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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CIVIL LAW (WRONGS) AMENDMENT BILL 2024

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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Attorney-General**

CIVIL LAW (WRONGS) AMENDMENT BILL 2024

This Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have a significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004 (HRA)*.

This explanatory statement relates to the *Civil Law (Wrongs) Amendment Bill 2024 (the Bill)*. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill.

The statement is to be read in conjunction with the Bill. It is note, and is not meant to be, a comprehensive description of the Bill.

OVERVIEW OF THE BILL

The Bill amends the *Civil Law (Wrongs) Act 2002 (the CLWA)* to modernise and strengthen model defamation laws by:

- exempting digital intermediaries from liability in defamation law where their role in publishing material online is merely passive, specifically where they only provide conduit, caching or storage services;
- exempting search engines from liability in defamation law for results generated through standard, automated functions (except where the results are promoted or sponsored for commercial benefit);
- introducing a new “innocent dissemination” defence for digital intermediaries, so that a digital intermediary that removes or blocks access to allegedly defamatory content that was published via its service or platform within seven days of receiving a complaint cannot be held liable for the content;
- empowering courts in defamation proceedings to make orders requiring a digital intermediary to remove or block access to defamatory content, regardless of whether that digital intermediary is party to the proceedings or is liable in defamation law;
- requiring courts to consider the object of uniform defamation laws, and any relevant privacy, safety and public interest considerations, when making preliminary discovery orders to assist plaintiffs to identify potential defendants (known as a *Kabbabe* order);
- amending the requirements under existing defamation law for ‘offers to make amends’, so that in matters concerning online content, an offer to remove, or block access to content is an acceptable alternative to publishing a correction; and

- extending the defence of absolute privilege in defamation law to disclosures made to the police, the ACT Human Rights Commission or other statutory bodies with functions that involve dealing with disclosures of criminal or unlawful conduct or that may receive disclosures of such conduct from vulnerable people.

CONSULTATION ON THE PROPOSED APPROACH

In November 2004, the Attorneys-General of the States and Territories agreed to support the enactment in their respective jurisdictions of the 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.

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 Council of Attorneys-General, as it then was, 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 by each State and Territory to give effect to the recommended amendments. The ACT implemented the Stage 1 reforms in 2021 (via the Civil Law (Wrongs) Amendment Bill 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 forces or services and some other complaints handling bodies.

In March 2021, Attorneys-General agreed to release a discussion paper for the Stage 2 review, in response to which almost 50 written submissions were received. A series of stakeholder roundtables were held in late 2021 to discuss the key issues.

In August 2022, the Meeting of Attorneys-General (as it then was) agreed to release for public consultation the draft Part A and B Model Defamation Amendment Provisions and an accompanying Background Paper. 53 submissions were received.

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 be 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 for some jurisdictions 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 for some jurisdictions where necessary.

CONSISTENCY WITH HUMAN RIGHTS

Rights Engaged

Defamation laws involve balancing the inherent tensions between the right to freedom of expression, and the right to privacy and reputation. In circumstances where these rights are in direct conflict, defamation laws often limit one in order to promote the other.

Any limitations imposed on human rights as a result of the Bill are considered to be reasonable, proportionate and justifiable.

This Bill engages the following rights:

- Right to life (section 9 HRA) – promoted
- Protection from torture and cruel, inhuman or degrading treatment etc (section 10 HRA) – promoted
- Protection of family and children (section 11 HRA) – promoted
- Right to privacy and reputation (section 12 HRA) – promoted and limited
- Right to freedom of expression (section 16 HRA) – limited

Rights Promoted

Right to reputation

The right to reputation protects personal honour and reputation and imposes an obligation on government to provide adequate legislation to that end. Under this right, individuals must be able to effectively protect themselves against unlawful attacks on their reputation and have an effective remedy against those responsible for such attacks.

The Bill promotes the right to reputation in several ways:

- This Bill introduces an ‘innocent dissemination’ defence for digital intermediaries. By encouraging digital intermediaries to resolve complaints expeditiously, the amendment creates an accessible, non-litigious and expeditious means by which members of the public can avoid or limit reputational harm caused by content published online. Given the costs associated with defamation actions, the complexity of defamation laws and the time it takes to pursue litigation, this is an important protection.
- The Bill promotes the right to reputation by empowering courts to make orders against a digital intermediary that is not party to the proceedings, requiring them to remove, block or disable access to defamatory material published via their platform or service. Therefore, the amendment recognises that even where a digital intermediary may not be liable in defamation law, they do have the ability to implement appropriate and efficient solutions which enable individuals to protect their reputation, and limit any damage caused by the material.

