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amation Law Reform on the Agenda Again: Proposed Reforms in New South Wales

Sally Barber examines controversial proposals for changes to defamation laws

The Carr Labor Government in New South Wales has foreshadowed reform to defamation law as one of the planks of its tort law reform program, which will be introduced by legislation in the Spring session of Parliament.

At a speech given at the Sydney Institute on 9 July 2002, Premier Carr referred to the complexity of defamation law and the high stakes involved in the protection of individual reputation resulting in long and expensive litigation and stated that the reforms are "about striking a balance between the community's right to know and protecting reputations". The Premier's stated view was that "too often damages awards for loss of reputation – non-economic loss – are excessive". He outlined a set of proposals including:

- making greater provision for resolution of disputes without litigation;
- detailing a process for the use of corrections and apologies, with costs penalties as an incentive, to settle claims and avoid litigation;
- reducing the limitation period for commencing proceedings from 6 years to 12 months;
- capping compensation for non-economic loss to the maximum amount allowed in personal injury cases, presently $350,000; and
- barring corporations and statutory bodies from bringing actions in defamation.

The Premier summed up by saying the proposed reforms *"will bring the same commonsense approach to defamation that we've brought to other areas involving civil damages"*[1] .

The proposals stem from a report by a task force on defamation law reform commissioned by the Attorney-General to overhaul the *Defamation Act 1974*, comprised of Professor Reg Graycar, New South Wales Law Reform Commissioner and Professor of Law at University of Sydney, Professor Ken McKinnon, Chairman of the Australian Press Council, Michael Sexton SC, New South Wales Solicitor General and Maureen Tangney, Director Legislation and Policy Division of the Attorney General's Department.[2]

BACKGROUND

The *Defamation Act 1974* (NSW) (**Act**) last had significant amendments made to it in 1994.[3] Those amendments:

- limited the role of the jury in defamation trials to determining whether the pleaded imputations are conveyed by the matter complained of, and, if so, whether they are defamatory of the plaintiff (resulting in the advent of separate "section 7A jury trials" on meaning), with defences and damages to be determined by the judge alone; and
- made it a requirement that, in assessing damages, the trial judge is to take into consideration the general range of damages for non-economic loss in personal injury awards in NSW (including those regulated by statute).

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PROPOSALS AND COMMENTARY

In respect of the proposals foreshadowed by the Premier, reducing the limitation period for commencing proceedings is a sensible reform in circumstances where the object of defamation proceedings is restoration of the plaintiff's reputation. Arguably, the harm is immediate and so too should be the seeking of redress. The task force relied on this argument and empirical research showing that over 80% of actions are commenced within 6 months of publication in making its recommendation, which mirrors that of the NSWLRC's 1995 Report on Defamation.[4]

The recommendation for a cap on non-economic loss contrasts with the current position under section 46A of the Act, which is expressed as a guide only. It is not clear whether the statutory maximum is intended to apply to each imputation successfully found or to each proceeding overall[5], but a cap will increase certainty and make any cost benefit analysis regarding settlement options easier to undertake. However, the reality is that there have been very few awards by judges alone for non-economic loss which exceed $350,000[6], so that the cap may have little effect on damages awards.

There are many arguments for the proposal that the right to sue in defamation be limited to natural persons, including that other remedies are available to corporations for damage caused by a defamatory publication eg injurious falsehood, passing off and misleading or deceptive conduct under the *Trade Practices Act*, and that some corporations use the threat of defamation proceedings to silence critics[7] (see eg the "McLibel case"). Although section 65A of the *Trade Practices Act* prevents proceedings against media organisations under section 52 of that Act, section 52 can be a very effective alternative to defamation proceedings[8], particularly in respect of the availability of injunctive relief, especially where the defamatory publication is sourced from a competitor. Whilst Premier Carr's view is that corporations and statutory bodies can defend their reputations in the media and by "winning the public debate"[9], that argument only really applies to large corporations. Liability in defamation is often easier to establish than the alternative causes of action. For instance, proof of malice is required to establish injurious falsehood. Removal of the right to sue in defamation may therefore result in serious financial damage to a corporation, for which there is no remedy[10]. There are no good arguments for allowing statutory bodies to sue in defamation, given their role in society and the importance of citizens being able to speak freely about them.

