First print

New South Wales

Defamation Amendment Bill 2020

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Defamation Act 2005* and the *Limitation Act 1969* to implement nationally agreed changes to the law of defamation.

Background

In November 2004, the Attorneys General of the States and Territories agreed to support the enactment in their respective jurisdictions of uniform model provisions in relation to the law of defamation called the *Model Defamation Provisions* (the ***MDPs***). The MDPs were prepared by the Australasian Parliamentary Counsel's Committee. Each State and Territory subsequently enacted legislation to give effect to the MDPs.

In New South Wales, the MDPs were enacted in the *Defamation Act 2005* (the ***2005 Act***). The 2005 Act also located provisions concerning the limitation period for actions for defamation in the *Limitation Act 1969*.

Each State and Territory is a party to the *Model Defamation Provisions Intergovernmental Agreement*. The Agreement establishes the Model Defamation Law Working Party (the ***DWP***). The functions of the DWP include reporting to the Council of Attorneys-General on proposals to amend the MDPs.

In 2018, the Council of Attorneys-General reconvened the DWP to review the MDPs. The review, led by New South Wales, was conducted in 2019 and 2020.

The DWP recommended to the Council of Attorneys-General that certain amendments also prepared by the Australasian Parliamentary Counsel's Committee be made to the MDPs. The

Council agreed in July 2020 to support the enactment of the *Model Defamation Amendment Provisions 2020* by each State and Territory.

The aims of the *Model Defamation Amendment Provisions 2020* are as follows—

(a) to provide for serious harm to be an element of the cause of action for defamation,

(b) to require that, if raised by a party, a judicial officer is generally to determine whether the serious harm element is established as soon as practicable before the trial of defamation proceedings so as to deal with insignificant claims early in the proceedings,

(c) to provide for certain individuals to be counted as employees of a corporation for the purpose of determining whether the corporation can sue for defamation,

(d) to require a concerns notice to be given to the publisher of matter that is or may be defamatory before defamation proceedings may be commenced against the publisher in respect of the matter,

(e) to make various amendments with respect to the form, content and timing for concerns notices and offers to make amends,

(f) to clarify that a defendant may plead back imputations relied on by the plaintiff as well as those relied on by the defendant to establish the defence of contextual truth,

(g) to provide for a defence for the publication of defamatory matter concerning an issue of public interest,

(h) to provide for a defence in respect of peer reviewed matters published in academic or scientific journals,

(i) to clarify when material is sufficiently identified in a publication of defamatory matter for it to be treated as proper material on which to base the defence of honest opinion,

(j) to make it clear that the maximum amount of damages for non-economic loss specified by the MDPs operates to create a scale or range of damages rather than a cap,

(k) to require the leave of the court to commence defamation proceedings against certain associates of a defendant previously sued for defamation in respect of the publication of the same matter,

(l) to provide that an election to have defamation proceedings tried by jury can be revoked only with the consent of all the parties or with the leave of the court on the application of a party,

(m) to allow a court to determine costs in respect of defamation proceedings that end because of the death of a party if it is in the interests of justice to do so,

(n) to introduce a single publication rule concerning the limitation period for multiple publications of the same defamatory matter by the same publisher or an associate of the publisher so that—

  (i) the start date of the 1-year limitation period for each publication runs from the date of the first publication, and

  (ii) for an electronic publication, the start date runs from when it is uploaded for access or sent to the recipient rather than when it is downloaded or received,

(o) to provide for the limitation period for commencing defamation proceedings to be extended to enable pre-trial processes to be concluded and to provide courts with greater flexibility to extend the limitation period,

(p) to allow notices and other documents to be sent to an email address specified by the recipient for the giving or service of documents,

(q) to make certain other consequential or related amendments.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Defamation Act 2005 No 77

Persons to be counted as employees when determining if a corporation can sue

Section 9 of the 2005 Act provided that generally a corporation did not have a cause of action for defamation. However, a corporation that was not a public body could still sue for defamation if—

(a) the objects for which the corporation was formed did not include obtaining financial gain for its members or corporators, or

(b) the corporation employed fewer than 10 persons and was not related to another corporation (with related being defined by reference to section 50 of the *Corporations Act 2001* of the Commonwealth).