Right to privacy

Everyone has the right not to have their privacy interfered with unlawfully or arbitrarily. The new requirement in the Bill for courts to consider privacy, safety and relevant public interest considerations in making a Kabbabe order (an order requiring a digital intermediary to provide a complainant with identifying information in relation to the person who authored or originated the content, which will allow the complainant to commence defamation proceedings against the person identified) will promote the originator’s right to privacy, balanced against promoting the complainant’s right to reputation.

Other rights

The reforms also promote the following rights: the right to life, the protection from torture and cruel, inhuman or degrading treatment, and the protection of family and children.

The right to life includes a positive duty for the ACT Government to take appropriate steps to protect the right to life of those within its jurisdiction and to investigate arbitrary or unlawful killings. Likewise, the prohibition on torture and cruel, inhuman or degrading treatment requires the Government to prevent such conduct. The Bill removes barriers for individuals reporting crimes to police, and in doing so, supports the ability of police and other statutory bodies to provide services which protect the right to life, and prevent torture and cruel, inhuman and degrading treatment.

Children have special rights under human rights law, and the Government is required to support parents to exercise responsibility for their children. Family violence carries a real threat to life, and the ACT Government is acutely aware of its prevalence and the real risks it poses to the ACT community. By removing a barrier to victim-survivors reporting their experiences of family violence, the Bill supports parents to take steps to protect both themselves and their children from harm.

Rights Limited

Right to freedom of expression

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 16 of the HRA protects an individual's right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside the ACT.

The Bill introduces an innocent dissemination defence for digital intermediaries. To access this defence, when a digital intermediary receives a complaint alleging that content published via its platform or service is defamatory, it must remove or block ongoing access to that content within seven days.

This engages and limits the right to freedom of expression for the purpose of promoting the right to privacy and reputation, as by incentivising digital intermediaries to remove online content on the basis of untested allegations of defamation, there is a risk that lawful content will also be removed.

2. Legitimate purpose (s 28 (2) (b))

The legitimate purpose of introducing the innocent dissemination defence for digital intermediaries is to recognise the unique and significant risks the online environment poses to the right to reputation and to create an accessible way for individuals to protect their reputation.

3. Rational connection between the limitation and the legitimate purpose (s 28(2)(b))

The Bill will amend the CLWA to introduce an 'innocent dissemination' defence for digital intermediaries. To access this defence, when a digital intermediary receives a complaint alleging that content published via its platform or service is defamatory, it must remove or block ongoing access to that content within seven days.

A digital intermediary may only rely on the defence if it has an easily accessible complaints mechanism. For example, a digital intermediary may allow users to send their complaints via direct message, or to a publicly available email address.

However, complaints that allege defamation are untested, and digital intermediaries are not well-placed to assess the veracity or legal implications of content published via their platform. Therefore, by incentivising digital intermediaries to remove online content to mitigate the risks of liability in defamation law, there is a risk that lawful online content is also removed.

The limitation on the right to freedom of expression is rationally connected to the legitimate purpose of the reforms. The amendment incentivises digital intermediaries to both create accessible communication channels (such as a direct messaging service) for users, and to resolve complaints about allegedly defamatory content expeditiously.

4. *Proportionality (s 28(2)(e))*

The approach chosen in the Bill is the least restrictive means possible for achieving the legitimate objective of the reforms.

The internet has created new opportunities for the realisation of the right to freedom of expression. There is a plethora of online platforms that facilitate individuals to publish content in real time, to a global audience. However, these individuals do not have any pre-requisite responsibility to demonstrate the truthfulness or reasonableness of their publications.

There is an increasing recognition in both international and Australian case law that some features of online platforms increase the risk of defamation. Sir David Eady, former Judge of the High Court of England described content published via these platforms as “rather like contributions to a casual conversation...often uninhibited, casual and ill thought out”.¹

These features of the online environment, particularly given the absence of harm minimisation safeguards, present a significant risk to the right to reputation. This demands a policy response that prioritises non-litigious, timely resolutions. The innocent dissemination defence provides this solution, and by doing so, strikes a more appropriate balance between the right to freedom of expression and the right to reputation.

By prioritising timely solutions, the amendment also recognises that while a complainant may be able to commence defamation proceedings against those who do publish allegedly defamatory content, this is a time and cost intensive process. A complainant would have already suffered significant reputational harm before any defamation proceedings are finalised.

