

DEFAMATION AMENDMENT BILL 2023

STATEMENT OF PUBLIC INTEREST

Background

In November 2004, Attorneys-General agreed to enact model provisions in recognition of the need for uniform defamation law in Australia. All states and territories subsequently enacted the original Model Defamation Provisions (**MDPs**) through legislation. In NSW, this is the *Defamation Act 2005*.

NSW led the Stage 1 Review of the MDPs, which was completed in July 2020. During that review, Attorneys-General agreed that a second reform process should be undertaken to address other issues. The Stage 2 Review of the MDPs had two parts:

- Part A (led by NSW) addressed the question of digital intermediary liability for the publication of third-party content.
- Part B (led by Victoria) considered whether absolute privilege should be extended to cover reports of conduct such as sexual harassment and sexual assault to police and other complaints-handling bodies.

On 22 September 2023, the Standing Council of Attorneys-General approved by majority the final amendments for Part A and Part B of the Stage 2 Review of the MDPs, subject to some jurisdictions' Cabinet processes where necessary. South Australia was in the minority, approving Part B and some aspects of the Part A reforms.

The Defamation Amendment Bill (2023) would enact the Part A amendments (the digital intermediary amendments) and the Part B amendments (the absolute privilege amendments) in New South Wales by amending the *Defamation Act 2005*.

Need: Why is the policy needed based on factual evidence and stakeholder input?

Part A - Digital intermediary amendments

The premise of Part A of the Stage 2 Review of the MDPs was that due to the broad test for determining who is a publisher under the common law, a digital intermediary is anyone who participates in the facilitation of an online publication other than the person who authors the content in the first place (the originator).

The term 'digital intermediary' is used to cover a very broad range of functions such as internet service providers, content hosts, search engines, review websites and social media platforms. It also includes organisations and individuals who use online platforms to host forums that invite third-party comments ('forum administrators'). The situation of forum administrators was considered in the High Court decision of *Fairfax Media Publications Pty Ltd & Ors v Voller* [2021] HCA 27 (*Voller*).

Stakeholders and legal experts have raised concerns that the current state of Australian defamation law in relation to digital intermediary liability for third-party content is unclear and inconsistent. There have been a number of cases in recent years that have considered this issue. While they have all demonstrated the complex questions that arise and the potential for long and costly disputes, the cases involving 'forum administrators' are particularly important.

In *Voller*, a majority of the High Court held that several media companies were publishers of comments posted on their public Facebook pages by third party users responding to news stories

that the media companies had posted. Since the *Voller* decision, there have been calls for urgent law reform to address the situation of forum administrators.

Part B - Absolute privilege amendments

Stakeholders have reported that the potential threat of defamation proceedings may deter victim-survivors from coming forward to police about conduct such as sexual harassment and sexual violence. Extending the defence of absolute privilege to reports to police would address any chilling effect on complainants because the defence cannot be defeated in any circumstance.

Objectives: What is the policy's objective couched in terms of the public interest?

Part A - Digital intermediary amendments

The policy objective for the digital intermediary amendments is to clarify the law and create more certainty for both plaintiffs and digital intermediary defendants. The reforms apply to all digital intermediaries, but addressing the circumstances of forum administrators is a particular priority. Ultimately, the amendments are intended to strike a better balance between protecting reputations and not unreasonably limiting freedom of expression in the various circumstances where third parties may publish defamatory matter via digital intermediaries.

Part B - Absolute privilege amendments

The policy objective is to ensure that victim-survivors are not deterred by the potential threat of defamation proceedings from coming forward to police about conduct such as sexual harassment and sexual violence.

Options: What alternative policies and mechanisms were considered in advance of the bill?

Defamation law is governed by both legislation, being the *Defamation Act 2005*, and judicial decisions. The only option for addressing the issues outlined above is legislative reform.

Part A - Digital intermediary amendments

A wide range of approaches to the liability of digital intermediaries were considered through the Stage 2 Review of the MDPs. Options are detailed in the Discussion Paper, exposure draft amendments and Background Paper all released publicly and available on the Department of Communities and Justice website (see <https://www.dcj.nsw.gov.au/about-us/engage-with-us/past-consultations/statutory-reviews/review-model-defamation-provisions.html>).

Examples of alternative approaches considered were:

- the UK approach of a safe harbour defence subject to a complaints notice process
- the US approach under which digital intermediaries have very broad protections
- retaining the status quo with minor changes to clarify the role of digital intermediaries

Part B - Absolute privilege amendments

A range of approaches to addressing the chilling effect of the threat of defamation liability on reporting of conduct such as sexual harassment and sexual assault to police and other complaints-handling bodies was considered through the Stage 2 Review of the MDPs. They are detailed in the Discussion Paper, exposure draft amendments and Consultation Paper, and written submissions made on them (available at <https://engage.vic.gov.au/review-of-model-defamation-provisions> and <https://www.dcj.nsw.gov.au/about-us/engage-with-us/past-consultations/statutory-reviews/review-model-defamation-provisions.html>).

The key alternative considered was making no change and relying on protection for complainants through the existing qualified privilege defence.

Analysis: What were the pros/cons and benefits/costs of each option considered?

The fundamental role of defamation law is to achieve a balance between two competing interests:

- to avoid placing unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance, and
- to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter

Part A - Digital intermediary amendments

The final Part A digital intermediary amendments are a holistic set of reforms designed to address the full spectrum of digital intermediary participation in the publication of third-party content. The reforms that were ultimately agreed are a pragmatic approach designed to strike the right balance between protecting reputations and not unreasonably limiting freedom of expression.

Part B - Absolute privilege amendments

There is a strong public policy imperative for removing any barriers that might prevent victim-survivors from coming forward to police. While the existing defence of qualified privilege does offer some protection, the victim-survivor would still need to establish that it applies. It is appropriate that instead, reports to police should have the protection of absolute privilege.

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

The Standing Council of Attorneys-General has agreed that jurisdictions in the majority will use best endeavours to enact the Part A and the Part B amendments to the MDPs for commencement on 1 July 2024. In light of this, the Bill will commence on proclamation.

The Bill does not require onerous preparation for implementation. Nevertheless, there is ample lead time for digital intermediaries to consider the amendments and make any preparations they consider necessary. The Department of Communities and Justice will also liaise with the courts about any administrative changes that will be needed.

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

Extensive stakeholder consultation was undertaken to inform the policy development and drafting process. The consultation was conducted through the Stage 2 Review of the MDPs. It included:

- In April 2021, a Discussion Paper covering Part A and Part B was released for public consultation. 48 written submissions were received. This was followed by four large stakeholder roundtables to discuss issues raised in written submissions.
- In August 2022, exposure draft Part A amendments and an accompanying Background Paper were released for public consultation, followed by one large stakeholder roundtable. 36 written submissions were received.
- In August 2022, exposure draft Part B amendments and an accompanying Consultation Paper were released for public consultation. 19 written submissions were received.

A wide range of stakeholders participated in the consultation. For Part A, they included technology sector stakeholders, legal peak bodies, legal practitioners, academics, media companies, advocacy groups and individuals. For Part B, they included complaints-handling bodies, victims' rights groups, legal peak bodies, legal practitioners and academics.