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Defamation law reform: the search for uniformity

Queensland's Attorney-General, Dean Wells, discusses the parameters for reform of defamation law

Debate has been raging through political and legal circles for many years about unifying the defamation laws in this country, so that freedom of speech is not inhibited by uncertainty and confusion about who can say what, without fear of litigation.

The laws of defamation represent an attempt to balance two important, and to some extent competing principles, each of which is inherently important to a democratic society. Broadly speaking, one is pushed by the press, and the other by the politicians. Freedom of the press (which, according to Thomas Jefferson, "cannot be limited without being lost") is essential to free and open debate in a democracy. It is the point of principle from where the media as a whole argues its position on defamation law reform.

The view traditionally put by the politicians is that freedom of the press to report must be tempered by protection of every individual's right to privacy. So it is we immediately arrive at the most difficult issue in relation to uniformity of the laws - the defence of truth - and the question of the desirability of having a public interest or public benefit qualification to this defence.

Another central question is that of reputation. If the principle intention of defamation laws is to protect the reputation of the citizen, is this best achieved by paying the claimant a large quantum of damages? Or would a correcting statement or broadcast, of equal or similar prominence to the original defamatory statement, do more to effectively rectify the alleged slur.

Is it possible to quantify damage to reputation in monetary terms? Does specific financial disadvantage need to be proved? Who should determine the quantum of damages so it best reflects the actual disadvantage suffered, rather than being based on inflated out-of-court settlements widely publicised in the media? Should there exist a provision for exemplary damages? Should the limitation period be altered? Should criminal defamation remain on the statue books?

Realistic Goals

All these questions were addressed by former Federal Attorney-General Gareth Evans during the last attempt at achieving uniformity. We have studied the Evans experience; this time round, our goals are more realistic, and our methods more workable.

We accept the reality that we will not get every jurisdiction to agree on every point. What we now have is three states in general agreement on some, and only some, of the key substantive issues. We expect this will result in uniformity on key issues between Victoria, New South Wales and Queensland. The discussion paper identifies justification, qualified privilege, correction orders and forum shopping as issues of substantive agreement, even at this early stage.

The result of reforms in these areas will be a more workable law in each of the three states. A degree of uniformity will have been achieved, and the laws will be more effective. Rather than being casinos for the rich, where litigants choose their table, and gamble for huge profits, the laws will be tilted more towards assuaging damaged reputations as expeditiously as possible, and setting damages at more realistic levels.

If the degree of uniformity outlined is attained, we should be able to put an end to forum shopping, and create a degree of certainty across the eastern seaboard which will be welcomed by media proprietors, journalists and the legal profession.

The joint discussion paper on defamation laws released in late August and endorsed by myself and my New South Wales and Victorian counterparts has been designed to stimulate debate within the community and specialist interest groups about alternatives for reform.

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Truth

In Western Australia, South Australia and Victoria, truth alone is a complete defence. In Queensland, Tasmania and the Australian Capital Territory, truth and public benefit must be proved. In New South Wales, the common law has been replaced by a statutory defence, section 15 of the Defamation Act 1974, which requires the defendant to establish:

(i) the imputation complained of is a matter of substantial truth, and

(ii) the imputation either relates to a matter of public interest, or is published under qualified privilege.

The provisions under which justification would become available as a defence are broadly agreed by the three states. To quote from the Queensland position as outlined in the discussion paper:

"Queensland and New South Wales are extremely reluctant to provide for truth alone.

However, in furtherance of the overall objective to attain uniformity, Queensland, like New South Wales, would be receptive to arguments in support of truth alone as a defence provided that appropriate measures are introduced to ensure that individuals are protected from unjustifiable revelations about their private affairs, except where the publication of such matters is genuinely in the public interest."

Retractions or apologies

Some form of retraction, mitigating damages, is considered desirable by all three jurisdictions. To again quote from the Queensland and New South Wales position, as published in the discussion paper:

"New South Wales and Queensland are considering the introduction of a facility for a plaintiff to make early application for an urgent, court ordered correction statement. It is proposed that, if a defendant elects to publish a retraction of the defamatory statement, or apology, or opportunity to put corrective material in terms and form as prescribed by the court, no or highly restricted damages be payable. The defendant would be able to elect not to publish the retraction and continue proceedings, at the risk of increased costs if successful."

