

CLAUSE NOTES

Defamation Amendment Bill 2024

Clause 1 Short title

Specifies the name of the proposed Act.

Clause 2 Commencement

Provides that the Act commences on Royal Assent.

Clause 3 Principal Act

Provides that the Principal Act being amended is the *Defamation Act 2005*.

Clause 4 Section 4 amended (Interpretation)

Inserts several new definitions to support the digital intermediary liability amendments including the definition of 'digital intermediary' and other interrelated definitions of 'digital matter', 'online service', and 'poster', as well as the definition for 'access prevention step', amongst other terms.

Clause 5 Section 4A inserted (Examples and notes)

Inserts section 4A to make clear that an example or note at the foot of a provision forms part of the Act.

Section 4A is important because examples are used extensively in this Bill to illustrate the intended application of the amendments.

Section 4A also confirms that an example in the Act is not exhaustive.

Clause 6 Part 2, Division 2A inserted (Exemptions from liability for digital intermediaries)

Inserts new sections 10B to 10E to provide for conditional exemptions from liability in defamation for digital intermediaries.

Section 10B provides for defined terms relevant to the new Division 2A. Definitions for 'caching service', 'conduit service', 'storage service', 'search engine provider', 'search engine' and 'search result' are inserted. Given the technical nature of the definitions, examples are provided to illustrate the intended application.

Section 10C provides for the conditional exemption for a 'caching service', 'conduit service' or 'storage service', including those activities that may disqualify the digital intermediary from relying on the exemption, i.e. section 10C(1)(c).

Section 10D provides for the conditional exemption for search engine providers, including those activities that may disqualify the search engine provider from relying on the exemption, i.e. section 10D(2).

Section 10E provides that the judicial officer is to determine whether a digital intermediary exemption is established as soon as practicable before trial, unless satisfied that there are good reasons to postpone the determination.

Clause 7 Section 15 amended (Content of offer to make amends)

Amends section 15 to update the mandatory requirements for an offer to make amends for online publications by allowing the publisher to “offer to take access prevention steps in relation to the matter”. This amendment broadens the provision by allowing a publisher to offer to remove, block, disable or otherwise prevent access to a matter. The definition of ‘access prevention step’ is included in clause 4 of this Bill.

Clause 8 Section 23A inserted (Orders for preliminary discovery about posters of digital matter)

Inserts section 23A, which provides that, before making an order for preliminary discovery for information to assist in identifying a poster or locating an address of a poster to enable the bringing of defamation proceedings, the court must take into account the objects of the Act and any privacy, safety or other public interest considerations.

This new section does not provide a new avenue to seek preliminary discovery. It simply applies this requirement over the general court procedure law.

An example provided of privacy and safety matters to consider is 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.

Clause 9 Section 27 amended (Defence of absolute privilege)

Section 27 of the Act is amended to extend the defence of absolute privilege to matter that is published to a police officer (‘an official of a police force or service of an Australian jurisdiction’). The matter is to be published to the official while the official is acting in an official capacity.

Clause 10 Section 31A inserted

Inserts section 31A, which introduces a new innocent dissemination defence for digital intermediaries.

The purpose of the new defence is to recognise that digital intermediaries should not be liable for defamatory content where they are merely a subordinate distributor and lack actual knowledge of the content in question. The defence can only be relied on where the digital intermediary has received a written complaint about a publication, either via its accessible complaints mechanism or otherwise in accordance with section 44, and takes reasonable steps, if available, to remove or otherwise prevent access to the matter within 7 days.

Clause 11 Section 39A inserted

Inserts section 39A, which explicitly empowers a court to make an order against a digital intermediary who is not a party to defamation proceedings to take access prevention steps or other steps the court considers necessary to prevent or limit the continued publication or republication of the matter.

This section applies in circumstances where the court has granted interim or final judgement for the plaintiff in a defamation action.

Clause 12 Section 44 amended (Giving of notices and other documents)

Amends section 44 to modernise the provision allowing a document to be served by sending it by messaging or other electronic communication in addition to being able to send it by email.

Clause 13 Section 48B inserted

Inserts section 48B, which provides that Schedule 6 contains the savings and transitional provisions on commencement of the provisions in the Bill.

Clause 14 Schedule 1 substituted

Schedule 1 is repealed and substituted with a new Schedule 1 to provide that matter published to the Anti-Discrimination Commissioner or any member of staff of the Anti-Discrimination Commissioner is covered by the defence of absolute privilege.

Clause 15 Schedule 6 inserted

Schedule 6 is inserted, containing the savings and transitional provisions as they relate to the new statutory exemptions and the innocent dissemination defence for digital intermediaries (Clause 2 of Schedule 6), amendments to offers to make amends (Clause 3 of Schedule 6), and the new preliminary discovery and non-party digital intermediary orders (Clause 4 of Schedule 6), the absolute privilege amendments (Clause 5 of Schedule 6) and the amendments to giving or service of documents (Clause 6 of Schedule 6).

Clause 16 Repeal of Act

This automatically repeals the amending legislation after the first anniversary of this Act commencing. The provisions that the amending legislation inserts into the Principal Act still remain in force after the repeal of the Amending Act.