The recommendations of the task force on defamation law reform, in addition to that which was foreshadowed by the Premier, involve the inclusion of a statement of objects and principles in the Act, including "to promote speedy and non-litigious methods of resolving disputes wherever possible"[11].

The recommendations also include a proposal for a new part in the Act called "Resolution of Disputes without Litigation" which will constitute the first substantive part of the Act and provide for a detailed process for corrections and apologies and, where appropriate, monetary compensation, to be available before proceedings are issued. It is not clear precisely how this process would be implemented and the extent to which it would be mandatory, but the report refers to "a clear statutory preference for a pre-trial, non-litigious process"[12]. There is much to be said for implementing such a process, particularly given that most plaintiffs sue to restore their reputations and not for damages[13].

The task force recommends that costs penalties (more onerous than simply costs following the event) should attach to unreasonable failure to resolve the matter (eg. for a plaintiff, not accepting an offer of correction or apology where the offer is considered to have been reasonable; for a defendant, not making such an offer where it seemed appropriate to do so)[14]. Whilst this seems an admirable proposal, the question of how a judge would interpret reasonableness of a party's refusal to settle arises.

The task force also recommended that it should be a defence (where an action proceeds to that stage) that an offer was made as soon as practicable, the defendant remained ready and willing to perform the terms of the offer, and the offer was reasonable in the circumstances[15]. Again, the success of

this reform will depend on judges' interpretation of what is a reasonable offer.

It was recommended that where proceedings had been issued, mediation should be encouraged wherever possible as an aid to resolution of disputes, such mediation to be conducted by an outside dispute resolution process, and that a practice direction should contain a list of accredited/authorised mediators[16].

The task force also recommends amending the statutory defence of qualified privilege (section 22) to make it a defence which is workable for the media, rather than the toothless tiger it currently is in a media context. There is only one reported case where a mass media defendant has successfully been able to rely on that defence, and the case involved a very unusual set of circumstances[17]. The task force proposes that there be added to section 22 a list of factors the Courts are to consider when assessing reasonableness, the requirement to demonstrate which is currently the downfall of most media attempts to rely on the defence. The factors are as follows:

- the extent to which the subject matter is a matter of public interest;
- the extent to which the matter complained of concerns the performance of the public functions or activities of the plaintiff;
- the nature of the information;
- the seriousness of the imputations;
- the extent to which the matter distinguishes between proven facts, suspicions and third party allegations;
- the urgency of the publication of the matter;
- the sources of the information and the integrity of those sources;
- whether the matter complained of contained the gist of the plaintiff's side of the story and, if not, whether a reasonable attempt was made by the publisher to obtain and publish a response from the plaintiff; and
- any other steps taken to verify the information in the matter complained of[18].

The Australian Press Council further proposed that section 22 be amended by adding a phrase into the beginning of the section, so that it reads as follows: "In the determination of whether the conduct of the publisher is reasonable under Subsection (1) *in the light of the duty of the press to publish matters of public interest* the following matters are relevant", because the Council believes this addition would have the effect of drawing the judiciary's attention to the fact that newspapers have an obligation to keep readers informed and that judgments have to be made about how carefully and comprehensively the newspaper conducted its inquiries in the limited time available before publication[19]. This no doubt stems from the perception, at least by media defendants, that the test of reasonableness as currently applied by the Courts is unrealistically onerous.

Some members (2 out of 4) of the task force expressed concern that the proposed list to be added to section 22 might not be seen as moving sufficiently far enough away from the current approach (and there is merit in that view) and propose therefore that, in relation to the discussion of political and government matters only, an additional provision in the following terms be inserted: "There is a defence of qualified privilege for a publication concerning government and political matters" and then makes a non-exhaustive list of what would constitute such matters[20].

The effect of such an amendment would be a statutory broadening of the common law qualified privilege defence in relation to publications concerning government and political matters, abolishing the requirement of reasonableness which has posed such a barrier to mass media reliance on any form of the qualified privilege defence[21].

