

These are the *Model Defamation Amendment (Digital Intermediaries) Provisions 2023* prepared by the Australasian Parliamentary Counsel's Committee. On 22 September 2023, the members of the Standing Council of Attorneys-General (other than South Australia) approved by majority all the amendments made by these Provisions, subject to the completion of Cabinet processes where necessary.

Model Defamation Amendment (Digital Intermediaries) Provisions 2023

Explanatory note

Overview

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.

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* (the **Stage 1 amendments**) by each State and Territory to give effect to the recommended amendments.

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.

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Model Defamation Amendment (Digital Intermediaries) Provisions 2023
Explanatory note

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.

These provisions contain the Stage 2, Part A amendments. The Stage 2, Part B amendments are contained in the *Model Defamation Amendment (Absolute Privilege) Provisions 2023*.

The aims of the Stage 2, Part A amendments made by these provisions are as follows—

- (a) to exempt a digital intermediary from liability for defamation for the publication of digital matter if—
 - (i) the intermediary's role in the publication of the matter is limited to providing a caching service, conduit service or storage service and so long as the intermediary did not take an active role in the publication, for example, by initiating, promoting or editing the matter, or
 - (ii) the intermediary is a search engine provider whose role in the publication of the matter is limited to providing an automated process for users to generate search results identifying or linking to a webpage on which the matter is located,
- (b) to provide a digital intermediary with a defence in relation to defamatory digital matter posted by a third party if reasonable steps are taken, whether before or within 7 days after receiving a complaint, to remove or prevent access to the matter,
- (c) to allow for an offer to make amends in relation to the publication of defamatory digital matter to include an offer to take steps to remove or prevent access to the matter,
- (d) to confirm courts must take certain matters into account when making an order for, or in the nature of, preliminary discovery for information about the identity or address of posters of defamatory digital matter,
- (e) to enable courts to make orders against digital intermediaries who are not parties to certain defamation proceedings to require them to take steps to remove or prevent access to defamatory digital matter,
- (f) to allow notices and other documents to be given or served by means of email, messaging or other electronic communication to an electronic address or location indicated by the recipient,
- (g) to provide for savings and transitional matters for the amendments,
- (h) to make certain other consequential, related or minor amendments.

Outline of provisions

Clause 1 provides for the name of these provisions to be the *Model Defamation Amendment (Digital Intermediaries) Provisions 2023*.

Clause 2 provides that Schedule 1 sets out the amendments made to the MDPs by these provisions.

Schedule 1 Model amendments to Model Defamation Provisions

1 Definitions for the Stage 2, Part A amendments

Schedule 1[1] inserts new definitions in the MDPs 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) 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.

Schedule 1[2] provides for the status of examples used in the Stage 2, Part A amendments. Examples are not intended to be exhaustive. Also, examples do not limit, but may extend, the meaning of the provisions to which they relate. The provision also confirms an example or note at the foot of a provision forms part of the substantive text of the MDPs.

2 Digital intermediary amendments

2.1 Background

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

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

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

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

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

Keane and Gordon JJ dissented.

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

2.2 Statutory exemptions from liability

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

Firstly, **Schedule 1[3]** creates an exemption from liability for a digital intermediary in relation to the publication of digital matter using a caching service, conduit service or storage service provided by the intermediary. The exemption is conditional because the intermediary must prove each of the following (the *passive intermediary exemption conditions*)—

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

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

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

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

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

Secondly, **Schedule 1[3]** creates an exemption from liability for a search engine provider in relation to both the publication of digital matter comprised of search results and the publication of digital matter comprised of matter on other websites to which the results facilitate access by providing a hyperlink. The exemption is conditional because—

- (a) it is available only if the provider proves the provider's role was limited to providing an automated process for the user of the search engine to generate the results, and
- (b) it applies only to search results generated by the search engine limited to identifying a webpage on which content is located by reference to 1 or more of the following—
 - (i) the title of the webpage,
 - (ii) a hyperlink to the webpage,
 - (iii) an extract from the webpage,
 - (iv) an image from the webpage, and
- (c) it excludes search results to the extent the results are promoted or prioritised by the search engine provider because of a payment or other benefit given to the provider by or on behalf of a third party (**sponsored search results**).

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

The exemption for search engine providers makes it clear there is no liability for automatically generated defamatory search results that are not sponsored search results. It also confirms the majority decision in the *Deferos* 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.

