

[Act 2002 No 136]



New South Wales

## Defamation Amendment Bill 2002

### Explanatory note

This explanatory note relates to this Bill as introduced into Parliament. \*

### Overview of Bill

The objects of this Bill are:

- (a) to amend the *Defamation Act 1974* as follows:
  - (i) to state the objects of the Act,
  - (ii) to provide that a corporation does not have the right to sue for defamation of the corporation,
  - (iii) to set out the factors that can be taken into account when determining whether the conduct of a publisher in publishing a defamatory imputation about a person was reasonable for the purposes of the defence of qualified privilege,
  - (iv) to encourage publishers of defamatory publications to make offers of amends in respect of damage caused by such publications,
  - (v) to set out factors that a court may take into account in awarding costs in defamation proceedings and to require a court to order that costs in such proceedings be assessed on an indemnity basis if there has

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\* Amended in committee—see table at end of volume.

- been an unreasonable failure to settle the proceedings unless the interests of justice require otherwise,
- (vi) to confer some protection against actions for defamation for the publication of reports of media conferences given, and media releases issued, by or on behalf of public officials and public authorities,
  - (vii) to make some amendments in the nature of statute law revision,
  - (viii) to enact provisions of a savings or transitional nature consequent on the enactment of the proposed Act, and
- (b) to amend the *District Court Act 1973* to make it clear that actions in the District Court in which there are issues of fact on a claim in respect of defamation are generally to be tried with a jury, and
  - (c) to amend the *Limitation Act 1969* to provide that a limitation period of one year applies to defamation actions unless a court considers it just and reasonable to extend that period in a particular case.

## Outline of provisions

**Clause 1** sets out the name (also called 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 amendments to the *Defamation Act 1974* set out in Schedule 1.

**Clause 4** is a formal provision that gives effect to the amendments to the *District Court Act 1973* and the *Limitation Act 1969* set out in Schedule 2.

## Schedule 1 Amendment of Defamation Act 1974

**Schedule 1 [1]** inserts a new section 3 in the Act that sets out the objects of the Act.

**Schedule 1 [2]** amends section 7 of the Act to insert a definition of *offer to make amends* in the Act.

**Schedule 1 [3]** amends section 7 of the Act to provide that notes that are included in the Act do not form part of the Act.

**Schedule 1 [4]** makes an amendment to section 7A of the Act that is consequential on the amendment made to the *District Court Act 1973* by Schedule 2.1 [2].

**Schedule 1 [5]** inserts a new section 8A in the Act that provides that a corporation (whether or not constituted for a governmental or other public purpose) does not have a cause of action in defamation in respect of the publication of defamatory matter about the corporation. However, the proposed section also makes it clear that it does not affect any right to sue for defamation that a member of a corporation may have as an individual.

**Schedule 1 [6]** inserts a new Part in the Act dealing with the making of offers of amends. **Schedule 1 [14]** consequentially repeals Division 8 of Part 3 of the Act, which currently deals with offers to make amends.

The most important difference between the provisions of the new Part and the current provisions of Division 8 of Part 3 of the Act is that the current provisions limit the making of offers of amends to situations where there has been an innocent publication of defamatory matter. A publication is innocent only if the publisher and the publisher's agents and employees exercised reasonable care in relation to the publication of the matter, did not intend the matter in question to be defamatory and did not know of any circumstances by reason of which the matter was or may have been defamatory. The new Part is not similarly limited. It extends to any matter that carries, or may carry, a defamatory imputation about a person.

Proposed section 9A specifies the objects of the new Part.

Proposed section 9B provides that the new Part applies if a person (the ***publisher***) publishes matter (the ***matter in question***) that carries, or may carry, an imputation that is defamatory of another person (the ***aggrieved person***).

Proposed section 9C defines certain expressions used in the new Part.

Proposed section 9D enables a publisher to make an offer of amends to an aggrieved person. The proposed section sets out the requirements for any such offer. For instance, the offer must be made no later than the earlier of 14 days after the publisher is told by the aggrieved person that the matter in question is or may be defamatory or the day of service by the publisher of a defence in an action for defamation brought by the aggrieved person. However, there is scope for renewed offers of amends to be made after the expiry of those periods if the renewed offer is a genuine attempt by the publisher to address matters of concern raised by the aggrieved person about an earlier offer and is made within 14 days after the earlier offer is withdrawn (or within an agreed period).

Proposed section 9E sets out some of the matters to which a court must have regard in determining whether an offer to make amends is reasonable for the purposes of the new Part.

