

Defamation and Other Legislation Amendment Bill 2025

Explanatory Notes

Short title

The short title of the Bill is the Defamation and Other Legislation Amendment Bill 2025.

Policy objectives and the reasons for them

The key policy objective of this Bill is to amend the *Defamation Act 2005* 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 Queensland, the MDPs were enacted by the *Defamation Act 2005* (the Defamation Act).

All the States and Territories are parties 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 Standing Council of Attorneys-General (SCAG) on proposals to amend the MDPs.

In 2018, the then Council of Attorneys-General reconvened the DWP to review the MDPs. The Stage 1 Review of the MDPs, led by New South Wales, was conducted in 2019 and 2020.

The DWP recommended to the Council of Attorneys-General that certain amendments, also prepared by the Australasian Parliamentary Counsel's Committee, be made to the MDPs as part of Stage 1. The Council unanimously agreed in July 2020 to support the enactment of the *Model Defamation Amendment Provisions 2020* (the Stage 1 amendments) by each State and Territory to give effect to the recommended amendments. In Queensland, the Stage 1 amendments were enacted by the *Defamation (Model Provisions) and Other Legislation Amendment Act 2021*.

The Stage 2 Review of the MDPs was commenced in 2021 by the DWP. The Stage 2 Review of the MDPs was comprised of Parts A and B. Part A, led by New South Wales, focused on the question of internet intermediary liability for defamation for the publication of third-party content. Part B, led by Victoria, focused on whether the defence of absolute privilege should be extended to cover reports to police and some other complaints handling bodies. At the conclusion of the policy development process

for both Parts A and B of Stage 2, the DWP recommended to SCAG that certain amendments prepared by the Australasian Parliamentary Counsel's Committee be made to the MDPs.

On 22 September 2023, the members of SCAG, other than South Australia, approved by majority all the recommended amendments for Part A (the Stage 2, Part A amendments), subject to the completion of Cabinet processes where necessary. SCAG also approved by majority the recommended amendments for Part B (the Stage 2, Part B amendments), subject to the completion of Cabinet processes where necessary.

The Stage 2, Part A amendments are contained in the *Model Defamation Amendment (Digital Intermediaries) Provisions 2023*. The Stage 2, Part B amendments are contained in the *Model Defamation Amendment (Absolute Privilege) Provisions 2023*. Both sets of amendments and accompanying explanatory notes are available on the website of the Australasian Parliamentary Counsel's Committee (<https://pcc.gov.au>).

The Bill also includes amendments to the criminal defamation offence in section 365 of the Criminal Code to ensure that an accused person who may access the new defence or statutory exemption for defamation in civil proceedings as a result of the Stage 2 amendments, also has a lawful excuse for criminal defamation.

Achievement of policy objectives

The Bill will enact both the Stage 2, Part A amendments and the Stage 2, Part B amendments in Queensland. The aims of the amendments are as follows:

- to exempt a digital intermediary from liability for defamation for the publication of digital matter if—
 - 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
 - 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;
- 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;
- 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;
- 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;
- 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;

- 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;
- 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;
- to provide for savings and transitional matters for the amendments; and
- to make certain other consequential, related or minor amendments.

The Bill will also amend the existing criminal defamation offence in section 365 of the Criminal Code to ensure that the new defence for digital intermediaries and the new statutory exemptions from liability operate as a lawful excuse in criminal defamation proceedings. This will ensure that digital intermediaries who may be protected by the new exemptions or defence in civil proceedings do not remain liable for criminal defamation.

Alternative ways of achieving policy objectives

There are no alternative ways of implementing the Stage 2, Part A amendments and the Stage 2, Part B amendments in Queensland.

Estimated cost for government implementation

The costs of implementation will be met from existing resources.

Consistency with fundamental legislative principles

The fundamental legislative principles require legislation to have sufficient regard to the rights and liberties of individuals (section 4(2)(a) of the *Legislative Standards Act 1992* (LS Act)).

The Bill is generally consistent with the fundamental legislative principles set out in the LS Act. Potential breaches of the fundamental legislative principles are addressed below.

Evidential burden of lawful excuses

Legislation should not reverse the onus of proof in criminal proceedings without adequate justification (section 4(3)(d) of the LS Act).

The Bill provides for the new exemptions and defence for digital intermediaries to operate as lawful excuses in a prosecution criminal defamation. Under section 365(4) of the Criminal Code, the prosecution has the burden of negating the existence of a lawful excuse if, and only if, evidence directed to establishing the excuse is first adduced by or on behalf of the accused person.

This is consistent with the general approach in criminal proceedings that the accused person must satisfy the evidential onus of proof for any defence or excuse they raise

and, if the accused person does satisfy the evidential onus, the prosecution then bears the onus of negating the excuse or defence beyond reasonable doubt.