2.3 Defence

Section 32 of the MDPs provides a defence for the publication of defamatory matter by subordinate distributors of the matter or by their employees or agents. It is called the defence of innocent dissemination. The defence was largely based on the general law as it stood at the time the MDPs were originally approved, but the provision sought to make the position of providers of internet and other electronic and communication services clearer than it was at general law. See the explanatory note for the original MDPs about the intended operation of section 32 available on the Australasian Parliamentary Counsel's Committee website (<https://pcc.gov.au>).

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

- (a) The defendant must prove the defendant was a subordinate distributor. This includes proving the defendant did not have any capacity to exercise editorial control over the content of the defamatory matter before it was first published. Given the large variety of contemporary digital intermediaries and some of their sophisticated technical capacities and functions, it is unclear when they may be considered to have the capacity to exercise editorial control.
- (b) The defendant must also prove the defendant neither knew, nor ought reasonably to have known, the matter was defamatory (see section 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.
- (c) The defence provides no specific timeframe within which the defendant must act after the defendant has the required knowledge about the defamatory matter.

Some overseas jurisdictions, including the United Kingdom and New Zealand, have enacted statutory defences (sometimes called safe harbour defences) to provide additional protection for digital intermediaries who do not post defamatory matter if, among other things, they accept a

notice from the plaintiff complaining about the matter and then contact the poster to seek their consent to remove the post and provide their identifying information to the plaintiff.

However, **Schedule 1[7]** 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 aimed at digital intermediaries, with greater clarity provided about when intermediaries will be put on notice about defamatory digital matter posted by third parties using their online services.

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

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

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

2.4 Making of orders to take access prevention steps or other steps

Schedule 1[8] 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.

2.5 Savings and transitional provisions for the new statutory exemptions and defence

Schedule 1[15] 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).

3 Offer amendments

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

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

- (a) the aggrieved person may give the publisher a concerns notice setting out the imputations about which the aggrieved person complains and certain other matters,
- (b) the publisher may seek further particulars after a concerns notice is given,
- (c) the publisher may make an offer to make amends in the form provided by the provisions, but not if it is made following the applicable period after the concerns notice is given or after a defence is served in defamation proceedings for the matter in question,

- (d) the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher in relation to the matter in question if the publisher carries out the terms of an offer to make amends accepted by the aggrieved person,
- (e) the publisher has a defence in defamation proceedings for the matter in question if the aggrieved person refuses to accept a reasonable offer to make amends made in compliance with certain requirements.

The original MDPs did not make it mandatory for an aggrieved person to give a concerns notice. However, the Stage 1 amendments made it mandatory to give a concerns notice before defamation proceedings can be commenced.

The MDPs require an offer to make amends to include, among other things, the following offers (the *mandatory remedial offers*)—

- (a) an offer to publish, or join in publishing, a reasonable correction of, or a clarification of or additional information about, the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited,
- (b) if material containing the matter has been given to someone else by the publisher or with the publisher's knowledge—an offer to take, or join in taking, reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person.

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

Schedule 1[4] allows an offer to make amends in relation to the publication of digital matter to include an offer to take access prevention steps. These steps may involve removing the matter or instead blocking, disabling or otherwise preventing access to the matter.

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

Schedule 1[5] allows a publisher to include in an offer to make amends, if appropriate, an offer to take reasonable steps instead of, or in addition to, either or both mandatory remedial offers.

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

Schedule 1[15] contains savings and transitional provisions for the amendments concerning offers to make amends. 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.

4 Preliminary discovery or non-party digital intermediary order amendments

4.1 Preliminary discovery orders

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

Schedule 1[6] 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.

4.2 Non-party digital intermediary orders

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

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

Schedule 1[8] 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.

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

Schedule 1[15] contains savings and transitional provisions for the amendments concerning preliminary discovery or non-party digital intermediary orders. With 2 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.

5 Document giving or service amendments

Section 44 of the MDPs, as amended by the Stage 1 amendments, provides a notice or other document permitted or required by the MDPs to be given to, or served on, a person may be given or served by sending it to an email address specified by the person for giving or serving documents on the person. A concerns notice is an example of a document to which section 44 applies.

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

Schedule 1[9] and [10] enable any form of electronic communication, including without limitation emails and messaging, to be used to give or serve documents if the recipient indicates an electronic address or location for giving or serving documents on the recipient using the type of communication. The use of the word “indicated” is intended to capture not only express statements about it, but also conduct by or on behalf of the recipient that might reasonably be considered indicative of an electronic address or location for sending documents to the recipient.

Schedule 1[11] 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.

Schedule 1[15] 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.

