



AUSTRALASIAN PARLIAMENTARY COUNSEL'S COMMITTEE

COUNCIL OF ATTORNEYS-GENERAL

Model Defamation Amendment Provisions 2020

REPORT OF THE AUSTRALASIAN PARLIAMENTARY COUNSEL'S COMMITTEE

On 3 October 2019, officers of the Defamation Working Party provided instructions for drafting by the Australasian Parliamentary Counsel's Committee to prepare public consultation legislation for the Council on this matter.

A copy of the draft public consultation legislation is attached.

A handwritten signature in black ink, appearing to read "A. O'Callaghan".

Annette O'Callaghan
NSW Parliamentary Counsel
Secretary, Australasian Parliamentary Counsel's Committee

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Model Defamation Amendment Provisions 2020

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1 Name of provisions

These provisions are the *Model Defamation Amendment Provisions 2020*.

2 Purpose of provisions

- (1) The purpose of these provisions is to set out model amendments to the Model Defamation Provisions—
 - (a) to require a plaintiff to prove serious harm for a cause of action for defamation, and
 - (b) to provide for certain individuals to be counted as employees of a corporation in determining whether the corporation is an excluded corporation, and
 - (c) to require a concerns notice to be given to the publisher of defamatory matter before defamation proceedings may be commenced against the publisher, and
 - (d) to make various amendments with respect to the content and timing for concerns notices and offers to make amends, and
 - (e) 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, and
 - (f) to provide for a defence in respect of peer reviewed matters published in academic or scientific journals, and
 - (g) to provide for a defence for the responsible communication of matters of public interest, and
 - (h) 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, and
 - (i) to clarify that a court may award damages for non-economic loss up to a maximum amount, but without limiting the court's power to award aggravated damages separately, and
 - (j) 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, and
 - (k) to confirm that an election to have defamation proceedings tried by jury is irrevocable, and
 - (l) 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, and
 - (m) to introduce a single publication rule requiring the limitation period for defamatory proceedings in respect of further publications of the same defamatory matter by the same publisher or an associate to be calculated by reference to the first publication date, and
 - (n) 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.
- (2) In these provisions, the *Model Defamation Provisions* are the Model Defamation Provisions prepared by the Parliamentary Counsel's Committee and approved by the Standing Committee of Attorneys-General on 21 March 2005.

3 Model amendments to Model Defamation Provisions

Schedule 1 sets out the model amendments to the Model Defamation Provisions.

Schedule 1 Model amendments to Model Defamation Provisions

[1] **Section 4 Definitions**

Insert in alphabetical order—

concerns notice means a concerns notice for the purposes of section 14.

[2] **Section 7A**

Insert before section 8—

7A Serious harm required for cause of action for defamation

- (1) An individual has no cause of action for defamation in relation to the publication of defamatory matter about the individual unless the individual proves that the publication has caused, or is likely to cause, serious harm to the reputation of the individual.
- (2) An excluded corporation referred to in section 9 has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless the corporation proves that the publication has caused, or is likely to cause—
 - (a) serious harm to the reputation of the corporation, and
 - (b) serious financial loss.

[3] **Section 9 Certain corporations do not have cause of action for defamation**

Omit “employs fewer than 10 persons” from section 9(2)(b).

Insert instead “has fewer than 10 employees”.

[4] **Section 9(6)**

Insert in alphabetical order—

employee, in relation to a corporation, includes any individual (whether or not an independent contractor) who is—

- (a) engaged in the day to day operations of the corporation other than as a volunteer, and
- (b) subject to the control and direction of the corporation.

[5] **Section 10 No cause of action for defamation of, or against, deceased persons**

Insert at the end of the section (after renumbering the current provision as subsection (1))—

- (2) Subsection (1) does not prevent a court, if it considers it in the interests of justice to do so, from determining the question of costs for proceedings discontinued because of the subsection.

[6] **Part 3, Division 1, heading**

Omit “Offers”. Insert instead “Concerns notices and offers”.

