

# Explanatory Statement

## DEFAMATION LEGISLATION AMENDMENT BILL 2025

### SERIAL NO. 13 LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

ATTORNEY-GENERAL

#### GENERAL OUTLINE

The Bill amends the Criminal Code, the *Defamation Act 2006* (the Act), the *Limitation Act 1981* and the *Local Court (Criminal Procedure) Act 1928* to implement nationally agreed changes to the law of defamation.

In November 2004, the Attorneys-General of the states and territories agreed to support the enactment in their respective jurisdictions of uniform model provisions in relation to the law of defamation called the Model Defamation Provisions (the MDPs). The MDPs were prepared by the Australasian Parliamentary Counsel's Committee. Each state and territory subsequently enacted legislation to give effect to the MDPs.

In the Northern Territory, the MDPs were enacted in the Act. The Act also located provisions concerning the limitation period for actions for defamation in the *Limitation Act 1981*.

Each state and territory is a party to the Model Defamation Provisions Intergovernmental Agreement. The Agreement establishes the Model Defamation Law Working Party (the DWP). The functions of the DWP include reporting to the Council of Attorneys-General on proposals to amend the MDPs.

In 2018, the Council of Attorneys-General reconvened the DWP to review the MDPs. The review was conducted in 2019 and 2020.

In July 2020 it was agreed that each State and Territory support the enactment of the Model Defamation Amendment Provisions 2020 (the Stage 1 amendments). The aims of the stage 1 amendments are outlined below.

A Stage 2 review of the MDPs was commenced in 2021 by the DWP. The Stage 2 review was comprised of Part A, focused on the question of internet intermediary liability for defamation for the publication of third-party content, and Part B, focused on whether the defence of absolute privilege should be extended to cover reports to police and some other complaints handling bodies.

The DWP recommended amendments to the Standing Council of Attorneys-General. On 22 September 2023, amendments for Stage 2, Part A contained in the Model Defamation Amendment (Digital Intermediaries) Provisions 2023 and Part B contained in the Model Defamation Amendment (Absolute Privilege) Provisions 2023 were approved.

The proposed Act enacts the Stage 1 amendments and the Stage 2 amendments.

The aims of the Stage 1 amendments are as follows:

- (a) to provide for serious harm to be an element of the cause of action for defamation;
- (b) to require that, if raised by a party, a judicial officer is generally to determine whether the serious harm element is established as soon as practicable before the trial of defamation proceedings so as to deal with insignificant claims early in the proceedings;

- (c) to provide for certain individuals to be counted as employees of a corporation for the purpose of determining whether the corporation can sue for defamation;
- (d) to require a concerns notice to be given to the publisher of matter that is or may be defamatory before defamation proceedings may be commenced against the publisher in respect of the matter;
- (e) to make various amendments with respect to the form, content and timing for concerns notices and offers to make amends;
- (f) to clarify that a defendant may plead back imputations relied on by the plaintiff as well as those relied on by the defendant to establish the defence of contextual truth;
- (g) to provide for a defence for the publication of defamatory matter concerning an issue of public interest;
- (h) to provide for a defence in respect of peer reviewed matters published in academic or scientific journals;
- (i) to clarify when material is sufficiently identified in a publication of defamatory matter for it to be treated as proper material on which to base the defence of honest opinion;
- (j) to make it clear that the maximum amount of damages for non-economic loss specified by the Act operates to create a scale or range of damages rather than a cap;
- (k) to require the leave of the court to commence defamation proceedings against certain associates of a defendant previously sued for defamation in respect of the publication of the same matter;
- (l) to provide that an election to have defamation proceedings tried by jury can be revoked only with the consent of all the parties or with the leave of the court on the application of a party;
- (m) to allow a court to determine costs in respect of defamation proceedings that end because of the death of a party if it is in the interests of justice to do so;
- (n) to introduce a single publication rule concerning the limitation period for multiple publications of the same defamatory matter by the same publisher or an associate of the publisher so that:
  - (i) the start date of the 1-year limitation period for each publication runs from the date of the first publication; and
  - (ii) for an electronic publication, the start date runs from when it is uploaded for access or sent to the recipient rather than when it is downloaded or received;
- (o) to provide for the limitation period for commencing defamation proceedings to be extended to enable pre-trial processes to be concluded and to provide courts with greater flexibility to extend the limitation period;
- (p) to allow notices and other documents to be sent to an email address specified by the recipient for the giving or service of documents;
- (q) to make certain other consequential or related amendments.

The aims of the Stage 2, Part A amendments are as follows:

- (a) to exempt a digital intermediary from liability for defamation for the publication of digital matter if:
  - (i) the intermediary's role in the publication of the matter is limited to providing a caching service, conduit service or storage service and so long as the intermediary did not take an active role in the publication, for example, by initiating, promoting or editing the matter; or

- (ii) the intermediary is a search engine provider whose role in the publication of the matter is limited to providing an automated process for users to generate search results identifying or linking to a webpage on which the matter is located;
- (b) to provide a digital intermediary with a defence in relation to defamatory digital matter posted by a third party if reasonable steps are taken, whether before or within seven days after receiving a complaint, to remove or prevent access to the matter;
- (c) to allow for an offer to make amends in relation to the publication of defamatory digital matter to include an offer to take steps to remove or prevent access to the matter;
- (d) to confirm courts must take certain matters into account when making an order for, or in the nature of, preliminary discovery for information about the identity or address of posters of defamatory digital matter;
- (e) to enable courts to make orders against digital intermediaries who are not parties to certain defamation proceedings to require them to take steps to remove or prevent access to defamatory digital matter;
- (f) to allow notices and other documents to be given or served by means of email, messaging or other electronic communication to an electronic address or location indicated by the recipient;
- (g) to provide for savings and transitional matters for the amendments; and
- (h) to make certain other consequential, related or minor amendments.

The aim of the Stage 2, Part B amendments is to extend the defence of absolute privilege to publications of defamatory matter to officials of Australian police forces or services while they are acting in their official capacities.

## **NOTES ON CLAUSES**

### **Part 1 Preliminary matters**

#### **Clause 1. Short Title.**

This is a formal clause which provides for the citation of the Bill. The Bill when passed will be cited as the *Defamation Legislation Amendment Act 2025* (the amending Act).

#### **Clause 2. Commencement.**

This clause sets out how and when the amending Act will be commenced. In this case, the amending Act (except Part 3) will commence the day after assent, with Part 3 commencing immediately after Part 2.

## Part 2 Amendments to Defamation Act 2006 and related amendments to other Acts

### Division 1 Defamation Act 2006

#### Clause 3. Act amended.

This is a formal clause which provides that Part 2 amends the *Defamation Act 2006*.

#### Clause 4. Section 3 amended (Definitions)

A definition for the expression ***applicable period*** for an offer to make amends is used to cater for the differing periods depending on whether there has been a request for further particulars. Clause 4 applies the definition to the whole of the Act.

Clause 4 defines ***associated entity*** to have the same meaning as in section 50AAA of the Corporations Act 2001 of the Commonwealth. This change is consistent with other amendments made that refer to associated entities. Clause 4 also inserts definitions of ***excluded corporation***, ***concerns notice*** and ***further particulars notice*** to facilitate the use of those terms throughout the Act.

#### Clause 5. Section 8 amended (Certain corporations do not have cause of action for defamation)

##### Persons to be counted as employees when determining if a corporation can sue

Section 8 of the Act provided that generally a corporation did not have a cause of action for defamation. However, a corporation that was not a public body could still sue for defamation if:

- (a) the objects for which the corporation was formed did not include obtaining financial gain for its members or corporators; or
- (b) the corporation employed fewer than 10 persons and was not related to another corporation (with related being defined by reference to section 50 of the *Corporations Act 2001* of the Commonwealth).

