1999

# THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

# DEFAMATION BILL 1999

## EXPLANATORY MEMORANDUM

Circulated by authority of
Gary Humphries MLA
Attorney-General

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## DEFAMATION BILL 1999

The Bill deals with the law about defamation. The new measures in this law are intended to simplify the law and encourage the timely resolution of disputes. The law consolidates older laws about defamation.

## OVERVIEW

### Sources of law

Today, ACT defamation law consists of judge-made common law as modified by two inherited NSW Acts:

- the *Defamation Act 1901* of New South Wales (No 22, 1901) provides the basic structure for civil and criminal actions in the ACT; and
- the *Defamation (Amendment) Act 1909* of the State of New South Wales (No. 22, 1909) provides for certain statutory defences to a civil or criminal action for defamation.

These Acts are archaic. For example, the laws provide:

- that a right of action for oral slander shall extend to all defamatory words for which an action might have been maintained before 24 August 1847; and
- that a plaintiff or prosecutor in whose favour judgment is given may levy damages directly out of the presses used in printing the defamatory article.

The old NSW laws were based on old Imperial legislation. The old NSW laws dealt with issues of concern at the time, particularly discrimination against former convicts. These laws have been repealed in NSW for many years.

Changes to policy, described below, necessitated substantial change to both the form and content of these old NSW laws. To aid consideration of changes, the old NSW laws have been repealed and old and new provisions incorporated within the framework of a new Defamation Bill. A number of archaic provisions in the old NSW laws have not been carried through to the new legislation. For example, section 23 of the *Defamation Act 1901* is not continued as the provision is no longer appropriate (it dealt with execution on printing presses) and section 3 of the *Defamation (Amendment) Act 1909* is not continued (as actions for obscene or blasphemous libel have been abrogated).

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## Proposals for reform

Proposals to reform the law of defamation in Australia, and to do so on a uniform basis, have been made for many decades. However, the latest proposals for a uniform law amongst a majority of states and territories collapsed in 1998. Proposals for reform have been previously stymied by irreconcilable differences between the media and defamation lawyers.

Earlier, in December 1995, the Community Law Reform Committee proposed that the ACT should make a new defamation law based generally on the lines of the then uniform proposal. While largely confining its considerations to the uniform exercise, the Committee also made a number of additional recommendations which, at the time, did not find support among some ACT defamation practitioners. This diversity of views mirrors reform experience in other jurisdictions and has hampered the reform of this area of law.

On the basis of the Committee's report, in 1996 the Assembly repealed a number of Imperial laws continuing to apply in the ACT dealing with defamation and abolished the common law misdemeanours of criminal libel, blasphemous libel, seditious libel and obscene libel. While these repeals and abolitions stripped the law of some of its more objectionable characteristics, they were never intended to address the more fundamental task of improving the basic law of defamation. More recently, the Assembly passed amendments to the Limitations Act.

## 1998 Reform Proposals

As a result of the collapse of the uniform exercise, on 11 September 1998, the Attorney-General initiated a review of defamation law with the release of a discussion paper suggesting a series of targeted reforms.

As the policy underlying the reforms to this area of law lie in the reform proposals and reaction to them, these aspects are detailed below.

### *Defence of truth*

At common law, the most important defence for defamation is truth (alone). This remains the case in most common law countries and a number of Australian states (particularly Victoria).

However, the common law defence was altered in NSW very early in its colonial history based on recommendations of a Select Committee of the House of Lords (which were not accepted in the United Kingdom in relation to civil actions). Subsequently, under the statutory defence, a defendant has been required to show that not only was the matter true, but that publishing the matter also served a legitimate public benefit. Originally, this departure from the common law was supported as a way of precluding the criminal antecedents of the sizable NSW convict population being brought to public attention. Recently, it has been argued

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that to remove this part of the defence would leave many plaintiffs vulnerable and without a legal remedy for an invasion of privacy.

The "public benefit" element of the ACT defence of truth is based on the NSW law as it was in 1901 (the NSW defence has been altered on a number of occasions, and is now framed in terms of "public interest").