[7] **Section 12A**

Insert after section 12—

12A Defamation proceedings cannot be commenced without concerns notice

- (1) An aggrieved person cannot commence defamation proceedings unless—

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- (a) the person has given each 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) a period of at least 14 days has elapsed since the concerns notice was given in relation to each proposed defendant.
- (2) Subsection (1)(b) does not prevent reliance on—
- (a) some, but not all, of the imputations particularised in a concerns notice, or
 - (b) imputations that are substantially the same as those particularised in a concerns notice.
- (3) The court may grant leave for proceedings to be commenced despite non-compliance with subsection (1)(c), but only if the proposed plaintiff satisfies the court—
- (a) the commencement of proceedings after the end of the 14-day period contravenes the limitation law, or
 - (b) there are other exceptional circumstances justifying the granting of leave.
- (4) The commencement of proceedings contravenes the limitation law for the purposes of subsection (3)(a) if—
- (a) the court would be required to extend the limitation period to enable the proceedings to be commenced after the end of the 14-day period, or
 - (b) the proceedings could not be commenced after the end of the 14-day period because the court will have ceased to have power to extend the limitation period.
- (5) In this section—
- limitation law** mean [*insert reference to provisions of statute of limitations*]*.
- Jurisdictional note.** Each jurisdiction is to insert a reference to the provisions of its limitation statute corresponding to Schedule 4.1 to these Provisions.

[8] Section 14 When offer to make amends may be made

Insert after section 14(2)(a)—

- (a1) specifies the location where the matter in question can be accessed (for example, a website address), and

[9] Section 14(3)

Omit the subsection. Insert instead—

- (3) If an aggrieved person gives the publisher a concerns notice, but fails to particularise adequately the imputations of concern or the location of the matter in question, the publisher may give the aggrieved person a written notice (a **further particulars notice**) requesting the aggrieved person to provide reasonable further particulars as specified in the further particulars notice about the imputations of concern or location.

[10] Section 15 Content of offer to make amends

Insert after section 15(1)(b)—

- (b1) must provide for the offer to be open for acceptance for a period of at least 28 days commencing on the day the offer is made, and

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[11] Section 15(1)(d)

Insert “, or a clarification of or additional information about,” after “reasonable correction of”.

[12] Section 15(1)(f)

Omit “offer, and”. Insert instead “offer.”

[13] Section 15(1)(g)

Omit the paragraph.

[14] Section 15(1A)

Insert after section 15(1)—

(1A) In addition to the matters referred to in subsection (1), an offer to make amends may include any other kind of offer, or particulars of any other action taken by the publisher, to redress the harm sustained by the aggrieved person because of the matter in question, including (but not limited to)—

- (a) an offer to publish, or join in publishing, an apology in relation to the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited, or
- (b) an offer to pay compensation for any economic or non-economic loss of the aggrieved person, or
- (c) the particulars of any correction or apology made, or action taken, before the date of the offer.

[15] Section 15(2)

Omit “subsection (1)(g)(ii)”. Insert instead “subsection (1A)(b)”.

[16] Section 18 Effect of failure to accept reasonable offer to make amends

Omit section 18(1)(a). Insert instead—

- (a) the publisher made the offer as soon as reasonably practicable after being given a concerns notice in respect of the matter (and, in any event, within 28 days after the notice is given), and

[17] Section 18(1)(b)

Omit “at any time before the trial”.

[18] Section 18(3)

Insert after section 18(2)—

- (3) Despite section 22(2), the judicial officer (and not the jury) in defamation proceedings tried by jury is to determine whether a defence under this section is established.

Jurisdictional note. Each jurisdiction that provides for jury trials for defamation proceedings is to enact the above subsection.

[19] Section 21 Election for defamation proceedings to be tried by jury

Insert after section 21(2)—

- (2A) An election is irrevocable.

[20] Section 23

Omit the section. Insert instead—

23 Leave required for further proceedings in relation to publication of same defamatory matter

- (1) This section applies to a person who has previously brought defamation proceedings for damages, whether in this jurisdiction or elsewhere, against a person (a *previous defendant*) in relation to the publication of a matter.
- (2) The person may not bring further defamation proceedings for damages against a previous defendant or an associate of a previous defendant in relation to the same or any other publication of the same or like matter, except with the leave of the court in which the further proceedings are to be brought.
- (3) A person is an *associate of a previous defendant* if, at the time of the publication to which the previous defamation proceedings related, the person was—
 - (a) an employee of the defendant, or
 - (b) a person publishing matter as a contractor of the defendant, or
 - (c) an associated entity (within the meaning of the *Corporations Act 2001* of the Commonwealth) of the defendant.

[21] Section 26

Omit the section. Insert instead—

26 Defence of contextual truth

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter carried one or more imputations that are substantially true (*contextual imputations*), and
 - (b) any defamatory imputations of which the plaintiff complains that are not contextual imputations and are also carried by the matter do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.
- (2) The contextual imputations on which the defendant may rely to establish the defence include imputations of which the plaintiff complains.

