

Summary of Amendments to the Model Defamation Provisions

ATTACHMENT TO MEDIA UPDATE - IN THE PUBLIC INTEREST?: CHANGES TO THE UNIFORM DEFAMATION LAW

This table summarises the amendments to the Model Defamation Provisions released on 27 July 2020 and how the final amendments differ from the [Draft MDAPs](#) released on 12 November 2019. The final amendments are available [here](#), with a consolidated version of the amended Model Defamation Provisions available [here](#). All section references are to the Model Defamation Provisions.

Issue		Summary of Final Amendments	Change from Earlier Draft MDAPs
1.	Employees s 9	<p>There is a new definition of employee for the purpose of assessing whether or not a corporation is an excluded corporation.</p> <p>The new definition provides an employee means any individual (whether or not an independent contractor):</p> <ul style="list-style-type: none">• engaged in the day to day operations of the corporation (other than as a volunteer); and• subject to the control and direction of the corporation.	<p>No material change from Draft MDAPs.</p> <p>The final amendments narrow the scope of when a corporation will be an excluded corporation by requiring that an excluded corporation not be an associated entity (defined by reference to s 50AAA of the <i>Corporations Act 2001</i> (Cth)) of another corporation rather than just not a related body corporate.</p>
2.	Deceased people s 10(2)	<p>Costs may now be awarded in proceedings that end due to the death of the plaintiff or defendant.</p>	<p>No change from Draft MDAPs.</p>
3.	Serious harm s 10A	<p>The publication of a defamatory matter about a person must have caused, or be likely to cause, serious harm to the reputation of the person. This is a new element of the cause of action.</p> <p>Harm to the reputation of an excluded corporation is not serious harm unless it has caused, or is likely to cause, serious financial loss.</p> <p>The final drafting also clarifies a number of matters, including that:</p> <ul style="list-style-type: none">• serious harm is a matter for the judge not jury;• this issue may be determined at any time before (or during) a trial;	<p>While the serious harm drafting is similar to the Draft MDAPs (and the UK Defamation Act), the final drafting includes important clarifying language, including around when the issue can be raised (as suggested by several stakeholders).</p>

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		<ul style="list-style-type: none"> • if a party applies for this element to be determined before trial, it must be determined as soon as practicable before the trial commences (unless there are special circumstances); • examples of the matters to be taken into account when assessing special circumstances include costs, court resources and the extent to which the serious harm is related to other issues for determination; and • this element may be determined on the pleadings without the need for further evidence. 	
4.	Content of concerns notice s 12A	<p>A concerns notice must be in writing and:</p> <ul style="list-style-type: none"> • specify where the matter in question can be accessed (e.g, webpage address); • set out the imputations of concern; • inform the defendant of the serious harm alleged to be caused, or likely to be caused by the publication; and • if practicable, including a copy of the matter complained of. <p>Similarly to the current provisions, if a concerns notice fails to adequately particularise the location of the material, the imputations or the serious harm, the publisher may give a further particulars notice requesting reasonable further particulars about the information concerned. If the aggrieved person fails to provide reasonable particulars within 14 days (or a further period agreed by the publisher and aggrieved person) after being given the notice, they are taken to not have given a concerns notice for the purposes of the section.</p>	New requirement that a concerns notice include a copy of the matter in question (if practicable) and set out the serious harm allegedly suffered.
5.	Defamation proceedings cannot be commenced without concerns notice s 12B	<p>A person cannot commence defamation proceedings unless they have provided the proposed defendant a concerns notice and the applicable period for an offer to make amends has elapsed.</p> <p>The court may grant leave for a plaintiff to commence proceedings despite non-compliance with this rule in certain circumstances, for example if</p>	No material change from Draft MDAPs.

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		compliance with the rule would leave to a contravention of the relevant limitations law.	
6.	When offer to make amends can be made s 14	An offer to make amends must be made during the applicable period, being: <ul style="list-style-type: none"> • if the aggrieved person has provided further particulars in response to the publisher's further particulars notice in relation to the concerns notice, 14 days after the provision of the further particulars; or • otherwise, 28 days after the publisher was given the concerns notice. 	Similar to Draft MDAPs (with parts of the proposed s 14 moved to the new s 12A).
7.	Content of offer to make amends s 15	The amendments add to the existing provision that an offer to make amends must provide for the offer to remain open for 28 days. They also provide the option for an offer to make amends to offer a clarification or additional information about the matter, rather than a correction of the matter. For websites, it adds that an offer to make amends may include an offer to remove the matter from the website or location.	Similar to Draft MDAPs. Final drafting provides that an offer can also include an offer to remove the matter from a website.
8.	Effect of failure to accept reasonable offer to make amends s 18	The amendments clarify that it is a defence to an action for defamation if an offer to make amends is not accepted, and: <ul style="list-style-type: none"> • the publisher made the offer as soon as reasonably practicable after the publisher was given a concerns notice in respect of the matter (and, in any event, within the applicable period for an offer to make amends); and • the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer; and • in all the circumstances, the offer was reasonable. The amendments also add that it is up to the judge, not the jury, to determine whether the defence is established.	No material change from Draft MDAPs.
9.	Juries s 21(3)	An election to trial jury can be revoked by consent of all parties or with leave of the Court (but only if the Court is satisfied revocation is in the interests of justice).	New. Draft MDAPs did not allow for revocation.

