Commercial Impact of the Uniform Defamation Bills

Robert Todd discusses the practical effects of the new Bills on broadcasters and publishers

Australia has moved a step closer to uniform defamation laws with the recent tabling in Queensland, New South Wales, Victoria and the Australian Capital Territory of draft Defamation Bills. The Bills mark the culmination of a lengthy and controversial period of consultation which is to continue while the Bills proceed through the Parliaments. It is anticipated that consultation will continue until approximately February 1992 when each of the governments have indicated that they are likely to legislate to make the principal provisions law in each State.

The Bills adopt a format which is similar to that adopted by the *New South Wales Defamation Act 1974*. This will provide a level of consistency and comfort for most media organisations who will be familiar with the provisions of the Act although some of the changes to the Act have been criticised as being regressive or unnecessary. The Bills, like the Act, do not exclude the operation of the common law but insofar as the Act provides, but modify it in certain respects.

The adoption of the New South Wales *Defamation Act* as a basis for the new Bills may assist in limiting the impact of their introduction on the conduct of national publishers or broadcasters who already have to adopt an approach of accepting the lowest common denominator to ensure compliance with the variety of existing State legislation. The Bills will have their most significant impact on publishers in States other than New South Wales. Lawyers with experience of the New South Wales *Defamation Act* will be able to provide immediate advice on the Bills' likely operation on those States.

Impact on Publishers and Broadcasters

However, the Bills will have a significant impact on publishers and broadcasters in the following areas:

Damages: While the legislators hope damages will be limited by their assessment by judges rather than juries, this may not be the effect of the legislation. In jurisdictions which allow the assessment of damages by judges a number of high awards have been made but low awards are not uncommon. Thus, plaintiffs are more likely to institute and pursue proceedings if judges' assessments result in greater certainty. Further, the legal costs associated with defamation litigation, are unlikely to be restrained by this development given the increasing imposition of costs penalties by way of either offers of compromise and/or the effect of the proposed correction statements.

Correction Statements: It is likely that these provisions will lead to a signifiant number of applications for court recommended correction statements to enable plaintiffs to take advantage of the costs and damages sanctions. Most publishers and broadcasters will need to have in place a system for dealing with these applications quickly and efficiently.

Limitation Periods: Whilst the reduction in limitation periods is likely to be beneficial to publishers and broadcasters by eliminating some potential actions, it is also likely to encourage prospective plaintiffs to apply for a correction statement in circumstances where they would otherwise have delayed action.

Legal Compliance: Publishers and broadcasters will need to review their existing compliance systems to ensure that they are updated and, im particular, will have to ensure that all journalists and management understand the Bills and their operation.

Correction statements

The most commercially significant of the proposed changes will probably be the correction statements.

Publishers, in handling complaints, will be under significant time constraints and pressure. Their response to complaints and demands for correction statements will require careful and speedy consideration of any matters of significance and importance to publishers and journalists.

Clause 44 of the New South Wales *Defamation Bill* provides that a party or prospective party to defamation proceedings (whether or not proceedings have been commenced) may apply to the court for an order *recommending* that the publisher publish in a specified way and time a correction order in the form approved by a court or by a mediator appointed by the court.

It should be noted that:

- Publication of the correction statement is not mandatory.
- No inference of liability can be drawn from the publication of the correction statement.
- Evidence of, or relating to, the correction statement is not admissable in evidence before a jury.
- Correction statement can only be sought within a period of 14 days after service of initiating process or prior to the initiation of proceedings.
- Correction statements are initiated by way of a notice of motion before the appropriate court.

Sanctions for correction statements

Clause 59 of the New South Wales *Defamation Bill* provides that a court in assessing damages or awarding costs may take into account five factors:

- Whether a correction statement was published.
- Whether or not a plaintiff applied for a statement and an application for a statement promptly.
- If a correction statement is published — whether it was published promptly, its contents, position and prominence.
- If publication is made after an order under Clause 44, the publisher's reasonableness in adopting the recommendation or any unreasonable rejection by a plaintiff of the defendent's willingness to publish such a statement.

It is highly likely that in all actions, either contemplated or initiated, a prudent plaintiff will make an application for a correction statement to maximse the potential award of damages or costs particularly as the failure to do so may adversely affect his/her position. In those circumstances, publishers must have in place a system by which they can prepare material to establish their case for an appropriate correction statement, or that a correction statement would not be appropriate. This proposed clause will significantly increase the managerial and legal time spent in dealing with complaints.

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