

Parliament of Victoria

Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024

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No. 5 | June 2024

Bill Brief

Parliamentary Library & Information Service

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Terminology

absolute privilege	<p>Absolute privilege is recognised by common law and in defamation law.</p> <p>Under this privilege, defamation action cannot be brought against a person even if the defamatory statement's author knew it was false and intended to damage the other's reputation. This applies to statements made in the course of:</p> <ul style="list-style-type: none"> • parliamentary proceedings • broadcast of parliamentary proceedings • court and legal proceedings • tribunals that operate like courts.¹
Chief Statistician	<p>The Chief Statistician is a statutory position under the <i>Crime Statistics Act 2014</i>. They head up Victoria's Crime Statistics Agency.²</p>
chilling effect	<p>Merriam Webster defines this term as 'a usually undesirable discouraging effect or influence'.³ Defamation law has been characterised as having this effect on reporting of unlawful conduct, such as sexual harassment.⁴</p>
defamation	<p>Victoria Legal Aid describes defamation as 'causing serious harm to a person's reputation by publishing material about them that changes the way people feel about them ... Publishing includes speaking, writing, drawing, photographing or blogging'.⁵</p>
qualified privilege	<p>The defence of qualified privilege recognises there are circumstances where a person has a legal or social duty to communicate information to a recipient who has an interest in receiving it—for example, giving a job reference.</p> <p>The qualified privilege defence depends on the facts of the matter and can be defeated if:</p> <ul style="list-style-type: none"> • the conduct in publishing the alleged defamatory material was not reasonable • the person(s) to whom the publication was made did not have an interest, or an apparent interest, in the information published • there is evidence of malice. <p>A defence of qualified privilege can generally only be determined at final hearing.⁶</p>

¹ Jager, H. (2022) 'Defences to defamation', *The Law Handbook* [Online], Fitzroy Legal Service website.

² Crime Statistics Agency (date unknown) 'About us', CSA website.

³ Merriam-Webster Dictionary (Online) (date unknown) 'chilling effect', Merriam-Webster website.

⁴ Victorian Department of Justice and Community Safety (2022) *Review of the Model Defamation Provisions: Stage 2 Part B – Policy options*, Standing Council of Attorneys-General's Stage 2 Review of the Model Defamation Provisions—Part B, 24 August, Melbourne, Victorian Government, p. 10.

⁵ Victoria Legal Aid (2022) 'Defamation', VLA website.

⁶ Victorian Department of Justice and Community Safety (2022) op. cit., p. 12.

Executive Summary

The Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024 introduces a number of reforms and technical amendments across several Acts. However, this Bill Brief focuses on two significant sets of changes.

The most extensive of these amendments relate to the *Defamation Act 2005*. Australia's defamation laws are contained in mirrored legislation across all states and territories. These are agreed upon by the Standing Council of Attorneys-General (SCAG). SCAG have recently reviewed the model defamation provisions, upon which each state and territory's defamation legislation is based, and have agreed on several updates. These updates form a key part of this Bill and are split into two parts:

- clarification of digital intermediaries' liability for third-party content; and
- extension of 'absolute privilege' to reports made to police.

The other significant change relates to increased data provisions for the Chief Statistician, who heads Victoria's Crime Statistics Agency. In addition to the data they already receive from the Chief Commissioner of Police, the Bill would allow the Chief Statistician to request data from courts. Among other benefits, it is anticipated this will support an upcoming review of the *Bail Act 1977*.

This Bill Brief provides the background to how these proposals came about. It then outlines the second reading speech and the Bill's provisions. Finally, the paper will detail some views from key stakeholders both from media coverage and from submissions to review consultation processes. This Bill Brief is not meant as a comprehensive summary of the topics covered but is intended as a helpful overview of some of the key provisions of the Bill.

Bill information

Introduced: 15 May 2024

House: Legislative Assembly

Second reading: 28 May 2024

Commencement:

- (1) This Act (other than Parts 2 and 6, Division 2 of Part 12 and Schedule 1) comes into operation on the day after the day on which this Act receives the Royal Assent.
- (2) Subject to subsection (3), Parts 2 and 6, Division 2 15 of Part 12 and Schedule 1 come into operation on a day or days to be proclaimed.
- (3) If a provision referred to in subsection (2) does not come into operation before 13 May 2025, it comes into operation on that day.

Links to key documents including the Bill, Explanatory Memorandum, statement of compatibility and second reading speech can be found at the [Library's Infolink page for this Bill](#).

For further information on the progress of the bill, please visit the [Victorian Legislation and Parliamentary documents website](#).

Introduction

The Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024 ('the Bill') seeks to introduce a number of justice reforms. Among them are measures to increase the efficiency of Victoria's integrity bodies, to clarify the validity of electronic signatures in legal procedures and to allow the use of police-issued body-worn camera footage as evidence-in-chief in family violence matters. This Bill Brief, however, will focus on the following changes:

- amendments to the *Crime Statistics Act 2014* to allow for the disclosure of court data from certain proceedings to the Chief Statistician; and
- reforms to the *Defamation Act 2005* in line with the nationally agreed model defamation provisions.

This Bill Brief provides an outline of the second reading speech and the Bill as they relate to these two sets of amendments. The paper then outlines some of the recent media commentary as well as stakeholder views on both the status quo and proposed reforms.

Crime and criminal justice trends data

The Chief Statistician, who leads Victoria's Crime Statistics Agency, receives data from the Chief Commissioner of Police, as well as publishing and releasing statistics in relation to crime in Victoria.⁷ However, the Chief Statistician does not have power to request data from courts. This Bill would allow that to occur and enable them to gather data not just on crime but criminal justice trends. The data is required to inform a statutory review of recent amendments to the *Bail Act 1977*, but calls for greater data capture have been coming for several years. This Bill Brief will explain some of the context that led to these amendments, together with highlighting broader discussion on data availability in the criminal justice system.

Defamation reforms

The more substantial reforms in the Bill relate to defamation laws. Following extensive consultation initiated by the Standing Council of Attorneys-General (SCAG) and led by the New South Wales and Victorian governments, a set of amendments was agreed to be implemented in mirroring legislation across each state and territory. The Bill proposes amendments relating to two areas of concern within the *Defamation Act*:

- the liability of digital intermediaries for third-party content; and
- the extension of 'absolute privilege' to reports to police.

The responsibility of internet intermediaries—or digital intermediaries—for content published through their platforms has been a point of contention in a number of court cases. This Bill seeks to clarify the responsibilities of various participants in the online environment by introducing a number of definitions, exemptions and other measures.

The extension of absolute privilege has in part been prompted by Sex Discrimination Commissioner Kate Jenkins's *Respect@Work* report, which in 2020 shone a light on sexual harassment in the workplace, especially as it disproportionately affects women.⁸ The provision of an absolute privilege defence for reports made to police is meant to lessen what is described as defamation law's 'chilling effect' on the reporting of unlawful personal conduct. This Bill Brief explores some of the context, commentary and stakeholder views that have shaped the current debate.

⁷ *Crime Statistics Act 2014*, cl 5

⁸ Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, AHRC, January.

1 | Background

Before the paper addresses the Bill, the following section details some of the events leading up to the reforms being proposed. These include the pressing need for data availability around crime and criminal justice in Victoria, together with the changing context around Australian defamation law.

Criminal justice statistics

Royal commissions

There have been calls for greater data capture in criminal justice systems for a number of years. Improvement of data processes was among the recommendations from the Royal Commission into Family Violence in 2016.⁹ At that time, Court Services Victoria (CSV) acknowledged the challenge of data collection, coordination and release. In its submission to the commission, CSV stated:

There are significant gaps in data collection and quality in relation to family violence across almost all jurisdictions. This limits CSV's ability to identify, analyse, report and forecast in relation to family violence matters. This means that evidence driven optimisation of service delivery, funding and staffing levels and skill sets is limited.¹⁰

The Magistrates' Court, the Children's Court and the County Court all told the royal commission that they either couldn't accurately compile data on family violence matters or did not collect it at all.¹¹ Victoria's Chief Statistician, Fiona Dowsley, raised the importance of integrating data from multiple sources, including courts data, in enabling 'the development of a more comprehensive recidivism model' around family violence matters.¹²

The commission's recommendation 199 in particular encouraged the government to establish an agency that would 'liaise with the Crime Statistics Agency and other agencies to coordinate data collection and sharing for the purposes of assessing the overall performance of systems that respond to family violence'.¹³

This was implemented with the introduction of the Family Violence Reform Implementation Monitor in 2017.¹⁴ In its most recent report, the monitor reiterated the call for more data availability to aid understanding of the criminal justice system, saying there was a 'need for disaggregated data to shed light on the experiences of diverse cohorts', including refugee and migrant communities, LGBTQIA+ people and people with a disability.¹⁵

This echoed findings from the final report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, where data availability around the experiences of people with disability in the justice system was identified as a key concern:

No jurisdiction in Australia, except to an extent New South Wales, collects or publishes data recording the number of people with disability in the criminal justice system or the types and prevalence of disability within custodial settings. Inconsistent and incomplete disability

⁹ State of Victoria (2016) *Royal Commission into Family Violence: report and recommendations*, parliamentary paper no. 132, March, Melbourne, Victorian Government Printer, p. 41.

