

LEGISLATION NOTE: DEFAMATION ACT 2005 (WA)

By Megan Ashford

Introduction

The *Defamation Act 2005 (WA)* (the 'Act') took effect on 1 January 2006, (s2), significantly affecting some aspects of defamation law in Western Australia.

The Act is Western Australia's contribution to an Australia wide implementation of almost uniform,¹ mirror legislation to modify and reform the law of defamation.² It is the result of decades of calls for reform, addressed in Western Australia as early as 1979,³ and most recently in 2003.⁴ Specifically it is the manifestation of an intergovernmental agreement signed by the Attorneys General of all States and Territories.⁵

This note is intended to draw attention to the more significant changes to defamation law in Western Australia effected by the Act. Consequently, discussion of some aspects of the Act will be in greater detail than others.

Objects of the Act

The broad aim of the Act is to clarify and simplify the common law of defamation. This is indicated by the long title which states that the purpose of the Act is to:

- § modify the general law relating to the tort of defamation; and,
- § repeal a number of dated acts⁶; and,
- § amend the *Criminal Code*⁷.

¹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 September 2005 5162, 5164, 5178-5180 (S.E. Walker, Nedlands)

² Mirror legislation has been enacted in all States, except the Northern Territory and Australian Capital Territory.

³ Law Reform Commission of Western Australia, *Report on Defamation* (Perth : The Law Reform Commission of Western Australia, 1979)

⁴ Western Australian Defamation Law Reform Committee, *Committee Report on Reform to the Law of Defamation in Western Australia* (Perth : Western Australian Defamation Law Reform Committee, 2003)

⁵ Explanatory Memorandum, Defamation Bill 2005 (2005) (WA) ; Western Australia, Parliament. Standing Committee on Uniform Legislation and Statutes Review, Report 4, *Defamation Bill 2005* (Hon Simon O'Brien MLC, Chairman) (October, 2005), 31

⁶ *Libel Act 1843 (Imp)*, *Newspaper Libel and Registration Act 1884 (WA)*, *Newspaper Libel and Registration Act 1884 Amendment Act 1888 (WA)*, *Slander of Women Act 1900 (WA)*; s46.

⁷ *Criminal Code Act Compilation Act 1913 (WA)* (the 'Criminal Code')

Section 2 of the Act lays down four specific objectives within this general aim:⁸

- 1) To enact uniform defamation laws throughout Australia, s2(a); and,
- 2) To curb defamation laws where they intrude upon free expression and publication about matters of public interest and importance, s2(b); and,
- 3) To provide fair and effective remedies to persons whose reputations have been damaged by the publication of defamatory matter, s2(c); and,
- 4) To provide efficient, alternative means of dispute resolution to litigation, s2(d).

Cause of Action

It is necessary to begin by noting that s6(2) states that the Act will only affect the general law of defamation so far as the Act expressly or impliedly provides. General law is defined to cover both common law and equity, (s4 'general law').

Distinction between slander and libel abolished

The first important modification to the law of defamation is the abolition of the distinction between slander and libel, (s7(1)). Slander occurred when the defamation was communicated in a transient form, while in libel it was communicated in a more permanent form.⁹ The effect of the act is to create a single cause of action, 'defamation', and remove the requirement to prove 'special damage' or material loss in slander cases.

'Defamation' is not defined, leaving the common law definition unaltered; it is something that exposes a person to ridicule, causes people to avoid him or her or tends to lower his or her reputation in the eyes of the world¹⁰. This accords with s6(2), that the Act modifies only certain aspects of the law.

Corporations may not sue

Perhaps the modification with the greatest potential impact is contained in section 9. It says that a corporation does not have a cause of action for a defamation regarding a defamatory matter about the corporation. Public bodies

⁸ Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 2005 4130 (J.A. McGinty, Attorney General)

⁹ Gillooly, M, *The Law of Defamation in Australia and New Zealand* (Sydney : Federation Press, 1999), 3

¹⁰ *Berkoff v Burchill* [1997] EMLR 139, 146, *Boyd v Mirror Newspapers Ltd* [1980] NSWLR 449, 453-3

are also prohibited from suing in defamation, s9. On the definition of 'public body', the total number of artificial entities prohibited from bringing an action in defamation is quite substantial. A 'public body' is defined to include local government bodies and governmental or public authorities created by law, (s9(6) 'public body'). A corporation is defined to include those incorporated under domestic or foreign law, (s9(6) 'corporation').

A defamatory 'matter' is defined extremely broadly to include gestures, pictures, the printed and spoken word, whether communicated by visual, oral, written or electronic means, whether published privately or publicly, (s4 'matter' (a)-(e)). There is nothing that will not fall into the 'catch-all' of s4 'matter' (e), 'any other thing by means of which something may be communicated to a person'.