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10.	Roles of judicial officers and juries s 22(5)(c)	This subsection adds that nothing in the section about the role of the juries requires or permits a jury to determine any issue that another provision of the Act requires a judicial officer to determine.	New.
11.	Multiple Proceedings s 23	<p>The existing provision is amended to also extend to "associates" of previous defendants, such that a person requires leave to bring defamation proceedings against a defendant or an associate of a defendant they have previously brought proceedings against in relation to the same or any other publication of the same or like matter.</p> <p>Associate of a previous defendant means an employee, contractor or associated entity of the defendant, or an employee or contractor of an associated entity of the defendant, at the time of the publication to which the previous proceedings related.</p>	<p>Minor changes compared to Draft MDAPs.</p> <p>Definition of associate expanded to include employee/contractor of associated entity.</p>
12.	Contextual Truth s 26	<p>The updated defence clarifies that a defendant may "plead back" substantially true imputations originally pleaded by the plaintiff, meaning that the defendant can rely on contextual imputations which include imputations pleaded by the plaintiff.</p> <p>The revised wording provides a defence if the defendant proves that:</p> <ul style="list-style-type: none"> • the matter carried one or more imputations that are substantially true (contextual imputations), and • any defamatory imputations of which the plaintiff complains that are not contextual imputations and are also carried by the matter do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations. 	No change from Draft MDAPs.
13.	Public interest defence s 29A	<p>There is a new defence to publication of a defamatory matter where:</p> <p>a) the matter concerns an issue of public interest; and</p> <p>b) the defendant reasonably believed that publication was in the public interest.</p>	The requirement that publication be responsible in the Draft MDAPs has been replaced with the reasonable belief requirement. This amendment is influenced by s 4 of the UK Defamation Act.

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		<p>The new provision requires the Court to take into account all circumstances of the case and sets out a non-exhaustive list of factors the Court may take into account for the purposes of assessing the circumstances of the case (all of which do not need to be taken into account).</p> <p>The application of the defence is a matter for the jury (if applicable).</p>	<p>The requirement to take into account all the circumstances of the case has also been added.</p> <p>The factors the Court may take into account (but are not limited to) when assessing the circumstances of the case are the same as those used to assess responsibility under the Draft MDAPs.</p> <p>The new drafting also clarifies that not all listed factors need to be taken into account in order to make out the defence.</p>
14.	Qualified Privileges 30	<p>The existing defence is modified (given introduction of public interest defence), with the list of factors for assessing reasonableness narrowed to only:</p> <ul style="list-style-type: none"> a) the seriousness of the imputations; b) the extent to which the matter distinguishes between suspicion/allegations/proven facts; c) the nature of the defendant's business environment; d) whether it was appropriate in the circumstances to publish expeditiously; and e) any other steps taken to verify the matter published. <p>The listed factors are to be taken into account to the extent the court considers them applicable, are not exhaustive and do not all need to be established. It is also not necessary to establish that the matter published was of public interest to establish the defence.</p> <p>The new drafting also clarifies that application of the statutory qualified privilege defence is a question for the jury (where applicable).</p>	<p>Minor changes compared to MDAPs (additional public-interest related factors deleted from reasonableness factors).</p>

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15.	Peer Reviews s 30A	This is a new defence in relation to peer-reviewed publications in academic/scientific journals.	No change from Draft MDAPs.
16.	Honest Opinion s 31	The amendment inserts additional language clarifying when an opinion for the purpose of the honest opinion defence will be based on proper material.	No change from Draft MDAPs.
17.	Triviality (formerly s 33)	The defence of triviality has been abolished (on the basis that the serious harm threshold has now been introduced).	No change from MDAPs.
18.	Damages s 35	New drafting clarifies that: <ul style="list-style-type: none"> the \$250,000 cap on damages for non-economic loss (indexed annually) is to be awarded only in a most serious case; and an award of aggravated damages is to be made separately to any award of damages for non-economic loss to which the cap applies. 	No change from MDAPs.
19.	Service s 44	Notices or other documents that need to be given to a person under the Act may be given by sending the notice or document to an email address specified by the person for the giving of service of documents.	New.
20.	Application of Amendments s 50, Sch 4, cl 3	These sections clarify that amendments only apply to the publication of defamatory matter after the commencement of the amendments.	No change from Draft MDAPs.
21.	Limitation period – electronic publication Sch 4, cl 1 and 1C	New drafting clarifies that the date of publication for the purposes of assessing the limitation period, in relation to publication of matter in electronic form, means the day on which the matter was first uploaded for access or sent electronically to a recipient. Additional drafting clarifies that this clarification is not relevant for purposes other than the limitation period (e.g. choice of law).	New.

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22.	Single publication rule Sch 4, cl 1A	<p>A cause of action for defamation against the first publisher of a matter (or an associate of the first publisher) in respect of the subsequent publication of matter that is substantially the same is treated as having accrued on the date of the first publication for the purpose of assessing the limitation period.</p> <p>In cases of electronic publications, the date of first publication is defined to mean the day the matter was first uploaded for access or sent electronically to a recipient</p> <p>An associate of the first publisher is defined to mean an employee, contractor or associated entity of the first publisher, or an employee or contractor of an associated entity of the first publisher.</p> <p>The single publication rule does not apply where the manner of subsequent publication is materially different from the manner of the first publication.</p>	<p>Minor changes compared to Draft MDAPs.</p> <p>The final drafting does not include the "original publisher" language that some stakeholders raised issue with, substituting it for "first publisher". This does not introduce any further clarity around the extent to which the single publication rule is intended to apply to secondary publishers.</p>
23.	Extension of limitation period Sch 4, cl 1, 1B	<p>This is a new provision providing that a person may apply to the Court to extend the limitation period for a period of up to three years from the date of publication if the plaintiff satisfies the Court it is just and reasonable to allow an action to proceed.</p> <p>The Court must have regard to all circumstances of the case, and in particular to certain specified matters including the length and reasons for the plaintiff's delay and the impact of the delay on the evidence.</p> <p>A concerns notice extends the limitation period if delivered within 56 days before the limitation period expires.</p>	No change from Draft MDAPs.