¹⁰ *ibid.*, p. 146.

¹¹ *ibid.*, p. 146.

¹² *ibid.*, p. 147.

¹³ *ibid.*, p. 100.

¹⁴ Victorian Government (2020) 'Establish an independent statutory Family Violence Agency: Recommendation 199', Victorian Government website.

¹⁵ Family Violence Reform Implementation Monitor (2023) *Monitoring Victoria's family violence reforms: service response for perpetrators and people using violence within the family*, Melbourne, Office of the FVRIM, January, p. 36.

screening processes, a lack of data collection and poor data linkage all contribute to the poor understanding of the prevalence and types of disability in the criminal justice system.¹⁶

Review of 2023 amendments to the Bail Act 1977

Questions of data availability are pertinent to Victoria’s bail laws. The *Bail Act 1977* has been significantly amended over the last decade. The most recent of these changes were introduced through the Bail Amendment Bill 2023.¹⁷ These amendments to the Bail Act sought to address a number of concerns, including—among other things—increases to the prison population and ‘time served prison sentences’; and bail laws’ impact on women and Aboriginal and Torres Strait Islander cohorts in particular.¹⁸ In order to monitor the laws’ effectiveness, the Bill introduced new section 32C, which stated that a ‘review must be commenced no later than 2 years after’ the Bill’s commencement and completed within six months.¹⁹

The courts collect a large amount of data on crime and criminal justice trends, but at present only crime statistics from Victoria Police and Corrections Victoria are provided to the Chief Statistician.²⁰ The Chief Statistician does not have the ability under the *Criminal Statistics Act 2014* to request and access data from the courts about the criminal justice process. Amendments in the Bill seek to address this gap in data availability in the hopes that it will help provide insights for the review of the *Bail Amendment Act 2023* amendments.²¹

Model defamation provisions

Other significant changes in the Bill relate to defamation law. In 2005, SCAG established the *Model Defamation Provisions Intergovernmental Agreement*. A Defamation Working Party (DWP) was established, resulting in a unifying set of model defamation provisions. Defamation law was standardised across the states and territories through mirroring legislation. The push towards uniformity sought to bring defamation law up to date with the changing nature of communication, particularly from analogue to digital.

Review of model defamation provisions

In 2018, the DWP was reassembled to undertake a review of the model defamation provisions. From early 2019 the group invited submissions on how these provisions were working and whether any changes were necessary.²² Then Attorney-General Jill Hennessy described the laws as ‘dated’ and said that a ‘national approach to reform is essential to keep pace with the digital age, especially where online publications cross state boundaries’.²³

Stage 1 of the review was led by New South Wales and wrapped up in 2020, resulting in mirrored reforms in each legislature. In Victoria, those reforms were introduced with the Justice Legislation Amendment (Supporting Victims and Other Matters) Bill 2020.²⁴ The changes placed a cap on damages for non-economic loss and introduced a new public

¹⁶ Commonwealth of Australia (2023) *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Criminal justice and people with disability*, volume 8, final report, September, Canberra, Commonwealth of Australia, p. 9.

¹⁷ For more information, see the Parliamentary Library and Information Service’s Bill Brief on the *Bail Amendment Bill 2023*.

¹⁸ Wright, A. (2023) *Bail Amendment Bill 2023*, Parliamentary Library & Information Service, August, Melbourne, Parliament of Victoria, p. 7.

¹⁹ *Bail Act 1977*, s 32(2)–(3)

²⁰ ‘Explanatory Memorandum’, Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024 (Vic), p. 3.

²¹ *ibid.*, p. 3.

²² J. Hennessy, Attorney-General (2019) *Have your say on defamation law overhaul*, media release, 27 February.

²³ *ibid.*

²⁴ *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020*, part 5, division 1; see also the Parliamentary Library & Information Service’s Bill Brief, *Justice Legislation Amendment (Supporting Victims and Other Matters) Bill 2020*.

interest defence, a serious harm threshold, a single publication rule and a mandatory concerns notice procedure.²⁵

Defamation law amendments contained in this Bill are part of the second stage of reforms to the model defamation provisions. Stage 2 consultations were conducted over two parts. Part A was led by New South Wales, and Part B by Victoria. It is intended that these reforms will be in place within every state and territory by 1 July 2024.²⁶ The New South Wales Government legislated both sets of reforms in October 2023 through the Defamation Amendment Bill 2023 (NSW).²⁷

Part A: Digital intermediary responsibility for third-party content

Part A looked at ‘the question of internet intermediary liability in defamation for the publication of third-party content’.²⁸ According to then NSW Attorney-General Mark Speakman, who led the review that resulted in provisions now being implemented in this Bill, the reforms ‘address issues that have been the subject of long and costly disputes in recent years and respond to the decision of the High Court in *Fairfax Media Publications Pty Ltd & Others v Voller* [2021] HCA 27’ (‘the Voller case’).²⁹ The High Court in the Voller case found that media companies were liable as ‘the publishers of the third-party Facebook user comments’.³⁰

A consultation discussion paper expressed the reasons for clarifying this area of the law, recognising that ‘a range of internet intermediaries’ may hold ‘some responsibility in defamation law for the publication of third-party content where they have created systems or online environments to enable and promote the publication and dissemination of user-generated content’.³¹ The reforms proposed by the NSW Government were motivated by the need to balance the protection of reputations with a duty to not ‘unreasonably’ limit freedom of expression in the online landscape.³² The provisions drafted as a result of this process are part of this Bill.

Technology has outpaced legislation

The digital world has progressed significantly since the uniform defamation laws were initially designed in 2005. Defamation law currently contains defences for offline ‘secondary publishers’, such as newsagents, booksellers and librarians.³³ However, current policy and legislative settings are unclear for the online arena. The DWP’s consultation discussion paper on these proposals explained that currently the scope of people or entities that can be held liable as ‘publishers’ in defamation law is very broad.³⁴

While digital intermediaries are ‘often easily identifiable’ as potential objects of defamation suits, given they may be in a position to provide remedies for harmful content, the working group ventured that this ‘does not necessarily mean that they should automatically be held responsible for content that is authored or created by a third-party’.³⁵ These intermediaries

²⁵ NSW Department of Communities and Justice (2021) *Discussion paper: Attorneys-General Review of Model Defamation Provisions—Stage 2*, 31 March, Sydney, NSW Department of Communities and Justice, p. 6.

²⁶ Victorian Department of Justice and Community Safety (2023) ‘*Review of Model Defamation Provisions*’, Engage Victoria website; M. Daley, Attorney-General (NSW) (2023) *Modernising defamation law for a digital world*, media release, 25 October.

²⁷ *Defamation Amendment Bill 2023* (NSW)

²⁸ NSW Department of Communities and Justice (2021) op. cit., p. 6

²⁹ Daley (2023), op. cit.

³⁰ *Fairfax Media Publications Pty Ltd & Others v Voller* [2021] HCA 27, ‘Judgement summary’.

³¹ NSW Department of Communities and Justice (2021) op. cit., p. 6.

³² NSW Department of Communities and Justice (2022) *Background Paper: Model Defamation Amendment Provisions 2022 (Consultation Draft)*, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part A, August, Sydney, NSW Government, p. 4.

³³ NSW Department of Communities and Justice (2021) op. cit., p. 16

³⁴ *ibid.*, p. 15.

