



Internet
Association
of Australia

INTERNET ASSOCIATION OF AUSTRALIA
ABN 71 817 988 968
ACN 168 405 098
PO Box 8700
Perth Business Centre WA 6849
Phone: 1300 653 132

8 September 2022

Policy, Reform & Legislation
NSW Department of Communities and Justice
Locked Bag 5000
Parramatta NSW 2124

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

RE: Stage 2 Review of the Model Defamation Provisions: Part A

INTRODUCTION

Thank you for the opportunity to express the Internet Association of Australia's (IAA) perspective on the Stage 2 Review of the Model Defamation Provisions: Part A. IAA has been actively involved in the consultations concerning the Model Defamation Provisions (MDPs) and we appreciate the continued efforts of the Attorneys General and the Policy, Reform & Legislation team at the NSW Department of Communities and Justice to work with industry, academia and other stakeholders to ensure the development of sound and effective MDPs.

We recognise that in general, the draft MDPs reflect much of industry's feedback that was provided in previous consultation processes. However, there are still a few areas that require improvement. Furthermore, we wish to reiterate certain points in response to other submissions made during the previous consultation and the Roundtable held in September 2022. Many of IAA's members are small to medium sized Internet Service Providers (ISPs) but our membership also consists of some domain registrars and hosting services. Our response is thus primarily representative of our smaller ISP members, as well as in support of the general wellbeing of the Internet and the Internet industry. As such, this response will specifically focus on recommendations 1 and 5 as they are of greatest relevance to our members.

OUR RESPONSE

RECOMMENDATION 1; DRAFT SECTION 9A

Conditional Statutory Exemption

In general, we strongly support Recommendation 1 which would introduce a conditional statutory exemption for the internet intermediaries specified in draft s 9A(1). We stand by the position of our response to the 2021 Discussion Paper that granting such immunity should not pose any practical risk to complainants who have been defamed as these types of intermediaries play no active part in the publication of the defamatory content. We believe the exemption would also be more likely to mean that the focus of the dispute is directed towards the originator.

In addition, we disagree with the view that a defamed person would be denied a remedy as a result of the exemption. Recommendation 5 indicates the intent to provide complainants with a safeguard by ensuring internet intermediaries may still be subject to a court order even where they are not parties to a proceeding. We note that the drafting of s 39A as per Recommendation 5 likely needs further revision to ensure it is fit for purpose, and this will be discussed further below.

Furthermore, we disagree with the view that no internet intermediaries should be granted a statutory exemption, given comparable entities in the physical world (e.g. postal service, library) are only able to rely on the innocent dissemination defence.

We note that:

- 1) The intermediaries identified in this provision can be in some cases, distinguished from offline examples of conduits.

For example, libraries can play an active role in promoting certain material over others such as by having specific material on display, or in the explicit selection of books to hold in the collection. This is vastly different to the role ISPs, caching and storage service providers play which is a strictly passive role.

Furthermore, from a practicality perspective, it is much easier for complainants to put such entities on notice in the offline world. Without causing the creation of new processes or complex systems, it is hard to see how complainants would narrow down the specifics as to which particular ISP, caching or storage provider, is responsible for the material that was accessed online through use of an intermediary's services. Thus, the innocent dissemination defence – which in part relies on the intermediary receiving a written complaints notice and thereafter removing the defamatory content – would be practically ineffective in application.

- 2) Even where these internet intermediaries are deemed analogous to the mere conduits of the offline world, they should not be subject to potentially bad or outdated law solely for the sake of consistency.

It is our view that affording certain internet intermediaries a statutory exemption as per Recommendation 1 would still be of benefit in clarifying and codifying the law, even if it does not make a substantive difference in the operation of the law. It would indeed bring statute more in line with the recent High Court decision in *Google LLC v Defteros* [2022] HCA 27. Although Google certainly does not fit within the specific definitions that s 9A is limited to, the judgement still suggests the Court's recognition that certain intermediaries are simply not publishers. We welcome this being codified through the MDP to ensure this is clearly established and thereby provide greater certainty for the relevant intermediaries.

Furthermore, to the extent there are inconsistencies between the way mere conduits are treated in the physical world to how s 9A would operate, we recommend that this be the subject of further law reform to also ensure such offline entities are given similar protections, and not the other way around.

Numbering and Electronic Addressing Services

Though we understand and acknowledge the need for the statutory exemption under s 9A to be limited to specific types of intermediaries, we believe it should be further extended to include numbering and electronic addressing services such as domain name registrars and registry

operators. We consider these intermediaries similarly serve a function that is only facilitative in nature, and not that of a publisher.

By way of explanation, the domain name system is an online directory service which enables access to internet resources by mapping the numeric internet addresses required for machine to machine communications, to a more familiar human format such as *example_domain.com.au*.

