

UNIFORM at last?

An overview of uniform, national defamation laws

By David Rolph

It is no understatement to suggest that the introduction of uniform, national defamation laws across Australia in 2006 is the most significant event in the history of Australian defamation law.¹

Before 2006, Australia had eight different defamation jurisdictions. The differences were significant. In some jurisdictions, such as South Australia and Victoria, the common law was the major source of defamation law; in some, such as Queensland and Tasmania, defamation law was codified. In others, like NSW, a defamation statute substantially modified the common law.

The substantive differences between these defamation laws may have encouraged 'forum-shopping' by plaintiffs. It certainly led to different outcomes when the same publication was sued upon in different jurisdictions.² The introduction of uniform, national defamation laws is, therefore, an important victory for common sense and efficiency.

UNIFORMITY

The promotion of uniform defamation laws is one of the stated objects of the new defamation legislation.³ A concern for uniformity also manifests itself in the new legislation in two concrete ways.

The first is the means by which each new *Defamation Act* deals with previous statutory interventions in defamation law (except for those in Victoria and Western Australia, where the statutory interventions were minimal). Rather than simply repealing those earlier pieces of legislation, each new *Defamation Act* states that the general law of defamation applies as if those statutes had never been enacted.⁴ The effect is that the general law of defamation applies (or, in the case of Queensland and Tasmania, is revived) across Australia as if no statutory modification had ever occurred, >>



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subject now to modification brought about only by the new legislation.

The second is the introduction of a statutory choice-of-law rule for publications occurring in more than one Australian 'jurisdictional area'. Under this choice-of-law rule, the substantive law applied to resolve a claim for multi-state defamation is that of the 'jurisdictional area' with which the publication as a whole has the closest connection. To determine which system of law has the closest connection with the publication, the court may take into account factors such as the plaintiff's place of residence, the extent of publication, and the extent of damage to the plaintiff's reputation within each relevant jurisdictional area.⁵ This statutory choice-of-law rule should promote uniformity of defamation laws within Australia, as well as removing the incentive to 'forum-shop' by plaintiffs.

However, the statutory choice-of-law rule does not affect the applicable choice-of-law rule for truly international torts, which is the *lex loci delicti* (the law of the place of the wrong).⁶ Given that defamation is committed wherever publication occurs, and publication occurs where a recipient receives and comprehends defamatory matter, there can be as many applicable systems of law as there are places where publication occurs.⁷ For a truly international defamatory publication, the statutory choice-of-law rule is of no assistance. There is still scope, therefore, for multiple defamation laws to apply to the publication of the same defamatory matter, particularly with the rise of internet technologies. However, there have been few cases of multi-state defamation relying upon publication within and outside Australia.

STANDING

One of the contentious aspects of the defamation reform process was the debate over standing to sue for defamation. The new legislation imposes restrictions on the rights of corporations to sue for defamation, as well as explicitly stating that there can be no actionable defamation of the dead.

In 2002, NSW introduced restrictions on the right of corporations to sue for defamation.⁸ These provisions have been substantially replicated in the uniform defamation laws. Now, as a general rule, corporations cannot sue for defamation. The only exceptions are not-for-profit corporations and genuinely small corporations, defined as those entities with fewer than ten employees.⁹ The reasons given for this important change are that:

- defamation law was intended to protect the reputation of natural persons only, not artificial entities;
- corporations should not enjoy the presumption of damage to reputation that defamation law allows;
- corporations are already entitled to protect their reputation by a number of causes of action, such as injurious falsehood, passing off and misleading and deceptive conduct (where proof of actual damage is an essential ingredient); and
- large corporations tend to have the financial resources to use non-legal means, such as marketing, to rehabilitate their reputations.

