publish and moderate content, and technology and digital platforms will continue to evolve over time.

Framing the provisions in this way would protect both 'innocent' digital intermediaries that could not have known that the relevant matter was defamatory, and digital intermediaries with actual notice of a defamatory matter that took appropriate steps in response. Digital intermediaries would be incentivised to consider complaints seriously. There would not be protection for a digital intermediary that was given actual notice of a defamatory matter but took no actions to limit harm to the plaintiff's reputation. There would also not be a blanket protection for all digital intermediaries that can easily be contacted with a complaint, regardless of knowledge or control over defamatory content. Complainants would have a mechanism to potentially resolve concerns about defamatory content at an early stage, but still have the option of pursuing a claim against a digital intermediary if appropriate. In our view, this would strike a better balance between the key objects of the MDPs: providing effective and fair remedies for harm to reputation, promoting speedy and non-litigious methods of resolving disputes, and ensuring that the law does not place unreasonable limits on freedom of expression.

Conclusion

We are generally supportive of the introduction of a complaints notice process and limiting liability for digital intermediaries that have limited participation in the publication of defamatory content and/or respond appropriately to complaints about defamatory content. However, we are concerned that Recommendations 3A and 3B as drafted go too far to protect digital intermediaries.

While we have a slight preference for Recommendation 3B, we are concerned that the current drafting of Recommendation 3B links a digital intermediary's liability for defamation to whether it is contactable and whether a complainant understands and follows the requirements for 'duly giving' a complaints notice, rather than linking liability to the digital intermediary's knowledge that the content is defamatory, which is the thrust of the innocent dissemination defence.

On balance, our preference is for the new digital intermediary defence to be clearly connected to a digital intermediary's response to a complaints notice, with minor amendments to the existing innocent dissemination defence to clarify that digital intermediaries are not primary distributors. In our view, the amendments should:

- limit liability for digital intermediaries that do not have knowledge of the defamatory matter and have not actively participated in the publication of the defamatory matter;
- limit liability for digital intermediaries that have taken appropriate action to protect against harm to the complainant's reputation upon receipt of notice that the matter is defamatory;

- not provide a blanket immunity or defence for digital intermediaries where they have actively participated in the publication of defamatory material, have encouraged or enticed the publication of defamatory material, or have knowledge that material posted on their platform is defamatory; and
- provide a simple and non-litigious way for a complainant to bring defamatory content to the attention of a digital intermediary and resolve disputes early.

If you have any questions about this submission or require further information, please do not hesitate to contact me at ben.tuckett@lawright.org.au.

Yours faithfully

Ben Tuckett
Principal Solicitor and Managing Lawyer
Court and Tribunal Services