Section 9 did not define the term ***employee***, so the term would have its ordinary meaning. The ordinary meaning of the term does not include persons who provide services other than under a contract of service. For example, it does not include independent contractors and other non-employees even though they may have major roles in the operations of the corporation.

The inability to count these kinds of persons as employees could enable some corporations operating for financial gain to avoid the general prohibition on corporations suing for defamation because of the way their businesses are structured.

Schedule 1[4] inserts a definition of ***employee*** so that it 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.

Schedule 1[2], when read with the amendment made by **Schedule 1[3]**, will also exclude corporations that are associated entities of other corporations from having a cause of action for defamation (currently, the exclusion is limited to those related to other corporations). **Schedule 1[1]** defines ***associated entity*** to have the same meaning as in section 50AAA of the *Corporations Act 2001* of the Commonwealth. This change is consistent with other amendments made that refer to associated entities. **Schedule 1[1]** also inserts a definition of ***excluded corporation*** to facilitate the use of the term throughout the 2005 Act.

Costs may be awarded in defamation proceedings ending because of party's death

Section 10 of the 2005 Act prevented a person (including a personal representative of a deceased person) from asserting, continuing or enforcing a cause of action for defamation in relation to—

(a) the publication of defamatory matter about a deceased person, or

(b) the publication of defamatory matter by a deceased person.

On one interpretation, the section may prevent a court from awarding costs in defamation proceedings that end because the plaintiff or defendant dies.

Schedule 1[5] makes it clear that a court is not prevented, if it considers it in the interests of justice to do so, from determining the question of costs for defamation proceedings discontinued because of the death of a party.

Serious harm as element of the cause of action

Before the enactment of the 2005 Act, at general law a plaintiff had to prove material loss (or ***special damage***) if the publication of defamatory matter was slanderous, but not if it was libellous. Generally libel was the publication of defamatory matter in a written or other permanent form while slander was the publication of defamatory matter in a form that is temporary and merely audible.

Section 7 of the 2005 Act provided that there was to be no distinction between slander and libel. As a result, all publications of defamatory matter were actionable without proof of special damage. However, section 33 of the 2005 Act made it a defence to the publication of defamatory matter if the defendant proved that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm. The defence is called the defence of triviality.

Section 1 of the *Defamation Act 2013* of the United Kingdom (the ***UK Defamation Act***) requires a plaintiff to prove in an action for defamation that the defamatory publication has caused, or is likely to cause, serious harm to the reputation of the plaintiff. If the plaintiff is a corporation trading for profit, the corporation must also prove that serious financial loss has been caused or is likely to be caused.

Schedule 1[6] provides, consistently with the approach taken in the UK Defamation Act, for it to be an element of the cause of action for defamation for the plaintiff to prove the publication of the defamatory matter has caused, or is likely to cause, serious harm to the reputation of the plaintiff. Also, excluded corporations suing for defamation must prove serious financial loss.

In addition, a procedure is set out for determining whether the serious harm element is established. The principal features of the procedure are as follows—

(a) the judicial officer is to determine whether the element is established rather than the jury (if there is one),

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

(c) if a party applies for the element to be determined before the trial for the proceedings commences, the judicial officer is to determine the issue as soon as practicable before the trial commences unless satisfied that there are special circumstances justifying the postponement of the determination to a later stage of the proceedings (including during the trial).

The purpose of the procedure is to encourage the early resolution of defamation proceedings by enabling the issue to be dealt with as a threshold issue.

Schedule 1[23] and [24] make consequential amendments to section 22 of the 2005 Act concerning the respective roles of judicial officers and juries to recognise that the determination of the element is a matter for the judicial officer rather than the jury.

