The Concerns Notice Prerequisite - An Early Escalation of Cost and Formality

By **Kevin Lynch** and **Heather Pym**[1]

The Model Defamation Amendment Provisions (**new UDL**) commenced in some States on 1 July 2021.[2] Amongst a bundle of other reforms is the introduction of a mandatory requirement that an aggrieved person issue a concerns notice prior to commencing defamation proceedings.

The stated objective of this reform is to promote speedy and non-litigious methods of dispute resolution.[3] Stakeholders, including the Law Society of New South Wales, formed a view that without a mandatory concerns notice "the offer to make amends process may lack potency".[4]

This article considers whether aspects of the mandatory concerns notice reform may have the unintentional consequence of frustrating that objective. It also considers the value of the concerns notice process itself, with reference to the operation of the non-mandatory concerns notice process since the 2005 uniform defamation laws (**2005 UDL**) were enacted.

The concerns notice and offer to make amends

The 2005 UDL allowed an aggrieved person to issue a concerns notice prior to commencing proceedings.[5] A concerns notice is a written notification sent to a person alleged to have published allegedly defamatory material, identifying that material and outlining the imputations of concern.

A person receiving a concerns notice could make a formal written offer to make amends, typically within 28 days, including an offer to publish a reasonable correction, pay costs and potentially an offer to pay compensation and an apology. If an offer to make amends is accepted and carried out on its terms, that is the end of the matter. If an offer to make amends was not accepted and it was found at trial to have been made as soon as practicable after the becoming aware of the defamation, by a publisher who was ready and willing to carry out its terms be reasonable in all of the circumstances, the offer would establishe a complete defence to the action.

The 2005 UDL did not require a plaintiff to issue a concerns notice. In many cases proceedings were commenced without a concerns notice at all.[6]

The new uniform defamation laws – mandatory concerns notices which enshrine the imputations for trial

The new UDL provides that a person subject to an alleged defamation *must* serve a concerns notice before they are able to commence proceedings.[7] The concerns notice moves from being an option to a mandate. Amongst other requirements, the concerns notice must include details of the defamatory meanings that the aggrieved person *intends to rely on in proceedings*.[8]

The concern that arises here is that a person who has a defamation complaint, typically an individual, is likely to require legal advice in order to prepare a concerns notice which meets the requirements of the legislation.[9] The requirement that the concerns notice include imputations that will need to be in a form that could be taken to trial is enough to intimidate an inexperienced plaintiff's lawyer and even challenge an experienced defamation solicitor.

The result of all of this is that an individual who wishes to formalise a complaint will expend legal costs that may extend to the involvement of senior counsel, before a concerns notice is ready to go out.

Whilst a publisher may well be assisted by a clearly articulated and presented outline of concerns (or, on the other hand, the failure to formulate a valid concerns notice at all), the preparation of the mandatory concerns notice will come with a sunk costs payload that can frustrate attempts at early settlement. Having retained a solicitor and counsel to settle imputations that are trial-ready, along with an articulation of serious harm,[10] a plaintiff may be more inclined to press ahead with an action.

In many cases, a potential defendant, the alleged publisher and the interests of early resolution of

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2 The new UDL came into effect in New South Wales, South Australia, Victoria and Queensland on 1 July 2021. At the time of writing the Northern Territory, Western Australia and the Australian Capital Territory are yet to action the agreement made by the Counsel of Attorneys-General in July 2020 to introduce the uniform amendments.

3 See for example, Defamation Amendment Bill 2020, Second Reading Speech, Hansard, 6 August 2020 at 3020.

4 Defamation Amendment Bill 2020, Second Reading Speech, Hansard, 6 August 2020 at 3020.

5 See for example section 14 of the *Defamation Act* 2005 (NSW). Statutory references for the 2005 UDL are consistent for NSW, VIC, QLD, TAS, SA and WA.

6 A recent example was *Rush v Nationwide News Pty Limited* (No 7) [2019] FCA 496.

7 See section 12B of the new UDL.

8 See section 12A of the new UDL.

9 This article does not consider the real questions of disadvantage and access to justice that this might pose.

10 See for example section 14(2)(b) of the *Defamation Act* 2005 (NSW)

complaints are all well served by a notification of a grievance that is inexpert or even informal.[11] The push towards formality and cost may impose upon the opportunity for early settlement.

It is also foreseeable that a complainant, in conference with solicitor and/or counsel, will err towards stretching a claim to encompass all conceivable imputations in the concerns notice, in case the imputations may be required at trial.[12] If this shopping list of imputations makes its way into the Statement of Claim, there is the likelihood of interlocutory challenge. If a plaintiff attempts to depart from the imputations in his or her concerns notice, costs will be front-loaded with a preliminary argument as to whether or not the imputations in a Statement of Claim are substantially the same as those particularised in the concerns notice.[13]

There may also be preliminary skirmishes as to whether or not a concerns notice was defective or satisfied the prerequisites to bring a defamation claim.

The track record of the concerns notice and offer to make amends

In assessing the potential of the mandatory concerns notice regime, particularly given the drawbacks discussed in this article, some consideration can be given to the operation of the optional process under the 2005 UDL.

It is impossible to assess how many disputes employed the regime for "resolution of civil disputes without litigation" in the 2005 UDL or the size of the subset that met that objective. Many matters are resolved without a formal concerns notice. There are also likely to have been matters that were resolved prior to litigation via an offer to make amends or offers made outside of the statutory regime. The statutory steps may also have formed a part of a more protracted fruitful negotiation.

Anecdotally, the offer to make amends is most usefully deployed where a publisher has made an error or regrettable publication and wants to put its best foot forward in attempting to resolve the matter via a compelling early offer. More frequently, a prospective defendant is reluctant to make the concessions required to formulate a reasonable offer to make amends within the 28 day period, at a time that the publisher wants to manage a complainant's expectations and test their opponents resolve in the face of potential litigation defences.

The one thing we do know is that the number of matters where a concerns notice was met with an offer to make amends and later assessed by the Court were comparatively few. On one of the very few occasions where the defence was upheld,[14] Her Honour Justice Gibson noted that such an outcome was "the exception, not the norm". At the time of that decision, some 8 years after the 2005 UDL, Justice Gibson noted that the defence had yet to be relied upon successfully in Australia. That poor strike rate has been maintained in the years since. Reported cases that raised the defence under the 2005 UDL barely exceed double digits Australia-wide. Among these, the rate of success in establishing the defence is less than 10%.

Whilst this is by no means the only measure by which the concerns notice/offer to make amends process can be evaluated, it does suggest that a process that starts with what is now to be a mandatory step tends to fade to obscurity on occasions where it is taken up by a publisher and tested as a defence.

Concerns that the offer to make amends process lacks potency might be better addressed by stronger prospects at the end point, rather than a mandatory commencement.

11 The mandatory concerns notice does not, of course, preclude an informal complaint or notice, but it does ratchet-up the formality of any communication that is able to meet the new pre-requisites for bringing proceedings.

12 A plaintiff is not bound to persist with all of the imputations particularised in a concerns notice – see section 12B(2)(a) of the new UDL which allows "some, but not all" of the proposed imputations to be relied upon in the proceedings.

13 See section 12B(2)(b) of the new UDL.

14 *Sleeman v Tuloch Pty Limited T/as Palms on Oxford (No. 4)* [2013] NSW DC 111 at 45.