It is further proposed that evidence of the defendant's acceptance, or non acceptance of any court ordered correction should not be admissible in court. This position is strongly supported by Victoria.

The success of this option will depend on procedural details yet to be worked out. The idea, however, that early involvement by the courts can assist in bringing the two parties together at an early stage, increasing the chance of an early settlement, is one which is recognised widely as having considerable merit.

Qualified privilege

In New South Wales the Common Law defence of qualified privilege as outlined in Section 22 of the Defamation Act has extended application. It states:

"(1) where in respect of matter published to any person

(a) the recipient has an interest or apparent interest in having information on some subject;

(b) the matter is published to the recipient in the course of giving to him information on that subject; and

(c) the conduct of the publisher in publishing that matter is reasonable in the circumstances, there is a defence of qualified privilege for that publication.

(2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that person has that interest.

(3) Where matter is published for reward in circumstances in which there would be a qualified privilege under subsection (1) for the publication if it were not for reward, there is a defence of qualified privilege for that publication notwithstanding that it is for reward."

Dean Wells

In Queensland, Section 377 of the Criminal Code provides a lawful excuse for the publication of defamatory material within certain defined categories. These include:

- publication by a person having lawful authority over the plaintiff;
- publication for the purpose of seeking remedy or redress from a person in authority;
- publication for the protection of the interests of either party to the communication;
- publication for the public good;
- publication in answer to enquiries made by persons having an interest in knowing the truth;
- publication for the purpose of giving information to persons having such an interest in knowing the truth as to make the defendant's conduct in making the publication reasonable in the circumstances;
- publication on the invitation or challenge of the plaintiff;
- publication in order to answer or to refute some other defamatory matter published by the plaintiff; and
- publication in the course of, or for the purposes of the discussion of some subject of public interest, the public discussion of which is for the public benefit.

It is up to the plaintiff to defeat the privilege by proving the publication was made with an absence of good faith.

On the Queensland position, in relation to qualified privilege, the discussion paper states:

"any proposal for a uniform statutory provision should not represent a restriction on the existing provisions in the Criminal Code which accord qualified privilege to publication of material in a wide range of circumstances".

New South Wales argues strongly for the retention of a provision of reasonableness as outlined in its Section 22 of the Act and states:

"New South Wales supports the proposal for uniformity in the major statutory defences including qualified privilege. With this aim in mind close liaison with other jurisdictions will be required before final options for change are settled".

Victoria considers there exists the basis for agreement on the nature and form of a defence of qualified privilege.

Forum selection, juries and awards

All three States agree forum shopping should be restricted. Matters to be considered in changing the rules to this effect include principle place of publication, occurrence of the most significant damage, availability of witnesses, and likely expense.

Queensland and New South Wales favour larger juries of up to 12. Victoria sees no problem with smaller juries but states in the discussion paper:

"... this is a procedural matter not affecting the achievement of legislation based on uniform principles of law".

New South Wales and Queensland consider juries should determine liability and the applicability of defences and that judges should decide the quantum of damages. While Victoria believes the task of addressing damages should remain with juries it is willing to allow a judge to give a jury guidelines.

Public figure test

Queensland, New South Wales and Victoria unanimously reject the introduction of a public figure test. The discussion paper notes that Queensland, Victoria and New South Wales:

"... unreservedly believe that the reputation of public figures should not be afforded less protection than other persons in the community. The choice to become a public figure should not mean that the public has an unmitigated right to scrutinise every facet of such person's life".

The acceptance of a public figure test necessarily creates a risk of unfair invasion of the individual's private life. Even though the proposal would only extend to the pro-

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person, be in a position to exercise control of:

- The operations of a company that broadcasts programs;
- The management of any broadcasting station operated by a company that broadcasts programs;
- The management of the programs broadcast by a company; or
- The selection or provision of programs to be broadcast by a company the broadcasts programs.

The control provisions of Section 62 are similar to the provisions of regulations made under the previous Broadcasting Act. As they have not been the subject of any significant or contentious interpretations by the now defunct Broadcasting Tribunal or the courts, their importance could easily be underestimated. They can have an inhibiting affect on management arrangement linked with overseas shareholdings.

Section 62 also limits the aggregate voting power of overseas persons to not more than 15 per cent of the total voting powers exercisable by all the members of the company.

However, with the approval of the Minister, overseas persons may, in respect of a sound radio broadcaster, have shareholding interests which, when aggregated are between 15 per cent and 25 per cent of the total voting powers.