Schedule 1[32] removes the defence of triviality because the onus will now be 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 the harm was trivial.

Concerns notice required before commencing proceedings

Part 3 of the 2005 Act set out provisions to encourage the resolution of civil disputes about the publication of potentially defamatory matter without litigation.

In particular, the provisions of Division 1 of Part 3 apply if a person (the ***publisher***) publishes matter (the ***matter in question***) that is, or may be, defamatory of another person (the ***aggrieved person***). The principal features of these provisions are as follows—

(a) the aggrieved person may give the publisher a concerns notice setting out the imputations of which the aggrieved person complains and certain other matters,

(b) the publisher may seek further particulars after a concerns notice is given,

(c) the publisher may make an offer to make amends in the form provided by the provisions, but not if it is made after 28 days of the concerns notice being given or after a defence is served in defamation proceedings for the matter in question,

(d) the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher in relation to the matter in question if the publisher carries out the terms of an offer to make amends accepted by the aggrieved person,

(e) the publisher has a defence in defamation proceedings for the matter in question if the aggrieved person refuses to accept a reasonable offer to make amends made in compliance with certain requirements.

It is not mandatory under these provisions for the aggrieved person to give a concerns notice to the publisher. Consequently, the aggrieved person may commence defamation proceedings instead of giving a concerns notice.

However, if the aggrieved person does not give a concerns notice, it is open to the publisher to make an offer of amends until proceedings are commenced and a defence is filed. The rejection of a reasonable offer of amends might result in a defence for the publisher in these circumstances.

Schedule 1[9] provides that an aggrieved person cannot commence defamation proceedings unless—

(a) the person has given the proposed defendant a concerns notice in respect of 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.

The ***applicable period*** for an offer to make amends is defined in section 14, as amended by **Schedule 1[10] and [11]**, to cater for an extended period beyond 28 days of a concerns notice being given if further particulars for the concerns notice have been requested.

The court may grant leave for the commencement of proceedings despite non-compliance with the precondition referred to in paragraph (c) above, but only if the 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.

Schedule 1[7] alters the heading to Division 1 of Part 3 to give greater prominence in the 2005 Act to concerns notices.

Form and content of concerns notices

Section 14 of the 2005 Act provided for what should be included in a concerns notice. However, it did not expressly provide for the form the notice should take.

Section 14 also prevented a publisher from making an offer to make amends if made after 28 days of the concerns notice being given or after a defence is served in defamation proceedings for the matter in question. However, the publisher could request further particulars to be provided by the aggrieved person within 14 days.

The New South Wales Court of Appeal has held a statement of claim for defamation may constitute a concerns notice if it includes the matters required to be specified in a concerns notice. See *Mohareb v Booth* [2020] NSWCA 49 at [11], citing its previous judgment to this effect in *Zoef v Nationwide News Pty Ltd* [2016] NSWCA 283; (2016) 92 NSWLR 570 at [92].

However, the purpose behind concerns notices is to avoid litigation altogether. The provisions about concerns notices appear in Part 3 of the 2005 Act, which is headed "Resolution of civil disputes without litigation". In contrast, Part 4 is headed "Litigation of civil disputes".

In addition, it has been suggested that the matters currently required to be specified in a concerns notice may be insufficient to enable publishers to assess whether there is a case to answer, particularly in respect of electronic publications.

Schedule 1[8] relocates provisions about concerns notices into its own section. It states the requirements for the content of a concerns notice to include—

(a) requiring the notice to specify the location where the matter in question can be accessed (for example, a webpage address), and

(b) requiring the notice to inform the publisher of the harm that the aggrieved 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

(c) requiring an excluded corporation giving a notice to also provide information about what it considers to be serious financial loss caused, or likely to be caused, by the publication of the matter in question, and

(d) requiring an aggrieved person, if practicable, to provide the publisher with a copy of the matter in question together with the notice.

