Stage 2 Review of the Model Defamation Provisions

Part A: Liability of Internet Intermediaries for Third Party Content

September 2022

SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the Courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practise in NSW. Currently, 95 of our members report practising in the area of defamation. We also include amongst our members judges, academics, and retired practitioners and judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's Media and Information Law and Technology Committee. If you would like any further information regarding this submission, please contact the Association's Department of Policy and Law Reform on 02 9232 4055.

Contents

A. Introduction

1. The New South Wales Bar Association (the **Association**) welcomes the opportunity to contribute to Part A of the Stage 2 Review of the Model Defamation Provisions (MDP) relating to the liability of internet intermediaries for third party content.

2. On 12 August 2022, the Meeting of Attorneys-General agreed to release the Part A consultation draft Model Defamation Amendment Provisions 2022 (the **draft Part A MDAPs**) and accompanying Background Paper for public consultation. This follows initial Stage 2 consultation in relation to the *Review of Model Defamation Provisions – Stage 2 Discussion Paper* in 2021, to which the Association provided a submission dated 31 May 2021.[1]

3. The Association provides the following submission on the draft Part A MDAPs, with reference to the recommendations made in the Background Paper.

[1] The Association's submission of 31 May 2021 can be found at: https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/stage-2/nsw-bar-association-submission.PDF

B. Submissions

1 Section 9A – Certain digital intermediaries not liable for defamation

Recommendations 1 and 2

4. The Association supports the introduction of a conditional, statutory exemption from defamation liability for certain passive digital intermediaries.

5. We consider it important that the interaction between the exemption provided by section 9A and the power to make orders against non-parties provided by section 39A be explicit. That is, as recognised in the Background Paper, internet intermediaries may be in a good position to assist to remove material when the originator is unable or unwilling to do so. To this end it is important that an order can be made against a non-party notwithstanding that they may be entitled to the benefit of the exemption provided by section 9A. This is discussed further below in connection with the proposed section 39A.

6. The Association has a concern that the definitions in section 9A, particularly the definition of "storage service", are broad and could provide unintended protection to an organisation that provides remote storage of content (for example Facebook or Instagram, which store a user's content on a remote server). The Association recommends that the Meeting of Attorneys-General give consideration to amending the definition of "storage service" to make clear that it applies to a service whose primary function is to enable users to store content remotely.

7. Further, the Association is concerned with the interaction between the definition of "storage service" and the requirement in subsection 9A(1)(b). For example, whilst the primary function of a cloud-based storage service would be storage of documents, those services often also provide a mechanism for the publication of content, such as through the creation of a link from which a third person could download content. This is a passive role which the Association understands the exemption would be seeking to protect, however it is arguable that in this scenario the intermediary's role in the publication extended beyond merely providing storage, thus taking the intermediary outside of the protection.

2 Section 15 – Content of offer to make amends

Recommendation 7

8. The Association supports the proposed amendment to section 15(1A)(b).

9. The Association is concerned that the proposed amendments to section 15(1B) may dissuade online publishers who are authors, originators or posters from making offers to make amends that include offers to correct defamatory matters or notify readers that the matter may be defamatory where it would otherwise be appropriate and reasonable to do so.

10. The Association proposes the following amendments to proposed section 15(1B):

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

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

Recommendation 6

11. The Association recognises the concerns raised by some stakeholders as to privacy and safety in connection with applications for preliminary discovery. The Association does not oppose the proposed section 23A, but offers the following three observations for the consideration of the Meeting of Attorneys-General.

12. First, rule 5.2 of the *Uniform Civil Procedure Rules 2005* (NSW) provides the Court with a discretion whether or not to make an order for preliminary discovery. In cases where there is evidence of a specific risk to the privacy or safety of a proposed defendant, it is likely the discretion is already broad enough for the Court to have regard to this evidence. In this sense there is an argument that the proposed amendment is unnecessary.

13. Secondly, absent evidence of a specific risk or concern in a particular case, the matters set out in the proposed amendment are at such a high level of generality that they are unlikely to be meaningful in the exercise of the discretion.

