

2021

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CIVIL LAW (WRONGS) AMENDMENT BILL 2021

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004*, s 37)**

**Presented by
Shane Rattenbury MLA
Attorney-General**

CIVIL LAW (WRONGS) AMENDMENT BILL 2021

This Explanatory Statement relates to the *Civil Law (Wrongs) Amendment Bill 2021* (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Explanatory Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the amendments. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

The Bill **is** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*(ACT) (HRA).

OVERVIEW OF THE BILL

The object of the Bill is to enact the Model Defamation Amendment Provisions 2020 (stage 1 defamation reform) (MDAP) in the ACT.

On 27 July 2020, the Council of Attorneys-General (CAG) approved the final version of the MDAP and agreed that the MDAP would be enacted and commenced by all States and Territories. The enactment of the MDAP by all jurisdictions will represent the finalisation of the stage 1 defamation reform. This Explanatory Statement and Bill should be read in conjunction with the Explanatory Note to the Model Defamation Amendment Provisions 2020, prepared by the Parliamentary Counsel's Committee and approved by CAG.¹

While the MDAP are uniform, there are slight differences across defamation laws in Australia due to each jurisdictions' respective established legal frameworks, for example, in relation to the use of jury trials in defamation proceedings. In the Australian Capital Territory (ACT), South Australia and Northern Territory, defamation proceedings are heard by a judge alone and juries do not have a role in such proceedings, however, this is not the case for other jurisdictions. The CAG Defamation Working Party (DWP) agreed that the adoption of the MDAP should not change jurisdictions' existing frameworks surrounding the use of jury trials.

The Bill makes several significant amendments to chapter 9 of the *Civil Law (Wrongs) Act 2002* (ACT), including:

- introducing a serious harm threshold to require plaintiffs to establish that a publication caused, or is likely to cause, serious harm to their reputation;

¹ Explanatory Note, Model Defamation Amendment Provisions 2020,
https://www.pcc.gov.au/uniform/2020/Model_Defamation_Amendment_Provisions_2020.pdf

- introducing a single publication rule to provide that the applicable one-year limitation period runs from the date material is uploaded to the internet;
- providing for certain individuals to be counted as employees of a corporation for the purpose of determining whether the corporation can sue for defamation;
- clarifying the concerns notice procedure and the procedure for offers to make amends, including requiring that concerns notices must be served with sufficient time for a response to be provided before proceedings can be commenced;
- introducing a new public interest defence, modelled on section 4 of the UK *Defamation Act 2013* which provides a defence of responsible communication on a matter of public interest;
- introducing a new defence for peer-reviewed statements and assessments in scientific and academic journals; and
- clarifying that the cap on damages for non-economic loss operates as a scale, and that aggravated damages are awarded separately to damages for non-economic loss.

CONSULTATION ON THE PROPOSED APPROACH

The MDAP respond to the most pressing concerns raised by stakeholders nationwide throughout the consultation process. The Government consulted stakeholders as a member of the DWP. The DWP's Discussion Paper for the stage 1 defamation reform (released in February 2019) invited written submissions in response to 17 topics and asked stakeholders across Australia to raise any additional issues. Forty-four written submissions were received by the DWP and respondents included media and digital industry stakeholders, legal stakeholders, academics, and individuals with experience in bringing or defending defamation claims.

The Government also consulted with ACT stakeholders, including the Law Society of the ACT and the ACT Bar Association, about whether the Bill appropriately and effectively implements the MDAP into the ACT legal framework.

CONSISTENCY WITH HUMAN RIGHTS

The Bill is compatible with the *Human Rights Act 2004* (HRA) as outlined below.

Rights engaged

The common law tort of defamation is modified and applied in the ACT under the *Civil Law (Wrongs) Act* and has the effect of limiting freedom of expression to protect the reputation of individuals. This Bill amends several defamation provisions within Chapter 9 of the *Civil Law (Wrongs) Act*, engaging the following rights under the HRA:

- section 12 – the right to not have his or her reputation unlawfully attacked;
- section 16 – the right to freedom of expression; and
- section 21 – the right to a fair hearing.