Schedule 1[8] also makes it clear that a document that is required to be filed or lodged to commence defamation proceedings cannot be used as a concerns notice.

Schedule 1[10] and [11] extend the 28-day period for making an offer to make amends if further particulars are requested in a further particulars notice and they are provided 15 days or more after the concerns notice is given. However, the extension applies only in respect of the first further particulars notice if there is more than one. **Schedule 1[11]** also removes provisions concerning concerns notices being relocated by **Schedule 1[8]**. **Schedule 1[1]** also inserts definitions of ***concerns notice*** and ***further particulars notice*** to facilitate the use of those terms throughout the 2005 Act.

The extended time will enable procedures involving concerns notices and offers to make amends to be completed before the commencement of defamation proceedings.

A definition for the expression ***applicable period*** for an offer to make amends is used to cater for the differing periods depending on whether there has been a request for further particulars. **Schedule 1[1]** applies the definition to the whole of the 2005 Act.

Form and duration of offers to make amends

Section 15 of the 2005 Act provided for the form and content of offers to make amends. Some of them were mandatory, others not.

Currently, there is no requirement concerning how long an offer to make amends needs to be kept open for acceptance.

The publisher is required to include an offer to publish, or join in publishing, a reasonable correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited. However, it is insufficient for this purpose to publish, or join in publishing, a clarification of or additional information about the matter where this would address the concern of the aggrieved person.

Also, there has been some uncertainty about whether or not certain offers to redress the harm sustained by the aggrieved person are mandatory.

Schedule 1[12] requires an offer to make amends to be open for at least 28 days commencing on the day the offer is made.

Schedule 1[13] enables 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.

Schedule 1[16] relocates provisions concerning offers to redress the harm sustained by the aggrieved person to make it clear that the inclusion of these matters is not mandatory. Also, it makes it clear that offers of redress can include an offer to remove a publication made in electronic form. **Schedule 1[14], [15] and [17]** make consequential amendments to facilitate the relocation of these provisions.

Defence of failure to accept reasonable offer to make amends

Section 18 of the 2005 Act provided a publisher with a defence in defamation proceedings if the aggrieved person fails to accept a reasonable offer to make amends. The defence has 2 preconditions in addition to reasonableness.

The first precondition is that the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory. As previously noted, section 14 of the 2005 Act

currently prevents a publisher from making an offer to make amends if made after 28 days of a concerns notice being given or after a defence is served in defamation proceedings for the matter in question.

The second precondition is that the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer at any time before the trial. This precondition has been read as precluding reliance on the defence even if the publisher remains ready and willing to carry out the terms of the offer during the trial.

The defence is currently required to be determined by a jury because of the operation of section 22 of the 2005 Act. Section 22 generally requires juries to determine defences. There are concerns about the potential for jury prejudice if juries have before them an offer to make amends when considering other defences in proceedings.

Schedule 1[18] alters the first precondition so that the offer must be made as soon as reasonably practicable after the publisher was given a concerns notice in respect of the matter (and, in any event, within the applicable period for an offer to make amends).

Schedule 1[19] alters the second precondition so that the defence can be relied on if the publisher remains ready and willing to carry out the terms of the offer during the trial.

Schedule 1[20] provides for the judicial officer (rather than the jury) to determine whether the defence is established.

Schedule 1[23] and [24] make consequential amendments to section 22 of the 2005 Act concerning the respective roles of judicial officers and juries to recognise that the determination of the defence is a matter for the judicial officer rather than the jury.

Election for jury can be revoked only if all parties consent

Section 21 of the 2005 Act enabled a party to defamation proceedings to elect to have a jury trial.

Section 21 also provided that an election may be made unless a court orders otherwise. In particular, the section provided that (without limiting its power to order otherwise) a court may order that defamation proceedings are not to be tried by jury if—

(a) the trial requires a prolonged examination of records, or

(b) the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

In *Wagner v Harbour Radio Pty Ltd* [2017] QSC 222 at [8], Applegarth J indicated that the broad discretion to order otherwise does not mean that the right of a party to elect to have a jury trial should be lightly displaced given the historic and enduring role of juries in defamation proceedings. His Honour also held at [77] that ultimately he was required to consider whether the interests of justice are served by exercising the discretion to displace the election.

