



Defamation (Model Provisions) and Other Legislation Amendment Bill 2021

Submission

We would like to thank the Legal Affairs and Community Safety Committee for the opportunity to comment on the Defamation (Model Provisions) and Other Legislation Amendment Bill 2021 (“the Bill”). In this submission, we will provide observations on the practical implications of the proposed legislative amendments on our organisation and suggest potential future reform directions where possible.

Overview

Historically, 4ZZZ has not shied away from providing the important service of critiquing public figures, contributing significantly to the countercultural movements of the '70s and '80s, as only a community-led broadcaster can do. As a proponent for marginalised communities, our strong legacy continues today, albeit with the added risk that the modern legal and media environments pose.

Today, our newsroom runs on the volunteer time of experienced and student journalists with limited resources. It can be challenging to address not only the need to get a story right but also the implications of publishing on the organisation as a whole. We believe that the provisions of this bill will make some of those choices, between the public interest, the good of the organisation we work for and the communities it serves, a little easier. However, there are some areas of concern remaining that are specific to smaller publishers like 4ZZZ.

Changes to defamation laws are not a silver bullet to issues in investigative and public interest journalism, but at the very least they are part of that puzzle.

Concern Notices and Current Practices in Community Radio

4ZZZ operates under a full community radio broadcast license and is therefore subject to the Australian Communication and Media Authority (ACMA) standards for broadcast radio as well as the Community Broadcasting Association of Australia's (CBAA) code of practice relating to content on the station. Included in part 7 of the code is a section on basic complaints handling in regards to the code.

In line with the requirements of those bodies, 4ZZZ has developed a complaints process that tasks a responsible person with the receipt, acknowledgement and planned response of any complaint referring to the conditions of our broadcast license. We mention this here as it aligns very closely with the proposed mechanism for concern notices as proposed in the legislation, though it does specify a shorter period of time in which to make a response (28 days for defamation and 60 days for a breach of broadcast standards)

Aligning processes like this will make it considerably easier for an organisation like ours to handle complaints, but we would also like to highlight that while 28 days may be reasonable for an organisation with paid staff, our organisation, which is reliant on the work of volunteers may find it more difficult to prepare a response in the timeframe. We are fortunate to have some paid staff, but I would imagine for a similar community news organisation with a lower budget, this might be a challenge. Community news organisations would benefit from some flexibility in the legislation around meeting the requirement for a response within 28 days.

We also appreciate the options for resolution outside of litigation, not only because litigation is expensive to prosecute regardless of the outcome, but also because as a community organisation it is in our best interest to maintain good relationships with our local community and prolonged legal actions could erode such relationships.

Serious Harm, Trivial Defenses & Public Interest

As a publisher of news and current affairs content, we take measures to ensure that content broadcasted by us is accurate and fair-minded. In the rare case our collective work may be considered to be defamatory, it would be challenging for an organisation of our size to mount a significant legal defence, given our limited resources. This would be especially frustrating in cases where the perceived harm is trivial to the complainant. The problem with using a defence in a court case for us would be the significant time and resources that would go into mounting such a defence.

Therefore, we are very supportive of provisions that would see trivial claims dealt with before the need for court proceedings. The proposed amendments will not cover every case, but they may help with some stories where the overall consequences of the publication are minimal.

We also support a consistent and clear definition of 'public interest' as defined in clause 16 of the Bill, including considerations for the protection of confidential sources in defamation hearings. The defence of Qualified Privilege pursuant to s 30 of the *Defamation Act 2005* (Qld) sets an extremely high bar for smaller broadcasters such as 4ZZZ to establish, particularly given the limited resources available to us. The proposal to include public interest as a defence is one that will assist those of us who do not have the same ability to pursue and establish Qualified Privilege.

Damage awards and Scaling

At the time of writing this submission, the maximum level of damages awardable under the legislation would represent around $\frac{2}{3}$ of the annual operating budget of 4ZZZ. For small organisations, a defamation action might be enough to completely shut us down, if not cripple our ability to function. Smaller broadcasters have a significantly higher risk of a substantial loss than larger organisations.

In general, the provisions to instruct the court to award damages based on severity is commendable, but does little to mitigate such a risk. Insurance provides a level of security, but will inherently influence decision-making for stories of significant scope. This, in turn, makes it harder to produce stories for our communities without needing to take on risk beyond that of other, larger commercial news organisations.

Certainly, provisions for a fairer and more just allocation or assessment of damages, in line with the means of a publisher, would be preferable for the purposes of the Act.

Further thoughts

In consideration of the challenges for a publishing organisation of our size, there is a significant need for support for public interest journalism. This be addressed effectively through changes in defamation law alone.

It is outside the scope of the Bill, but we submit it would be valuable to develop support for small publishers (especially community non-profits) through the provision of a *public interest defence fund*. Such a fund would be designed to support organisations like ours in cases where public interest has been raised as a defence in defamation proceedings.