National Defamation Law Reform

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Australia's outdated defamation laws have long been slanted in favour of plaintiffs. However, the 'plaintiff's bonanza' may be somewhat tempered by the recent passage of the *Defamation Amendment Bill 2020* (NSW) (**Bill**) on 6 August 2020.[1] The Bill is based on a raft of reforms proposed by the Council of Attorneys-General in late July. It is expected that identical copies will be passed in all other states and territories. The Bill has also passed through the Victorian Parliament. NSW and Victoria will now decide whether the Bills will come in to operation 1 January 2021 or whether they will wait till 1 July 2021 to allow the other States and Territories to catch up. The amendments signal to the courts that the balance must shift towards freedom of expression.

Among the most significant inclusions are:

- a 'serious harm' element to weed out trivial claims;
- a dedicated public interest defence for reports on matters of public concern;
- a single publication rule so that the limitation period for online publications runs from the date the material is first uploaded rather than each time it is downloaded;
- clarification that a defendant may 'plead back' a plaintiff's imputations to establish a defence of contextual truth; and
- provisions aimed at clarifying the statutory cap for damages for non-economic loss.

Defamation law remains a *'Frankenstein's monster'* of *'countless complications and piecemeal reforms riveted to the rusting hulk of a centuries' old cause of action'*,[2] but these reforms represent a significant improvement. However, the effectiveness of the new provisions will largely hinge on how they are interpreted by courts.

1. Serious harm element (s 10A)

Background

There is no explicit 'threshold of seriousness' in Australian defamation law, as the courts have tended to reject attempts to recognise one.[3] Under the current laws, the filtering of spurious claims does not occur until trial – by which point significant time and costs have been incurred.

Section 10A of the Bill aims to change this by requiring the plaintiff to prove the defamatory publication *'has caused, or is likely to cause, serious harm to the reputation of the person'*. It also endeavours to similarly encourage the early resolution of disputes by making harm a threshold issue.[4]

The new provision requires the judge to determine whether serious harm has occurred. The issue can be determined at any time, either on the application of a party or the judge's own initiative. However, if a party raises the issue before trial, the judge must reach a decision as soon as possible, unless special circumstances warrant a delay. Subsection 10A(7), which was not included in an earlier draft of the amendments, allows a judge to determine the serious harm element *'on the pleadings without the need for further evidence if satisfied that the pleaded particulars are insufficient to establish the element'*.

Potential effect

The introduction of section 10A is largely positive, as it permits the courts to dismiss weak or frivolous cases at the outset, before considerable time and costs are wasted. It also means the defendant will no longer bear the burden of proving that the plaintiff suffered trivial harm.

It is likely the provision will be useful in knocking out low-level disputes between individuals, but not cases against large media organisations.[5] It may present case management challenges for judges and there is an element of unpredictability in how s 10A will be interpreted. Unlike the UK, the legislation does not build on pre-existing common law developments. It is hoped that judges will read the provision literally and refrain from tacitly lowering the threshold of seriousness to one of substantiality.

1 Latika Bourke, 'Copying UK defamation laws will fix Australia's 'plaintiff bonanza': Spycatcher silk' The Age (online, 2 August 2020) <https://www.smh.com.au/world/europe/copying-uk-defamation-laws-will-fix-australia-s-plaintiff-bonanza-spycatcher-silk-20200721-p55e7p.html>.

2 Matthew Collins, 'Reflections on the Defamation Act 2013, one year after Royal Assent', *Inforrm's Blog* (online, January 2020) <https://inforrm.org/2014/04/25/reflections-on-the-defamation-act-2013-one-year-after-royal-assent-matthew-collins/>.

3 See e.g. *Lesses v Maras* (2017) 128 SASR 292, 317-18 (per curiam); [2017] SASCFC 48. Cf. *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858 at [31]-[42] per McCallum J. The Supreme Court of New South Wales decision in *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858 is a notable exception. Instead of a threshold of seriousness, the defence of triviality under section 33 of the Defamation Act provides that *'it is a defence to a publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain harm'*.

