Uniform Defamation Bill 1991

Peter Bartlett reviews the main features of this long-awaited bill

November 1991 witnessed a significant step towards more uniform defamation laws in Australia, with the introduction of bills into the Parliaments of New South Wales, Victoria, Queensland and the Australian Capital Territory. The bills largely follow the New South Wales *Defamation Act* 1974, with some novel reforms. Victoria, Queensland and the Australian Capital Territory will need to consider whether they wish to adopt in large part, the New South Wales Act, an Act which was described as complex and difficult to apply.

Justification — truth and privacy

The Attorneys-General of Queensland, New South Wales and Victoria have agreed to introduce a 'hybrid truth and privacy' defence. The defence will be available if the publication is substantially true. The defence of truth alone will not be available where the publication relates to the health, private behaviour, homelife or personal or family relationships of the person concerned. The Bill then takes the unusual step of providing some examples of situations in which the publication of a person's private affairs may be warranted in the public interest.

It is felt by the Attorneys-General that truth as an absolute defence (which presently exists in South Australia, Western Australia, Northern Territory and Victoria) does not sufficiently protect a person's privacy. Implicit in the above argument is an acceptance by the Attorneys-General that the law of defamation should provide a compromise between the competing interests of the individual's right to privacy and the public's entitlement to being fully informed.

A "hybrid truth and privacy defence", assumes that reputation and privacy are inextricably linked. The Victorian Attorney-General Kennan remarked that "a law of defamation that permits the media to justify intrusions of privacy on the basis of truth alone is no longer an appropriate law".

It is questionable whether reputation and privacy should be linked in such terms. First, defamation and privacy are concerned with different interests. Defamation law is designed to protect a person's reputation. On the other hand privay protects a person's private matters such as marital or family relationships.

The recent disclosure in a Melbourne Sunday newspaper of the HIV positive status of an acclaimed ballet dancer serves as a good illustration of the differences between the concepts of privacy and reputation. Invasion of privacy was the ballet dancer's real grievance. However, to obtain a remedy under the truth and privacy defence, the ballet dancer would be forced to bring an action in defamation which inevitably focuses on his reputation, when reputation was irrelevant to the grievance complained of.

A further problem is that unwarranted intrusions into a person's privacy may not always be defamatory. For instance the Law Council of Australia in its second submission gave the example of a politician of whom it was published that his child was a drug addict. Even though the politician may have felt there was an unwarranted intrusion into his private life, it was probably not defamatory of him to say that his child was a drug addict. In these circumstances no remedy is available.

Truth alone should be a defence in defamation. Publishers should be free to publish material that is true. If material deals with privacy matters then the appropriate remedy should be contained in a new privacy tort.

Truth alone is also simpler, clearer and easier to apply than a truth plus privacy provision. Proof of the truth of the matter is sufficient. Journalists and editors are also assisted in their work by the ease with which they may apply this rule. The inherent vagueness of the notion 'privacy' makes the application of a defence of truth and privacy more complicated. The media and their legal advisors may find a need to edit by second guessing juries. This can have a significant impact on freedom of speech.

Contextual truth

At common law the defendant will only succeed in a defence of justification if it can prove the truth of every imputation pleaded by the plaintiff.

The common law has been modified in New South Wales and Tasmania. Section 16 of the New South Wales Defamation Act provides a defence to any imputation complained of so long as one or more of the imputations contextual to the imputation complained of are matters of substantial truth.

The Attorneys-General have proposed the introduction of a defence of contextual truth, similar to s16 of the New South Wales Defamation Act. However, the defence will only be available where at least one imputation is substantially true, and the publication carrying the imputation was not an unwarranted intrusion on the plaintiff's privacy.

It would seem to be in the interests of justice that a defendant who can prove serious imputations against a plaintiff, should not be liable for damages if the defendant fails to prove the truth of lesser imputations.

Official notices

Every jurisdiction in Australia affords some protection to the publication of official notices. Victoria, via s.5A of the Victorian Wrongs Act, provides the narrowest protection. Publication of documents is privileged so long as they are issued by a senior member of the Victorian Police Force, and are for the purpose of protecting the public or gaining information that may be of assistance in the investigation of an alleged crime. All other jurisdictions provide protection for the publication of a notice or report by a government department or officer, at the request of the government department or officer.

The proposal of the Attorneys-General expands on the statutory qualified privilege provided for official notices by extending the categories of protected official reports. A defence will be available for the publication of any notice, or fair report or summary of the notice of report in accordance with an official request. Official requests can now come from any member of the police force, a council, board or other authority or a person appointed for public purposes under the legislation of any State or Territory or of the Commonwealth.

Qualified privilege

The defence of qualified privilege is an acknowledgment that it is, in some circumstances, in the public interest for people and the media to express themselves freely, and be protected, even if the publication is untrue and defamatory.

