

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

Model Defamation Amendment (Absolute Privilege) 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* 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 forces or services and some other complaints handling bodies.

At the conclusion of the policy development process for both Parts A and B of Stage 2, the DWP recommended to SCAG that certain amendments prepared by the Australasian Parliamentary Counsel's Committee be made to the MDPs. On 22 September 2023, the members of SCAG (other than South Australia) approved by majority all the recommended amendments for Part A (the *Stage 2, Part A amendments*), subject to the completion of Cabinet processes where necessary. SCAG also approved by majority the recommended amendments for Part B (the *Stage 2, Part B amendments*), subject to the completion of Cabinet processes where necessary.

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

The aim of the Stage 2, Part B amendments made by these provisions is to extend the defence of absolute privilege to publications of defamatory matter to officials of Australian police forces or services while they are acting in their official capacities.

Outline of provisions

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

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

Schedule 1 Model amendments to Model Defamation Provisions

It is a defence under both the general law and section 27 of the MDPs if the defendant in proceedings for the publication of defamatory matter proves the publication occurred on an occasion of absolute privilege. It is also a defence under both the general law and section 30 of the MDPs if the defendant proves the publication occurred on an occasion of qualified privilege.

The general law and section 27 of the MDPs do not provide for the defence of absolute privilege to apply generally to publications of defamatory matter to police forces or services. Typically, defendants rely on the defence of qualified privilege (whether at general law or under the MDPs) as a defence for these kinds of publications. Although the defence of absolute privilege is indefeasible once established, the defence of qualified privilege can be defeated if the plaintiff proves the defendant was actuated by malice. See generally *Roberts v Bass* (2002) 212 CLR 1.

Anecdotal evidence indicates the threat of potential defamation proceedings may be deterring some people from making complaints to police forces or services and other complaints handling bodies. Also, feedback from stakeholders suggests the defence of qualified privilege does not provide a sufficient safeguard against this deterrent effect. In particular, there is uncertainty about the kinds of publications that will attract the defence of qualified privilege at general law. This is because the defence at general law requires both the publisher to have an interest in communicating, or a legal, social or moral duty to communicate, the information concerned and the recipient to have a corresponding or reciprocal interest or duty. For a recent example, see *Sherman v Lamb* [2022] QDC 215.

Schedule 1[1] amends section 27 of the MDPs to extend the defence of absolute privilege to publications of defamatory matter to a person who, at the time of the publication, is an official of a police force or service of an Australian jurisdiction and it is published to the official while the official is acting in an official capacity.

The term *Australian jurisdiction* is defined in section 4 of the MDPs to mean a State, a Territory or the Commonwealth. Consequently, the expression “police force or service of an Australian jurisdiction” used in the amendment will cover the police forces or services of each State and Territory and also of the Commonwealth.

Schedule 1[2] defines the term *official* of a police force or service of an Australian jurisdiction for the amendment to mean—

- (a) an officer, employee or member of staff of the police force or service, or

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(b) another person engaged to act for or on behalf of the police force or service.

The term is intended to cover not only employees, staff members and office holders (including the head of the police force or service and its police officers and administrative staff) but also other persons who act for or on behalf of the force or service in an official capacity (for example, police officers of other jurisdictions or contractors).

Schedule 1[3] 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.

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1 Name of provisions

These provisions are the *Model Defamation Amendment (Absolute Privilege) 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 this model amendment applies 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 27 Defence of absolute privilege

Insert after section 27(2)(b)—

- (b1) the matter is published to a person who, at the time of the publication, is an official of a police force or service of an Australian jurisdiction and it is published to the official while the official is acting in an official capacity, or

[2] Section 27(3)

Insert at the end of the section—

- (3) In this section:
 - official* of a police force or service of an Australian jurisdiction means:
 - (a) an officer, employee or member of staff of the police force or service, or
 - (b) another person engaged to act for or on behalf of the police force or service.

[3] Part 6 Savings and transitional provision

Insert after Division 3, as inserted by the *Model Defamation Amendment (Digital Intermediaries) Provisions 2023*—

Division 4 Model Defamation Amendment (Absolute Privilege) Provisions 2023

56 Absolute privilege amendments

- (1) This section applies to the amendments made to this Act by the *Model Defamation Amendment (Absolute Privilege) Provisions 2023* about the defence of absolute privilege in its application to publications to officials of police forces or services of Australian jurisdictions (the *absolute privilege amendments*).
- (2) The absolute privilege amendments apply to a post-commencement action.
- (3) The existing law continues to apply despite the absolute privilege amendments to a pre-commencement action.
- (4) In this section:
 - existing law*, in relation to the absolute privilege amendments, means the law that would have applied if the amendments had not been enacted.
 - post-commencement action*, in relation to the absolute privilege amendments, means a cause of action for the publication of defamatory matter accruing after the commencement of the amendments.
 - pre-commencement action*, in relation to the absolute privilege amendments, means a cause of action for the publication of defamatory matter accruing before the commencement of the amendments.