In the discussion paper, it was proposed that the ACT repeal the "public benefit" element and return to the simple common law formulation of this defence. In practical terms, there are very few cases where the defence is able to prove truth, but fails to establish that the publication was not for the public benefit. However, because the qualification must be addressed as a matter of course during pre-trial pleadings in all cases (i.e., the defendant must assert that the alleged defamation was both true and a matter of public benefit) the continued existence of the public benefit rule necessitates additional pleadings which are sometimes seized upon as providing additional grounds for claims for exemplary damages.

Defamation lawyers opposed this proposal and argued that the law on this subject should be the same as that in NSW (although that jurisdiction now has a slightly different test based on "public interest"). They argued that removal of the public benefit test would permit publication of stale and irrelevant criminal convictions and youthful indiscretions. They also asserted that changes are not justified by reason of complexity or cost, as the issue does not loom large at trial or in preparation. Some have argued that the public benefit test should remain until replaced by a new right of privacy (although, the enactment of legislation dealing with a right of privacy, will require further, substantial, consideration).

Removal of the public benefit test will bring the law in the ACT into line with common law jurisdictions (particularly Victoria).

The function of defamation law is the protection of reputation. The public benefit test has had a distorting effect on the law of defamation by shifting the issue from reputation to privacy. The lack of cases based on the issue of public benefit points to the ineffectual nature of defamation to protect privacy.

Government has agreed that the defence of truth should revert to its original simple common law form.

***Corrections and apologies***

In defamation law, greater emphasis is placed on an award of damages than prompt correction (and legitimate costs) as the goal of these proceedings. At present, there are few structural incentives for potential litigants to seriously attempt to resolve the dispute between them short of going to trial. Indeed, there are significant tactical disincentives to making an offer of amends under the old legislation still in force in the ACT (which might come in the form of an apology, a correction or a reasonable offer of settlement). These disincentives are so great that the process has been used very infrequently.

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Accordingly, the 1998 discussion paper emphasised the need to focus the attention of parties and their advisors at an initial stage of discussions on reputation rather than reparation. In such a way, the need for expensive and long drawn-out litigation may be greatly diminished.

In the paper, it was proposed that provision be made to alter the tactical considerations in handling defamation matters so as to encourage litigants to consider making (or accepting) a timely correction or apology through a statutory "offer of amends" process (which might consist of a reasonable apology, correction, offer of settlement or a combination of such).

> For example: The Canberra Tribune mistakenly identifies Judy Smith as having embezzled money from her employer. Swift correction to an equivalent audience will significantly reduce any injury to Judy Smith's reputation. However, if Judy Smith does not actively participate in the formal process of expediting the correction or stonewalls such efforts, those responsible for the article should be able to resist a subsequent defamation action.

Similarly, failure on the part of the defendant, will result in the plaintiff being able to seek an expedited order vindicating that person's reputation in addition to any other right the plaintiff might have.

> For example: Continuing the example above, where those responsible for the article make no or inadequate effort to correct the error, Judy Smith should be able to apply to Court for an order vindicating her reputation. Such an order may, of itself, reduce any injury. It would leave open the prospect of a later action for damages (which might be considerably higher if those responsible do not publish a correction).

There was general agreement in most submissions about the new procedures. Defamation lawyers suggested that an additional structural incentive for early settlement could be a rule which put parties at greater risk of indemnity cost orders if they failed to settle when a reasonable settlement offer was made (at present even if a party behaves unreasonably in negotiations, they will not necessarily suffer a cost penalty). Media commentators suggested that plaintiffs should, in addition, be required to swear the truth of the correction.

Government has agreed that a new statutory scheme should provide guidance to a court for the test of 'reasonableness' which will emphasise the desirability of a proportional (i.e., the equal prominence of an apology in comparison to the defamatory publication) and timely response. Government also agreed with the further suggestions noted above.