However, section 21 did not provide expressly for whether an election could be revoked by a party once it was made.

There are conflicting cases concerning whether an election can be revoked by the party who made it after the election is made. In *Chel v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWCA 379 the New South Wales Court of Appeal held an election cannot be revoked. However, in *Kencian v Watney* [2015] QCA 212 the Queensland Court of Appeal held it can be revoked.

Schedule 1[22] enables an election to be revoked only—

(a) with the consent of all the parties to the proceedings, or

(b) if all the parties do not consent, with the leave of the court on the application of a party.

The court will be permitted to grant leave only if satisfied it is in the interests of justice for the election to be revoked.

The purpose behind the provisions concerning leave is to enable a court to allow an election to be revoked if the parties cannot agree and the circumstances of the case are such that it is in the interests of justice to allow the revocation. The discretion to allow a revocation will be available only if an election has been made in circumstances where the court has not already ordered that there should not be a jury trial.

Like the discretion to order there be no jury trial, the discretion to allow a revocation of an election is not intended to allow the election to be displaced lightly. An example where it might be in the interests of justice to allow a revocation is if pre-trial publicity has created an unacceptable climate of hostility or prejudice against a party.

Schedule 1[21] relocates an existing provision concerning when the court can dispense with a jury as this will usually occur when an election is sought to be made rather than after it is made.

Leave to sue associates of previously sued defendant

Section 23 of the 2005 Act required a person to obtain the leave of the court to commence defamation proceedings if the person has already brought defamation proceedings for damages (whether in New South Wales or elsewhere) against the same defendant in relation to the same or any other publication of the same or like matter.

Currently, section 23 does not prevent a person bringing defamation proceedings for damages against persons who were closely associated with a previously sued defendant at the time of the publication, for example employees or contractors of the previous defendant. This can result in multiple proceedings in respect of the same matter simply because the plaintiff chooses to sue an associate rather than the previous defendant.

Schedule 1[25] recasts section 23 so that it also requires the leave of the court to bring defamation proceedings against associates of the previous defendant. These are persons who, at the time of the publication by the previous defendant, were—

(a) employees of the defendant, or

(b) persons publishing matter as contractors of the defendant, or

(c) associated entities of the defendant (or employees or contractors of these associated entities).

Pleading back plaintiff's imputations for defence of contextual truth

Section 26 of the 2005 Act provided for a defence of contextual truth. The defence deals with the case where the publication of defamatory matter carries defamatory imputations some of which are substantially true. The defence operates when the defamatory imputations of which the plaintiff complains do not further harm the reputation of the plaintiff because of the substantially true imputations.

The defence of contextual truth in the 2005 Act was intended to adopt the defence of contextual truth created by section 16 of the repealed *Defamation Act 1974* of New South Wales. Under the defence in New South Wales, a defendant could rely on imputations to establish the defence even if they had been pleaded by the plaintiff. Relying on the plaintiff's imputations for this purpose was known as "pleading back".

Differences between the wording of section 26 of the 2005 Act and section 16 of the repealed *Defamation Act 1974* of New South Wales have caused uncertainty about whether a defendant can plead back a plaintiff's imputations under provisions based on the MDPs. In *Besser v Kermode* [2011] NSWCA 174, the New South Wales Court of Appeal decided it was not permissible to plead back a plaintiff's imputations.

Schedule 1[26] reformulates the defence of contextual truth to make it clear that, in order to establish the defence, a defendant may plead back substantially true imputations originally pleaded by the plaintiff.

