

Act 1994 No. 93

## 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.

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**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.

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

**SCHEDULE I—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.

**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.

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