

PUBLIC BRIEFING ON THE DEFAMATION LEGISLATION AMENDMENT BILL 2025
Attorney-General's Department

Madam CHAIR: On behalf of the committee, I welcome everyone to this public briefing on the Defamation Legislation Amendment Bill 2025.

I welcome to the table to give evidence to the committee, from the Attorney-General's Department, Ms Leonique Swart, Deputy Chief Executive Officer, and Ms Hannah Clee, Acting Director of Legal Policy. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee, and look forward to hearing from you today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public briefing and is being webcast through the Assembly's website. A transcript will be made for use of the committee and may be put on the committee's website.

If, at any time during the hearing, you are concerned that what you say should not be made public you may ask that the committee goes into closed session to take your evidence in private.

Could you please each state your name and the capacity in which you are appearing. Ms Swart, would you like to make an opening statement?

Ms SWART: Leonique Swart, Deputy Chief Executive Officer. I will hand to my colleague to make an opening statement.

Ms CLEE: Hannah Clee, Acting Director of Legal Policy, Attorney-General's Department. I will be making the opening statement on behalf of the department.

We thank the committee for the opportunity to brief on the Defamation Legislation Amendment Bill 2025. Through this briefing our intention is to provide the committee with context to the Bill through a snapshot of defamation law; the application in the Northern Territory of the *Defamation Act 2006*, as amended by the Bill; note how defamation law is governed and how the amendments were developed and consulted on; and to provide a short overview of the key amendments contained in the Bill.

Defamation law is the body of law that aims to protect individuals, groups and entities from the publication of false or damaging statements that may cause harm to reputation or standing in society. The law needs to balance the protection of reputation with the values relating to free speech, along with the constitutional protections of political communication.

An action for defamation requires proof that statements have been communicated by publishing to a third party, whether written, spoken or electronic; must identify or be about the plaintiff; and must be defamatory and have caused, or are likely to cause, the plaintiff harm because of a negative claim about the plaintiff.

The *Defamation Act 2006* is the Act for the Northern Territory that promotes uniform laws of defamation applying in Australia. The objects of the Act, aside from promoting uniform laws, are:

- 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
- to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter
- to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.

You might have picked up on the reference to uniform laws. Uniform laws are laws that are harmonised across a number of, or all, jurisdictions. It requires cooperation between jurisdictions; and occurs where it is considered appropriate to take a consistent legislative approach to an issue or matter. In this case, defamation laws are uniform through legislation that is drafted as model laws.

Model laws are a suggested example of a law that is centrally drafted for multiple independent legislatures to use as a base for making their law on the same subject matter, with local variations as necessary to achieve the agreed uniform national policy through local law.

The purpose of the model law is uniformity, supported by the model law containing agreed legislative wording that is made or used word for word, after minor modification or as a general guide for making the law. The benefit of a model law is to allow for uniform justice.

Defamation law in Australia is legislated through uniform laws that are developed through model laws; namely, the model defamation provisions (MDPs). The model laws are made through an intergovernmental agreement—specifically for MDPs, the Model Defamation Provisions Intergovernmental Agreement, which I will refer to as ‘the agreement’—governed through the Standing Council of Attorneys-General (SCAG). The MDPs are drafted by the Parliamentary Counsel’s Committee.

The Northern Territory is a party to the agreement, as are all jurisdictions across Australia. The agreement supports uniform defamation laws in Australia, agreeing to enact uniform model provisions for defamation, the MDPs, and was made in November 2004. Each state and territory subsequently enacted legislation to give effect to the MDPs.

Our Act, enacted in 2006, reflects the agreed MDPs. Provisions concerning the limitation period for defamation Acts were also inserted in the *Limitation Act 1981* at that time.

The agreement also established a working party with action officers from relevant agencies in each jurisdiction who participate in discussion and development of the MDPs. The working party reports to SCAG.

Under the agreement where state and territory Attorneys-General agree through SCAG to an amendment to the MDPs, each state and territory is obliged to secure the introduction, passage and commencement of legislation to give effect to the agreed amendments.

In 2018 it was agreed at SCAG to reconvene the working party to review the MDPs. This review was conducted in two stages. The stage 1 and stage 2 reviews were led by New South Wales, for stage 1 and stage 2 part A, and Victoria for stage 2 part B. Consultation occurred as part of these reviews.

The first stage resulted in the Attorneys-General agreeing to the Model Defamation Amendment Provisions 2020. All jurisdictions other than the Northern Territory and Western Australia have now enacted the stage 1 amendments. Western Australia has indicated an intent to do so.

The second stage of review contained two parts: part A considering responsibilities and liability of digital intermediaries for defamatory content published by third parties online; and part B considering the expansion of the defence of absolute privilege to publications made to certain complaint-handling bodies.

