

New South Wales

Defamation Amendment Act 2002 No 136

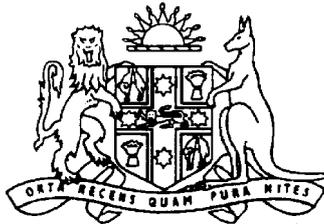
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Defamation Amendment Act 2002 No 136

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Act No 136, 2002

An Act to amend the *Defamation Act 1974* with respect to corporations, the settlement of claims for defamation, defences for defamation and costs in defamation proceedings; to amend the *District Court Act 1973* with respect to juries in actions for defamation; to amend the *Limitation Act 1969* to provide for a one year limitation period for defamation actions and the extension of that limitation period; and for other purposes. [Assented to 18 December 2002]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Defamation Amendment Act 2002*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Defamation Act 1974 No 18

The *Defamation Act 1974* is amended as set out in Schedule 1.

4 Amendment of other Acts

The Acts specified in Schedule 2 are amended as set out in that Schedule.

Schedule 1 Amendment of Defamation Act 1974

(Section 3)

[1] Section 3

Insert after section 2:

3 Objects of Act

The objects of this Act are as follows:

- (a) to provide effective and appropriate remedies for persons whose reputations are harmed by the publication of defamatory matter,
- (b) to ensure that the law of defamation does not place unreasonable limits on the publication and discussion of matters of public interest and importance,
- (c) to promote speedy and non-litigious methods of resolving disputes concerning the publication of defamatory matter,
- (d) to promote the resolution of proceedings for defamation before the courts in a timely manner and avoid protracted litigation.

[2] Section 7 Definitions

Omit section 7 (1). Insert instead:

- (1) In this Act:

offer to make amends means an offer to make amends made under section 9D.

Territory of the Commonwealth includes a territory governed by the Commonwealth under a trusteeship agreement.

[3] Section 7 (5)

Insert after section 7 (4):

- (5) Notes included in this Act do not form part of this Act.

[4] Section 7A Functions of judge and jury

Omit “applies” from section 7A (5).

Insert instead “and section 76B of the *District Court Act 1973* apply”.

[5] Section 8A

Insert after section 8:

8A Corporations do not have cause of action for defamation

- (1) A corporation has no cause of action for defamation in respect of the publication of any matter by means of which a defamatory imputation about the corporation is made.
- (2) Nothing in subsection (1) precludes an individual who is a member of a corporation from asserting or enforcing a cause of action in defamation in respect of the publication of any matter by means of which a defamatory imputation about the individual is made where that same publication also makes a defamatory imputation about the corporation.
- (3) Despite subsection (1), a corporation may assert or enforce a cause of action in defamation in respect of the publication of any matter by means of which a defamatory imputation about the corporation is made if:
 - (a) the corporation employs fewer than 10 persons at the time of publication of the matter, and
 - (b) the corporation has no subsidiaries (within the meaning of the *Corporations Act 2001* of the Commonwealth) at that time.
- (4) In this section, *corporation* includes any corporation constituted by or under an Act or any other law (whether or not for a governmental or other public purpose).

[6] Part 2A

Insert after Part 2:

Part 2A Resolution of disputes without litigation

9A Object of Part

The object of this Part is to encourage the early settlement of disputes involving the publication of defamatory matter.

9B Application of Part

This Part applies if a person (the *publisher*) publishes matter (the *matter in question*) that carries, or may carry, an imputation that is defamatory of another person (the *aggrieved person*).

9C Definitions

In this Part:

aggrieved person, *matter in question* and *publisher*—see section 9B.

amends agreement—see section 9F (1) (a).

qualified offer—see section 9D (2) (b).

9D Offers to make amends

- (1) The publisher may make an offer to make amends to the aggrieved person.
- (2) The offer may be in relation to:
 - (a) the matter in question generally, or
 - (b) a particular defamatory imputation that the publisher accepts that the matter in question carries (a *qualified offer*).
- (3) An offer to make amends:
 - (a) must be in writing, and
 - (b) must be readily identifiable as an offer to make amends under this section, and
 - (c) must include an offer to publish, or join in publishing, a reasonable correction (if appropriate in the circumstances) of the matter in question, and
 - (d) must include an offer to publish, or join in publishing, a reasonable apology (if appropriate in the circumstances) in relation to the matter in question, and
 - (e) if material containing the matter has been given to someone else by the publisher or with the publisher's knowledge—must include an offer to take, or join in taking, reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person, and