Rights promoted

Defamation law engages and limits the right of freedom of expression for the purposes of ensuring a person's right to reputation is maintained. The Bill promotes the right to freedom of expression by limiting the circumstances in which a successful action for defamation may be made, therefore increasing a person's ability to express their views without being subjected to defamation law. The provisions in the Bill that promote the right to freedom of expression include:

- introducing a serious harm threshold to require plaintiffs to establish that a publication caused, or is likely to cause, serious harm to their reputation;
- introducing a single publication rule to provide that the applicable one-year limitation period runs from the date material is uploaded to the internet;
- restricting the ability for certain corporations (who are not holders of human rights) the ability to sue for defamation;
- introducing a new public interest defence, modelled on section 4 of the UK *Defamation Act 2013* which provides a defence of responsible communication on a matter of public interest;
- clarifying requirements for a defence of contextual truth and material relied upon for the defence of honest opinion;
- introducing a new defence for peer-reviewed statements and assessments in scientific and academic journals.

Rights which may be limited

Right to reputation

The Bill engages and may limit the right to reputation. As discussed in more detail below, any limitations on this right are reasonable and proportionate in accordance the criteria set out in section 28 of the HRA. That is, they are compatible with the HRA.

Nature of the right and the limitation (s28 (a) and (c))

Section 12 of the HRA provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and not to have his or her reputation unlawfully attacked. This right has been interpreted

to require the Government to adopt appropriate legal or other measures to give effect to the prohibition on such interference or attacks.

Clause 11 of the Bill introduces a serious harm threshold that requires that a publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person, as an element for a successful action of defamation. Accordingly, this clause engages and potentially limits the right of a person not to have their reputation attacked because it allows for the publication of material that may damage or is likely to damage a person's reputation if such damage is not "serious".

Clause 23 of the Bill clarifies that in relation to the defence of contextual truth, a defendant may plead back substantially true imputations originally pleaded by the plaintiff. This clause engages and potentially limits the right of a person not to have their reputation attacked because it allows for the publication of material that may damage a person's reputation, if the publication contained one or more imputations that are substantially true, and it did not provide further harm to the reputation because of the substantial truth of the contextual implications.

Clause 24 of the Bill introduces a new public interest defence, which provides a defence of responsible communication on a matter of public interest. This clause engages and potentially limits the right of a person not to have their reputation attacked because it allows for the publication of material that may damage a person's reputation, where the matter concerns an issue of public interest and the defendant reasonably believed that the publication of the matter was in the public interest.

Clause 26 of the Bill introduces a defence for peer-reviewed statements and assessment in scientific and academic journals. This clause engages and potentially limits the right of a person not to have their reputation attacked because it allows for the publication of material that may damage a person's reputation, where the publication also included one or more other contextual imputations that are substantially true, the publication relates to a scientific or academic issue and an independent review of the publication's scientific or academic merit was carried out before publication in the journal by either the editor of the journal who has expertise in the scientific or academic issue or by one or more experts within the field of the particular scientific or academic issue.

Clause 27 of the Bill clarifies the material relied upon for the defence of honest opinion. This clause engages and potentially limits the right of a person not to have their reputation attacked because it allows for the publication of material that may damage a person's reputation where publication contains an opinion that is based on proper material. This clause clarifies that proper material is material that sets out in specific or general terms in the published matter, is notorious, is accessible from a reference, link or other access point included in the matter, or is otherwise apparent from the context in which the matter is published. It also clarifies that proper material

is material that is also substantially true or was published on an occasion of absolute or qualified privilege or attracted the protection of certain defence outlined in Chapter 9 of the *Civil Law (Wrongs) Act*.

Legitimate purpose (s28 (b))

The amendments ensure the right to reputation is appropriately and consistently balanced against the right of freedom of expression and that unreasonable limitations on freedom of expression are not imposed. The amendments respond to the substantial and pressing concern that defamation laws currently have a ‘chilling effect’ on freedom of expression. That is, the amendments pursue the legitimate purpose of promoting the right to freedom of expression. The purposes of clauses 11, 23, 24, 26 and 27 of the Bill is also to ensure the integrity of the defamation laws across Australia by implementing nationally consistent defamation laws within the Territory. Nationally consistent laws uphold the integrity of defamation laws across Australia by preventing manipulation of legal systems.

Rational connection between the limitation and the purpose (s28 (d))

The amendments are rationally connected to the objective of promoting freedom of expression by narrowing the range of circumstances a person may be found liable for defamation.

