Review of Model Defamation Provisions
Policy, Reform & Legislation
NSW Department of Communities and Justice
By email: defamationreview@justice.nsw.gov.au

Friday September 9, 2022

Dear Defamation Working Party,

The Digital Industry Group Inc. (DIGI) thanks you for the opportunity to provide our views on Part A of the Stage 2 Review of the Model Defamation Provisions, concerning the liability of internet intermediaries for third-party content, as advanced in the Part A consultation draft Model Defamation Amendment Provisions 2022 (**draft Part A MDAPs**) and the associated explanatory paper (**Background Paper**).

By way of background, DIGI is a non-profit industry association that advocates for the interests of the digital industry in Australia. DIGI's founding members are Apple, eBay, Google, Linktree, Meta, Snap, TikTok, Twitter and Yahoo, and its associate members are Change.org, Gofundme, ProductReview.com.au and Redbubble. DIGI's vision is a thriving Australian digitally-enabled economy that fosters innovation, a growing selection of digital products and services, and where online safety and privacy are protected.

Digital intermediaries play an integral function in Australian life, with a myriad of positive impacts to local consumers, jobs and the economy. We also recognise the ways that intermediary services can be misused to cause harm, and DIGI shares the Government's strong commitment to providing greater clarity for complainants, originators of defamatory content, and digital intermediaries, while striking a balance between "protecting reputations and not unreasonably limiting freedom of expression".

DIGI appreciates the thoughtfulness that has gone into the latest discussion paper, clearly informed by consultations and feedback offered throughout the process. We support the efforts made in the draft Part A MDAPs to introduce clear exemptions and defences, to be available in circumstances where digital intermediaries act in purely passive and technical roles, helping Australians to communicate online and easily access information. In this submission, we also identify some instances where the draft provisions do not reflect the true nature of digital intermediaries' roles, which may require further consideration.

We thank you for your consideration of the matters raised in this submission, and we look forward to further engaging in this review. Should you have any questions, please do not hesitate to contact me.

Best regards,

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Recommendation 1: Exemption for mere conduits, caching and storage services

DIGI supports the recommendation for a conditional, statutory exemption for liability in defamation for caching services, conduit services and storage services provided by digital intermediaries, to be made available regardless of whether the digital intermediaries had knowledge that the digital matter was defamatory. An exemption of this nature would provide protections that ensure the law of publication in defamation is suitable for a digital age, and reflective of the entirely passive role that digital intermediaries sometimes play in facilitating publication.

Recommendation 2: Exemption for standard search engine functions

DIGI supports the introduction of a conditional, statutory exemption for search engines, to be available regardless of whether the search engine had received knowledge that the digital matter was defamatory. The introduction of such an exemption would be an important step in recognising the public benefit provided by search engine services in enhancing Australians' access to information online, as well as the truly passive role they play in facilitating access to information.

However, DIGI does not agree with the approach to autocomplete functions that is proposed by Recommendation 2. The rationale for the exemption as proposed is that search results are the product of an algorithm, generated without human input, such that search engine services play a truly passive role that should not attract liability in defamation. The Background Paper explains that search engines "have no interest in the content", and "simply use an automated process to provide access to third-party content". These propositions apply equally to the predictive search terms that are 'automatically suggested' when a user begins to enter a query in a search engine: these terms are the product of an algorithm, based on popular user searches. It is true, as the Background Paper notes, that search engine providers have some abilities to remove certain terms from appearing as suggestions. However, to carve out autocomplete search results based solely on this capability would be to suggest that search engine providers ought to preemptively ensure any search terms that might be considered defamatory to any individual are excluded. That is not a practical exercise to be undertaken, and would require a troubling amount of speculation by the search engine service provider. The preemptive moderating of search terms that might be considered to be defamatory also has the capacity to have a chilling effect on expression, upsetting the balance between freedom of expression and the protection of reputation.

There are two particular concerns:

1. The proposed exemption would not apply to search terms that are suggested by an autocomplete function.
2. The proposed exemption would carve out, seemingly unintentionally, search results where there was any involvement of autocomplete in engaging the search.

On the basis that it is appropriate for the exemption to apply whenever the search engine has done nothing more than provided an automated service, section 9A(3) should be amended such that:

- A search engine provider is not liable for defamation for the publication of search results where the provider proves that the search results were generated automatically.
- At a minimum, the phrase "*from search terms inputted by the user of the engine rather than terms automatically suggested by the engine*" is removed.