14. Thirdly, defamation proceedings are increasingly being brought in the Federal Court of Australia. Rule 7.22 of the *Federal Court Rules 2011* (Cth) (**FCR**) concerns preliminary discovery to ascertain the description of a prospective respondent. There is an argument that the proposed amendment will not be "picked up" by section 79(1) of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**) given FCR 7.22 is a law of the Commonwealth that otherwise applies to preliminary discovery. If this is correct, the proposed amendment will not apply to applications made in the Federal Court. This may be something that could be considered by the Commonwealth Government if and when it considers the matter raised in recommendation 4 (in relation to the *Online Safety Act 2021* (Cth)).

4 Section 31A – Defence for publications involving digital intermediaries

Recommendations 3A and 3B

15. The Association recognises that there are a range of views regarding the right approach to a new defence for internet intermediaries. For that reason, the Association offers its observations in relation to both alternatives for the consideration of the Meeting of Attorneys-General.

16. The Association offers three observations which apply equally to alternatives 3A and 3B.

17. First, as with section 9A above, we consider it important that the interaction between the defence provided by section 31A and the power to make orders against non-parties provided by section 39A be explicit, and that it is important that an order can be made against a non-party notwithstanding that they may not be liable due to the operation of this defence. To this end the Association recommends that any defence would be defeated if the digital intermediary fails to comply with any order made against it under section 39A. This is discussed further below in connection with the proposed section 39A.

18. Secondly, the Association considers that the proposed defeasance provision may not be consonant with the aims of the defence. A finding of malice would ordinarily require it to be established that the defendant (or its servants or agents) had knowledge of the digital matter prior to its publication, such that a malice can be inferred (for example, knowledge of falsity or reckless indifference amounting to wilful blindness). A person with such knowledge is more likely to be an "originator" (which the Association notes is undefined) rather than a digital intermediary. In practice, it is highly unlikely that a digital intermediary would be found to have prior knowledge at all, let alone to have been actuated by malice in providing its online service. A suggested alternative defeasance is included in the redrafted section below.

19. Thirdly, the present drafting of subsection 31A(1)(c)(ii) (alternative 3A)/31A(1)(c) (alternative 3B) requires that the access prevention steps be taken by the defendant, and also that they be taken in a confined period, namely the period of 14 days after receipt of a concerns notice. The provision does not deal with the situation where another party may take access prevention steps before the defendant gets a chance to do so. For example, where a concerns notice is simultaneously sent to an originator/author/poster, or where the defendant has taken the steps

before the receipt of a concerns/complaints notice (for example, as a result of steps taken by it to detect/identify and block the matter). In such circumstances, a plaintiff could still bring proceedings in relation to the period of time the matter was actually available for download. On this basis, the Association recommends that the relevant subsection refer to "reasonable access prevention steps" without referring to the identity of the person obliged to take the steps, and applies to steps taken both before receipt of a complaints notice and in the period 14 days after. In this context the words "if any" are likely to be superfluous given there will always be access prevention steps that can be taken by someone in the period following the publication of digital matter.

Alternative 3A

20. In relation to alternative 3A, we note that the Background Paper states that "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". However, the proposed defence is only engaged if the identity of the poster is provided by the digital intermediary, and not in circumstances where it is independently known to the complainant. That is, the defence requires that the plaintiff gave the defendant a complaints notice (section 31A(1)(c)), and a valid complaints notice requires that the plaintiff was unable to obtain sufficient identifying information about a poster (section 31A(3)(a)).

21. Critically, the proposed amendment does not deal with a situation where the complainant already knows the identity of the originator or ascertains it independently, or a situation where the complainant chooses to proceed against the digital intermediary, instead of seeking to ascertain the identity of the poster. For example, assume a situation where the complainant knows the identity of the originator but chooses to sue the digital intermediary rather than (or in addition to) the originator. In this instance, the complainant cannot issue a complaints notice because they know the identity of the poster of the matter, and the digital intermediary will be unable to satisfy subsection 31A(1)(c) of the defence. So too if a complainant chooses not to issue a complaints notice at all. The digital intermediary will thus be unable to avail itself of this proposed defence, and it will be left in the same position it is presently – namely, it must choose to avoid liability by removing the matter, thereby potentially inhibiting the originator/author/poster's freedom of speech (which may not avoid liability in any event for the

period it was available if it is unable to bring itself within the terms of section 32 (innocent dissemination) or some other defence), or it may elect to leave the matter available and risk being held liable for defamation. The Association understands that it is this situation that the proposed amendments are designed to avoid.