The amendments will also achieve the aim of ensuring consistency of defamation laws through the implementation of model provisions. The restrictions on defamation proceedings will assist to protect freedom of expression.

These clauses only permit the publication of material that may affect a person’s reputation in strictly confined circumstances. These are circumstances where the benefits and public interest associated with the permitted publication justify the impact on a person’s reputation and ensures that the right to freedom of expression is not unreasonably limited.

For instance, this will be in instances where the publication will not “seriously” damage a person’s reputation (clause 11), is substantially true or contains other elements of truth (clause 23 and 27) where attempts were made to verify the information by an expert (clause 26) or where the publisher believed it to be true and the publication was in the public interest (clause 27).

Proportionality (s28 (e))

Permitting the publication of material that may affect a person’s reputation in the limited circumstances contemplated in the Bill is considered reasonable and proportionate. This is because this right is only limited for specified purposes, consistent with the right to freedom of expression and in circumstances where the benefit associated with publication outweighs the impact on a person’s reputation.

Clause 11 of the Bill permits publication under circumstances where the damage to a person's reputation is not "serious". This is reasonable and proportionate because it allows for freedom of expression in circumstances where the damage to a person's reputation is minimal.

Clause 23 of the Bill permits publication under circumstances where the publication contained one or more imputations that are substantially true, and it did not provide further harm to the reputation because of the substantial truth of the contextual implications. This is reasonable and proportionate because it allows for freedom of expression in circumstances where no further harm is incurred to a person's reputation and where there are elements of truth.

Clause 24 of the Bill permits publication under circumstances where it is a matter of public interest and the person believes the information to be true. This is reasonable and proportionate because it allows for freedom of expression in circumstances where the publication is of benefit to the welfare or well-being of the general public.

Clause 26 of the Bill permits publication to scientific and academic journals under circumstances where it is subject to review by a relevant expert (editor, independent or peer review) and contains elements of truth within the publication on other issue. This is reasonable and proportionate because it allows for freedom of expression in circumstances where attempts have been made to verify factual information relating to scientific or an academic view by an expert or experts in the relevant field.

Clause 27 of the Bill permits publication in circumstances where publication contains an opinion that is based on proper material. This is reasonable and proportionate because the clause provides guidance for the circumstances that may amount to proper material to support that the publication was an opinion. These include consideration of the extent to which the matter published distinguishes between suspicions, allegations and proven facts, 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 and any other steps taken to verify the information in the matter published. This establishes a clear framework of what could be considered proper material on which an opinion may be based, providing additional safeguards for minimal limitation of the right to protect a person's reputation under this amendment.

Right to fair hearing

Nature of the right and the limitation (s28 (a) and (c))

Section 21 of the HRA provides that everyone has the right to have criminal charges and the rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Clauses 12 to 21 of the Bill relate to Division 9.3.1 concern notices and offers to make amends. These clauses clarify the concerns notice procedure and the

procedure for offers to make amends, including requiring that concerns notices must be served with sufficient time for a response to be provided before proceedings can be commenced. These engage the right to a fair hearing as they create a requirement that a plaintiff first go through a notice procedure and gives the defendant a chance to make a reasonable offer to resolve before being able to commence proceedings. The defendant is also able to rely on that offer as a defence.

However, as this pre-trial procedure does not prevent the plaintiff from commencing litigation after following the procedure it does not limit the right to a fair hearing. A plaintiff may still, if desired, commence litigation, after completing the concern notices process. For completeness, even if the right to a fair hearing were limited by the amendments, this limitation would be permissible applying the criteria set out in section 28 of the HRA as outlined below.

Legitimate purpose (s28 (b))

The purpose of making it a requirement that a plaintiff first go through a notice procedure is to encourage the resolution of disputes using concerns notice and avoiding litigation. This provision gives the defendant a chance to make a reasonable offer to resolve the dispute before being able to commence litigation, therefore promoting the resolution of disputes using alternative dispute resolution processes.

Rational connection between the limitation and the purpose (s28 (d))

The requirement to go through a concern notice procedure promotes resolution of disputes using alternative dispute resolution processes as the plaintiff must go through this process before they can commence litigation.

Proportionality (s28 (e))

This limitation to the right to a fair hearing is reasonable and proportionate because the amendment does not prevent the plaintiff from exercising their right to a fair hearing. The amendments merely require that the concern notice procedure is completed before litigation can commence.