Recommendations 3A / 3B: Defence for internet intermediaries

DIGI supports the introduction of a defence to be available to digital intermediaries where certain steps have been taken in response to a complaint within a specified period.

With respect to the two models proposed by Recommendations 3A and 3B, DIGI supports the 'safe harbour' model proposed in Recommendation 3A, subject to our comments below on the form of the model to be implemented. Both models would require that digital intermediaries have in place a complaints mechanism that is reasonably accessible to the public, and where a complaints notice is lodged, to take certain steps within 14 days in order to preserve the availability of the defence. The point of difference between the models is simply that the 'safe harbour' model would remain available to digital intermediaries where a complainant has, or is provided with, sufficient identifying information about the originator to be able to pursue proceedings against them. This affords greater flexibility to digital intermediaries in handling complaints, while still furthering the purpose of these reforms – to efficiently resolve complaints about digital matters, and to focus disputes between complainants and originators of defamatory matters. Furthermore, Recommendation 3A will have the effect of empowering originators to determine whether they value the dissemination of their speech enough to give up sufficient identifying information; this is a choice they would be deprived of under Recommendation 3B.

The model proposed by Recommendation 3B is not preferred. Digital intermediaries with limited/no knowledge of a dispute ought to be permitted a defence in circumstances where they facilitate a complainant to pursue an originator directly, and where it is plain that a complainant already has sufficient information to do so. To deny digital intermediaries a defence in these circumstances may fuel unmeritorious complaints, whereby complaints notices are submitted to digital intermediaries in circumstances where a complainant has no intention of pursuing or even contacting an originator. Further, it may not be apparent within 14 days (if at all) that a digital matter complained of is defamatory. The model proposed by Recommendation 3B may pressure digital intermediaries to remove content which a court would not consider defamatory, just to avoid liability and/or to retain the availability of a defence should a complainant pursue proceedings against it. Such a result is inconsistent with the objective of striking a balance between "protecting reputations and not unreasonably limiting freedom of expression".

We make the following specific comments on the form of section 31A:

1. **Interaction between complaints notices and concerns notices** – An intended purpose of the safe harbour model, and the complaints mechanism underlying it, is to focus disputes between complainants and originators of defamatory content as much as possible. At the time a complaints notice is received, a digital intermediary ought to be focused on facilitating the complainant's contact with the originator of the matter complained of, or failing that, taking access prevention steps. However, at present, the distinction between a complaints notice in the form contemplated by s 31A of the draft Part A MDAPs, and a concerns notice in the form described in s 12A, is unclear. It appears possible that a complaints notice sent to a digital intermediary may satisfy the requirements for a concerns notice under s 12A, allowing proceedings to be commenced against the digital intermediary after 28 days, regardless of whether the complainant intended the complaints notice to serve this dual purpose or made it known to the digital intermediary that it would.

The table below sets out the requirements for each type of notice. It is clear that there will be some circumstances where simply meeting the basic requirements of a complaints notice will constitute having sent a concerns notice, even if it is not plainly stated that relief may be sought from the digital intermediary.

Complaints notice (s 31A)	**Concerns notice (s 12A)**
• In writing • Specifies the location where the matter could be accessed, for example, a webpage address • 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 • 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 • Name of plaintiff	• In writing • Specifies the location where the matter can be accessed (for example, a webpage address) • Informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter • The harm that the person considers to be serious harm to the person's reputation caused, or likely to be caused, by the publication of the matter • For an aggrieved person that is an excluded corporation – the financial loss that the corporation considers to be serious financial loss caused, or likely to be caused, by the publication of the matter • A copy of the matter provided to the publisher together with the notice, if practicable

A complaints notice should be sent for the purpose of pursuing the originator, or otherwise having defamatory material removed. It should not serve dual purposes and allow proceedings to be commenced against a digital intermediary in 28 days, when the digital intermediary has spent part of that time considering the complaint and potentially liaising with an originator about providing its contact information. In the 14 days after a complaints notice is lodged, a digital intermediary should be focused on resolving the complaint, and should not simultaneously be concerned with potentially defending itself against proceedings brought by the complainant.

To allow a complaints notice to serve this secondary purpose would also undermine the purpose for which concerns notices were recently made a mandatory precursor to commencing proceedings: to facilitate quick and cheap resolution of disputes prior to litigation.

