

The Commonwealth plan for reforming defamation law in Australia

Introduction

In March 2004, the Commonwealth Attorney General released a short paper, *Outline of possible national defamation law (the Outline paper)*. The Commonwealth has given the States and Territories until the July 29–30 meeting of the Standing Committee of Attorneys-General (SCAG) to unanimously agree to amend the key aspects of their laws along the lines of the Outline paper. If they fail to do so, the Commonwealth has said it will develop legislation to override State and Territories' defamation law. Due partly to constitutional limitations, any such legislation would leave some aspects of defamation law in the hands of the States and Territories.¹ However, defamatory statements published via the media, including television, radio, commercial newspapers and the internet would certainly be covered by any Commonwealth law.

The Outline paper does not contain draft text of a Bill, but rather indicates the Commonwealth's preferred position on resolving some of the points of difference between the various jurisdictions, in particular with regard to defences to defamation actions.

After giving a brief explanation of the characteristics of defamation law in Australia, this paper briefly reviews the major proposals contained in the *Outline paper*.

What is defamation?

Defamation occurs where one person communicates (hereafter 'publishes') material that damages the reputation of another.² Publication may be by virtually any means — including the spoken or written word and pictures. The publication must reach a person other than the person defamed.

There are a number of technical elements that must be proved for a civil defamation³ action to succeed under common law, but historically the publication must convey imputations⁴ about the plaintiff that are:

- likely to injure the reputation by exposing the plaintiff to hatred, contempt or ridicule
- capable of lowering the plaintiff in the estimation of right-thinking members of society — that is, it must be disparaging in the sense that there is an imputation that the plaintiff is somehow blameworthy or at fault; or
- capable of making people shun or avoid the plaintiff.

These 'causes of action' have been somewhat modified by state and territory legislation, but essentially remain the same.

The purpose of defamation law is usually characterised as being 'to strike a balance between the protection of reputation and free speech'.⁵ Even if the imputations are defamatory, there are a number of defences that may legally excuse the publication of the material in question. The defences vary across jurisdictions, but generally include:

- that the publication was 'justified' — that is, the facts alleged are true or, in some jurisdictions, that they were true *and also* the subject matter was of public interest or public benefit
- that the publication represented a 'fair comment' — that is, the material represented an statement of opinion about a matter of public interest⁶

- that the publication was covered by 'absolute privilege' — for example, statements made in parliamentary or judicial proceedings
- that the publication was covered by 'qualified privilege' — this covers a range of matters including 'fair and accurate reporting' of certain public events or meetings of public interest. It also extends to the relatively new and somewhat uncertain doctrine concerning communication about government or political matters laid down by the High Court in *Lange v ABC*;⁷ and
- a range of other defences such as innocent dissemination and triviality.

Defamation law in Australia

Queensland and Tasmania have codified their defamation law — the entire body of law is governed by legislation. In NSW and the ACT, the causes of action are largely governed by the common law, but legislative defences have been introduced.⁸ Defamation law in the other jurisdictions is mainly governed by the common law with only more minor aspects set out in legislation. There is no Commonwealth legislation on defamation at present.

In 1976, the Australian Law Reform Commission (ALRC) was asked to review defamation law having regard to, among other things, 'proposals for uniformity between the laws of [the States and Territories]'. The resulting report, *Unfair Publication*, concluded that defamation law in Australia was both 'inefficient in vindicating reputation ... and unduly impedes the flow of information on public affairs'.⁹ It recommended that a new

law be developed that was ‘uniform throughout Australia [and] contained in a single statute without the necessity to resort to earlier decided caselaw’.¹⁰

Prompted by the ALRC report, the SCAG worked on a uniform national defamation law during the early 1980s. However, reform stalled later in the decade when agreement could not be reached in such key areas as the defence of ‘justification’ and the definition of ‘defamatory matter’. Whilst sporadic activity was undertaken by SCAG in the 1990s, relatively little progress was made on a national level. In 2003, SCAG had reportedly agreed to a series of key principles for defamation law,¹¹ but a failure to produce any model provisions led to the tabling of the *Outline* paper by Commonwealth Attorney-General in March 2004.