³⁵ *ibid.*, p. 16.

may include internet service providers, internet content hosts, search engines, social media platforms and online forum hosts, with some having ‘minimal connection with the content posted’—a passive role—and others playing ‘a more active role—for example, by selecting, moderating or curating it’.³⁶

In the current environment, these decisions on liability are being left up to court interpretation, including the Voller case and *Google LLC v Defteros* [2022] HCA 27³⁷ (‘the Defteros case’), in the latter of which the High Court found Google to be not liable for defamatory material contained in non-sponsored search results.³⁸ These in part prompted experts to call for reform of defamation laws.

Requirement for compatibility with new federal legislation

Consultation was also required on how defamation law operates in conjunction with other Commonwealth Acts around online activity.

The *Broadcasting Services Act 1992* (Cth) contains an immunity defence for ‘internet service providers’ and ‘internet content hosts’. However, how this complements defamation law has been muddied by the Voller case,³⁹ where in its ruling the High Court found that a person is liable if they take part in communicating defamatory matter to a third person by ‘facilitating and encouraging’ it.⁴⁰ According to the consultation paper, the ‘questions of scope’—where entitlement to a defence potentially conflicts with other Acts—‘have important implications for defamation law in the online environment’.⁴¹

Another recent addition to the framework for regulating online behaviour is the *Online Safety Act 2021* (Cth), which is intended to work in tandem with the model defamation provisions. That Act introduced the eSafety Commissioner and aims to minimise harm to online users in ways not covered by defamation law.⁴²

Part B: Expanding ‘absolute privilege’ defence

In August 2022, Victorian Attorney-General Jaclyn Symes announced a consultation process to explore how to reduce ‘the chilling effect of current defamation laws’.⁴³ The chilling effect describes the phenomenon of people being deterred from reported crimes committed against them for fear of defamation. In order to reduce this effect, Victoria’s proposal would ‘aim to strike the right balance between protecting victim-survivors from claims of defamation when making a report to police and other bodies, while maintaining appropriate safeguards to limit any improper reputational damage’.⁴⁴ A discussion paper distributed in advance of the consultation indicated that the process would consider criminal allegations being made ‘to police and to statutory investigative agencies, such as crime or corruption commissions’.⁴⁵

Respect@Work report and the ‘chilling effect’

The consultation was in part driven by the findings of Sex Discrimination Commissioner Kate Jenkins’s *Respect@Work* report, released in 2020. The report found workplace sexual harassment was ‘prevalent and pervasive’ but that ‘most people who experience sexual

³⁶ *ibid.*, p. 30.

³⁷ *Google LLC v Defteros* [2022] HCA 27, ‘Judgement summary’.

³⁸ M. Whitbourn (2022a) ‘Google scores major win in High Court defamation battle’, *Sydney Morning Herald*, 17 August.

³⁹ *Fairfax Media Publications Pty Ltd & Others v Voller* [2021] HCA 27, ‘Judgement summary’.

⁴⁰ E. Byrne (2021) ‘High Court finds media outlets are responsible for Facebook comments in Dylan Voller defamation case’, *ABC News*, 8 September.

⁴¹ NSW Department of Communities and Justice (2021) *op. cit.*, p. 32

⁴² eSafety Commissioner (2022) ‘Stage 2 Review of the Model Defamation Provisions – Part A: eSafety Commissioner submission’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part A, 9 September, Sydney, NSW Department of Communities and Justice.

⁴³ J. Symes, Attorney-General (2022) *Reducing the chill of defamation on victim-survivors*, media release, 25 August.

⁴⁴ *ibid.*

⁴⁵ NSW Department of Communities and Justice (2021) *op. cit.*, p. 88.

harassment never report it'.⁴⁶ Given the high prevalence of sexual harassment towards women, Jenkins's report focused particularly on the toll that defamation law was having on women. This discussion drew on the context of 'recent high-profile matters' involving 'women who had not made a formal complaint of sexual harassment and whose private complaints and allegations were aired by the media without their consent'.⁴⁷ The commission received evidence to suggest fear of defamation was at least partly responsible for low reporting of sexual assault and harassment.⁴⁸

In responding to these findings, the report's recommendation 39 encouraged SCAG to consider protections for 'alleged victims of sexual harassment who are witnesses in civil proceedings, including but not limited to defamation proceedings'.⁴⁹ The recommendation set out a range of possible protective measures, including the introduction into defamation laws of 'a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details in any defamation court proceeding, where the defamatory material includes allegations of sexual harassment'.⁵⁰ In response, SCAG issued a communiqué to say it would prioritise consideration of legislative amendments in line with recommendation 39.⁵¹

Current settings and calls for change

A 'qualified' privilege defence currently exists for victim-survivors reporting sexual assault. Section 30 in the Defamation Act sets out the conditions of this defence, including the stipulation that the defendant must be able to prove that publication of the matter was 'reasonable in the circumstances'.⁵²

In section 27, the 'absolute privilege' defence in a defamation case is limited to matter published in the course of 'the proceedings of a parliamentary body' and court or tribunal proceedings. Absolute privilege would also be a defence if the matter were 'published in another Australian jurisdiction' and an absolute privilege defence would apply in comparable circumstances in that jurisdiction.⁵³

As part of Part B of the review of model defamation provisions, the Department of Justice and Community Safety proposed to extend the absolute privilege defence to reports made to the police (and potentially other statutory bodies). They argued:

- qualified privilege does not reduce the 'chilling effect' and can contribute to the retraumatisation of victim-survivors;
- a qualified privilege defence is costly and time-consuming; and
- absolute privilege is better able to provide certainty to victim-survivors and witnesses about when reports to certain bodies are protected, and may prevent other impacts and concerns held by victim-survivors and witnesses, including those around privacy, embarrassment, reprisal, career progression and giving evidence in court.⁵⁴

A majority of stakeholders backed the proposal to extend absolute privilege, with only nine out of 27 stakeholders deeming the existing qualified privilege defence adequate (see the 'Stakeholder views' section).⁵⁵

The Bill only extends privilege to police reports (see 'The Bill'). However, the Standing Committee of Attorneys-General agreed on guidelines that detail how each jurisdiction could 'list additional circumstances to which absolute privilege applies in Schedule 1 to its

⁴⁶ AHRC (2020), op. cit., p. 14.

⁴⁷ *ibid.*, p. 569.

⁴⁸ *ibid.*, p. 565.

⁴⁹ *ibid.*, p. 573.

⁵⁰ *ibid.*, p. 573.

⁵¹ M. Dreyfus, Attorney-General (Cth) (2022) *Standing Council of Attorneys-General communiqué*, media release, 9 December.

⁵² *Defamation Act 2005*, s 30(1).

⁵³ *ibid.*, s 27.

⁵⁴ Victorian Department of Justice and Community Safety (2022) *Review of the Model Defamation Provisions: Stage 2 Part B – Policy options*, Standing Council of Attorneys-General's Stage 2 Review of the Model Defamation Provisions—Part B, 24 August, Melbourne, Victorian Government, pp. 11–12.

⁵⁵ *ibid.*, p. 11.

defamation legislation’, including determining the complaints-handling bodies to be listed.⁵⁶ This aspect is still under consideration by the Victorian Government.⁵⁷

2 | Second reading speech

The Minister for Police and Minister for Crime Prevention, Anthony Carbines, delivered the second reading speech for the Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024 on 28 May 2024. The speech outlined the breadth of the Bill, which the minister said would ‘support the effective operation of the justice and integrity systems’.⁵⁸

Specifically relevant to this Bill Brief, the Minister outlined the key areas of reform, including:

- increased data provisions for the Chief Statistician; and
- enactment of the newly revised and consolidated model defamation provisions.⁵⁹

Also included in the Bill but not detailed in this Bill Brief are the following reforms:

- clarified admissibility of electronic signatures in criminal proceedings;
- an extension of the use of police-issued body-worn camera footage as evidence-in-chief in family violence matters; and
- wide-ranging technical amendments to improve the efficiency of the state’s integrity framework.

Criminal justice statistics

The Bill expands the remit for the Chief Statistician to request courts’ data. The second reading speech raises the possibility of the data contributing ‘to building holistic insights into the justice system’ and enabling ‘proactive policy actions to safeguard the delivery of justice services’.⁶⁰ Of particular emphasis in the speech is the need for more data on the operation of bail laws in the wake of reforms introduced through the *Bail Amendment Act 2023*. The minister states:

The linkage of bail data held by the courts with other bail data will deliver a comprehensive review on the operation of bail changes. This will allow government to ensure the bail system is working appropriately to balance the right to bail for an accused and the public safety of the community.⁶¹

The speech also outlines some of the safeguards around data provision to ensure published statistics are ‘de-identified’, data is only ‘accessed as necessary’, and no data is provided that ‘may affect the fair trial of a case’.⁶² Ultimately, the minister summarised the reforms as providing ‘a clear framework to exchange data safely and securely between the courts and the Chief Statistician’.⁶³

⁵⁶ Standing Council of Attorneys-General (2023a) *Guiding Principles for jurisdictions to determine whether to extend absolute privilege to matter published to a complaints-handling body*, September, SCAG.

