

Passed by both Houses



New South Wales

Defamation Amendment Bill 2020

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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,*

, 2020



New South Wales

Defamation Amendment Bill 2020

Act No _____, 2020

An Act to amend the *Defamation Act 2005* and the *Limitation Act 1969* 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 2020*.

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—

applicable period for an offer to make amends is defined by section 14.

associated entity has the same meaning as in section 50AAA of the *Corporations Act 2001* of the Commonwealth.

concerns notice is defined by section 12A.

excluded corporation means an excluded corporation referred to in section 9.

further particulars notice means a further particulars notice referred to in section 12A(3).

[2] Section 9 Certain corporations do not have cause of action for defamation

Omit section 9(2)(b). Insert instead—

- (b) it has fewer than 10 employees and is not an associated entity of another corporation,

[3] Section 9(4)

Omit the subsection.

[4] Section 9(6)

Insert in alphabetical order—

employee, in relation to a corporation, includes any individual (whether or not an independent contractor) who is—

- (a) engaged in the day to day operations of the corporation other than as a volunteer, and
- (b) subject to the control and direction of the corporation.

[5] Section 10 No cause of action for defamation of, or against, deceased persons

Insert at the end of the section (after renumbering the current provision as subsection (1))—

- (2) Subsection (1) does not prevent a court, if it considers it in the interests of justice to do so, from determining the question of costs for proceedings discontinued because of the subsection.

[6] Section 10A

Insert after section 10—

10A Serious harm element of cause of action for defamation

- (1) It is an element (the *serious harm element*) of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.
- (2) For the purposes of subsection (1), harm to the reputation of an excluded corporation is not serious harm unless it has caused, or is likely to cause, the corporation serious financial loss.
- (3) The judicial officer (and not the jury) in defamation proceedings is to determine whether the serious harm element is established.
- (4) Without limiting subsection (3), the judicial officer may (whether on the application of a party or on the judicial officer's own motion)—

- (a) determine whether the serious harm element is established at any time before the trial for the proceedings commences or during the trial, and
 - (b) make any orders the judicial officer considers appropriate concerning the determination of the issue (including dismissing the proceedings if satisfied the element is not established).
- (5) If a party applies for the serious harm element to be determined before the trial for the proceedings commences, the judicial officer is to determine the issue as soon as practicable before the trial commences unless satisfied that there are special circumstances justifying the postponement of the determination to a later stage of the proceedings (including during the trial).
- (6) The matters a judicial officer may take into account in deciding whether there are special circumstances for the purposes of subsection (5) include (but are not limited to) the following—
- (a) the cost implications for the parties,
 - (b) the resources available to the court at the time,
 - (c) the extent to which establishing the serious harm element is linked to other issues for determination during the trial for the proceedings.
- (7) Without limiting subsection (5), the judicial officer may determine the serious harm element is not established on the pleadings without the need for further evidence if satisfied that the pleaded particulars are insufficient to establish the element.
- (8) 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 commences).

[7] Part 3, Division 1, heading

Omit “Offers”. Insert instead “Concerns notices and offers”.

[8] Section 12A

Insert after section 12—

12A Concerns notices

- (1) For the purpose of this Act, a notice is a *concerns notice* if—
- (a) the notice—
 - (i) is in writing, and
 - (ii) specifies the location where the matter in question can be accessed (for example, a webpage address), and
 - (iii) informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question (the *imputations of concern*), and
 - (iv) informs the publisher of the harm that the person considers to be serious harm to the person’s reputation caused, or likely to be caused, by the publication of the matter in question, and
 - (v) for an aggrieved person that is an excluded corporation—also informs the publisher of the financial loss that the corporation considers to be serious financial loss caused, or likely to be caused, by the publication of the matter in question, and

(b) a copy of the matter in question is, if practicable, provided to the publisher together with the notice.

Note. Section 12B requires a concerns notice to be given before proceedings for defamation can be commenced.