The blanket prohibition on corporations suing for defamation is only alleviated by one exception that 'excluded corporations' may sue. A corporation will fall into the exclusion if it is formed for charitable objects, not for the purpose of obtaining financial gain for its members (s92(a)). Alternatively, an excluded corporation will be one with fewer than 10 employees (or the part time equivalent), where the legal person is closely related to the natural person, and not related to any other corporate body, (s9(2)(b)).¹¹ Neither 'excluded corporation' may be a public body.

This provision aims to realise one of the objects of the Act;¹² to ensure that the law of defamation doesn't impose unreasonable limitations on freedom of expression, particularly with regard to matters of public interest and importance, (s3(b)). While the total number of bodies prevented from suing is expansive, debate in parliament focussed on its effect on corporations. It is clear that behind this provision lies an intent to prevent large and wealthy corporations from issuing SLAPP (strategic lawsuits against public participation) writs.¹³ It is also a consideration that the reputation of an artificial entity is worth less than the reputation of a natural person when public interest in a matter is in the balance¹⁴.

Part of the reasoning behind the somewhat arbitrary delineation of corporations that may and may not sue, is the availability of alternative causes of action open to corporations. They may rely on the tort of negligent misstatement, or the broad range of actions and remedies available under the *Trade Practices Act 1975* (Cth). Corporations and public bodies may well be forced to rely on these alternatives should the media and other bodies take advantage of their inability to sue in defamation.¹⁵

¹¹ *Ibid.*

¹² It is also the result of WADLRC, *Committee Report Recommendations* 4, 5 and 6, ii-iii.

¹³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 2005, 5186 (J.A. McGinty, Attorney General)

¹⁴ WADLRC, *Committee Report*, 9, McGinty, J, Address to Defamation Seminar, Murdoch University, (2003) <http://www.ministers.wa.gov.au/mcginty/docs/speeches/DEFAMATION.pdf> (29 March 2006)

¹⁵ Richards, R, 'Defamation law reform: past and present', (2003) 30(10) *Brief* 6, 7

However, the Act is explicit that while the corporation as an entity may not sue, a natural person associated with a corporation may sue if the matter defames him or her as an individual at the same time as it defames the corporation, (s9(5)).

While it is certainly important that public debate should not be stifled, it seems somewhat harsh that a corporate reputation cannot be protected, when the law of defamation exists to do just that.

Defences

Defences available under the Act are not exclusive. A defendant may rely on any defence available outside of the Act, (s24(1)).

Under the Act, the defendant may rely on the defence of substantial truth, (s25). Something is substantially true if the substance of it is not materially different from the truth, (s4 'substantially true'). Alternatively, the defendant may argue that the contextual imputations in the defamatory matter are substantially true and that the defamatory statement does not further harm the plaintiff's reputation in context, (s26).

The defendant may rely on the defence of publishing public documents, (s28(1)). A public document is defined in s28(4). It broadly includes any document or report published by a parliament, a government, a court or tribunal.

The defendant may also rely on the defence of publishing a fair report of public concern, (s29(1)), providing the matter was originally in a report of a proceeding of public concern, the defendant's publication was a fair copy of the original and the defendant had no knowledge that the original was not fair, (s29(2)). The definition of a 'proceeding of public concern' is defined in great detail in s29(4)(a)-(p), (5).

Defences of absolute and qualified privilege are available under the Act, (ss27, 30 respectively), as are the defences of honest opinion, (s31), innocent dissemination, (s32) and triviality (s33).

Remedies Available to the Plaintiff Under the Act

Injunctions

The Act does not consider the remedy of injunction, most likely because the Committee received no submissions on the matter, nor did it feel that there was a

need to reform this aspect of the law.¹⁶ In the absence of specific provisions, the equitable remedy of injunction is still available at the court's discretion to prohibit initial, or restrain further publication of defamatory material, (s6(2)).

Damages

Damages remain the primary remedy available to a plaintiff. However, in contrast to its silence on the remedy of injunction, the Act has extensively modified the law relating to damages. This is indicated by Part 4, Division 3 "Remedies", which is concerned solely with damages.

Generally, the Act states that the amount of damages awarded must bear some "rational" and "appropriate" relationship to the plaintiff's loss, (s34). This merely codifies the common law rule that damages are proportionate to the injury sustained by the plaintiff.¹⁷

Exemplary and Punitive Damages

Under the new legislation, exemplary and punitive damages for defamation are abolished, (s37). The rationale is that civil proceedings are not the appropriate forum for punitive or exemplary measures. Where a defamation is so serious as to warrant punitive measures, the defendant should be subject to criminal proceeding with criminal penalties.¹⁸ Naturally, with criminal consequences at stake, the defendant should also be entitled to have the matter proved at the criminal standard of proof; beyond reasonable doubt.