Section 8 did not define the term ***employee***, so the term would have its ordinary meaning. The ordinary meaning of the term does not include persons who provide services other than under a contract of service. For example, it does not include independent contractors and other non-employees even though they may have major roles in the operations of the corporation.

The inability to count these kinds of persons as employees could enable some corporations operating for financial gain to avoid the general prohibition on corporations suing for defamation because of the way their businesses are structured.

Clause 5(3) inserts a definition of ***employee*** so that it includes any individual (whether or not an independent contractor) who is:

- (a) engaged in the day to day operations of the corporation other than as a volunteer, and
- (b) subject to the control and direction of the corporation.

Clause 5(1), when read with the amendment made by clause 5(2), will also exclude corporations that are associated entities of other corporations from having a cause of action for defamation (currently, the exclusion is limited to those related to other corporations).

**Clause 6. Section 9 amended (No cause of action for defamation of, or against, deceased persons)**

**Costs may be awarded in defamation proceedings ending because of party's death**

Section 9 of the Act prevented a person (including a personal representative of a deceased person) from asserting, continuing or enforcing a cause of action for defamation in relation to:

- (a) the publication of defamatory matter about a deceased person; or
- (b) the publication of defamatory matter by a deceased person.

On one interpretation, the section may prevent a court from awarding costs in defamation proceedings that end because the plaintiff or defendant dies.

Clause 6 makes it clear that a court is not prevented, if it considers it in the interests of justice to do so, from determining the question of costs for defamation proceedings discontinued because of the death of a party.

**Clause 7. Section 9A inserted**

**Serious harm as element of the cause of action**

Before the enactment of the Act, at general law a plaintiff had to prove material loss (or special damage) if the publication of defamatory matter was slanderous, but not if it was libellous. Generally libel was the publication of defamatory matter in a written or other permanent form while slander was the publication of defamatory matter in a form that is temporary and merely audible.

Section 6 of the Act provided that there was to be no distinction between slander and libel. As a result, all publications of defamatory matter were actionable without proof of special damage. However, section 30 of the Act made it a defence to the publication of defamatory matter if the defendant proved that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm. The defence is called the defence of triviality.

Section 1 of the *Defamation Act 2013* of the United Kingdom (the UK Defamation Act) requires a plaintiff to prove in an action for defamation that the defamatory publication has caused, or is likely to cause, serious harm to the reputation of the plaintiff. If the plaintiff is a corporation trading for profit, the corporation must also prove that serious financial loss has been caused or is likely to be caused.

Clause 7 provides, consistently with the approach taken in the UK Defamation Act, for it to be an element of the cause of action for defamation for the plaintiff to prove the publication of the defamatory matter has caused, or is likely to cause, serious harm to the reputation of the plaintiff. Also, excluded corporations suing for defamation must prove serious financial loss.

In addition, a procedure is set out for determining whether the element is established. The principal features of the procedure are as follows:

- (a) the judicial officer is to determine whether the element is established rather than the jury (if there is one);
- (b) whether the element is established can be determined either before trial or during the trial of defamation proceedings on the judicial officer's own motion or on the application of a party; and
- (c) if a party applies for the serious harm element to be determined before the trial for the proceedings commences, the judicial officer is to determine the issue as soon as practicable before the trial commences unless satisfied that there are special circumstances justifying the postponement of the determination to a later stage of the proceedings (including during the trial).

The purpose of the procedure is to encourage the early resolution of defamation proceedings by enabling the issue to be dealt with as a threshold issue.

#### **Clause 8. Part 3, Division 1 heading amended**

Clause 8 alters the heading to Division 1 of Part 3 to give greater prominence in the Act to concerns notices.

#### **Clause 9. Sections 11A and 11B inserted**

##### **Concerns notice required before commencing proceedings**

Part 3 of the Act sets out provisions to encourage the resolution of civil disputes about the publication of potentially defamatory matter without litigation.

In particular, the provisions of Division 1 of Part 3 apply if a person (the publisher) publishes matter (the matter in question) that is, or may be, defamatory of another person (the aggrieved person). The principal features of these provisions are as follows:

- (a) the aggrieved person may give the publisher a concerns notice setting out the imputations of which the aggrieved person complains and certain other matters;
- (b) the publisher may seek further particulars after a concerns notice is given;
- (c) the publisher may make an offer to make amends in the form provided by the provisions, but not if it is made after 28 days of the concerns notice being given or after a defence is served in defamation proceedings for the matter in question;
- (d) the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher in relation to the matter in question if the publisher carries out the terms of an offer of amends accepted by the aggrieved person;
- (e) the publisher has a defence in defamation proceedings for the matter in question if the aggrieved person refuses to accept a reasonable offer to make amends made in compliance with certain requirements.

It is not mandatory under these provisions for the aggrieved person to give a concerns notice to the publisher. Consequently, the aggrieved person may commence defamation proceedings instead of giving a concerns notice.

However, if the aggrieved person does not give a concerns notice, it is open to the publisher to make an offer of amends until proceedings are commenced and a defence is filed. The rejection of a reasonable offer of amends might result in a defence for the publisher in these circumstances.

Clause 9 provides that an aggrieved person cannot commence defamation proceedings unless:

- (a) the person has given the proposed defendant a concerns notice in respect of the matter concerned; and
- (b) the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice; and
- (c) the applicable period for an offer to make amends has elapsed.

The applicable period for an offer to make amends is defined in section 13, as amended by clause 10, to cater for an extended period beyond 28 days of a concerns notice being given if further particulars for the concerns notice have been requested.

The court may grant leave for the commencement of proceedings despite non-compliance with the precondition referred to in paragraph (c) above, but only if the plaintiff satisfies the court:

- (a) the commencement of proceedings after the end of the applicable period for an offer to make amends contravenes the limitation law; or
- (b) it is just and reasonable to grant leave.

### **Form and content of concerns notices**

Section 13 of the Act provided for what should be included in a concerns notice. However, it did not expressly provide for the form the notice should take.

Section 13 also prevented a publisher from making an offer to make amends if made after 28 days of the concerns notice being given or after a defence is served in defamation proceedings for the matter in question. However, the publisher could request further particulars to be provided by the aggrieved person within 14 days.

The New South Wales Court of Appeal has held a statement of claim for defamation may constitute a concerns notice if it includes the matters required to be specified in a concerns notice. See *Mohareb v Booth* [2020] NSWCA 49 at [11], citing its previous judgment to this effect in *Zoef v Nationwide News Pty Ltd* (2016) 92 NSWLR 283 at [92].

However, the purpose behind concerns notices is to avoid litigation altogether. The provisions about concerns notices appear in Part 3 of the Act, which is headed 'Resolution of civil disputes without litigation'. In contrast, Part 4 is headed 'Litigation of civil disputes'.

In addition, it has been suggested that the matters currently required to be specified in a concerns notice may be insufficient to enable publishers to assess whether there is a case to answer, particularly in respect of electronic publications.

Clause 9 relocates provisions about concerns notices into its own section. It states the requirements for the content of a concerns notice to include:

- (a) requiring the notice to specify the location where the matter in question can be accessed (for example, a webpage address); and
- (b) requiring the notice to inform the publisher of the harm that the aggrieved person considers to be serious harm to the person's reputation caused, or likely to be caused, by the publication of the matter in question; and
- (c) requiring an excluded corporation giving a notice to also provide information about what it considers to be serious financial loss caused, or likely to be caused, by the publication of the matter in question; and
- (d) requiring an aggrieved person, if practicable, to provide the publisher with a copy of the matter in question together with the notice.

Clause 9 also makes it clear that a document that is required to be filed or lodged to commence defamation proceedings cannot be used as a concerns notice.