- (2) For the avoidance of doubt, a document that is required to be filed or lodged to commence defamation proceedings cannot be used as a concerns notice.
- (3) If a concerns notice fails to particularise adequately any of the information required by subsection (1)(a)(ii), (iii), (iv) or (v), the publisher may give the aggrieved person a written notice (a **further particulars notice**) requesting that the aggrieved person provide reasonable further particulars as specified in the further particulars notice about the information concerned.
- (4) An aggrieved person to whom a further particulars notice is given must provide the reasonable further particulars specified in the notice within 14 days (or any further period agreed by the publisher and aggrieved person) after being given the notice.
- (5) An aggrieved person who fails to provide the reasonable further particulars specified in a further particulars notice within the applicable period is taken not to have given the publisher a concerns notice for the purposes of this section.

[9] Section 12B

Insert before section 13—

12B Defamation proceedings cannot be commenced without concerns notice

- (1) An aggrieved person cannot commence defamation proceedings unless—
 - (a) the person has given the proposed defendant a concerns notice in respect of the matter concerned, and
 - (b) the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice, and
 - (c) the applicable period for an offer to make amends has elapsed.
- (2) Subsection (1)(b) does not prevent reliance on—
 - (a) some, but not all, of the imputations particularised in a concerns notice, or
 - (b) imputations that are substantially the same as those particularised in a concerns notice.
- (3) The court may grant leave for proceedings to be commenced despite non-compliance with subsection (1)(c), but only if the proposed plaintiff satisfies the court—
 - (a) the commencement of proceedings after the end of the applicable period for an offer to make amends contravenes the limitation law, or
 - (b) it is just and reasonable to grant leave.
- (4) The commencement of proceedings contravenes the limitation law for the purposes of subsection (3)(a) if the proceedings could not be commenced after the end of the applicable period for an offer to make amends because the court will have ceased to have power to extend the limitation period.
- (5) In this section—

limitation law means the *Limitation Act 1969*.

[10] Section 14 When offer to make amends may be made

Omit section 14(1)(a). Insert instead—

- (a) the applicable period for an offer to make amends has expired, or

[11] Section 14(2) and (3)

Omit section 14(2)–(5). Insert instead—

- (2) For the purposes of this Act, the *applicable period* for an offer to make amends is—
 - (a) if the aggrieved person has provided further particulars in response to a further particulars notice about a concerns notice after 14 days have elapsed since the concerns notice was given—14 days since the publisher was given the further particulars, or
 - (b) in any other case—28 days since the publisher was given a concerns notice by the aggrieved person.
- (3) If a publisher gives more than one further particulars notice, subsection (2)(a) applies only in respect of the first notice.

[12] Section 15 Content of offer to make amends

Insert after section 15(1)(b)—

- (b1) must provide for the offer to be open for acceptance for at least 28 days commencing on the day the offer is made, and

[13] Section 15(1)(d)

Insert “, or a clarification of or additional information about,” after “reasonable correction of”.

[14] Section 15(1)(f)

Omit “offer, and”. Insert instead “offer.”.

[15] Section 15(1)(g)

Omit the paragraph.

[16] Section 15(1A)

Insert after section 15(1)—

- (1A) In addition to the matters referred to in subsection (1), an offer to make amends may include any other kind of offer, or particulars of any other action taken by the publisher, to redress the harm sustained by the aggrieved person because of the matter in question, including (but not limited to)—
 - (a) an offer to publish, or join in publishing, an apology in relation to the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited, or
 - (b) if the matter has been published on a website or any other electronically accessible location—an offer to remove the matter from the website or location, or
 - (c) an offer to pay compensation for any economic or non-economic loss of the aggrieved person, or
 - (d) the particulars of any correction or apology made, or action taken, before the date of the offer.

[17] Section 15(2)

Omit “subsection (1)(g)(ii)”. Insert instead “subsection (1A)(c)”.

[18] Section 18 Effect of failure to accept reasonable offer to make amends

Omit section 18(1)(a). Insert instead—

- (a) the publisher made the offer as soon as reasonably practicable after the publisher was given a concerns notice in respect of the matter (and, in any event, within the applicable period for an offer to make amends), and

[19] Section 18(1)(b)

Omit “at any time before the trial”.