***A statutory timeframe***

Defamation actions are expensive because they take so long. In 1993, the Community Law Reform Committee studied *every* procedural step undertaken in most of the defamation cases before the ACT Supreme Court over a number of years. It was found that the Supreme Court Rules provide a coherent timetable concerning the management of pre-trial steps. However, it was also found that legal

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*practice* did not conform to the rules because time-limits specified in the rules may be varied by consent of the parties without application to the Court under Order 64 rule 6 of the Supreme Court Rules. (Other issues identified in the report concerning the Rules and defamation actions have been separately addressed.)

In the paper, it was proposed that the power to extend time should be exercised under direct court supervision rather than by the parties in defamation actions. A court should not agree to extend time save in exceptional circumstances or where the party is under a disability.

Defamation lawyers opposed this proposal and argued that case management and an 'expedited list' for some complex matters selected by the court are likely to produce the best results. They believe that there should be no special rules for defamation cases.

The arguments put forward by defamation practitioners are not persuasive. Defamation actions are too expensive. Time, expense and uncertainly associated with defamation proceedings are *so great* that it almost becomes a case of defamation proceedings being a privilege not a right.

***Protected Reports***

The paper proposed the establishment of a 'protected' reports defence (as in sections 24-6 of the NSW law) to provide a defence for the publication of a report (or copies or fair abstracts of reports) of a number of enumerated bodies. The defence would also apply to official and public documents and records.

This defence largely reflects present ACT practice. As in NSW, the defence would be defeated if the plaintiff was able to show that the publication was not made in good faith for various public purposes.

The proposal to provide a list of bodies whose proceedings or reports are privileged is non-contentious and has been supported, in principal, by both the Law Society and the media.

The proposal will bring greater certainty to ACT law and avoid debate in courts on matters that should be clearly articulated in legislation.

***Damages***

Damages in civil claims are generally based on the concept of proven financial loss (e.g., the loss of income). Uniquely, damages in defamation actions also serve to vindicate a plaintiff (demonstrating the baselessness of a defamatory allegation). Because this second component is based on a subjective assessment and the quantum of past awards, damages are open to criticism.

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In the discussion paper, it was proposed that the legislation give specific guidance to courts in respect of damages. It was proposed that a court should:

- ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded; and
- take into account the ordinary level of general damages component in personal injury awards in the ACT.

Media commentators supported this proposal but suggested that the amendment should go further and provide that damages for hurt feelings and loss of reputation should be expressly limited to $10,000, except where a plaintiff can prove actual damage. Defamation lawyers argued no change is required because there is no evidence of excessive awards in the ACT.

It is not proposed, at this stage to place a cap on general damages (although it may be necessary to reconsider this issue in the light of judicial practice once the legislation comes into effect). There will be differences of opinion about whether ACT damages are excessive or not, but the need for greater rigour in proving damage will help reduce any perception of excessive awards.

In addressing this issue it is also necessary to examine the issue of whether defamation cases might be heard by a jury in the ACT. To date, a jury has not heard an ACT defamation case (although this has been common practice in NSW). ACT litigants might try to avoid the effect of the above reform by seeking a jury to assess damages. However, the qualities which jurors bring to cases (particularly their experience of everyday life and their assessment of the credibility of witnesses) have little application in the assessment of damages.

***A "negligence defence" for defamatory statements***

In considering the responses to the issues paper, Government has agreed to a new defence for a defamatory statement similar to that in negligence cases (except where there is an imputation of criminal behaviour).

Defamation is a tort. In defamation, generally, liability is imposed without fault (the limited exceptions to the rule are discussed below). Anticipation of harm to another or awareness of a defamatory imputation is irrelevant. The plaintiff need only prove that the matter was published and that it gave rise to a defamatory imputation.

By contrast, negligence is not a tort but rather the basis for determining "fault-based liability", when relevant, for tort. In defining negligence, the courts have created a conceptual framework based on the artificial concepts of "duty of care" and "remoteness of damage". In particular, the duty of care is presently set by case law to what a reasonable person of ordinary prudence would do in the circumstances (having regard to any special competencies that such a person might possess because of the calling they are in). According to Fleming, this conceptual framework helps define "...what interests the law deems worthy of protection against negligent interference in consonance with current notions of policy".