Defence of publication of matter concerning an issue of public interest

Section 30 of the 2005 Act created a defence of qualified privilege for the publication of defamatory matter to a person (the ***recipient***) if the defendant proved that—

(a) the recipient has an interest or apparent interest in having information on some subject, and

(b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and

(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

The section also set out factors that the court could take into account in deciding the reasonableness of the defendant's conduct, including the extent to which the matter was in the public interest. These factors were based on the decision of the House of Lords in *Reynolds v Times Newspapers Ltd* (2001) 2 AC 127 (the ***Reynolds case***) concerning a comparable defence of qualified privilege under the general law of the United Kingdom.

The general law in Australia at the time also recognised a similar, though narrower, defence of qualified privilege. In particular, there was case law that rejected the more liberal defence recognised in the Reynolds case. See, for example, *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1165]–[1170].The defence at general law required a reciprocity of duty and interest, or community of interest, between publisher and recipients. It did not provide a defence for publication to the world at large.

The purpose of the defence under section 30 of the 2005 Act was to create a defence that extended to circumstances where there was not necessarily the reciprocity of duty and interest, or community of interest, between publisher and recipients required by the general law defence. However, section 30 has been largely unsuccessful in liberalising the approach taken by the courts to publications concerning issues that may be of public interest.

As the defence under section 30 is a defence of qualified privilege, it is defeated if the publication is made with malice. At general law, a publication of matter is actuated by malice if it is published for a purpose or with a motive that is foreign to the occasion that gives rise to the defence at issue. See *Roberts v Bass* (2002) 212 CLR 1 at 30–33.

In addition, there is some uncertainty in those jurisdictions where jury trials are allowed about whether the defence under section 30 is a matter for the jury or the judicial officer to determine because of section 22 of the 2005 Act. See, for example, *Fairfax Media Publications Pty Ltd v Gayle; The Age Company Pty Ltd v Gayle; The Federal Capital Press of Australia Pty Ltd v Gayle* [2019] NSWCA 172. On one view, section 22(5)(b) preserves the position at general law that defences of qualified privilege are matters for the judicial officer rather than the jury even though the section generally requires defences to be determined by the jury.

Section 4 of the UK Defamation Act provides for a defence in defamation proceedings for the defendant to show that—

(a) the statement complained of was, or formed part of, a statement on a matter of public interest, and

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

The statutory defence in the UK Defamation Act abolished the general law defence recognised in the Reynolds case. This was because the statutory defence was intended to codify the general law defence and pick up the case law applying to it. Consequently, the statutory defence does not set out relevant factors to be taken into account in determining whether the defence is established. Also, a ground for defeating the statutory defence (such as malice) is not specified.

Schedule 1[27] provides for a comparable defence to the defence in the UK Defamation Act. However, the defence differs from the defence in the UK Defamation Act in the following respects—

(a) the provision recasts the language used in the defence in the UK Defamation Act (which refers to statements on a matter of public interest) to take into account the language used in the 2005 Act (which refers to the publication of defamatory matter),

(b) the provision specifies some factors the court may take into account.

The purpose of these factors is to provide some non-exhaustive guidance to the court. Not all, or any, of these factors must be satisfied. They are not intended to operate as a checklist of relevant factors.

Whether the defence is established will be a matter for the jury.

One of the objects of the 2005 Act was to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance. The new defence is aimed at promoting that object.

Schedule 1[28] recasts the factors that may be taken into account in determining whether the defence under section 30 is established so as to minimise duplication with the factors for the new public interest defence. As with the new public interest defence, the purpose of these factors is to provide some non-exhaustive guidance to the court. Not all, or any, of these factors must be satisfied. They are not intended to operate as a checklist of relevant factors.

Schedule 1[29] makes it clear that whether the defence under section 30 is established will be a matter for the jury.

Defences concerning scientific or academic peer review

It is in the public interest for academics and scientists to be able to express their views freely, particularly if they have been subject to peer review.

Section 6 of the UK Defamation Act recognises this. It provides for a defence of qualified privilege for the publication of a defamatory statement in a scientific or academic journal if certain conditions are met (the ***principal defence***). One of the conditions is that an independent review of the statement's scientific or academic merit was carried out by both the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned.

