

DEFAMATION (AMENDMENT) ACT 1994 No. 93

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Defamation Act 1974 No. 18

SCHEDULE 1—AMENDMENTS

DEFAMATION (AMENDMENT) ACT 1994 No. 93

NEW SOUTH WALES



Act No. 93, 1994

An Act to amend the Defamation Act 1974 in relation to the functions of trial judges and juries and the assessment of damages in defamation proceedings; and for other purposes. [Assented to 12 December 1994]

Defamation (Amendment) Act 1994 No. 93

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Defamation (Amendment) Act 1994.

Commencement

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

Amendment of Defamation Act 1974 No. 18

3. The Defamation Act 1974 is amended as set out in Schedule 1.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

- (1) Section 3 (**Division of Act**):

Omit the section.

- (2) Section 7A:

Before section 8, insert:

Functions of judge and jury

7A. (1) If proceedings for defamation are tried before a jury, the court and not the jury is to determine whether the matter complained of is reasonably capable of carrying the imputation pleaded by the plaintiff and, if it is, whether the imputation is reasonably capable of bearing a defamatory meaning.

- (2) If the court determines that:

- (a) the matter is not reasonably capable of carrying the imputation pleaded by the plaintiff; or
- (b) the imputation is not reasonably capable of bearing a defamatory meaning,

the court is to enter a verdict for the defendant in relation to the imputation pleaded.

Defamation (Amendment) Act 1994 No. 93

SCHEDULE 1—AMENDMENTS—*continued*

(3) If the court determines that:

- (a) the matter is reasonably capable of carrying the imputation pleaded by the plaintiff; and
- (b) the imputation is reasonably capable of bearing a defamatory meaning,

the jury is to determine whether the matter complained of carries the imputation and, if it does, whether the imputation is defamatory.

(4) If the jury determines that the matter complained of was published by the defendant and carries an imputation that is defamatory of the plaintiff, the court and not the jury is:

- (a) to determine whether any defence raised by the defendant (including all issues of fact and law relating to that defence) has been established; and
- (b) to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.

(5) To the extent that section 88 of the Supreme Court Act 1970 applies to proceedings for defamation, it applies subject to the provisions of this section.

(3) Section 9 (**Causes of action**):

- (a) From the end of section 9 (5) (a), omit “and”.
- (b) Omit section 9 (5) (b).
- (c) After section 9 (5), insert:

(5A) Notwithstanding subsection (2), if the court or the jury (if any) finds for the plaintiff as to more than one cause of action in the same proceedings for defamation, the court may assess damages in a single sum.

(4) Section 12 (**Public interest a question for the court**):

Omit the section.

(5) Section 23 (**Qualified privilege a question for the court**):

Omit the section.

Defamation (Amendment) Act 1994 No. 93

SCHEDULE 1—AMENDMENTS—*continued*

(6) Section 46 (**General**):

From section 46 (1), omit “section”, insert instead “Part”.

(7) Section 46A:

After section 46, insert:

Factors relevant in damages assessment

46A. (1) In determining the amount of damages to be awarded in any proceedings for defamation, the court is to ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded.

(2) In determining the amount of damages for non-economic loss to be awarded in any proceedings for defamation, the court is to take into consideration the general range of damages for non-economic loss in personal injury awards in the State (including awards made under, or in accordance with, any statute regulating the award of any such damages).

(8) Section 58:

After section 57, insert:

Savings and transitional provisions

58. Schedule 3 has effect.

(9) Schedule 3:

At the end of the Act, insert:

SCHEDULE 3—SAVINGS AND TRANSITIONAL PROVISIONS

(Sec. 58)

PART 1—GENERAL

Savings and transitional regulations

1. (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

Defamation (Amendment) Act 1994

Defamation (Amendment) Act 1994 No. 93

SCHEDULE 1—AMENDMENTS—*continued*

(2) A provision referred to in subclause (1) may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.

(3) To the extent to which a provision referred to in subclause (1) takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

- (a) to affect in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication; or
- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of any thing done or omitted to be done before the date of its publication.

**PART 2—PROVISIONS CONSEQUENT ON
ENACTMENT OF DEFAMATION (AMENDMENT)
ACT 1994**

Definition

2. In this Part:

“**amending Act**” means the Defamation (Amendment) Act 1994.

Application of amendments

3. (1) An amendment made by the amending Act applies only to causes of action that accrue after the commencement of the amendment.

