

Model Defamation Amendment Provisions 2022

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1 Name of Act

This Act is the *Model Defamation Amendment Provisions 2022*.

2 Model amendments to Model Defamation Provisions

Schedule 1 sets out the model amendments to the *Model Defamation Amendment Provisions 2022*.

Drafting note 2.1 *This draft contains the amendments recommended by Part A of the draft policy recommendations for the Stage 2 reforms. The amendments recommended by Part B are in a separate document.*

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Schedule 1 Amendment of Model Defamation Provisions

[1] Section 4 Definitions [Part A, consequential amendments]

Insert in alphabetical order in section 4—

access prevention step, in relation to the publication of digital matter, means a step to remove, or to block, disable or otherwise prevent access by some or all persons to, the matter.

digital intermediary, in relation to the publication of digital matter, means a person, other than an author, originator or poster of the matter, who provides an online service in connection with the publication of the matter.

digital matter means matter transmitted, posted or stored using an online service.

online service means a service provided to a person to enable the person to access, search or otherwise use the internet, and includes the following services:

- (a) a transmission or storage service,
- (b) a content indexing service,
- (c) a service to provide, encourage or facilitate social or other interaction between persons,
- (d) a service to allow the use of a search engine.

post, in relation to the publication of digital matter, means the use of an online service to communicate the matter to 1 or more other persons.

poster, in relation to the publication of digital matter, means a person who posts the matter.

search engine means a software application designed to enable its users to search for content on the internet.

[2] Section 9A [Part A, recommendations 1 and 2]

Insert after section 9—

9A Certain digital intermediaries not liable for defamation

- (1) A digital intermediary is not liable for defamation for the publication of digital matter if the intermediary proves:
 - (a) the matter was published using a caching service, conduit service or storage service provided by the intermediary, and
 - (b) the intermediary's role in the publication was limited to providing a service mentioned in paragraph (a), and
 - (c) the intermediary did not:
 - (i) initiate the steps required to publish the matter, or
 - (ii) select any of recipients of the matter, or
 - (iii) encourage the poster of the matter to publish the matter, or
 - (iv) edit the content of the matter, whether before or after it was published, or
 - (v) promote the matter, whether before or after it was published.
- (2) Subsection (1)(c) does not apply in relation to action taken because it is required by a law of an Australian jurisdiction.
- (3) A search engine provider for a search engine is not liable for defamation for the publication of digital matter if the provider proves:

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- (a) the matter is limited to search results generated using the search engine from search terms inputted by the user of the engine rather than terms automatically suggested by the engine, and
 - (b) the provider's role was limited to providing an automated process for the user to generate the search results.
- (4) Subsection (3) does not apply in relation to search results to the extent they 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.
- (5) Subsections (1) and (3) apply regardless of whether the digital intermediary or search engine provider knew, or ought reasonably to have known, the digital matter was defamatory.
- (6) The judicial officer in defamation proceedings:
 - (a) is to determine whether a defendant has an exemption from liability for defamation mentioned in subsection (1) or (3) (an *intermediary exemption*), and
 - (b) is to determine whether an intermediary exemption is established as soon as practicable before the trial commences unless satisfied that there are good reasons to postpone the determination to a later stage of the proceedings, and
 - (c) may make any orders the judicial officer considers appropriate concerning the determination of the issue, including dismissing the proceedings if satisfied the intermediary exemption is established.
- (7) Without limiting subsection (6):
 - (a) the following matters are relevant in deciding whether there are good reasons to postpone the determination of whether an intermediary exemption is established to a later stage of the proceedings:
 - (i) the cost implications for the parties,
 - (ii) the resources available to the court at the time,
 - (iii) the extent to which technical or scientific issues are raised in the proceedings,
 - (iv) the extent to which establishing the intermediary exemption is linked to other issues for determination during the trial for the proceedings, and
 - (b) the judicial officer may determine an intermediary exemption is established on the pleadings without the need for further evidence if satisfied that the pleaded particulars are sufficient to establish the exemption.
- (8) Nothing in this section limits the powers that a judicial officer may have apart from this section to dismiss defamation proceedings, whether before or after the trial commences.
- (9) In this section:
 - catching service* means a service involving the automatic, intermediate and temporary storage of content only for the purpose of making the onward transmission of the content more efficient for users of an online service.
 - conduit service* means a service provided by an internet service provider within the meaning of the *Online Safety Act 2021* of the Commonwealth or other person that is limited to transmitting content using an online service.
 - search engine provider* for a search engine means a person who owns, or provides users with access to the functionality of, the search engine.

search result means a result generated by a search engine that is limited to identifying a webpage on which the result is located by reference to 1 or more of the following:

- (a) the title of the webpage,
- (b) a hyperlink to the webpage,
- (c) a short extract from the webpage,
- (d) an image from the webpage.

storage service means a service, other than a caching service, that enables its users to store content remotely using an online service.