Registrants are the persons who devise, select and request licences to domain names (usually for a fee) and **Registrars** take these requests and lodge them with the relevant **Registry**, generally via online and automated systems that accept thousands per day or more. In this chain, it is only the Registrant, as the domain name licensee and the party who devised the fully qualified domain name itself, that in our view could potentially have any real responsibility for the defamatory act should one be deemed to have occurred.

Furthermore, particularly for registry operators, it is our understanding that the registry operator for Australia's '.au' domain (auDA) already has a sufficient process to ensure there is a method through which complainants can request to have defamatory domain names removed if a registrant or registrar fails to act. auDA operates a domain name Licence Review Panel for such eventualities. As such, we believe that the risk of a defamed person from seeking remedy due to this type of intermediary being granted statutory exemption would be mitigated.

As it pertains to specific terminology, we propose "numbering and electronic addressing services" to be included in the definition for intermediaries specified in s 9A. This models the term used in the *Telecommunications Act 1997* (Cth) and we believe it to be sufficiently technology neutral while encompassing systems and services which provide basic directory and pointer services such as to facilitate communications interconnection.

It should also be noted that we also read the definition of 'cache' under recommendation 1 to also cover the caching of electronic addressing services (i.e. domain names) as well as higher order content.

RECOMMENDATION 5; DRAFT SECTION 39A

IAA recognises the need for Recommendation 5 to maintain the balance between protecting certain internet intermediaries and defamed persons. We therefore s 39A in principle and agree that defamed persons should have an appropriate avenue for remedy. However, there are certain issues with the drafting of s 39A that must be addressed.

Considerations which courts must give

We raise concerns about the broad nature of s 39A which gives courts powers to make orders against non-party persons. While we recognise s 39A(4) provides that the non-party person must be given an opportunity to make submissions about whether the order should be made, we believe that further provisions should be introduced that requires courts to take into account certain considerations, even prior to inviting the person to make a submission. These considerations include, but are not limited to:

- (a) whether there is another actor against whom the order should be made and would be more expedient in remedying the defamatory material;
- (b) whether there is another order that can be made that would be more expedient in remedying the defamatory material;

- (c) whether (a) and (b) have already been considered and/or pursued but proved unsuccessful;
- (d) whether the order will be overly burdensome for the non-party person to action;
- (e) any privacy, safety or public interest considerations which may arise should the order be made; and
- (f) the seriousness of the defamatory material.

Time Periods

S 39A lacks specific details which will likely make complying with the provision difficult and unclear. In particular, we note there is no mention of specific time periods for both the time afforded to non-party persons to make a submission, as well as time to comply with a court order once given. We believe providing such details is necessary to avoid any confusion.

For consistency with other obligations that apply to carriers and CSPs, we recommend that a time period of 5 working days is given for persons to make submissions, and then 10 working days to comply with the court order. A further provision could be made to reduce the time period for complying with a court order to 2 working days where the matter is urgent. However, we believe further drafting will be required in that case to define what constitutes an urgent matter, and further considerations the court must take into account to determine a matter as urgent.

Effectiveness

We also note an issue which was raised during the recent Roundtable as to s 39A only being relevant where legal proceedings are in place despite the possibility of a circumstance where it will not be possible for the defamed person to commence legal proceedings for a number of reasons.

While we are unable to make a recommendation or propose a solution to this issue, we support revisions being made to the extent it ensures the provision is effective in fulfilling the intent behind Recommendation 5 which seems to be an avenue to ensure internet intermediaries can be ordered to take action without themselves being subject to legal proceedings.

CONCLUSION

Once again, IAA appreciates the opportunity to contribute to the Stage 2 Review of the Model Defamation Provisions: Part A. IAA and its members recognise the importance of ensuring appropriate laws exist to protect persons from defamation. However, it is crucial that such laws are practical, measured, and effective. To that extent, IAA is committed, and sincerely looks forward, to continue collaborating with the various stakeholders in this area to ensure fit-for-purpose Model Defamation Provisions that will improve the operation of defamation law in Australia.

ABOUT THE INTERNET ASSOCIATION OF AUSTRALIA

The Internet Association of Australia (IAA) is a member-based association representing the Internet community. Founded in 1995, as the Western Australian Internet Association (WAIA), the Association changed its name in early 2016 to better reflect our national membership and growth.

Our members comprise industry professionals, corporations, and affiliate organisations. IAA provides a range of services and resources for members and supports the development of the Internet industry both within Australia and internationally. Providing technical services as well as social and professional development events, IAA aims to provide services and resources that our members need.

IX-Australia is a service provided by the Internet Association of Australia to Corporate and Affiliate members. It is the longest running carrier neutral Internet Exchange in Australia. Spanning six states and territories, IAA operates over 30 points of presence and operates the New Zealand Internet Exchange on behalf of NZIX Inc in New Zealand.

IAA is also a licenced telecommunications carrier, and operates on a not-for-profit basis.

Yours faithfully,



Chief Executive Officer
Internet Association of Australia