The innocent dissemination defence also has several safeguards to ensure that the limit on the right to freedom of expression is reasonable and justifiable.

¹ *Rana v Google Australia Pty Ltd* [2013] FCA 60, [71] (Mansfield J), quoting *Smith v ADVFN plc* [2008] EWHC 1797 (QB), [14] (Eady J).

The innocent dissemination defence allows a digital intermediary seven days in which to respond to a complaint alleging content is defamatory. While a shorter time-period may have provided a more robust protection of the right to reputation, it would also increase the risk that digital intermediaries remove lawful content to mitigate the risk of liability, which would likely have created a greater limitation on the right to freedom of expression. The seven-day period aims to provide an appropriate balance between a complainant's need for a prompt outcome, while also allowing a digital intermediary sufficient time to appropriately consider the complaint.

The defence is also defeated if the digital intermediary was actuated by malice in establishing or providing the online service by which the defamatory material was published. For example, if an individual creates a Facebook group for the purpose of encouraging parents and guardians to post inflammatory comments about the local school principal alleging the principal had been fired from their previous role, in circumstances where the individual had no reason to believe this was true, the individual may be actuated by malice and may not have the benefit of the defence in a defamation claim.

It should also be noted that the innocent dissemination defence is not the only defence available in defamation law, and a digital intermediary may choose to allow content to remain accessible online with the intention of relying on another defence in any subsequent proceedings. For example, defamation law has a defence for the publication of matter that concerns the public interest, and a defence for the publication of an honest opinion.

Right to reputation

Two amendments limit the right to reputation: (i) the introduction of a requirement for courts to consider an originator's right to privacy when granting a Kabbabe order; and (ii) extending the defence of absolute privilege to all matters published to police and other prescribed statutory bodies.

These are considered below in turn.

Introduction of requirement for courts to consider the right to privacy when making a Kabbabe order

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

The Bill introduces a requirement for courts to consider privacy, safety and any other relevant matters of public interest when determining whether it is appropriate to grant an order requiring a digital intermediary to identify an individual who has published content online anonymously, or under a pseudonym. By doing so, this amendment may limit the right to reputation, as it may result in courts refusing applications in order to preserve an individual's privacy.

2. Legitimate purpose (s 28 (2) (b))

The legitimate purpose of this amendment is to ensure that defamation laws provide an appropriate balance between the right to reputation, and the right to privacy with respect to certain court orders.

3. Rational connection between the limitation and the legitimate purpose (s 28(2)(b))

It is commonplace for digital intermediaries to allow users to publish content via their platform or service anonymously, or under a pseudonym. This feature empowers individuals to make decisions that prioritise their online privacy and safety, and how they wish to participate in the online community. However, if an originator publishes defamatory content anonymously, it may be difficult for a complainant to obtain enough information to commence defamation proceedings.

Currently, complainants may apply to the Court for an order requiring a digital intermediary to provide a complainant with identifying information, which will allow the complainant to commence defamation proceedings (referred to as a **Kabbabe order**). The ability for a complainant to make this type of application ensures that complainants have access to an effective means by which to protect their reputation and receive compensation for any reputational harm they have suffered.

However, by its very nature, this application limits the right to privacy, in order to promote the right to reputation. By introducing a requirement to consider privacy, safety and other relevant matters of public interest in applications for Kabbabe orders, this amendment recognises that there will be instances where it is appropriate to protect someone's privacy, notwithstanding the consequences to someone's ability to commence defamation proceedings.

This requirement is also intended to minimise the risk that applicants will attempt to manipulate Kabbabe orders for malicious and harmful purposes. For example, a perpetrator of domestic and family violence may apply for a Kabbabe order to obtain identifying information about their former partner.

4. Proportionality (s 28(2)(e))

In effect, this amendment will require the Court to consider the complainant's right to reputation and balance it against the originator's right to privacy. It will allow Courts to consider the unique circumstances of each case. It is intended to facilitate a proportional response for each individual application.

Extending the defence of absolute privilege

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

The Bill will extend the defence of absolute privilege to matters published to police and other prescribed statutory bodies. This engages and limits the right to reputation, because in effect, it will remove a person's ability to successfully sue for defamation with respect to those publications.

2. Legitimate purpose (s 28 (2) (b))

The legitimate purpose of extending the defence of absolute privilege is to remove or to mitigate one barrier to people reporting criminal and unlawful conduct to police and other relevant statutory bodies: the actual or perceived threat of defamation proceedings.