### **Clause 10. Section 13 amended (When offer to make amends may be made)**

## **Form and content of concerns notices**

Clause 10 extends the 28-day period for making an offer to make amends if further particulars are requested in a further particulars notice and they are provided 15 days or more after the concerns notice is given. However, the extension applies only in respect of the first further particulars notice if there is more than one. Clause 10 also removes provisions concerning concerns notices being relocated by Clause 9.

The extended time will enable procedures involving concerns notices and offers to make amends to be completed before the commencement of defamation proceedings.

## **Clause 11. Section 14 amended (Content of offer to make amends)**

### **Form and duration of offers to make amends**

Section 14 of the Act provided for the form and content of offers to make amends. Some of them were mandatory, others not.

Currently, there is no requirement concerning how long an offer to make amends needs to be kept open for acceptance.

The publisher is required to include an offer to publish, or join in publishing, a reasonable correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited. However, it is insufficient for this purpose to publish, or join in publishing, a clarification of or additional information about the matter where this would address the concern of the aggrieved person.

Also, there has been some uncertainty about whether or not certain offers to redress the harm sustained by the aggrieved person are mandatory.

Clause 11(1) requires an offer to make amends to be open for at least 28 days commencing on the day the offer is made.

Clause 11(2) enables an offer to make amends to include an offer to publish, or join in publishing, a clarification of, or additional information about, the matter in question as an alternative to a reasonable correction.

Clause 11(5) relocates provisions concerning offers to redress the harm sustained by the aggrieved person to make it clear that the inclusion of these matters is not mandatory. Also, it makes it clear that offers of redress can include an offer to remove a publication made in electronic form. Clause 11(3), (4) and (6) make consequential amendments to facilitate the relocation of these provisions.

## **Clause 12. Section 17 amended (Effect of failure to accept reasonable offer to make amends)**

### **Defence of failure to accept reasonable offer to make amends**

Section 17 of the Act provided a publisher with a defence in defamation proceedings if the aggrieved person fails to accept a reasonable offer to make amends. The defence has 2 preconditions in addition to reasonableness.

The first precondition is that the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory. As previously noted, section 13 of the Act currently prevents a publisher from making an offer to make amends if made after 28 days of a concerns notice being given or after a defence is served in defamation proceedings for the matter in question.

The second precondition is that the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer at any time before the trial. This precondition has been read as precluding reliance on the defence even if the publisher remains ready and willing to carry out the terms of the offer during the trial.



Clause 12(1) alters the first precondition so that the offer must be made as soon as reasonably practicable after the publisher was given a concerns notice in respect of the matter (and, in any event, within the applicable period for an offer to make amends).

Clause 12(2) alters the second precondition so that the defence can be relied on if the publisher remains ready and willing to carry out the terms of the offer during the trial.

### **Clause 13. Section 20 replaced**

#### **Leave to sue associates of previously sued defendant**

Section 20 of the Act required a person to obtain the leave of the court to commence defamation proceedings if the person has already brought defamation proceedings for damages (whether in this jurisdiction or elsewhere) against the same defendant in relation to the same or any other publication of the same or like matter.

Currently, section 20 does not prevent a person bringing defamation proceedings for damages against persons who were closely associated with a previously sued defendant at the time of the publication, for example employees or contractors of the previous defendant. This can result in multiple proceedings in respect of the same matter simply because the plaintiff chooses to sue an associate rather than the previous defendant.

Clause 13 recasts section 20 so that it also requires the leave of the court to bring defamation proceedings against associates of the previous defendant. These are persons who, at the time of the publication by the previous defendant, were:

- (a) employees of the defendant; or
- (b) persons publishing matter as contractors of the defendant; or
- (c) associated entities of the defendant (or employees or contractors of these associated entities).

### **Clause 14. Section 23 replaced**

#### **Pleading back plaintiff's imputations for defence of contextual truth**

Section 23 of the Act provided for a defence of contextual truth. The defence deals with the case where the publication of defamatory matter carries defamatory imputations some of which are substantially true. The defence operates when the defamatory imputations of which the plaintiff complains do not further harm the reputation of the plaintiff because of the substantially true imputations.

The defence of contextual truth in the MDPs was intended to adopt the defence of contextual truth created by section 16 of the repealed Defamation Act 1974 of New South Wales. Under the defence in New South Wales, a defendant could rely on imputations to establish the defence even if they had been pleaded by the plaintiff. Relying on the plaintiff's imputations for this purpose was known as 'pleading back'.

Differences between the wording of section 23 of the Act and section 16 of the repealed *Defamation Act 1974* of New South Wales have caused uncertainty about whether a defendant can plead back a plaintiff's imputations under provisions based on the MDPs. In *Besser v Kermode* [2011] NSWCA 174, the New South Wales Court of Appeal decided it was not permissible to plead back a plaintiff's imputations.

Clause 14 reformulates the defence of contextual truth to make it clear that, in order to establish the defence, a defendant may plead back substantially true imputations originally pleaded by the plaintiff.

## Clause 15. Section 26A inserted

### Defence of publication of matter concerning an issue of public interest

Section 27 of the Act created a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proved that:

- (a) the recipient has an interest or apparent interest in having information on some subject, and
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
- (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

The section also set out factors that the court could take into account in deciding the reasonableness of the defendant's conduct, including the extent to which the matter was in the public interest. These factors were based on the decision of the House of Lords in *Reynolds v Times Newspapers Ltd* (2001) 2 AC 127 (the Reynolds case) concerning a comparable defence of qualified privilege under the general law of the United Kingdom.

The general law in Australia at the time also recognised a similar, though narrower, defence of qualified privilege. In particular, there was case law that rejected the more liberal defence recognised in the Reynolds case. See, for example, *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1165]–[1170]. The defence at general law required a reciprocity of duty and interest, or community of interest, between publisher and recipients. It did not provide a defence for publication to the world at large.

The purpose of the defence under section 27 of the Act was to create a defence that extended to circumstances where there was not necessarily the reciprocity of duty and interest, or community of interest, between publisher and recipients required by the general law defence. However, section 27 has been largely unsuccessful in liberalising the approach taken by the courts to publications concerning issues that may be of public interest.

As the defence under section 27 is a defence of qualified privilege, it is defeated if the publication is made with malice. At general law, a publication of matter is actuated by malice if it is published for a purpose or with a motive that is foreign to the occasion that gives rise to the defence at issue. See *Robert v Bass* (2002) 212 CLR 1 at 30 to 33.

Section 4 of the UK Defamation Act provides for a defence in defamation proceedings for the defendant to show that:

- (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
- (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

The statutory defence in the UK Defamation Act abolished the general law defence recognised in the Reynolds case. This was because the statutory defence was intended to codify the general law defence and pick up the case law applying to it. Consequently, the statutory defence does not set out relevant factors to be taken into account in determining whether the defence is established. Also, a ground for defeating the statutory defence (such as malice) is not specified.

Clause 15 provides for a comparable defence to the defence in the UK Defamation Act. However, the defence differs from the defence in the UK Defamation Act in the following respects:

- (a) the provision recasts the language used in the defence in the UK Defamation Act (which refers to statements on a matter of public interest) to take into account the language used in the MDPs (which refers to the publication of defamatory matter);

(b) the provision specifies some factors the court may take into account.

The purpose of these factors is to provide some non-exhaustive guidance to the court. Not all, or any, of these factors must be satisfied. They are not intended to operate as a checklist of relevant factors.

One of the objects of the Act was to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance. The new defence is aimed at promoting that object.

**Clause 16. Section 27 amended (Defence of qualified privilege for provision of certain information)**

Clause 16 recasts the factors that may be taken into account in determining whether the defence under section 27 is established so as to minimise duplication with the factors for the new public interest defence. As with the new public interest defence, the purpose of these factors is to provide some non-exhaustive guidance to the court. Not all, or any, of these factors must be satisfied. They are not intended to operate as a checklist of relevant factors.