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Because it is not necessary to prove fault in defamation cases, the conceptual framework developed by the courts in relation to negligence is not used as the basis for liability for defamation actions. Because courts do not require a defamation plaintiff to establish fault, a plaintiff need not prove the existence of a duty of care, breach of the duty, proximity or actual damage. Consequently, a defamation defendant cannot make his/her defence in the same way a defendant does by denying fault-based liability in relation to other torts (by successfully negating a plaintiff's case concerning duty of care, breach of the duty, proximity or damage).

Continued reliance on the imposition of liability without fault sits uneasily with modern concepts of personal responsibility and fairness. Accordingly, there has been a number of attempts over the past 150 years to graft the concept of "fault" onto defamation. As noted below, "innocence" or "the absence of fault" has become an element of some defences relating to innocent dissemination or innocent publication. In the USA, the Supreme Court has gone further and judicially imposed a requirement for plaintiffs to establish fault in all cases. There is little evidence to suggest that these changes had much of an overall effect on plaintiffs or defendants. However, it should be noted that these changes are fiercely opposed by Australian practitioners and judicial adherents to the present scheme and are described in some literature as unworkable, unfair or irrelevant.

*Background - Negligence as a basis for liability in defamation*

Lord Campbell - Libel Act 1843

In a major reform to the law by the *Libel Act 1843,* Lord Campbell provided a radical defence for public newspapers or periodicals where the publisher made a libel without gross negligence or malice, and made an apology or offer of apology. The provision was amended the following year to permit payment into court. This reform not only predated and anticipated judicial development of negligence as a basis for liability for wrongs but also anticipated the development of a statutory amends process.

Section 8 of the ACT *Defamation Act, 1901* repeats the original Lord Campbell provision. Under the provision, a defendant must:

- establish that the libel was not published with malice;
- establish that the libel was not published with gross negligence; and
- publish or offer to publish an apology.

In addition, the defendant may pay into court an amount by way of amends for the injury suffered.

There has been little judicial consideration of the Lord Campbell reform. In *Levien v Fox*, 1890, the NSW Supreme Court concluded that it was incumbent on an editor to "...prove the absence of gross negligence, not only on his part, but also on the part of those in whose hands he elects to leave the conduct of his newspaper". Today, it

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is probable that a court would use the modern conceptual framework concerning negligence in considering the provision.

With one possible exception in the past decade, the provision has not been expressly relied upon in pre-trial pleadings in the ACT (although the provision forms an important legal basis for publication of a vast array of material, including letters to the editor). There may be a couple of reasons for this: firstly, the provisions are archaic; secondly, they pre-empt litigation; and thirdly, there are technical difficulties with the payment into court provision that limits its utility.

In other jurisdictions, the original Lord Campbell provision has been significantly amended. For example, in NSW it has been replaced by a number of provisions dealing with innocent publication (section 36-45 of the *Defamation Act 1974*). In the Australian Law Reform Commission report on unfair publications (No. 11, 1979), the Commission indicated that these revised provisions had not been extensively used and that similar provisions had been criticised in UK and NZ reports. The Commission, incautiously, indicated that the provisions raised problems because "...only the defendant will know the circumstances surrounding the publication. He is given a complete defence, under certain circumstance, against an innocent plaintiff." These criticisms were echoed in a submission to the NSW Parliament on the uniform defamation process in 1992, when it was claimed that these provisions are "utterly useless... they are never used".

Lord Esher – innocent distribution - 1885

In the case of *Emmens v Pottle, 1885,* Lord Esher MR rejected application of the doctrine of no fault in the case of an innocent distributor of a libel. It was argued to the court that, just as a newspaper proprietor is liable for a libel made in the paper in his absence and without his knowledge, so also should be a newsagent responsible for selling the paper. However, while Lord Esher accepted that the plaintiff had made a prima-facie case, the defendant had proved that he did not know of the libel and ought not to have known of the libel having used reasonable care. Lord Esher concluded that, as there was no fault, there was no liability.

