THE VICTORIAN BAR INCORPORATED

SUBMISSION TO THE NSW DEPARTMENT OF COMMUNITIES AND JUSTICE

CONSULTATION ON PART A OF THE STAGE 2 REVIEW OF THE MODEL DEFAMATION PROVISIONS

INTRODUCTION

1. The Victorian Bar **(the Bar)** welcomes the opportunity to provide submissions in response to the consultation led by the NSW Department of Communities and Justice (**the Department**) on Part A of the Stage 2 Review of the Model Defamation Provisions and accompanying Background Paper dated August 2022 (**the Background Paper**).

2. On 12 August 2022, the Chair of the Defamation Law Working Party from the Department sent an email inviting the Bar to make a submission in response to the Background Paper which explains the policy rationale behind the exposure draft Part A Model Defamation Amendment Provisions (**the draft Part A MDAPs**).

3. In 2021, the Bar provided submissions to the Meeting of Attorneys-General (**the MAG**), now known as the Standing Council of Attorneys-General (**the SCAG**), identifying the issues set out in the Discussion Paper in relation to the Stage 2 defamation reforms (**the 2021 submission**). The 2021 submission to the MAG is accessible here.

4. The Bar's approach in this paper is to focus on the issues identified in the Background Paper rather than seek to argue the points identified in the 2021 submission.

ACKNOWLEDGEMENT

5. The Bar acknowledges the contributions of its Defamation Law Working Group in the preparation of this submission, in particular Mr Toby Mullen and Mr Marcus Hoyne.

COMMENTS IN RESPONSE TO THE INVITATION

Recommendation 1 – Exemption for mere conduits, caching and storage facilities

6. As set out in the 2021 submission to the MAG, and although a statutory defence may not be required given the common law position, the Bar supports the concept of a statutory defence for mere conduits and caching and storage facilities.

7. There are two minor matters of drafting which the Bar believes can be improved in proposed sub-section 9A(1)(c):

   (a) For clarity, the chapeau in sub-section 9A(1)(c) should read:

   "the intermediary did not do any of the following:"

   (b) There is a typographical error in sub-section 9A(c)(ii) and it should read:

   "*select any of the recipients of the matter;*"

Recommendation 2 – Exemption for standard search engine function

8. This area of the existing law was obviously significant impacted by the decision of the High Court in *Google LLC v Defteros* [2022] HCA 27 (*Defteros*) which decision was delivered subsequent to the Background Paper being published. The effect is that the changes to the law proposed by the draft Part A MDAPs is perhaps not as significant as what may have been thought to be the case.

9. There have been several decisions of the High Court in this area in recent years and, at the risk of oversimplification, the Bar understands the position to be as follows:

    (a) A search engine provider may be liable as publisher for the purposes of the law of defamation if the search result excerpt is, itself, defamatory (*Trkulja v Google LLC* (2018) 263 CLR 149 at [35]), *Defteros* at [23]);

    (b) Where the snippet from the search engine entices a person to click on a defamatory story, the search engine provider may be liable as publisher of the hyperlinked story – *Google Inc v Duffy* (2017) 129 SASR 304 [599] as explained by Gageler J in *Defteros* at [67] – [68] cf per Keifel CJ and Gleeson J at [18].

    (c) Where a search engine returns organic (ie non-sponsored) results including a hyperlink to a defamatory story, but the search result is not itself defamatory, the provider of the search engine will not usually be the publisher of the hyperlinked story – *Defteros*;

    (d) Where a person provides the means for others to make defamatory comments and "*encouraged the creation of the alleged defamatory matter*", that person will be a publisher - *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767; *Defteros* at [27], [33] cf per Keifel CJ and Gleeson J.

10. It is against this background that the proposed sub-sections 9A(3) – (4) of the draft Part A MDAPs operate.

11. The Bar is of the view that the distinctions drawn by the courts in *Trkulja, Duffy* and *Defteros* are not always sound from a public policy perspective and result in uncertainty as to the circumstances in which a search engine will be liable and when it will not be liable. As such, the Bar supports the intention of the new provisions but only if those provisions increase clarity in the area rather than detracting from it. To that extent, the Bar has concerns with elements of the proposed subsections.

12. First, the definition of "search results" includes a "short extract from the webpage". However, it is unclear how "short" the extract has to be to be a "search result". The Bar recommends the removal of the word "short" as it is likely to lead to dispute, and the length of the extract appears irrelevant. For example, a long extract which does not include the defamatory imputation is less problematic that a short extract which does.