While there is a legitimate policy interest in ensuring that all members of the public feel safe and confident to share information with police and other statutory bodies, the Bill is intended to have the most profound impact on victim-survivors of criminal or unlawful conduct, including family violence and sexual harassment.

3. Rational connection between the limitation and the legitimate purpose (s 28(2)(b))

There is a rational connection between extending the defence of absolute privilege to all matters published to police and other statutory bodies, and the legitimate policy purpose of addressing defamation law's "chilling effect" on reporting.

There is a public interest in ensuring that all members of the community feel confident and safe to share information with police and other statutory bodies that investigate complaints or provide support to vulnerable members of the community. Indeed, these bodies are established to provide services to the community, and their ability to do so is contingent on open and frank communications with the public.

However, members of the public face significant social, legal and personal barriers when choosing whether or not to report criminal or unlawful conduct to police or other statutory bodies (such as anti-discrimination commissions). Regardless of whether the individual believes their complaint is truthful, the significant costs, time and emotional distress associated with legal proceedings may prove to be a powerful deterrent.

Stakeholders have reported defamation law may be weaponised to silence victim-survivors of criminal and unlawful conduct, including those who have experienced sexual violence and discrimination.² That is, perpetrators of violence and other harmful conduct may threaten to commence defamation proceedings for the sole purpose of ensuring a victim-survivor does not make an allegation to police or a prescribed statutory body, or to retract a complaint or allegation. This leaves them particularly vulnerable to the ‘chilling effects’ of defamation law.

One of the objectives of the model defamation laws is to ensure that individuals who have suffered reputational harm because of a defamatory publication have access to effective and fair remedies. However, this is balanced by the objective to ensure that the law of defamation does not place unreasonable limits on the publication and discussion of matters of public interest and importance. It was never envisioned that defamation laws would impede victim-survivors, or any member of the public, from seeking the protection and support of police and statutory bodies. Such publications are in the public interest, and should be appropriately protected.

At present, the law is insufficient to address these socio-legal issues. If a report to police or another statutory body is the subject of defamation proceedings, a defendant may rely on the defence of qualified privilege. However, to establish this defence, a defendant must demonstrate that they had a legal or moral duty to publish the defamatory matter, and the recipient had a legal or moral interest in receiving that defamatory matter. Therefore, to establish the defence, an individual is likely to be exposed to proceedings. As such, notwithstanding the existence of the defence of absolute privilege, defamation law can still have a “chilling effect” on reporting. This impedes the effectiveness of police, and complaints-handling bodies, who rely on open and frank communication to be of service to the community.

By extending the defence of absolute privilege to all matters published to police and other prescribed statutory bodies, the law will provide all members of the public with certainty and confidence that they can share information with police and other prescribed bodies, without fear of being exposed to defamation proceedings for doing so.

For victim-survivors, the law will provide them with assurances that it is safe to share their experiences with police and other services designed to assist them, and that the nature of their allegations will not be interrogated in prolonged, and re-traumatising defamation proceedings.

² See for example: Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report (2020)*, p. 79; Women’s Legal Service NSW, *Submission to Stage 2 Review of the Model Defamation Provisions*, May 2021, p. 1.

The extension of absolute privilege is more limited for the ACT Law Society and ACT Bar Association. This reflects that, in contrast to the other prescribed bodies, they are not solely government bodies, and as such, communications to them may not always be connected to the public interest. Limiting the extension of the absolute privilege defence to publications made for the purpose of making a complaint, or related to a complaint, ensures the connection to the public interest and legitimate purpose is maintained.

Proportionality (s 28(2)(e))

The approach chosen in the Bill is the least restrictive means possible for achieving the legitimate objective of the reforms.

This Bill extends the defence of absolute privilege to all matters published to police and a narrow list of prescribed statutory bodies:

- ACT Human Rights Commission
- ACT Integrity Commission
- Inspector of Correctional Services
- Office of the Workplace Health and Safety Commissioner
- Official Visitor Scheme
- Public Trustee and Guardian
- Sentence Administration Board
- ACT Law Society
- ACT Bar Association

These bodies have statutory functions that require them to investigate or respond to reports of criminal or unlawful conduct, or they may otherwise receive information about such conduct in the course of carrying out their statutory functions.