⁵⁷ Victorian Department of Justice and Community Safety (2023) op. cit.

⁵⁸ Carbines, A. Minister for Police (2024) ‘Second reading speech: Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024’, *Debates*, Victoria, Legislative Assembly, 28 May, p. 1838.

⁵⁹ *ibid.*, p. 28.

⁶⁰ *ibid.*

⁶¹ *ibid.*, p. 29.

⁶² *ibid.*

⁶³ *ibid.*

Defamation laws

In relation to amendments to the Defamation Act, the minister emphasised the benefits of having ‘uniformity’ in defamation laws across states and territories. According to the speech, the reforms have:

... been informed by extensive public consultation, facilitated by consultation papers, submissions processes, stakeholder roundtables, advice from expert advisory groups and public exposure drafts of the proposed changes to the model provisions.⁶⁴

The Bill also commits the government to review both stage 1 and stage 2 reforms within three years of their commencement.

Digital intermediary liability for third-party content

On the part A reforms, the speech emphasised the need for the laws to be fit for purpose for ‘an everchanging digital and online landscape’.⁶⁵ On the back of recent court decisions, he said there is ‘widespread agreement that the law needs to provide greater clarity about the potential liability of digital intermediaries and their responsibilities when potentially defamatory matter is published online’.⁶⁶

The second reading speech details the series of measures being taken:

- providing conditional exemptions for a selection of digital intermediaries;⁶⁷
- updating the mandatory requirements for an offer to make amends for an online publication, to ensure flexibility in complaints-handling processes;⁶⁸
- requiring courts to consider balancing factors when making preliminary discovery orders;⁶⁹
- introducing a new defence for digital intermediaries, to clarify when a digital intermediary has capacity to exercise editorial control;⁷⁰
- enabling courts to make orders against non-party digital intermediaries; and⁷¹
- expanding the electronic means by which notices can be given or served.⁷²

Absolute privilege immunity for reports to police

The minister indicated in the second reading speech that reports made to police are ‘not adequately protected from defamation liability’ and the current legislative setting ‘can have a chilling effect on the reporting of crime’.⁷³ The speech highlighted the potentially costly and retraumatising effects of a ‘qualified privilege’ defence,⁷⁴ while also indicating that a disproportionate number of these victim-survivors are women, as ‘22 per cent of Australian women aged 18 years and over have experienced sexual violence since the age of 15’.⁷⁵ Further, only 8.3 per cent of women who have experienced sexual assault by a male report ‘the most recent incident’ to police.⁷⁶

The minister also referenced the *Respect@Work* report from Sex Discrimination Commissioner Jenkins⁷⁷ and explained Victoria’s leading role in seeking to reduce this chilling

⁶⁴ *ibid.*, p. 30.

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *ibid.*, p. 31.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *ibid.*, p. 32.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ *ibid.*, p. 32–33.

effect through reforms to defamation laws. The minister stressed that the defence of absolute privilege constitutes a ‘complete immunity and defence to a defamation claim’.⁷⁸

3 | The Bill

The Bill amends a large number of Acts, but this Bill Brief focuses on only two parts of the Bill:

- Part 2—Amendments to the *Crime Statistics Act 2014* relating to provision of court data to the Chief Statistician
- Part 4—Amendment of the *Defamation Act 2005*

Part 2 would commence on a day to be proclaimed before 13 May 2025 or on that day, while part 4 would commence on the day of royal assent.⁷⁹

Provision of court data to the Chief Statistician

Clauses 3–7 allow for the Chief Statistician to request data from the courts through the Crime Statistics Act. Clause 8 makes consequential amendments to the *Spent Convictions Act 2021* to accord with these changes.

The provisions would allow the Chief Statistician to publish and release information on ‘crime and criminal justice issues and trends’, rather than only ‘crime’.⁸⁰

The Bill seeks to introduce several definitions into the Crime Statistics Act in order to define the type of data that must be provided if requested by the Chief Statistician, including ‘applicable court’ and ‘applicable court data’.⁸¹ The Bill also indicates how and what information must be provided and the privacy provisions in place.

Applicable courts from which the Chief Statistician will be able to request data include the Children’s, Magistrates’, County and Supreme courts. Applicable court data may include electronically held information relating to criminal proceedings, bail proceedings and any other proceedings under all or parts of the following Acts:

- *Family Violence Protection Act 2008*
- *Personal Safety Intervention Orders Act 2010*
- *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*
- *Sex Offenders Registration Act 2004*.⁸²

Information might include orders made, judgements, applications made or warrants issued. Identified data would be provided to the Chief Statistician, but would have to be subjected to privacy protections and deidentified prior to public release.⁸³

There are limits, however, on what can be provided. Documents such as hearing transcripts, evidence and information under judicial privilege are not included in the definition of ‘applicable court data’, nor is health information of people involved in but not party to an applicable proceeding.⁸⁴

⁷⁸ *ibid.*, p. 33.

⁷⁹ [Justice Legislation Amendment \(Integrity, Defamation and Other Matters\) Bill 2024](#) (Vic), cl 2.

⁸⁰ *ibid.*, cl 3.

⁸¹ *ibid.*, cl 4(2)

⁸² *ibid.*, cl 5(2)

⁸³ *ibid.*, cl 5(3)

⁸⁴ *ibid.*, cl 5(4)

Amendments to the *Defamation Act 2005*

Digital intermediaries

Part 4, division 2 of the Bill proposes amendments agreed to by SCAG following part A of the review of the model defamation provisions. These relate to digital intermediaries and defamation liability.

Several definitions are proposed in clauses 14 and 15 to clarify the operation of the Defamation Act in an online environment (see Table 1).⁸⁵ For additional details around how the amendments detailed in this section will function in practice, clause 21 details the transitional and savings provisions.⁸⁶

Table 1: Definitions included in clauses 14 and 15

Clause 14 definitions	
access prevention step	A step to remove matter; or to block, disable or otherwise prevent access to defamatory matter.
digital intermediary	A person who provides or administers an online service where matter is published. This may include forum administrators, for instance, who administer online platforms that enable users to provide content or interact, but excludes the ‘poster’ of the content.
digital matter	Matter published electronically by means of an online service.
online service	A service provided to a person to enable the person to use the Internet.
poster	A person who uses an online service to publish matter.
Clause 15 definitions	
caching service	An online service whose main function is to provide automatic, intermediate and temporary storage of content.
conduit service	An online service whose main function is to enable users to access and make use of the internet.
search engine	Software that helps users to search the internet for content.
search engine provider	A person maintaining or providing a search engine.
search result	A result generated by a search engine that identifies a webpage through one or more of the following: webpage title; a hyperlink; an extract; an image from the webpage.
storage service	An online service that is not a caching service but nonetheless enables users to store content remotely.

Source: Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024, cls 14–15.

Note: definitions have been abbreviated for ease of reference; refer to Bill for detailed definitions.

⁸⁵ *ibid.*, cl 14–15

⁸⁶ *ibid.*, cl 21.