22. Put simply, to have the availability or otherwise of a defence be contingent on a procedural step that is required to be taken by a complainant is likely to lead to situations where complainants do not take the required step in order to deprive the defendant of the defence. We consider the defence should be drafted in a way to avoid this situation.

23. If the Meeting of Attorneys-General consider that alternative 3A is the preferred approach, the Association recommends the amendments set out below to address the above matters:

Recommended amendments to the proposed section 31A (recommendation 3A alternative)

(1) It is a defence to the publication of defamatory digital matter if the defendant proves ~~the defendant~~:

(a) the defendant was a digital intermediary in relation to the publication, and

(b) the defendant had, at the time of the publication, a mechanism that was easily accessible by members of the public for submitting complaints notices under this section (the ***defendant's complaints mechanism***), and

(c) either:

(i) at any time before the commencement of proceedings the plaintiff had sufficient identifying information about the poster of the matter, or

(ii) reasonable access prevention steps had been taken prior to the receipt of a complaints notice under this section or within 14 days after being given the complaints notice under this section.

(2) For subsection (1)(c)(i), a plaintiff is taken to have sufficient identifying information about the poster of the matter if:

(a) ~~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 under this section, ~~either:~~

(i) provided the plaintiff with sufficient identifying information about the poster of the matter, but only if the defendant obtained the poster's consent in accordance with subsection (4~~2~~) before doing so, or

(ii) the plaintiff did not give a complaints notice under this section to the defendant.

(3~~2~~) For subsection (2~~1~~)(a~~c~~)~~(i)~~, a defendant obtained the consent of the poster of the digital matter in accordance with this subsection if:

(a) the defendant provided the poster with a copy of the complaints notice, and

(b) the poster consented, after being provided with a copy of the notice, to the defendant providing the plaintiff with sufficient identifying information about the poster.

(4~~3~~) A complaints notice was duly given under this section about the publication of defamatory digital matter if:

(a) before giving the notice and after taking reasonable steps to obtain the information, the plaintiff was unable to obtain sufficient identifying information about the poster of the matter, and

(b) the notice was in writing and set out the following:

(i) the name of the plaintiff,

(ii) the location where the matter could be accessed, for example, a webpage address,

(iii) an explanation of why the plaintiff considered the matter to be defamatory and, if the plaintiff considered the matter to be factually inaccurate, a statement to that effect,

(iv) the harm that the plaintiff considered to be serious harm to the plaintiff's reputation caused, or likely to be caused, by the publication of the matter,

(v) the steps taken by the plaintiff to obtain sufficient identifying information about the poster of the matter, and

(c) the notice was given using the defendant's complaints mechanism or given to the defendant in another way permitted by section 44.

(5~~4~~) A failure to take either of the following steps is not to be treated as unreasonable for subsection (4~~3~~)(a):

(a) applying for an order from a court for substituted service or an order for, or in the nature of, discovery,

(b) engaging another person to conduct an investigation to obtain sufficient identifying information about the poster of the digital matter.

(6~~5~~) A defence under this section is defeated if, and only if, the plaintiff proves the defendant failed to comply with an order made against it pursuant to section 39A. ~~was actuated by malice in providing the online service used to publish the digital matter.~~

(7~~6~~) A defendant who would otherwise be a digital intermediary in relation to the publication of digital matter does not cease to be a digital intermediary for this section merely because the defendant took steps to detect or identify, or steps to remove, block, disable or otherwise prevent access by some or all persons to:

(a) defamatory or other unlawful content posted, or sought to be posted, by a person using the online service provided by the defendant, or

(b) other content posted, or sought to be posted, by a person using the online service provided by the defendant that was incompatible with the terms or conditions under which the service was provided.