The defence of absolute privilege is a complete immunity and is not defeated by evidence of false and misleading statements. However, there are statutory safeguards to ensure that the right to reputation is not unreasonably limited. Notably, under sections 338 and 339 of the *Criminal Code*, it is an offence to provide false or misleading information to the Territory, or a person exercising a function under Territory law. This provides both a strong deterrent and ensures that police retain the ability to pursue criminal sanctions where false and misleading reports are made.

These statutory bodies also fall within the definition of a ‘territory authority’: a body established for a public purpose under legislation. Territory authorities are subject to the *Information Privacy Act 2014 (IPA)*, which promotes the responsible and transparent handling of ‘personal information’. For the purposes of the IPA, ‘personal information’ means information or an opinion about an identified individual, or an individual or who is reasonably identifiable, whether the information or opinion is true or not. Therefore, the statutory bodies that fall within scope of the extended defence of absolute privilege have a statutory obligation to manage personal information with confidentiality and sensitivity. This reduces the risk of reputational harm.

The above-listed statutory bodies are also all public authorities, and subject to obligations under the HRA. That is, it is unlawful for a public authority to act in a way that is incompatible with a human right, or to give proper consideration to that human right when making a decision.

In addition to the above, the enabling legislation for many of these statutory bodies contain either explicit confidentiality requirements, or offences for the reckless or unauthorised disclosure of information. For example, section 99 of the *Human Rights Commission Act 2005* provides that it is an offence for a current or former commissioner, or member of staff to recklessly divulge protected personal information that is obtained in the course of exercising their statutory functions. The same offence applies to people who were present at a conciliation conference.

Similar safeguards exist in the legislation establishing the other bodies proposed to be prescribed. See, for example: section 297 of the *Integrity Commission Act 2018*, section 37 of the *Inspector of Correctional Services Act 2017*, section 271 of the *Work Health and Safety Act 2011*, section 25 of the *Official Visitor Act 2012*, section 65A of the *Public Trustee and Guardian Act 1985*.

In developing this reform, consideration was given to whether the scope of the extension of absolute privilege should be limited by reference to various conditions, such as who published the matter, how they published the matter, and the content of the matter. However, these caveats to accessing the defence were considered to weaken its protection and undermine the intention of the reforms. There was also a concern that these conditions would introduce complexity and invite litigation on technical legal points. For example, the defence of absolute privilege will capture:

- **Matters published by any person:** This is intended to recognise the complexity inherent with imbalanced power dynamics, and experiences of criminal and unlawful conduct. For example, someone may be both a complainant and an accused, or both a victim-survivor and a witness (for example, within domestic and family violence dynamics).

- **Both formal and informal communications:** This will limit legal proceedings on technical legal grounds related to whether a publication was formal and will ensure that someone is not precluded from relying on the defence, on the basis that they did not make a publication via the 'correct' administrative channel.
- **All matters published, regardless of content:** Limiting the availability of the defence of absolute privilege by reference to specific conduct is likely to introduce definitional complexity and invite litigation as to whether the conduct alleged falls within scope. This would expose victim-survivors to legal proceedings, which is likely to be retraumatising. There is also a real risk that seeking to circumscribe the types of conduct that may be protected by the defence of absolute privilege will result in uncertainty. For example, subtle differences in the framing of offences between jurisdictions may lead to different outcomes between similar cases.

The broad scope of the reforms recognises that not all individuals can navigate complex laws and systems. If the defence of absolute privilege was to be extended in a complex or narrow way, it would place an onus on individual members of the public to assess whether they would be protected by the law.

The means by which the defence of absolute privilege has been extended is also significant, and provides an additional safeguard. The Bill amends the CLWA to allow the defence of absolute privilege to be extended to matters published by a person or body in any circumstance specified in a schedule to the Act, rather than subordinate legislation. Therefore, if there is a future proposal to extend the defence of absolute privilege to another person, body or circumstance, that proposal will be subject to full scrutiny of the Legislative Assembly.

Notwithstanding the above, the proposed extension of absolute privilege to the ACT Law Society and the ACT Bar Association in the Bill is more limited than the proposal with respect to police and other statutory bodies. Specifically, the Bill proposes to extend absolute privilege only to communications made to them for the purposes of their statutory complaints functions in relation to the legal profession. This position reflects the approach taken in NSW to its professional disciplinary bodies for the legal profession. It is an appropriate and proportionate outcome, given that (compared to solely government bodies as such), the ACT Law Society and the ACT Bar Association have a range of organisational purposes and communications to them may cover a wide range of matters not necessarily connected to the public interest.