**Clause 17. Section 27A inserted**

**Defences concerning scientific or academic peer review**

It is in the public interest for academics and scientists to be able to express their views freely, particularly if they have been subject to peer review.

Section 6 of the UK Defamation Act recognises this. It provides for a defence of qualified privilege for the publication of a defamatory statement in a scientific or academic journal if certain conditions are met (the principal defence). One of the conditions is that an independent review of the statement's scientific or academic merit was carried out by both the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned.

Section 6 also provides for a defence in respect of assessments in the same journal about the statements and a defence for fair reports of the statements.

As the defences under the UK Defamation Act are defences of qualified privilege, they are defeated if the publication is made with malice.

Clause 17 provides for comparable defences to the defences in the UK Defamation Act. The defences differ from the defences in the UK Defamation Act in the following respects:

- (a) the independent review of the defamatory matter's scientific or academic merit for the principal defence may be carried out either by the editor of the journal if the editor has relevant expertise or by one or more other persons with relevant expertise (rather than both as is the case under the UK Defamation Act);
- (b) the defences are not defences of qualified privilege;
- (c) the defences can be defeated if, and only if, the plaintiff proves that the defamatory matter or assessment was not published honestly for the information of the public or the advancement of education;
- (d) as a result, a publication made with malice does not necessarily defeat the defences.

**Clause 18. Section 28 amended (Defences of honest opinion)**

**Proper material for defence of honest opinion**

Section 28 of the Act provided for a defendant to have a defence to the publication of defamatory matter if it is an expression of opinion that is in the public interest and based on proper material.

An opinion is based on proper material if it is based on material that:

- (a) is substantially true; or
- (b) was published on an occasion of absolute or qualified privilege (whether under the Act or at general law); or
- (c) was published on an occasion that attracted the protection of a defence under section 28 or section 25 or 26 of the Act.

There has been some uncertainty about how any material relied on needs to be referred to in a publication for the opinion to be based on proper material, particularly if the material is in electronic form or is common knowledge.

Clause 18 requires the material to be:

- (a) set out in specific or general terms in the published matter; or
- (b) notorious; or
- (c) accessible from a reference, link or other access point included in the matter (for example, a hyperlink on a webpage); or
- (d) otherwise apparent from the context in which the matter is published.

#### **Clause 19. Section 30 repealed (Defence of triviality)**

Clause 19 removes the defence of triviality because the onus will now be on the plaintiff to prove serious harm in order to bring a successful action for defamation. Accordingly, there is no need for the defendant to prove the harm was trivial.

#### **Clause 20. Section 32 amended (Damages for non-economic loss limited)**

##### **Maximum amount of damages for non-economic loss**

Section 32 of the Act provided for a maximum amount of damages that may be awarded for non-economic loss in defamation proceedings.

Damages for non-economic loss are aimed at providing compensatory damages to cover the intangible matters of consolation for hurt feelings, damage to reputation and the vindication of the plaintiff's reputation.

A court may order a greater amount than the maximum amount if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate warrant an award of aggravated damages.

However, there have been inconsistent approaches concerning its effect.

One approach (which reflects the original purpose behind the provision) is that the section sets a scale or range of damages, with the maximum amount reserved for the worst kinds of damage even if the publication does not warrant an award of aggravated damages. See *Murray v Raynor* [2019] NSWCA 274 at [92] and [93].

The other view is that the maximum amount operates as a cap (rather than setting a scale or range) that can be set aside in circumstances where aggravated damages are warranted. See *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154.

The purpose behind specifying a maximum amount for non-economic loss was to ensure a level of parity with the award of other damages (for example, for personal injury) while still providing for appropriate

compensation for this intangible loss. The purpose behind allowing aggravated damages was to enable additional compensation to be awarded if the conduct of the defendant exacerbated the plaintiff's loss.

Also, the current power of courts to award more than the maximum amount if aggravated damages are warranted has resulted in some cases in excessive damages for non-economic loss being awarded.

Clause 20:

- (a) confirms that the maximum amount sets a scale or range rather than a cap, with the maximum amount to be awarded only in a most serious case; and
- (b) requires awards of aggravated damages to be made separately to awards of damages for non-economic loss so that the scale or range for damages for non-economic loss continues to apply for non-economic loss even if aggravated damages are awarded.

### **Clause 21. Section 41 amended (Giving of notices and other documents)**

#### **Giving notices or other documents by email**

Section 41 of the Act allowed notices and other documents to be given for the purposes of the Act by sending them by facsimile transmission to the facsimile number of the person. However, provision was not made for sending them by any other electronic means.

Clause 21(1) and (3) allow notices and other documents to be sent to an email address specified by the recipient for the giving or service of documents. Clause 21(2) makes a consequential amendment to facilitate the insertion of the provisions.

### **Clause 22. Part 7 inserted**

#### **Savings and transitional provisions**

Clause 22 provides that an amendment made to the Act by Part 2 applies only in relation to the publication of defamatory matter after the commencement of the amendment.

### **Division 2                      Limitation Act 1981**

#### **Clause 23. Act amended**

This is a formal clause which provides that Part 2 Division 2 amends the *Limitation Act 1981*.

### **Clause 24. Sections 44AA and 44AAB inserted**

#### **Extension of limitation period and single publication rule**

Division 1 of Part 7 of the MDPs provided that an action for defamation must be brought by a plaintiff within one year running from the date of the publication of the matter complained of.

However, it required a court to extend this limitation period by a period of up to three years if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in the one-year period.

At general law, each publication of defamatory matter is a separate cause of action. Publication occurs when it is received in a communicable form by at least one third party. See *Dow Jones v Gutnick* (2002) 210 CLR 575 at 600. A third party is a person other than the person said to be defamed or the publisher's spouse. Section 7 of the Act restated the position at the general law that a person has a single cause of action for defamation in relation to the publication of defamatory matter about the person even if more than one defamatory imputation is carried by the matter.

For publications on the Internet, publication occurs when a third party downloads the webpage concerned rather than when it is posted by the publisher. As result, it was held by the High Court in *Dow Jones v*

*Gutnick* (2002) 210 CLR 575 that the law applicable to choosing the law to apply to an action for defamation is the law of the place it is downloaded rather than uploaded.

As webpages may be downloaded many thousands of times, this means there is a separate cause of action for each download and the limitation period applicable to each download will vary even though the same matter is involved. This may enable plaintiffs to circumvent the purpose behind the limitation period by relying on later downloads of the same matter, which may occur many years after the webpage was first uploaded.

Section 8 of UK Defamation Act has introduced a single publication rule for the purposes of the UK limitation period concerning actions for defamation. This rule applies if a person:

- (a) publishes a statement to the public (the first publication); and
- (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

The effect of the rule is that the date of the first publication will be treated as the start date for the limitation period for all of the publications except if the manner of a subsequent publication is materially different from the first publication.

The principal purpose behind the single publication rule is to ensure that the limitation period for actions for defamation continues to be effectual in connection with electronic publications.

Section 32A of the Limitation Act 1980 of the United Kingdom (the UK Limitation Act) enables a court to allow an action for defamation to proceed if it appears to the court that it would be equitable to allow it to do so having regard to the degree to which:

- (a) the operation of the limitation period prejudices the plaintiff or any person whom the plaintiff represents; and
- (b) any decision of the court to allow it to proceed would prejudice the defendant or any person whom the defendant represents.

Section 32A also requires the court to look at all the circumstances of the case and, particularly, at certain specified matters.

Clause 24 makes a consequential amendment to remove the current requirement for the court to extend the limitation period if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in the one-year period.

