Defamation Reforms

The need for Reforms

The Uniform Defamation Laws came in force in Australia in 2005. Since then, a number of problems have been identified in the way in which some provisions were framed as applied by the Courts.

The Model Defamation Amendment Act 2020, also known as the Stage 1 Defamation Reforms (Reforms) commenced in New South Wales, South Australia, Victoria and on 1 July 2021 and apply to defamatory publications made after that date.

The principal purpose of the Reforms is to address concerns with the existing law and to ensure that there is an appropriate balance between freedom of speech and protection of reputation.

The key legislative changes are summarised below.

Mandatory Concerns Notices

New sections 12A and 12B now make it mandatory for plaintiffs to serve a Concerns Notice on potential defendants prior to commencement of defamation proceedings. These sections also bind the plaintiff to detail imputations alleged to harm plaintiff`s reputation and the plaintiffs are bound to plead imputations as set out in the concerns notice at trial. That is, if an imputation is not set out in the concerns notice, the plaintiff or applicant cannot rely upon it. This is contrary to the modern trend to allow liberal amendments provided they do not cause prejudice to the opponent subject also to the quick just etc provisions of the *Civil Procedure Act*.

It is now critical to get the imputations right, first time, in the concerns notice.

The publisher has 28 days after service of the concerns notice to make an offer to make amends. (section 14)

Serious harm test

New subsection 10A requires plaintiffs to prove that the defamatory matter has caused or is likely to cause serious harm to their reputation. Serious harm is not defined in the legislation and presumably it will depend on the particular circumstances of each case.

This section is aimed to filter out trivial and vexatious defamation claims and deal with issues of proportionality: *Bleyer v Google Inc* [2014] NSWSC 897. Trivial defamation matters tend to result in disproportionately high legal costs for both plaintiffs and defendants with low damages as well as placing a substantial burden on Court resources. Therefore, as a result of the introduction of this section the defence of triviality (section 33) is abolished. It would be superfluous if there is a serious harm threshold.

The introduction of this section may well create more problems than it solves as it will increase time and costs of the proceedings. This section requires the court to determine whether there is serious harm.

Defence of public interest journalism

New Section 29A introduces a public interest defence and is designed to deal with the perceived issue that media defendants rarely or never succeeded in establishing the section 30 defence (qualified privilege). The Attorney General Mark Speakman has referred to this section as '*one of the most significant reforms*' and it has been suggested that this defence offers a '*new dawn of free speech and public interest journalism*'.

Section 30 supposedly enshrines principles of good journalism and requires publishers to act reasonably in publishing potentially defamatory materials. For instance, this section inter alia, requires publishers to ensure that the publications are matters of public interest, take steps to verify the information in the matter published, distinguish between suspicions, allegations and proven facts and not be actuated by malice.

Section 29A has exactly mirrors the provisions of Section 30 and carried over some of the relevant factors that the court is to consider in establishing that defence. The critical part of this section is in the following terms:
'*It is a defence to the publication of defamatory matter if the defendant proves that –*
(a) the matter concerns an issue of public interest, and (b) the defendant reasonably believed that the publication of the matter was in the public interest.'

A question arises whether a publisher can have a reasonable belief that a publication is in the public interest if the statement is false. Therefore, it is at least arguable that no problems are solved. This is made worse by the fact that the section repeats most of the criteria from the old section 30, which everyone seems to acknowledge made no difference. For these reasons, the section may very well turn out to have no practical utility.

It is arguable that the intended result could have been achieved in a different way. Prior to the passage of the Uniform Defamation Laws in 2005, Queensland had a defence of *qualified protection-excuse* made in good faith (*Sections 16(1)(h) and 17 Defamation Act 1889* (Qld)). That defence could be established if the defendant could establish that the publication related to a matter of public interest and was made in good faith to give information to persons with or were believed on reasonable grounds to have an interest in knowing the truth as to make the publication reasonable in the circumstances.

Once defendants could prove these elements, the plaintiff had the onus to prove lack of good faith which was extremely difficult to establish. But surprisingly no consideration was given to reviving this section.