Civil Law (Wrongs) Amendment Bill 2021
Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004*, I have examined the **Civil Law (Wrongs) Amendment Bill 2021**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

.....

Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 **Name of Act**

This clause is a formal provision setting out the name of the Act as the *Civil Law (Wrongs) Amendment Act 2021* (the Act).

Clause 2 **Commencement**

This clause provides for commencement of the Act on the day after its notification day.

Clause 3 **Legislation amended**

This clause is a formal provision identifying that the Act amends the *Civil Law (Wrongs) Act 2002*. This clause also includes a note identifying that the Act consequentially amends the *Limitation Act 1985*.

Clause 4 **Definitions—ch 9**

Section 116, definition of *aggrieved person*

This clause substitutes the definition of ‘aggrieved person’ in section 116. This clause is a consequential amendment to align with the amendment to the division 9.3.1 heading (Concerns notices and offers to make amends).

Clause 5 **Section 116, new definitions**

This clause inserts the following new definitions for division 9.3.1 (Concerns notices and offers to make amends): ‘applicable period’ for an offer to make amends, ‘concerns notice’ and ‘further particulars notice’.

This clause also inserts new definitions for ‘associated entity’ by reference to section 50AAA of the *Corporations Act 2001* (Cth) and for ‘excluded corporation’.

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

This clause substitutes the definitions of ‘matter in question’ and ‘publisher’ in section 116. This clause is a consequential amendment to align the definitions of ‘matter in question’ and ‘publisher’ with the amendment to the division 9.3.1 heading (Concerns notices and offers to make amends).

Clause 7 **Certain corporations do not have cause of action for defamation**

Section 121 (2) (b)

Section 121 (1) provides that a corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication. Section 121 (2) defines a corporation as an excluded corporation if the corporation is not a public body and it

was formed pursuant to objects which do not include obtaining a financial benefit for its members or corporators, or if it employs fewer than 10 persons and is not related to another corporation.

This clause substitutes section 121 (2) (b) to clarify that a definition of ‘excluded corporation’ includes a corporation that operates for financial gain but nevertheless, has fewer than 10 employees and is not an associated entity of another corporation. This clause restricts the types of corporations that have a cause of action for defamation by excluding a corporation that is an associated entity of another corporation. The existing definition of excluded corporation under section 121 (2) (b) is limited to those related to other corporations (by reference to section 50 of the *Corporations Act 2001* (Cth)).

Clause 8 Section 121 (4)

The substituted definition of excluded corporation in section 121 (2) (b) notes that the definition does not include a corporation that is an associated entity of another corporation. As the definition no longer defines an excluded corporation by reference to a corporation that is related to another corporation, this clause omits section 121 (4) to align with the substituted definition.

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

This clause includes a clear definition of “employee” to preserve the intent that only small corporations can sue for defamation. This seeks to ensure that corporations who operate using a large number of contractors, for example, are not able to sue for defamation as an “excluded corporation”. This is to preserve the policy intent that large corporations should not have an action in defamation.

In section 121 (2) (b), the definition of ‘excluded corporation’ refers to a corporation that operates for financial gain but employs fewer than 10 persons. However, as the provision does not define the words, ‘employs’ or ‘employee’, the ordinary meaning of the term employee has the effect of excluding persons, such as independent contractors, from being considered employees of a corporation. As a result, some corporations could operate for financial gain and employ more than 10 persons (including independent contractors) and still be regarded as an excluded corporation.

This clause inserts a new definition of ‘employee’ in section 121 to include an individual, including 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.

Clause 10 No cause of action for defamation of, or against, deceased persons

New section 122 (2)

Section 122 provides that a person, including a personal representative of a deceased person, has no cause of action for defamation in relation to the publication of defamatory material about a deceased person (whether published before or after the deceased person's death) or in relation to the publication of defamatory material by a person who has died since publishing the material. This reflects the legislature's intent to prevent defamation actions where a party is deceased.

This clause clarifies that if a court considers it in the interests of justice to do so, it is not prevented from awarding costs in defamation proceedings that end because the plaintiff or defendant dies.

Clause 11 New section 122A

This clause inserts new section 122A in division 9.2.2 to introduce a serious harm threshold to require plaintiffs to establish that a publication caused, or is likely to cause, serious harm to their reputation.

