



This is Part 4 of our article series titled “Defamation”. In this Part 4, the new *Defamation Amendment Act 2020* (NSW) will be discussed along with the main changes made to existing legislation. This new Act is in force from 1 July 2021 and aims to reduce litigation over minor matters and provide fair remedies for harm caused.



## **A. SUMMARY OF AMENDMENTS**

The *Defamation Amendment Act 2020* (NSW) (‘the Act’) has made amendments to the *Defamation Act 2005* (NSW) and the *Limitation Act 1969* (NSW).

Some of the new statutory inclusions brought about by this Act include the following:

1. The serious harm element has been added so that a cause of action for defamation is that the publication of such defamatory material caused or is likely to cause serious harm to the reputation of the person.<sup>1</sup>
2. Defamation proceedings can only be commenced 28 days after a concerns notice has been issued to the defendant, outlining the allegations and evidence relied on.<sup>2</sup>
3. A new defence, the ‘public interest’ defence has been added to further protect journalists and media outlets where there was a reasonable belief that it is in the public interest to publish matter which is accused of being defamatory.<sup>3</sup>

These major amendments are discussed in further detail as follows.

## **B. SERIOUS HARM ELEMENT**

An additional cause of action required to be proven by a plaintiff is that the allegedly defamatory material has caused, or is likely to cause, serious harm to the reputation of the plaintiff. This reduces cases brought to court over minor matters.

The Act does not provide a set definition for serious harm. This element is assessed by the court in the early stages of the proceedings based on the circumstances and evidence. For example, it would be considered serious harm to the reputation of a corporation if that corporation suffers serious financial loss as a result of the defamatory material.<sup>4</sup> The matter would not proceed if it is deemed to be trivial and this element cannot be satisfied. Previously, the defence of triviality was used by defendants – this defence has now been removed as the serious harm element would prevent trivial claims from proceeding.

## **C. CONCERNS NOTICE**

A concerns notice is now required to be served to a defendant at least 28 days before commencing proceedings. This way, the parties are encouraged to attempt to resolve the matter outside of court before commencing proceedings. The concerns notice must:<sup>5</sup>

<sup>1</sup> *Defamation Amendment Act 2020* (NSW) s 10A.

<sup>2</sup> *Ibid* ss 12A, 12B.

<sup>3</sup> *Ibid* s 29A.

<sup>4</sup> *Ibid* s 10A(2).

<sup>5</sup> *Ibid* s 12A.



1. Be in writing;
2. Specify the location of the allegedly defamatory material (eg link to website);
3. Advise of the defamatory accusations that the plaintiff believes are being made;
4. Advise of the harm to the reputation of the plaintiff that has been caused or is likely to be caused (including financial loss for corporations); and
5. A copy of the allegedly defamatory material, if practicable.

A defendant can provide a 'further particulars notice' to the plaintiff if the concerns notice does not include all of the information above. The plaintiff must provide their response within 14 days, or the concerns notice would be considered to have not been provided.<sup>6</sup>

An offer to make amends can also be made by the defendant during this 28 day period. If the plaintiff accepts, they cannot commence any action against the defendant over the same matter.

#### **D. RESPONSIBLE COMMUNICATION IN THE PUBLIC INTEREST**

If material was published with the reasonable belief that is for the public interest, the defendant may use this as a defence to a claim of defamation.

The court must take into account all of the circumstances of the case when assessing this defence. Some factors to be considered include:<sup>7</sup>

1. The seriousness of the defamatory allegation;
2. The extent to which the allegedly defamatory material relates to the performance of the public functions or activities of the person;
3. The sources used in the published material and the integrity of the sources;

4. Whether the material contained the substance of the person's side of the story, or whether a reasonable attempt was made to obtain a response from them;
5. Steps taken to verify the information in the material; and
6. The importance of freedom of expression in the discussion if issues of public interest.

For more information on related matters, you may wish to read the following articles:

1. [\*Defamation \(Part 1\)\*](#): Discusses the elements and procedures involved in this civil action.
2. [\*Defamation \(Part 2\) - The Effects of the Defamation Act 2005 \(NSW\)\*](#): This is Part 2 of our article series titled "Defamation". Defamation (Part 1) discussed the general concepts of Defamation, including how a plaintiff can claim for damages, and the defences available to a defendant. Part 2 discusses the amendments to Defamation law since 2006.
3. [\*Defamation \(Part 3\) - Defamation on Social Media\*](#): This is Part 3 of our article series entitled "Defamation". Defamation (Part 1 and Part 2) discussed the general concepts of Defamation, including how a plaintiff can claim for damages, the defences available to a defendant and Defamation law since 2006.

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid s 29A.

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