Except in Tasmania, the uniform laws also provide that no cause of action in defamation may be brought by or against a dead person or his or her personal representative.¹⁰ Defamation remains an exception to the general, statutory position that allows the survival of causes of action in tort.¹¹

LIMITATION PERIOD

In 2002, NSW introduced a limitation period of one year from the date of publication for claims in defamation.¹² The uniform laws have extended this limitation period throughout Australia.¹³ A provision has also been introduced that allows an extension of time for up to three years if the court deems that it was not reasonable to expect the plaintiff to commence proceedings within the one-year limitation period.¹⁴

This reduced limitation period is a significant departure from the general limitation period for claims in tort, which varies between three and six years, depending on the jurisdiction. The stated rationale for this change was to encourage plaintiffs to seek vindication of their damaged reputations as soon as possible.

THE ROLE OF JUDGE AND JURY

One of the difficult areas of defamation law reform has been the allocation of responsibilities between judge and jury in a defamation trial. At common law, the judge usually determined questions of law and the jury questions of fact, including the defamatory meaning of the publication, issues of fact relating to defences and the assessment of damages.

Prior to 2006, defamation practice throughout Australia varied markedly as to respective roles of judge and jury. In certain jurisdictions, such as the ACT and South Australia, defamation actions were tried by a judge sitting alone. In other jurisdictions, such as Victoria, juries determined the defamatory meaning and questions of fact relating to defences while a judge dealt with the balance of the issues. In NSW, under s74 of the *Defamation Act 1974* (NSW), the jury dealt with the issue of defamatory meaning alone, while the trial judge addressed all issues relating to defences and damages. Given the diversity of trial procedures that existed prior to 2006, it was perhaps not realistic to expect a uniform approach to the respective roles of judge and jury in a defamation trial in the new laws.

The 'uniform' laws attempt to solve this problem by allowing either the plaintiff or the defendant to elect to have the proceedings tried by jury (except in the ACT, the Northern Territory and South Australia, where no such provision exists).¹⁵ The effect is that, in jurisdictions where civil juries are not generally used and where juries are rarely used in defamation cases, parties can continue to have proceedings dealt with by a judge sitting alone.

Where defamation proceedings are tried by jury, the new laws prescribe that the jury is to determine whether the publication in fact defames the plaintiff, as well as issues relating to any defence.¹⁶ It is then for the trial judge, not the jury, to assess the damages payable to the plaintiff.¹⁷

It is true that, as the federal attorney-general noted when commenting on the SCAG proposal, the uniform laws do

not provide for a uniform trial procedure across jurisdictions. There may still be some scope for 'forum-shopping' by plaintiffs seeking a procedural advantage. However, the harmonisation of substantive defamation law should overwhelm any procedural advantage. Moreover, in the interests of achieving 'uniform' national defamation laws, the position adopted by the new laws is the most pragmatic option.

DEFENCES

The uniform laws introduce a range of statutory defences, which augment rather than supplant common law defences to defamation.¹⁸ One of the controversial changes to the statutory defences was to the defence of justification, which now requires a defendant to establish only the substantial truth of a defamatory imputation.¹⁹ It is no longer necessary for a defendant to establish the additional element of public interest or benefit, as was previously required in the ACT, NSW, Queensland and Tasmania.

A statutory defence of contextual truth has also been introduced,²⁰ in addition to the controversial *Polly Peck* defence at common law.²¹ There is a statutory defence of qualified privilege,²¹ in terms similar to those in s22 the *Defamation Act 1974* (NSW), augmenting the common law defence of qualified privilege. The statutory defence of 'honest opinion' replicates the three 'comment' defences under the *Defamation Act 1974* (NSW) of comment, comment of a servant or agent, and comment of a stranger.²³ There are

also statutory defences of absolute privilege,²⁴ publication of public documents,²⁵ fair report of proceedings of public concern,²⁶ innocent dissemination²⁷ and triviality.²⁸

REMEDIES

The uniform laws also introduce significant changes to the remedies available for defamation. Perhaps the most significant change is the capping of damages for non-economic loss at \$250,000.²⁹

At common law, defamation damages were expressed to be 'at large'. It was not merely the fact of a verdict in favour of a defamation plaintiff that was important; the quantum of damages needed to be 'sufficient to convince a bystander of the baselessness of the charge'.³⁰

During the late 1980s and early 1990s, there was widespread concern that the level of defamation damages was too high and, more particularly, disproportionate to the level of damages for non-economic loss in personal injury claims. This led the High Court in *Carson v John Fairfax & Sons Ltd* to allow a court to take the level of damages for non-economic loss in personal injury claims into account when assessing damages in defamation cases.³¹ This found statutory expression in NSW in s46A(2) of the *Defamation Act 1974* (NSW).