(2) However, an amendment made by the amending Act does not apply to a cause of action that accrues after the commencement of the amendment if:

- (a) the cause of action is one of two or more causes of action in proceedings commenced by the plaintiff; and

Defamation (Amendment) Act 1994 No. 93

SCHEDULE 1—AMENDMENTS—*continued*

- (b) 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 by another defendant); and
 - (c) one or more of the other causes of action in the proceedings accrued before the commencement of the amendment.
- (3) If an amendment made by the amending Act does not apply to a cause of action, this Act is taken to apply to the cause of action as if the amendment had not been made.
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[*Minister's second reading speech made in—
Legislative Council on 22 November 1994
Legislative Assembly on 29 November 1994*]

FIRST PRINT

DEFAMATION (AMENDMENT) BILL 1994

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to amend the Defamation Act 1974:

- (a) to provide that truth alone is a defence to a defamatory imputation; and
- (b) to provide that the trial judge and not the jury is to determine:
 - whether any defence raised in defamation proceedings is established; and
 - the amount of damages (if any) to be awarded in successful defamation proceedings; and
- (c) to provide that, in the assessment of damages, the trial judge:
 - is to ensure that any damages awarded have an appropriate and rational relationship to the injury to the plaintiff; and
 - is to take into consideration the general range of damages for non-economic loss in personal injury awards in the State; and
 - may assess damages in a single sum in proceedings involving more than one successful cause of action; and
- (d) to otherwise restate the present law concerning the respective functions of the trial judge and the jury in determining whether the publication of a matter is defamatory.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the Schedule of amendments to the Defamation Act 1974.

Defamation (Amendment) 1994

SCHEDULE 1—AMENDMENTS**Truth alone as a defence**

At present, section 15 of the Act provides that it is a defence to a defamatory imputation if the imputation:

- (a) is a matter of substantial truth; and
- (b) relates either to a matter of public interest or is published under qualified privilege.

Item (6) replaces section 15 with a new section that provides that proof of the substantial truth of a defamatory imputation alone will be a defence. This reflects the position at common law.

Item (7) makes similar amendments to section 16 (truth: contextual imputations) to ensure that it is a defence to any imputation complained of if that imputation does not further injure the plaintiff's reputation because of the substantial truth of any contextual imputations. A contextual imputation is an imputation made by the publication of the same matter by which the alleged defamatory imputation is made.

Item (5) consequentially repeals section 14. That section presently deals with the matters relating to qualified privilege for the purposes of existing sections 15 and 16.

Functions of judge and jury

In jury trials for defamation, the jury can presently determine:

- if the publication of the matter complained of carried the imputation alleged by the plaintiff; and
- if the alleged imputation is defamatory; and
- factual issues relating to defences.

However, a trial judge may withdraw an alleged imputation from the jury if the judge is satisfied either that the matter complained of was not reasonably capable of carrying the imputation alleged or that the alleged imputation was not reasonably capable of bearing a defamatory meaning. The trial judge is also presently required to determine certain legal issues relevant to defences such as whether the publication of the matter complained of was in the public interest (section 12) or was protected by qualified privilege (section 23).

Item (2) inserts a new section 7A. The new section restates the present role of judges and juries in defamation proceedings tried by a jury except that the trial judge alone will now be required:

- to determine all issues of fact and law necessary to establish any defence; and
- to assess damages.

Items (4) and (8) consequentially repeal sections 12 (public interest a question for the court) and 23 (qualified privilege a question for the court). These provisions will be unnecessary because of the new requirement that judges are to determine issues of fact and law relating to defences.

Item (3) makes consequential amendments to section 9 (causes of action) relating to the assessment of damages.

Defamation (Amendment) 1994

Assessment of damages for defamation

Item (10) inserts a new section 46A. Proposed subsection (1) will require a trial judge to assess damages so as to ensure that there is an appropriate and rational relationship between any damages awarded and the harm to the plaintiff. Proposed subsection (2) will also require the trial judge to take into consideration the general range of damages for non-economic loss in personal injury awards in New South Wales (whether awarded under the common law or under a statute). Proposed subsection (2) reflects the approach sanctioned by the High Court in cases such as *Carson v. John Fairfax & Sons Ltd.* (1992–1993) 178 C.L.R. 44 in relation to the assessment of damages by juries.

Item (9) makes a consequential amendment to section 46.