In September 2023 Attorneys-General agreed to the Model Defamation Amendment (Digital Intermediaries) Provisions 2023, which formed part of stage 2 part A, and the Model Defamation Amendment (Absolute Privilege) Provisions 2023, which is the stage 2 part B parts, as well as guiding principles for extending absolute privilege to matter published to a complaint-handling body.

It was also agreed that a review of both stage 1 and stage 2 amendments was to commence no later than three years after the commencement of stage 2 in all implementing states and territories. Subject to the passage of this Bill, the Northern Territory will be the fourth jurisdiction to have enacted both stage 1 and stage 2 amendments, following ACT, New South Wales and Victoria.

I turn to the scope of the Bill. The Bill amends defamation law in the Act and the *Limitation Act 1981* to implement the nationally agreed changes to the law of defamation as drafted in the Model Defamation Amendment Provisions 2020, the stage 1 amendments; Model Defamation Amendment (Digital Intermediaries) Provisions 2023, the stage 2 part A amendments; and Model Defamation Amendment (Absolute Privilege) Provisions 2023, the stage 2 part B amendments. It also makes an unrelated, but related to defamation, amendment to criminal defamation in the *Local Court (Criminal Procedure) Act 1928*. The Bill, therefore, makes amendments to the defamation laws in the Northern Territory to give effect to the changes that are being made, or have already been made, to defamation laws across Australia.

Enacting the Bill will bring the Northern Territory up to date in relation to defamation reforms and fulfil our obligations under the agreement. This reduces reputational risk to the Northern Territory, given we are only one of two jurisdictions to yet implement stage 1 reforms, and to also maintain the ongoing agreement for uniform laws. It eliminates the risk of forum shopping. This is where plaintiffs seek to have their case heard in the court they believe is most likely to provide a judgement or result in their favour, which may increase litigation in the NT due to the less stringent legislative regime. It is for the uniformity of laws and promotes efficient use of court time.

In terms of stakeholders, media organisations are particularly enthusiastic for the stage 2 reforms. This is as the rapid development of the digital age has broadened the media landscape, with ordinary individuals now able to publish content widely via social media. A 2018 report by the University of Technology Sydney highlighted that defamation cases involving digital publications had surged, reflecting the broader shift towards online platforms.

The reforms clarify certain issues relating to serious harm as an element of defamation, liability for third-party content posted online and the application of certain defences. The most significant of the stage 1 reforms that are contained in the Bill are:

- that a defamed person (the plaintiff) must suffer serious harm in order to have a successful defamation claim against a person (the publisher)
- a single publication rule for the purposes of determining issues concerning the limitation period of one year for the commencement of defamation proceedings
- that the plaintiff must, rather than may, provide a concerns notice to the publisher before formally commencing proceedings, with the publisher having the rights to make amends
- defences for publishers concerning matters published in the public interest or as part of peer-reviewed academic or scientific tomes.

The most significant stage 2 reforms that are in the Bill are:

- two conditional statutory exemptions from defamatory liability for a narrow group of intermediaries, including search engines, in relation to organic search results
- a new innocent dissemination defence for internet intermediaries subject to a simple complaints process
- a new court power to make orders against non-party internet intermediaries to prevent access to defamatory matters online
- a requirement that courts consider balancing factors when making preliminary discovery orders
- updates to the mandatory requirements for an offer to make amends for online publications
- additional electronic means by which documents may be given or served
- an expansion to the defence of absolute privilege to matter published to an official of a police force service or acting in official capacity.

I note that the Attorney-General outlined the Bill in detail during her explanatory speech and, as such, do not propose to repeat that content for this briefing. However, by way of summary, Part 2 of the Bill makes a number of amendments to the act and the *Limitation Act*:

- to streamline court processes by making the plaintiff outline their concerns and request for damages to the defendant prior to commencing court action. This is intended to promote resolution of complaints prior to litigation, thereby saving court time and resources
- changing the legal test for damage caused to the plaintiff. This means that the plaintiff must establish that they have suffered, or are likely to suffer, serious harm due to publication. This change is designed to prevent backyarders or trivial or minor defamatory publications leading to court proceedings
- establishing new defences for publications made in the public interest where a party demonstrates the criteria is met
- establishing a single publication rule. This prevents the limitation being extended by later publications.

Part 2 also makes an amendment related to the MDPs to the *Local Court (Criminal Procedure) Act 1928* to prevent an offence against section 204 of the Criminal Code which relates to unlawful publication of defamatory matter to be dealt with summarily. This will allow the Local Court to deal with the offence rather than requiring a Supreme Court trial.

Part 3 of the Bill implements changes to limit digital intermediary liability for defamation. Digital intermediaries are virtually any digital platform, including social media platforms, review websites, search engines such as Google and members of the public who host community Facebook pages. The law of defamation extends to digital intermediaries which means, for example, Person A has a public Facebook account; Person B, a member of the public not related or known to Person A, posts a comment in the public comment forum that defames Person C; Person A may be held liable in defamation.