Recent tort law reforms, however, introduced the capping of damages for non-economic loss in personal injury claims, with a provision allowing for indexation. There was the real >>

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possibility that a disparity between the level of damages in defamation and personal injury claims could re-appear. This was particularly the case given that the High Court in *Rogers v Nationwide News Pty Ltd* effectively read down the scope of operation of s46A(2) of the *Defamation Act 1974* (NSW).³²

The solution adopted under the uniform defamation laws is the capping of damages for non-economic loss at \$250,000, with a provision allowing for indexation similar to that in the civil liability legislation.³³ Damages for non-economic loss in defamation claims may exceed this threshold if the court deems it appropriate to award aggravated damages.³⁴

One of the concerns raised about the capping of defamation damages is that it might not serve as a sufficiently strong disincentive to media outlets publishing defamatory matter. If media outlets know that their potential liability is, generally, limited, they might choose to bear the risk and absorb any payout as a cost of doing business.

This concern is strengthened by the fact that, under the new laws, exemplary or punitive damages can no longer be awarded for defamation.³⁵ This reflects the position that existed in NSW under the *Defamation Act 1974* (NSW), s46(3)(a). Prior to 2006, exemplary damages were available in all Australian jurisdictions except NSW. Although they were awarded sparingly, where the defendant's conduct amounted to a high-handed and contumelious disregard of the plaintiff's right to reputation, exemplary damages were nevertheless awarded.³⁶ Now, the distinctly punitive aspect of the award of defamation damages has been removed, leaving compensation for damage to reputation and injury to feelings the principal purposes of an award.

CONCLUSION

The changes to Australian defamation law brought about by the introduction of uniform laws are substantial and significant. It will not take long for their impact to be felt. It might take longer to assess their merits. ■

Notes: **1** The relevant Acts in each jurisdiction are *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2006* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); and *Defamation Act 2005* (WA). In the interests of space, reference will be made to the NSW legislation, except where there are differences. **2** For example, *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6; (1973) 22 FLR 181. **3** *Civil Law (Wrongs) Act 2002* (ACT), s115(a); *Defamation Act 2006* (NT), s2(a); *Defamation Act 2005* (NSW), s3(a). **4** *Civil Law (Wrongs) Act 2002* (ACT), s118(3); *Defamation Act 2006* (NT), s5(3); *Defamation Act 2005* (NSW), s6(3). **5** *Civil Law (Wrongs) Act 2002* (ACT), s123; *Defamation Act 2006* (NT), s10; *Defamation Act 2005* (NSW), s11. **6** *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491. **7** *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575. **8** *Defamation (Amendment) Act 2002* (NSW), s3, sch 1, cl 5. **9** *Civil Law (Wrongs) Act 2002* (ACT), s121; *Defamation Act 2006* (NT), s8; *Defamation Act 2005* (NSW), s9. **10** *Civil Law (Wrongs) Act 2002* (ACT), s122; *Defamation Act 2006* (NT), s9; *Defamation Act 2005* (NSW), s10. **11** See, for example,