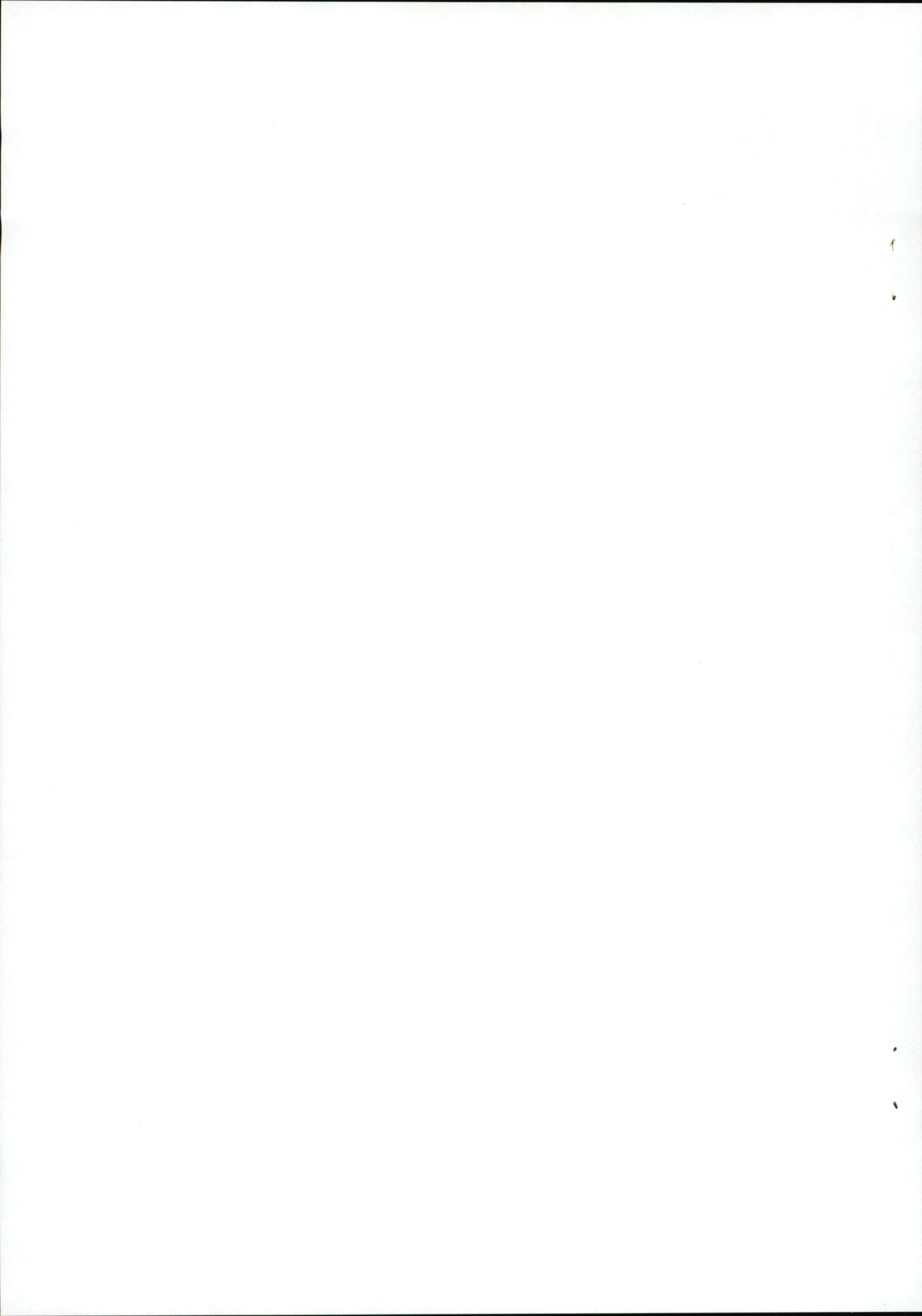
Other amendments

Items (11) and (12) contain provisions of a savings and transitional nature. In particular, clause 3 of proposed Schedule 3 provides that an amendment made by the proposed Act applies only to causes of action that accrue after the commencement of the amendment. However, the amendment will not extend to a cause of action that accrues after the commencement of the amendment if:

- the cause of action is one of two or more causes of action in proceedings relating to the multiple publication of the same defamatory matter; and
- one of the other causes of action in the proceedings accrued before the commencement of the amendment.

In cases where an amendment does not extend to a cause of action, the principal Act will continue to apply to that cause of action as if the amendment had not been made.

Item (1) makes an amendment in the nature of statute law revision.



FIRST PRINT

DEFAMATION (AMENDMENT) BILL 1994

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Defamation Act 1974 No. 18

SCHEDULE 1—AMENDMENTS

DEFAMATION (AMENDMENT) BILL 1994

NEW SOUTH WALES



No. , 1994

A BILL FOR

An Act to amend the Defamation Act 1974 in relation to the defence of truth, the functions of trial judges and juries and the assessment of damages in defamation proceedings; and for other purposes.

*Defamation (Amendment) 1994***The Legislature of New South Wales enacts:****Short title**

1. This Act may be cited as the Defamation (Amendment) Act 1994.

Commencement

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

Amendment of Defamation Act 1974 No. 18

3. The Defamation Act 1974 is amended as set out in Schedule 1.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

10 (1) Section 3 (**Division of Act**):

Omit the section.