13. Second, the search engine provider is said to avoid liability if the search results are generated from terms inputted by the user rather than being automatically suggested. This contemplates the input terms are either inputted by a user or are automatically generated whereas, in reality, they may be (and often are) derived in part by the user and in part automatically. Hence, if a person inputs "Martin" into a search engine and the engine auto suggests "Smith" – which is what the user would input without an autosuggestion or autocomplete anyway - it is not clear why the search engine should lose its defence in respect of the search results. The Bar acknowledges the position may be different if the search engine suggested the term "Martin Smith murderer" in response to a user inputting "Martin Smith". However:

    (a) on the current drafting, where the autocomplete response is itself defamatory, the search engine would not be exempt from liability because "the matter" would not be "limited to search results"; and

    (b) any attempt to delineate between autocomplete responses for which the search engine provider is liable and those for which they are not liable is likely to result in substantial uncertainty.

14. As such, the search engine provider should be liable for defamatory autocomplete responses but not for any searches results that are returned as a result of an autocomplete response.

15. Third, there appears to be substantial scope for there to be dispute about what amounts to an "automated process" in (3)(b), particularly where the processes may be semi-automated. Consideration ought be given to how this may be better defined.

16. Given the recent decision in *Defteros*, an alternative to redrafting subsection (3) is to delete proposed sub-section (3) entirely, and instead rely on the common law as authoritatively stated, and any incremental future adjustments around it. However, that would maintain the distinctions identified in *Trkulja*, *Duffy* and *Defteros.*

General Matters – Sections 1 and 2

17. Proposed sub-section 9A(6)(b) contemplates that the judicial officer will consider the exemption as soon as practicable regardless of whether any party raises the issues for consideration. It appears to impose a mandatory obligation on the Court. Presumably the defence must be pleaded or the issue raised, so it is suggested that the better approach to proposed sub-section 9A(6)(b) is to replace the word "is" with the words used in the chapeau to sub-section 10A(4);

    "The judicial officer …. may (whether on the application of a party or on the judicial officer's own motion):"

18. The Bar queries whether proposed sub-section 9A7(b) is necessary or even helpful. While it may be the case that, for instance, serious harm can be determined simply by considering the pleaded particulars and determining them insufficient (see sub-section 10A(7)), it is not clear what circumstances could result in the pleaded particulars alone being sufficient to establish the defence other than in the (unlikely) situation where the plaintiff admits those particulars in a Reply. The concern is that, in including this provision in the Act, it may suggest to Courts that they can summarily determine the case in a broader arrange of circumstances than is intended or appropriate.

19. It is not clear why the definition of "search engine provider" includes a person who merely "owns" the search engine. If the person does not provide the functionality of search engine, it is difficult to see how they will be liable but, in any event, it is also difficult to see how they will meet the definition of "digital intermediary" as they will not be providing an online service in connection with the publication of the matter. As such, making reference to owners may be apt to confuse.

Recommendation 3 – Safe harbour/Innocent dissemination

20. The Bar believes that there may be merit in considering the Law Council's suggestion of an expanded concept of innocent dissemination. However, if that suggestion is not to be pursued, the Bar prefers Model A (safe harbour) over Model B (expanded innocent dissemination) as it provides an additional method whereby the dispute is fought between the primary protagonists being the complainant and the originator/poster.

21. Having said that, the Bar:

    (a) recognises the limited circumstances in which the safe harbour defence is likely to be utilised in practice;

    (b) again, notes there are some issues with the drafting of the proposed provision s 31A. These drafting concerns arise in relation to both alternatives.

22. The safe harbour defence will only arise where a poster, who has not identified themselves in the original post, subsequently agrees to identify themselves when threatened with defamation proceedings. It seems unlikely this will occur with any regularity (although it may occur if the intermediary can terminate the poster's usage rights if such consent is not provided).

23. In any event, the Bar sees little downside to permitting this as an additional option. At the roundtable on 1 September 2022, some participants seemed to be of the view that this simply added a further 14 days to the process. However, option A does not add any additional time over option B. Under both options, the time frame is 14 days.

24. The Bar believes that 14 days is an appropriate time frame. Requiring a digital intermediary to remove all links to a defamatory publication in less than 14 days – where the intermediary is unlikely to be

able to determine the truth of otherwise of the publication – tilts the balance too far in favour protection of reputation over freedom of expression.

25. The Bar makes the following comments in respect of the drafting.

26. First, some members of the Bar's working group query the requirement for an easily accessible complaints mechanism to exist before digital intermediaries can rely on the defence. It is felt that if the plaintiff is able to give a notice in accordance with proposed sub-section 31A(3), the defendant ought be able to rely on the defence regardless of whether a plaintiff is able to show that the defendant's complaints mechanism is not "easily accessible". It is thought to be illogical in the individual case to deny an intermediary a defence because the complaints mechanism is not "easily accessible" if the plaintiff was able to access that mechanism.