Under the section of the report dealing with case management, the role of juries and the section 7A trial, the task force recommended that the plaintiff should be required to take the necessary steps to bring a matter on for trial and that there be a default process if no action is taken after 12 months, whereby the matter lapses and the action is struck out automatically (in contrast to Part 32A Supreme Court Rules). Where an action lapses for want of prosecution, the task force recommended that there should be no order for costs. However, the task force recommended that a defendant be able to apply for costs, in which event a plaintiff could also apply for the matter to be reinstated. Otherwise, the Court should have a discretion as to whether the plaintiff should be given leave to reinstate an application once it has lapsed[22].

The task force recommended that there should be no change to the current process under which the section 7A trial is heard by a judge with the jury, and the defences and damages hearing takes place separately before a judge alone. Professor McKinnon dissented on this point, in line with a widespread view held by media defendants that the section 7A trial process introduced by the 1994 amendments to the *Defamation Act* have increased the complexity and expense involved in defamation proceedings[23].

Broadening the defence of protected report by creating a specific statutorily conferred form of protection for publication of certain third party statements, because of a perceived (and, if reasonableness continues to be interpreted restrictively, real) risk that even the revised section 22 would not protect publishers in respect of reporting defamatory third party statements. This would be achieved by making amendments to sections 24 and 25 of the Act, by adding to the list of proceedings of public concern the subject of a protected report defence "proceedings of a press conference given by a public official with the authority of a government body or instrumentality (including a minister of the Crown)" and adding to the list of official and public documents and records the subject of a protected report defence "a press release issued by a public official with the authority of a government body or instrumentality (including a minister of the Crown)". That would reduce the number of defamation proceedings founded on re-publication by the media of proceedings of press conferences and press releases made by third parties, and relieve the media of the obligation to check the veracity of such third party statements prior to publication.

In closing, the task force expressed its view that the proposals set out in its report could form the basis for discussion with the States and Territories, with a view to a further attempt to bring about national reform (there have been many attempts by the Standing Committee of Attorneys General, dating back to 1980)[24]. The task force's view is that any such reform process should include a re-think by NSW of the rule that makes the imputation the cause of action in that state, the only state where that rule applies. There have been contrasting views expressed about this

proposal[25], but arguably the resulting requirement of precision, whilst potentially increasing the number of interlocutory proceedings, simplifies the jury trial on meaning.

The proposals were welcomed by some Attorneys General of other States[26].

CONCLUSION

The focus of the review by the task force was stated to be to strike a balance between the free flow of information on matters of public interest and importance and the protection of individual reputations.

The detail of the government's proposals, in the form of a Defamation (Amendment) Bill, are yet to be seen, and no doubt intense lobbying by all interested parties is taking place. It is to be hoped any amendments implemented assist in achieving the balance sought by the task force's stated aims, which can only be of benefit to both plaintiffs and defendants.

The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

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1 "Cost penalties: big stick in defamation reform plot", Gazette of Law & Journalism, 24 July 2002; Press Release issued by Premier Carr, 9 July 2002; "Carr moves to restrict payouts for defamation", S. Gibbs and J. Pearlman, The Sydney Morning Herald, 10 July 2002.

2 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, p.(i).

3 *Defamation (Amendment) Act 1994* (No 93).

4 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, p.12; NSWLRC Report 75 (1995) – Defamation: Recommendation 37, p.204.

5 "Cost penalties: big stick in defamation reform plot", Gazette of Law & Journalism, 24 July 2002.

6 "Change for change's sake will not serve the defamed", R.Coleman, The Sydney Morning Herald, 15 July 2002.

7 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, pp.13-14.

8 See eg *Re: FAI General Insurance Co Limited and RAIA Insurance Brokers Limited* (1992) 108 ALR 479.

9 "Carr moves to restrict payouts for defamation", S. Gibbs and J. Pearlman, The Sydney Morning Herald, 10 July 2002.

10 See comments of Peter Bartlett as reported in "Mixed reaction to NSW reform package", A. Crossland, The Australian Financial Review, 12 July 2002.

11 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, p.(i)).

12 Ibid, pp.(ii), 6); "Cost penalties: big stick in defamation reform plot", Gazette of Law & Journalism, 24 July 2002.

13 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, p.3.

14 Ibid, p.(ii).

15 Ibid, p.(ii).

16 Ibid, p.(ii)).

17 Tobin & Sexton, Australian Defamation Law and Practice, 14,090.

18 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, pp.(iv)-(v).

