DRAFT SECOND READING SPEECH

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Defamation Amendment Bill 2024

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Honourable Speaker, I move that the Bill now be read a second time.

Together with other states and territories, Tasmania has committed to introducing reforms to the model defamation provisions to ensure ongoing national uniformity in this area of law.

The reforms were developed through the Stage 2 Review of the Model Defamation Provisions and recently agreed on a majority basis by the Standing Council of Attorneys-General (or SCAG).

The Defamation Amendment Bill 2024 (the Bill) will amend Tasmania's *Defamation Act 2005* to fulfil this commitment.

By way of background, in November 2004 after agreement by Attorneys-General, all states and territories enacted the original Model Defamation Provisions through legislation.

All states and territories are parties to the Model Defamation Provisions Intergovernmental Agreement which, amongst other things, establishes the Model Defamation Law Working Party that reports to the SCAG on proposals to amend the Model Defamation Provisions.

In 2018 the then Council of Attorneys-General reconvened the Model Defamation Law Working Party to review the Model Defamation Provisions. New South Wales led the Stage 1 Review, which was conducted over 2019 and 2020. The Stage 1 amendments were enacted in Tasmania by the *Defamation Amendment Act 2021*.

During the Stage 1 review, Attorneys-General agreed that a second reform process should be undertaken to address other significant issues.

The Stage 2 Review of the Model Defamation Provisions consisted of two parts. Part A, led by New South Wales, addressed the question of digital intermediary liability for the publication of third-party content. Part B, led by Victoria, considered whether absolute privilege should be extended to cover reports of criminal and unlawful conduct such as sexual harassment and sexual assault to police and other complaints-handling bodies.

The Stage 2 Review involved detailed policy analysis and included extensive national public consultation, which I will now outline.

In April 2021, a discussion paper was released which received around 50 written submissions. There were four stakeholder roundtables held by New South Wales in September and October 2021.

In August 2022, exposure draft model amendments and accompanying policy papers were released for public consultation. There were 36 written submissions in response to the Part A exposure draft amendments. A large roundtable was also held to discuss stakeholder views on Part A.

The Model Defamation Law Working Party carefully considered all stakeholder feedback and submissions received throughout the Stage 2 Review. Stakeholder engagement was essential in the development and refinement of the Stage 2 reforms. Further, New South Wales and Victoria sought advice from their respective defamation expert panels throughout the Stage 2 Review.

I extend my thanks to New South Wales and Victoria for leading the national consultation processes, to the expert panels, and to all stakeholders for their constructive feedback.

On 22 September 2023 SCAG approved, by majority, the final amendments for Part A and Part B, subject to some jurisdictions' Cabinet processes where necessary.

Uniformity remains a key objective of the Model Defamation Provisions. SCAG agreed that jurisdictions in the majority will use their best endeavours to enact Part A and Part B amendments for commencement on 1 July 2024, and I am pleased to be progressing Tasmania’s commitment with this Bill.

There was also agreement that there should be a review of the Stage 1 and Stage 2 amendments that begins no later than three years after the commencement of the Stage 2 amendments in all implementing states and territories.

Honourable Speaker, the Bill enacts the Model Defamation Amendment (Digital Intermediaries) Provisions 2023 and the Model Defamation Amendment (Absolute Privilege) Provisions 2023. I will now outline the policy rationale and details of the Part A amendments, before turning to the Part B amendments.

Part A – digital intermediaries

Defamation law has struggled to keep pace with the emergence, and pervasiveness, of digital or online communications. Defamation law developed over hundreds of years when publishing was generally a privileged and professional activity subject to editorial standards, where most high-profile defamation cases involved prominent public figures suing mainstream media companies.

In modern Australia, anyone with an internet connection is able to publish to the world at large. Online publication is made possible by digital intermediaries that play various roles in the publication process for user-generated or third-party content.

Digital intermediaries range from internet service providers to internet content hosts, social media platforms, search engines and review websites, to name just a few. Under the common law, the test for publication in defamation is very broad. Essentially, anyone who contributes to any extent to the publication of defamatory matter is a publisher. This means that nearly all digital intermediaries are likely to be considered publishers of third-party content in defamation law.

Several recent cases have considered the issue of digital intermediary liability for third-party content. These cases have demonstrated the complex questions that arise, as well as the potential for long and costly disputes. Stakeholders and legal experts have raised concerns that current Australian defamation law in this area is unclear and inconsistent.

A key recent example is the status and liability of forum administrators following the High Court decision in the case of *Fairfax Media Publications Pty Ltd & Ors v Voller* [2021] HCA 27. In *Voller*, a majority of the High Court held that several media companies were publishers of comments posted on their public Facebook pages by third-party users responding to news stories they had posted.

