



# Defamation law overhaul looks promising for insurers

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## AT A GLANCE

- Defamation is a risk that the insurance industry covers extensively, including through professional indemnity, public liability and management liability policies, as well as specific multimedia policies.
- Australia's Attorneys-General have agreed to a major overhaul of Australia's defamation laws, with proposed changes intended to rein in defamation claims and provide some proportionality between costs and damages.
- The Defamation Amendment Bill 2020 (NSW), now under consideration by the legislature, will assist insurers in assessing defamation risks and managing the costs of claims and premiums.

## STRIKING THE RIGHT BALANCE

The law of defamation is intended to protect personal reputation, but it does so at the expense of freedom of speech and public discussion. Finding the right balance has been the subject of much debate, particularly given the influence of social media and internet publishers. Many commentators think that the scales weigh too heavily in favour of plaintiffs.

Defamation claims are notoriously expensive to litigate, and legal costs often outweigh damage awards. These claims are also challenging to resolve

because they involve a personal element that is often highly emotive for plaintiffs, most of whom are not public figures.

The pressure to reform defamation laws for both traditional and online publishers has been mounting for a long time. After much anticipation, the Parliamentary Counsel's Committee has released the consolidated Model Provisions (as at 27 July 2020)<sup>1</sup> for viewing. The model amendment bill has made its way into the first round of the legislature.<sup>2</sup>

<sup>1</sup> [https://www.pcc.gov.au/uniform/2020/Consolidated\\_Model\\_Defamation\\_Provisions.pdf](https://www.pcc.gov.au/uniform/2020/Consolidated_Model_Defamation_Provisions.pdf) (Model Provisions).

<sup>2</sup> <https://legislation.nsw.gov.au/bills/bf1f7e81-1c51-4291-8ee8-18e6dfc19f0b> (Defamation Amendment Bill 2020 (NSW) (Defamation Amendment Bill)).

The Council of Attorneys-General suggested that “the amendments will reset defamation law to strike a better balance between protecting individual reputations and freedom of expression, particularly regarding matters of public interest.”<sup>3</sup>

## THE KEY CHANGES

The Defamation Amendment Bill includes five key elements that will help insurers manage the increasing costs of defamation claims. These are:

- **Single publication** – this rule provides that the applicable one year limitation period runs from the date that material is uploaded to the internet and is intended to bring added certainty to limitation of actions
- **‘Serious harm’** – this threshold requires claimants to demonstrate that the publication has, or is likely to have, caused serious reputational harm – this is to be determined by the judicial officer as soon as practicable before the trial
- **Concerns notice** – the clarification regarding this procedure for offers to make amends includes the requirement for concerns notices to be served with sufficient time for a response before proceedings can be commenced
- **Public interest defence** – this is aimed at strengthening the defences available to media organisations for reporting matters in the public interest (modelled on section 4 of the UK Defamation Act 2013), and
- **Damages** – the changes to damages are aimed at preventing a reoccurrence of recent ‘sky high’ defamation payouts to plaintiffs in excess of the non-economic loss cap. The changes include a clarification of the operation of the cap on non-economic damages.

## SINGLE PUBLICATION

In ordinary circumstances the *Limitations Act*<sup>4</sup> provides that an action in defamation must be brought by a plaintiff within one year of the date of publication. That date is easily identified when the defamatory text is a newspaper printed on a certain date but can be more difficult to determine with digital publications.

At general law, each publication of defamatory matter is a separate cause of action. Publication occurs when the content is received in a communicable form by at least one third party. For publications on the internet, publication occurs when a third party downloads the relevant webpage rather than when it is posted by the publisher. As a result, the High Court found that the applicable law for defamation is the law of the place the publication is downloaded, rather than where it is uploaded.<sup>5</sup>

This means under the existing law there is a separate cause of action for each webpage download, with the limitation period separately applying to each download despite the same webpage being involved. Concerningly, plaintiffs can potentially circumvent the limitation period by relying on later downloads of the same content, which may occur many years after the webpage was first uploaded.

To address these concerns, the Defamation Amendment Bill, largely based on the UK law<sup>6</sup>, provides:

- an automatic extension to the one year limitation period if a concerns notice is given to the proposed defendant within 56 days before the limitation period would ordinarily expire<sup>7</sup>



**Australia’s Attorneys-General have agreed to a major overhaul of Australia’s defamation laws with proposed changes to rein in defamation claims and provide some proportionality between costs and damages.**

<sup>3</sup><https://www.ag.gov.au/sites/default/files/2020-07/Council%20of%20Attorneys-General%20communiqu%C3%A9%20%E2%80%93%20July%202020.pdf>

<sup>4</sup> *Limitations Act 1969* (NSW), s 14B.

<sup>5</sup> *Dow Jones v Gutnick* (2002) 210 CLR 575.

<sup>6</sup> cf UK Defamation Act, s 8; UK Limitation Act s 32A.

<sup>7</sup> Defamation Amendment Bill, Schedule 2, 14B.

- a single publication rule for determining when the limitation period starts for multiple publications<sup>8</sup>
- a commencement date of the limitation period for electronic/digital publications that is the date the publisher uploads the publication, rather than the date it is downloaded,<sup>9</sup> and
- a 'hard' cut off for limitation periods of three years from the date of original publication.<sup>10</sup>

This reform is intended to ensure plaintiffs bring claims promptly. It is also designed to alleviate the uncertainty caused by digital publishing and archiving, which creates the potential for an open-ended limitation period given digital material can be stored and downloaded for an indefinite period.

