

# "Not Just Hurt Feelings": Meeting the Serious Harm Threshold in Defamation Proceedings

If you're thinking about making (or defending) a defamation claim in South Australia, the very first hurdle is now "serious harm". Since 1 July 2021, the *Defamation Act 2005* ("the **Act**") provides that it isn't enough to prove the words were defamatory. You must also prove the publication has caused, or is likely to cause, serious harm to reputation.

Further, for corporations (which can only sue if they are a not-for-profit or have fewer than 10 employees and are not a public body), harm to reputation is not 'serious' unless it has caused, or is likely to cause, serious financial loss.

## What does "serious harm" mean in practice?

- **It's about real-world impact, not just the sting of the words.** Courts look for evidence of actual or likely reputational damage such as who saw the defamatory publication, who

believed it, how it changed their view, and whether that persisted. In *Greenwich v Latham*, the Federal Court found serious harm from a high-reach tweet in a heated political context.

- **But numbers alone aren't everything.** The "quality" (i.e. the nature) of the defamatory publication and its resulting impact matters more than just how many times it has been viewed.
- **Recent NSW example – claim dismissed:** In *Mannoun v Ristevski* (which involved a Facebook comment calling the mayor of the Liverpool City Council a "crim"), the Court dismissed the proceeding on the basis that serious harm was not established because the plaintiff couldn't show the post actually caused serious reputational damage beyond a small audience which already held hostile views in relation to the local council.

## The South Australian position (s 10A, *Defamation Act 2005* (SA))

Section 10A sets the bar:

- Individuals suing for defamation must prove the publication has caused or is likely to cause serious harm.
- Corporations must also demonstrate serious financial loss.
- Judges or magistrates decide whether the serious harm threshold has been met (not juries).
- Early determination: the Court may (and generally should, if asked) decide whether the serious harm threshold is met before trial and can dismiss the case if the element isn't made out—even on the pleadings if the particulars given by the plaintiff in relation to the serious harm element are insufficient.

**Why this matters:** If serious harm is not there or is unlikely, a claim can be dismissed quickly, saving both sides substantial costs. Conversely, a well-prepared plaintiff who provides full particulars of how the defamatory publication has caused, or is likely to cause serious harm to their reputation, can secure an early "green light" and momentum toward resolution through negotiations.

## How an early serious-harm application plays out

1. Either party can ask the Court to decide serious harm early.
2. The Court should decide on the issue as soon as practicable, unless special circumstances justify postponement (e.g., the serious harm element is tightly linked with trial issues).
3. If serious harm isn't established, the Court can dismiss the proceeding and make costs orders.

Courts elsewhere have used this case-management tool actively. *Mannoun* is a recent example of a plaintiff losing because the serious harm threshold was not met.

# What plaintiffs should do early

To clear the threshold, plaintiffs in defamation claims should be well prepared with evidence of serious harm. For example:

- **The defamatory imputations**: evidence of what defamatory meanings were conveyed by the publication.
- **Audience & belief:** Proof of who saw it (analytics, platform data, recipients) and that its viewers believed it.
- **Reputational impact:** Names or categories of people whose estimation of you dropped, how you know, and for how long.
- **Duration:** evidence of how long the publication was available to be viewed. For example, the serious harm threshold is less likely to be met in relation to a social media post that only remained viewable for a few hours, as opposed to a post that was available to view for several days or weeks.
- **Context & specificity:** Highly specific, grave allegations to a credible audience weigh in your favour; vague insults to a hostile niche forum may not.
- **Corporations:** Link publication to lost sales, cancelled deals, and otherwise a measurable impact on revenue in order to meet the "serious financial loss" threshold.

# What defendants should do early

- **Press for early determination of the serious harm element** and require the plaintiff to particularise serious harm if the plaintiff has not adequately done so.
- **Challenge causation:** Probe whether anyone who matters actually believed it or changed behaviour toward the plaintiff.
- **Identify the audience:** Small numbers of individuals, hostile or partisan audiences, low visibility, or fleeting attention can undercut serious harm.
- **Preserve platform evidence:** A publication that has limited reach or engagement, or for example, is hidden behind a "view more" button is less likely to meet the serious harm threshold. *Mannoun* illustrates how this can succeed.

# Key takeaways

- **Serious harm is a gatekeeper**: no serious harm, no claim. The issue is often determined early on in defamation proceedings. There is risk of being ordered to pay the defendant’s costs for bringing a claim without meeting the serious harm threshold.
- **Evidence wins**: Courts want concrete proof of reputational or financial impact, not assumptions. Cases like *Greenwich* (serious harm made out) and *Mannoun* (claim dismissed) show the difference that evidence and context make.

# Thinking of suing, or have received a Defamation Concerns Notice?

We act for both plaintiffs and defendants in defamation proceedings. We can:

- Test your claim/defence against the serious-harm standard and provide you with practical and realistic advice;
- Gather and present the appropriate evidence; and
- Run or resist an early section 10A application in court.