This Bill limits the extent of liability by:

- creating exemptions from liability for defamation where a digital platform is considered passive or is a search engine provider that requires a user to input search terms to access the material
- creating a statutory defence to digital intermediaries (Person A) subject to having an accessible complaints mechanism and includes taking reasonable access prevention or removal steps
- providing for take-down orders to prevent access to material found to be defamatory.

While the Bill is largely technical in scope, the proposed amendments support the Northern Territory's obligations under the intergovernmental agreement and go towards consistency in the application of defamation law across Australia.

In closing, the Attorney-General's Department would like to thank the drafters from the Office of the Parliamentary Counsel for their help and assistance during the drafting process of this Bill through enabling both the stage 1 and stage 2 MDP reforms to be covered in a single Bill, and our action officers who participated in the national working party and in the drafting of the Bill and who were, unfortunately, unable to attend today due to personal leave.

Madam CHAIR: Thank you, Ms Clee.

J DAVIS: I pass my thanks to whoever prepared the explanatory statement. As someone who is pretty new to this job, it was extremely clear and helpful. Thank you very much to whoever did that.

I have a couple of questions. Do any clauses in this piece of legislation differ from the national model?

Ms CLEE: As mentioned, these model laws have been drafted to reflect the national MDPs that were drafted.

J DAVIS: So, it is all consistent.

I am not sure whether this is something you can comment on or not. Does the department have any concerns about any aspects of the legislation?

Ms SWART: As a department, no, I do not think we have any concerns. Even if we did, we probably could not make that express, because that is the subject of advice to government. We participated through the working party. The way that works is that we provide input through the development of the legislation and the policy that goes behind it. A lot of those issues are intimated at that stage.

J DAVIS: To follow on from that, given the specifics of our jurisdiction and that many people here operate within a different context to many other places, is there any consideration of that or is there anything you can see that may be of concern about that? Does that question make sense?

Ms SWART: Yes. Is there is any residual concern about how it might apply in the Northern Territory? No. This is an area of law that expands because it has now moved to the digital age. It is more ubiquitous, so the operation would be fairly similar in the Northern Territory compared with other jurisdictions, in any event.

The only thing we have adjusted for the Northern Territory—but that is not related to the model laws—is the provision about the offence being able to be prosecuted in the summary jurisdiction. That sits outside the uniform law.

The process to develop this model legislation was quite extensive. That explanatory statement was helpfully developed through other jurisdictions as well, so we used some of that.

Also, on the New South Wales communities and safety department website there is a useful summary about the background and how it was developed, including all the submissions that were put forward from various

stakeholders that were consulted. That extended into the Northern Territory; I do not think there is anything specific to the Northern Territory that was submitted.

We can provide that background to the committee secretariat if that is of any use.

J DAVIS: I would appreciate that; thank you.

Mr HOWE: Thank you Ms Clee and Ms Swart for coming in today and for all the effort you have put in. It is deeply appreciated. Apologies for my tardiness on arrival. I appreciate the work you guys have done.

I only have one question. What feedback, if any, do we have from other states who have already passed the legislation?

Ms CLEE: It is too early at this stage. Victoria only passed theirs at the end of last year, so it is still early days for the stage 2 reforms in particular. I understand that we included some slight amendments that arose as a result of the stage 1 amendments that we were able to incorporate into our Bill.

Mr HOWE: Thank you. That is all.

Madam CHAIR: Chansey, do you have any questions?

Mr PAECH: No. I acknowledge that this was being drafted before the August election. There has been a huge volume of work the department has undertaken for a long time. It is good to see it coming to fruition.

The only question for the department is probably one more about the work that is anticipated about community education and the changes when they take effect. Obviously, there should be a communication plan or strategy with media outlets and general Territorians using social media around the defamation changes. I am mindful that has probably been worked on, but is that something that is being considered?

Ms CLEE: Yes. We always try to communicate changes of the law with fact sheets and the like. We will take broader consultation and communication as may be required.

Ms SWART: We will make material available on the Attorney-General's Department website. That is what we normally do. We can have another look at our plan for communications post-passage and ensure it gets out to the community as much as possible.

Mr PAECH: Thank you. We can work with the government, members of the committee. The general concern with the new legislative change is multicultural and First Nations communities being aware of what the changes are in case they are in breach of any new legislative changes. We can take that up as a recommendation, potentially, for the committee. I have no further questions, thank you.

Madam CHAIR: Does the committee have any further questions? Thank you for coming in today. Thank you for taking the time for that. I appreciate it ...

J DAVIS: Not a question. I want to check whether, while you are here, there is anything you want to add or you think we need to be aware of in considering this Bill.

Ms SWART: I have nothing further to add.

Madam CHAIR: The comment from Chansey was that it has been worked on for a while now. That brings us to the end. Thank you very much ladies—Leonique and Hannah. Thank you, Chansey.

The committee concluded.