In addition, it provides for the one-year limitation period to be automatically extended by an additional period if a concerns notice is given to the proposed defendant on a day within the period of 56 days before the limitation period expires. The additional period is aimed at allowing the proposed defendant time to consider the concerns notice and the aggrieved person to consider any offer to make amends. It is calculated by subtracting from 56 days any days remaining after the concerns notice is given until the one-year limitation period expires.

Clause 24 also introduces a single publication rule based on the UK Defamation Act for determining when the limitation period commences for multiple publications. It differs from the UK Defamation Act because it extends to subsequent publications of substantially the same matter by certain associates of the first publisher (such as employees and contractors) as well as to subsequent publications by the same publisher.

**Clause 25. Section 44A amended (Extension of limitation period by court)**

Clause 25 provides for a comparable provision to that in the UK Limitation Act for extending the limitation period for actions for defamation. The provision differs from the UK Limitation Act in the following respects:

- (a) the provision limits an extension to a maximum of three years from the date of publication;
- (b) the plaintiff must satisfy the court that it is just and reasonable to allow the action to proceed rather than equitable;
- (c) although the provision requires the court to have regard to all of the circumstances of the case and particularly to matters based on the UK Limitation Act, it does not require what is just and reasonable to be determined by reference to prejudice to the plaintiff or defendant or those whom they represent.

**Clause 26. Section 44D inserted**

Finally, clause 26 provides for the commencement of the limitation period in relation to electronic publications to be determined by reference to when the publisher uploads it for access or sends it electronically rather than by reference to when it is downloaded or received. However, this change is limited to determining the commencement of the limitation period. Consequently, it does not change the law concerning when the elements for a cause of action for defamation are established or the choice of law for determining that cause of action.

**Clause 27. Section 52 amended (Application of Act to actions for defamation)**

Clause 27 makes a minor technical amendment to update specific references to provisions.

**Clause 28. Part V, Division 3 inserted**

Clause 28 provides for the provisions concerning the extension of the limitation period to apply only in relation to the publication of defamatory matter after the commencement of the provisions, subject to an exception.

The exception is for the single publication rule introduced by Clause 24 to extend to subsequent publications occurring after the commencement of the provision inserting the rule even though the first publication occurred before the commencement.

**Division 3                      Local Court (Criminal Procedure) Act 1928****Clause 29. Act amended**

This is a formal clause which provides that Part 2 Division 3 amends the *Local Court (Criminal Procedure) Act 1928*.

**Clause 30. Section 131A amended (Certain assault and harm offences may be dealt with summarily)**

Clause 30 amends section 131A of the *Local Court (Criminal Procedure) Act 1928* to list an offence against section 204 of the Criminal Code (unlawful publication of defamatory matter) in that section. This will permit an offence against section 204 of the Criminal Code, which would otherwise be dealt with by indictment, to be dealt with summarily.

## Part 3 Further amendments to Defamation Act 2006

### Division 1 Act amended

#### Clause 31. Act amended

This is a formal clause which provides that Part 3 further amends the *Defamation Act 2006*.

### Division 2 Digital intermediaries amendments

#### Clause 32. Section 3 amended (Definitions)

##### Definitions for the Stage 2, Part A amendments

Clause 32 inserts new definitions in the Act for terms used in provisions inserted by the Stage 2, Part A amendments.

The term **digital matter** is defined to mean matter published in electronic form by means of an online service. The definition is not intended to affect or limit the general meaning of matter (which is defined in an inclusive way in the Act). Rather, the definition is intended to cover a class of electronic matter falling within the more general term.

The term **online service** is defined broadly to mean a service provided to a person, whether or not it is requested or it is for a fee or reward, to enable the person to use the internet. It includes a service enabling a person to access or connect to the internet. It also includes services enabling persons to use the internet to send or receive content, store or share content or to search for content or interact with other persons. The definition contains examples of online services.

The term **digital intermediary**, in relation to the publication of digital matter, is defined to mean a person who provides or administers the online service by means of which the matter is published.

The definition is not intended to alter the general law concerning when a person will be treated as the publisher of defamatory digital matter. As indicated in the background to the digital intermediary amendments below, a person is a publisher of defamatory matter at general law if the person is instrumental in, or contributes to any extent to, the publication of defamatory matter.

Also, the use in the definition of the indefinite article in relation to persons to whom it applies is intended to recognise there may be more than 1 digital intermediary in relation to the publication of the same digital matter.

A digital intermediary includes a person (sometimes called a **forum administrator**) who administers a facility provided by an internet-based platform enabling users to share content or interact with other users about a topic. An example of a forum administrator is an individual who uses a facility on a social media platform to create and administer a public page for residents of their local suburb to post information and comments that may be of interest to locals. The individual in the example is a digital intermediary because the individual is providing an online service that facilitates sharing and interaction between users of the public page. In addition, the person providing the social media platform used to create and administer the public page is also a digital intermediary in relation to publications of digital matter on the page.

The definition excludes an author, originator or poster of the digital matter. The purpose of excluding these persons from the definition is to ensure the definition captures only persons providing an online service as an intermediary (in other words, as a subordinate publisher). The term **author** is intended to cover, for example, persons who write content but do not post it themselves. The term **originator** is intended to include any person who plays a role in creating the content. Often the originator may also be the poster of the matter. However, this is not always the case. Examples of other originators include a group of persons who create or edit (or create and edit) a video together before it is posted or a person who edits and endorses a statement drafted and posted by another person.



The term **poster**, in relation to the publication of digital matter, means a person who uses the online service by means of which the matter is published for the purpose of communicating the matter to one or more other persons. The term includes, but extends beyond, a person who posts matter on a website.

The term **access prevention step**, in relation to the publication of digital matter, is defined to mean a step:

- (a) to remove the matter; or
- (b) to block, disable or otherwise prevent access, whether by some or all persons, to the matter.

The definition of **access prevention step** is intended to apply flexibly to cover the different tools available to particular digital intermediaries, based on their functions, to address defamatory digital matter.

A signposting definition is provided for the terms **caching service**, **conduit service**, **search engine**, **search engine provider**, **search result** and **storage service**.

### Clause 33. Part 2, Division 2A inserted

#### Digital Intermediary Amendments

##### Background

The liability of digital intermediaries for defamation has been the subject of several cases in recent years. However, the precise scope of their liability at general law remains unclear as the case law is developing on an incremental basis. Two recent decisions of the High Court of Australia concerning the liability of digital intermediaries for participation in the publication of defamatory matter are particularly important.

In *Fairfax Media Publications Pty Ltd & Ors v Voller* [2021] HCA 27 (the Voller case), a majority of the High Court held several media companies were publishers of comments posted on their public Facebook pages by third party users. Kiefel CJ, Keane and Gleeson JJ (with whom Gageler and Gordon JJ agreed) held a person who has been instrumental in, or contributes to any extent to, the publication of defamatory matter is a publisher. For this purpose, all the general law requires is a voluntary act of participation in its communication. The media companies, in setting up their forums for comments and also posting content on the forums, satisfied this test. Edelman and Steward JJ dissented.

In *Google LLC v Defteros* [2022] HCA 27 (the Defteros case), a majority of the High Court held a search engine provider was not liable for defamation as a publisher of defamatory matter on a webpage to which there was a hyperlink included in search results. However, the reasoning of the majority differed.

Kiefel CJ and Gleeson J found the search engine provider was not the publisher because it merely facilitated access to the article and did not approve or encourage its writing or provide a forum for its communication. Its role was therefore different to the roles of the media companies in the Voller case.

