



This is Part 2 of our article series titled “Defamation”. See Part 1 for an overview of defamation. Part 2 discusses the amendments to Defamation law since 2006.



A. THE DEFAMATION ACT 2005 (NSW)

The Defamation Act 2005 (NSW) (“the Act”), which came into operation on 1 January 2006 brought in changes to defamation law. The Act has for the most part, brought uniformity to the defamation laws of the states and territories in Australia.

The amendments or new statutory inclusions as brought about by the Defamation Act 2005 (NSW) include the following:

1. The removal of the distinction between slander and libel.
2. Limitations on who can sue for defamation – corporations can only sue for defamation if it is a non-profit organisation or if the corporation employs less than 10 people.
3. There is now a one year limitation period in which Plaintiff’s must bring their defamation action (this can be extended in some circumstances to three years but the Court would need to grant this extension).
4. Where defamation has occurred nationwide (or across more than one state), to determine under which jurisdiction the action is to take place, the Court will look at where the harm “has its closest connection”. Factors taken into account to determine “closest connection” include:
 - a. where the Plaintiff ordinarily resides at the time of publication;
 - b. extent of publication in the relevant Australian jurisdictional areas; and
 - c. extent of harm suffered in each jurisdictional area.
5. An offer to make amends and apologies. This has been brought about by a focus to resolve defamation claims without the need for litigation. The general steps under the Act are as follows:
 - a. A “Concerns Notice” is forwarded by the aggrieved person to the publisher of the defamatory material. A “Concerns Notice” is to contain in writing the specific imputations alleged to have been made.
 - b. The publisher of the defamatory material may issue a request for further particulars of the imputations if they are of the view that the “Concerns Notice” does not adequately identify the imputations.
 - c. The aggrieved person must reply to the request for further particulars within 14 days. If the aggrieved person fails to do so, the “Concerns Notice” would be considered to not have been served.
 - d. After the service of the “Concerns Notice”, the publisher of the defamatory material can respond by making an “Offer to Make Amends”.
 - e. An “Offer to Make Amends” should be made in writing, comply with the requirements of the Act, include an offer to publish a reasonable correction regarding the defamed material and include an offer to pay expenses reasonably incurred by the aggrieved person in considering the offer. The “Offer to Make Amends” may also include an offer to publish an apology or an offer to pay compensation for any economic or non economic loss.
 - f. An “Offer to Make Amends” cannot be made if 28 days has elapsed after a “Concerns Notice” has been served by the aggrieved person, or when a defence has been served in an action brought by the aggrieved person.



6. The main defences to an action of defamation generally reflect the same defences as that prior to the Act being implemented, although there are some differences. The main defences under the Act now include:

- a. Imputations are substantially true [note the new defence of contextual truth, where the defendant can prove that in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (“contextual imputations”) are substantially true and the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations].
- b. Absolute privilege defence - this remains substantially similar to that prior to the implementation of the Act.
- c. Fair Report - this could be a defence if the reportage of specific proceedings of public concern is given qualified protection as long as the report is fair.
- d. Qualified privilege - this defence refers to matters of public interest, where the truth cannot be proven. The elements required to win this defence include: (i) that the recipient has an interest or apparent interest in having information on some subject; (ii) the matter is published to the recipient in the course of giving to the recipient information on that subject; and (iii) the conduct of the defendant in the publication is reasonable in all the circumstances.
- e. Honest opinion (previously known as fair comment defence) - this defence requires: (i) that the matter was an expression of opinion of the defendant rather than a statement of fact; (ii) the opinion related to a matter of public interest; and (iii) the opinion is based on proper material.
- f. Innocent dissemination: In order to apply the defence of innocent dissemination, the defendant would need to prove: (i) the matter was published merely in the capacity, or as an employee or

agent, of a subordinate distributor; (ii) that the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and (ii) the defendant’s lack of knowledge was not due to any negligence on the part of the defendant.

- g. Triviality - This defence could apply to publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.

7. In relation to damages, there is now a cap for non-economic damages that can be awarded which has been set at \$250,000.00.

The amendments made to defamation law have helped to unify the varying laws of the Australian states and territories.

Some of the important changes seek to resolve defamation disputes before they go to court through the mechanism of a Concerns Notice and an Offer to Make Amends.

Whilst some defences remain the same as that prior to the introduction of the Act, there have been some differences which the recent amendments have ushered in.

Comasters is able to advise clients in defamation actions.

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