Section 6 also provides for a defence in respect of assessments in the same journal about the statements and a defence for fair reports of the statements.

As the defences under the UK Defamation Act are defences of qualified privilege, they are defeated if the publication is made with malice.

Schedule 1[30] provides for comparable defences to the defences in the UK Defamation Act. The defences differ from the defences in the UK Defamation Act in the following respects—

(a) the independent review of the defamatory matter's scientific or academic merit for the principal defence may be carried out either by the editor of the journal if the editor has relevant expertise or by one or more other persons with relevant expertise (rather than both as is the case under the UK Defamation Act),

(b) the defences are not defences of qualified privilege,

(c) the defences can be 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,

(d) as a result, a publication made with malice does not necessarily defeat the defences.

Proper material for defence of honest opinion

Section 31 of the 2005 Act provided for a defendant to have a defence to the publication of defamatory matter if it is an expression of opinion that is in the public interest and based on proper material.

An opinion is based on proper material if it is based on material that—

(a) is substantially true, or

(b) was published on an occasion of absolute or qualified privilege (whether under the 2005 Act or at general law), or

(c) was published on an occasion that attracted the protection of a defence under section 31 or section 28 or 29 of the 2005 Act.

There has been some uncertainty about how any material relied on needs to be referred to in a publication for the opinion to be based on proper material, particularly if the material is in electronic form or is common knowledge.

Schedule 1[31] requires the material to be—

(a) set out in specific or general terms in the published matter, or

(b) notorious, or

(c) accessible from a reference, link or other access point included in the matter (for example, a hyperlink on a webpage), or

(d) otherwise apparent from the context in which the matter is published.

Maximum amount of damages for non-economic loss

Section 35 of the 2005 Act provided for a maximum amount of damages that may be awarded for non-economic loss in defamation proceedings.

Damages for non-economic loss are aimed at providing compensatory damages to cover the intangible matters of consolation for hurt feelings, damage to reputation and the vindication of the plaintiff's reputation.

A court may order a greater amount than the maximum amount if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate warrant an award of aggravated damages.

However, there have been inconsistent approaches concerning its effect.

One approach (which reflects the original purpose behind the provision) is that the section sets a scale or range of damages, with the maximum amount reserved for the worst kinds of damage even if the publication does not warrant an award of aggravated damages. See *Murray v Raynor* [2019] NSWCA 274 at [92] and [93].

The other view is that the maximum amount operates as a cap (rather than setting a scale or range) that can be set aside in circumstances where aggravated damages are warranted. See *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154.

The purpose behind specifying a maximum amount for non-economic loss was to ensure a level of parity with the award of other damages (for example, for personal injury) while still providing for appropriate compensation for this intangible loss. The purpose behind allowing aggravated damages was to enable additional compensation to be awarded if the conduct of the defendant exacerbated the plaintiff's loss.

Also, the current power of courts to award more than the maximum amount if aggravated damages are warranted has resulted in some cases in excessive damages for non-economic loss being awarded.

Schedule 1[33] and [34]—

(a) confirm that the maximum amount sets a scale or range rather than a cap, with the maximum amount to be awarded only in a most serious case, and

(b) require awards of aggravated damages to be made separately to awards of damages for non-economic loss so that the scale or range for damages for non-economic loss continues to apply for non-economic loss even if aggravated damages are awarded.

Giving notices or other documents by email

Section 44 of the 2005 Act allowed notices and other documents to be given for the purposes of the 2005 Act by sending them by facsimile transmission to the facsimile number of the person. However, provision was not made for sending them by any other electronic means.

Schedule 1[35] and [37] allow notices and other documents to be sent to an email address specified by the recipient for the giving or service of documents. **Schedule 1[36]** makes a consequential amendment to facilitate the insertion of the provisions.