[20] Section 18(3)

Insert after section 18(2)—

- (3) Despite section 22(2), the judicial officer (and not the jury) in defamation proceedings tried by jury is to determine whether a defence under this section is established.

[21] Section 21 Election for defamation proceedings to be tried by jury

Insert after section 21(1)—

- (1A) Without limiting subsection (1), a court may order that defamation proceedings are not to be tried by jury if—
 - (a) the trial requires a prolonged examination of records, or
 - (b) the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

[22] Section 21(3) and (4)

Omit section 21(3). Insert instead—

- (3) An election may be revoked only—
 - (a) with the consent of all the parties to the proceedings, or
 - (b) if all the parties do not consent, with the leave of the court.
- (4) The court may, on the application of a party to the proceedings, grant leave for the purposes of subsection (3)(b) only if satisfied it is in the interests of justice for the election to be revoked.

[23] Section 22 Roles of judicial officers and juries in defamation proceedings

Omit “officer.” from section 22(5)(b). Insert instead “officer, or”.

[24] Section 22(5)(c)

Insert after section 22(5)(b)—

- (c) requires or permits a jury to determine any issue that another provision of this Act requires a judicial officer to determine.

[25] Section 23

Omit the section. Insert instead—

23 Leave required for multiple proceedings in relation to publication of same defamatory matter

- (1) This section applies to a person who has brought defamation proceedings for damages, whether in this jurisdiction or elsewhere, against a person (a *previous defendant*) in relation to the publication of a matter.
- (2) The person may not bring further defamation proceedings for damages against a previous defendant or an associate of a previous defendant in relation to the same or any other publication of the same or like matter, except with the leave of the court in which the further proceedings are to be brought.
- (3) A person is an *associate of a previous defendant* if, at the time of the publication to which the previous defamation proceedings related, the person was—
 - (a) an employee of the defendant, or
 - (b) a person publishing matter as a contractor of the defendant, or
 - (c) an associated entity of the defendant (or an employee or contractor of the associated entity).

[26] Section 26

Omit the section. Insert instead—

26 Defence of contextual truth

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter carried one or more imputations that are substantially true (*contextual imputations*), and
 - (b) any defamatory imputations of which the plaintiff complains that are not contextual imputations and are also carried by the matter do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.
- (2) The contextual imputations on which the defendant may rely to establish the defence include imputations of which the plaintiff complains.

[27] Section 29A

Insert after section 29—

29A Defence of publication of matter concerning issue of public interest

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter concerns an issue of public interest, and
 - (b) the defendant reasonably believed that the publication of the matter was in the public interest.
- (2) In determining whether the defence is established, a court must take into account all of the circumstances of the case.
- (3) Without limiting subsection (2), the court may take into account the following factors to the extent the court considers them applicable in the circumstances—
 - (a) the seriousness of any defamatory imputation carried by the matter published,

- (b) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,
 - (c) the extent to which the matter published relates to the performance of the public functions or activities of the person,
 - (d) whether it was in the public interest in the circumstances for the matter to be published expeditiously,
 - (e) the sources of the information in the matter published, including the integrity of the sources,
 - (f) if a source of the information in the matter published is a person whose identity is being kept confidential, whether there is good reason for the person's identity to be kept confidential (including, for example, to comply with an applicable professional code or standard),
 - (g) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person,
 - (h) any other steps taken to verify the information in the matter published,
 - (i) the importance of freedom of expression in the discussion of issues of public interest.
- (4) Subsection (3) does not—
- (a) require each factor referred to in the subsection to be taken into account, or
 - (b) limit the matters that the court may take into account.
- (5) Without affecting the application of section 22 to other defences, the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established.

[28] Section 30 Defence of qualified privilege for provision of certain information

Omit section 30(3). Insert instead—

- (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account the following factors to the extent the court considers them applicable in the circumstances—
- (a) the seriousness of any defamatory imputation carried by the matter published,
 - (b) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,
 - (c) the nature of the business environment in which the defendant operates,
 - (d) whether it was appropriate in the circumstances for the matter to be published expeditiously,
 - (e) any other steps taken to verify the information in the matter published.
- (3A) Subsection (3) does not—
- (a) require each factor referred to in the subsection to be taken into account, or
 - (b) limit the matters that the court may take into account.
- (3B) It is not necessary to prove that the matter published concerned an issue of public interest to establish the defence of qualified privilege under subsection (1).

