

9 September 2022

James Popple
Chief Executive Officer
Law Council of Australia

By email: james.popple@lawcouncil.asn.au

Dear Dr Popple

**REVIEW OF MODEL DEFAMATION PROVISIONS – PART A OF THE EXPOSURE
DRAFT AMENDMENTS TO THE MODEL DEFAMATION PROVISIONS**

Thank you for your memorandum dated 19 August 2022.

Regarding the recommendations in the Consultation Paper from the New South Wales Department of Communities and Justice (Consultation Paper), the Law Society responds as follows:

Recommendation 1: Conditional, statutory exemption from defamation liability for mere conduits, caching and storage services

The Law Society has no issues with a new statutory, conditional exemption from liability in defamation law for mere conduits, caching services and data storage services.

Recommendation 2: Conditional, statutory exemption from defamation liability for standard search engine functions

The Law Society has no issues with this recommendation. In particular, the Society supports the qualification that the immunity would only apply if in performing its function, the search engine has no monetary or other particular interest in promoting the content outside of the search engine's normal functioning.

Recommendation 3A: Model A – Safe harbour defence for digital intermediaries, subject to simple complaints notice process (Alternative to Recommendation 3B)

The Law Society prefers the Safe Harbour defence, to focus the dispute between the complainant and the originator of the content.

The Law Society also considers that:

- any complaints notice process should have firm time constraints within which internet intermediaries be required to either resolve the complaint or else remove material in dispute until such time as a complaint is resolved; and
- there should be enforceable consequences for non-compliance by the internet intermediary with the complaints notice process. We note that the 'access prevention steps' to be taken within 14 days are only that – steps taken regardless of the

outcome. That the steps are 'reasonable in the circumstances' is also indeterminate and could lead to arguments regarding the reasonableness of steps taken by intermediaries.

The concern of the Law Society is that a toothless complaints notice process would engender indifference by internet intermediaries to complaints. The Law Society suggests that an infringement-type penalty for non-compliance with a complaint notice may be appropriate. Another consideration may be to require internet intermediaries to report information regarding their handling of complaints to the appropriate regulator.

Recommendation 3B: Model B – innocent dissemination defence for digital intermediaries, subject to a simple complaints notice process (Alternative to Recommendation 3A)

See response to recommendation 3A.

Recommendation 4: clarifying interaction with the Commonwealth Online Safety Act 2021 immunity.

The Law Society notes the recent establishment of the *Online Safety Act 2021* (OSA) and paucity of judicial consideration of the new legislation to date. The Law Society is of the view that the conditional statutory exemption for 'mere conduits' suggested in recommendation 1 should obviate the requirement for an express exemption to s.235(1) of the OSA.

Recommendation 5 and 6: clarifying and enhancing Court powers, specifically, in relation to non-parties to prevent access to defamatory matter online.

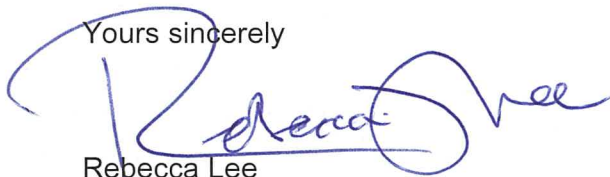
The Law Society strongly supports the recommendations to provide courts with clear and consistent options to grant remedies to complainants. It is important for the administration of justice that successful complainants in defamation proceedings can vindicate their rights.

Recommendation 7: amend mandatory requirements for the content of an offer to make amends to allow a publisher to prevent access to the information in dispute.

The Law Society supports the proposed amendments as a practical solution which reflects the realities of what intermediaries can do with online material and what remedial action complainants seek – to have the matter removed.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on (08) 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely



Rebecca Lee
President