Gageler J found the search results were organic in the sense they were generated from the operation of the ranking algorithm of the search engine, but no feature of the content of the particular organic search results in the case operated as an enticement or encouragement to click on the hyperlink. His Honour left open the issue of whether hyperlinks promoted or prioritised by the search engine provider because of a payment or other benefit would be treated differently. Similarly, Edelman and Steward JJ found that the search engine provider was not the publisher because the hyperlink did not of itself direct, entice or encourage the searcher to click on the hyperlink.

Keane and Gordon JJ dissented.

The decision in the Defteros case was concerned with whether the search engine provider was the publisher of defamatory matter to which the hyperlinks in the search results facilitated access. This may be contrasted with search results containing defamatory matter as part of the content extracted from the hyperlinked website. At general law, a search engine provider may be liable for these kinds of defamatory search results. See *Google Inc v Duffy* [2017] SASFC 130.

## Statutory exemptions from liability

The Stage 2, Part A amendments provide for 2 conditional statutory exemptions from liability for defamation targeting narrow classes of digital intermediaries.

Firstly, clause 33 creates an exemption from liability for a digital intermediary in relation to the publication of digital matter using a caching service, conduit service or storage service provided by the intermediary. The exemption is conditional because the intermediary must prove each of the following (the ***passive intermediary exemption conditions***)—

- (a) the matter was published using a caching service, a conduit service, a storage service or a combination of those services;
- (b) the intermediary's role in the publication was limited to providing 1 or more of the services;
- (c) the intermediary did not take an active role in the publication, for example, by initiating, promoting or editing the matter.

A ***caching service*** is defined to mean an online service whose principal function is to provide automatic, intermediate and temporary storage of content for the purpose of making the onward electronic transmission of the content more efficient for its users. An example of a caching service is a service for temporarily and automatically storing files that are most frequently downloaded by users of a website to speed up the download time for those files.

A ***conduit service*** is defined to mean an online service whose principal function is to enable its users to access or use networks or other infrastructure to connect to, or send or receive data by means of, the internet. An example of a conduit service is a service provided by an internet service provider enabling its users to connect to and use the internet.

A ***storage service*** is defined to mean an online service, other than a caching service, whose principal function is to enable its users to store content remotely. An example of a storage service is an internet-based cloud service enabling its users to store documents, videos or photographs for later retrieval.

These services, as defined, are limited to services typically involving passive, rather than active, participation in the publication of digital matter. Also, paragraph (c) of the passive intermediary exemption conditions provides an additional safeguard by excluding digital intermediaries who, in a particular case, take an active role in a publication of digital matter. However, a digital intermediary will not lose the benefit of the exemption for taking action required by or under a law of an Australian jurisdiction or an order of an Australian court or Australian tribunal.

Secondly, clause 33 creates an exemption from liability for a search engine provider in relation to both the publication of digital matter comprised of search results and the publication of digital matter comprised of matter on other websites to which the results facilitate access by providing a hyperlink. The exemption is conditional because:

- (a) it is available only if the provider proves the provider's role was limited to providing an automated process for the user of the search engine to generate the results; and
- (b) it applies only to search results generated by the search engine limited to identifying a webpage on which content is located by reference to 1 or more of the following:
  - (i) the title of the webpage;
  - (ii) a hyperlink to the webpage;
  - (iii) an extract from the webpage;
  - (iv) an image from the webpage; and

- (c) it excludes search results to the extent the results are promoted or prioritised by the search engine provider because of a payment or other benefit given to the provider by or on behalf of a third party (***sponsored search results***).

Automatically generated defamatory search results may result from a user query or an autocomplete predictive text suggestion (or a combination of both). In the case of an autocomplete predictive text suggestion, the exemption would apply to the search results generated, but not to any defamatory meaning in the suggestion itself.

The exemption for search engine providers makes it clear there is no liability for automatically generated defamatory search results that are not sponsored search results. It also confirms the majority decision in the Defteros case that a search engine provider is generally not liable for defamatory matter to which hyperlinks in search results facilitated access if the results are generated organically by the user of the search engine.

The policy rationale for the exemption is search engine providers have no interest, with the exception of sponsored search results, in the specific content to which search results provide access by providing a hyperlink. The publication of the search results is prompted in the first instance not by the search engine, but by the user typing in a search query. The search results simply provide the user with access to third-party content using results generated by an automated process. The exemption aligns Australian law with the approach taken to search engines in other jurisdictions, particularly the United Kingdom. See, for example, *Metropolitan International School Ltd v Designtechnica Corp* [2009] EWHC 1765 (QB).

A search engine provider may still be liable for defamation at general law in relation to sponsored search results because they are excluded from the exemption. As previously indicated, the High Court in the Defteros case did not decide whether a search engine provider would be taken at general law to be a publisher of matter to which sponsored search results facilitated access by providing a hyperlink.

For example, the exemption would not apply to a search result labelled as an 'Ad' or 'Sponsored'. The exemption would also not extend to the content of a webpage to which the sponsored search result facilitated access by providing a hyperlink. However, the exemption would extend to other search results and the webpages to which they facilitated access.

Both exemptions will apply regardless of whether the digital intermediary knew, or ought reasonably to have known, the digital matter was defamatory.

Also, both exemptions have been drafted so that they will be available to be pleaded even if, at general law, the digital intermediary is not, or may not be, the publisher of defamatory digital matter because, to use the language of some of the majority in the Defteros case, it did not approve, encourage or participate in communicating the matter. In this regard, the exemptions differ from a substantive defence because a substantive defence operates only if the defendant is in fact the publisher of defamatory matter.

The aim of the exemptions is to enable arguments about liability to be resolved, if possible, at an early stage in proceedings without the need to determine whether the digital intermediary or search engine provider was in fact the publisher. To this end, the provisions set out a process to enable the issue of whether an exemption applies to be determined early and expeditiously by a judicial officer. The process is modelled, with some differences, on the process set out in section 10A of the MDPs for determining the serious harm element for a cause of action for defamation.

#### **Clause 34. Section 14 amended (Content of offer to make amends)**

##### **Offer amendments**

The Act requires an offer to make amends to include, among other things, the following offers (the mandatory remedial offers):

- (a) an offer to publish, or join in publishing, a reasonable correction of, or a clarification of or additional information about, the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited;

- (b) if material containing the matter has been given to someone else by the publisher or with the publisher's knowledge—an offer to take, or join in taking, reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person.

The Act also allows, but does not require, a publisher to include other kinds of offers. For example, the Stage 1 amendments allowed a publisher to include an offer to remove defamatory matter published on a website or any other electronically accessible location (a removal offer).

Clause 34(1) allows an offer to make amends in relation to the publication of digital matter to include an offer to take access prevention steps. These steps may involve removing the matter or instead blocking, disabling or otherwise preventing access to the matter.

The new provision broadens the provision allowing a removal offer to be made to allow a publisher to offer to block, disable or otherwise prevent access to a matter.

Clause 34(2) allows a publisher to include in an offer to make amends, if appropriate, an offer to take reasonable steps instead of, or in addition to, either or both mandatory remedial offers.

Both new provisions are aimed at providing greater flexibility to publishers in dealing with complaints about the publication of defamatory digital matter. The provisions do not prevent the publisher from making the mandatory remedial offers. They merely enable the publisher to offer to take reasonable access steps as an alternative. For example, there may be circumstances in which it would not be possible to publish a correction or clarification without republishing the defamatory matter. In any event, section 17 of the Act prevents a defendant from relying on the defence of making an offer to make amends unless the court is satisfied the offer was reasonable in all the circumstances.

#### **Clause 35. Section 20A inserted**

##### **Preliminary discovery or non-party digital intermediary order amendments**

###### **Preliminary discovery orders**

The identity or address of posters of defamatory digital matter is often unclear or uncertain. Consequently, courts are sometimes asked to make orders for, or in the nature of, preliminary discovery to assist in identifying the posters so that documents like concerns notices and originating processes can be given to, or served on, them. The power to make these kinds of orders is found in legislation dealing with a court's procedure or the general law, although typically it is found in its rules of court.