Civil Law (Wrongs) Amendment Bill 2024
Human Rights Act 2004 – Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Civil Law (Wrongs) Amendment Bill 2024**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Part 1 Civil Law (Wrongs) Act 2002

Clause 1 Name of Act

This clause provides the name of the Act is the *Civil Law (Wrongs) Amendment Act 2024*.

Clause 2 Commencement

This clause provides for the Act to commence 18 months after the Act is notified, unless it commences earlier by a commencement notice, displacing s 79 of the *Legislation Act 2001*.

Consistency among Australia's defamation legislation provides certainty for businesses and individuals, particularly in the context of the online environment and the inter-jurisdictional nature of some defamation claims. The intention is for each jurisdiction to enact the amendments for commencement on 1 July 2024. However, the longer default commencement period provides the Territory with flexibility to delay commencement, if required, due to delays in other jurisdictions in progressing the amendments.

Clause 3 Legislation amended

This clause provides the Act amends the *Civil Law (Wrongs) Act 2002*.

Clause 4 Definitions—ch 9

Section 116, new definitions

Clause 4 inserts new definitions 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 MDPs). 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 2.1 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 1 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) (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.

Clause 5 New division 9.2.2A

This clause 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.

This clause also 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 *Google LLC v Defteros* [2022] HCA 27 (**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 Designtecnica 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 6 Content of offer to make amends

Section 127 (1A) (b)

This clause provides that an offer to make amendments in relation to the publication of digital matter can 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 7 New section 127 (1B)

This clause 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 clauses 6 and 7 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 18 of the MDPs 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 8 New section 133A

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 8 confirms a court, in making a preliminary discovery order, is required to take into account the objects of the MDPs 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 2 matters.

Clause 9 Defence of absolute privilege

New section 137 (2) (ba)

Clause 9 amends section 137 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 already defined in 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 10 New section 137 (2) (d)

Clause 10 amends section 137 to extend the defence of absolute privilege to publications of defamatory matter to a person or body in the circumstances specified in Schedule 1A to the Act.

Clause 11 New section 137 (3)

Clause 11 defined the term official of a police force or service of an Australian jurisdiction to mean, for the purposes of the amendment –

- (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 12 New section 139BA

Clause 12 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 7 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 7-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 for 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 13 New section 139JA

Clause 13 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.

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 13 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.

Clause 14 New section 139O

Clause 14 provides any form of electronic communication, including without limitation emails and messaging, may 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. The clause enables parties to serve documents, particularly on digital intermediaries, using forms of electronic communication which are commonly used nowadays to send and receive documents.

Clause 14 also 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 15 New chapter 19

Clause 15 inserts a Chapter of savings and transitional provisions for the Stage 2, Part B amendments.

The amendments will apply to publications after the amendments commence while the existing law will continue to apply to publications before the commencement.

Clause 16 New chapter 20

Clause 16 inserts a Chapter of savings and transitional provisions for the Stage 2, Part A amendments.

New statutory exemptions and defence:

Clause 16 contains savings and transitional provisions for the new statutory exemptions and defence. 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 1 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).

Offers to make amends:

Clause 16 provides the amendments 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.

Preliminary discovery or non-party digital intermediary orders:

Clause 16 provides, with 2 exceptions, the amendments will apply to orders made after the commencement of the amendment, regardless of whether the proceedings involve causes of action accruing 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.

Document giving or service:

Clause 16 contains savings and transitional provisions for the amendments concerning the giving or service of documents. The amendments 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 New schedule 1A

Clause 17 inserts the new Schedule 1A - Additional publications to which absolute privilege applies - into the Act. The Schedule prescribes a list of complaints-handling entities, and prescribes the circumstances when publications made to these entities will be covered by the absolute privilege defence for the purposes of section 137 (see Clause 10 above).

The prescribed entities are:

- ACT Human Rights Commission
- ACT Integrity Commission
- Inspector of Correctional Services
- Office of the Workplace Health and Safety Commissioner
- Official Visitors Scheme
- Public Trustee and Guardian
- Sentence Administration Board
- ACT Law Society
- ACT Bar Association.

With two exceptions, all publications made to the entity, or officials of the entity, will be covered by the absolute privilege defence.

The two exceptions are the ACT Law Society and ACT Bar Association. For these two entities, only publications made for the following purposes will be covered by the defence of absolute privilege:

- a) making a complaint under the *Legal Profession Act 2006*,
- b) the investigation of the complaint under that Act; and
- c) anything else that may be done under that Act in relation to the complaint.