Defence of scientific or academic peer review

New defence in section 30A provides protection for publications in scientific or academic journals. This defence is designed to encourage robust discussion on scientific and academic matters.

The defendant is to prove that the matter:

- was published in a scientific or academic journal;
- relates to a scientific or academic issue; and
- an independent review on its scientific or academic merit was carried before the publication.

This defence will not stand if the plaintiff can establish that the defamatory matter was not published honestly for the information of the public or advancement of education.

While unobjectionable, how many cases have there been over the last 100 years against such article in such journals? Any?

Clarification on the operation of the cap on damages for non-economic loss

The Reforms resolve a long-standing issue about the correct construction of Section 35 and the relationship between aggravated damages and the cap on general damages. The new Reforms provide that the aggravated damages to be awarded separately and the statutory cap in section 35 (currently $421,000) operates as the upper limit of scale which means that the maximum amount will be only awarded in the most serious cases.

Clarification on the operation of contextual truth defence

The concept behind Section 26 is if a true and an untrue allegation are simultaneously published about someone and the truth of the true allegation is so significant that it overcomes the defamatory effect of the untrue allegation, then it provides a defence. Under the previous section 26, a defendant could not rely on the plaintiffs' own imputations as contextual imputations. As a consequence, it was exceedingly difficult for defendants to establish this defence. A clever pleader could draft the imputations so as to exclude any possibility of any contextual imputations for the defendant to rely upon.

Changes to s 26 reformulate the defence of contextual truth and clarifies that a defendant can rely on the plaintiffs' own imputations if they turn out to be true in order to establish the defence.

This change ends the practice of plaintiffs applying to amend and 'adopt' contextual imputations pleaded by the defendant, thereby depriving the defendant to rely upon them.

Under the new s 26 it no longer matters if the imputation is just a variant of what the plaintiff complains and a defendant is able to set up a broad, more general imputation.

Clarification on establishing the defence of honest opinion

Under the uniform model defamation laws there are three elements in the section 31 defence of honest opinion on section 31. In summary, the defendant must prove that the publication, first, relates to a matter of public interest, secondly, is based on sufficiently indicated proper material for comment and, thirdly, is the opinion of the defendant or of persons in the other categories mentioned in the section.

To establish proper material under the previous Act, the defendant needed to establish that the material was substantially true, or was published on an occasion of absolute or qualified privilege, or an occasion that attracted the protection of a defence under section 31 or section 28 or 29. It was probably the case under the previous legislation that the "sufficiently indicated" aspect was satisfied, for example, but hyperlinks to the material in question or by similar indications or that it was notorious.

A new s 31(5) has been introduced to explain when an opinion will be 'based on proper material'. It largely replicates the previously existing position but makes clear what will satisfy the "sufficiently indicated" aspect, by including a specific reference to it being "proper

material" if it is "accessible from a reference, link or other access point included in the matter (for example, a hyperlink on a webpage) or "notorious".

Single publication rule

Prior to the Reforms, in respect of online publications a new cause of action arose whenever the publication was accessed and downloaded. As a result, the one-year limitation period on online material was often, in practice, redundant. The consequence was what was known as the 'multiple publication rule'. This has been addressed in the Reforms by the introduction of s 14C to the Limitation Act 1969. Under the 'single publication rule', the start date of the limitation period for online publications will be the date that a publication is first uploaded or sent electronically to recipients (not the date it was downloaded). This applies when a subsequent publication is substantially the same as the first publication.

Stage 2 defamation reforms

The Stage 2 Defamation Reforms are underway currently and focus on two key issues:

1) the liability of internet intermediaries for publication of third-party content; and
2) whether the defence of absolute privilege should be extended to reports of alleged illegal conduct to police and statutory investigative bodies and reports of misconduct to employers and professional disciplinary bodies.

To sum up, while changes are welcome in some areas such as amendments to sections 26 and 35, it is arguable that there is a good chance that the new legislation to increase time and costs in defamation proceedings.

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