- (f) must state whether it is a qualified offer and, if so, set out the defamatory imputation in relation to which it is made, and
 - (g) must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer,
 - (h) may include particulars of any correction or apology made, or action taken, before the date of the offer, and
 - (i) may include an offer to pay compensation for any economic or non-economic loss of the aggrieved person.
- (4) For the purposes of subsection (3) (i), an offer to pay compensation may be in any of the following forms:
- (a) an offer to pay a stated amount,
 - (b) an offer to pay an amount to be agreed between the publisher and the aggrieved person or, if an agreement is not made, the amount decided by a court,
 - (c) an offer to pay the amount decided by a court,
 - (d) an offer to:
 - (i) enter into an arbitration agreement within the meaning of the *Commercial Arbitration Act 1984*, and
 - (ii) pay the amount decided by the arbitrator or, if an arbitration agreement is not made, the amount decided by a court.
- (5) The publisher may not make an offer to make amends after the earlier of:
- (a) the end of 28 days after the day the aggrieved person gives the publisher notice in writing informing the publisher that the matter in question is or may be defamatory of the person, or
 - (b) the service by the publisher of a defence in an action brought against the publisher by the aggrieved person in relation to the matter in question.
- (6) If 2 or more persons published the matter in question, an offer to make amends by one or more of them does not affect the liability of the other or others.

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- (7) An offer to make amends may be withdrawn before it is accepted.
 - (8) A publisher who has withdrawn an offer to make amends may make a renewed offer.
 - (9) A renewed offer may (but need not) be in the same terms as the withdrawn offer.
 - (10) A renewed offer is to be treated as a new offer (including for the purposes of subsection (5)).
 - (11) However, nothing in subsection (5) or (10) prevents the making of a renewed offer that is not in the same terms as the withdrawn offer if:
 - (a) the renewed offer represents a genuine attempt by the publisher to address matters of concern raised by the aggrieved person about the withdrawn offer, and
 - (b) the renewed offer is made within 14 days after the withdrawal of the withdrawn offer or such other period as may be agreed by the publisher and the aggrieved person.
 - (12) An offer to make amends is taken to have been made without prejudice, unless the offer otherwise provides.

9E What is a reasonable offer to make amends?

- (1) In deciding whether an offer to make amends is reasonable, a court must have regard to any correction or apology published before any trial arising out of the matter in question, including the extent to which the correction or apology is brought to the attention of the audience of the matter in question having regard to:
 - (a) the prominence given to the correction or apology as published in comparison to the prominence given to the matter in question as published, and
 - (b) the period that elapses between publication of the matter in question and publication of the correction or apology.
- (2) However, subsection (1) does not limit the matters that the court may take into account in deciding whether an offer to make amends is reasonable.

9F Acceptance of offer to make amends

- (1) If an offer to make amends is accepted, a court may:
 - (a) order the publisher to pay the aggrieved person the expenses incurred by the aggrieved person in accepting and performing the agreement made by acceptance of the offer (the *amends agreement*), and
 - (b) on the application of a party to the amends agreement, decide the amount of compensation mentioned in section 9D (4) (b), (c) or (d).
- (2) If a question arises about what must be done to perform the amends agreement, the court may decide the question on the application of either party.
- (3) A court may (but need not) order any costs incurred by the aggrieved person that form part of the expenses referred to in subsection (1) (a) to be assessed on an indemnity basis.
- (4) The powers conferred on a court by subsection (1), (2) or (3) are exerciseable:
 - (a) if the aggrieved person has brought proceedings against the publisher in any court for defamation in respect of the matter in question, by that court in those proceedings, and
 - (b) except as provided in paragraph (a), by the Supreme Court.
- (5) If the publisher performs the amends agreement (including paying any compensation under the agreement), the aggrieved person cannot begin or continue an action for defamation against the publisher in relation to the matter in question.

9G Effect of failure to accept reasonable offer to make amends

If an offer to make amends is made in relation to the matter in question but is not accepted, it is a defence to an action for defamation against the publisher in relation to the matter if:

- (a) the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory, and

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- (b) at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to perform the terms of the offer, and
 - (c) in all the circumstances the offer was reasonable.

[7] Section 17A Matters relating to Ombudsman etc

Omit “section 125 (4) of the *Police Service Act 1990*” from section 17A (3).

Insert instead “section 127 (7) of the *Police Act 1990*”.

[8] Section 17A (4)

Omit “section 170A or 197 (5) of the *Police Service Act 1990*”.

Insert instead “section 169 of the *Police Act 1990*”.

[9] Section 17A (6)

Omit “*Police Service Act 1990*”. Insert instead “*Police Act 1990*”.

[10] Section 17A (6)

Omit “section 170A or 197 (5)”. Insert instead “section 169”.

[11] Section 22 Information

Insert after section 22 (2):

- (2A) In determining for the purposes of subsection (1) whether the conduct of the publisher in publishing matter concerning a person is reasonable in the circumstances, a court may take into account the following matters and such other matters as the court considers relevant:
 - (a) the extent to which the matter published is of public concern,
 - (b) the extent to which the matter published concerns the performance of the public functions or activities of the person,
 - (c) the seriousness of any defamatory imputation carried by the matter published,
 - (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,

- (e) whether it was necessary in the circumstances for the matter published to be published expeditiously,
- (f) the sources of the information in the matter published and the integrity of those sources,
- (g) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the publisher to obtain and publish a response from the person,
- (h) any other steps taken to verify the information in the matter published.

[12] Part 3, Division 8

Omit the Division.