Clause 35 confirms a court, in making a preliminary discovery order, is required to take into account the objects of the Act and privacy, safety or other public interest matters that may arise if the order is made. For example, the provision would require the court to take into account the potential for domestic violence against a poster of digital matter whose address is being sought by the alleged perpetrator. The provision does not limit the matters the court may take into account in addition to these two matters.

#### **Clause 36. Section 28A inserted**

###### **Defence**

Section 29 of the Act provides a defence for the publication of defamatory matter by subordinate distributors of the matter or by their employees or agents. It is called the defence of innocent dissemination. The defence was largely based on the general law as it stood at the time the MDPs were originally approved, but the provision sought to make the position of providers of internet and other electronic and communication services clearer than it was at general law. See the explanatory note for the original MDPs about the intended operation of section 29 available on the Australasian Parliamentary Counsel's Committee website (<https://pcc.gov.au>).

Several problems have been identified in applying the defence of innocent dissemination to contemporary digital intermediaries, including the following:

- (a) The defendant must prove the defendant was a subordinate distributor. This includes proving the defendant did not have any capacity to exercise editorial control over the content of the defamatory matter before it was first published. Given the large variety of contemporary digital intermediaries and some of their sophisticated technical capacities and functions, it is unclear when they may be considered to have the capacity to exercise editorial control.
- (b) The defendant must also prove the defendant neither knew, nor ought reasonably to have known, the matter was defamatory (see section 29(1)(b)) and this lack of knowledge was not due to any negligence on the part of the defendant (see section 29(1)(c)). The test concerning knowledge includes both actual and what is sometimes called “constructive” knowledge components, which has created uncertainty about the knowledge requirements for the defence. This uncertainty may operate in some cases to discourage digital intermediaries from monitoring online services they provide for unlawful content so as to avoid being treated as having knowledge about defamatory matter.
- (c) The defence provides no specific timeframe within which the defendant must act after the defendant has the required knowledge about the defamatory matter.

Some overseas jurisdictions, including the United Kingdom and New Zealand, have enacted statutory defences (sometimes called safe harbour defences) to provide additional protection for digital intermediaries who do not post defamatory matter if, among other things, they accept a notice from the plaintiff complaining about the matter and then contact the poster to seek their consent to remove the post and provide their identifying information to the plaintiff.

However, clause 36 provides for a new defence with the following features (the defence features):

- (a) the defendant must prove the following:
  - (i) the defendant was a digital intermediary in relation to the publication of the defamatory digital matter;
  - (ii) the defendant had, at the time of the publication, an accessible complaints mechanism for the plaintiff to use;
- (b) if the plaintiff gave the defendant a written complaint about the publication containing certain basic information—the defendant must prove, in addition to both the matters mentioned in paragraph (a) of the defence features, that reasonable access prevention steps, if steps were available, were taken by the defendant or another person in relation to the publication before the complaint was given or within seven days after the complaint was given;
- (c) the defence will be available to defendants who moderate content by taking steps to detect or identify, or steps to remove, block, disable or otherwise prevent access by persons to, content that may be defamatory or breach the terms or conditions of the online service.

The seven-day period mentioned in paragraph (b) of the defence features aims to provide an appropriate balance between a complainant’s need for a prompt outcome and the digital intermediary’s need to have sufficient time to take action, or decide not to take action, in response to the complaint.

An example of access prevention steps satisfying paragraph (b) of the defence features is, when defamatory digital matter is published on an online forum, if the matter was removed by a defendant forum administrator or instead by the poster of the matter.

A complaint must be in writing and make the digital intermediary aware of certain basic information about the digital matter concerned, including what the matter is and where it can be located. An objective test focused on a reasonable person in the digital intermediary's circumstances is to be applied in deciding whether the digital intermediary to whom a complaint is given has been made aware of the basic information.

There are no formal requirements for the format of the complaint except that it has to be in writing. A complaint including only the basic information would be insufficient for a concerns notice because concerns notices require more detailed information. However, a concerns notice would operate as a sufficient complaint if it included the basic information.

If a complaint is not made, the digital intermediary will have the benefit of the defence if the intermediary can prove the matters mentioned in paragraph (a) of the defence features. The digital intermediary will not be required to prove the matter mentioned in paragraph (b) of the defence features in these circumstances.

The defence seeks to overcome the problems with the defence of innocent dissemination (which will continue to operate as it does currently) in the following ways:

- (a) it expressly applies to digital intermediaries;
- (b) it makes clear a complaint including the basic information that is received by a digital intermediary operates as notice of the defamatory matter;
- (c) it provides a specific timeframe for action to be taken to have the benefit of the defence.

In effect, the new defence provides for a defence of innocent dissemination aimed at digital intermediaries, with greater clarity provided about when intermediaries will be put on notice about defamatory digital matter posted by third parties using their online services.

The defence is intended to operate in addition to the statutory exemptions to cover a broader range of digital intermediaries who are not covered by the exemptions because they play more active roles in facilitating the publication of defamatory digital matter by third parties. The digital intermediaries covered by the defence would generally be considered publishers at general law.

Examples are forum administrators and digital intermediaries providing social media platforms or review websites.

The defence may be defeated only if the plaintiff proves the defendant was actuated by malice in establishing or providing the online service by means of which the matter was published. An example of this kind of malice is a person who creates a social media page for the purpose of encouraging users of the social media platform to post comments about the plaintiff being dishonest or incompetent in circumstances where the defendant had no reason to believe the plaintiff was dishonest or incompetent.

## **Clause 37. Section 36A inserted**

### **Non-party digital intermediary orders**

Courts sometimes grant injunctions or make other orders to prevent the publication or republication of defamatory digital matter, whether on a temporary or permanent basis. See, for example, *Webster v Brewer (No 2)* [2020] FCA 727. However, there is uncertainty in relation to court powers to make orders in relation to non-party digital intermediaries who host or otherwise facilitate access to defamatory digital matter.

In the United Kingdom, section 13 of the Defamation Act 2013 (UK) confers a power on a court to order the operator of a website on which a defamatory statement is posted to remove the statement if the court gives judgment for the claimant in an action for defamation (the UK power). The section is expressed not to limit any power the court has apart from the section. Also, the section is not in terms limited to operators of websites who are parties to the defamation proceedings concerned.

Clause 37 confers a similar power to the UK power, but with the following features:

- (a) the power is available in relation to defamation proceedings, but only if:
  - (i) the plaintiff has obtained judgment for defamation against the defendant in the proceedings; or
  - (ii) a court has granted a temporary injunction or makes another temporary order preventing the defendant from continuing to publish, or from republishing, the matter pending the determination of the proceedings; or
  - (iii) a court has granted a final injunction or makes another final order preventing the defendant from continuing to publish, or from republishing, the matter;
- (b) the power can be exercised only in relation to a digital intermediary who is not a party to the defamation proceedings;
- (c) unlike the UK power:
  - (i) the power is not confined to operators of websites, but extends to digital intermediaries generally, including when they may not be liable for defamation; and
  - (ii) the power is not limited to ordering the removal of the matter, but extends to any step (including an access prevention step) the court considers necessary in the circumstances to prevent or limit the continued publication or republication of the digital matter or to comply with, or otherwise give effect to, the judgment, injunction or other order mentioned in paragraph (a);
- (d) except for a first temporary order that needs to be made expeditiously pending another hearing, a court must give the digital intermediary an opportunity to be heard about whether it is appropriate for the order to be made;
- (e) the power may be exercised even if the digital intermediary is not, or may not be, liable for defamation for the publication of the digital matter concerned;
- (f) the provision conferring the power is:
  - (i) expressed not to limit other powers the court has apart from the provision to make these kinds of orders; and
  - (ii) not intended to affect the high bar set at general law for granting injunctions or otherwise to affect the tests applied by courts in deciding whether to make orders to restrain the publication, continued publication or republication of defamatory matter.

