



NEW TRAPS IN DEFAMATION REFORMS

Wide-ranging changes to defamation laws require close attention by practitioners to avoid the risk of claims.

Practitioners should be alert to changes to defamation law in the *Model Defamation Amendment Provisions* which apply to publications made on and from 1 July 2021. Victoria, New South Wales, South Australia, Queensland and the ACT have adopted the model provisions.

This column flags some key changes and areas of risk for defamation practitioners.

Single publication rule

The new single publication rule tightens the 12-month limitation period for defamation actions, particularly those concerning electronic/online publications.

The rule provides that:

- the date of the first publication will be treated as the “start date” for the 12-month limitation period
- critically, for electronic/online publications, the publication now occurs when it is “first uploaded for access or sent electronically to a recipient”. Before the amendments, and at general law, a fresh publication occurred each time online content was downloaded by a reader, recommencing the limitation period.

Missed time limits remain a continuous source of claims at LPLC across all areas of law and the introduction of the single publication rule requires those practising in defamation to be more vigilant than ever.

Out of time? If the court is satisfied that it is “just and reasonable” to do so, the limitation period may be extended to a period of up to three years.

Concerns Notice

It is now mandatory for plaintiffs to issue a Concerns Notice before commencing proceedings, unless a court grants the plaintiff leave otherwise. Coupled with that, only the defamatory imputations listed in the Concerns Notice can then be referred to in any litigation. This means practitioners need to carefully formulate their client’s claim from the outset and seek specialist advice preparing Concerns Notices as appropriate.

Almost out of time? The 12-month limitation period will be extended if a Concerns Notice is served within 56 days of that period otherwise expiring. For example, if the notice is served seven days before the limitation period expires, then the limitation period will be extended by 50 days (ie, 56 days minus six days).

Serious harm threshold

Individual plaintiffs must now establish that a publication has caused or is likely to cause “serious harm” to their reputation. For corporations entitled

to sue in defamation, they must demonstrate “serious financial loss”.

The threshold in some respects replaces the now abolished “triviality” defence and is intended to prevent the litigation of trivial or frivolous defamation claims, but arguably is more onerous a test. Key considerations in determining whether the applicable threshold is met will include the scale and extent of the publication(s) in issue and the gravity of the statements made.

The threshold can be considered as a preliminary hearing on application of the defendant.

Therefore, close consideration needs to be given to the threshold when advising clients on the merits of the claim at the outset of any defamation matter.

New and amended defences

Practitioners dealing with mass media organisations in particular, should also be aware of the new “public interest” defence.

The defence has two limbs, namely:

- the matter concerns an issue of public interest
- they reasonably believed that publishing the material was in the public interest.

The reforms also introduce a defence applying to matters published in peer-reviewed academic and scientific journals.

Amendments have also been made to the existing statutory defences of contextual truth, honest opinion and qualified privilege.

Corporations

The reforms have also further narrowed the capability for corporations to sue in defamation – contractors are now considered employees under these reforms.

Risk management

Practitioners should familiarise themselves with the key defamation law changes and update their firm’s systems, precedents and processes. Particular vigilance is required with managing shorter time limits, and allowing sufficient time to consider and advise on serious harm thresholds and prepare comprehensive Concern Notices which can be relied on in court. ■

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This column is provided by the **Legal Practitioners’ Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

TIPS

- The reforms apply to publications made on and from 1 July 2021 in five states and territories in Australia.
- A 12-month limitation period applies from the date of first publication, which for online publications is the date it is first uploaded.
- A Concerns Notice must set out *all* imputations to be relied on in court.
- The threshold for any defamation claim is “serious harm” to reputation for an individual and “serious financial loss” for a corporation.
- Defamation law is complex. Don’t dabble if this is not an area you act in regularly.