4 Explanatory Note, Model Defamation Amendment Provisions 2020 (NSW), 4 <https://www.pcc.gov.au/uniform/2020/Model_Defamation_Amendment_Provisions_2020.pdf>.

5 See also Michael Douglas, 'Australia's "Outdated" Defamation Laws Are Changing: But There's No "Revolution" Yet', *International Forum for Responsible Media Blog* (online, 31 July 2020) <https://inforrm.org/2020/07/31/australias-outdated-defamation-laws-are-changing-but-theres-no-revolution-yet-michael-douglas/>.

Although the defence of triviality is to be abolished, MinterEllison considers that it should have been left on the books. It would have served as another tool at the court's disposal when dealing with marginal claims.

2. Public interest defence (s 29A)

Background

One of the notable inclusions in the Bill is a new public interest defence. Australian courts have repeatedly rejected a common law version of this defence, unlike our counterparts in the UK, Canada and New Zealand. The UK also enacted a statutory public interest defence in 2013. Yet in Australia, responsible investigative journalism that falls short of perfect reporting has not been adequately protected.

The new public interest defence aims to ensure that defamation law does not unreasonably limit freedom of expression and the discussion of matters of public interest. The Bill adopts similar wording to the UK statutory defence and is a significant improvement on an earlier draft based on New Zealand's defence.

Section 29A states that a defendant will not be liable if:

(a) the article concerned an issue of public interest; and

(b) the defendant reasonably believed that publication of the matter was in the public interest.

The jury (or if one is not empanelled, the judge) is responsible for deciding if the defence is established. All circumstances of the case must be considered. However, s 29A(3) provides the court with a list of factors that 'may' be taken into account. These factors include the seriousness of the imputations, the integrity of the journalist's sources, the steps taken to verify the claims, and whether the story contained the plaintiff's version of events.

Potential effect

The defence is a potentially significant development. It remains available to media publishers even if it is later proved the article contained factual errors. Further, unlike the statutory qualified privilege defence, it is not necessary for the defendant to prove the recipients had a specific interest in receiving the information. This will ensure the public interest defence remains available to large media companies who regularly publish stories to the wider population.

The defence is likely to assist in defending meticulously-prepared investigative pieces, such as those sued over by Joe Hockey and Eddie Obeid. This change will be cautiously welcomed by media organisations, who may take on significant defamation risk when they go to print based on information provided by whistleblowers and confidential sources.

However, a potential problem lies in the interpretation of s 29A(3), which specifies a list of factors the court may consider when reaching a determination. These factors are nearly identical to the criteria currently considered under the 'reasonableness' limb of statutory qualified privilege. In relation to qualified privilege, the criteria have been treated rigidly as a series of independent hurdles to be overcome, rather than optional or guiding factors. This approach has undermined the utility of the statutory qualified privilege defence and effectively neutered it for media defendants.

Should courts apply the statutory factors in a similar way, s 29A may also become difficult to establish. MinterEllison raised this issue during the consultation phase. Although the defence has been needlessly complicated by the factors, it includes some safeguards recommended in public submissions:

- unlike an earlier draft provision, there is no requirement that the court 'must' consider the factors;
- the Bill clarifies that s 29A(3) does not require each factor to be taken into account. Nor does it limit the matters that may be considered;[6]
- unlike the previous draft, the factors are no longer tied exclusively to one aspect of the defence ('reasonableness', or, in the earlier draft, 'responsible communication'); and
- an additional factor has been added to the list. The court may also consider 'the interest in freedom of expression and discussion of matters of public interest'.

The efficacy of these safeguards, and the defence overall, will depend largely on how the courts interpret s 29A(3) and how juries assess the errors of journalists.

Changes to statutory qualified privilege (s 30)

The most important change to statutory qualified privilege is that the Bill clarifies the court does not need to consider all the factors. A further provision has also been inserted, stating that it is the jury's responsibility to determine whether the defence is established. This change is welcome, but it is ultimately a matter of judicial discretion as to how much the existing approach to s 30(3) is relaxed.