Exemptions for some digital intermediaries

Clause 15 proposes two liability exemptions through new sections 10C and 10D:

- for **digital intermediaries** when they provide **caching, conduit** or **storage services** in relation to potentially defamatory matter, and
- for **search engine providers** in relation to matter published in search results or matter published on websites accessed through search result hyperlinks.⁸⁷

Several conditions restrict the applicability of these exemptions, including the requirement that the intermediary's role in publication be 'passive' in publication.⁸⁸

Under new section 10C, intermediaries would have to prove that, in addition to a caching, conduit or storage service being involved in publication, the intermediary was limited to this function and did not take an 'active role' such as 'initiating, promoting or editing' the information.⁸⁹

Under new section 10D, a search engine provider would have to prove that search results containing defamatory matter were generated in an 'automated process' and that this process was the limit of the search engine provider's involvement.⁹⁰ The exemption is limited to search results containing a title, hyperlink, extract and image for the webpage and would exclude search results 'promoted or prioritised ... because of a payment or other benefit given to the provider'.⁹¹ While an exemption might include search results generated from an 'autocomplete predictive text suggestion', an exemption would not apply to the original search suggestion if it was defamatory.⁹²

Offers to make amends

Clause 16 would increase the number of avenues for a publisher to make amends. Under the substituted section 15(1A)(b), an offer to make amends may include an offer of 'access prevention steps', meaning 'to block, disable or otherwise prevent access to a matter'.⁹³ Under new section 15(1B), making amends may include 'reasonable steps', instead of the current mandatory remedial offers contained in section 15(1)(d) and (e).⁹⁴ Currently, a mandatory remedial offer must include:

- 'a reasonable correction of, or a clarification of or additional information about, the matter in question'; and
- 'reasonable steps to tell the other person'—if it has been distributed to others—'that the matter is or may be defamatory of the aggrieved person'.⁹⁵

The Bill recognises that in some circumstances a correction or clarification may not be possible.⁹⁶

Preliminary discovery orders

Clause 17 seeks to ensure 'privacy, safety or other public interest considerations' are taken into account by a court—for instance, whether the poster is at risk of domestic violence if their identity is revealed—when determining whether to make a preliminary discovery order.

⁸⁷ *ibid.*, cl 15

⁸⁸ 'Explanatory Memorandum', [Justice Legislation Amendment \(Integrity, Defamation and Other Matters\) Bill 2024](#) (Vic), p. 14.

⁸⁹ [Justice Legislation Amendment \(Integrity, Defamation and Other Matters\) Bill 2024](#) (Vic), cl 15, new section 10C.

⁹⁰ *ibid.*, cl 15, new section 10D.

⁹¹ 'Explanatory Memorandum', [Justice Legislation Amendment \(Integrity, Defamation and Other Matters\) Bill 2024](#) (Vic), pp. 15–16.

⁹² *ibid.*, p. 16.

⁹³ *ibid.*, p. 18.

⁹⁴ *ibid.*

⁹⁵ [Defamation Act 2005](#), s 15(1)(d)–(e).

⁹⁶ 'Explanatory Memorandum', [Justice Legislation Amendment \(Integrity, Defamation and Other Matters\) Bill 2024](#) (Vic), p. 18.

Preliminary discovery may be sought by a plaintiff when they wish to identify a ‘poster’ if the matter in question, for instance, has been published anonymously.⁹⁷

Defence for publications involving digital intermediaries

New section 31A would introduce a new defence for digital intermediaries against liability for defamatory matter. The defence would apply if the defendant were able to prove that, in relation to the defamatory matter, they:

- were a digital intermediary;
- had an ‘accessible complaints mechanism’ in place; and
- took ‘reasonable access prevention steps’ either before a written complaint was made or within seven days of receiving the complaint.⁹⁸

Conditions would apply, and if the intermediary was proven to be motivated by malice in providing the online service that enabled the defamatory matter to be published, then this defence would be defeated.⁹⁹

Orders against non-party digital intermediaries

New section 39A will apply in circumstances where either a plaintiff’s case for defamation has been upheld by a judge, or a court has granted a temporary or final injunction on the defendant publishing defamatory matter. In this context, the court would be able to ‘order a digital intermediary who is not a party to the proceeding ... to take access prevention steps’, such as preventing or limiting publication or republication.¹⁰⁰

A court will not be able to make a final order until it has at least given the non-party digital intermediary a chance to say whether an order is appropriate, but if prompt action is required, it can make a temporary order without hearing from the intermediary.¹⁰¹ The non-party digital intermediary can be ordered to take steps, even if they are not liable for defamation in relation to the matter.¹⁰²

Giving of notices and other documents

Amendments in clause 20 would enable ‘any form of electronic communication’ to be used in giving or serving documents to a recipient—a person or body corporate—if that recipient ‘indicates’ that they use a certain type of communication or that there is a location where they are contactable. The word ‘indicate’ is intentionally broad to allow for multiple ways contact details might be provided.¹⁰³ Multiple examples are used in the Bill, including email or direct messaging addresses provided on a forum by the poster themselves, and website forms provided by a digital intermediary that can be used to contact the intermediary.¹⁰⁴

Absolute privilege

Clause 22 seeks to introduce provisions extending an absolute privilege defence.

New section 27(2)(ba) will extend this defence specifically to reports made to ‘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’.¹⁰⁵

⁹⁷ M. Schoenberg (2004) ‘Evidence gathering, confidentiality and the courts’, Australian Mining and Petroleum Law Association Yearbook, p. 110.

⁹⁸ Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024 (Vic), cl 18, new section 31A(1).

⁹⁹ *ibid.*, cl 18, new section 31A(4)

¹⁰⁰ *ibid.*, cl 19, new section 39A

¹⁰¹ *ibid.*, cl 19, new section 39A(4)–(5)

¹⁰² *ibid.*, cl 19, new section 39A(6)

¹⁰³ ‘Explanatory Memorandum’, Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024 (Vic), p. 22.

¹⁰⁴ Justice Legislation Amendment (Integrity, Defamation and Other Matters) Bill 2024 (Vic), cl 21

¹⁰⁵ *ibid.*, cl 22, new section 27(3)(b).

The term ‘official’ is broadly defined to include officers, employees and staff members of Victoria Police or a police force of any other jurisdiction. It may also include a ‘person engaged to act for or on behalf of the police force or service’.¹⁰⁶ Clause 23 indicates that the clause 22 absolute privilege amendments will only apply to matter published after the amendments’ commencement date, not those published before.¹⁰⁷

4 | Recent media coverage

This section looks at some of the coverage the Bill, and the model defamation provisions reform process more broadly, have received in the media.

Absolute privilege

In the Victorian Government’s press release introducing the Bill, the absolute privilege provisions are a central focus, given Victoria’s leading role in this part of SCAG’s review. Attorney-General Jaclyn Symes said that the government was ‘making it easier for victim-survivors to report crimes including sexual harassment and assault’.¹⁰⁸ The Government highlighted the chilling effect of defamation laws and the countering influence of ‘granting them complete immunity if their alleged perpetrator tries to bring a defamation suit against them’.¹⁰⁹

The Bill’s absolute privilege provisions were backed by Victoria Legal Aid’s Melanie Schleiger, who highlighted the chilling effect of current laws: ‘The silencing effect caused by the actual or perceived threat of a defamation action results in the under-reporting of sexual harassment and threatens the safety of women at work and in the community’.¹¹⁰ *Guardian Australia* and *News.com.au* both highlighted the fact that reports to the media would not be covered under the changes.¹¹¹

In the context of the *Lehrmann v Network Ten* court case, *Women’s Agenda* also profiled the effects of current defamation laws on the reporting of sexual assault and sexual harassment. Law expert Regina Featherstone discussed the current weaponisation of defamation law, saying ‘complainants are stopped in their tracks when they receive a concerns notice’.¹¹²

Featherstone co-authored *Let’s talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report*, released in April 2023 just weeks before the Bill’s introduction. The report reveals that defamation has been described as a ‘sword’ and the practice of defamation notices being used as a ‘new means of achieving silence’.¹¹³ The report also details the financial threat of being pursued for defamation: ‘The average award for non-economic loss for defamation is \$239,856 (federally), four times higher than the average award for non-economic loss in sexual harassment’.¹¹⁴

¹⁰⁶ *ibid.*, cl 22, new section 27(3)(a).

¹⁰⁷ *ibid.*, cl 23, new section 53(2)–(3).

¹⁰⁸ J. Symes, Attorney-General (2024) *Making it easier for victim-survivors to report violence*, media release, 15 May.

¹⁰⁹ *ibid.*

¹¹⁰ B. Jackson (2024) ‘“Respond better”: Victoria proposes defamation changes as sexual assault and harassment antidote’, *News.com.au*, 15 May.

¹¹¹ B. Kolovos (2024) ‘Victoria moves to protect sexual assault victims from defamation action for reporting crimes’, *The Guardian Australia*, 15 May; B. Jackson (2024) *op. cit.*

¹¹² O. Cleal (2024) ‘Victim-survivors are encouraged to speak out about sexual harassment. Defamation laws stop them in their tracks.’, *Women’s Agenda*, 17 May.

¹¹³ Featherstone, R. & S. Bargon (2024) *Let’s talk about confidentiality: NDA use in sexual harassment settlements since the Respect@ Work Report*, 6 March, Sydney, University of Sydney Law School, supported by Redfern Legal Centre & Human Rights Law Centre, p. 52.

