



Australian Capital Territory

Civil Law (Wrongs) Amendment Act 2021

A2021-15

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Australian Capital Territory

Civil Law (Wrongs) Amendment Act 2021

A2021-15

An Act to amend the *Civil Law (Wrongs) Act 2002*, and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 Name of Act

This Act is the *Civil Law (Wrongs) Amendment Act 2021*.

2 Commencement

This Act commences on the day after its notification day.

Note The naming and commencement provisions automatically commence on the notification day (see [Legislation Act](#), s 75 (1)).

3 Legislation amended

This Act amends the *Civil Law (Wrongs) Act 2002*.

Note This Act also amends the *Limitation Act 1985* (see sch 1).

4 Definitions—ch 9 Section 116, definition of *aggrieved person*

substitute

aggrieved person, for division 9.3.1 (Concerns notices and offers to make amends)—see section 124.

5 Section 116, new definitions

insert

applicable period, for an offer to make amends, for division 9.3.1 (Concerns notices and offers to make amends)—see section 126.

associated entity—see the [Corporations Act](#), section 50AAA.

concerns notice, for division 9.3.1 (Concerns notices and offers to make amends)—see section 124A.

excluded corporation—see section 121.

further particulars notice, for division 9.3.1 (Concerns notices and offers to make amends)—see section 124A (3).

6 Section 116, definitions of *matter in question* and *publisher*

substitute

matter in question, for division 9.3.1 (Concerns notices and offers to make amends)—see section 124.

publisher, for division 9.3.1 (Concerns notices and offers to make amends)—see section 124.

**7 Certain corporations do not have cause of action for defamation
Section 121 (2) (b)**

substitute

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

8 Section 121 (4)

omit

9 Section 121 (6), new definition of *employee*

insert

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.

**10 No cause of action for defamation of, or against, deceased persons
New section 122 (2)**

insert

- (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.

11 New section 122A

in division 9.2.2, insert

122A 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 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 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 must 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 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).

12 Division 9.3.1 heading

substitute

Division 9.3.1 Concerns notices and offers to make amends

13 New sections 124A and 124B

insert

124A Concerns notices

- (1) For this division, a notice is a *concerns notice* if—
 - (a) the notice—
 - (i) is in writing; and
 - (ii) states the location where the matter in question can be accessed; and

Example—location
a webpage address

 - (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 124B requires a concerns notice to be given before proceedings for defamation can be commenced.

- (2) To remove any 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 stated 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 stated 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 stated in a further particulars notice within the applicable period is taken not to have given the publisher a concerns notice for this section.

124B 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 relation to 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 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 1985*.

14 Section 126

substitute

126 When offer to make amends may be made

- (1) An offer to make amends cannot be made if—
 - (a) the applicable period for an offer to make amends has expired; or
 - (b) a defence has been served in an action brought by the aggrieved person against the publisher in relation to the matter in question.

-
- (2) For this division, 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 1 further particulars notice, subsection (2) (a) applies only in relation to the first notice.

15 **Content of offer to make amends**
New section 127 (1) (ba)

insert

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

16 **Section 127 (1) (d)**

after

reasonable correction of

insert

, or a clarification of or additional information about,

17 **Section 127 (1) (g)**

omit

18 New section 127 (1A)

insert

- (1A) In addition to the matters mentioned 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.

19 Section 127 (2)

omit

subsection (1) (g) (ii)

substitute

subsection (1A) (c)

20 **Effect of failure to accept reasonable offer to make amends**
Section 130 (1) (a)

substitute

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

21 **Section 130 (1) (b)**

omit

at any time before the trial

22 **Section 133**

substitute

133 **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).

23 Section 136

substitute

136 Defence of contextual truth

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter carried 1 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.

24 New section 139AA

after section 139, insert

139AA 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;
Example—good reason
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 mentioned in the subsection to be taken into account; or
 - (b) limit the matters that the court may take into account.

25 **Defence of qualified privilege for provision of certain information**
Section 139A (3)

substitute

- (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 mentioned 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).

26 New section 139AB

after section 139A, insert

139AB 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) 1 or more people 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 1 or more of the people 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 1 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.

27 Defences of honest opinion Section 139B (5)

substitute

- (5) For 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; or
Example—other access point
a hyperlink on a webpage
 - (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, section 138 (Defence for publication of public documents) or section 139 (Defences of fair report of proceedings of public concern).

28 **Defence of triviality**
Section 139D

omit

29 **Damages for non-economic loss limited**
Section 139F (1)

omit

Unless the court orders otherwise under subsection (2), the

substitute

The

30 **Section 139F (2)**

substitute

- (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.