New section 122A (1) is modelled on section 1 of the United Kingdom's *Defamation Act 2013*. New section 122A (1) provides that it is an element of a cause of action for defamation for the plaintiff to prove that the publication of the defamatory matter has caused, or is likely to cause, serious harm to the reputation of the plaintiff (the serious harm element).

New section 122A (2) is also modelled on the United Kingdom's *Defamation Act 2013*. New section 122A (2) provides that in order to satisfy the serious harm element, excluded corporations operating for financial gain must prove that serious financial loss has been caused or is likely to be caused due to the publication of the defamatory matter.

New section 122A (3) provides that in defamation proceedings, the judicial officer is to determine whether the serious harm element is established.

New sections 122A (4) – 122A (7) establish the procedures that the judicial officer may follow when determining whether the serious harm threshold has been established. The procedures are as follows:

- the judicial officer may, on the judicial officer's own motion or on the application of a party, determine whether the serious harm element is established at any time before the trial for the proceedings commences, or during the trial;
- the judicial officer may, on the judicial officer's own motion or on the application of a party, make any orders the judicial officer considers appropriate concerning the determination of the issue (including dismissing the proceedings if it is determined that the serious harm element is not established);
- 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. The judicial officer may postpone the determination to a later stage of the proceedings (including during

the trial) if the judicial officer is satisfied that special circumstances exist. In determining whether there are special circumstances, the judicial officer may consider matters such as the cost implications for the parties, the resources available to the court at the time and the extent to which establishing the serious harm element is linked to other issues to be determined during the trial for the proceedings; and

- 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.

The intent of these sections is to encourage parties to resolve the proceedings early by enabling the issue to be dealt with as a threshold issue.

New section 122A (8) clarifies that except for those limitations that are provided for in section 122A, the section does not limit the powers that a judicial officer would otherwise have.

Clause 12 Division 9.3.1 heading

This clause substitutes the division 9.3.1 heading ‘Offers to make amends’ with ‘Concerns notices and offers to make amends’.

Clause 13 New sections 124A and 124B

This clause inserts new sections 124A and 124B into part 9.3 of the Act (Resolution of civil disputes without litigation). Currently, under part 9.3 of the Act, it is not mandatory for the aggrieved person to give a concerns notice to the publisher. As such, the aggrieved person may commence defamation proceedings instead of giving a concerns notice.

However, the processes in new sections 124A and 124 B encourage the resolution of disputes using concerns notices, avoiding litigation altogether.

New section 124B (1) provides that an aggrieved person cannot commence defamation proceedings unless the person has provided the proposed defendant with a concerns notice relating to the defamatory matter, the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice and the applicable period for an offer to make amends has elapsed.

New section 124B (3) provides that the court may grant leave for proceedings to commence if the applicable period for an offer to make amends has not elapsed. In order for the court to grant leave, the plaintiff must demonstrate that the court would cease to have power to extend the limitation period if the proceedings were commenced after the applicable period. Alternatively, the plaintiff must satisfy the court that it is just and reasonable to grant leave. A substituted definition of ‘applicable period’ is provided for in section 126 (2).

New section 124A clarifies the concerns notice procedure and the procedure for offers to make amends, including requiring that concerns notices must be served with sufficient time for a response to be provided before proceedings can be commenced.

New section 124A (1) defines a ‘concerns notice’ as a written notice which:

- states the location where the defamatory matter be accessed (for example, a webpage address);
- informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried out by the defamatory material (the imputations of concern);
- informs the publisher of the harm that the person considers to be serious harm to the person’s reputation which has been caused or is likely to be caused by the publication of the defamatory material; and
- if applicable, informs the publisher of the financial loss that an excluded corporation considers to be serious financial loss caused or likely to be caused by the publication of the defamatory material.

If practicable, a copy of the defamatory material should be provided to the publisher together with the concerns notice.

New section 124A (2) clarifies that a court document that is required to be filed or lodged to commence defamation proceedings cannot be provided to a publisher as a concerns notice.