At common law a statement will attract qualified privilege if the material was published in the performance of a legal, moral or social duty, to a person who had duty to receive it. It has been virtually impossible for the media successfully to plead the defence.

Section 22 of the New South Wales Defamation Act 1974 was aimed at giving the media greater access to the defence. However, narrow interpretations by the courts of the 'reasonableness' requirement has effectively denied the availability of qualified privilege as a defence for the media.

The current bills retain the common law qualified privilege defences and the present statutory defences in New South Wales and Queensland, and provide a new defence, so long as the defendant proves that a statement related to a matter of public interest, was made in good faith and was made after reasonable inquiries.

Even though the reform is touted as a significant move toward opening the availability of qualified privilege to the media, it may turn out that this defence will not make much difference to the present interpretation of s22 of the New South Wales Act.

It is difficult to see how the media can succeed in the new defence, unless they are prepared to disclose their sources. The defence will however be useful where sources are not in issue.

Correction statements

Court-recommended correction statements would be a novelty to all jurisdictions in Australia. As pointed out by the Attorneys-General, their introduction is based on the belief that they "may be very effective in partially, or even in some cases fully, restoring reputation and assuaging damaged feelings."

A prompt and well placed apology is viewed by the Attorneys-General as often the most appropriate remedy to restore a person's reputation.

Monetary damages have traditionally been the main compensatory tool for damaged reputations. However their status as the main remedy has been said to be more historical than practical. The Australian Law Reform Commission was similarly not enthused about damages when it reported that "not merely are damages inappropriate to vindicate reputation, the link between liability and damages has prejudiced plaintiffs".

However, the proposal in the bills contains practical and administrative problems. The creation of this new remedy will impose additional legal expense on both parties. There will be a need for at least two appearances before the Court. An application for a correction statement will be dealt with on an interlocutory basis if defamation proceedings have been commenced. Will the application be by oral evidence or affidavit material? If by affidavit, what does the mediator do if the defendant simply swears that it stands by the story and will plead justification.

Variation in the standard of proof and the admission of evidence between interlocutory proceedings and trials can also be of importance. For instance, hearsay evidence is admissible at interlocutory proceedings but is inadmissible at trial. The standard of proof at interlocutory proceedings is the balance of convenience, whereas at trial it is based on the balance of probabilities.

The bills also omits to define the way in which correction statements are to be labelled. If the correction was labelled 'court ordered' or 'court recommended' then the public could be deceived in thinking that the matter had been fully settled, while if it appeared that the defendant published it at his or her own volition, subsequent success at trial by the defendant would confuse the public.

In terms of vindicating a person's reputation, a correction order would need to be obtained quickly. The Attorneys-General believed that "to be effective, it is imperative that this system be a 'fast track' procedure." For defendants, normally media groups, the 'fast track' procedure may not provide sufficient time for a proper assessment of the matter. If the Attorneys-General believe that court involvement in this area is justified, which is open to some doubt, a system of compulsory pre-trial conferences, immediately after the issue of the proceedings, would be preferable.

The role of juries

In New South Wales all defamation actions are heard by juries. In the Australian Capital Territory they are all heard by a judge sitting alone. In Victoria both the plaintiff and the defendant can elect to have the case heard by a jury, otherwise the case is head by a judge sitting alone. If the case is being heard by a jury, the jury would determine both whether the publication was defamatory, and if so, the level of damages.

There will be no alteration to the present law in Victoria. New South Wales and Queensland will allow the jury still to decide whether the publication is defamatory, but the judge will decide quantum. The Australian Capital Territory Bill follows the New South Wales Bill, but it is not clear whether that envisages the introduction of juries into the Australian Capital Territory.

This is an area in which there will not be uniformity between the various states. This is unfortunate. A preferable course is to allow the jury to continue to assess damages, with the judge providing some guidance, a system recently accepted by the High Court. Without recounting all the arguments for the retention of the juries, it is still widely accepted that a jury has the capacity to reflect wide sectional community values. In this sense, the value placed on a person's reputation by a jury is more representative of the social morals. In addition, there is some doubt that the Attorneys'-General view that judges deciding quantum will lead to lower verdicts, is accurate.

Limitation periods

The bills propose that actions in defamation be brought within six months from the date upon which the plaintiff first learned of the publication, with an absolute limitation period of three years.

If forum shopping is to be avoided then proposed changes to the limitation period need to be uniform. When limitation periods differ between jurisdictions, plaintiffs whose actions are barred by jurisdiction have the opportunity to sue in another jurisdiction where the limitation period is longer.

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anticipated union involvement in the immigration aspects of the importation of artists is borne out by the fact that Actors Equity has now advertised for the appointment of a full-time employee to be known as the "Imported Artists Officer". Finally, we must ask the question of whether it is not appropriate that Australian actors should attain their professional status and acceptance solely through talent rather than through artificial barriers to competition. In a climate where such barriers are removed for all manufacturing and secondary industries we must ask whether they should not also be removed for the so-called 'cultural industries'.

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