6 Consequential, related or minor amendments

Schedule 1[12] amends section 44 of the MDPs to ensure consistency of language in the section. The section, apart from the subsection amended, refers to both giving and serving documents.

Schedule 1[15] inserts a Division of savings and transitional provisions containing the provisions mentioned above for the Stage 2, Part A amendments. **Schedule 1[13] and [14]** insert Part and Division headings in relation to previous savings and transitional provisions to facilitate the insertion of the Division.

Model Defamation Amendment (Digital Intermediaries) Provisions 2023

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Model Defamation Amendment (Digital Intermediaries) Provisions 2023

1 Name of provisions

These provisions are the *Model Defamation Amendment (Digital Intermediaries) Provisions 2023*.

2 Model amendments to Model Defamation Provisions

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

Note. The *Model Defamation Provisions* to which these model amendments apply are the consolidated *Model Defamation Provisions* (as at 27 July 2020) prepared by the Australasian Parliamentary Counsel's Committee. See the website of the Committee (<https://pcc.gov.au>).

Schedule 1 Model amendments to Model Defamation Provisions

[1] Section 4 Definitions

Insert in alphabetical order in section 4—

access prevention step, in relation to the publication of digital matter, means a step:

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

caching service is defined for Part 2, Division 2A by section 10B.

conduit service is defined for Part 2, Division 2A by section 10B.

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 or administers the online service by means of which the matter is published.

Note. There may be more than 1 digital intermediary in relation to the publication of the same digital matter.

digital matter means matter published in electronic form by means of an online service.

online service means 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, including, without limitation, a service enabling a person:

- (a) to access or connect to the internet, or
- (b) to use the internet to do 1 or more of the following:
 - (i) send or receive content,
 - (ii) store content,
 - (iii) index content,
 - (iv) search for content,
 - (v) share content,
 - (vi) interact with other persons.

Examples of an online service:

- 1 An internet-based social media platform.
- 2 A forum created or administered by a person using a facility provided by an internet-based social media platform that enables users to share content or interact with other users about a topic.
- 3 A website or other internet-based platform that enables knowledge to be shared by or with its users.

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.

search engine is defined for Part 2, Division 2A by section 10B.

search engine provider is defined for Part 2, Division 2A by section 10B.

search result is defined for Part 2, Division 2A by section 10B.

storage service is defined for Part 2, Division 2A by section 10B.

[2] Section 4A

Insert after section 4—

4A Examples and notes

- (1) An example or note at the foot of a provision forms part of this Act.
- (2) An example in this Act:
 - (a) is not exhaustive, and
 - (b) may extend, but does not limit, the meaning of the provision to which it relates.

Jurisdictional note.

- 1 This section does not apply to jurisdictional notes, which are directed to whether or how provisions are to be enacted by participating jurisdictions.
- 2 A jurisdiction may decide whether the enactment of this section is required for the jurisdiction having regard to its Interpretation Act and drafting practices.

[3] Part 2, Division 2A

Insert after Division 2—

Division 2A Exemptions from liability for digital intermediaries

10B Definitions

In this Division:

caching service means 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.

Example of a caching service: 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 the files.

conduit service means 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.

Examples of a conduit service:

- 1 A service provided by an internet service provider enabling its users to connect to the internet.
- 2 An internet-based service enabling its users to send emails or send text messages to other persons.

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

search engine provider for a search engine means a person who maintains, or provides users with access to the search functions of, the search engine.

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

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

storage service means an online service, other than a caching service, whose principal function is to enable its users to store content remotely.

Example of a storage service: An internet-based cloud service enabling its users to store documents, videos or photographs for later retrieval.

10C Exemption for digital intermediaries providing caching, conduit or storage services

- (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 1 or more of the following services provided by the intermediary:
 - (i) a caching service,
 - (ii) a conduit service,
 - (iii) a storage service, and
 - (b) the intermediary's role in the publication was limited to providing 1 or more of the services mentioned in paragraph (a), and
 - (c) the intermediary did not do any of the following:
 - (i) initiate the steps required to publish the matter,
 - (ii) select any of the recipients of the matter,
 - (iii) encourage the poster of the matter to publish the matter,
 - (iv) edit the content of the matter, whether before or after it was published,
 - (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 or under a law of an Australian jurisdiction or an order of an Australian court or Australian tribunal.

Example. Action taken to comply with a code of conduct or other document regulating conduct that a digital intermediary is required to comply with by a law of an Australian jurisdiction.
- (3) Subsection (1) applies regardless of whether the digital intermediary knew, or ought reasonably to have known, the digital matter was defamatory.