Law Reform (Miscellaneous Provisions) Act 1946 (NSW) s2(1). Prior to the introduction of the SCAG proposal, Phillip Ruddock stated that he would consider legislating to reinstate the right of all corporations to sue for defamation and to allow claims for defamation of the dead at a federal level. **12** *Defamation (Amendment) Act 2002* (NSW), s4, sch 2, cl 2.2. **13** *Limitation Act 1985* (ACT), s 21B(1); *Limitation Act 1981* (NT), s12(1A); *Limitation Act 1969* (NSW), s14B; *Limitation of Actions Act 1974* (Qld), s10AA; *Limitation of Actions Act 1936* (SA), s37(1); *Defamation Act 2005* (Tas), s20A(1); *Limitation of Actions Act 1958* (Vic), s5(1AAA); *Limitation Act 2005* (WA), s15. **14** *Limitation Act 1985* (ACT), s21B(2); *Limitation Act 1981* (NT), s44A; *Limitation Act 1969* (NSW), s56B; *Limitation of Actions Act 1974* (Qld), s32A; *Limitation of Actions Act 1936* (SA), s37(2); *Defamation Act 2005* (Tas), s20A(2); *Limitation of Actions Act 1958* (Vic), s23B; *Limitation Act 2005* (WA), s40. **15** *Defamation Act 2005* (NSW), s21(1). **16** *Defamation Act 2005* (NSW), s22(2). **17** *Defamation Act 2005* (NSW), s22(3). **18** *Civil Law (Wrongs) Act 2002* (ACT), s134(1); *Defamation Act 2006* (NT), s21(1); *Defamation Act 2005* (NSW), s24(1); *Defamation Act 2005* (SA), s22(1). **19** *Civil Law (Wrongs) Act 2002* (ACT), s135; *Defamation Act 2006* (NT), s22; *Defamation Act 2005* (NSW), s25; *Defamation Act 2005* (SA), s23. **20** *Civil Law (Wrongs) Act 2002* (NSW), s136; *Defamation Act 2006* (NT), s23; *Defamation Act 2005* (NSW), s26; *Defamation Act 2005* (SA), s24. **21** *Caccavo v Daft* [2006] TASSC 36. **22** *Civil Law (Wrongs) Act 2002* (ACT), s139A; *Defamation Act 2006* (NT), s27; *Defamation Act 2005* (NSW), s30; *Defamation Act 2005* (SA), s28. **23** *Civil Law (Wrongs) Act 2002* (ACT), s139B; *Defamation Act 2006* (NSW), s28; *Defamation Act 2005* (NSW), s31; *Defamation Act 2005* (SA), s29. **24** *Civil Law (Wrongs) Act 2002* (ACT), s137; *Defamation Act 2006* (NT), s24; *Defamation Act 2005* (NSW), s27; *Defamation Act 2005* (SA), s25. **25** *Civil Law (Wrongs) Act 2002* (ACT), s138; *Defamation Act 2006* (NT), s25; *Defamation Act 2005* (NSW), s28; *Defamation Act 2005* (SA), s26. **26** *Civil Law (Wrongs) Act 2002* (ACT), s139; *Defamation Act 2006* (NT), s26; *Defamation Act 2005* (NSW), s29; *Defamation Act 2005* (SA), s27. **27** *Civil Law (Wrongs) Act 2002* (ACT), s139C; *Defamation Act 2006* (NT), s29; *Defamation Act 2005* (NSW), s32; *Defamation Act 2005* (SA), s30. **28** *Civil Law (Wrongs) Act 2002* (ACT), s139D; *Defamation Act 2006* (NT), s30; *Defamation Act 2005* (NSW), s33; *Defamation Act 2005* (SA), s31. **29** *Civil Law (Wrongs) Act 2002* (ACT), s139F(1); *Defamation Act 2006* (NT), s32(1); *Defamation Act 2005* (NSW), s35(1); *Defamation Act 2005* (SA), s33(1). **30** *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 per Lord Hailsham LC. **31** (1993) 178 CLR 44. **32** (2003) 216 CLR 327. **33** *Civil Law (Wrongs) Act 2002* (ACT), s139F; *Defamation Act 2006* (NT), s32; *Defamation Act 2005* (NSW), s35; *Defamation Act 2005* (SA), s33. **34** *Civil Law (Wrongs) Act 2002* (ACT), s139F(2); *Defamation Act 2006* (NT), s32(2); *Defamation Act 2005* (NSW), s35(2); *Defamation Act 2005* (SA), s33(2). **35** *Civil Law (Wrongs) Act 2002* (ACT), s139H; *Defamation Act 2006* (NT), s34; *Defamation Act 2005* (NSW), s37; *Defamation Act 2005* (SA), s35. **36** See, e.g. *Martin v Trustrum* [2003] TASSC 22; *Cullen v White* [2003] WASC 153.

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