[29] Section 30(6)

Insert after section 30(5)—

- (6) Without affecting the application of section 22 to other defences, the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established.

[30] Section 30A

Insert after section 30—

30A Defence of scientific or academic peer review

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter was published in a scientific or academic journal (whether published in electronic form or otherwise), and
 - (b) the matter relates to a scientific or academic issue, and
 - (c) an independent review of the matter’s scientific or academic merit was carried out before the matter was published in the journal by—
 - (i) the editor of the journal if the editor has expertise in the scientific or academic issue concerned, or
 - (ii) one or more persons with expertise in the scientific or academic issue concerned.
- (2) If there is a defence to the publication of defamatory matter in a scientific or academic journal because of subsection (1), there is also a defence to the publication of any assessment of the matter in the same journal if the defendant proves that—
 - (a) the assessment was written by one or more of the persons who carried out the independent review of the matter, and
 - (b) the assessment was written in the course of that review.
- (3) It is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in a fair summary of, or fair extract from, a matter or assessment for which there is a defence because of subsection (1) or (2).
- (4) If a journal has more than one editor, a reference in this section to the editor of the journal is to be read as a reference to the editor or editors who were responsible for deciding to publish the matter concerned.
- (5) A defence established under this section is defeated if, and only if, the plaintiff proves that the defamatory matter or assessment was not published honestly for the information of the public or the advancement of education.

[31] Section 31 Defences of honest opinion

Omit section 31(5). Insert instead—

- (5) For the purposes of this section, an opinion is *based on proper material* if—
 - (a) the material on which it is based is—
 - (i) set out in specific or general terms in the published matter, or
 - (ii) notorious, or
 - (iii) accessible from a reference, link or other access point included in the matter (for example, a hyperlink on a webpage), or

- (iv) otherwise apparent from the context in which the matter is published, and
- (b) the material—
 - (i) is substantially true, or
 - (ii) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law), or
 - (iii) was published on an occasion that attracted the protection of a defence under this section or section 28 or 29.

[32] Section 33 Defence of triviality

Omit the section.

[33] Section 35 Damages for non-economic loss limited

Omit “Unless the court orders otherwise under subsection (2), the” in section 35(1).

Insert instead “The”.

[34] Section 35(2)–(2B)

Omit section 35(2). Insert instead—

- (2) The maximum damages amount is to be awarded only in a most serious case.
- (2A) Subsection (1) does not limit the court’s power to award aggravated damages if an award of aggravated damages is warranted in the circumstances.
- (2B) An award of aggravated damages is to be made separately to any award of damages for non-economic loss to which subsection (1) applies.

[35] Section 44 Giving of notices and other documents

Insert after section 44(1)(a)(iii)—

- (iv) by sending it by email to an email address specified by the person for the giving or service of documents, or

[36] Section 44(1)(b)(ii)

Omit “corporate.”. Insert instead “corporate, or”.

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

Insert after section 44(1)(b)(ii)—

- (iii) by sending it by email to an email address specified by the body corporate for the giving or service of documents.

[38] Schedule 4 Savings, transitional and other provisions

Insert at the end of clause 1(1)—

any Act that amends this Act

[39] Schedule 4

Insert at the end of the Schedule, with appropriate Part and clause numbering—

Part Provisions consequent on enactment of Defamation Amendment Act 2020

Application of 2020 amendments

An amendment made to this Act by the *Defamation Amendment Act 2020* applies only in relation to the publication of defamatory matter after the commencement of the amendment.

