

Passed by both Houses



New South Wales

Defamation Amendment Bill 2023

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney,*

, 2023



New South Wales

Defamation Amendment Bill 2023

Act No _____, 2023

An Act to amend the *Defamation Act 2005* to implement nationally agreed changes to the law of defamation.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts—

1 Name of Act

This Act is the *Defamation Amendment Act 2023*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Defamation Act 2005 No 77

[1] Section 4 Definitions

Insert in alphabetical order—

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

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

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

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

digital intermediary, in relation to the publication of digital matter, means a person, other than an author, originator or poster of the matter, who provides or administers the online service by means of which the matter is published.

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

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

online service means a service provided to a person, whether or not it is requested or it is for a fee or reward, to enable the person to use the internet, including, without limitation, a service enabling a person—

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

Examples of an online service—

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

poster, in relation to the publication of digital matter, means a person who uses the online service by means of which the matter is published for the purpose of communicating the matter to 1 or more other persons.

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

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

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

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

[2] Section 4A

Insert after section 4—

4A Examples and notes

- (1) An example or note at the foot of a provision forms part of this Act.

- (2) An example in this Act—
- (a) is not exhaustive, and
 - (b) may extend, but does not limit, the meaning of the provision to which it relates.

[3] Part 2, Division 2A

Insert after Division 2—

Division 2A Exemptions from liability for digital intermediaries

10B Definitions

In this division—

catching service means an online service whose principal function is to provide automatic, intermediate and temporary storage of content for the purpose of making the onward electronic transmission of the content more efficient for its users.

Example of a catching service— A service for temporarily and automatically storing files that are most frequently downloaded by users of a website to speed up the download time for the files.

conduit service means an online service whose principal function is to enable its users to access or use networks or other infrastructure to connect to, or send or receive data by means of, the internet.

Examples of a conduit service—

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

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

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

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

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

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

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

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

- (1) A digital intermediary is not liable for defamation for the publication of digital matter if the intermediary proves—
- (a) the matter was published using 1 or more of the following services provided by the intermediary—
 - (i) a caching service,
 - (ii) a conduit service,

- (iii) a storage service, and
- (b) the intermediary's role in the publication was limited to providing 1 or more of the services mentioned in paragraph (a), and
- (c) the intermediary did not do any of the following—
 - (i) initiate the steps required to publish the matter,
 - (ii) select any of the recipients of the matter,
 - (iii) encourage the poster of the matter to publish the matter,
 - (iv) edit the content of the matter, whether before or after it was published,
 - (v) promote the matter, whether before or after it was published.
- (2) Subsection (1)(c) does not apply in relation to action taken because it is required by or under a law of an Australian jurisdiction or an order of an Australian court or Australian tribunal.
Example— Action taken to comply with a code of conduct or other document regulating conduct that a digital intermediary is required to comply with by a law of an Australian jurisdiction.
- (3) Subsection (1) applies regardless of whether the digital intermediary knew, or ought reasonably to have known, the digital matter was defamatory.

10D Exemption for search engine providers

- (1) A search engine provider for a search engine is not liable for defamation for—
 - (a) the publication of digital matter comprised of search results if the provider's role was limited to providing an automated process for the user of the search engine to generate the results, or
 - (b) the publication of digital matter to which the search results provide a hyperlink if the provider's role in the publication of the matter is limited to the role mentioned in paragraph (a).
- (2) Subsection (1) does not apply in relation to search results, or to digital matter to which the search results provide hyperlinks, to the extent the results are promoted or prioritised by the search engine provider because of a payment or other benefit given to the provider by or on behalf of a third party.
- (3) Subsection (1) applies regardless of whether the search engine provider knew, or ought reasonably to have known, the digital matter was defamatory.

10E Early determination of digital intermediary exemptions

- (1) The judicial officer in defamation proceedings—
 - (a) is to determine whether a defendant has a digital intermediary exemption, and
 - (b) is to determine whether a digital intermediary exemption is established as soon as practicable before the trial for the proceedings commences unless satisfied that there are good reasons to postpone the determination to a later stage of the proceedings, and
 - (c) may make any orders the judicial officer considers appropriate concerning the determination of the issue, including dismissing the proceedings if satisfied the digital intermediary exemption is established.
- (2) Without limiting subsection (1)—

