



Australian Government

Attorney-General's Department

Outline of possible national defamation law

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Introduction: the need for a national law

Defamation law in Australia is constituted by a patchwork of common law and State and Territory statutes. The ALRC concluded in its 1979 report, *Unfair Publication: Defamation and Privacy*, that significant changes were needed 'in the substantive law governing rights of action and defence'. The ALRC concluded that 'the laws [were] complex and [conflicted] from one part of the country to another'. It recommended that there should be a codified, uniform law of defamation in Australia to replace the patchwork of existing statutes and case law.

The need for uniformity in defamation has generally been accepted. The issue has been more or less constantly on the Standing Committee of Attorneys-General (SCAG) agenda since 1980. The development of a national media and the internet makes differences between jurisdictions increasingly hard to justify. However, progress towards uniformity has been minimal.

Accordingly, the Australian Government proposes to develop a draft Bill for a national defamation law based on its existing constitutional powers. The Bill would be a code for defamation. The Australian Government agrees with the ALRC that codification of the law would greatly improve its accessibility to both lawyers and laypersons.

The elements of the code are outlined below.

Scope of the national defamation law: application provisions

The application provisions of the national law would ensure that the Act was limited to matters within Commonwealth constitutional power. Putting to one side the possibility of a reference of power to the Commonwealth, it is proposed that the Act would be limited primarily to defamatory publications made:

- in a territory
- in the course of trade and commerce among the States
- by the use of postal, telegraphic, telephonic and like services (defined to include radio, television and the internet)
- by a trading or financial corporation formed within the limits of the Commonwealth, or a foreign corporation, or
- in relation to the activities of a trading or financial corporation formed within the limits of the Commonwealth, or a foreign corporation.

The proposed law would thus be a code for most defamation proceedings. The only significant areas that would remain within State jurisdiction would involve some defamatory publications made by one individual against another, such as placing something on a notice board or spreading leaflets alleging corruption.

A reference of power from the States to the Commonwealth Parliament under s51(xxxvii) of the Constitution would, however, remove even these limitations. It would ensure that the Act would be a code for all defamation actions.

The causes of action

The Act would grant a right of action against any person who publishes matter which tends to:

- adversely affect the reputation of a person in the estimation of ordinary persons
- deter ordinary persons from associating or dealing with a person, or
- injure a person in his or her occupation, trade, office or financial credit.

The cause of action would arise against each publisher of the matter.¹ There would, however, be an exception for some unintentional publications.

To ensure that there are not a multiplicity of actions on the same subject, the Act would contain a provision similar to s9(3) of the *Defamation Act 1974* (NSW). That provision prevents a person who has brought proceedings in respect of the same matter from instituting any further proceeding for defamation except with leave of the court. This would accord with the recommendations of the ALRC report.

The Act would implement the ALRC's recommendation regarding defamation of the dead. A cause of action would be available to a representative of the deceased or a surviving spouse, parent, child, sibling against each publisher of defamatory matter. The action would only be available for publication within 3 years of death. Damages, however, would not be available; the remedies would instead be a correction order, declaration or injunction.

In addition, the Act would deal with the survival of actions in the manner recommended by the ALRC.

Defences

Truth and the public benefit

The Act would provide a defence to publication if it is true and for the public benefit. This would be identical in operation to the defence in New South Wales, Queensland, Tasmania and the Australian Capital Territory. The element of publication for the 'public benefit'² is designed to discourage defamatory statements about a person's private life. While there is some vagueness in the concept, the alternative of creating a separate right of action for invasions of privacy would raise policy issues extending beyond the scope of defamation law reform.

For the purposes of the defence, a matter would be regarded as true if the defendant establishes that the defamatory matter was in substance true.

¹ The Act would make clear that there was a single right of action for the publication of defamatory matter, regardless of the number of imputations it may contain.

² It may be the 'public benefit' element should require the defendant to show more than that the publication related to 'a matter of public interest' (as to which, see 'Honest and reasonable opinion').

Honest and reasonable opinion

The Act would provide a defence of honest and reasonable opinion on certain matters. To claim the defence, the defendant would have to show that:

- the published matter related to ‘a matter of public interest’
- it amounted to the defendant’s honestly held opinion
- the opinion was based on facts expressly or impliedly referred to in the matter, or facts known to the defendant and each recipient of the matter
- the facts were in substance true or were covered by absolute or qualified privilege, and
- a reasonable person aware of those facts *could* (not would) have formed the same opinion as the defendant.

The defence is narrower than the common law defence of fair comment because it protects only opinions and comments that a reasonable person might have formed. Thus, prejudiced, biased and grossly exaggerated opinions will receive no protection.

The definition of ‘matter of public interest’ would be based upon the topics identified in s14 of the *Defamation Act 1889* (Qld)³ and the ALRC report.

A separate defence would cater for defendants who are not authors of the published matter; for instance, a newspaper that publishes a letter to the editor. It would be a defence to show that:

- the published matter related to ‘a matter of public interest’
- it amounted to opinion
- it did not purport to be the opinion of the defendants, or their agents or employees, and
- there was no reasonable cause to believe that it was not the honest opinion of the author.

This defence is similar to s10(2)(b) of the *Defamation Act 1992* (NZ).

Absolute privilege

The Act would provide a defence to the publication of defamatory matter in the course of proceedings in Commonwealth, State and Territory legislatures and courts; royal commissions; Commonwealth administrative tribunals; and other bodies or circumstances identified by regulation. This may in some cases extend the common law defence of absolute privilege.⁴

³ Topics include the public conduct of a person who takes part in public affairs; the conduct of a public officer or public servant in the discharge of his or her duties; the merits of a case decided by a court, or the conduct of a judge, party, or a witness; and public entertainment, works of art and literary productions.

