**Defamation through Digital Intermediaries**

On Monday 1 July 2024, the New South Wales and the Australia Capital Territory Governments became the first jurisdictions in Australia to implement legislation that addresses defamation occurring on digital platforms. [[1]](#footnote-1)

**Update to the defence of innocent dissemination**

In Fairfax Media Publications Pty Ltd v Voller (2021) 273 CLR 346 A 2021, the High Court determined that digital intermediaries can be held liable for defamatory posts made by the public on social media platforms in which that intermediary has exclusive control. This raised concerns regarding inconsistency with the defence of innocent dissemination, as it meant an intermediary was considered the original publisher of defamatory content.[[2]](#footnote-2)

In response, in 2024 the NSW and ACT Governments introduced section 31A of the *Defamation Act 2005* (NSW) and section 139BA of the *Civil Wrongs Act 2002* (ACT). These sections provided an updated defence to the tort of defamation for those who accidently or ‘innocently disseminate’ defamatory content through digital platforms. It means that those who, since the case of *Voller* could now be considered the publisher of defamatory content simply because they administer the platform it was released on will have a defence.

**Framework for defamed individuals to submit complaints**

The reforms include a clear and straightforward complaints process for those who believe they have been defamed to raise concerns directly with the publisher of the content in question. Where an intermediary is deemed to have a known and readily accessible complaints mechanism in place for a potential plaintiff in proceedings to utilise and make a complaint in relation to defamatory content, then this plaintiff can seek to have the content removed from the digital platform.[[3]](#footnote-3) Where an aggrieved individual makes a complaint to the digital intermediary advising them of their name, the location of the defamatory content and reason why it is considered as defamatory, and the content is not removed within 7 days of the complaint being made, then the individual has the ability to bring proceedings against the intermediary. In these circumstances the defence of innocent dissemination may not be available.

Alternatively, if a complaint is received by the intermediary, and they took steps to rectify the complaint, but not enough information was provided in the complaint to do so, if the matter proceeds to court then the defence of innocent dissemination may still be available. However, the intermediary would still be required to show the court that reasonable steps were taken to attempt to rectify and prevent further impact to the plaintiff in proceedings.[[4]](#footnote-4)

**Provisions for courts to make orders for the removal of content**

Both the NSW and the ACT reforms give the court the authority to order that digital intermediaries remove content from their platforms even if they are not a party to the proceedings.[[5]](#footnote-5) For example, if a news outlet made a post on Facebook and an individual left a comment on this post that was of a defamatory nature then the court can order for the news outlet to remove the comment from their post even if it has been determined that under the new innocent dissemination defence that outlet wasn’t the original publisher.

**Reforms encompassing the Stage 2 Part A Model Defamation Provisions**

The amendments implemented by the NSW and ACT governments were influenced by the Stage 2 Part A Model Defamation Provisions that were concerned directly with the liability of digital intermediaries in relation to third party content.[[6]](#footnote-6) The Stage 2 Part A provisions aim to strike a better balance between freedom of expression and the protection of an individual’s reputation in digital settings. These amendments were approved by the Standing Council of Attorneys-General on 22 September 2023.

1. NSW Government Communities and Justice, ‘Landmark laws to protect people caught up in digital defamation’ (Media Release, 1 July 2024). [↑](#footnote-ref-1)
2. Defamation Amendment Bill 2023 (NSW). [↑](#footnote-ref-2)
3. *Defamation Act 2005* (NSW) s 31A sub-ss (3), (6). [↑](#footnote-ref-3)
4. *Defamation Act 2005* (NSW) s 31A sub-ss (5). [↑](#footnote-ref-4)
5. *Defamation Act 2005* (NSW) s 31A (2). [↑](#footnote-ref-5)
6. Defamation Amendment Bill 2023 (NSW). [↑](#footnote-ref-6)