Proposed section 9F confers certain powers on a court in respect of the enforcement of an offer to make amends that is accepted by an aggrieved person.

It also provides that if the publisher performs the agreement made by the acceptance of the offer (including paying any compensation under the agreement), the aggrieved person cannot begin or continue an action for defamation against the publisher in relation to the matter in question.

Proposed section 9G provides that it is a defence to an action for defamation against the publisher if the publisher made an offer of amends that was not accepted and the offer was made as soon as practicable after the publisher became aware that the matter in question is or may be defamatory, the publisher was ready and willing to perform the offer and the offer was reasonable in the circumstances.

**Schedule 1 [7]–[10]** make amendments to section 17A of the Act in the nature of statute law revision. The amendments update references to the *Police Service Act 1990*, which was recently renamed as the *Police Act 1990*.

**Schedule 1 [11]** amends section 22 of the Act to set out the factors that a court may take into account when determining whether the conduct of a publisher in publishing a defamatory imputation about a person was reasonable for the purposes of the defence of qualified privilege.

Section 22 provides that it is a defence to the publication of a defamatory matter to a person (the *recipient*) if:

- (a) the recipient has an interest or apparent interest in having information on some subject, and
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
- (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances.

**Schedule 1 [12]** inserts a new section 25A in the Act that contains defences that relate to the publication of reports on media conferences given, or media releases issued, by or on behalf of public officials or public authorities in their official capacities. **Schedule 1 [13]** makes a consequential amendment to section 26 of the Act.

The new section provides that there is a defence for the publication of a fair report of the proceedings of a media conference given by or on behalf of a public official or public authority acting (or purportedly acting) in an official capacity. It also provides that there is a defence for the publication of a media release or a copy of a media release (or a fair extract or abstract from, or fair summary of, a media release) issued by or on behalf of a public official or public authority acting (or purportedly acting) in an official capacity.

The new section also provides for defences for subsequent publications by another person that are based on earlier reports of such media conferences if the person does not, at the time of the subsequent publication, have knowledge that should make the person aware that the earlier report is not fair or is not a report of what it purports to be.

The provisions of the new section mirror the defences that apply to protected reports of proceedings under section 24 of the Act and the publication of public documents under section 25 of the Act. However, the new section makes it clear that it does not affect the liability (if any) in defamation of any public official or public authority in respect of an imputation published by means of a media conference given, or media release issued, by or on behalf of the official or authority.

**Schedule 1 [16]** inserts a new section 48A in the Act to require a court (unless the interests of justice require otherwise) to order costs against an unsuccessful party to proceedings for defamation to be assessed on an indemnity basis if the court is satisfied that the party unreasonably failed to make or accept a settlement offer made by the other party to the proceedings. **Schedule 1 [15]** makes a consequential amendment to the Part heading for the Part in which the new section is to be inserted.

The proposed section also provides that in awarding costs in respect of proceedings for defamation, the court may have regard to the following matters:

- (a) the way in which the parties to the proceedings conducted their cases,
- (b) such other matters as the court considers relevant.

**Schedule 1 [17]** inserts a new section 56A in the Act to enable the Governor to make regulations for the purposes of the Act.

**Schedule 1 [18]** amends clause 1 of Schedule 3 to the Act to enable regulations of a savings or transitional nature to be made consequent on the enactment of the proposed Act.

**Schedule 1 [19]** inserts a new Part in Schedule 3 to the Act that contains provisions of a savings and transitional nature.

## **Schedule 2 Amendment of other Acts**

**Schedule 2.1** amends the *District Court Act 1973* to make it clear that actions in the District Court in which there are issues of fact on a claim in respect of defamation are generally to be tried with a jury. The provisions to be inserted mirror those in sections 85 and 86 of the *Supreme Court Act 1970*. However, these new provisions are made subject to the provisions of section 7A of the *Defamation Act 1974* by the amendment made to that section by Schedule 1 [4]. Section 7A of the *Defamation Act 1974* limits the role of juries in defamation

proceedings to the determination of whether a matter carried an imputation about the plaintiff and, if so, whether that imputation was defamatory of the plaintiff.

**Schedule 2.2** amends the *Limitation Act 1969* to provide that the limitation period for defamation actions generally is shortened to one year from the date of publication of the defamatory matter, with the court having a discretion to extend the period in exceptional circumstances. However, a court will not be able to grant an extension beyond 3 years dating from the time of the publication of the defamatory matter.