[3] Section 15 Content of offer to make amends [Part A, consequential amendment using new terminology]

Omit section 15(1A)(b). Insert instead—

- (b) if the matter is digital matter—an offer to take access prevention steps in relation to the matter, or

[4] Section 15(1B) [Part A, recommendation 7]

Insert after section 15(1A)—

- (1B) If the matter in question is digital matter:
 - (a) an offer to make amends may, instead of making the offer mentioned in subsection (1)(d), include an offer to take access prevention steps, and
 - (b) the offer mentioned in subsection (1)(e) is not required to be made if an offer to take access prevention steps is made.

[5] Section 23A [Part A, recommendation 6]

Insert after section 23—

23A Orders for preliminary discovery about posters of digital matter

- (1) This section applies if the court procedure law for a court allows a person seeking to bring defamation proceedings for the publication of digital matter to obtain an order for, or in the nature of, discovery for either or both of the following purposes:
 - (a) to obtain information to assist in identifying the posters of the matter,
 - (b) to obtain information to assist in locating physical or digital addresses for the posters of the matter to allow concerns notices to be given to them or defamation proceedings against them to be commenced.
- (2) Despite anything to the contrary in the court procedure law for a court, the court must take the following matters into account before making an order mentioned in subsection (1):
 - (a) the objects of this Act,
 - (b) privacy, safety or other public interest considerations that may arise if the order is made.
- (3) In this section:
court procedure law for a court means:
 - (a) rules of court for the court, or
 - (b) an Act or other legislation that regulates the practice or procedure of the court, or

- (c) another law, including the general law, concerning the inherent or implied jurisdiction or powers of the court.

[6] Section 31A [Part A, recommendation 3A alternative]

Insert after section 31—

31A Defence for publications involving digital intermediaries

- (1) It is a defence to the publication of defamatory digital matter if the defendant proves the defendant:
 - (a) was a digital intermediary in relation to the publication, and
 - (b) had, at the time of the publication, a mechanism that was easily accessible by members of the public for submitting complaints notices under this section (the *defendant's complaints mechanism*), and
 - (c) if the plaintiff duly gave the defendant a complaints notice under this section about the publication—the defendant, within 14 days after being given the complaints notice, either:
 - (i) provided the plaintiff with sufficient identifying information about the poster of the matter, but only if the defendant obtained the poster's consent in accordance with subsection (2) before doing so, or
 - (ii) took the access prevention steps in relation to the publication of the matter, if any, that were reasonable for the defendant to take in the circumstances.

Note. See subsection (3) about requirements for duly giving complaints notices under this section. Also, see subsection (7), which defines *sufficient identifying information* about the poster of digital matter to mean information sufficient to enable both a concerns notice to be given to, and defamation proceedings to be commenced against, the poster.

- (2) For subsection (1)(c)(i), a defendant obtained the consent of the poster of the digital matter in accordance with this subsection if:
 - (a) the defendant provided the poster with a copy of the complaints notice, and
 - (b) the poster consented, after being provided with a copy of the notice, to the defendant providing the plaintiff with sufficient identifying information about the poster.
- (3) A complaints notice was duly given under this section about the publication of defamatory digital matter if:
 - (a) before giving the notice and after taking reasonable steps to obtain the information, the plaintiff was unable to obtain sufficient identifying information about the poster of the matter, and
 - (b) the notice was in writing and set out the following:
 - (i) the name of the plaintiff,
 - (ii) the location where the matter could be accessed, for example, a webpage address,
 - (iii) an explanation of why the plaintiff considered the matter to be defamatory and, if the plaintiff considered the matter to be factually inaccurate, a statement to that effect,
 - (iv) the harm that the plaintiff considered to be serious harm to the plaintiff's reputation caused, or likely to be caused, by the publication of the matter,