In the latter case of *Sun Life v Smith, 1934,* Scrutton LJ put Lord Esher's language into more modern form saying that the issue was really whether the defendants had been negligent in carrying on their business.

This fault-based defence of innocent publication has not been universally accepted as a statement of the common law and a number of judges have suggested that there is no common law defence of innocent publication. In 1977, Lord Denning MR pointed out in *Goldsmith v Sperrings Limited* that if an innocent distributor could be sued, this could stifle the distribution of contentious or controversial material. He commented that "[t]he freedom of the press depends on the channels of distribution being kept open." While they agreed, other members of the Court considered that this was a question for parliament rather than the courts.

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Lord Esher – unintentional publication - 1890

In the case of *Pullman v Hill, 1890,* Lord Esher MR further extended the concept of fault to the case of an unintentional publication of a libel. In that case, he pointed out that a libel published to oneself was not actionable. However, theft of the libelous material could not be actionable. He argued that, if a person does not wish to be liable for a libel, "...so far as he possibly can", the person should keep it to themselves. As with the earlier case, Lord Esher's decision has been interpreted as requiring fault in such cases (although it is sometimes dismissed as a decision about what constitutes publication).

US Supreme Court – 1974

In 1974, the US Supreme Court decided that defamation law should no longer impose liability without fault except for actual loss (*Gertz v Robert Welch Inc*). Justice Powell explained that "...punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedom of speech and press". The decision was ignored in other common law countries.

Following the Supreme Court decision, statute law reform was proposed in the USA (Annenburg propositions). Two Annenburg propositions are relevant:

- in any action for defamation, whether for declaratory judgment or damages, the plaintiff shall bear the burden of proving by clear and convincing evidence that the defamatory statements of and concerning the plaintiff are false.

- in all defamation actions for damages, at minimum the plaintiff shall bear the burden of proving, through clear and convincing evidence, that the defendant failed to act as a reasonable person under the circumstances.

In 1992, the American approach and derivative law reform proposals formed the basis of a submission to the NSW Legislation Committee for the Defamation Bill 1992 (the Committee). The Council argued that "there is a need to consider whether fault should now be a necessary ingredient in a successful defamation action". In particular, the Council urged consideration of the two above Annenburg propositions, without success.

Littlemore proposal - 1992

In 1992 Stuart Littlemore proposed the removal of a range of defences with a new defence based on a concept of negligent publication as the basis of liability. He suggested that the law be split into two torts – an intentional defamation (in respect to which the only defences would be those based on truth, privilege or fair comment) and unintentional defamation (in respect of which the only defence would be due care). In the alternative, he proposed that a defence of due care should be substituted for a range of existing defences.

The Legislation Committee referred this proposal to the NSW Law Reform Commission for further consideration (commenting that there may be unexpected

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consequences). However, the NSW Law Reform Commission pointed out that the Littlemore proposal "effects an overhaul of the whole law of defamation, almost assimilating it into negligence".

Hull proposal – 1998

In 1998, Crispin Hull suggested that the primary defence for a defamatory statement should be the same as in negligence except where there is an imputation of criminal behaviour.

*Negligence as a basis for liability in defamation*

Having regard to the above, there are a number of different ways of introducing the concept of negligence into defamation, in order of magnitude of intervention:

- adopting the Littlemore approach and rebuilding the law of defamation from scratch;

- adopting one or more of the above Annenburg propositions requiring the plaintiff to prove that the defamatory statement was false and that the defendant failed to act as a reasonable person under the circumstances;

- requiring, as in the USA since the decision in *Gertz*, the plaintiff to prove a minimal requirement of proven fault; or

- building on the Lord Campbell and Lord Esher approaches of permitting the defendant a defence that the defendant did not act negligently.