[22] Section 29A

Insert after section 29—

29A Defence of responsible communication in the public interest

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter is of public interest, and
 - (b) the publication of the matter is responsible.
- (2) In determining for the purposes of subsection (1) whether the publication of the matter about a person is responsible, a court must take into account the following factors to the extent the court considers them relevant in the circumstances—
 - (a) the seriousness of any defamatory imputation carried by the matter published,

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- (b) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,
 - (c) the extent to which the matter published relates to the performance of the public functions or activities of the person,
 - (d) whether it was in the public interest in the circumstances for the matter to be published expeditiously,
 - (e) the extent of compliance with any applicable professional codes or standards,
 - (f) the sources of the information in the matter published, including the integrity of the sources,
 - (g) if a source of the information in the matter published is a person whose identity is being kept confidential, whether there is good reason for the person's identity to be kept confidential (including, for example, to comply with an applicable professional code or standard),
 - (h) 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,
 - (i) any other steps taken to verify the information in the matter published.
- (3) Subsection (2) does not limit the matters the court may take into account.
- (4) Without affecting the application of section 22 to other defences, the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established.

Jurisdictional note. Each jurisdiction that provides for jury trials for defamation proceedings is to enact the above subsection.

[23] Section 30 Defence of qualified privilege for provision of certain information

Omit section 30(3). Insert instead—

- (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account any of the following factors—
- (a) the seriousness of any defamatory imputation carried by the matter published,
 - (b) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,
 - (c) whether it was in the public interest in the circumstances for the matter to be published expeditiously,
 - (d) the nature of the business environment in which the defendant operates,
 - (e) the sources of the information in the matter published, including the integrity of the sources,
 - (f) 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,
 - (g) any other steps taken to verify the information in the matter published.
- (3A) Subsection (3) does not—
- (a) require each matter referred to in the subsection to be taken into account, or
 - (b) limit the matters that the court may take into account.

- (3B) It is not necessary to prove that the matter published was of public interest to establish the defence of qualified privilege under subsection (1).

[24] Section 30(6)

Insert after section 30(5)—

- (6) Without affecting the application of section 22 to other defences, the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established.

Jurisdictional note. Each jurisdiction that provides for jury trials for defamation proceedings is to enact the above subsection.

[25] Section 30A

Insert after section 30—

30A Defence of scientific or academic peer review

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
- (a) the matter was published in a scientific or academic journal (whether published in electronic form or otherwise), and
 - (b) the matter relates to a scientific or academic issue, and
 - (c) an independent review of the matter's scientific or academic merit was carried out before the matter was published in the journal by—
 - (i) the editor of the journal, and
 - (ii) one or more persons with expertise in the scientific or academic issue concerned.
- (2) If there is a defence to the publication of defamatory matter in a scientific or academic journal because of subsection (1), there is also a defence to the publication of any assessment of the matter in the same journal if the defendant proves that—
- (a) the assessment was written by one or more of the persons who carried out the independent review of the matter, and
 - (b) the assessment was written in the course of that review.
- (3) It is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in a fair summary of, or fair extract from, a matter or assessment for which there is a defence because of subsection (1) or (2).
- (4) If a journal has more than one editor, a reference in this section to the editor of the journal is to be read as a reference to the editor or editors who were responsible for deciding to publish the matter concerned.
- (5) A defence established under this section is defeated if, and only if, the plaintiff proves that the defamatory matter or assessment was not published honestly for the information of the public or the advancement of education.

[26] Section 31 Defences of honest opinion

Omit section 31(5). Insert instead—

- (5) For the purposes of this section, an opinion is *based on proper material* if—
- (a) the material on which it is based is—
 - (i) set out in specific or general terms in the published matter, or

- (ii) notorious, or
 - (iii) accessible from a reference, link or other access point included in the matter (for example, a hyperlink on a webpage), or
 - (iv) otherwise apparent from the context in which the matter is published, and
- (b) the material—
- (i) is substantially true, or
 - (ii) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law), or
 - (iii) was published on an occasion that attracted the protection of a defence under this section or section 28 or 29.

[27] Section 33 Defence of triviality

Omit the section.

[28] Section 35 Damages for non-economic loss limited

Omit “Unless the court orders otherwise under subsection (2), the” in section 35(1).

Insert instead “The”.

[29] Section 35(2)–(2B)

Omit section 35(2). Insert instead—

- (2) The maximum damages amount is to be awarded only in a most serious case.
- (2A) Subsection (1) does not limit the court’s power to award aggravated damages if an award of aggravated damages is warranted in the circumstances.
- (2B) An award of aggravated damages is to be made separately to any award of damages for non-economic loss to which subsection (1) applies.