¹¹⁴ *ibid.*

Digital intermediaries

The digital intermediary reforms in Victoria's Bill did not attract much attention. However, there was interest following SCAG's agreement to reform defamation laws regarding digital intermediaries in late 2022. This decision followed the two high-profile High Court decisions mentioned previously, the *Defteros*¹¹⁵ and *Voller*¹¹⁶ cases, each of which highlighted areas of defamation law requiring clarity.

NSW's Attorney-General at the time, Mark Speakman, who had led the reform consultation process, described the digital intermediary reforms, which were slated for all states and territories, as 'substantially' upgrading defamation laws 'to strike a better balance between protecting reputations and promoting freedom of speech online', especially with technology having 'advanced significantly' since defamation laws were first drafted.¹¹⁷ Federal Attorney-General Mark Dreyfus was quoted as saying the changes were 'a pragmatic approach'.¹¹⁸

Speakman also addressed how the changes would address forum administrators, given the interest surrounding the *Voller* case. 'Under the new defence,' he said, 'a person or organisation running a Facebook page would need to receive a written complaint regarding any allegedly defamatory third-party comments before they could be held liable'.¹¹⁹ Further, the forum administrator must then 'take reasonable steps to remove or otherwise prevent access to the matter within seven days in order to rely on the defence'.¹²⁰

Following SCAG's agreement to the part A reforms, the *Law Society Journal* profiled the proposed changes in February 2023. On the proposed reforms to digital intermediary liability, the University of Sydney's Professor David Rolph 'noted that recent cases have brought into sharp relief the issue of whether forum administrators of social media pages are a primary or secondary publisher'.¹²¹ Additionally, he called for reforms of 'the whole legislation to bring it clearly into the 21st century'.¹²² Associate Professor Jason Bosland, from the University of Melbourne, also supported exemptions for digital intermediaries from defamation liability on the basis of their 'passive role', but questioned whether you can call a search engine provider, which relies on algorithms to generate results, 'purely passive'.¹²³

¹¹⁵ Whitbourn (2022a), op. cit.

¹¹⁶ Whitbourn, M. (2022b) 'States strike national agreement on social media defamation laws', *Sydney Morning Herald*, 12 December.

¹¹⁷ Whitbourn, M. (2022b) op. cit.

¹¹⁸ *ibid.*

¹¹⁹ A. Meade (2022) 'Defamation reforms: Australian media may not be liable for Facebook comments in future', *The Guardian Australia*, 14 December.

¹²⁰ *ibid.*

¹²¹ F. A. Hunt (2023) 'Moving Australia's defamation laws into the digital age', *Law Society Journal (Online)*, 7 February.

¹²² *ibid.*

¹²³ *ibid.*

5 | Stakeholder views

Criminal justice statistics

In March 2022, the Legislative Council Legal and Social Issues Committee (LCLSIC) completed its inquiry into Victoria’s criminal justice system. A range of submissions raised the issue of data availability around not just crime but criminal justice trends.

Victoria Legal Aid (VLA) said in its submission that improving the justice system would include building ‘the evidence base with improved data collection on outcomes, interventions and user experience, and a system-based funding model’.¹²⁴ Similarly the Victorian Aboriginal Legal Service said data availability was a ‘persistent issue’ and raised it as a key reform opportunity for increasing ‘transparency and accountability’ across the criminal legal system, particularly where it concerned Aboriginal people and their ‘individual and collective rights over Indigenous Data’.¹²⁵ The Victorian Council of Social Service (VCOSS) noted that ‘[p]eople with disabilities are overrepresented in the criminal justice system, as victims, accused persons, defendants and witnesses’ and advocated for broader data collection to inform justice system outcomes.¹²⁶

In its findings, the LCLSIC found ‘a lack of data collection in key areas’ and recommended reform to increase data collection and protection.¹²⁷ This belief was reflected in recommendation 1 in the final report, which called on the government to ‘work with key stakeholders across the criminal justice system to improve data collection, accessibility and transparency’. This included increased data collection on ‘recidivism rates across the criminal justice process’ for those in a various circumstances such as ‘those released on community correction orders, parolees, those who re-offend while out on bail.’¹²⁸

Defamation reforms

The consultation processes around the model defamation provisions attracted a range of submissions from stakeholders. The following section details some of the positions put forward in those submissions.

Digital intermediary liability for third-party content

Digital rights and safety advocates

In considering the changes suggested by the SCAG review, the eSafety Commissioner encouraged the Attorneys-General ‘to consider ways of making defamation redress more accessible’ due to the ‘prohibitive’ costs of defamation action, causing some people to come to the eSafety Commissioner instead.¹²⁹ Others stated that any revised provisions should ‘reflect the nature of digital publications’ in balance with maintaining suitable access to remedy for complainants.¹³⁰

¹²⁴ Victoria Legal Aid (2021) ‘Towards a fairer and more effective criminal justice system for Victoria: Submission to the Inquiry into Victoria’s Criminal Justice System’, submission 159, Inquiry into Victoria’s criminal justice system, September, Melbourne, Legislative Council Legal and Social Issues Committee, p. 15.

¹²⁵ Victorian Aboriginal Legal Service (2021) ‘Victorian Aboriginal Legal Service submission to the inquiry into Victoria’s criminal justice system’, submission 139, Inquiry into Victoria’s criminal justice system, September, Melbourne, Legislative Council Legal and Social Issues Committee, pp. 8-9.

¹²⁶ Victorian Council of Social Service (2021) ‘VCOSS submission to the inquiry into Victoria’s criminal justice system’, submission 137, Inquiry into Victoria’s criminal justice system, September, Melbourne, Legislative Council Legal and Social Issues Committee, p. 22.

¹²⁷ Legislative Council Legal and Social Issues Committee (2022) *Inquiry into Victoria’s criminal justice system*, volume 1, final report, March, Melbourne, The Committee, p. xix.

¹²⁸ *ibid.*, p. 32.

¹²⁹ *ibid.*

¹³⁰ NSW Department of Communities and Justice (2021) *op. cit.*, p. 17

Digital Rights Watch argued that while the ‘ubiquitous nature’ of digital platforms was a challenge for defamation law and that there is a legitimate need to ‘provide meaningful legal pathways for those suffering harm caused by defamation online’, the Attorneys-General needed to ‘strongly consider the normative consequences of defamation law for internet and tech policy in Australia, and the flow on effects for Australians’ digital rights’.¹³¹ Recent examples of high-profile cases that raised questions in this regard involved the operator of the Twitter handle ‘PRGuy’, who sought the right to anonymity after allegations of defamation made against them, and YouTuber Jordan Shanks (‘FriendlyJordies’), who was accused of defamation by a former deputy premier of NSW, John Barilaro.¹³²

Digital intermediaries

According to the discussion paper circulated by SCAG, ‘stakeholders representing internet intermediaries’ interests argued that there is insufficient protection from liability for content that they have not authored’.¹³³ Digital intermediaries claimed ‘that they are not, and cannot, be aware of all content posted by third parties that appears on their webpages or in search results’.¹³⁴ Further, intermediaries revealed that, without a court order to remove content, providers may be tempted ‘to remove content to avoid potential liability, which would have a chilling effect on freedom of expression’.¹³⁵

The stakeholders consulted included many of the big online players: Google, Microsoft, Meta (parent company of Facebook, Instagram and WhatsApp), Twitter (now X), Wikimedia (parent of Wikipedia) and Reddit. All were supportive of clarifying defamation law but took issue with the wording or necessity of certain provisions.

Microsoft and Google, for example, questioned the distinction between manually entered and automated search results and the consequences for their liability, and suggested alternative wording.¹³⁶ Meta and Wikimedia each questioned the proposed powers of a court to require an internet intermediary to remove allegedly defamatory content. Among other concerns, Wikimedia noted that intermediaries that are not a party in defamation proceedings might nonetheless have the ‘onerous’ task of ‘having to keep track of orders “preventing or limiting the continued publication or republication of matter”, and implementing them’.¹³⁷ Meta stated that, in certain circumstances, non-parties should be able to challenge the making of such an order.¹³⁸

News media

There was also a submission from ‘Australia’s Right to Know’ (ARTK), which is a coalition of some of Australia’s biggest media platforms, including Fairfax, News Corp, *The Guardian* and

¹³¹ Digital Rights Watch (2022) ‘[Submission to the NSW Department of Communities and Justice on the exposure draft of the Model Defamation Amendment Provisions \(Part A\)](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part A, 16 September, NSW Department of Communities and Justice, p. 1.