Section 37 should be read with s36, in which the Act makes it irrelevant to consider the state of mind of the defendant in a civil matter.¹⁹ This links with the amendments to the *Criminal Code* contained in Schedule 4 of the Act, (s47). The new section 345 of the *Criminal Code* "criminal defamation" makes it an offence to publish a defamatory matter knowing it to be false or without regard to the truth or falsity of the matter.²⁰ The defendant's intent to cause serious harm or without having regard to whether it will cause serious harm, is an element of the offence.

¹⁶ WADLRC, *Committee Report*, 27-28

¹⁷ *Coyne v Citizen Finance Ltd* (1991) 99 ALR 252, 254, Gillooly, *The Law of Defamation*, 280, WADLRC, *Committee Report*, 9

¹⁸ Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 September 2005 5516 (J.A. McGinty, Attorney General), WADLRC, *Committee Report*, Recommendation 33, viii, 31, *Carson v John Fairfax & Sons* (1993) 113 ALR 577, 611

¹⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 September 2005 5487 (J.A. McGinty, Attorney General).

²⁰ Section 53 and chapter XXXV are repealed. Section 345 makes criminal defamation a crime with a penalty of 3 years imprisonment, or, a summary conviction with a penalty of 12 months imprisonment and a fine of AUD\$12,000.

Compensatory Damages

In defamation, compensatory damages have the purpose of both vindication and compensation.²¹

Subject to s34, the Act doesn't affect the amount of damages that may be awarded for economic loss, (s6(2)). Consequently, the plaintiff may be compensated accurately with a sum of money equivalent to his loss.²²

However, the Act modifies the amount of damages that may be awarded for non economic loss, (s35). Damages for non economic losses are generally not easily quantifiable because the loss itself is not tangible. The Act imposes a cap at an annually adjusted AUD\$250,000.00 for non economic loss, (s35(1)).²³ It appears that the cap has been introduced in part to acknowledge that the plaintiff's loss in defamation is lower on a scale of values than a plaintiff's loss in personal injury matters. Awards of damages should reflect this.²⁴

It is doubtful whether the cap will have any serious impact on awards of damages in Western Australia. The cap is merely a maximum amount that can be awarded, and traditionally awards in Western Australia are lower than in other states. For example, in the Western Australian case *Todd v Swan Television*,²⁵ the court awarded AUD\$70,000.00 in damages.²⁶ By contrast, in New South Wales the plaintiff was awarded a total of AUD\$420,000.00 in *Jarratt v John Fairfax Publications Ltd*.²⁷ However, with a cap set so much higher than actual awards, Western Australian plaintiffs are potentially better off than they were under common law.

Aggravated Damages

Aggravated damages are usually, but not exclusively, awarded to compensate the plaintiff where the defendant's conduct caused further harm.²⁸ They are awarded at the court's discretion, (s35(2)), and by virtue of s35(2), they may be awarded for non economic loss. This means that there is the potential for sums greater than the statutory cap to be awarded in some cases.

²¹ *Uren v John Fairfax* (1966) 117 CLR 118, 150

²² Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 September 2005 5484 (J.A. McGinty, Attorney General)

²³ Contrary to Recommendation 29, WADLRC, *Committee Report*, viii, 28, 29

²⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 September 2005 5483 (J.A. McGinty, Attorney General). This received approval of the majority of the High Court of Australia (Mason CJ, Deane, Dawson, and Gaudron JJ) in *Carson v John Fairfax & Sons Ltd* (1993) 113 ALR 577, 587. Toohey, Brennan and McHugh JJ dissented, (613-4, 600, 628-9).

²⁵ (2001) 25 WAR 284

²⁶ Richards, 'Defamation law', 7

²⁷ [2001] NSWSC 739

²⁸ Gillooly, *Law of Defamation*, 283, *Carson v John Fairfax & Sons Ltd* (1993) 113 ALR 577, 581

Traditionally, damages are assessed with regard to injured feelings as well as loss of reputation.²⁹ The Law Reform Commission of Western Australia ('LRCWA') criticised this, saying that damages should only compensate for a damaged reputation³⁰. The Act does not appear to have acted on this criticism, and by maintaining the court's discretion to award aggravated damages, it is likely that the court will still consider the emotional distress of the plaintiff when awarding damages.

Single lump sum for multiple causes of action

At common law, damages are usually awarded as a lump sum for each individual cause of action. In defamation actions the common law is more flexible, making it possible for damages for multiple causes of action to be awarded as a single lump sum, whether it is multiple imputations in the one publication, or publication of the one matter in several jurisdictions.³¹

The Act both modifies the common law approach by allowing the plaintiff only one cause of action where multiple imputations are contained in the one matter, (s8). Where the same imputation is published in multiple jurisdictions, the plaintiff may have damages assessed as a single lump sum, (s39). It is particularly appropriate to codify this approach having regard to the likelihood that one publication could appear in multiple states and territories.