None of the first three options are considered to be appropriate, at this stage. Each of these options relies upon the concept of fault as a basis for an action. While each would enable a defendant to challenge the plaintiff's case using the existing conceptual framework of negligence as a basis for liability, each of these options would impose significant new requirements on a plaintiff, possibly adding to the cost and complexity of bringing any defamation action. In addition, the Littlemore and Annenburg options involve radical reshaping of large sections of the existing law while, as a minimum, the Gertz approach would require recasting the common law cause of action into statutory form.

The fourth option provides a way of allowing a defendant to raise innocence or the lack of fault as a defence without these consequences.

This approach represents a significant change to the law. Unlike the existing provision based on the Lord Campbell reform (or interstate variants), a defendant would not need to negate malice, offer an apology or make a payment for amends. However:

- in relation to apology and payment for amends, these matters must now be traversed by parties contemplating litigation in the new offer of amends provisions dealing with the resolution of disputes without litigation; and

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- the negation of malice is, in part, dealt with by limiting this provision to defamatory imputations of criminal behaviour.

The new negligence defence contained within the bill has the following features:

- it is provided as a defence to both civil and criminal proceedings;
- the defence is not available where there is an imputation of criminal behaviour; and
- the defence is made out if the defendant proves to the civil standard that they were not negligent in publishing the defamatory matter relying on the ordinary legal approach to negligence when it is a basis for liability.

*Consequences of adopting the new defence*

The new defence should end the controversy that has dogged the approach taken by Lords Campbell and Esher. In particular, it will be difficult to sue an "innocent publisher" such as, for example:

- a telecommunications or mail utility;
- an internet service provider; or
- in relation to an owner, the use of publishing equipment by a third party (or during a live broadcast).

Such an outcome lends a desirable degree of certainty to the existing law and is consistent with the outcome in the Esher cases and in *Levine*. It acts to advance the "freedom of the press" by significantly protecting the channels of distribution.

The proposal will also allow the case-based extension of the concept of fault to other situations, more in accord with modern perceptions of personal liability. On this basis, the new defence might encourage the desirable development of the more systematic and careful checking of newspaper articles (on the basis that the defence might be invoked when possibility of fault is minimised).

## REVENUE/COST IMPLICATIONS

There are no revenue implications.

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## DETAIL OF THE BILL

### *Part 1—Preliminary*

This part contains formal and explanatory provisions.

| *Section name* | *Description* |
|---|---|
| Name of Act | A formal provision. |
| Commencement | A formal provision. |
| Definitions—the dictionary | A signpost provision, directing readers to the dictionary at the end of the law for explanations of terms used in the law. |
| Notes | This law is a melding of provisions from older laws and new provisions. The older provisions have been cast into more modern language. For ease of research, the notes include explanatory references to the older sources of the law (but these notes do not form part of the law). |

### *Part 2— Resolution of disputes without litigation*

This part contains rules that encourage the swift but fair resolution of disputes. The underlying policy objective of this part is to ensure effective and commensurate relief in this area of the law.

A financial settlement paid many years after a defamation does not repair reputation, however much it might satisfy other needs. The only effective and commensurate remedy is immediate action, often involving goodwill and accommodation on the part of both parties.

To be effective, this part will require a general change of stance on the part of litigants. Publishers who adopt a conciliatory and inquiring stance when challenged about the veracity of published material are provided with a valuable mechanism to quickly correct errors through an offer of amends. Those who are aggrieved must similarly react promptly to offers of amends.