¹³² *ibid.*

¹³³ NSW Department of Communities and Justice (2021) *op. cit.*, p. 17.

¹³⁴ *ibid.*, p. 18.

¹³⁵ *ibid.*

¹³⁶ Microsoft (2022) ‘[Submissions to Attorneys-General Review of Model Defamation Provisions Stage 2 Part A—Discussion Paper and Draft Model Amendment Defamation Amendment Provisions](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part A, 14 September, Sydney, NSW Department of Communities and Justice, pp. 1–2; Google (2022) ‘[Submission to Council of Attorneys-General Review of Model Defamation Provisions—Part A Model Defamation Amendment Provisions \(MDAPs\) and background paper](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part A, 14 September, Sydney, NSW Department of Communities and Justice, pp. 1–3.

¹³⁷ Wikimedia (2022) ‘[Review of Model Defamation Provisions—Stage 2: Submission of Wikimedia Foundation, Inc.](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part A, September, Sydney, NSW Department of Communities and Justice, pp. 7–8.

¹³⁸ Meta (2022) ‘[Meta response to draft Model Defamation Provisions](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part A, September, Sydney, NSW Department of Communities and Justice, p. 14.

others. Their submission came in the wake of the Voller ruling, in which the High Court found that media outlets were liable for defamatory comments made in comments to posts they publish on social media. While recommending a ‘rethink of the definitions of “digital intermediary” and “online service”’, ARTK stated that its members ‘should not be liable for third party comments posted in these circumstances’.¹³⁹

Victim-survivor advocates

The defamation laws came in for criticism from advocates for victims of online defamatory content. DVConnect, a service provider for victims of domestic and family violence, took issue with the breadth of stakeholders consulted, saying that a consultation was not complete until there was representation of populations such as:

- Aboriginal and Torres Strait Islander communities;
- LGBTIQ+ communities;
- CALD communities;
- people with a disability; and
- people with lived experience of domestic, family and sexual violence.¹⁴⁰

The service criticised the discussion paper’s focus on ‘protecting reputations and not unreasonably limiting freedom of expression’, saying this did not ‘recognise the inherent characteristics and impacts of DFSV [domestic, family and sexual violence]’.¹⁴¹

Other views

Some stakeholders submitted that the existing ‘innocent dissemination defence’ in defamation laws needed to be ‘better adapted to digital publications’ and revised to work in tandem with immunity provisions in the *Broadcasting Services Act 1992*.¹⁴²

The consultation paper indicated there was a broad view that ‘easily accessible and low cost avenues for complainants to have content modified or removed’ were needed so complainants could avoid courts processes that provide barriers for seeking remedy.¹⁴³

Absolute privilege

Several legal, human rights and advocacy bodies provided submissions to the part B consultation led by Victoria. These were informed by draft amendments assembled by the Australian Parliamentary Counsel’s Committee (APCC) for review. The initial consultation also took a broader scope than the amendments proposed in the Bill. Stakeholders were consulted on the possibility of extending absolute privilege to not only police reports but also reports lodged with a range of other bodies, including IBAC, the Victorian Inspectorate and employers.

Most were in general support of this measure in seeking to negate the chilling effect of current defamation laws, but there was notable division within the legal community.

¹³⁹ Australia’s Right to Know (2022) ‘[Submission to Stage 2 review of the Model Defamation Provisions—Part A: liability of internet intermediaries for third-party content](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part A, 14 September, Sydney, NSW Department of Communities and Justice, pp. 1–2.

¹⁴⁰ DVConnect (2022) ‘[DVConnect submission](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part A, 9 September, Sydney, NSW Department of Communities and Justice, pp. 6–7.

¹⁴¹ *ibid.*, p. 7.

¹⁴² NSW Department of Communities and Justice (2021) *op. cit.*, p. 18.

¹⁴³ *ibid.*

Table 2: Some major stakeholder views in relation to the stage 2, part B model defamation provisions reforms¹⁴⁴

	Supportive	Not supportive
Stakeholders surveyed on extension of absolute privilege to reports of criminal or unlawful conduct made to all or some of the following bodies: <ul style="list-style-type: none"> • police • statutory investigative agencies • professional disciplinary bodies • employers. 	<ul style="list-style-type: none"> • IBAC • Victorian Bar Association • Victorian Legal Aid • Victorian Trades Hall Council • Victorian Legal Services Board and Commissioner • NSW Legal Services Commissioner • South Australian Bar Association • Queensland Legal Services Commission • Victims of Crime Commissioner • Women’s Legal Service • Law Society of Tasmania • Law Society of NSW • NSW Young Lawyers 	<ul style="list-style-type: none"> • Law Council of Australia • NSW Bar Association • Bennett + Co

Source: Victorian Department of Justice and Community Safety (2022) Review of the Model Defamation Provisions: Stage 2 Part B—Policy options.

Public entities

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) supported an extension of absolute privilege to reports to the police. However, it argued in its submission that the privilege should be extended further to:

- both informal and formal reports
- publications to specified entities (as opposed to just complaints)
- publications made to entities that have the capacity to apply penalties for false and misleading publications
- federal entities, and
- publications made to employers.¹⁴⁵

VEOHRC said that workplace reports were ‘an important area to protect, as employers are often the first port of call for victims of unlawful conduct’.¹⁴⁶

Sex Discrimination Commissioner Kate Jenkins, who submitted on behalf of the Australian Human Rights Commission, said:

... there are sound public policy reasons for providing protections for victims of sexual harassment who are witnesses in defamation proceedings where their sexual harassment allegations are raised, including improving victim confidence that their confidentiality and privacy will be protected when making a complaint or discussing their circumstances.¹⁴⁷

¹⁴⁴ Victorian Department of Justice and Community Safety (2022) op. cit., pp. 11–12, footnotes 13–14.

¹⁴⁵ Victorian Equal Opportunity & Human Rights Commission (2022) ‘[VEOHRC submission](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part B, 14 September, Melbourne, Victorian Department of Justice and Community Safety, p. 1

¹⁴⁶ *ibid.*

¹⁴⁷ Australian Human Rights Commission (2022) ‘[Review of the Model Defamation Provisions Stage 2 Part B Policy Options Paper: Australian Human Rights Commission Feedback](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part B, 5 October, Victorian Department of Justice and Community Safety, p. 2.

The Victorian Inspectorate supported extending absolute privilege to reports made to the Inspectorate.¹⁴⁸

From other states and territories, there was a small response to the mooted changes. The Queensland Health Ombudsman was ‘very supportive of the proposal to extend absolute privilege’,¹⁴⁹ as was the South Australian Department of Child Protection, who thought it ‘would offer victims and witnesses important protection when reporting unlawful conduct’.¹⁵⁰

Advocacy bodies

There was broad support for the proposal from a range of victim-survivor advocacy bodies. This included the submissions in support from knowmore—a free nationwide community legal centre for victims and survivors of child abuse—the Queensland Sexual Assault Network (QSAN) and Rape & Sexual Assault Research & Advocacy (RASARA) (who submitted in conjunction with Marque Lawyers). In addition to its support for lessening the chilling effect, RASARA also stated that extending absolute privilege to:

... the making of reports to police and other designated investigative agencies carries no material risk of insuperable harm to individual reputations. Such reports are not in the public domain, and are then subject to investigative processes which mitigate effectively any risk of harm being caused by false or baseless reports.¹⁵¹

QSAN also supported an extension of absolute privilege to contexts that would help reduce the chilling effect in CALD communities especially, given how common it is for that network to see CALD women in relationships with Caucasian men receiving threats about defamation after raising matters with the police or in family courts. QSAN states that it ‘would also argue for the extension of the absolute privilege to the raising of issues in the family courts and other relevant courts’.¹⁵²

knowmore also emphasised the importance of maintaining consistency between jurisdictions in the implementation of these proposals, so as not to ‘create confusion and distress’ for survivors in navigating the legal system and potential differences in protections against defamation claims.¹⁵³

Legal community

In favour

Victoria Legal Aid’s Melanie Schleiger had encouraged the review to seek input from Aboriginal Community Controlled Organisations on how defamation laws are experienced by First Nations people and what impact they have on reporting of sexual assault, which is experienced at higher rates among First Nations people along with additional ‘barriers to

¹⁴⁸ Victorian Inspectorate (2022) ‘[Review of Model Defamation Provisions: Submission by the Victorian Inspectorate](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part B, September, Melbourne, Victorian Department of Justice and Community Safety, p. 2.