The Minister has first to be satisfied that the overseas person would not be a person who would, either alone or in association with any other person, actually exercise the types of control set out in Section 62(l)(a), (b), (d) or (d).

The Minister must also be satisfied that the holding would not, in all the circumstances, be contrary to the public interest.

The Minister may give approval subject to conditions. The Minister may withdraw his approval and any condition may be revoked, varied or added to by the Minister. Complex tracing provisions capture significant shareholding interests held indirectly.

Section 64 provides for the Minister to approve excessive holdings by overseas persons where he is satisfied that the overseas person intends to dispose of the interest or reduce it or take any other action to comply with the Act and needs time to do so.

Such an approval may include conditions and can be withdrawn at any time. The conditions may be revoked, varied or added to by the Minister. In practice the Minister is likely to impose a time limit but no other special conditions.

A special provision enables an insurance company which is an overseas person to be deemed not to be an overseas person for the purposes of Section 62 (and for the purpose of determining whether any other company is an overseas person for the purposes to Section 62). This requires the approval of the Minister who is to be satisfied that the shareholding interest was acquired out of funds usually held by the insurance company for investment in New Zealand. He also has to be satisfied that the insurance company will not actually exercise the control set out in Section 62(1) (a), (b), (c) or (d). The Minister must also be satisfied that the shareholding would not, in all the circumstances, be contrary to the public interest.

Special provisions have been made for overseas companies financing broadcasters. Most banks in New Zealand are overseas persons.

'The Minister must also be satisfied that the holding would not....be contary to the public interest'

An overseas person is not prevented by Section 62 from holding note, debenture, mortgage or other security in which a broadcaster is a debtor. Nor is that overseas person prevented from exercising any of the rights or remedies under the security.

Where the security confers voting rights which are exercisable:

- during a period in which any payment is in default;
- on the proposal to reduce the capital of the company;
- on a proposal that affects rights attached to the debenture mortgage or other security;
- on a proposal to wind the company up;
- on a proposal for the disposal of the whole of the property, business, and undertaking of the company;
- during the winding-up of the company, an overseas person is not prevented from holding or exercising those voting rights.

The holding of any such notes, debentures, mortgages or other security or such voting rights is deemed not to be the control of the exercise of voting power or the holding of a shareholding interest.

Section 68 makes it lawful for an overseas person to continue holding a shareholding interest which was held before 17 May 1989.

While there are no restrictions on the participation of overseas persons as directors of a broadcaster as such, care has to be taken that they are not in a position to exercise the control set out in Section 62(1)(a), (b) (c) and (d). There are no special controls on the aggregation of ownership of broadcasters. However the relevant competition legislation, the Commerce Act, applies.

tection of defamatory material which involved a matter of public concern, a grey area emerges as to the distinction between matters of public concern and matters of purely private concern.

It is anticipated that similar questions arise in defining who is a *"public figure"*.

Limitation period

Victoria remains committed to its existing six-year limitation period. However, Queensland and New South Wales consider a shorter limitation period would be beneficial. Both States recommend the limitation period be reduced to six months from the date the plaintiff first learned of the publication with an absolute limitation period of three years.

In support of the Queensland and New South Wales position, the discussion paper states:

"... it is argued that the very nature of a defamation action requires that a person take action to restore their reputation as soon as becoming aware of the defamatory publication. Any further delay in commencing action could result in problems in obtaining evidence or locating witnesses and may impose unnecessary hardship on publishers."

Criminal Defamation

New South Wales and Victoria are in favour of retaining some form of criminal defamation. Queensland is considering abolishing it.

In New South Wales, Section 50 of the Defamation Act provides that a person shall not without lawful excuse publish a matter which is defamatory of another living person, either with intent to cause serious harm, or with knowledge that the publication will cause serious harm to any person. The section can only be acted on with the consent of the Attorney-General.

In Victoria, the Director of Public Prosecutions has discretion in the filing of presentments. Queensland considers there to be little purpose in retaining criminal defamation because of its extremely limited use in the past.

Contempt

Queensland, New South Wales and Victoria are all considering the creation of a new tort, committed where a publication prejudices a trial to the extent that it has to be delayed or aborted. Liability would depend on establishing either that:

- the publisher ran a deliberate risk of aborting the trial; or
- there was serious editorial or managerial indifference to the duty to establish risk minimisation procedures.