27. Other members of the working group are of the view that the complaints notice procedure is useful as a means of encouraging digital intermediaries to establish a complaints handling process that will be more likely to be accessed by the public.

28. Second, while it can be understood why requiring the poster's consent to the disclosure of their details may be desirable in some circumstances (e.g. allegations of domestic violence), the requirements under proposed s 31A(1)(c) are potentially problematic.

    (a) The Bar queries whether the requirement to obtain the consent of the poster is an appropriate means of "protecting the poster's privacy and anonymity" (Background Paper page 38). The fact is that the poster's details can usually be obtained via preliminary discovery without notice being given to the poster. Of course, that is an expensive and potentially time-consuming process but if the poster's "privacy and anonymity" are considered worthy of protection (which the Bar doubts other than in specific circumstances such as those set out above) then that should be directly protected rather than through the blunt instruments of cost and delay;

    (b) As noted above, a poster who is not already easily identifiable is unlikely to give their consent to being identified so the benefits of this aspect of the safe harbour defence may be realised in only a small number of cases;

    (c) It is illogical to provide that the plaintiff should retain the right to sue the intermediary if the intermediary disclosed the contact details of the poster to the plaintiff but the intermediary did not first obtain the consent *of the poster*. If the intent is to disincentivise intermediaries from providing contact details where it would be contrary to public policy to do so, this is an ill directed mechanism for achieving that goal;

    (d) It would deal with the safety concern more directly if the intermediary was required to ask the prospective defendant to confirm whether there may be any risk to their physical

safety if their contact details were disclosed. If the prospective defendant supplied a reasonable explanation as to why their safety may be compromised disclosure of the information would be prohibited (and it would not simply be the case that the defence would not be applicable);

(e) An access prevention step may only result in some of the recipients being denied access and proposed sub-section 31A(1)(c)(ii) (for Model A) focuses on what is reasonable from the defendant's perspective only. It would be preferable if sub-section (ii) read:

"*took such access prevention steps in relation to the publication of the matter that were reasonable in the circumstances*".

29. Third, at the roundtable discussion on 1 September 2022, it was said that it was intended that this defence would be available to persons such as administrators of Facebook pages. The Bar does not believe the drafting achieves that aim.

(a) The definition of "poster" (and, hence excluded from the definition of "digital intermediary") is very broad. It means someone who communicates matter to one or more other persons online. An administrator of a Facebook post is likely to come within the definition.

(b) More broadly, the definition of "post" is extremely broad. Any online communication is a post. Indeed, even a search engine could be said to be a poster on the basis of the current definition. The usual definition of "post" material online is the person who takes the initial steps of uploading the material online even if material must be approved by another person before it is actually available to be downloaded.

Recommendation 4 – *Online Safety Act 2021* (Cth) immunity

30. The Bar has no comments to make about this recommendation.

Recommendation 5 – Non-party orders

31. The Bar is generally supportive of these provisions although believes the provision should go further than the current draft contemplates.

32. In the Bar's opinion, it should not be a precondition to the grant of a non-party order that an order is made in the form of proposed section 39A(1) before a non-party order can be made. Non-party orders can already be made by Courts and such orders are not subject to such a pre-condition. It is accepted that non-party orders would be not usually be made in the absence of some other order being made against parties, but it is submitted that this is a matter better left to the discretion of the judge.

33. Further, the Court should have the capacity to make *ex parte* orders under proposed s 39A in appropriate circumstances. Sub-section (4) can either be deleted (as Courts are unlikely to make the orders without notice in most circumstances anyway) or it should be redrafted to read as follows:

> *"The court should only make an order under this section against a person who is not a party to the proceeding if:*
>
> *(a) the person has been given an opportunity to make submissions about whether the order should be made; or*
>
> *(b) the circumstances are such that is was reasonable that the person was not given an opportunity to make submissions about whether the order should be made.*

Recommendation 6 – Preliminary Discovery

34. It is not clear to the Bar how, in a practical sense, a Court is supposed to use the guidance being provided by proposed section 23A, as it requires the Court to take into account a range of factors which point in different directions and which the Courts can take into account in any event.

35. Although the Bar is of the view that the provision will provide little benefit it does not appear to do any harm either (save for potentially increasing the burden on judges).

Recommendation 7 – Offers to make amends

36. The Bar is supportive of the amendments proposed to section 15. It does not propose any change to the draft Part A MDAPs.