



Balancing Freedom of Expression and Political Communication - The New Model Defamation Provisions

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Australia's defamation laws have long been criticised as being of little benefit. In Queensland, the *Defamation Act 2005* (Qld) has been in effect since 2006 without any substantive amendments until now.

In that time, technology, telecommunications and the way we consume information has changed exponentially together with the means by which defamatory material can be published via Facebook, Instagram and other social media platforms. The way material is published is no longer restricted to news and media articles and careful thought must be given to the content of comments and posts on social media.

In an ever-changing world with global consequences for publications, it was only a matter of time before the Uniform Defamation Laws were updated. Recent Amendments to the *Defamation Act 2005* (Qld) (**the Act**), which came into effect on 1 July 2021, sought to strike a balance between freedom of expression and individuals' rights with the inclusion of:

1. a new public interest defence;
2. a scientific or academic peer review defence;

3. serious harm element; and
4. steps to encourage the early resolution of disputes prior to commencing proceedings and before attending trial.

These changes have also implemented strict time limits which can have consequences for plaintiffs and publishers alike.

History of Uniform Defamation Laws

Over 15 years ago, the Attorney-General of each State and Territory agreed to support the enactment of the Uniform Defamation



Laws (the Model Defamation Provisions) which underpinned and formed the template for the defamation laws in their respective jurisdictions.¹ In Queensland, this led to the enactment of the Act which came into effect on 1 January 2006.

The changes to the Model Defamation Provisions are well overdue having not been amended since their creation in 2005 when Facebook was only a year old and when Twitter and Instagram were not yet created. In this ever-changing world there are consequences for publications that can spread like wildfire, affecting reputations worldwide.

Recent changes to Defamation Laws

In an attempt to provide greater clarity for community publishers, the *Defamation (Model Provisions) and Other Legislation Amendment Bill 2021* (Qld) was introduced to the Queensland Parliament.

Changes to the Act include:

1. inserting a new public interest defence which arises where:
 - a. the matter concerns an issue of public interest; and
 - b. the defendant reasonably believed that the publication of the matter was in the public interest;²
2. inserting a new scientific or academic peer review defence for material published in scientific or academic journals and which relate to a scientific or an academic issue;³
3. inserting a requirement for a serious harm element to a cause of action for defamation. Under this new element:
 - a. the plaintiff is required to prove that publication of the defamatory material has caused, or is likely to cause, serious harm to the reputation of the plaintiff. 'Excluded Corporations' (where its objects do

not include obtaining financial gain or where there are less than 10 employees and organisations which are not a public body) on the other hand are required to prove that the defamatory material has "caused, or is likely to cause serious financial loss" to the corporation;⁴ and

- b. the judicial officer is to determine whether there is a serious harm element as soon as practicable before the commencement of trial unless satisfied that there are special circumstances for postponing that determination;
4. the issuing of a Concerns Notice prior to going to Court which must state, among other things, the specific location where the defamatory material can be accessed and informs the publisher of the serious harm element (or serious financial loss for Excluded Corporations);⁵
 5. that an offer to make amends, made by the publisher, must be open for acceptance for at least 28 days;⁶
 6. amendments to the requirements for the defence of failure of the aggrieved person to accept a reasonable offer, specifying a strict timeframe for a publisher to make a reasonable offer to make amends within 14 days of receipt of further particulars to the Concerns Notice or otherwise within 28 days of receipt of the Concerns Notice (rather than after becoming aware the matter is or may be defamatory);⁷ and
 7. clarification of the cap on damages for non-economic loss to apply regardless of whether aggravated damages are awarded and that an award for aggravated damages is to be made separately to awards for damages for non-economic loss. The amendments also restrict the cap for damages for non-economic loss to only be awarded in the most serious cases.⁸



What these changes mean

The drafting of the new public interest defence (modelled from, and comparable with, the *Defamation Act 2013* (UK)) and the new scientific and peer review defence are intended to reduce unreasonable restrictions on the freedom of expression.

The amendments also aim to bring about the early resolution of defamation disputes prior to issuing proceedings and streamline proceedings by determining the new serious harm element before the Court hears the matter at trial. The serious harm element should therefore be analysed by the aggrieved person, as prospective plaintiffs, prior to issuing a Concerns Notice and proceedings, and should additionally cause publishers to pause before publishing and to seek advice following receipt of a Concerns Notice.

Some amendments impact the rights and liberties of individuals such as the strict requirements surrounding:

1. the issuing and drafting of Concerns Notices;
2. the timeframe to respond to a further particulars notice; and
3. the timeframe by which offers to make amends are issued.

That is, if the Concerns Notice is not drafted in accordance with the Act and a further particulars notice is issued by the publisher, the prospective plaintiff is required to respond within 14 days otherwise the

Concerns Notice will be taken to not have been issued. This will impact the prospective plaintiff's ability to commence proceedings unless leave is granted by the Court waiving the requirement for a Concerns Notice to be issued prior to commencing proceedings. Also, if an offer to make amends is not made within the time required, the publisher will be unable to rely on the defence for failure to accept an offer. Therefore, it is critical that Concerns Notices are articulated clearly and that prospective plaintiffs consider obtaining legal advice prior to issuing any notice.

Prospective plaintiffs should also be mindful of the single publication rule, where deemed to be only one cause of action for defamation regardless of multiple defamatory imputations being made, applied in context with the one year limitation period from the date of publication. As time limits expire quickly, prospective plaintiffs should act promptly as soon as they become aware of the defamatory publication and seek advice to protect their rights.

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¹ Explanatory Memorandum, *Defamation Bill 2005* (Qld), pg. 1.

² *Defamation Act 2005* (Qld), s 29A.

³ *Defamation Act 2005* (Qld), s 30A.

⁴ *Defamation Act 2005* (Qld), s 10A.

⁵ *Defamation Act 2005* (Qld), s 12A(1).

⁶ *Defamation Act 2005* (Qld), s 15.

⁷ *Defamation Act 2005* (Qld), ss 14 and 18.

⁸ *Defamation Act 2005* (Qld), s 35.