(8~~7~~) In this section:

> ***sufficient identifying information*** about the poster of digital matter means information sufficient to enable both a concerns notice to be given to, and defamation proceedings to be commenced against, the poster.

Alternative 3B

24. Alternative 3B also suffers from the vice that its availability is contingent upon the complainant having issued a complaints notice using the defendant's complaints mechanism. However, the Association notes that the problem is not as significant in relation to this alternative, given that the requirement for the complainant to know the identity of the poster is absent and the significant overlap between the requirements of a complaints notice and that of a concerns notice which must be issued pursuant to section 12A. There remains a risk however that a complainant could seek to avoid the defendant having the benefit of the defence by issuing a concerns notice other than by using the defendant's complaints mechanism, thus depriving it of the character of a complaints notice.

The right approach?

25. As recognised in the Background Paper, there are competing views as to the right approach. The Association recognises that there are arguments in favour of, and against, each of the proposed alternatives.

26. The Association refers to its submissions dated 31 May 2021 (**May 2021 submissions**),[2] and in particular the submissions about competing interests in paragraphs 40 to 44.

27. To the extent that alternative 3A seeks to focus the dispute between the complainant and the originator, and does not necessarily compel a digital intermediary to take access prevention steps to avoid liability, this alternative provides greater protection for both freedom of expression and the right of the publisher to defend their publication. It reduces the risk that a publisher of material that is asserted to be substantially true/an honest opinion/published in the public interest will be deprived of its rights by the publication being taken down by a digital intermediary upon receipt of a complaints notice in order to avoid liability. In a case where the poster is known, it also takes the burden of seeking to ascertain whether or not matter is defamatory and defensible

[2] https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/stage-2/nsw-bar-association-submission.PDF

off the internet intermediary who is unlikely to have sufficient knowledge of the facts to make such a determination.

28. Alternative 3A also balances the rights discussed above with the complainant's right to protect their reputation, particularly in relation to anonymous or fake posters. If the identity of the poster is unknown to the intermediary, or they are determined to remain anonymous, the only recourse for the intermediary to avoid liability will be to take access prevention steps; in that sense the alternative 3A defence will operate in the same way as the alternative 3B defence. If the poster's identity is known, the complainant can seek to protect their reputation by taking action directly against the poster, including potentially by seeking an order under section 39A, which can also be made against the digital intermediary as a non-party.

29. An additional argument in favour of the 3A alternative is that it provides a mechanism for the complainant to ascertain the identity of the poster (subject to their consent) without the need for the complainant to obtain preliminary discovery from the Court, which can sometimes be costly.

30. In contrast, the 3B alternative provides complainants with a greater ability to protect their reputation given the only option for the digital intermediary to avoid liability is to take access prevention steps. This may result in a complainant obtaining relief in the form of a matter being taken down significantly sooner than they would if required to obtain a judgment against the digital intermediary and/or the originator/poster/author before obtaining such relief. If an internet intermediary declines to take access prevention steps, subject to any other available defence, the complainant may obtain vindication in the form of a judgment and award of damages against the intermediary.

31. A further argument in favour of the 3B alternative is that it does not require any amendment to achieve the objectives of the Stage 2 reforms (as opposed to the Association's observations in relation to the 3A alternative discussed above).

32. In the May 2021 submissions, it was submitted that any defence or approach which requires or incentivises third party intermediaries to simply remove online publications upon receipt of a complaint to avoid being liable for third party content, without at least giving the third party creator of the material proper recourse to defend themselves, should be avoided (see paragraph 42 of the May 2021 submissions). The risk of this approach being adopted is greater with alternative 3B.

33. It is noted that the 3A alternative is to a similar effect to the provision recommended by the Association in paragraph 53 of its May 2021 submissions. At the time of that recommendation, which provided that the defence would only apply to a defendant that "was involved in the publication of the matter only in the capacity of an Internet intermediary", the term internet or digital intermediary was undefined. Recommendation 3A can be considered a significant change from the Association's recommendation proposed in its May 2021 submissions and later during stakeholder consultation, on the basis that the proposed definition of "digital intermediary", which captures *inter alia* any person who provides a "service" (an undefined term) that encourages interaction between persons on the internet, is too broad and that there is no sound policy reason why a publisher who encouraged, incited or pays for defamatory online content should be able to avoid liability for defamatory matter they continue to publish online despite notice or complaint.