### SERIOUS HARM

Before the enactment of the 2005 Act, a plaintiff had to prove material loss (or special damage) if the publication of defamatory matter was slanderous, but not if it was libelous. Generally, libel was the publication of defamatory matter in a written form, while slander was the publication of defamatory matter in an audible form.

The Defamation Amendment Bill introduces a requirement that the defamatory publication has caused, or is likely to cause, serious harm to the reputation of the plaintiff. Corporations suing for defamation must also prove serious financial loss.<sup>11</sup>

In addition, it includes a procedure for determining whether the serious harm element is established. The principal features of the procedure are that:

- the judicial officer determines whether this element is established, rather than the jury

- the issue can be determined either before or during the trial on the officer's own motion, or on a party's application, and
- the judicial officer is to determine the issue as soon as practicable if a party applies for the element to be determined before the trial commences, unless they are satisfied that there are special circumstances justifying the postponement of the determination to a later stage of the proceedings (including during the trial).

### CONCERNS NOTICES

The New South Wales Court of Appeal has held that a statement of claim for defamation may constitute a concerns notice if it includes the matters required to be specified in a concerns notice.<sup>12</sup>

The Defamation Amendment Bill makes a number of changes to concerns notices, including:

- making it clear that a document that is required to be filed or lodged to commence defamation proceedings cannot be used as a concerns notice<sup>13</sup>
- requiring the notice to specify the location where the matter in question can be accessed<sup>14</sup>
- 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<sup>15</sup>
- extending 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<sup>16</sup>

<sup>8</sup> Defamation Amendment Bill, Schedule 2, 14C.

<sup>9</sup> Defamation Amendment Bill, Schedule 2, 14C & 73A(1).

<sup>10</sup> Defamation Amendment Bill, Schedule 2, 56A.

<sup>11</sup> Defamation Amendment Bill, Schedule 1[6], 10A.

<sup>12</sup> 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].

<sup>13</sup> Defamation Amendment Bill, Schedule 1[8], 12A.

<sup>14</sup> Defamation Amendment Bill, Schedule 1[8], 12A.

<sup>15</sup> Defamation Amendment Bill, Schedule 1[8], 12A.

<sup>16</sup> Defamation Amendment Bill, Schedule 1[10] & [11], 14.

- requiring an offer to make amends to be open for at least 28 days,<sup>17</sup> and
- enabling an offer to make amends to include an offer to publish or co-publish a clarification as an alternative to a reasonable correction.<sup>18</sup>

These amendments will, hopefully, support pre-litigation steps to resolve disputes early.

## PUBLIC INTEREST DEFENCE

While an existing defence of qualified privilege exists, it has not yet been successfully relied on in defamation proceedings. The Defamation Amendment Bill aims to introduce a similar defence to that used in the UK Defamation Act. It has also included a number of factors that the court may consider<sup>19</sup> – though it is specifically noted that these factors are non-exhaustive and should not operate as a checklist.

The explanatory notes state that the object of law of defamation was to not place unreasonable limits on freedom of expression and the publication and discussion of matters of public interest and importance. Given the Court's previous approach, however, it remains to be seen whether the new defence will have the anticipated effect of protecting free speech, or whether it will have limited benefit in practice.

## CLARIFICATION ON DAMAGES

Under the previous regime, judicial interpretation led to a circumstance where a 'cap' on non-economic loss existed until any award of aggravated damages was made. At that point, the cap ceased to have practical effect and so large judgments have been awarded, including in *Wilson*<sup>20</sup> and *Rush*.<sup>21</sup> Amendments in the Defamation Amendment Bill now:

- 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,<sup>22</sup> and
- 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 even if aggravated damages are awarded.<sup>23</sup>

While it is unclear how the award of damages will be affected by the changes, commentators generally agree the general trend will be downwards.

## WHERE TO FROM HERE?

The Council of Attorneys-General has stated its intention to introduce the reforms quickly and agreed to progress a second stage reform process that will focus on the responsibilities and liability of digital platforms for defamatory content, amongst other pressing 'modern' issues.

At its next meeting, the Council will seek to agree to release a Stage 2 discussion paper for public consultation. It is expected to address issues such as whether social media companies and other 'secondary publishers' ought to be held liable in defamation as publishers of comments authored by third party users on their platforms. The Courts have considered this topic in a number of cases, including recently in *Voller*.<sup>24</sup>

Technology companies, publishers, insurers and advocates of free speech will continue to closely watch these developments given the wide-ranging implications of judgments and the proposed amendments.

<sup>17</sup> Defamation Amendment Bill, Schedule 1[12], 15.

<sup>18</sup> Defamation Amendment Bill, Schedule 1[13], 15(1)(d).

<sup>19</sup> Defamation Amendment Bill, Schedule 1[27], 29A.

<sup>20</sup> *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 (*Wilson*).

<sup>21</sup> *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 (*Rush*).

<sup>22</sup> Defamation Amendment Bill, Schedule 1[33], 35.

<sup>23</sup> Defamation Amendment Bill, Schedule 1[34], 35(2)–(2B).

<sup>24</sup> *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102 (*Voller*).

## WHAT DOES THIS MEAN FOR INSURERS?

Defamation is a challenging area for insurers given the common inclusion of defamation cover in a range of insurance products and the significant costs associated with claims.

Insurers are likely to welcome the proposed reforms as they should rein in defamation claims, provide some proportionality between costs and damages, and give respondents more time and flexibility in responding.

The clarification on damages and the introduction of a 'serious harm' test may also result in a reduction in trivial claims.

Hard lessons have been learned by the industry since the model defamation laws were introduced in 2005. While many industry observers are optimistic about the proposed changes, it will take time to see how effective these amendments are in addressing the current imbalance in the regime.

## NEED TO KNOW MORE?

For more information please contact us.



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