DIGI proposes that the MDAPs make clear that a complaints notice sent for the purpose of section 31A cannot serve as a concerns notice for the purpose of section 12A. This clarification would be similar to that in section 12A(2), which makes clear that a document that is to be filed to commence defamation proceedings cannot serve a dual purpose as a concerns notice. This would make clear to plaintiffs and digital intermediaries that the sending of a concerns notice is the critical pre-litigation step before commencing proceedings, and that until that occurs (even

where a complaints notice has been lodged), digital intermediaries have the benefit of the safe harbour.

2. **"Sufficient identifying information"** – As noted above, a key objective of these proposed reforms is to focus disputes regarding defamatory material on complainants and the originators of the defamatory material. The intention of the proposed complaints mechanism is that digital intermediaries would be tasked with either facilitating contact between complainants and originators, or removing the matter complained of, and would in those circumstances have a complete defence. However, the proposed definition of "sufficient identifying information" requires provision of information sufficient to enable proceedings to be commenced against an originator; and per section 31A(4)(a), a complainant is not required to have applied for an order for substituted service or preliminary discovery to have taken reasonable steps. It follows that:

    - a complainant could be in possession of an originator's mobile number and/or email address, but this would be insufficient to satisfy section 31A(1)(c)(ii). Such information may be sufficient to send a concerns notice, initiate discussions with the originator, and potentially obtain further information from the originator or obtain their agreement to accept service electronically; yet it is not clear that a complainant in possession of this information would be expected to take those steps, simply because they do not have the the postal address of an originator (that would enable them to effect service on the originator).
    - a digital intermediary will not be taken to have facilitated contact unless they can provide the kind of information required to facilitate traditional methods of service, even though it is not a kind of information ordinarily held by digital intermediaries, and would need to be provided by the originator. It can reasonably be anticipated that originators who may be receptive to being put in contact with complainants electronically may be hesitant to provide their physical address online, and withhold consent altogether.

    This aspect of the proposed section may undermine the objectives of focusing disputes between complainants and originators, and protecting reputations without unreasonably limiting freedom of expression, by compelling digital intermediaries to obtain from originators information they do not ordinarily hold, or else remove material.

    DIGI is also extremely concerned that the complaints mechanism may be abused by persons seeking to obtain information about an originator's location for improper purposes; for example, perpetrators of domestic violence seeking to obtain information about an originator's location, or to suppress allegations in the public interest posted online, or to otherwise intimidate or harass the originator. The originator in this scenario would likely refuse to have information about their location disclosed, and the matters complained of may then need to be removed to preserve the defence. In this situation, where an originator does not wish to provide their contact details to the complainant, the complaints process under Section 5 of the UK Defamation Act 2013 enables the originator to provide their contact details to the intermediary, and the intermediary is not authorised to provide the contact details to the complainant unless served with a court order. Further consideration should be given to the options for the originator in such circumstances. We are concerned that the only option under Recommendation 3A in this circumstance is the removal of content, and this outcome would not strike the appropriate balance between allowing genuine complainants to protect their reputation, and supporting the freedom of expression of Australians, particularly in circumstances where there is a power imbalance between the complainant and originator.

DIGI submits that it would be more conducive to the objectives of this defence for the meaning of "sufficient identifying information" to more closely align with the types of information digital intermediaries ordinarily hold (e.g. email addresses and/or mobile phone numbers). This course would allow complainants to send concerns notices electronically, and if necessary, seek other information from other intermediaries or orders for substituted service once proceedings have been commenced. This would also limit the extent to which a complaints mechanism may be abused for purposes other than genuine efforts to resolve disputes about defamatory material posted online.

3. **"Access prevention steps"** – This term is currently defined as "a step to remove, or to block, disable or otherwise prevent access by some or all persons to, the matter". The definition should clarify that it is sufficient to prevent access to a matter by persons in Australia. The absence of such a clarifying statement raises issues of purported extraterritorial application, which may cannot be achieved by amendments to state defamation legislation.

4. **Content of complaints notice** – A digital intermediary that has received a complaints notice should be able to determine, based on the steps described and the information obtained, whether a complainant has taken reasonable steps to obtain information and/or has sufficient identifying information to be able to proceed on their own. Digital intermediaries should not be burdened with the task of assessing information provided and trying to decide whether a complaint has been "duly" made, requiring their prompt action, or if no action need be taken. There are some elements of the UK section 5 regime, and the prescribed 'Notice of Complaint' that complainants are required to send under that regime, that may go some way to address this challenge. DIGI suggests that the complaints notice be required to include, in addition to the requirements already proposed:

    - Similar to the UK regime, the complainant's preferred contact details, such as an email address (in addition to providing their name as is proposed);
    - Similar to the UK regime, confirmation that the complainant has taken reasonable steps, and yet does not have sufficient identifying information about the originator of the relevant post;
    - Further, the information (if any) that the complainant has been able to find by taking reasonable steps (in addition to a description of the steps taken).