Pleading back plaintiff's imputations for defence of contextual truth (s 26)

Background

The convoluted defence of contextual truth allows defendants to plead contextual imputations. The defendant is protected if the contextual imputation is *'substantially true'* and the imputations on which the plaintiff relies do not further harm his or her reputation *'because of the substantial truth of the contextual imputations'*.

6 This is similar to the approach taken by the UK Supreme Court in the recent decision of *Serafin v Malkiewicz* [2020] UKSC 23.

Changes to s 26 reformulate the defence of contextual truth to make it clear that, in order to establish the defence, a defendant may 'plead back' any substantially true imputations originally pleaded by the plaintiff.

Potential effect

This change resolves confusion around whether defendants may 'plead back' and justify any of the plaintiff's imputations to establish the defence. It should end the practice of plaintiffs applying to amend and 'adopt' contextual imputations pleaded by the defendant, thereby depriving the defendant of the ability to rely upon them. However, we think a more radical solution exists. Incorporating contextual truth into the defence of justification would do even more to reduce confusion (especially for juries).

Damages (s 35)

Background

Section 35 of the *Defamation Act* provides for a maximum amount of damages for non-economic loss, but inconsistent interpretations have led to controversy in cases involving high damages awards.

The interpretation which honours the intended effect of the provision holds that s 35 sets a scale or range of damages, with the maximum amount reserved for the worst kinds of damage.[7] However, in *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154, the Victorian Court of Appeal adopted a different approach. It held that s 35 did not fix the upper limit of a range or scale, but rather acted as a cap that could be set aside when aggravated damages are awarded. This had the effect of 'blowing open' the limit on damages for non-economic loss.

The Bill makes it clear that the maximum amount of damages for non-economic loss operates as scale or range of damages, rather than a cap. It states that the maximum amount should only be awarded in the most serious cases. Second, it requires awards of aggravated damages to be made separately to any award for non-economic loss.

Potential effect

These changes will reduce general damages awards,[8] give defendants greater certainty about their financial risk exposure in defamation litigation and help clarify the true 'cost' of aggravation. The changes also guard against aggravated damages becoming punitive (despite this being prohibited).

Extension of limitation period and single publication rule (Schedule 4)

Background

Presently, a defamation action must be brought within 1 year of the date of publication. Publication occurs when the material is received by a third party. The 'multiple publication rule' provides that each publication gives rise to a separate cause of action, subject to its own limitation period. This means that the limitation period for online publications is effectively open-ended, as the period is extended each time a new person views the publication.

Under the Bill, the one-year limitation period for bringing a defamation claim remains, but two salient changes have been made:

- first, the Bill inserts a 'single publication rule' similar to that in the UK. Where a defendant publishes an article and, at a later date, the defendant or an associate republishes substantially the same matter, time will have started running from publication of the first article; and
- second, a plaintiff is granted an automatic 56-day extension if they file a Concerns Notice in the final 56 days of the limitation period. The extension starts running from the date the Concerns Notice is filed. This additional period is aimed at giving the proposed defendant time to consider the concerns notice and also allows the aggrieved person to consider any offer to make amends.

Potential effect

The single publication rule will stop plaintiffs getting around the purpose of the limitation period by relying on later downloads of the same matter. The new rule is medium neutral but, as far as electronic material is concerned, publication will have occurred when the material was first uploaded or sent to a recipient.

The single publication rule differs from the UK equivalent because it extends not only to subsequent publications by the publisher, but to subsequent publications of substantially the same matter by associates of the publisher (such as employees and contractors).

7 See e.g. *Murray v Raynor* [2019] NSWCA 274 at [92] and [93].

8 For instance, in *Rush v Nationwide News Pty Ltd* (No 7) [2019] FCA 496, Wigney J awarded Geoffrey Rush damages for non-economic loss (including aggravated damages) in the amount of $850,000. Rush also received $1.98 million for loss of earnings. A court would no longer be able to set aside the maximum amount for non-economic loss or refrain from specifying an amount for aggravation.

Contributions & Comments

Contibutions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

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