(2) Section 7A:

Before section 8, insert:

Functions of judge and jury

15 7A. (1) If proceedings for defamation are tried before a jury, the court and not the jury is to determine whether the matter complained of is reasonably capable of carrying the imputation pleaded by the plaintiff and, if it is, whether the imputation is reasonably capable of bearing a defamatory meaning.

20 (2) If the court determines that:

(a) the matter is not reasonably capable of carrying the imputation pleaded by the plaintiff; or

25 (b) the imputation is not reasonably capable of bearing a defamatory meaning,

the court is to enter a verdict for the defendant in relation to the imputation pleaded.

(3) If the court determines that:

30 (a) the matter is reasonably capable of carrying the imputation pleaded by the plaintiff; and

Defamation (Amendment) 1994

SCHEDULE 1—AMENDMENTS—*continued*

- (b) the imputation is reasonably capable of bearing a defamatory meaning,
the jury is to determine whether the matter complained of carries the imputation and, if it does, whether the imputation is defamatory. 5
- (4) If the jury determines that the matter complained of carries an imputation that is defamatory of the plaintiff, the court and not the jury is:
- (a) to determine all issues of fact and law relating to any defence raised by the defendant; and 10
- (b) to assess the amount of damages (if any) that should be awarded to the plaintiff.
- (5) To the extent that section 88 of the Supreme Court Act 1970 applies to proceedings for defamation, it applies subject to the provisions of this section. 15
- (3) **Section 9 (Causes of action):**
- (a) From the end of section 9 (5) (a), omit “and”.
- (b) Omit section 9 (5) (b).
- (c) After section 9 (5), insert: 20
- (5A) Notwithstanding subsection (2), if the court or the jury (if any) finds for the plaintiff as to more than one cause of action in the same proceedings for defamation, the court may assess damages in a single sum.
- (4) **Section 12 (Public interest a question for the court):** 25
- Omit the section.
- (5) **Section 14 (Interpretation):**
- Omit the section.
- (6) **Section 15:**
- Omit the section, insert instead: 30
- Truth generally**
15. It is a defence to any imputation complained of that the imputation is a matter of substantial truth.

Defamation (Amendment) 1994

SCHEDULE 1—AMENDMENTS—*continued*

(7) Section 16 (**Truth: contextual imputations**):

(a) From section 16 (1), omit “contextual to the imputation complained of”, insert instead “a contextual imputation”.

5 (b) Omit section 16 (2), insert instead:

(2) It is a defence to any imputation complained of if that imputation does not further injure the reputation of the plaintiff because of the substantial truth of any contextual imputation.

10 (8) Section 23 (**Qualified privilege a question for the court**):

Omit the section.

(9) Section 46 (**General**):

From section 46 (1), omit “section”, insert instead “Part”.

(10) Section 46A:

15 After section 46, insert:

Factors relevant in damages assessment

20 46A. (1) In determining the amount of damages to be awarded in any proceedings for defamation, the court is to ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded.

25 (2) In determining the amount of damages for non-economic loss to be awarded in any proceedings for defamation, the court is to take into consideration the general range of damages for non-economic loss in personal injury awards in the State (including awards made under, or in accordance with, any statute regulating the award of any such damages).

(11) Section 58:

30 After section 57, insert:

Savings and transitional provisions

58. Schedule 3 has effect.

*Defamation (Amendment) 1994*SCHEDULE 1—AMENDMENTS—*continued*

(12) Schedule 3:

At the end of the Act, insert:

SCHEDULE 3—SAVINGS AND TRANSITIONAL PROVISIONS

5

(Sec. 58)

PART 1—GENERAL**Savings and transitional regulations**

1. (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts: 10

Defamation (Amendment) Act 1994

(2) A provision referred to in subclause (1) may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day. 15

(3) To the extent to which a provision referred to in subclause (1) takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication; or 20

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of any thing done or omitted to be done before the date of its publication. 25

PART 2—PROVISIONS CONSEQUENT ON ENACTMENT OF DEFAMATION (AMENDMENT) ACT 1994

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Definition

2. In this Part:

“**amending Act**” means the Defamation (Amendment) Act 1994.

SCHEDULE 1—AMENDMENTS—*continued***Application of amendments**

5 3. (1) An amendment made by the amending Act applies only to causes of action that accrue after the commencement of the amendment.

 (2) However, an amendment made by the amending Act does not apply to a cause of action that accrues after the commencement of the amendment if:

10 (a) the cause of action is one of two or more causes of action in proceedings commenced by the plaintiff; and

15 (b) 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 by another defendant); and

 (c) one or more of the other causes of action in the proceedings accrued before the commencement of the amendment.

20 (3) If an amendment made by the amending Act does not apply to a cause of action, this Act is taken to apply to the cause of action as if the amendment had not been made.