5. **Time period** – We understand that, where a complaint is duly made, a digital intermediary would need to act within 14 days to preserve the availability of the safe harbour defence. DIGI submits that a period of 14 days is not a practical amount of time to contact an originator, seek their consent to provide contact information, relay that information to the complainant, or otherwise remove the matter complained of. A longer period would be required if the defence is to be attainable. It may also be appropriate that the period can be extended with the agreement of the complainant.

    Further, DIGI suggests that the bounds of the 14 day period be clarified. Such clarification should address uncertainty in relation to weekends and public holidays, which also differ for the complainant and digital intermediary if they are not situated in the same time zone. For example, guidance about the UK process clarifies that the stipulated time period "does not include any time

falling on a non-business day in England and Wales (ie Saturday, Sunday, Good Friday, Christmas Day or a Bank Holiday)."[1]

6. **Complaints mechanism to be "easily accessible" –** DIGI submits that the requirement for a complaints mechanism to be "easily accessible by members of the public" should be rephrased to more clearly set an objective test – for example, a requirement that the complaints mechanism be easily accessible by a reasonable member of the public.

Recommendation 4: Interaction with *Online Safety Act* immunity

Save for the proposed introduction of non-party orders under Recommendation 5 (discussed below), DIGI is not aware of any aspect of existing or proposed defamation legislation that would be in conflict with section 235(1) of the Online Safety Act, and does not consider an exemption for defamation law under the Online Safety Act to be necessary. In saying that, DIGI is a key stakeholder in matters relating to the Online Safety Act, having co-led the drafting of the Act's industry codes of practice. If Recommendation 4 were to be adopted, we would welcome the opportunity to participate, along with other relevant stakeholders, in further consultation by the Commonwealth Government.

Recommendation 5: New court powers for non-party orders to remove online content

DIGI acknowledges that it is appropriate, in certain circumstances, for a non-party to take steps to give effect to a court's decision that a matter is defamatory. It is indeed the usual practice of digital intermediaries to limit access to digital matter on their platforms once a court has found the matter to be defamatory of a complainant (where the originator of the matter has not already removed it). Even if this were not the case, there are existing court powers by which a digital intermediary may be ordered to facilitate the removal of defamatory matter (as is acknowledged in the Background Paper).

Against that background, DIGI opposes the introduction of a proposed new power for courts to order non-parties "to prevent or limit the continued publication or republication of the [defamatory] matter…". The introduction of such powers would expose non-parties to potentially broad, unlimited orders that could create general monitoring obligations, requiring them to expend significant time and resources to identify and monitor the republication of digital matters. Even if it were possible for intermediaries to comply with such orders (in many cases it will not be), it has the potential to impose on a court the significant burden of supervising non-parties to litigation.

Were a court to be empowered to make orders of this kind notwithstanding the imposition it places on the court to supervise non-parties, it is critical that the scope be very clearly and narrowly defined, so as to avoid unduly burdening the non-party, acknowledge the nature of their involvement in the publication, and take into account what steps they are capable of taking. With regard to the form proposed in section 39A of the draft Part A MDAPs, DIGI has significant concerns. The section would empower a court to make orders, without express geographical or temporal limitations, requiring non-parties to take steps that may be beyond their technical capacity, exposing them to the risk of being found in contempt of proceedings

[1] See 'Complaints about defamatory material posted on websites: Guidance on Section 5 of the Defamation Act 2013 and Regulations', Ministry of Justice.

in which no relief was originally sought against them. We make the following specific comments on section 39A:

1. The section contains no geographical or temporal limitations. On the current wording of section 39A, a court may make an order that would require a digital intermediary to:

    a. monitor, indefinitely, all subject matter relating to the complainant to ensure the matter(s) the subject of the court's findings are not republished;
    b. remove matter(s) from being accessed anywhere, not just Australia, despite no finding having been made that the matter(s) being defamatory under local laws other than in Australia.

    As noted in the Background Paper, it is not clear that the section, to the extent it seeks to empower courts to make orders concerning extraterritorial publication, is of a kind that can be made by amendments to the MDAPs.