[13] Part 4, heading

Omit the heading. Insert instead:

Part 4 Damages and costs

[14] Section 48A

Insert after section 48:

48A Costs in proceedings for defamation

- (1) In awarding costs in respect of proceedings for defamation, the court may have regard to the following matters:
 - (a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings),
 - (b) whether the costs in the proceedings may exceed the quantum of damages to be awarded in the proceedings,
 - (c) such other matters as the court considers relevant.
- (2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise):
 - (a) if proceedings for defamation are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity basis

if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff, or

- (b) if proceedings for defamation are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

- (3) In this section:

settlement offer means any genuine offer to settle the proceedings made before the proceedings are determined and includes an offer to make amends (whether made before or after the proceedings are commenced).

[15] Section 56A

Insert after section 56:

56A Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

[16] Schedule 3 Savings and transitional provisions

Insert at the end of clause 1 (1):

Defamation Amendment Act 2002

[17] Schedule 3, Part 4

Insert after Part 3:

**Part 4 Provisions consequent on enactment of
Defamation Amendment Act 2002**

5 Definition

In this Part:

amending Act means the *Defamation Amendment Act 2002*.

6 Application of amendments made by amending Act

- (1) An amendment made to this Act by the amending Act does not apply to:
 - (a) a defamatory imputation published before the commencement of the amendment, or
 - (b) proceedings concerning any such imputation (whether commenced before or after the commencement of the amendment).
- (2) Regulations made as referred to in clause 1 (1) may have effect despite the provisions of subclause (1), if the regulations so provide.

Schedule 2 Amendment of other Acts

(Section 4)

2.1 District Court Act 1973 No 9

[1] Section 76A Action to be tried without jury unless jury required in interests of justice

Insert after section 76A (3):

- (4) This section does not apply to an action referred to in section 76B.

[2] Section 76B

Insert after section 76A:

76B Defamation actions to be tried by jury unless Court orders otherwise

- (1) An action in which there are issues of fact on a claim in respect of defamation is to be tried with a jury.
- (2) Despite subsection (1), the Court may order that all or any issue of fact be tried without a jury if:
 - (a) any prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury, or
 - (b) all parties consent to the order.

2.2 Limitation Act 1969 No 31

[1] Section 14B

Insert after section 14A:

14B Defamation

- (1) Except as provided by subsection (2), this section applies to a cause of action based on the publication of defamatory matter that accrues after the commencement of this section.
- (2) If:
 - (a) a cause of action based on the publication of defamatory matter that accrues after the commencement of this section is one of two or more

causes of action in proceedings commenced by the plaintiff, and

- (b) each cause of action in the proceedings accrues because of the publication of the same, or substantially the same, matter on separate occasions (whether by the same defendant or another defendant), and
- (c) one or more of the other causes of action in the proceedings accrued before the commencement of this section,

then this Act as in force immediately before the commencement of this section continues to apply to each cause of action regardless of when it accrues.

- (3) An action on a cause of action to which this section applies is not maintainable if brought after the expiration of one year running from the date on which the defamatory matter was published.

[2] Part 3, Division 2A

Insert after Division 2:

Division 2A Defamation

56A Extension of limitation period by court

- (1) Except as provided by subsection (2), this section applies to a cause of action based on the publication of defamatory matter that accrues after the commencement of this section.
- (2) If:
 - (a) a cause of action based on the publication of defamatory matter that accrues after the commencement of this section is one of two or more causes of action in proceedings commenced by the plaintiff, and
 - (b) each cause of action in the proceedings accrues because of the publication of the same, or substantially the same, matter on separate occasions (whether by the same defendant or another defendant), and

- (c) one or more of the other causes of action in the proceedings accrued before the commencement of this section,

then this Act as in force immediately before the commencement of this section continues to apply to each cause of action regardless of when it accrues.

- (3) A person claiming to have a cause of action to which this section applies may apply to the court for an order extending the limitation period for the cause of action.
- (4) After hearing such of the persons likely to be affected by the application as it sees fit, the court may, if it decides that it is just and reasonable to do so, order that the limitation period for the cause of action be extended for such period as it determines. However, the court cannot extend the period beyond 3 years running from the date on which the defamatory matter concerned was published.

56B Effect of order

If a court orders the extension of a limitation period for a cause of action under section 56A, the limitation period is accordingly extended for the purposes of:

- (a) an action brought by the applicant in that court on the cause of action that the applicant claims to have, and
- (b) section 26 (1) (b) in relation to any associated contribution action brought by the person against whom the cause of action lies.

56C Costs

Without affecting any discretion that a court has in relation to costs, a court hearing an action brought as a result of an order under section 56A may reduce the costs otherwise payable to a successful plaintiff, on account of the expense to which the defendant has been put because the action was commenced outside the original limitation period.

56D Prior expiry of limitation period

An order for the extension of a limitation period, and an application for such an order, may be made under this Division even though the limitation period has already expired.

[Second reading speech made in—
Legislative Assembly on 13 November 2002 am
Legislative Council on 5 December 2002]

BY AUTHORITY