The major Commonwealth proposals

Probably the most significant proposals in the *Outline* paper are the proposed codification of defences (points 3-9 below). For the sake of convenience, proposals relating to causes of action are dealt with first.

1. A cause of action would lie against a person who publishes material which tends to:

- adversely affect the reputation of a person in the estimation of ordinary persons
- deter ordinary persons from associating or dealing with a person, or
- injure a person in his or her occupation, trade, office or financial credit.

The above points define what is a ‘defamatory matter’ and is taken directly from the 1979 ALRC report. A recent report to the West Australian Government (the *WA Report*) also recommends the same causes of action as the Commonwealth.¹²

The first two dot points largely reflect existing Australian law. However, the third cause of action is contained only in the Tasmania and Queensland Codes, and these

only refer to injury in a ‘profession or trade’.¹³ If implemented, this third cause of action would probably allow for a defamation suit to be based on a publication that *does not* impugn a person’s or company’s personal or professional reputation.¹⁴ By comparison, protection of reputation is at least in theory at the heart of the common law of defamation. Neither the *Outline* paper nor the *WA report* make any comment about *why* the common law should be extended in this way.¹⁵ The proposal has been criticised in the press because it would potentially make it more difficult for the media to report business news.¹⁶ However, these criticisms are only really valid if it is difficult to mount a recognised defence to a defamation action based on such reporting.

2. In the case of alleged defamation against a deceased person, a cause of action would be available to a ‘representative’ of the deceased or a surviving spouse, parent, child, or sibling against each publisher of defamatory matter, provided the offending material was published within three years of death. Monetary damages, however, could not be awarded — the remedies available would include a correction order, declaration or injunction. Again this seems to be derived from the ALRC report. The ALRC favoured the idea on the grounds that an ‘unjust attack’ on a recently deceased person may produce ‘considerable distress’ for their relatives. No jurisdiction in Australia currently allows for anyone other than the person¹⁷ defamed to commence a defamation suit.¹⁸ The *Outline* paper also proposes that actions should survive the plaintiff’s death. Tasmania is the only jurisdiction that allows for this.¹⁹

3. A well-known defence under both common law and legislation is that of ‘fair comment’ on a matter of public interest.²⁰ Probably the major point of controversy in the *Outline* paper is the requirement that the comment would have to be fair *and* reasonable – as the paper explains:

The defence is narrower than the common law defence of fair comment because it protects only

opinions and comments that a reasonable person *might* have formed [based on the facts explicitly or implied referred to in the material]. Thus, prejudiced, biased and grossly exaggerated opinions will receive no protection [emphasis added].

Whilst the common law test is that whether any fair minded person could honestly express the opinion in question on the proved facts,²¹ ‘the law makes considerable allowance for the prejudice and bias to be found even in generally fair minded persons’.²² Note that the allowance for prejudice or bias does not extend to the situation where the making of the comment was motivated by malice.

In its submission²³ in response to the *Outline* paper, the University of NSW Communications Law Centre cited its research and suggested that, at least on some issues, a significant proportion of the population thought that holding a different opinion²⁴ from their own was *not reasonable*. The implications of this research, if accurate, is that the concept of what is a ‘reasonably’ held opinion is somewhat subjective. Whether this ‘subjectivity’ issue might be mitigated through having defamation actions heard by judges (as the *Outline* paper proposes) is speculative.

4. At common law, the so-called ‘justification’ defence only requires that facts contained in the relevant publication be true. This defence is available in Victorian, SA, WA and the NT. The *Outline* paper proposes that the defence also requires that the publication is for public benefit—this being the defence operating in Queensland, Tasmania and ACT legislation.²⁵ According to the Commonwealth, the ‘public benefit’ requirement is designed to discourage defamatory statements about a person’s private life. On this same issue, the *WA report* comments:

unless it was the price of national uniformity we do not support the addition of a public interest requirement. In our view that requirement can only be justified in the interests of protecting privacy. But those interests are best

protected by a law specifically directed to privacy rather than attempting to indirectly protect privacy through the law of defamation.²⁶

On the issue of privacy and the justification defence, the *Outline* paper states:

While there is some vagueness in the (public benefit) concept, the alternative of creating a separate right of action for invasions of privacy would raise policy issues extending beyond the scope of defamation law reform.