The requirement for the accused person to first adduce evidence directed to establishing the new lawful excuses acknowledges that matters related to them are peculiarly within the knowledge of the accused person, and therefore that the accused person is better positioned than the prosecution to meet the evidential burden.

Human rights

Whether legislation has sufficient regard to rights and liberties of individuals (section 4(2)(a) of the LS Act) depends on whether rights depends on whether legislation abrogates rights from any source without sufficient justification.

Limitations on human rights imposed by the Bill, and their justifications, are addressed in the Statement of Compatibility with Human Rights.

Consultation

Stakeholder consultation was undertaken by the DWP to inform the policy development, drafting process and finalisation of the Stage 2, Part A amendments and Stage 2, part B amendments, including the following:

- In April 2021, a Discussion Paper covering Part A and Part B of the Stage 2 review was released for public consultation. 48 written submissions were received. This was followed by four large stakeholder roundtables to discuss issues raised in written submissions.
- In August 2022, an exposure draft of the Part A amendments and an accompanying Background Paper were released for public consultation, followed by one large stakeholder roundtable. 36 written submissions were received.
- In August 2022, an exposure draft of the Part B amendments and an accompanying Consultation Paper were released for public consultation. 19 written submissions were received.

A wide range of stakeholders participated in the consultation. For Part A, they included technology sector stakeholders, peak legal bodies, legal practitioners, academics, media companies, advocacy groups and individuals. For Part B, they included complaints-handling bodies, victims' rights groups, peak legal bodies, legal practitioners and academics.

Consistency with legislation of other jurisdictions

The Bill aligns with the Stage 2, Part A amendments and the Stage 2, Part B amendments agreed to by a majority of SCAG in September 2023. To date, New South Wales, Victoria, the Australian Capital Territory, Tasmania, and the Northern Territory have enacted the Stage 2, Part A amendments and the Stage 2, Part B amendments.

Notes on provisions

Clause 1 provides that the Bill, when enacted, will be cited as the *Defamation and Other Legislation Amendment Act 2025* (the amending Act).

Clause 2 provides that the Bill, when enacted, will commence on the day that is 7 days after the date of assent.

Part 2 - Amendment of Defamation Act 2005

Clause 3 provides that the amending Act amends the *Defamation Act 2005* (the Defamation Act).

Clause 4 omits section 4(2), which provides that notes do not form part of the Defamation Act. This ensures that notes will form part of the Defamation Act, in accordance with section 14(4) of the *Acts Interpretation Act 1954*.

Clause 5 inserts new part 2, division 2A (Exemptions from liability for digital intermediaries) which contains new sections 10C to 10E.

New section 10C (Exemption for digital intermediaries providing caching services, conduit services or storage services) 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 on the intermediary proving: (a) that the matter was published using a caching service, a conduit service, a storage service or a combination of those services; (b) their role in the publication was limited to providing one or more of the services; and (c) they did not take an active role in the publication, for example, by initiating, promoting or editing the matter. However, the conditional requirement (c) that an intermediary did not take an active role in publication does not apply where action is required by or under a law of an Australian jurisdiction or an order by an Australian court or tribunal.

The new section 10C contains the following definitions for the section - ‘*caching service*’, ‘*conduit service*’, and ‘*storage service*’.

New section 10D (Exemption for search engine providers) 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 only available 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. 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 only applies to search results generated by the search engine limited to identifying a webpage on which content is located by reference to one 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. The exemption does not apply to 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).

The exemption confirms the High Court majority judgment of *Google LLC v Deferos* [2022] HCA 27 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 new section 10D contains the following definitions for the section – ‘*search engine*’, ‘*search engine provider*’, and ‘*search result*’.

New section 10E (Early determination of digital intermediary exemptions) sets out a framework for a judicial officer to determine the issue of whether a digital intermediary exemption applies.

Clause 6 amends section 15 (Content of offer to make amends) to:

- provide that an offer to make amends may include an offer to take access prevention steps in relation to digital matter; and
- allow a publisher to offer to take access prevention steps in relation to digital matter in an offer to make amends instead of, or in addition to, either or both of the mandatory remedial offers in sections 15(1)(d) and (e) of the Defamation Act.

Clause 7 inserts new section 23A (Orders for preliminary discovery about posters of digital matter) which confirms a court, in making an order for, or in the nature of, preliminary discovery is required to consider the objects of the Defamation Act as well as privacy, safety or other public interest matters that may arise if the order is made. For example, the provision would require the court to consider 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 8 amends section 27 (Defence of absolute privilege) 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.

Currently, it is a defence under both the general law and section 27 of the Defamation 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 30 of the Defamation Act if the defendant proves the publication occurred on an occasion of qualified privilege.

The general law and section 27 of the Defamation 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 Defamation 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.