[30] Section 50

Insert after section 49—

50 Application of 2020 amendments

An amendment made to this Act by the *Model Defamation Amendment Provisions 2020* applies only in relation to the publication of defamatory matter after the commencement of the amendment.

Jurisdictional note. This provision is to be inserted in the appropriate location by each jurisdiction with reference to the name of the amending Act enacted to give effect to the *Model Defamation Amendment Provisions 2020*.

[31] Schedule 4 Amendment of other Acts

Omit section 1(2) in Schedule 4.1. Insert instead—

- (2) The 1-year limitation period referred to in subsection (1) is taken to have been extended as provided by subsection (3) if a concerns notice is given to the proposed defendant on a day (the *notice day*) within the period of 56 days before the limitation period expires.
- (3) The limitation period is extended for an additional period of 56 days minus any days remaining after the notice day until the 1-year limitation period expires.
Example. Assume a concerns notice is given 7 days before the limitation period expires. This means that there are 6 days left after the notice day before the period expires. Consequently, this subsection would operate to extend the limitation period by 56 minus 6 days, that is, 50 days.

- (4) In this section—
concerns notice has the same meaning as in the *Defamation Act 2005*.
Jurisdictional note. Each jurisdiction is to insert the name of its defamation legislation in the definition.

[32] Schedule 4.1

Insert after section 1—

1A Single publication rule

- (1) This section applies if—
- (a) a person (the *original publisher*) publishes matter to the public that is alleged to be defamatory (the *first publication*), and
 - (b) the original publisher or an associate of the original publisher subsequently publishes (whether or not to the public) matter that is substantially the same.
- (2) Any cause of action for defamation against the original publisher or an associate of the original publisher in respect of the subsequent publication is to be treated as having accrued on the day of the first publication for the purposes of determining when—
- (a) the limitation period applicable under section 1 begins, or
 - (b) the 3-year period referred to in section 1B(2) begins.
- (3) Subsection (2) does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.
- (4) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the considerations to which the court may have regard include (but are not limited to)—
- (a) the level of prominence that a matter is given, and
 - (b) the extent of the subsequent publication.
- (5) This section does not limit the power of a court under section 1B to extend the limitation period applicable under section 1.
- (6) In this section—

associate of an original publisher means—

- (a) an employee of the publisher, or
- (b) a person publishing matter as a contractor of the publisher, or
- (c) an associated entity (within the meaning of the *Corporations Act 2001* of the Commonwealth) of the publisher.

day of first publication, in relation to publication of matter on a website or in any other electronic form, means the day on which the matter was first posted or uploaded on the website or sent electronically.

public includes a section of the public.

1B Extension of limitation period

- (1) A person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period applicable under section 1 for the cause of action.

- (2) The court may extend the limitation period to a period of up to 3 years running from the date of the alleged publication of the matter if the plaintiff satisfies the court that it is just and reasonable to allow an action to proceed.
- (3) In determining whether to extend the limitation period, the court is to have regard to all of the circumstances of the case and in particular to—
 - (a) the length of, and the reasons for, the plaintiff's delay, and
 - (b) if a reason for the delay was that some or all of the facts relevant to the cause of action became known to the plaintiff after the limitation period expired—
 - (i) the day on which the facts became known to the plaintiff, and
 - (ii) the extent to which the plaintiff acted promptly and reasonably once the plaintiff knew whether or not the facts might be capable of giving rise to an action, and
 - (c) the extent, having regard to the delay, to which relevant evidence is likely to be unavailable or less cogent than if the action had been brought within the limitation period.

[33] Schedule 4.1

Insert after section 2—

3 Application of 2020 amendments

- (1) The amendment made to section 1 by the *Model Defamation Amendment Provisions 2020* applies in relation to the publication of defamatory matter after the commencement of the amendment.
Jurisdictional note. This provision is to be inserted in the appropriate location by each jurisdiction with reference to the name of the amending Act enacted to give effect to the *Model Defamation Amendment Provisions 2020*.
- (2) Section 1A (as inserted by the *Model Defamation Amendment Provisions 2020*) applies in relation to the publication of defamatory matter after the commencement of the section, subject to subsection (3).
- (3) Section 1A extends to a first publication before the commencement of the section, but only in respect of subsequent publications after the commencement.
- (4) Section 1B (as inserted by the *Model Defamation Amendment Provisions 2020*) applies in relation to the publication of defamatory matter after the commencement of the section.