All types of forum administrators, whether they are individuals, volunteers for small organisations, politicians, or media companies have been impacted by the *Voller* decision. Some forum administrators have elected to turn off comments on their forums to avoid potential liability. The state of defamation law as it applies to forum administrators currently is not acceptable. A major part of the Part A reforms is a new defence that is designed to make the law clearer and more certain for all digital intermediaries.

The reforms being enacted in the Bill strike a better balance between protecting reputations and not unreasonably limiting freedom of expression in the various circumstances where third parties publish defamatory matter via digital intermediaries. The Bill provides a pragmatic response to all digital intermediary functions.

Honourable Speaker, the Bill provides six key reforms:

- firstly, a conditional exemption from defamation liability for conduit, caching and storage services, and for search engines in relation to organic search results;

- secondly, updates to the mandatory requirements for an offer to make amends for online publications;

- thirdly, a requirement for courts to consider balancing factors when making preliminary discovery orders against digital intermediaries;

- fourthly, a new innocent dissemination defence for digital intermediaries, subject to a simple complaints process;

- fifthly, a specific power for courts to make non-party orders against digital intermediaries to prevent access to defamatory matter online;

- and finally, expanded electronic means by which notices can be delivered.

I will now outline some of these key reforms in further detail.

Clause 6 of the Bill establishes a conditional exemption from defamation liability for three specific digital intermediary functions:

- Firstly, a caching service that stores content temporarily to make onward transmission more efficient will be exempted. This includes files commonly downloaded from a website temporarily and automatically stored to speed up the download time.

- Secondly, a conduit service, the principal function of which is to enable users to connect with the internet, send data or receive data, will be exempted. This includes internet or email service providers.

- Thirdly, a storage service, the principal function of which is to enable users to store content remotely, will be exempted. An example is a cloud service provider that enables users to store photos for later retrieval.

This recognises the passive role of digital intermediaries in these contexts, and importantly, the exemption only applies in a narrow set of circumstances.

The Stage 2 Review also considered the functions performed by search engine providers and it was ultimately concluded that a conditional exemption for search engine providers in relation to organic search results is appropriate. Again, the exemption is designed to apply very narrowly.

Honourable Speaker, one of the objects of the Defamation Act is to promote speedy and non-litigious methods of dispute resolution. Part 3 of the Act establishes a procedure to enable parties to settle disputes without the need for expensive litigation by encouraging a publisher to make a reasonable offer to make amends to the aggrieved person. If the aggrieved person does not accept a reasonable offer in all the circumstances, the publisher may rely on their offer to make amends as a defence in any subsequent defamation action against them.

The Bill improves this process, including by providing that an offer to make amends may include an "offer to take access prevention steps in relation to the matter". This amendment broadens the provision by allowing a publisher to offer to remove, block, disable or otherwise prevent access to the matter. The Bill also amends the relevant elements to provide for the making of corrections and to take reasonable steps to advise other publishers that the matter may be defamatory.

Honourable Speaker, many originators who post defamatory material online do so using a pseudonym. To commence defamation proceedings, the plaintiff must identify and locate the originator. Plaintiffs are able to obtain preliminary discovery orders from Australian courts requiring a digital intermediary to disclose information concerning the originator's identity. Courts already can, and do, consider proportionality, privacy and the risk of abuse of process in exercising the discretion to make preliminary discovery orders. However, there may still be a risk that such orders are abused or have a chilling effect.

The proposed new section 23A provides that, before making an order for preliminary discovery, the court must take into account the objects of the Act and any privacy, safety or other public interest considerations. This does not provide a new avenue to seek preliminary discovery; it simply applies this requirement over the general rules. This will promote consistency across jurisdictions. It is also in the interests of protecting domestic violence victims and other vulnerable members of society who may be using a pseudonym online due to safety concerns.

Honourable Speaker, one of the most significant reforms progressed in the Bill is the introduction of a new innocent dissemination defence for digital intermediaries. The new defence recognises that digital intermediaries should not be liable for defamatory content where they are merely a subordinate distributor and lack actual knowledge of the content in question. Once the digital intermediary has received a written complaint about a publication, it must take reasonable steps, if available, to remove or otherwise prevent access to the matter within 7 days in order to rely on the defence.

The new defence has been designed to avoid the problems that have been identified with the application of the existing section 32 innocent dissemination defence to digital intermediaries. The new defence provides that the plaintiff must have given the digital intermediary a written complaint containing certain basic information to put the digital intermediary on notice. The defence gives a clear time frame in which action needs to be taken to rely on the defence, and the defence is available to digital intermediaries that moderate and remove content that may be defamatory.

The Bill provides requirements for a written complaint in relation to this.

