

Defamation Reforms

By Parisa Hart

The Uniform Defamation Laws came in to 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, Queensland and the Australian Capital Territory 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

Sections 12A and 12B make it mandatory for a plaintiff to serve a 'concerns notice' on a potential defendant prior to commencement of defamation proceedings. Proceedings cannot be commenced until 28 days after the plaintiff has served the concerns notice. The concerns notice must identify the allegations and evidence the plaintiff seeks to rely upon.

The effect of these provisions is that if an imputation is not set out in the concerns notice, the plaintiff cannot then seek to rely upon it when proceedings are commenced. The change altered the previous practice which allowed amendments provided they do not cause prejudice to the opponent (subject to s 56 and following of the *Civil Procedure Act 2005*).

The potential defendant has the opportunity, within the 28-day period after service of the concerns notice, to make an offer to make amends (s 14). If the offer is accepted, the plaintiff cannot then assert an action for defamation in respect of the same matter.

Serious harm test

A new element is introduced by s 10A which requires a plaintiff to prove that



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the defamatory matter has caused or is likely to cause serious harm to his or her reputation. Serious harm is not defined and, presumably, whether it arises will depend on the particular circumstances of each case.

This provision is designed to filter out trivial or vexatious defamation claims and deal with issues of proportionality: see *Bleyer v Google Inc* [2014] NSWSC 897. Trivial defamation matters tend to result in disproportionately high legal costs for both plaintiffs and defendants, compared with the low damages occasioned, as well as placing a substantial burden on court resources. A consequence of the introduction of this provision is that the defence of triviality (s 33) is abolished.

This provision requires the court to determine whether serious harm has been occasioned. This is intended to be determined as soon as practicable before the

trial, in order to avoid unnecessary time and costs where this element cannot be satisfied or the claim is, in fact, trivial. It is to be seen whether the need to determine this element will result in a less costly or more efficient proceeding.

Defence of public interest journalism

Section 29A introduces a new, public interest defence. It is available where a defendant can demonstrate that the publication concerns an issue of public interest and the defendant reasonably believed that they were acting in the public interest in making the publication.

The amendment is designed to deal with the perceived difficulties of defendants rarely establishing the s 30 defence of qualified privilege.

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

A question likely to arise is whether a publisher can have a reasonable belief that a publication is in the public interest where the statement is false. It is not obvious that the amendments adequately address that situation.

Defence of scientific or academic peer review

A new defence is provided in s 30A which gives protection for publications in scientific or academic journals. This defence is designed to encourage robust discussion on scientific and academic matters.

To establish the defence, the defendant must 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 out before the publication.



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

While this amendment appears uncontroversial, this change does not appear to have been prompted by some particular flaw in the existing legislation. Historically, there have been few cases in relation to such publications.

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 s 35 and the relationship between aggravated damages and the cap on general damages. The Reforms provide that the aggravated damages are to be awarded separately and the statutory cap in s 35 (currently \$421,000) operates as the upper limit of scale. This means that the maximum amount will be only awarded in the most serious cases.

Clarification on the operation of contextual truth defence

By s 26 there is a defence where, if a true allegation and an untrue allegation are published simultaneously, the truth of the true allegation can be so significant that it overcomes the defamatory effect of the untrue allegation. Under the previous s 26, a defendant could not rely on the plaintiff's own imputations as contextual imputations. An appropriately drafted pleading could frame the imputations so as to exclude any possibility of any contextual imputations for the defendant to rely upon. As a consequence, it was difficult for a defendant to establish this defence.

The changes introduced to s 26 reformulate the defence of contextual truth and clarify that a defendant can rely on the plaintiff's own imputations, if they turn out to be true, in order to establish the defence.

This change is likely to result in the end of a plaintiff applying to amend and to 'adopt' the contextual imputations pleaded by the defendant, thereby depriving the defendant of the ability to rely upon them.

Clarification on establishing the defence of honest opinion

Under the Uniform Defamation Laws there are three elements to the defence of honest opinion in s 31. In summary, the defendant must prove that the publication, first, related to a matter of public interest, secondly, was based on sufficiently indicated proper material for comment and, thirdly, was the opinion of the defendant or of persons in the other categories mentioned in the section.

A new s 31(5) has been introduced to explain when an opinion will be 'based on proper material' for the purposes of the second element. It largely replicates the previously existing position but the amendment makes clear what will satisfy the 'sufficiently indicated' aspect, by including a specific reference to it being 'proper material' if the material on which it is based is 'accessible from a reference, link or other access point included in the matter (for example, a hyperlink on a webpage)' or is '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

Stage 2 Defamation Reforms are currently being considered. They will 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.

Conclusion

The changes introduced by the Reforms are welcome, particularly in areas such as the amendments to ss 26 and 35. However it remains to be seen whether all changes, for example the serious harm test introduced by s 10A, will result in reduced time and costs in defamation proceedings. **BN**