2. Section 39A would empower a court to make non-party orders in circumstances where it has not first made equivalent orders against the originator of the defamatory matter. Where proceedings have been commenced against the originator only, it is appropriate that relief against ongoing publication or republication be sought in the first instance from the originator. DIGI submits that only once an originator has failed to comply with those orders should a non-party be required to expend time and resources to consider the proposed order and become involved in the proceedings. To do otherwise may create a practice of complainants seeking relief against non-parties only, or against non-parties and originators concurrently, pulling non-parties into proceedings where the originator is capable of and intends to prevent or limit ongoing publication or republication.

3. Section 39A(2)(a) contemplates non-parties being ordered to prevent or limit the "continued publication or republication" of a matter. It is one thing to require a non-party to remove digital matter or posts that were expressly the subject of the court's decision and are clearly identified to the non-party (for example, by reference to a URL, date and time, and content of the post). However, orders regarding "republication" may pose an impossible burden on non-parties and on the court to supervise compliance with its orders. While it is not clear from the wording of the section, DIGI understands from the Background Paper that the section is directed to instances where a matter has gone "viral" on a platform, republished many times by persons other than the originator(s) involved in the proceedings. An order to prevent or limit any republication may require monitoring by a non-party to ensure that neither the defendant, nor any other person, republishes the matter in question. Digital intermediaries require specific details of a matter in order to be able to ensure its removal – for example, the URL at which the matter is located, and where the matter is a video, timestamps for the relevant defamatory material. An order requiring proactive monitoring, without providing specific details of the matters to be removed, is not reflective of the non-party's limited knowledge of and involvement with the matter, and may in some circumstances be in conflict with the Online Safety Act. Even if significant resources were expended, any instance of republication of which the non-party may not be aware (such as a repost or a screenshot) could expose the non-party to being found in contempt of the order. DIGI submits that it would be more appropriate that:

    a. a non-party be the subject of orders only with respect to the precise matters that were the subject of the court's findings, identified as precisely as possible (for example, by reference to URLs, and where the defamatory matter in question is a video, by reference

to timestamps), as published by the originator who was named as a defendant in the proceedings in question;

b. the defendant alone be the subject of orders prohibiting republication of a matter;
c. to the extent that a defendant does not comply with such orders, the plaintiff would be responsible for bringing the non-compliance to the court's attention, and obtaining additional non-party orders (specifically identifying any republications) as appropriate.

4. Section 39A(3) refers to non-parties being ordered to take "1 or more access prevention steps", or "a step to be taken in relation to all, or only some, of the users of an online service". There is ambiguity in the draft Part A MDAPs as to what is meant by an "access prevention step". We understand that "access prevention step" is defined as "a step to remove, or to block, disable or otherwise prevent access by some or all persons, to the matter." It is worth noting that after access prevention steps are taken, digital intermediaries may not be able to restore digital matters. We suggest clarification that there is no expectation to restore content in circumstances where a defendant is not found to be liable for defamation, or a temporary injunction is lifted.

5. Section 39A(4) would provide that an order would not be made against a non-party without that person first being given an opportunity to make submissions about whether the order should be made. If Recommendation 5 were adopted in any form, DIGI considers the opportunity to make submissions on the order, and in particular whether the form of order proposed is capable of being complied with, is critical. It should be noted that in some circumstances, where the form of order proposed specifically identifies the matters to be removed, and is capable of being complied with, without undue burden, a digital intermediary may indicate to the court that it does not oppose the order.

Recommendation 6: Considerations when making preliminary discovery orders about originators

DIGI is broadly supportive of the recommendation to require a court to take into account certain considerations before making an order for preliminary discovery of a poster's identity or contact information. As noted in the Background Paper, the section proposed in the draft Part A MDAPs would co-exist with requirements in Australian jurisdictions that courts consider all relevant circumstances. In the context of an application for preliminary discovery from a digital intermediary, seeking to identify a poster and/or obtain sufficient contact information for them, we would expect that a court would take into account the factors listed in section 23A(2). That said, DIGI does not oppose the clarity afforded by the section.

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

DIGI supports the amendments proposed by the draft Part A MDAPS to section 15, concerning the requirements for an offer to make amends. We consider that the changes better reflect both the role of a digital intermediary (including its limited knowledge and involvement in the publication), and the recourse it can offer with respect to a matter, in circumstances where they are unfamiliar with the subject matter and thus unable to offer the publication of corrective or clarifying material. Amending section 15 in the manner proposed would facilitate quick and cost-effective resolution of disputes.