Importantly, the defence is defeated if the defendant was motivated by malice in establishing or providing the online service by which the digital matter was published. Malice, as a disqualifying concept, is used throughout the Model Defamation Provisions.

The Bill assists complainants where content has “gone viral” and is hard to remove, or the publisher has refused to assist. Despite not being party to the proceedings, digital intermediaries may be in a good position to assist a plaintiff in these cases. The new section 39A would explicitly empower a court to make an order against a digital intermediary who is not a party to the proceedings to take access prevention steps or other steps the court considers necessary to prevent or limit the continued publication or republication of the matter. That would apply in circumstances where the court has granted interim or final judgement for the plaintiff in a defamation action, for example, against the originator.

The Part A reforms enacted in the Bill are the result of a significant reform process and address complex issues arising from modern digital communications. The Bill does not affect fundamental principles of defamation law such as publication but are designed to provide certainty and clarity for both plaintiffs and digital intermediaries. The right balance has been struck between protecting reputations and freedom of

expression in the context of the very modern challenges now faced by defamation law.

I will now turn to the Stage 2 Review Part B reforms.

Part B – absolute privilege

The Part B reforms address the concern that the threat of potential defamation proceedings may deter people from making complaints to police forces and other complaint handling bodies. My thanks again to Victoria for leading the Part B reforms.

To explain this amendment in more detail, it is helpful to look at the law as it stands. Currently, it is a defence under both the general law and section 27 of the Defamation Act if the defendant in proceedings for the publication of defamatory matter proves the publication occurred on the occasion of absolute privilege. It is also a defence under both the general law and section 30 of the Defamation Act if the defendant proves the publication occurred on an occasion of qualified privilege.

Currently, the defence of absolute privilege does not apply generally to matter published to police forces, and in such cases, the defendant would typically rely on the defence of qualified privilege as a defence for these kinds of publications.

Stakeholder feedback has indicated that the defence of qualified privilege does not provide a sufficient safeguard against the deterrent effect of defamation liability, especially as there is uncertainty about the kinds of publications that will attach the defence of qualified privilege at general law.

The Bill extends the defence of absolute privilege to publications of matter to police officers. This amendment will support complainants to report conduct to the police, such as sexual and other forms of harassment, where threats of defamation have been used to pressure victims into silence.

The SCAG also agreed that states and territories can extend absolute privilege to matters published to other complaint-handling bodies by listing relevant bodies in Schedule 1 of individual jurisdictions' Defamation legislation. SCAG endorsed 'Guiding Principles' to be used by jurisdictions to determine relevant bodies to be listed for the purposes of Stage 2 Part B reforms.

The Guiding Principles provide that jurisdictions are to consider the Part B objectives and whether the body falls within one or more of the following categories of bodies: human rights and anti-discrimination bodies; statutory investigative bodies; or professional disciplinary bodies.

A further consideration of the Guiding Principles is that the body has functions under legislation or is established by legislation to receive and handle complaints about conduct where there is a risk of defamation law having a chilling effect on reporting – including, for example: sexual, domestic, and family violence; sexual harassment, bullying, discrimination, or vilification; and/or conduct in breach of human rights.

The body also must have sufficient safeguards to protect against the making of false and misleading reports and ensure the integrity of the process for making and handling complaints.

This Bill lists the Anti-Discrimination Commissioner, and any member of their staff in Schedule 1 of the Defamation Act, which will provide that the defence of absolute privilege applies to matters published to the Anti-Discrimination Commissioner.

The Anti-Discrimination Commissioner investigates complaints of direct and indirect discrimination, sexual harassment, victimisation, inciting hatred and promoting discrimination and prohibited conduct. Relevantly, the *Anti-Discrimination Act 1998* (Tas) contains sufficient safeguards to protect against the making of false and misleading reports.

The conduct for which complaints may be made to the Commissioner align with the conduct contemplated by the Part B guiding principles and, along with the amendment to include reports to Tasmania Police, the vast majority of reporting of this conduct will be protected, and encouraged, by the Bill.

To be clear, states and territories may add to their Act's Schedule 1 at any time, and the Government will continue to monitor this issue and consider the appropriateness of listing other complaint-handling bodies in the future.

Honourable Speaker, the Bill also contains savings and transitional provisions for the amendments. The amendments will apply to publications after the amendments commence while the existing law will continue to apply to publications before the commencement.

In addition to the thorough consultation processes that occurred throughout the development of the model defamation provisions, a

consultation version of the Bill was made available for public comment through the Department of Justice's webpage, with targeted stakeholders being advised by email. I thank those stakeholders who provided input and it is positive to see that there is support for these reforms.

This is an important Bill. It implements the nationally-agreed model defamation amendments and fulfils Tasmania's commitment to states and territories in respect of the Stage 2 reforms.

I commend the Bill to the House.