10D Exemption for search engine providers

- (1) A search engine provider for a search engine is not liable for defamation for:
 - (a) the publication of digital matter comprised of search results if the provider's role was limited to providing an automated process for the user of the search engine to generate the results, or
 - (b) the publication of digital matter to which the search results provide a hyperlink if the provider's role in the publication of the matter is limited to the role mentioned in paragraph (a).
- (2) Subsection (1) does not apply in relation to search results, or to digital matter to which the search results provide hyperlinks, 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.
- (3) Subsection (1) applies regardless of whether the search engine provider knew, or ought reasonably to have known, the digital matter was defamatory.

10E Early determination of digital intermediary exemptions

- (1) The judicial officer in defamation proceedings:
 - (a) is to determine whether a defendant has a digital intermediary exemption, and
 - (b) is to determine whether a digital intermediary exemption is established as soon as practicable before the trial for the proceedings 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 digital intermediary exemption is established.
- (2) Without limiting subsection (1):
- (a) the following matters are relevant in deciding whether there are good reasons to postpone the determination of whether a digital 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 digital intermediary exemption is linked to other issues for determination during the trial for the proceedings, and
- (b) the judicial officer may determine a digital 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.
- (3) 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 for the proceedings commences.
- (4) In this section:
digital intermediary exemption means an exemption from liability for defamation mentioned in section 10C or 10D.

[4] Section 15 Content of offer to make amends

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

[5] Section 15(1B)

Insert after section 15(1A)—

- (1B) If the matter in question is digital matter, an offer to take access prevention steps may be made instead of, or in addition to, either or both of the offers mentioned in subsection (1)(d) and (e).

[6] Section 23A

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, preliminary 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.

Example for paragraph (b). Evidence suggesting the poster of digital matter is in fear of domestic violence from the person seeking an order to obtain the poster's address.
- (3) This section does not limit the matters the court may take into account before making an order mentioned in subsection (1).
- (4) 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) the general law concerning the inherent or implied jurisdiction or powers of the court.

[7] **Section 31A**

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:
 - (a) the defendant was a digital intermediary in relation to the publication, and
 - (b) the defendant had, at the time of the publication, an accessible complaints mechanism for the plaintiff to use, and
 - (c) if the plaintiff gave the defendant a written complaint under this section about the publication—reasonable access prevention steps, if steps were available, were taken in relation to the publication, whether before the complaint was given or within 7 days after the complaint was given.

Note.

- 1 The defendant is not required to prove paragraph (c) to establish the defence if the plaintiff has not given the defendant a complaint about the publication under this section. Subsection (3) sets out requirements for giving complaints.
- 2 Subsection (6) defines **accessible complaints mechanism**.
- (2) For subsection (1)(c), reasonable access prevention steps were taken in relation to the publication of digital matter if:
 - (a) for access prevention steps taken by the defendant—the steps taken were reasonable for the defendant to take in the circumstances, or
 - (b) for access prevention steps taken by another person—it was reasonable for the defendant not to take steps because of the steps already taken.
- (3) A written complaint is given under this section about the publication of defamatory digital matter if:

- (a) the complaint contained information sufficient to enable a reasonable person in the defendant's circumstances to be made aware of the following:
 - (i) the name of the plaintiff,
 - (ii) the matter and where it could be located,
 - (iii) that the plaintiff considered the matter to be defamatory, and
 - (b) the complaint was given using an accessible complaints mechanism for the plaintiff to use or given to the defendant in another way permitted by section 44.
- (4) A defence under this section is defeated only if the plaintiff proves the defendant was actuated by malice in establishing or providing the online service by means of which the digital matter was published.
- (5) 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 persons to, the following:
- (a) defamatory or other unlawful content published, or sought to be published, by a person using the online service provided by the defendant,
 - (b) other content published, or sought to be published, 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 allows a defendant to rely on the defence despite the definition of *digital intermediary* in section 4 excluding authors, originators or posters of digital matter if the defendant's editorial or moderating role over content published using the online service was limited to the steps mentioned in the subsection.

- (6) In this section:
- accessible complaints mechanism* for a plaintiff to use means an easily accessible address, location or other mechanism available for the plaintiff to use to complain to the defendant about the publication of the digital matter concerned.

Examples of an accessible complaints mechanism:

- 1 An email address or direct messaging address to which a complaint may be sent.
- 2 A webpage, or a part of a webpage, enabling details about a complaint to be uploaded or inputted.