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

Recommendation 5

34. The Association supports the inclusion of a provision for orders of this kind to be made against non-parties to proceedings. This provision will play an important role in ensuring plaintiffs are able to obtain effective relief in circumstances where defendants may be unable or unwilling to remove matter, but digital intermediaries may otherwise be exempt from liability under section 9A or have the benefit of a defence under section 31A.

35. The Association offers the following four observations for the consideration of the Meeting of Attorneys-General.

36. First, as discussed above, the Association considers it important that an order can be made against a non-party notwithstanding that they may have an exemption under section 9A or a defence under section 31A. The Association is concerned 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 Association recommends that a new subsection (7) be inserted as follows:[3]

> (7) 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.

37. Secondly, the Association is concerned that the current drafting of subsection (4) may curtail the ability of a court to make urgent *ex parte* orders and may restrict the ability of a complainant to obtain urgent and effective relief in cases where very serious and damaging allegations are made. In such cases, the delay to provide the opportunity for the digital intermediary to be heard before an order can be made may be devastating to a complainant. In order to preserve the Court's discretion in this regard, the Association recommends that subsection (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. If the Meeting of Attorneys-General consider it appropriate to include a

[3] See suggested redrafting in paragraph 39 below.

provision to this effect it may be appropriate to specify in subsections 39A(1)(b) and 2(b) that an injunction includes an interim or interlocutory injunction.

38. Thirdly, the language of the proposed section, and in particular the use of the phrase "a person" in subsections (2) and (4), is broad and arguably provides the Court with the power to make orders against non-parties other than digital intermediaries, such as traditional media entities (for example, there may be a case where a person extensively quoted in an article is sued but not the media entity, or the media entity republishes the same material complained about). This may give rise to issues if the media entity wishes to argue a defence that was not available to the defendant.

39. To achieve these aims, the section could be redrafted along the following lines:

> (4) If an application is made to a court for an order under this section, the Court may, without determining the merits of the application, make the order as an interim order, to have effect subject to revocation by the Court until the application is determined.
>
> (5) A person against whom an order is sought under this section is entitled to be heard on the hearing of an application for an order (other than an order granted under 4) under this section.
>
> (6) Nothing in subsection (2) prevents the person from opposing an order under subsection (2) on the basis that it has a defence to the publication or republication of the matter other than that granted by section 31A.

40. Fourthly, as with the proposed section 23A, there is an argument that the provision will not be "picked up" by the **Judiciary Act**, and as such, will not apply to proceedings in the Federal Court.

6 Part 6 – Amendments to savings and transitional provisions

41. The Association supports the proposed amendments to Part 6.

C. The NSW Bar

42. The Association is a voluntary professional association comprised of 2,427 barristers with their principal place of practice in NSW.[4] Currently, 95 of our members reportedly practise in the area of defamation.[5] The Association also includes amongst its members judges, academics, and retired practitioners and judges. The Association is committed to promoting the public good in relation to legal matters and the administration of justice.[6]

43. Barristers are independent specialist advocates,[7] both in and outside of the courtroom.[8] Barristers owe their paramount duty to the administration of justice.[9]

44. This submission reflects the expertise, experience and concerns of the Association's members.

45. Should you wish to discuss this matter further, please contact in the first instance [redacted], Policy Lawyer at [redacted]

4 New South Wales Bar Association, *Statistics*, as at 23 May 2022 <https://www.nswbar.asn.au/the-bar-association/statistics>.

5 Ibid.

6 New South Wales Bar Association, *New South Wales Bar Association Strategic Plan* (2017) <http://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad061e3db4/attachment/strategic.pdf>.

7 *Barristers' Rules* rule 4(c).

8 See *Barristers' Rules* rule 11(c)(d).

9 *Barristers' Rules* rules 4(a), 23.