⁴ The *Parliamentary Privileges Act 1987* (Cth) and equivalent State and Territory legislation currently afford parliamentarians and others a defence of absolute privilege in relation to proceedings in parliament. There is no intention to limit the ambit of that defence.

Statutory qualified privilege: reasonable publication

The Act would provide a defence if the publication of the defamatory matter was reasonable in the circumstances. This would replace the common law defence of qualified privilege.

In determining whether the defendant's publication was reasonable in all the circumstances, the court could consider any or all of the following matters and such other matters as it thought relevant:

- whether the defendant believed in the truth of the published matter
- whether the published matter was in response to a previous attack on the defendant's reputation
- whether the defendant took reasonable steps to ensure the accuracy of the matter
- whether the defendant gave the plaintiff a reasonable opportunity to comment on the matter before it was published, and
- the extent of the publication.

The provision would thus be modelled on s22 of the *Defamation Act 1974* (NSW), but with different factors for the courts to consider.⁵ It is intended that some of the common law concerning qualified privilege would still be relevant to deciding whether the publication of the defamatory matter was reasonable; for example, a reference provided by an employer to one considering engaging a former employee would generally be treated as reasonable.

Fair report

The Act would create defences for the fair and accurate report of certain public proceedings or the fair and accurate copy or summary of a public document. It is intended that the defences would be similar to those in ss24 to 26 of the *Defamation Act 1974* (NSW) and ss128 and 129 of the *Civil Law (Wrongs) Act 2002* (ACT). The defence would not be available if the plaintiff can show that the defendant did not publish the matter in good faith for the information of the public or the advancement of education.

Triviality

The Act would create a defence if the circumstances of the publication were such that the defendant was unlikely to suffer harm. The defence would be based on s13 of the *Defamation Act 1974* (NSW). Unlike that provision, however, the Act would state that the circumstances of publication would exclude the character of the plaintiff. This would preclude any argument that the bad reputation of the plaintiff is an exculpatory circumstance.

⁵ In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 575, the High Court indicated that s22 of the *Defamation Act 1974* (NSW) ensured that the law of defamation in New South Wales did not place an undue burden on communications falling within the protection of the Constitution.

Innocent dissemination

The Act would create a defence for ‘distributors’, or employees or agents of such persons, who show that:

- they did not know that the published matter contained the alleged defamatory material, and
- it was reasonable for them, having regard to the nature of the publication and any facts of which they were aware, not to monitor the contents of the matter.

The defence resembles the defence of ‘innocent dissemination’ at common law but it would expressly cover new technology and situations (at least where they were not already covered by Commonwealth legislation).⁶ This would be done by creating a wide definition of ‘distributor’. However, the defence would not be available to persons who are authors, editors and commercial publishers (the latter being defined to include public broadcasting) and others who determined, or were concerned in the determination of, the content of the matter.

Other matters

Limitation period

Consistent with an emphasis on the speedy resolution of defamation actions, the Act would provide for a limitation period of 12 months from the date of publication. A court could, however, extend this period to a maximum of three years from the date of publication if it decided that it was just and reasonable to do so.

Actions to be heard by judge alone

The Act would require actions to be heard by a judge alone; juries would play no part. This can be expected to increase the speed and efficiency of trials. It reflects the current position in South Australia and the Australian Capital Territory.

Right of reply

The Act would create a strong incentive for defendants swiftly to publish a reply that would reach the same general audience as the original defamatory material. It would provide that a person claiming to be defamed may, within 14 days of becoming aware of the matter, request the defendant to publish, or cause to be published, in the same medium as the publication complained of, with substantially similar prominence, and at the earliest opportunity, a reply. If the defendant unreasonably fails to comply, and he or she loses the defamation action, the court would be required to increase any damages *and* to order the defendant to print such reasonable statement as the plaintiff seeks. Conversely, compliance with the plaintiff’s request would mitigate any damages.

⁶ At common law, distributors or vendors of a book or a newspaper (including printers) are not liable for defamation if they can demonstrate three things: they did not know that the publication was defamatory; their ignorance was not due to negligence; and they had no ground for supposing that the publication was likely to contain defamatory material. The position of internet service providers as innocent disseminators has not been the subject of significant Australian or English authority. Their liability under State and Territory laws is governed by Commonwealth legislation: clause 91 of Sch 5 of the *Broadcasting Services Act 1992* (Cth).

Correction orders

The court would be granted the power to make correction orders in addition to its power to grant injunctions, declarations and damages. The order would compel a defendant to correct a statement defamatory of the plaintiff. The effect of any correction order would generally be considered in awarding damages. The court could require that, as far as practicable, any corrections had substantially similar prominence to the original defamatory statement and would reach the same audience.

Jurisdiction of State and federal courts

State Supreme Courts and the Federal Court would be invested with concurrent jurisdiction to hear causes of action arising under the Act. Further thought is being given to whether all State and Territory courts which currently exercise jurisdiction, including magistrates courts, should be granted jurisdiction over causes of action arising under the Act. The avoidance of complexity suggests that jurisdiction should be conferred only on superior courts, whether State or federal.

Speedy resolution of proceedings

The court would be encouraged to facilitate the speedy resolution of defamation proceedings (for example, by exercising power to strike out claims that are not being expeditiously pursued for want of prosecution).