31 New chapter 18

insert

**Chapter 18 Transitional—Civil Law
(Wrongs) Amendment Act 2021**

252 Application of Civil Law (Wrongs) Amendment Act 2021

An amendment made to this Act by the *Civil Law (Wrongs) Amendment Act 2021* applies only in relation to the publication of defamatory matter after the commencement of the amendment.

253 Expiry—ch 18

This chapter expires 3 years after the day it commences.

Note Transitional provisions are kept in the Act for a limited time. A transitional provision is repealed on its expiry but continues to have effect after its repeal (see [Legislation Act](#), s 88).

32 Dictionary, definition of *aggrieved person*

substitute

aggrieved person, for division 9.3.1 (Concerns notices and offers to make amends)—see section 124.

33 Dictionary, new definitions

insert

applicable period, for an offer to make amends, for division 9.3.1 (Concerns notices and offers to make amends)—see section 126.

associated entity, for chapter 9 (Defamation)—see the [Corporations Act](#), section 50AAA.

concerns notice, for division 9.3.1 (Concerns notices and offers to make amends)—see section 124A.

excluded corporation, for chapter 9 (Defamation)—see section 121.

further particulars notice, for division 9.3.1 (Concerns notices and offers to make amends)—see section 124A (3).

34 Dictionary, definitions of *matter in question* and *publisher*

substitute

matter in question, for division 9.3.1 (Concerns notices and offers to make amends)—see section 124.

publisher, for division 9.3.1 (Concerns notices and offers to make amends)—see section 124.

Schedule 1 Limitation Act 1985— Consequential amendments

(see s 3)

[1.1] Section 21B (2)

substitute

- (2) The 1-year limitation period mentioned 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—calculating limitation period

A concerns notice is given 7 days before the limitation period expires. This means there are 6 days left after the notice day before the period expires. Consequently, this subsection operates to extend the limitation period by 56 minus 6 days, which is 50 days.

- (4) In this section:

concerns notice—see the *Civil Law (Wrongs) Act 2002*, section 124A.

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.

[1.2] New sections 21BA to 21BC

in division 2.2, insert

21BA 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 relation to 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 21B begins; or
 - (b) the 3-year period mentioned in section 21BB (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 21BB to extend the limitation period applicable under section 21B.

(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 the [Corporations Act](#), section 50AAA) 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.

21BB Extension of limitation period

- (1) A person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period applicable under section 21B (Defamation proceedings generally to be commenced within 1 year) for the cause of action.
- (2) The 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.

21BC Defamation—effect of limitation law concerning electronic defamatory publications on other laws

- (1) This section applies in relation to any requirement under section 21B (Defamation proceedings generally to be commenced within 1 year) or section 21BA (Defamation—single publication rule) 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.

[1.3] New part 6*insert***Part 6 Transitional—Civil Law (Wrongs) Amendment Act 2021****102 Application of amendments made by Civil Law (Wrongs) Amendment Act 2021 to publication of defamatory matter**

- (1) Section 21B (Defamation proceedings generally to be commenced within 1 year) (as amended by the *Civil Law (Wrongs) Amendment Act 2021*, schedule 1) applies in relation to the publication of defamatory matter on or after the commencement day.
- (2) Subject to subsection (3), section 21BA (Defamation—single publication rule) (as inserted by the *Civil Law (Wrongs) Amendment Act 2021*, schedule 1) applies in relation to the publication of defamatory matter on or after the commencement day.
- (3) Section 21BA extends—
 - (a) to a first publication before the commencement day; but
 - (b) in relation to subsequent publications—only on or after the commencement day.
- (4) Section 21BB (Extension of limitation period) (as inserted by the *Civil Law (Wrongs) Amendment Act 2021*, schedule 1) applies in relation to the publication of defamatory matter on or after the commencement day.
- (5) In this section:
commencement day means the day the *Civil Law (Wrongs) Amendment Act 2021*, schedule 1 commences.

103 Expiry—pt 6

This part expires 3 years after the day it commences.

Note Transitional provisions are kept in the Act for a limited time. A transitional provision is repealed on its expiry but continues to have effect after its repeal (see [Legislation Act](#), s 88).

[1.4] Dictionary, note 2

insert

- Corporations Act

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 12 May 2021.

2 Notification

Notified under the [Legislation Act](#) on 30 June 2021.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

I certify that the above is a true copy of the Civil Law (Wrongs) Amendment Bill 2021, which was passed by the Legislative Assembly on 23 June 2021.

Acting Clerk of the Legislative Assembly

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