- (a) the following matters are relevant in deciding whether there are good reasons to postpone the determination of whether a digital intermediary exemption is established to a later stage of the proceedings—
 - (i) the cost implications for the parties,
 - (ii) the resources available to the court at the time,
 - (iii) the extent to which technical or scientific issues are raised in the proceedings,
 - (iv) the extent to which establishing the digital intermediary exemption is linked to other issues for determination during the trial for the proceedings, and
 - (b) the judicial officer may determine a digital intermediary exemption is established on the pleadings without the need for further evidence if satisfied that the pleaded particulars are sufficient to establish the exemption.
- (3) Nothing in this section limits the powers that a judicial officer may have apart from this section to dismiss defamation proceedings, whether before or after the trial for the proceedings commences.
- (4) In this section—
digital intermediary exemption means an exemption from liability for defamation mentioned in section 10C or 10D.

[4] Section 15 Content of offer to make amends

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

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

[5] Section 15(1B)

Insert after section 15(1A)—

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

[6] Section 23A

Insert after section 23—

23A Orders for preliminary discovery about posters of digital matter

- (1) This section applies if the court procedure law for a court allows a person seeking to bring defamation proceedings for the publication of digital matter to obtain an order for, or in the nature of, preliminary discovery for either or both of the following purposes—
 - (a) to obtain information to assist in identifying the posters of the matter,
 - (b) to obtain information to assist in locating physical or digital addresses for the posters of the matter to allow concerns notices to be given to them or defamation proceedings against them to be commenced.
- (2) Despite anything to the contrary in the court procedure law for a court, the court must take the following matters into account before making an order mentioned in subsection (1)—
 - (a) the objects of this Act,

- (b) privacy, safety or other public interest considerations that may arise if the order is made.

Example for paragraph (b)— Evidence suggesting the poster of digital matter is in fear of domestic violence from the person seeking an order to obtain the poster's address.

- (3) This section does not limit the matters the court may take into account before making an order mentioned in subsection (1).
- (4) In this section—
court procedure law for a court means—
 - (a) rules of court for the court, or
 - (b) an Act or other legislation that regulates the practice or procedure of the court, or
 - (c) the general law concerning the inherent or implied jurisdiction or powers of the court.

[7] Section 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

[8] 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.

[9] Section 31A

Insert after section 31—

31A Defence for publications involving digital intermediaries

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

Note—

- 1 The defendant is not required to prove paragraph (c) to establish the defence if the plaintiff has not given the defendant a complaint about the publication under this section. Subsection (3) sets out requirements for giving complaints.
- 2 Subsection (6) defines *accessible complaints mechanism*.

- (2) For subsection (1)(c), reasonable access prevention steps were taken in relation to the publication of digital matter if—
- (a) for access prevention steps taken by the defendant—the steps taken were reasonable for the defendant to take in the circumstances, or
 - (b) for access prevention steps taken by another person—it was reasonable for the defendant not to take steps because of the steps already taken.
- (3) A written complaint is given under this section about the publication of defamatory digital matter if—
- (a) the complaint contained information sufficient to enable a reasonable person in the defendant's circumstances to be made aware of the following—
 - (i) the name of the plaintiff,
 - (ii) the matter and where it could be located,
 - (iii) that the plaintiff considered the matter to be defamatory, and
 - (b) the complaint was given using an accessible complaints mechanism for the plaintiff to use or given to the defendant in another way permitted by section 44.
- (4) A defence under this section is defeated only if the plaintiff proves the defendant was actuated by malice in establishing or providing the online service by means of which the digital matter was published.
- (5) A defendant who would otherwise be a digital intermediary in relation to the publication of digital matter does not cease to be a digital intermediary for this section merely because the defendant took steps to detect or identify, or steps to remove, block, disable or otherwise prevent access by persons to, the following—
- (a) defamatory or other unlawful content published, or sought to be published, by a person using the online service provided by the defendant,
 - (b) other content published, or sought to be published, by a person using the online service provided by the defendant that was incompatible with the terms or conditions under which the service was provided.
- Note—** This subsection allows a defendant to rely on the defence despite the definition of *digital intermediary* in section 4 excluding authors, originators or posters of digital matter if the defendant's editorial or moderating role over content published using the online service was limited to the steps mentioned in the subsection.
- (6) In this section—
- accessible complaints mechanism* for a plaintiff to use means an easily accessible address, location or other mechanism available for the plaintiff to use to complain to the defendant about the publication of the digital matter concerned.
- Examples of an accessible complaints mechanism—**
- 1 An email address or direct messaging address to which a complaint may be sent.
 - 2 A webpage, or a part of a webpage, enabling details about a complaint to be uploaded or inputted.

