

## CLAUSE NOTES

### *Defamation Amendment Bill 2021*

- Clause 1**      **Short title**  
Specifies the name of the proposed Act.
- Clause 2**      **Commencement**  
Provides that the Act commences on Royal Assent.
- Clause 3**      **Principal Act**  
Provides that the Principal Act being amended is the *Defamation Act 2005*.
- Clause 4**      **Section 4 amended (Interpretation)**  
Inserts several new definitions to support amendments relating to offers to make amends, concerns notices, and corporations' ability to sue for defamation.
- Clause 5**      **Section 9 amended (Certain corporations do not have cause of action for defamation)**  
Amends section 9 of the Principal Act to clarify and restrict the types of corporations that have a cause of action for defamation.  
  
Inserts a definition of 'employee', a term not currently defined in the *Defamation Act 2005*, to include any individual (whether or not an independent contractor) who is engaged in the day to day operations of the corporation other than as a volunteer and is subject to the control and direction of the corporation.  
  
As a result, corporations cannot structure their business to avoid the general prohibition on corporations suing for defamation.
- Clause 6**      **Sections 10 and 10A inserted**  
Inserts section 10(1) (No cause of action for defamation of, or against, deceased persons) from the 2005 Model Defamation Provisions to codify the common law position that there is no cause of action for defamation of, or against, deceased persons. Section 10 was previously agreed to by all Australian jurisdictions but does not currently form part of the Principal Act. It also inserts section 10(2) which clarifies that a court is not prevented from determining the question of costs for defamation proceedings discontinued due to the death of a party.  
  
Similar to the approach taken in the United Kingdom's *Defamation Act 2013*, the insertion of section 10A into the Act creates a serious harm element of a cause of action for defamation. Under section 10A the plaintiff will be required to prove the publication of the defamatory matter has caused, or is likely to cause, serious harm to the reputation of the plaintiff.

Section 10A sets out a procedure for determining whether the serious harm element is established, including:

- the judicial officer is to determine whether the element is established,
- whether the element is established can be determined either before trial or during the trial of defamation proceedings on the judicial officer's own motion or on the application of a party,
- 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).

The purpose of the new section is to encourage the early resolution of defamation proceedings by enabling the issue of serious harm to be dealt with as a threshold issue. As a result, the defence of triviality, which currently requires a defendant to prove the harm caused by defamation matter was trivial, will be removed from the Act (see clause 24).

**Clause 7 Part 3, Division 1: Heading amended**

Amends the heading of this part to reflect amendments relating to concerns notices.

**Clause 8 Sections 12A and 12B inserted**

New section 12A provides clarity as to the requirements of the concerns notice process for the purposes of defamation proceedings. This section also outlines the process for a "further particulars notice" that can be issued by a publisher in response to a concerns notice that fails to adequately specify the required information.

New section 12B provides that defamation proceedings cannot be commenced without a concerns notice that particularises the defamatory imputations alleged being given to the proposed defendant and the period in which the defendant can make an offer of amends has elapsed. Under this section the court may grant leave for proceedings to be commenced despite non-compliance with s12B(1)(c) only if the plaintiff satisfies the court that (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.

**Clause 9 Section 14 amended (When offer to make amends may be made)**

Amends section 14 of the Principal Act to provide for the "applicable period" that is open for the publisher to make an offer of amends and removes references to concerns notices provisions (see clause 8).

**Clause 10 Section 15 amended (Content of offer to make amends)**

Amends section 15 of the Principal Act to outline additional matters that may be included in an offer to make amends, including an offer to publish, or join in publishing, a clarification of, or additional information about, the matter in question as an alternative to a reasonable correction.

**Clause 11 Section 18 amended (Effect of failure to accept reasonable offer to make amends)**

Provides that the first pre-condition of establishing the defence under this section requires the offer being made 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).

Inserts a new subsection (3) into section 18 of the Principal Act to provide that the judicial officer, not the jury, determines whether the defence is established

**Clause 12 Section 20A amended (Proceedings generally to be commenced within one year)**

Provides for the one-year limitation period to be automatically extended by an additional period if a concerns notice is given to the proposed defendant on a day within the period of 56 days before the limitation period expires. This is to allow the proposed defendant time to consider the concerns notice and the aggrieved person to consider any offer to make amends.

**Clause 13 Sections 20AB, 20AC and 20 AD inserted**

Based on the UK's *Defamation Act 2013*, section 20AB introduces a single publication rule for determining when the limitation period commences for multiple publications, including subsequent publications of substantially the same matter by certain associates of the first publisher (such as employees and contractors) as well as to subsequent publications by the same publisher.

The effect of the introduction of a single publication rule, is that the date of the first publication of defamatory matter will be treated as the start date for the limitation period for all publications of the same matter, except if the manner of a subsequent publication is materially different from the first publication.