The aim of conferring the power is to ensure a complainant who has obtained an order or judgment against a poster of defamatory digital matter will have the court's assistance if the poster does not comply, or appears unlikely to comply, with the court's order or judgment and it is appropriate for the court to require a digital intermediary to take steps to assist the complainant, for example, by blocking access to the matter.

### **Making of orders to take access prevention steps or other steps**

Clause 37 confers a power on courts to make orders against digital intermediaries to take access prevention steps or other steps in relation to the publication of digital matter if they are not parties to certain defamation proceedings. The provision conferring the power makes it clear the power can be exercised in relation to a digital intermediary even if the intermediary is not liable for defamation because of a statutory exemption or defence.

## **Clause 38. Section 41 amended (Giving of notices and other documents)**

### **Document giving or service amendments**

Section 41 of the Act, as amended by the Stage 1 amendments, clause 21, provides a notice or other document permitted or required by the Act to be given to, or served on, a person may be given or served by sending it to an email address specified by the person for giving or serving documents on the person. A concerns notice is an example of a document to which section 41 applies.

The use of the word 'specified' in the provision suggests, on one view, the recipient must indicate in some formal way an email address for giving or serving documents on the recipient for the Act. Also, the provision is limited to electronic communication using emails and does not cover other forms of electronic communication commonly used nowadays to send documents, particularly to digital intermediaries.

Clause 38(1) and (2) enable any form of electronic communication, including without limitation emails and messaging, to be used to give or serve documents if the recipient indicates an electronic address or location for giving or serving documents on the recipient using the type of communication. The use of the word 'indicated' is intended to capture not only express statements about it, but also conduct by or on behalf of the recipient that might reasonably be considered indicative of an electronic address or location for sending documents to the recipient.

Clause 38(3) includes examples of when a recipient indicates an electronic address or location for giving or serving documents. The examples are focused on conduct by or on behalf of recipients, including digital intermediaries, that might reasonably be considered indicative of an electronic address or location for giving or serving documents on the recipients.

Clause 38(4) amends section 41 of the Act to ensure consistency of language in the section. The section, apart from the subsection amended, refers to both giving and serving documents.

## **Clause 39. Part 7, Division 2 inserted**

### **Consequential, related or minor amendments**

Clause 39 inserts a Division of savings and transitional provisions containing the provisions mentioned above for the Stage 2, Part A amendments.

Clause 39 contains savings and transitional provisions for the:

- amendments concerning offers to make amends;
- amendments concerning the giving or service of documents;
- new statutory exemptions and defence;
- amendments concerning preliminary discovery or non-party digital intermediary orders.

The amendments concerning offers to make amends will apply in relation to an offer to make amends made after the commencement of the amendments regardless of whether the offer concerns a publication of matter occurring before or after the commencement. The existing law will continue to apply to offers to make amends made before the commencement.

The amendments concerning the giving or service of documents will apply to documents given or served after the commencement of the amendments regardless of whether the proceedings involve causes of action accruing before or after the commencement or the proceedings were commenced before or after the commencement. The existing law will continue to apply to the giving or service of documents before the commencement.



## **Savings and transitional provisions for the new statutory exemptions**

Subject to an exception, the exemptions and defence will apply to causes of action accruing after the amendments commence while the existing law will continue to apply to causes of action accruing before the commencement. At general law, a cause of action accrues when the matter is published. The exception relates to multiple publications of the same or substantially the same matter where one or more publications occur before the commencement and the others occur after the commencement. The existing law will continue to apply to the publications after the commencement if they occur within 12 months after the commencement.

For example, if a post or multiple posts of digital matter are made on a social media platform after the amendments have commenced, the exemptions and defence will apply to the causes of action resulting from those publications. However, if a post of the digital matter is made on a social media platform before the commencement and then is re-posted after commencement (but within 12 months after the first post), the existing law will continue to apply to both the first post and the re-post.

The application of these savings and transitional provisions is affected by the Stage 1 amendments concerning the limitation period for actions for defamation. Proceedings for defamation must generally be commenced within 12 months after the cause of action accrues. As previously indicated, a cause of action for defamation accrues at general law when the matter is first published. However, if substantially the same matter is republished, the limitation period for the republished matter also runs from the date of the first publication of the matter (this is sometimes called the single publication rule).

## **Savings and transitional provisions for amendments concerning preliminary discovery or non-party digital intermediary orders**

With two exceptions, the amendments will apply to orders made after the commencement of the amendments regardless of whether the proceedings involve causes of action accruing before or after the commencement or the proceedings were commenced before or after the commencement. The exceptions are an order made before the commencement or an order varying or revoking an order made before the commencement. The existing law will continue to apply to these exceptions.

### **Division 3                      Absolute privilege amendments**

#### **Clause 40. Section 24 amended (Defence of absolute privilege)**

#### **Model amendments to Model Defamation Provisions**

It is a defence under both the general law and section 24 of the Act if the defendant in proceedings for the publication of defamatory matter proves the publication occurred on an occasion of absolute privilege. It is also a defence under both the general law and section 27 of the Act if the defendant proves the publication occurred on an occasion of qualified privilege.

The general law and section 24 of the Act do not provide for the defence of absolute privilege to apply generally to publications of defamatory matter to police forces or services. Typically, defendants rely on the defence of qualified privilege (whether at general law or under the Act) as a defence for these kinds of publications. Although the defence of absolute privilege is indefeasible once established, the defence of qualified privilege can be defeated if the plaintiff proves the defendant was actuated by malice. See generally *Roberts v Bass* (2002) 212 CLR 1.

Anecdotal evidence indicates the threat of potential defamation proceedings may be deterring some people from making complaints to police forces or services and other complaints handling bodies. Also, feedback from stakeholders suggests the defence of qualified privilege does not provide a sufficient safeguard against this deterrent effect. In particular, there is uncertainty about the kinds of publications that will attract the defence of qualified privilege at general law. This is because the defence at general law requires both the publisher to have an interest in communicating, or a legal, social or moral duty to communicate, the information concerned and the recipient to have a corresponding or reciprocal interest or duty. For a recent example, see *Sherman v Lamb* [2022] QDC 215.

Clause 40(1) amends section 24 of the Act to extend the defence of absolute privilege to publications of defamatory matter to a person who, at the time of the publication, is an official of a police force or service of an Australian jurisdiction and it is published to the official while the official is acting in an official capacity.

The term ***Australian jurisdiction*** is defined in section 3 of the Act to mean a State, a Territory or the Commonwealth. Consequently, the expression 'police force or service of an Australian jurisdiction' used in the amendment will cover the police forces or services of each State and Territory and also of the Commonwealth.

Clause 40(2) defines the term ***official*** of a police force or service of an Australian jurisdiction for the amendment to mean:

- (a) an officer, employee or member of staff of the police force or service; or
- (b) another person engaged to act for or on behalf of the police force or service.

The term is intended to cover not only employees, staff members and office holders (including the head of the police force or service and its police officers and administrative staff) but also other persons who act for or on behalf of the force or service in an official capacity (for example, police officers of other jurisdictions or contractors).

#### **Clause 41. Part 7, Division 3 inserted**

Clause 41 contains savings and transitional provisions for the amendments. The amendments will apply to publications after the amendments commence while the existing law will continue to apply to publications before the commencement.

#### **Part 4 Repeal of Act**

##### **Clause 42. Repeal of Act**

This is a standard clause that provides that the *Defamation Legislation Amendment Act 2024* will be repealed on the day after it commences.