New section 124A (3) provides that in circumstances where a concerns notice does not adequately particularise the information required in new section 124A (1), that the publisher may issue a further notice to the aggrieved person (a further particulars notice) requesting further information about the matters set out in the concerns notice. Pursuant to new section 124A (4), an aggrieved person must provide the further particulars stated in the further particulars notice within 14 days after being given the notice (unless a further period is agreed to by the publisher and the aggrieved person). New section 124A (5) states that an aggrieved person who fails to provide further particulars within the required timeframe is taken not to have provided the publisher with a concerns notice.

Clause 14 Section 126

This clause substitutes the existing section 126 into part 9.3 of the Act (Resolution of civil disputes without litigation). The clause clarifies when an offer to make amends may be made by the publisher to an aggrieved person. Section 126 (1) currently prevents a publisher from making an offer to make amends if made after 28 days of the concerns notice being provided, or after a defence is served in defamation proceedings for the defamatory matter.

Substituted section 126 (1) provides that an offer to make amends cannot be made if the applicable period for an offer to make amends has expired or the publisher has served a defence in an action brought by the aggrieved person.

In relation to division 9.3.1, section 126 (2) defines that the ‘applicable period’ for an offer to make amends is 28 days since the publisher was given a concerns notice by the aggrieved person. In circumstances where the aggrieved person has provided further particulars in response to a further particulars notice about a concerns notice, the applicable period is 14 days since the publisher was given the further particulars. However, this only applies to the first further particulars notice provided by the publisher.

Clause 15 Content of offer to make amends

New section 127 (1) (ba)

This clause inserts new section 127 (1) (ba) into part 9.3 of the Act (Resolution of civil disputes without litigation) which requires that an offer to make amends must be open for acceptance by the aggrieved person for at least 28 days commencing on the day the offer is made. Currently, the Act does not specify how long an offer to make amends should be kept open for acceptance.

Clause 16 Section 127 (1) (d)

This clause inserts the words, ‘, or a clarification of or additional information about,’ into section 127 (1) (d) to enable an offer to make amends to include 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 17 Section 127 (1) (g)

This clause omits section 127 (1) (g) as the provision is relocated to new section 127 (1A).

Clause 18 New section 127 (1A)

This clause inserts new section 127 (1A) into part 9.3 of the Act (Resolution of civil disputes without litigation) to clarify that while section 127 (1) sets out the mandatory requirements for an offer to make amends, offers by a publisher to an aggrieved person to redress the harm sustained by the aggrieved person are not mandatory. Existing section 127 (1) (g) is relocated into new sections 127 (1A) (a), (c) and (d). New section 127 (1A) (b) provides that offers of redress can include an offer to remove a publication made in electronic form.

Clause 19 Section 127 (2)

As section 127 (1) (g) is omitted, this clause omits the reference to subsection (1) (g) (ii) in section 127 (2) and substitutes the reference with ‘subsection (1A) (c)’.

Clause 20 Effect of failure to accept reasonable offer to make amends

Section 130 (1) (a)

Currently, under section 130 (1), a publisher may rely on a defence in defamation proceedings if the aggrieved person fails to accept a reasonable offer to make amends. Section 130 (1) sets out two preconditions that the publisher must satisfy and it must also be proven that in all the circumstances, the offer was reasonable.

This clause substitutes section 130 (1) (a) to provide that the first precondition of establishing the defence of failure to accept a reasonable offer to make amends requires the publisher to make the offer 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).

Clause 21 Section 130 (1) (b)

This clause omits the words, ‘at any time before the trial’, from section 130 (1) (b) in order to alter the second precondition of the defence of failure to accept a reasonable offer to make amends. This allows a publisher to rely on the defence if the publisher remains ready and willing to carry out the terms of the offer during the trial.

Clause 22 Section 133

This clause substitutes section 133 to require that a person must obtain the leave of the court to bring further defamation proceedings for damages against persons who were closely associated with a previously sued defendant at the time that the defamatory material was published.

Currently, section 133 allows a person to bring defamation proceedings for damages against persons who were closely associated with a previously sued defendant at the time of the publication. As an associate may be sued rather than a previous defendant, a person may commence multiple defamation proceedings in relation to the same or similar defamatory matter.

Substituted section 133 (3) defines an associate of a previous defendant as a person who, at the time of the publication of the defamatory matter, was an employee of the defendant, a person publishing defamatory matter as a contractor of the defendant or an associated entity of the defendant (or an employee or contractor of the associated entity).