Savings and transitional provisions

Schedule 1[39] provides that an amendment made to the 2005 Act applies only in relation to the publication of defamatory matter after the commencement of the amendment. **Schedule 1[38]** enables the Governor to make regulations of savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Limitation Act 1969 No 31

Extension of limitation period and single publication rule

Section 14B of the *Limitation Act 1969* provided that an action for defamation must be brought by a plaintiff within 1 year running from the date of the publication of the matter complained of.

However, section 56A required a court to extend this limitation period by a period of up to 3 years if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in the 1-year period.

At general law, each publication of defamatory matter is a separate cause of action. Publication occurs when it is received in a communicable form by at least one third party. See *Dow Jones v Gutnick* (2002) 210 CLR 575 at 600. A third party is a person other than the person said to be defamed or the publisher's spouse. Section 8 of the 2005 Act restated the position at the general law that a person has a single cause of action for defamation in relation to the publication of defamatory matter about the person even if more than one defamatory imputation is carried by the matter.

For publications on the Internet, publication occurs when a third party downloads the webpage concerned rather than when it is posted by the publisher. As result, it was held by the High Court in *Dow Jones v Gutnick* (2002) 210 CLR 575 that the law applicable to choosing the law to apply to an action for defamation is the law of the place it is downloaded rather than uploaded.

As webpages may be downloaded many thousands of times, this means 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. This may enable plaintiffs to circumvent the purpose behind the limitation period by relying on later downloads of the same matter, which may occur many years after the webpage was first uploaded.

Section 8 of UK Defamation Act has introduced a single publication rule for the purposes of the UK limitation period concerning actions for defamation. This rule applies if a person—

(a) publishes a statement to the public (the ***first publication***), and

(b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

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

The principal purpose behind the single publication rule is to ensure that the limitation period for actions for defamation continues to be effectual in connection with electronic publications.

Section 32A of the *Limitation Act 1980* of the United Kingdom (the ***UK Limitation Act***) enables a court to allow an action for defamation to proceed if it appears to the court that it would be equitable to allow it to do so having regard to the degree to which—

(a) the operation of the limitation period prejudices the plaintiff or any person whom the plaintiff represents, and

(b) any decision of the court to allow it to proceed would prejudice the defendant or any person whom the defendant represents.

Section 32A also requires the court to look at all the circumstances of the case and, particularly, at certain specified matters.

Schedule 2[1] provides for the 1-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 additional period is aimed at allowing the proposed defendant time to consider the concerns notice and the aggrieved person to consider any offer to make amends. It is calculated by subtracting from 56 days any days remaining after the concerns notice is given until the 1-year limitation period expires.

Schedule 2[2] introduces a single publication rule based on the UK Defamation Act for determining when the limitation period commences for multiple publications. It differs from the

UK Defamation Act because it extends to subsequent publications of substantially the same matter by certain associates of the first publisher (such as employees and contractors) as well as to subsequent publications by the same publisher.

Schedule 2[3] provides for a comparable provision to that in the UK Limitation Act for extending the limitation period for actions for defamation. The provision differs from the UK Limitation Act in the following respects—

(a) the provision limits an extension to a maximum of 3 years from the date of publication,

(b) the plaintiff must satisfy the court that it is just and reasonable to allow the action to proceed rather than equitable,

(c) although the provision requires the court to have regard to all of the circumstances of the case and particularly to matters based on the UK Limitation Act, it does not require what is just and reasonable to be determined by reference to prejudice to the plaintiff or defendant or those whom they represent.

The provision replaces the current requirement for the court to extend the limitation period if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in the 1-year period.

Schedule 2[4] provides for the commencement of the limitation period in relation to 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. However, this change is limited to determining the commencement of the limitation period. Consequently, it 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.

Savings and transitional provisions

Schedule 2[5] 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 an exception.

The exception is for the single publication rule introduced by **Schedule 2[2]** to extend to subsequent publications occurring after the commencement of the provision inserting the rule even though the first publication occurred before the commencement.