19 Ibid, p.(v).

20 Ibid, pp. (v)-(vi).

21 See, in relation to government and political matters *Lange v ABC* (1997) 189 CLR 520 at 574.

22 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, pp.11-12.

23 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform pp.8-9; "Change for change's sake will not serve the defamed", R.Coleman, The Sydney Morning Herald, 15 July 2002; "Defamation reformer presses on", K. Marshall, The Australian Financial Review, 19 July 2002.

24 NSWLRC Discussion Paper 32 (1993) – Defamation, paras 1.10-1.18.

25 See eg "Justice Levine says defamation law is not working: 'The nonsense must end'", Gazette of Law & Journalism, 1 September 1999; NSWLRC Report 75 (1995) – Defamation, paras 4.2-4.6).

26 "Push for defamation law unity", K. Marshall, The Australian Financial Review, 12 July 2002; "NSW plan 'doesn't go far enough'", K. Marshall and "Attorneys-general face full agenda for two-day meeting", K. Towers, The Australian Financial Review, 19 July 2002. "Cost penalties: big stick in defamation reform plot", Gazette of Law & Journalism, 24 July 2002; Press Release issued by Premier Carr, 9 July 2002; "Carr moves to restrict payouts for defamation", S. Gibbs and J. Pearlman, The Sydney Morning Herald, 10 July 2002).

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The Media Ownership Bill – A Divided Senate

Raani Costelloe provides an update on the cross media ownership debate.

The Senate Environment, Communications, Information Technology and the Arts legislation committee (**Committee**) released its Report on the *Broadcasting Services Amendment (Media Ownership) Bill 2002* (**Bill**) on 19 June 2002. The Bill was introduced into Parliament in late March 2002 and was immediately referred to the Committee. The Committee invited submissions and held public hearings at which it heard from interested parties.

The Bill proposes to amend the *Broadcasting Services Act 1992* (**BSA**) by repealing media-specific foreign ownership restrictions and creating an exemption to the cross-media ownership restrictions which would permit a person or company controlling a commercial radio licence, a commercial television licence and/or a newspaper in the same licence area (each a **media operation**) provided that separate editorial processes are maintained between the individual media operations.

The Report is in two parts:

- one part being the view of Government Senators comprising the majority of the Committee which supports the Bill subject to some recommendations; and
- the other part being the dissenting view of the minority Committee members of the Australian Democrats and Australian Labor Party (**ALP**) which rejects the Bill and calls for a broader inquiry into the media industry.

The Bill therefore faces a difficult passage through the Senate given that the Government requires the support of members of opposition parties in the Senate to ensure that it is enacted, particularly the ALP and the Australian Democrats. While the ALP has indicated support for the repeal of media-specific foreign ownership restrictions while opposing the cross-media ownership amendments, the Government has said that it will only deal with foreign ownership and cross-media together in one package and not separately.

CURRENT CROSS MEDIA & FOREIGN OWNERSHIP RESTRICTIONS

The BSA presently prevents any one person controlling more than one of the following in any geographic licence area:

- a commercial free-to-air television licence;
- a commercial radio licence; or
- a major newspaper.

The BSA contains specific foreign ownership restrictions with respect to free-to-air and pay television licences, including:

- **free-to-air television**: foreign persons must not be in a position to **control** a free-to-air television licence and the total of foreign interests must not exceed **20%**;
- **pay television**: foreign interests are limited to a **20%** company interest in a pay television licence for an individual and a **35%** company interest in aggregate.

A person is regarded to be in a position to exercise control of a licence, company or newspaper if the person has company interests exceeding **15%**. Company interests can be shareholding, voting, dividend or winding-up interests. The Australian Broadcasting Authority (**ABA**) may also have regard to other non-company interest factors in determining the issue of control.

In addition to the BSA, there are controls on foreign investment in the media under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**). In summary:

- **all media**: **all direct** (ie. non-portfolio) proposals by foreign interests to invest in the media sector irrespective of size are subject to prior approval under the Government's foreign investment policy on a **national interest** basis. Proposals involving **portfolio** share holdings of **5%** or more must also be approved;