Clause 23 Section 136

This clause substitutes section 136 to clarify that in relation to the defence of contextual truth, a defendant may plead back substantially true imputations originally pleaded by the plaintiff.

Clause 24 New section 139AA

This clause inserts new section 139AA into part 9.4 (Litigation of civil disputes). New section 139AA introduces a new public interest defence, modelled on section 4 of the United Kingdom's *Defamation Act 2013* to ensure that the law of defamation does not place unreasonable limits on freedom of expression (particularly on the publication and discussion of matters of public interest and importance). While a definition of 'public interest' is not provided for in new section 139AA, the ordinary meaning of the words will apply to limit the scope of the defence to matters relating to the welfare or well-being of the general public.

In order for the defendant to rely on the defence, the defendant must prove that the matter concerns an issue of public interest and that the defendant reasonably believed that the publication of the matter was in the public interest.

In determining whether the defence is established, sections 139AA (3) and 139AA (4) provide that the court must take into account all of the circumstances of the case, including the following non-exhaustive list of factors:

- the seriousness of any defamatory imputation;
- the extent to which the matter published distinguishes between suspicions, allegations and proven facts;
- the extent to which the matter published relates to the performance of the public functions or activities of the person;
- whether it was in the public interest for the matter to be published expeditiously;
- the sources of the information in the matter published, including the integrity of the sources;
- if the 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 (for example, to comply with a professional code or standard);
- any other steps taken to verify the information in the matter published; and
- the importance of freedom of expression in the discussion of issues of public interest.

Clause 25 Defence of qualified privilege for provision of certain information

Section 139 A (3)

This clause substitutes section 139A (3) into part 9.4 (Litigation of civil disputes) in relation to the defence of qualified privilege for the publication of defamatory matter.

Substituted section 139A (3) amends the list of non-exhaustive factors that the court may consider to determine the reasonableness of the defendant's conduct. The non-exhaustive list of factors are amended to reduce duplication of the non-exhaustive list of factors set out in new section 139AA. Similarly to new section 139AA, the court is not required to be satisfied of all the factors to determine that defence of qualified privilege is made out. In order to align with new section 139AA, the provision provides that in order to rely on the defence, it is not necessary to prove that the matter published concerned an issue of public interest.

Clause 26 New section 139AB

This clause inserts new section 139AB into part 9.4 (Litigation of civil disputes), which introduces a defence for peer-reviewed statements and assessments in scientific and academic journals (whether published in electronic or otherwise). The defence is modelled on section 6 of the UK *Defamation Act 2013* and recognises that it is in the public interest for academics and scientists to be able to express a scientific or academic issue freely, particularly in circumstances where their statements have been subject to peer view.

New section 139AB (5) provides that a defence under new section 139AB is defeated if the plaintiff proves that the defamatory matter was not published honestly for the information of the public or for the advancement of education.

Clause 27 Defences of honest opinion

Section 139B (5)

This clause substitutes section 139B (5) to clarify the material relied upon for the defence of honest opinion. With reference to section 139B (1) (c), an opinion is based on proper material if the material on which it is based is:

- set out in specific or general terms in the published matter; or
- notorious; or
- accessible from a reference, link or other access point included in the matter; or
- otherwise apparent from the context in which the matter is published; and
- the material is substantially true or was published on an occasion of absolute or qualified privilege or attracted the protection of a defence under sections 139B, 138 (Defence for publication of public documents) or 139 (Defences of fair report of proceedings of public concern).

Clause 28 Defence of triviality

Section 139D

This clause omits section 139D which provides for the defence of triviality. The introduction of a serious harm threshold (new section 122A) places the onus on the plaintiff to prove serious harm in order to bring a successful action for defamation. Accordingly, there is no need for the defendant to prove that the defamatory material is unlikely to cause the plaintiff harm.

Clause 29 Damages for non-economic loss limited

Section 139F (1)

This clause substitutes section 139F (1) to align with the amendments to section 139F (2).

Clause 30 Section 139F (2)

This clause substitutes section 139F (2) to clarify 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. The provision does not limit the court's power to award aggravated damages if the award is warranted in the circumstances. Substituted section 139F (2B) provides that an award of aggravated damages is to be made separately to any award of damages for non-economic loss.