| | |
|---|---|
| Application of pt2 | A formal provision. |
| Offer to make amends (UK s 2) | A publisher may make a formal offer of amends to an aggrieved party. The provision sets out what constitutes such an offer and what details may be included in the offer. |
| What is a reasonable offer to make amends? | This provides guidance to the parties and to a court about whether an offer of amends is reasonable. |
| Acceptance of offer to make amends | Where an amends is accepted, the innocent party may recover their costs (these costs may, of course, be anticipated in an offer to make amends). This aside, performance of an amends agreement finalises the matter. |

| | |
|---|---|
| False or misleading statement in correction | In the past, there has been the suggestion of collusive behaviour between a plaintiff and defendant in settling a matter. This provision makes it a criminal offence to make a false or misleading statement in a correction under this part. |
| Offer to make amends not accepted | A reasonable offer of amends (if not accepted by an aggrieved party) may be a complete defence to an action for defamation.<br><br>Failure to promptly and seriously consider an offer of amends, may result in an aggrieved party paying the publisher's costs on an indemnity basis. |
| Order to vindicate reputation if offer not made | If a reasonable offer of amends is not made, an aggrieved party may seek an order of the Supreme Court to vindicate their reputation. Failure to bring such an action where it may have mitigated the damage suffered may later adversely effect an aggrieved party's claim for damages. |

***Part 3— Rules Governing Litigation of Civil Claims***

This part contains statutory rules about civil (non-criminal) defamation proceedings. In the main, these provisions operate on the common law rules concerning defamation – they cannot be read as a compete description of the law.

| | |
|---|---|
| Application of pt3 | A formal provision. |
| Meaning of *published matter* in pt3 | A formal provision. |
| Slander actionable without special damage (1901 s3) | This provision has the same effect as section 3 of the *Defamation Act 1901 (NSW).* |
| Plaintiff's character not likely to be injured (1901 s 4) | This provision is to similar effect as section 4 of the *Defamation Act 1901 (NSW).* The older provision qualified the defence – the statutory defence did not apply if the defamatory matter contained an imputation that the person had committed an indictable offence. The qualification is otiose. |
| Application of common law defence of truth in a civil proceeding | The provision restores truth (alone) as a defence to an action for defamation.<br><br>The function of defamation law is the protection of reputation.<br><br>It is not necessary to also establish that publication was for the public benefit. The rule to this effect, contained in section 6 of the *Defamation Act 1901 (NSW)* is repealed. |
| Publication of a proceeding of public concern (1909 s 5) | This provides for the protection of certain fair reports of proceedings of the bodies set out in the provision. It substantially broadens the defence previously contained in section 5 of the *Defamation (Amendment) Act 1909 (NSW).* |

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|---|---|
| Publication of public document (1909 s 5A) | This provides for the protection of certain public documents set out in the provision. It substantially broadens the defence previously contained in section 5A of the *Defamation (Amendment) Act 1909 (NSW)*. |
| Publication under contract (1909 s 6) | This provision is to the same effect as section 6 of the *Defamation (Amendment) Act 1909 (NSW)*. |
| Evidence of apology admissible in mitigation (1901 s 5) | This provision is to the same effect as section 5 of the *Defamation Act 1901 (NSW)* (see also "Compensation etc provable in mitigation (1909 s 7)" below). |
| Payment into court (1901 s 7) | This provision is to the same effect as section 7 of the *Defamation (Amendment) Act 1909 (NSW)*. Note that this provision is not related to the statutory process set out in Part 2 of this Act dealing with the resolution of disputes without litigation. |
| Defence of apology and payment into court (1901 s 8) | This provision is to similar effect as section 8 of the *Defamation (Amendment) Act 1909 (NSW)* which was itself based on Lord Campbell's *Libel Act 1843*. It is largely overtaken by the new defence in section 23. The provision has been broadened to be applicable to all civil actions for defamation (previously the statutory provision was cast as applying to actions for a libel contained in a newspaper or periodical). The new provision does not include a payment into court provision, this being dealt with in a separate section "Payment into court" (above). |
| Defence—defendant not negligent | The absence of negligence is a complete defence to an action for defamation. Unlike the defence under Lord Campbell's *Libel Act 1843*, it is not necessary to also establish that publication was without malice or accompanied by a full apology.<br><br>The broad application of the new defence would be desirable as a means of encouraging the desirable development of the more systematic and careful checking of publications (on the basis that the defence might be invoked when possibility of fault is minimised). |
| Compensation etc provable in mitigation (1909 s 7) | This provision is to similar effect as section 7 of the *Defamation (Amendment) Act 1909 (NSW)* (see also "Evidence of apology admissible in mitigation (1901 s 5)" above). The provision has been expressly cast as applicable to all civil actions for defamation (previously the statutory provision applied to actions for a libel). |
| Damages | This new provision sets out mandatory rules concerning the assessment of damages. |
| Disclosure of name of contributor (1909 s 11) | This provision is to the same effect as section 11 of the *Defamation (Amendment) Act 1909 (NSW)*. |