[8] Section 39A

Insert after section 39—

39A Orders against non-party digital intermediaries concerning 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 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

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- (c) a court has granted a final injunction or makes another final order preventing the defendant from continuing to publish, or from republishing, the matter.
- (2) In defamation proceedings to which this section applies, the court may order a digital intermediary who is not a party to the proceedings (a *non-party digital intermediary*) to take access prevention steps or other 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:
 - (a) require 1 or more steps to be taken, or
 - (b) require 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 non-party digital intermediary unless the intermediary has been given an opportunity to be heard about whether it is appropriate for the order to be made.
- (5) Despite subsection (4), the court may make a temporary order without giving the non-party digital intermediary an opportunity to be heard about whether it is appropriate to make the order if the court considers it necessary in the circumstances for the order to be made expeditiously pending a subsequent hearing concerning whether a further temporary order or a final order should be made.
- (6) An order may be made under this section even if the non-party digital intermediary is not, or may not be, liable for defamation, including because of a defence, for the publication of the digital matter to which the defamation proceedings relate.
- (7) This section does not limit other powers the court may have apart from this section to grant injunctions or make other orders requiring a non-party digital intermediary to take access prevention steps or other steps.

[9] Section 44 Giving of notices and other documents

Omit section 44(1)(a)(iv). Insert instead—

- (iv) sending it by email, messaging or other electronic communication to an electronic address or location indicated by the person for giving documents to, or serving documents on, the person, or

[10] Section 44(1)(b)(iii)

Omit the subparagraph. Insert instead—

- (iii) sending it by email, messaging or other electronic communication to an electronic address or location indicated by the body corporate for giving documents to, or serving documents on, the body corporate.

[11] Section 44(1)

Insert at the end of the subsection—

Examples for paragraphs (a)(iv) and (b)(iii):

- 1 An email address or direct messaging address set out on an internet-based social media forum for contacting the administrator of the forum about content on the forum.
- 2 An email address or direct messaging address provided by the poster of digital matter on an internet-based social media forum for contacting the poster about the content of the matter.
- 3 A form on a website provided by a digital intermediary enabling a user to contact the intermediary by filling in the form or uploading documents.

[12] Section 44(2)

Omit “served”. Insert instead “given or served”.

[13] Part 6, Division 1

Insert before section 49—

Part 6 Savings and transitional provisions

Division 1 Model Defamation Provisions

[14] Part 6, Division 2

Insert before section 50—

Division 2 Model Defamation Amendment Provisions 2020

[15] Part 6, Division 3

Insert after section 50—

Division 3 Model Defamation Amendment (Digital Intermediaries) Provisions 2023

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 (Digital Intermediaries) Provisions 2023*. Also, references to the 2023 amendments will need to be altered if the amending Act of a jurisdiction is enacted after 2023.

51 Definitions

In this Division:

2023 amendments means amendments made to this Act by the *Model Defamation Amendment (Digital Intermediaries) Provisions 2023*.

existing law, in relation to 2023 amendments about a subject, means the law that would have applied if the amendments had not been enacted.

post-commencement action, in relation to 2023 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 2023 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 2023 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 by 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 Offer amendments

- (1) This section applies to the 2023 amendments about offers to make amends (the *offer amendments*).
- (2) The offer amendments apply to offers to make amends made after the commencement of the amendments regardless of whether the offers relate to publications occurring before or after the commencement.
- (3) The existing law continues to apply despite the offer amendments to offers to make amends made before the commencement of the amendments.

54 Preliminary discovery or non-party digital intermediary order amendments

- (1) This section applies to the 2023 amendments about courts making orders (the *preliminary discovery or non-party digital intermediary order amendments*):
 - (a) for, or in the nature of, preliminary 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 preliminary discovery or non-party digital intermediary 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 preliminary discovery or non-party digital intermediary order amendments:
 - (a) to an order made before the commencement of the amendments, or

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

55 Document giving or service amendments

- (1) This section applies to the 2023 amendments about the ways in which notices or other documents for the purposes of this Act must or may be given to, or served on, individuals or bodies corporate (the *document giving or service amendments*).
- (2) The document giving or service amendments apply to the giving or service of notices or other documents after the commencement of the amendments regardless of whether the notices or other documents relate:
 - (a) to pre-commencement actions or post-commencement actions, or
 - (b) to proceedings commenced before or after the commencement of the amendments.
- (3) The existing law continues to apply despite the document giving or service amendments to the giving or service of notices or other documents before the commencement of the amendments.