Clause 31 New chapter 18

This clause inserts new Chapter 18 —Transitional – Civil Law (Wrongs) Amendment Act 2021 and clarifies that the amendments in the Act apply only in relation to the publication of a defamatory matter after the commencement of the amendments in the Act.

New section 253 provides for the automatic expiry of Chapter 18 three years after Chapter 18 commences.

Clause 32 Dictionary, definition of *aggrieved person*

This clause substitutes the definition of 'aggrieved person' for division 9.3.1 (Concerns notices and offers to make amends). This is a consequential amendment to align with the amendment to the division 9.3.1 heading.

Clause 33 Dictionary, new definitions

This clause inserts new definitions for 'applicable period', 'concerns notice' and 'further particulars notice' for division 9.3.1 (Concerns notices and offers to make amends).

This clause inserts new definitions for ‘excluded corporation’ and ‘associated entity’ for chapter 9 (Defamation). The new definition of ‘associated entity’ aligns with the definition in section 50AAA of the *Corporations Act 2001* (Cth).

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

This clause substitutes the definitions of ‘matter in question’ and ‘publisher’ for division 9.3.1 (Concerns notices and offers to make amends). This is a consequential amendment to align with the amendment to the division 9.3.1 heading.

Schedule 1 Limitation Act 1985—Consequential amendments

Amendment [1.1] – Section 21B (2)

This clause substitutes section 21B (2) to make a consequential amendment to remove the current requirement for the court to extend the limitation period by up to 3 years if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in the one year period. The provision 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. The purpose of the additional period is to allow the proposed defendant time to consider the concerns notice and the aggrieved person to consider an offer to make amends (if any). It is calculated by subtracting from 56 days any days remaining after the concerns notice is given until the one year limitation period expires. An example has been included in this section to clarify how the limitation period is calculated.

This clause also includes substituted definitions for ‘concerns notice’ and ‘date of publication’ to align with consequential amendments to the Act.

Amendment [1.2] – New sections 21BA to 21BC

This clause inserts new sections 21BA, 21BB and 21BC to introduce a single publication rule to provide that the applicable one-year limitation period runs from the date material is uploaded to the internet.

At general law, each publication of defamatory matter is a separate cause of action and publication is deemed to occur when it is received in a communicable form by at least one third party (a person other than the person said to be defamed). For internet publications, publication is deemed to occur when the third party downloads the webpage (rather than when it is posted by the publisher). This means that there is a separate cause of action for each download and the limitation period applicable to each download will vary even though the same matter is involved (enabling plaintiffs to circumvent the purpose behind the limitation period by relying on later downloads of the same matter).

New section 21BA is modelled on section 8 of the United Kingdom’s *Defamation Act 2013*. The rule applies if a person publishes a defamatory statement to the public

(the first publication) and the person (or an associate of the person) subsequently publishes a statement that is substantially the same. The intent of the rule is to ensure that the limitation period for defamation actions continues to be effective in relation to electronic publications. Accordingly, the date of the first publication will be treated as the start date for the limitation period for all of the publications (except in circumstances where the subsequent publication is materially different from the first publication).

New section 21BB allows the extension of the limitation period of up to 3 years from the date of the alleged publication if the plaintiff satisfies the court that it is just and reasonable to allow the action to proceed. In determining whether to extend the limitation period to up to 3 years, the court must have regard to all the circumstances of the case, including the length of, and the reasons for the plaintiff's delay.

New section 21BC provides for the commencement of the limitation period in relation to the electronic publications to be determined by reference to when the publisher uploads it for access or sends it electronically rather than by reference to when it is downloaded or received. This provision is limited to determining the commencement of the limitation period and does not change the law concerning when the elements for a cause of action for defamation are established or the choice of law for determining that cause of action.

Amendment [1.3] – New part 6

This clause inserts new part 6 – Transitional – Civil Law (Wrongs) Amendment Act 2021.

Section 102 provides for the provisions concerning the extension of the limitation period to apply only in relation to the publication of defamatory matter after the commencement of the provisions, subject to the exception for the single publication rule, as introduced by new section 21BA. This extends the subsequent publications occurring after the commencement of the provision inserting the rule even though the first publication occurred before the commencement.

Section 103 provides for the automatic expiry of Part 6, 3 years after the day it commences.

Amendment [1.4] – Dictionary, note 2

This clause includes 'Corporations Act' in the example of Note 2 to the Dictionary.