- (v) the steps taken by the plaintiff to obtain sufficient identifying information about the poster of the matter, and
 - (c) the notice was given using the defendant's complaints mechanism or given to the defendant in another way permitted by section 44.
- (4) A failure to take either of the following steps is not to be treated as unreasonable for subsection (3)(a):
- (a) applying for an order from a court for substituted service or an order for, or in the nature of, discovery,
 - (b) engaging another person to conduct an investigation to obtain sufficient identifying information about the poster of the digital matter.
- (5) A defence under this section is defeated if, and only if, the plaintiff proves the defendant was actuated by malice in providing the online service used to publish the digital matter.
- (6) A defendant who would otherwise be a digital intermediary in relation to the publication of digital matter does not cease to be a digital intermediary for this section merely because the defendant took steps to detect or identify, or steps to remove, block, disable or otherwise prevent access by some or all persons to:
- (a) defamatory or other unlawful content posted, or sought to be posted, by a person using the online service provided by the defendant, or
 - (b) other content posted, or sought to be posted, by a person using the online service provided by the defendant that was incompatible with the terms or conditions under which the service was provided.
- Note.** This subsection makes it clear the defence may still be relied on despite the definition of *digital intermediary* in section 3 excluding authors, originators or posters of digital matter.
- (7) In this section:
sufficient identifying information about the poster of digital matter means information sufficient to enable both a concerns notice to be given to, and defamation proceedings to be commenced against, the poster.

[7] Section 31A [Part A, recommendation 3B alternative]

Insert after section 31—

31A Defence for publications involving digital intermediaries

- (1) It is a defence to the publication of defamatory digital matter if the defendant proves the defendant:
- (a) was a digital intermediary in relation to the publication, and
 - (b) had, at the time of the publication, a mechanism that was easily accessible by members of the public for submitting complaints notices under this section (the *defendant's complaints mechanism*), and
 - (c) if the plaintiff duly gave the defendant a complaints notice under this section about the publication—the defendant, within 14 days after being given the complaints notice, took the access prevention steps in relation to the publication of the matter, if any, that were reasonable for the defendant to take in the circumstances.
- Note.** See subsection (2) about requirements for duly giving complaints notices under this section.
- (2) A complaints notice was duly given under this section about the publication of digital matter if:

- (a) the notice was in writing and set out the following:
 - (i) the name of the plaintiff,
 - (ii) the location where the matter could be accessed, for example, a webpage address,
 - (iii) an explanation of why the plaintiff considered the matter to be defamatory and, if the plaintiff considered the matter to be factually inaccurate, a statement to that effect,
 - (iv) the harm that the plaintiff considered to be serious harm to the plaintiff's reputation caused, or likely to be caused, by the publication of the matter, and
 - (b) the notice was given using the defendant's complaints mechanism or given to the defendant in another way permitted by section 44.
- (3) A defence under this section is defeated if, and only if, the plaintiff proves the defendant was actuated by malice in providing the online service used to publish the digital matter.
- (4) A defendant who would otherwise be a digital intermediary in relation to the publication of digital matter does not cease to be a digital intermediary for this section merely because the defendant took steps to detect or identify, or steps to remove, block, disable or otherwise prevent access by some or all persons to:
- (a) defamatory or other unlawful content posted, or sought to be posted, by a person using the online service provided by the defendant, or
 - (b) other content posted, or sought to be posted, by a person using the online service provided by the defendant that was incompatible with the terms or conditions under which the service was provided.

Note. This subsection makes it clear the defence may still be relied on despite the definition of *digital intermediary* in section 3 excluding authors, originators or posters of digital matter.