The clause also inserts a definition of ‘*official*’ of a police force or service of an Australian jurisdiction for this section. 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 9 inserts new section 31A (Defence for publications involving digital intermediaries) to provide a defence to the publication of defamatory digital matter with the following features:

- the defendant must prove the following:
 - the defendant was a digital intermediary in relation to the publication of defamatory digital matter;
 - the defendant had, at the time of the publication, an accessible complaints mechanism for the plaintiff to use;
- if the plaintiff gave the defendant a written complaint about the publication containing certain basic information – the defendant must provide, in addition to both the matters mentioned above, 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;
- 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 to take reasonable access prevention steps 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 act, or decide not to take action, in response to the complaint.

An example of reasonable access prevention steps 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.

There are no formal requirements for the format of the complaint other than it 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.

If a complaint is not made, a digital intermediary will also have the benefit of the defence if the intermediary has provided an accessible complaints mechanism. The digital intermediary will not be required to prove it took reasonable access prevention steps in these circumstances.

This new defence seeks to overcome the following problems with the existing defence of innocent dissemination (section 32 of the Defamation Act) in its application to digital intermediaries:

- 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.
- The defendant must also prove the defendant neither knew, nor ought reasonably to have known, the matter was defamatory (see section 32(1)(b)) and this lack of knowledge was not due to any negligence on the part of the defendant (see section 32(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.
- The defence provides no specific timeframe within which the defendant must act after the defendant has the required knowledge about the defamatory matter.

The defence under new section 31A 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 10 inserts new section 39A (Orders against non-party digital intermediaries concerning defamatory digital matter) which 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 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 11 amends section 44 (Giving of notices and other documents) 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.

Clause 12 inserts new headings for part 6 (Transitional provisions) and part 6, division 1 (Transitional provision for Act No. 55 of 2005).

Clause 13 inserts a new heading for section 49 (Causes of action for publication of defamatory matter).

Clause 14 inserts a new heading for part 6, division 2 (Transitional provision for Defamation (Model Provisions) and Other Legislation Amendment Act 2021).

Clause 15 inserts a new heading for section 50 (Publication of defamatory matter after commencement).

Clause 16 inserts a new part 6, division 3 (Transitional provisions for Defamation and Other Legislation Amendment Act 2025) which contains new sections 51 to 56.

New section 51 (Definitions for division) contains the following definitions for new part 6, division 3 – ‘*2025 amendments*’, ‘*existing law*’, ‘*post-commencement action*’ and ‘*pre-commencement action*’.

New section 52 (Digital intermediary amendments) provides that subject to an exception, the statutory exemptions and defence in the amending Act 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 1 year 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 1 year after the first post), the existing law will continue to apply to both the first post and the re-post.

The application of new section 52 is affected by the Stage 1 amendments concerning the limitation period for actions for defamation. Proceedings for defamation must generally be commenced within 1 year after the cause of action accrues. As indicated above, 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).

New section 53 (Offer amendments) provides that the amendments about 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.

New section 54 (Preliminary discovery or non-party digital intermediary order amendments) provides that, 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.

New section 55 (Absolute privilege amendments) provides that the amendments to the defence of absolute privilege will apply to publications after the amendments commence while the existing law will continue to apply to publications before the commencement.

New section 56 (Documents giving or service amendments) provides that 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.

Clause 17 corrects a schedule heading (Schedule numbers 1-3 not used) to reflect that schedule number 4 is also not used.

Clause 18 amends Schedule 5 (Dictionary) and inserts the following terms ‘*access prevention step*’, ‘*digital intermediary*’, ‘*digital matter*’, ‘*online service*’, and ‘*poster*’.

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

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.

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 one 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.

Part 3 – Amendment of Criminal Code

Clause 19 provides that part 3 amends the Criminal Code.

Clause 20 amends section 365 (Criminal defamation) of the Criminal Code to provide that a person has a lawful excuse for the publication of defamatory matter if, having regard to the circumstances happening before, at the time of publication or after the publication, the accused person would:

- not be liable for defamation for the publication under section 10C or 10D of the Defamation Act if the person who had defamatory matter about them published brought civil proceedings for defamation against the accused person; or
- have a defence stated in section 31A of the Defamation Act for the publication if the person who had defamatory matter about them published brought civil proceedings for defamation against the accused person.

The clause also amends section 365 to exclude the defence stated in section 31A of the Defamation Act from the definition of ‘relevant defence’. The effect of this change is to ensure that circumstances after the publication can be had regard to in determining whether a person has a lawful excuse in the form of the defence stated in section 31A of the Defamation Act.

Clause 21 inserts a new part 9, chapter 113 (Transitional provision for Defamation and Other Legislation Amendment Act 2025) which contains new section 768.

New section 768 provides that:

- section 365 of the Criminal Code, as in force immediately before commencement, continues to apply to a proceeding for an offence in relation to defamatory matter published before the commencement; and

- new section 365 applies to a proceeding for an offence in relation to defamatory matter published after the commencement.