5. Under the common law, the general situation is that persons ‘republishing’ defamatory material are also potentially liable — for example, newspapers publishing defamatory letters to the editor. However, if the original author (for example, the writer of the letter) would have been entitled to the ‘fair comment’ defence, the republisher is also protected by the defence in certain circumstances. The *Outline* paper proposes that the defence be available where it can be shown that the material:

- related to ‘a matter of public interest’
- amounted to opinion
- did not purport to be the opinion of the defendants, or their agents or employees, and
- there was no reasonable cause to believe that it was not the honest opinion of the author.

As the *Outline* paper notes, this proposal corresponds closely with the defence in New Zealand under paragraph 10(2)(b) of the *Defamation Act 1992* (NZ). It seems reasonable to allow for some explicit defence on the issue. However, it is worth noting that the proposal would presumably allow a newspaper to publish a letter or opinion piece knowing that its author may well be liable to a defamation action²⁷ without incurring any liability themselves.

6. Another significant proposal is to replace the common law defence of ‘qualified privilege’ with a statutory one. Essentially, the common law recognises that a defence exists

where a state of reciprocity exists — *both* the person responsible for the defamatory publication and its recipient have a recognised legal, social or moral duty or a legitimate interest²⁸ in the matter contained in the publication. The *Outline* paper says nothing about the reciprocity issue — presumably it assumes reciprocity — and concentrates on placing obligations on the publisher to try to ensure the thrust of the material is reasonably accurate in order to determine whether publication was ‘reasonable in the circumstances’. The defence is modelled on NSW legislation.²⁹ However, for common law jurisdictions, reasonableness is only a requirement when seeking to rely on the ‘expanded’ doctrine of qualified privilege set out in *Lange v ABC*.³⁰ Historically, it seems that demonstrating ‘reasonableness’ has been problematic for defendants, at least for the press,³¹ so this may be an issue of contention.

7. The *Outline* paper proposes that legislation specify the types of bodies whose proceedings are protected by the defence of absolute privilege. It suggests that regulations will also allow non-parliamentary/legislative bodies or circumstances to be listed for the same purpose.³²

8. It will be a defence if the ‘circumstances of the publication were such that the defendant was ‘unlikely to suffer harm’. This defence is contained in the legislation of several states. Importantly, the *Outline* paper states the fact that a person does not enjoy a good reputation cannot be used as an argument that a person was not likely to suffer harm. This reflects existing Australian law.³³

9. A proposed remedy is that Courts could order a defendant to publish a correction to a defamatory statement. A similar power is available under section 80A of the *Trade Practices Act 1975*. Only the ACT has this power in defamation law, although the *WA Report* recommends it.³⁴ The major criticism of such a power is that it is an intrusion on media ‘freedom’, in that a publisher might be ordered to retract an allegation that they might otherwise still contend to be true. According to the *Outline* paper, in

awarding damages, a court would consider the effect of the correction — presumably with a view to reducing them.

10. The *Outline* paper proposes that a person claiming to be defamed may request a ‘right of reply’. A failure to grant a reasonable request of right of reply may result in increased damages if a subsequent defamation action is successful. Whilst the intent of this proposal seems similar to the ‘offer to make amends’ provisions in various jurisdictions, there is no obvious reason why such a provision could not be included in any Commonwealth legislation.

11. It is proposed that actions are to be heard by a judge alone. Currently, the situation amongst the state and territory jurisdictions varies. For example, Western Australia, Tasmania, Victoria and Queensland allow either the plaintiff or defendant to elect to have a jury.³⁵ Juries have been abolished for civil actions like defamation in South Australia. The NSW system is a hybrid in that a jury decides on whether the publication is defamatory, with a judge deciding on whether any defence applies, as well as any damages should an action be successful.

Comment

Several of the proposals reviewed by this Note appear to favour potential plaintiffs, although point 5 is a clear exception. It will be interesting to follow the debate on the concept of ‘reasonableness’ raised by some of the proposals. The *Outline* paper does not cover all of the possible issues of contention, such as whether corporations should be prohibited from suing for defamation. Nor does it set out any guidance on the assessment of damages.