Schedule 2 Amendment of Limitation Act 1969 No 31

[1] Section 14B Defamation

Insert at the end of the section—

- (2) The 1-year limitation period referred to in subsection (1) is taken to have been extended as provided by subsection (3) if a concerns notice is given to the proposed defendant on a day (the *notice day*) within the period of 56 days before the limitation period expires.
- (3) The limitation period is extended for an additional period of 56 days minus any days remaining after the notice day until the 1-year limitation period expires.
Example. Assume a concerns notice is given 7 days before the limitation period expires. This means that there are 6 days left after the notice day before the period expires. Consequently, this subsection would operate to extend the limitation period by 56 minus 6 days, that is, 50 days.
- (4) In this section—
concerns notice has the same meaning as in the *Defamation Act 2005*.
date of publication, in relation to the publication of matter in electronic form, means the day on which the matter was first uploaded for access or sent electronically to a recipient.

[2] Section 14C

Insert after section 14B—

14C Defamation—single publication rule

- (1) This section applies if—
 - (a) a person (the *first publisher*) publishes matter to the public that is alleged to be defamatory (the *first publication*), and
 - (b) the first publisher or an associate of the first publisher subsequently publishes (whether or not to the public) matter that is substantially the same.
- (2) Any cause of action for defamation against the first publisher or an associate of the first publisher in respect of the subsequent publication is to be treated as having accrued on the date of the first publication for the purposes of determining when—
 - (a) the limitation period applicable under section 14B begins, or
 - (b) the 3-year period referred to in section 56A(2) begins.
- (3) Subsection (2) does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.
- (4) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the considerations to which the court may have regard include (but are not limited to)—
 - (a) the level of prominence that a matter is given, and
 - (b) the extent of the subsequent publication.
- (5) This section does not limit the power of a court under section 56A to extend the limitation period applicable under section 14B.
- (6) In this section—
associate of a first publisher means—

- (a) an employee of the publisher, or
- (b) a person publishing matter as a contractor of the publisher, or
- (c) an associated entity (within the meaning of section 50AAA of the *Corporations Act 2001* of the Commonwealth) of the publisher (or an employee or contractor of the associated entity).

date of first publication, in relation to the publication of matter in electronic form, means the day on which the matter was first uploaded for access or sent electronically to a recipient.

public includes a section of the public.

[3] Section 56A Extension of limitation period by court

Omit section 56A(2) and (3). Insert instead—

- (2) A court may extend the limitation period to a period of up to 3 years running from the date of the alleged publication of the matter if the plaintiff satisfies the court that it is just and reasonable to allow an action to proceed.
- (3) In determining whether to extend the limitation period, the court is to have regard to all of the circumstances of the case and in particular to—
 - (a) the length of, and the reasons for, the plaintiff's delay, and
 - (b) if a reason for the delay was that some or all of the facts relevant to the cause of action became known to the plaintiff after the limitation period expired—
 - (i) the day on which the facts became known to the plaintiff, and
 - (ii) the extent to which the plaintiff acted promptly and reasonably once the plaintiff knew whether or not the facts might be capable of giving rise to an action, and
 - (c) the extent, having regard to the delay, to which relevant evidence is likely to be unavailable or less cogent than if the action had been brought within the limitation period.

[4] Section 73A

Insert before section 74—

73A Defamation—effect of provisions concerning electronic defamatory publications on other laws

- (1) This section applies in respect of any requirement under section 14B or 14C for the date of publication of a matter in electronic form to be determined by reference to the day on which the matter was first uploaded for access or sent electronically to a recipient.
- (2) A requirement to which this section applies is relevant only for the purpose of determining when a limitation period begins and for no other purpose.
- (3) Without limiting subsection (2), a requirement to which this section applies is not relevant for—
 - (a) establishing whether there is a cause of action for defamation, or
 - (b) the choice of law to be applied for a cause of action for defamation.

[5] Schedule 5 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 2020

Application of 2020 amendments

- (1) The amendment made to section 14B by the *Defamation Amendment Act 2020* applies in relation to the publication of defamatory matter after the commencement of the amendment.
- (2) Section 14C (as inserted by the *Defamation Amendment Act 2020*) applies in relation to the publication of defamatory matter after the commencement of the section, subject to subclause (3).
- (3) Section 14C extends to a first publication before the commencement of the section, but only in respect of subsequent publications after the commencement.
- (4) Section 56A (as amended by the *Defamation Amendment Act 2020*) applies in relation to the publication of defamatory matter after the commencement of the section.