[8] Section 39A [Part A, recommendation 5]

Insert after section 39—

39A Orders to prevent or limit publication or republication of defamatory digital matter

- (1) This section applies in relation to defamation proceedings for the publication of digital matter if:
 - (a) the plaintiff has obtained judgment for defamation against the defendant in the proceedings, or
 - (b) a court grants an injunction or makes another order preventing the defendant from continuing to publish, or from republishing, the matter pending the determination of the proceedings.
- (2) In defamation proceedings to which this section applies, the court may order a person who is not a party to the proceedings to take the steps the court considers necessary in the circumstances:
 - (a) to prevent or limit the continued publication or republication of the matter, or
 - (b) to comply with, or otherwise give effect to, the judgment, injunction or other order mentioned in subsection (1).
- (3) Without limiting subsection (2), an order under this section may require:
 - (a) 1 or more access prevention steps to be taken, or

- (b) a step to be taken in relation to all, or only some, of the users of an online service.
- (4) The court may not make an order under this section against a person who is not a party to the proceedings unless the person has been given an opportunity to make submissions about whether the order should be made.

[9] **Part 6, Division 1**

Insert before section 49—

Part 6 Savings and transitional provisions

Division 1 Model Defamation Provisions

[10] **Part 6, Division 2**

Insert before section 50—

Division 2 Model Defamation Amendment Provisions 2020

[11] **Part 6, Division 3 [Part A, consequential amendment to deal with savings and transitional issues]**

Insert after section 50—

Division 3 Model Defamation Amendment Provisions 2022

Jurisdictional note. These provisions are to be inserted in the appropriate location by each jurisdiction with reference to the name of the amending Act enacted to give effect to the *Model Defamation Amendment Provisions 2022*. Also, references to the 2022 amendments will need to be altered if the amending Act of a jurisdiction is enacted after 2022.

51 Definitions

In this Division:

2022 amendments means amendments made to this Act by the *Model Defamation Amendment Provisions 2022*.

existing law, in relation to 2022 amendments about a subject, means the law that would have applied if the amendments had not been enacted.

post-commencement action, in relation to 2022 amendments about a subject, means a cause of action for the publication of defamatory matter accruing after the commencement of the amendments.

pre-commencement action, in relation to 2022 amendments about a subject, means a cause of action for the publication of defamatory matter accruing before the commencement of the amendments.

52 Digital intermediary amendments

- (1) This section applies to the 2022 amendments about (the **digital intermediary amendments**):
 - (a) exempting digital intermediaries from liability for defamation, or
 - (b) providing a defence for publications of defamatory digital matter involving digital intermediaries.
- (2) Except as provided subsection (3)(b), the digital intermediary amendments apply to a post-commencement action.

- (3) The existing law continues to apply despite the digital intermediary amendments:
 - (a) to a pre-commencement action, and
 - (b) to a post-commencement action, but only if:
 - (i) the post-commencement action is 1 of 2 or more causes of action in proceedings commenced by a plaintiff, and
 - (ii) each cause of action in the proceedings accrues because of the publication of the same, or substantially the same, matter on separate occasions, whether by the same defendant or another defendant, and
 - (iii) 1 or more of the other causes of action in the proceedings are pre-commencement actions, and
 - (iv) the post-commencement action accrued no later than 12 months after the date on which the earliest pre-commencement action in the proceedings accrued.

53 Concerns notice amendments

- (1) This section applies to the 2022 amendments about the content of concerns notices (the *concerns notice amendments*).
- (2) The concerns notice amendments apply:
 - (a) to a concerns notice about matter published after the commencement of the amendments, and
 - (b) to a concerns notice about matter published before the commencement of the amendments if:
 - (i) the notice is given after the commencement of the amendments, and
 - (ii) the notice is the first notice, or a notice replacing a previous notice, given about the matter published.
- (3) The existing law continues to apply despite the concerns notice amendments to a concerns notice not mentioned in subsection (2).

54 Discovery or prevention order amendments

- (1) This section applies to the 2022 amendments about courts making orders (the *discovery or prevention order amendments*):
 - (a) for, or in the nature of, discovery, or
 - (b) to take steps:
 - (i) to prevent or limit the continued publication or republication of defamatory matter, or
 - (ii) to comply with, or otherwise give effect to, judgments, injunctions or other court orders.
- (2) Except as provided by subsection (3)(b), the discovery or prevention order amendments apply to the making of an order after the commencement of the amendments regardless of whether the proceedings in which they are made:
 - (a) involve a pre-commencement action or post-commencement action, or
 - (b) were commenced before or after the commencement of the amendments.
- (3) The existing law continues to apply despite the discovery or prevention order amendments:

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- (a) to an order made before the commencement of the amendments, or
- (b) to the amendment or revocation of an order made before the commencement of the amendments.

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