1. Unless the States referred the necessary power to the Commonwealth under section 51(xxxvii) of the Constitution.
2. Corporations may be defendants as well as individuals.

3. Defamation may also be a criminal offence in certain cases. However, because such prosecutions are rare, this note does not cover criminal defamation.
4. These are the allegations about a state of affairs or an act (for example, a person is corrupt, or that they murdered someone) contained the publication in question.
5. *Lange v ABC* (1997) 189 CLR 520 at 568.
6. The facts on which the opinion is based must also be true.
7. *Lange v ABC* (1997) 189 CLR 520
8. However, common law defences are still available in the ACT.
9. ALRC, *Unfair Publication*, report no. 11, 1979, pp. ix-x.
10. *ibid.*, pp. x-xi.
11. The Hon. Philip Ruddock, 'Australian Government pushes for uniform defamation law', *Media Release*, 14 November 2003.
12. *Western Australian defamation law*, September 2003. See <http://www.lawpress.com.au/DefamationReport.pdf>
13. NSW and WA also had similar definitions before amendments in the 1970s and 1980s.
14. Currently, at common law, such an imputation would only be a ground for an action for injurious falsehood.
15. Neither does the ALRC report. See paragraph 77.
16. 'Defamation Law a backwards step' *Australian Financial Review*, 23 March 2004; 'One step forward many steps back' *The Age*, 22 March 2004.
17. The common law allows corporations to take action for defamation.
18. Note that the 2003 *WA report* explicitly rejected the idea.
19. See Butler and Rodrick, *Australian Media Law*, 2004, Thomson Lawbooks, at paragraph 2.250.
20. The *Outline* paper states at page 3 that matters falling within the concept of public interest might include: 'the public conduct of a person who takes part in public affairs; the conduct of a public officer or public servant in the discharge of his or her duties; the merits of a case decided by a court, or the the conduct of a judge, party or a witness; and public entertainment, works of art and literary publications'.
21. *Rocca v Manhire* (1992) 57 SASR 224 at 229.
22. *Pryke v Advertiser Newspapers* (1984) 37 SASR 174 at 191 per King CJ.
23. *The proposed defence of honest and reasonable opinion* UNSW, Communications Law Centre, May 2004. See <http://www.comslaw.org.au/publications/pub61.pdf>
24. That is, an opinion about whether allegations of certain behaviour would lessen their opinion of someone.
25. NSW has a requirement for public interest or qualified privilege.
26. At paragraph 34.
27. For example, because the opinion was not 'reasonable'.
28. For example, government and political matters as per the *Lange v ABC* case.
29. Section 22 *Defamation Act 1974*. Section 22 does not exclude the availability of the common law defence (which does not require the 'reasonable' element). Note also that other jurisdictions have expressed requirements for 'reasonableness' in different ways — eg., the 'no negligence' defence in the section 134 of the *ACT Civil Law (Wrongs) Act 2002*.
30. See for example *Buddhist Society of WA v Bristile* [2000] WASCA 210.
31. 'Defend the right to hold an opinion' *The Courier Mail*, 27 May 2004. See also discussion in A. Kenyon, 'Lange and Reynolds qualified privilege', *Melbourne University Law Review*, August 2004 (in press).
32. An interesting issue arises if the Commonwealth lists a particular body in a regulation with retrospective effect so that a defence is effectively created *after* the defamatory publication occurred. Would this be invalid under subsection 48(2) of the *Acts Interpretation Act 1901* which purports to prohibit any retrospective effect for regulations if, inter alia, this would have a disadvantageous affect of the rights of a person? Judging by leading commentary on subsection 48(2), the answer is probably no: see D. Pearce, *Delegated Legislation in Australia*, 1999, Butterworths, paragraphs 31.7-31.13. Any regulation could however still be disallowed by either House of Parliament.
33. See *Harrigan v Jones* [2001] Aust Torts Rep 67, 264 at 288.
34. At paragraph 56.
35. Although in complex cases the judge may refuse the application for a jury.

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