

MEETING THE THRESHOLD: STAGE 1 DEFAMATION REFORMS GO LIVE

Date: 28 July 2021

By: Christien Corns, Sam Rappensberg, Harlee Bolger

A NEW ERA FOR AUSTRALIAN DEFAMATION LAW

Following Stage 1 of the review of the Model Defamation Provisions, the *Model Defamation Amendment Provisions* recently commenced in Victoria, New South Wales, South Australia, Queensland and the Australian Capital Territory. They apply to publications made on and from 1 July 2021.

The amendments make significant changes to the laws of defamation in those jurisdictions, including by requiring individual plaintiffs to now meet a 'serious harm' threshold to successfully bring a claim in defamation, as well as introducing a new 'public interest' defence.

HOW SERIOUS IS 'SERIOUS HARM'?

The amendments raise the standard of harm that a plaintiff must demonstrate in an action for defamation by adopting the 'serious harm' threshold already in place in the UK. The reforms also bring a somewhat corresponding end to the statutory triviality defence, which has been abolished.

To pursue a claim in defamation a plaintiff must now establish that a defamatory publication causes, or is likely to cause, serious harm to their reputation. Similarly, corporate plaintiffs entitled to sue for defamation must now establish 'serious financial loss' to their business.

Plaintiffs and practitioners alike must be mindful of these new thresholds and the evidence required to establish 'serious' harm or financial loss. These thresholds are primarily aimed at reducing the burden placed upon courts by trivial or frivolous defamation claims where no 'serious' harm has been suffered.

The legislation does not provide guidance on exactly what will constitute 'serious' harm or financial loss. Instead, what is considered to be 'serious' for the purposes of these thresholds will be left to the courts to consider on a 'case by case' basis. Decisions from the UK provide some assistance - they broadly suggest that the actual impact of the defamatory statement is as relevant a consideration as the scale of the publication, the gravity of the statements made within, and whether the publication has come to the attention of individuals who know the claimant.

IS IT IN THE PUBLIC INTEREST?

It is now a defence to the publication of defamatory material if the defendant proves that the matter concerns an issue of public interest, and the publisher reasonably believed that publishing the statement was in the public interest. The new defence draws upon elements of the UK Defamation Act 2013 public interest defence, as well

as our existing statutory qualified privilege defence. The new legislation provides guidance on what factors the court may take into account when determining whether the 'public interest' defence is established, including:

- the seriousness of any defamatory imputation carried by the matter published;
- the extent to which the matter distinguishes between suspicions, allegations, and proven facts;
- the sources of information in the matter, including the integrity of those sources;
- whether the matter contained the substance of the subject person's 'side of the story', and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from that person; and
- the importance of freedom of expression in discussion of issues of public interest.

The 'reasonable belief' component will see courts assessing both the publisher's state of mind as well as the objective reasonableness of the publisher's belief.

While the introduction of this defence was eagerly awaited by defendants (especially those in the media), the Australian formulation of it may well see publishers inherit the challenges they already experience in establishing a qualified privilege defence. Publishers should be mindful of this when seeking to rely on this defence.

WHAT ELSE?

The amendments also introduce, among other things:

- a single publication rule introducing a one-year limitation period for online publications commencing on the date on which they were first published;
- a new Concerns Notice regime, mandating that such a notice be served prior to commencing proceedings; and
- confirmation that the cap on damages for non-economic loss is to be treated as a scale, which cap is only reached in the most serious defamation cases. The cap cannot be exceeded, which will assist the formulation and understanding of damage awards by courts in defamation cases. That said, it will be interesting to see whether the explicitly separate awarding of aggravated damages in appropriate cases has the effect of circumventing the cap.

WHAT'S NEXT?

Public consultation for Stage 2 of the review of Model Defamation Provisions closed on 19 May 2021. The second stage of the review focuses on two broad areas:

1. the impact of defamation law on reports of criminal conduct to police and statutory investigative bodies; and
2. the liability of digital platforms for online content.

Stay tuned for our next Legal Insight, where we will discuss the impacts of the Stage 2 reforms on individuals engaging with social media and other digital platforms.

KEY CONTACTS



CHRISTIEN CORNS
PARTNER

MELBOURNE
+61.3.9640.4248
CHRISTIEN.CORNS@KLGATES.COM



SAM RAPPENBERG
SENIOR ASSOCIATE

MELBOURNE
+61.3.9205.2073
SAM.RAPPENBERG@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.