[10] Section 39A

Insert after section 39—

39A Orders against non-party digital intermediaries concerning defamatory digital matter

- (1) This section applies in relation to defamation proceedings for the publication of digital matter if—
 - (a) the plaintiff has obtained judgment for defamation against the defendant in the proceedings, or
 - (b) a court has granted a temporary injunction or makes another temporary order preventing the defendant from continuing to publish, or from republishing, the matter pending the determination of the proceedings, or
 - (c) a court has granted a final injunction or makes another final order preventing the defendant from continuing to publish, or from republishing, the matter.
- (2) In defamation proceedings to which this section applies, the court may order a digital intermediary who is not a party to the proceedings (a *non-party digital intermediary*) to take access prevention steps or other steps the court considers necessary in the circumstances—
 - (a) to prevent or limit the continued publication or republication of the matter, or
 - (b) to comply with, or otherwise give effect to, the judgment, injunction or other order mentioned in subsection (1).
- (3) Without limiting subsection (2), an order under this section may—
 - (a) require 1 or more steps to be taken, or
 - (b) require a step to be taken in relation to all, or only some, of the users of an online service.
- (4) The court may not make an order under this section against a non-party digital intermediary unless the intermediary has been given an opportunity to be heard about whether it is appropriate for the order to be made.
- (5) Despite subsection (4), the court may make a temporary order without giving the non-party digital intermediary an opportunity to be heard about whether it is appropriate to make the order if the court considers it necessary in the circumstances for the order to be made expeditiously pending a subsequent hearing concerning whether a further temporary order or a final order should be made.
- (6) An order may be made under this section even if the non-party digital intermediary is not, or may not be, liable for defamation, including because of a defence, for the publication of the digital matter to which the defamation proceedings relate.
- (7) This section does not limit other powers the court may have apart from this section to grant injunctions or make other orders requiring a non-party digital intermediary to take access prevention steps or other steps.

[11] Section 44 Giving of notices and other documents

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

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

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

Omit the subparagraph. Insert instead—

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

[13] Section 44(1)

Insert at the end of the subsection—

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

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

[14] Section 44(2)

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

[15] Schedule 4 Savings, transitional and other provisions

Insert at the end of the schedule, with appropriate part and clause numbering—

Part Provisions consequent on enactment of Defamation Amendment Act 2023

Definitions

In this part—

2023 amendments means amendments made to this Act by the *Defamation Amendment Act 2023*.

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

post-commencement action, in relation to 2023 amendments about a subject, means a cause of action for the publication of defamatory matter accruing after the commencement of the amendments.

pre-commencement action, in relation to 2023 amendments about a subject, means a cause of action for the publication of defamatory matter accruing before the commencement of the amendments.

Digital intermediary amendments

- (1) This clause applies to the 2023 amendments about (the *digital intermediary amendments*)—
 - (a) exempting digital intermediaries from liability for defamation, or
 - (b) providing a defence for publications of defamatory digital matter involving digital intermediaries.
- (2) Except as provided by subclause (3)(b), the digital intermediary amendments apply to a post-commencement action.
- (3) The existing law continues to apply despite the digital intermediary amendments—

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

Offer amendments

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

Preliminary discovery or non-party digital intermediary order amendments

- (1) This clause applies to the 2023 amendments about courts making orders (the *preliminary discovery or non-party digital intermediary order amendments*)—
 - (a) for, or in the nature of, preliminary discovery, or
 - (b) to take steps—
 - (i) to prevent or limit the continued publication or republication of defamatory matter, or
 - (ii) to comply with, or otherwise give effect to, judgments, injunctions or other court orders.
- (2) Except as provided by subclause (3)(b), the preliminary discovery or non-party digital intermediary order amendments apply to the making of an order after the commencement of the amendments regardless of whether the proceedings in which they are made—
 - (a) involve a pre-commencement action or post-commencement action, or
 - (b) were commenced before or after the commencement of the amendments.
- (3) The existing law continues to apply despite the preliminary discovery or non-party digital intermediary order amendments—
 - (a) to an order made before the commencement of the amendments, or
 - (b) to the variation or revocation of an order made before the commencement of the amendments.

Absolute privilege amendments

- (1) This clause applies to the 2023 amendments 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.

Document giving or service amendments

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