Section 20AC provides for how to extend the limitation period for an action for defamation to up to three years from publication if the court is satisfied that it is just and reasonable to allow an action to proceed.

Section 20AD provides for the commencement of the limitation period in relation to electronic publications to be determined by reference to the day when the publisher uploads it for access or sends it electronically rather than by reference to when it is downloaded or received.

**Clause 14 Section 20B amended (Application of section 20A)**

Provides that the application of section 20A is subject to section 20BA.

**Clause 15 Section 20BA inserted**

Provides for the application of the amendment provisions concerning sections 20A, 20AB, and 20AC apply only in relation to the publication of defamatory matter on or after the commencement of the provisions. An exception is a subsequent publication of defamatory matter proposed by section 20AB (Single publication rule) in which the first publication occurs before commencement date.

**Clause 16 Section 21 amended (Election for defamation proceedings to be tried by jury)**

Amends section 21 of the Principal Act to allow an election to have the defamation proceeding tried by jury to be revoked if both parties consent, or if both parties do not consent, the court grants leave if it is satisfied it is in the interests of justice to revoke an election.

**Clause 17 Section 22 amended (Roles of judicial officers and juries in defamation proceedings)**

Amends section 22 to clarify that the section does not require or permit juries to determine any issue, at general law or in the Principal Act, which is to be determined by a judicial officer.

**Clause 18 Section 23 substituted**

Currently section 23 in the Principal Act does not prevent a person bringing defamation proceedings for damages against persons who were closely associated with a previously sued defendant at the time of the publication, for example, employees or contractors of the previous defendant. This can result in multiple defamation proceedings in respect of the same matter. This clause recasts section 23 to clarify that a person cannot bring defamation proceedings against a previous defendant or their associates in relation to the same or similar publication unless they are granted leave by the court. An “associate of a previous defendant” is defined in subsection (3)

**Clause 19 Section 26 substituted**

Replaces section 26 (Defence of contextual truth) with a new section to clarify that a defendant may plead back substantially true imputations relied on by the plaintiff, as well as those relied on by the defendant, to establish the defence of contextual truth.

**Clause 20 Section 29A inserted**

Creates a new defence of publication of matter concerning an issue of public interest based on the approach taken by the UK *Defamation Act 2013*.

It will be a defence to the publication of defamatory matter if the defendant proves that both the matter concerns an issue of public interest and the defendant reasonably believed the publication of the matter was in the public interest.

In determining the whether the defence is established a court must take into account all the circumstances of the case. Subsection (3) includes a list of factors

the court may take into account in assessing the defence. The factors are intended to provide non-exhaustive guidance to the court.

Inserts subsection (5) which clarifies that the jury (in proceedings tried by a jury), not the judicial officer, determines whether the qualified privilege defence has been satisfied.

**Clause 21 Section 30 amended (Defence of qualified privilege for provision of certain information)**

Amends section 30 of the Principal Act to specify the factors that the court may take into account when determining whether the conduct of the defendant in publishing the matter was reasonable in circumstances for the purposes of this defence and to minimise duplication with the factors for the new public interest defence.

Inserts a new subsection (3A) which clarifies that the factors listed in subsection (3) are not intended to operate as a checklist.

Inserts a new subsection (6) which clarifies that the jury (in proceedings tried by a jury), not the judicial officer, determines whether the qualified privilege defence has been satisfied.

**Clause 22 Section 30A inserted**

Creates a new defence of scientific or academic peer review to recognise that it is in the public interest for academics and scientists to be able to express their views freely, particularly if they have been subject to peer review. This defence is comparable to the defence in the UK's *Defamation Act 2013*.

**Clause 23 Section 31 amended (Defences of honest opinion)**

Inserts a new subsection (5) to address uncertainty about how material relied on needs to be referred to in a publication in order for the opinion to be based on proper material, particularly if the material is in electronic form or is common knowledge.

**Clause 24 Section 33 repealed**

Repeals the defence of triviality as a result of the proposed insertion of the serious harm element of a cause of action for defamation (see clause 6 – new section 10A (Serious harm element of cause of action for defamation)).

**Clause 25 Section 35 amended (Damages for non-economic loss limited)**

Clarifies that the maximum amount of damages for non-economic loss operates to create a scale or range of damages whereby the maximum damages amount is to be awarded only in a most serious case, and that an award of aggravated damages is to be made separately.

**Clause 26 Section 44 amended (Giving of notices and other documents)**

Updates the service of notices and other documents by including service via email to specified email address.

**Clause 27 Section 49 inserted**

Savings and transitional provisions on commencement this Act applies only in relation to publication of defamatory matters on or after the commencement of the amendment.

**Clause 28 Repeal of Act**

This automatically repeals the amending legislation after the first anniversary of this Act commencing. The provisions that the amending legislation inserts into the Principal Acts still remain in force after the repeal of the Amending Act.