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***Part 4—Criminal Proceedings***

This part contains statutory rules about criminal defamation proceedings.

*Division 4.1—Defamatory libel*

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|---|---|
| Application | A formal provision. |
| Definitions in div 4.1 | A formal provision. |
| Meaning of victim in div 4.1 | A formal provision. |
| Malicious publication of defamatory libel (1901 s 11 and s 12) | This provision is to the same effect as sections 11 and 12 of the *Defamation Act 1901 (NSW).* |
| Beginning of prosecution (1909 s 4) | This provision is to the same effect as section 4 of the *Defamation (Amendment) Act 1909 (NSW).* |
| Publication of matters of public concern (1909 s 5) | As in civil proceedings, the publication of matters of public concern is to be a defence to criminal proceedings. |
| Publication under contract (1909 s 6) | This provision is to the same effect as section 6 of the *Defamation (Amendment) Act 1909 (NSW).* |
| Plea of truth and public benefit (1901 s 13) | This provision is to the same effect as section 13 of the *Defamation Act 1901 (NSW).* Note that under this provision, a defendant must also prove public benefit. |
| Effect of plea and evidence (1901 s 14) | This provision is to the same effect as section 14 of the *Defamation Act 1901 (NSW).* |
| Truth as a defence (1901 s 15) | This provision is to the same effect as section 15 of the *Defamation Act 1901 (NSW).* See also "Plea of truth and public benefit" (above). |
| Plea of not guilty (1901 s 16) | This provision is to the same effect as section 16 of the *Defamation Act 1901 (NSW).* |
| Defence of absence of authority, knowledge etc (1901 s 17) | This provision is to the same effect as section 17 of the *Defamation Act 1901 (NSW).* |
| Defence—defendant not negligent | As in civil proceedings, it is a defence that the defendant was not negligent. |

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*Division 4.2—Other libels and related offences*

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| Libel etc with intent to extort money or obtain a benefit (1901 s 10) | This provision is to the same effect as section 10 of the *Defamation Act 1901 (NSW).* |

*Division 4.3—Summary proceedings*

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| Application of div 4.3 | A formal provision. |
| Dismissal of case (1909 s 8) | This provision is to the same effect as section 8 of the *Defamation (Amendment) Act 1909 (NSW).* |
| Summary conviction (1909 s 9) | This provision is to the same effect as section 9 of the *Defamation (Amendment) Act 1909 (NSW).* |

***Part 5—Miscellaneous***

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| Scope of defences not limited | The construction of one statutory defence shall not be used to diminish the scope of another defence. This provision has been added as a precautionary measure because of the antiquity of some of the defences included in this law. |
| Time not to be enlarged except by leave | Rules 5 and 6 of Order 64 of the Supreme Court Rules make provision for the enlargement or abridgement of time appointed by the Rules. Rule 5 provides for enlargement of time by order of the court. Rule 6 provides for enlargement of time by consent.<br><br>The provision provides that the enlargement of time appointed by the Rules of the Supreme Court may only occur by order of the court (i.e., under Order 64, Rule 5) and not merely by consent. |
| Repeal and consequential amendment | The 1901 and 1909 NSW Defamation Acts still in force in the ACT are repealed (necessitating a minor amendment to the list of older laws applying in the Territory in the *Interpretation Act*). The *Supreme Court Act 1933* is amended to exclude jury trials in defamation actions. |

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| Dictionary | An explanation of the meaning of certain words used in the law. |