Mitigation

The defendant may mitigate the sum of damages payable in an unlimited number of ways.³² The Act provides a non exhaustive list of examples (s38(1)), such as whether the defendant has made an apology, or published a correction, and whether the plaintiff has already recovered some form of compensation, or instituted proceedings for another publication of similar defamation.

Jury Participation

While the Act permits either party to elect to have proceedings tried by jury, (s21(1)), it will not affect the award of damages. Damages will be determined by the judicial officer involved, (s22(3)).

²⁹ *Carson v John Fairfax & Sons Ltd* (1993) 113 ALR 577, 597

³⁰ WADLRC, *Committee Report*, 28

³¹ Gillooly, *Law of Defamation*, 270

³² S38(1) and (2), Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 September 2005 5488 (J.A. McGinty, Attorney General).

Offer of Amends

Section 38 appears to refer to 'offer to make amends' procedure in Division 1 of Part 3, "Resolution of civil disputes without litigation".

The Act provides for non litigious means of resolving defamation disputes by permitting the defendant to offer to make amends for publishing a matter that may or may not be defamatory, (s15). This 'offer' must comply with the requirements laid down in the Act; it must be in writing (s15(a)), contain an offer to publish a correction (s15(d)) and pay expenses reasonably incurred by the plaintiff(s15(f)). It may also include (but is not limited to) an offer to publish an apology (s15(g)(i)) and to pay compensation for economic and non economic losses (s15(g)(iii), s15(2)).

For the defendant, the advantages in this division are numerous. An offer is made without prejudice, unless otherwise stated, (s13(4)). An apology is not an admission of fault or liability, (s20). Making an offer of amends may mitigate the amount of damages for which a defendant may be liable, (s38).

For the plaintiff, there is the advantage of swift resolution, and public vindication. There is also the very real possibility that rejecting a reasonable offer of amends may provide the defendant with a defence to the matter, (s18(1)).

While not strictly remedial, this procedure accords more with the object of vindicating the plaintiff, and, is a more appropriate remedy for a damaged reputation, than mere pecuniary compensation.³³ It falls completely in line with the recommendations made by LRCWA.

Limitation Periods

As a result of the *Limitation Act 2005 (WA)*, which commenced on 15 November 2005³⁴, a cause of action must be brought within one year from the time that the defamatory matter was published.³⁵ Under the *Limitation Act 1935 (WA)* actions for slander had a two year limitation period,³⁶ and actions for libel only one year.³⁷

³³ WADLRC, *Committee Report*, 4-5

³⁴ *Limitation Act 2005 (WA)*, s2

³⁵ *Limitation Act 2005 (WA)*, ss15, 8

³⁶ *Limitation Act (1935) (WA)*, s38(1)(a)(ii)

³⁷ *Newspaper Libel and Registration Act 1884 Amendment Act 1888 (WA)*, s5

Miscellaneous Provisions

Part 5 of the Act addresses various miscellaneous issues.

Where a document or part of a document contains a statement that a particular person published, produced, printed or distributed it, it will be evidence of that fact in defamation proceedings, (s41).

Where proceedings concern whether a person has committed an offence, proof that a person was convicted of the offence by an Australian or foreign court will be conclusive evidence, (s42(1)). The contents of documents which go to prove conviction for an offence will be admissible to identify the facts on which the conviction is based, (s42(2)). A conviction includes a finding of guilt, but not a conviction that has been set aside, quashed, or pardoned, (s42(3)).

While a person will not be excused from answering questions or discovering or producing documents on the grounds that it may incriminate them in proceedings for criminal defamation, the answers to questions or documents produced will be inadmissible as evidence in proceedings for criminal defamation, (s43).

Serving documents on a natural person may be effected by personal service, service by facsimile, or by post to a specified address. In the absence of a specified address, documents may be to the last known residential or business address, (s44(1)(a)). Service on a body corporate is effected by leaving documents with a person apparently or actually over the age of 16, posting documents to head office, or the registered office, or principal office, or any other address specified, or sending documents by facsimile, (s44(1)(b)).

Section 45 makes provision for regulations. Section 46 repeals certain legislation, referred to previously. Section 47 amends the Criminal Code. Section 48 provides for the application of the Act to certain causes of action.

Conclusion

While there are no cases yet on the new Acts, the interpretation of the Act remains uncertain. It will be interesting for corporations and practitioners alike to see what, if any, judicial commentary is handed down on the provisions preventing corporations and other public bodies from having a cause of action in defamation.

For those who retain the right to a cause of action, the potential for offers of amends may provide a more satisfactory means of resolving a dispute for both the defendant and plaintiff. Alternatively, it will be interesting to observe the amounts awarded for damages under the new legislation.

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