¹⁴⁹ Office of the Health Ombudsman (Qld) (2022) ‘[Submission on Review of Model Defamation Provisions](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part B, October, Melbourne, Victorian Department of Justice and Community Safety, p. 3.

¹⁵⁰ South Australian Department of Child Protection (2022) ‘[Submission on the draft Model Defamation Amendment Provisions 2022—Part B amendments](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part B, September, Melbourne, Victorian Department of Justice and Community Safety.

¹⁵¹ Rape & Sexual Assault Research & Advocacy (RASARA) & Marque Lawyers (2022) ‘[Response to DJCS Review of Model Defamation Provisions](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part B, October, Melbourne, Victorian Department of Justice and Community Safety, pp. 1-2.

¹⁵² Queensland Sexual Assault Network (2022) ‘[Consultation on the extension of absolute privilege to police, investigative bodies and professional disciplinary bodies \(part B\)](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part B, October, Melbourne, Victorian Department of Justice and Community Safety, p. 2.

¹⁵³ knowmore (2022) ‘[Submission on the draft Part B Model Defamation Amendment Provisions 2022](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part B, October, Melbourne, Victorian Department of Justice and Community Safety, p. 5.

reporting sexual harassment and discrimination'.¹⁵⁴ VLA's submission illustrated the effect that current laws have on survivors of sexual assault, citing the words of Lydia (not their real name): 'I felt that the threat of defamation, on top of everything else, was enough to scare me out of proceeding with a complaint'.¹⁵⁵

The Victorian Legal Services Board agreed with the 'rationale' for extending absolute privilege to protect against retaliatory defamation against those reporting to police. The board said that the 'defence of absolute privilege is much likelier than that of qualified privilege to reduce the chilling effect'.¹⁵⁶ The board also explained that such a change would be beneficial to people experiencing conduct such as 'sexual harassment, bullying, discrimination, victimisation and other forms of harassment', as these behaviours were often perpetrated within power imbalances where a person of seniority or authority 'weaponise[s] the threat of defamation proceedings to continue to harass or victimise the person'.¹⁵⁷

Against

The Australian Discrimination Law Experts Group commended the Part B review's policy intent of negating the chilling effect of current laws but said 'extending absolute privilege to certain reports is unlikely to achieve the intended policy outcomes'.¹⁵⁸ The group instead recommended a broader review of defamation law, 'including how it can be used to silence, discredit and intimidate victim-survivors of sexual harassment and assault'.¹⁵⁹ Bennett Legal criticised the APCC's draft changes for 'uncertain' terminology and the 'ambiguous' breadth of absolute privilege as a defence, saying that this kind of privilege should only apply to 'formal reports to members of the police acting in their official capacities'.¹⁶⁰

The Law Council of Australia (LCA) was not supportive of the part B proposals. The LCA indicated that the existing defence of qualified privilege was adequate in balancing protection for complainants with the risk of 'significant reputational harm' to those being accused.¹⁶¹ It also expressed doubts over whether an absolute privilege would reduce the chilling effect cited by many entities:

In the Law Council's view, changes to the law will not address these concerns. For example, a person being threatened with defamation proceedings who is not aware of the potential protection of the qualified privilege defence, is similarly unlikely to be aware of the potential protection of the absolute privilege defence (should it be expanded as proposed).¹⁶²

Trade unions

A key theme of the submissions was an encouragement of the defence of absolute privilege to be extended further. The Victorian Trades Hall Council—saying that the 'current

¹⁵⁴ Victoria Legal Aid (2021) '[Towards a fairer and more effective criminal justice system for Victoria: Submission to the Inquiry into Victoria's Criminal Justice System](#)', submission 159, Inquiry into Victoria's criminal justice system, September, Melbourne, Legislative Council Legal and Social Issues Committee, p.

¹⁵⁵ Victoria Legal Aid (2021b) '[Our submission on defamation law's chilling effect on victims of sexual harassment](#)', VLA website, 21 June.

¹⁵⁶ Victorian Legal Services Board & Commissioner (2022) '[Review of Model Defamation Provisions](#)', Standing Council of Attorneys-General's Stage 2 Review of the Model Defamation Provisions—Part B, 5 October, Melbourne, Victorian Department of Justice and Community Safety, p. 2

¹⁵⁷ *ibid.*

¹⁵⁸ Australian Discrimination Law Experts Group (2022) '[Submission of the Australian Discrimination Law Experts Group in response to the Review of the Model Defamation Provisions Stage 2 Part B](#)', Standing Council of Attorneys-General's Stage 2 Review of the Model Defamation Provisions—Part B, 5 October, Victorian Department of Justice and Community Safety, p. 3.

¹⁵⁹ *ibid.*

¹⁶⁰ Bennett Litigation and Commercial Law (2022) '[Submission on the review of Model Defamation Provisions Stage 2 Part B](#)', Standing Council of Attorneys-General's Stage 2 Review of the Model Defamation Provisions—Part B, 5 October, Victorian Department of Justice and Community Safety, p. 2.

¹⁶¹ Law Council of Australia (2022) '[Review of Model Defamation Provisions Stage 2 Part B: exposure draft amendments and consultation paper](#)', Standing Council of Attorneys-General's Stage 2 Review of the Model Defamation Provisions—Part B, October, Melbourne, Victorian Department of Justice and Community Safety, p. 1.

¹⁶² *ibid.*, pp. 2-3.

defamation provisions actively undermine the functioning of civil society’—urged any changes to the scope of absolute privilege to include ‘reports made to police and investigatory bodies’ and to consider the ‘harm of the threat of defamation to the exercise of rights in the public arena (news media, social media and public spaces)’.¹⁶³

6 | Other jurisdictions

The model defamation provisions operate as a uniform national law scheme, whereby each state and territory implements mirroring legislation that includes the same provisions. The APCC provides guidance on how these can be incorporated into each jurisdiction’s legislature. Most jurisdictions have an Act called the ‘Defamation Act’ enacted in 2005 (or 2006 in the Northern Territory’s case), with the exception of the ACT, where defamation provisions are contained in chapter 9 of the *Civil Law (Wrongs) Act 2002*.¹⁶⁴

Since 2005, the model defamation provisions were mirrored in state and territory legislation in order to maintain consistency across borders. In 2021, stage 1 of changes initiated by SCAG were ushered into legislation uniformly by all states and territories except Western Australia and the Northern Territory.

Defamation law has now existed inconsistently across the country for almost three years and has been identified as problematic.¹⁶⁵ Professor David Rolph, from the University of Sydney, speculated that ‘even further differences are likely to eventuate’.¹⁶⁶ He posited that the federal government should legislate nationally given that many defamation cases were reaching the Federal Court already.¹⁶⁷

While the draft amendments were agreed to by SCAG in late 2023 for adoption across the country from 1 July 2024, there was again partial dissent, this time from South Australia. In a communiqué released by SCAG, South Australia was revealed to support the part B reforms but is still considering its implementation of the part A reforms separately from SCAG to establish ‘how they might best apply to South Australian legislation’.¹⁶⁸

¹⁶³ Victorian Trades Hall Council (2022) ‘[VTHC submission](#)’, Standing Council of Attorneys-General’s Stage 2 Review of the Model Defamation Provisions—Part B, 5 October, Melbourne, Victorian Department of Justice and Community Safety, pp. 1–2.

¹⁶⁴ Australian Parliamentary Counsel’s Committee (2020) [Australian national uniform law schemes and associated legislation of participating jurisdictions](#), November, Canberra, APCC.

¹⁶⁵ M. Whitbourn (2023) ‘[Australians forced to navigate different defamation laws across country](#)’, *Sydney Morning Herald*, 24 September.

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.*

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Suggested citation

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Acknowledgements

The Parliament of Victoria Library acknowledges the Traditional Owners of the lands on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander Elders past and present, and we value Aboriginal and Torres Strait Islander history, culture and knowledge.

The author would like to thank Annie Wright, Ben Reid, Caleb Triscari, Caley Otter, Debra Reeves, Ellie Florence and Marianne Aroozoo for their assistance in the preparation of this paper.

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ISSN: 2204-4779 (Print) 2204-4787 (Online)