

A PRACTICAL GUIDE TO THE NEW UNIFORM DEFAMATION LAW

This paper addresses the new uniform defamation law that was generally introduced effective as from 1 January 2006. On that date, the law came into effect in New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania.

The law came into effect in the Australian Capital Territory as from 23 February 2006 and it is hoped and expected that the law will become effective in the Northern Territory in the near future.

Whilst the uniform law is substantially the same, there are some differences. For example, South Australia and the Australian Capital Territory do not have jury trials, whereas the others do. In addition, the law in Tasmania does not include the provision in the Acts of the other States and the Australian Capital Territory that there is no right of action for a deceased person.

The law is a combination of the common law and the codified systems that have existed. It is intended that the new law will be reviewed upon a regular basis.

The new law applies to matters published after 1 January 2006 save that if the cause of action comprises the publication of the same or substantially the same matter on separate occasions and one or more of the other causes of action in the proceedings accrued before the commencement of the new law, then the law prevailing prior to the introduction of the new law may apply, subject to less than 12 months having elapsed since the date on which the earliest cause of action accrued.

The new law seeks to retain all Common Law defences that have existed.

As a general proposition, it is considered that the new law benefits publishers, rather than plaintiffs.

Prior to the introduction of the new law, each State and Territory had its own defamation laws. Whilst there were similarities, inevitably substantial similarities, between the laws, there were also differences.

Those differences created an anomaly because, for example, in the case of a national publication, an article could be defamatory in one State or Territory but not in another.

The new uniform laws were introduced under “threat” from the Federal Government – if the States and Territories did not pass uniform laws, then the Federal Government indicated that it would do so.

In this paper, I will identify some of the provisions of the new uniform law, and I will talk to you about the more significant of those provisions, particularly the provisions relating to:

- The making of an offer of amends, and apologies;
- The role of Juries and Judicial Officers; and
- Available defences.

Before I address those more significant provisions, I will highlight some of the other changes introduced by the new uniform law:

- The distinction between slander and libel has been abolished (Section 7).
- Importantly for New South Wales, Queensland and Tasmania but not so for Victoria, Western Australia and South Australia, the new law now provides for a single cause of action in respect of the matter complained of (Section 8). Previously in New South Wales, Queensland and Tasmania, the Court had to make a finding for each individual imputation. Now, in short, the Jury simply has to decide if the offending matter was defamatory.

It is anticipated that, with the introduction of this law, there will be fewer interlocutory applications in which the parties argue over which pleaded imputations are capable of arising, and which are not.

- There is a limited right of corporations to sue – they must either be not for profit or employ less than 10 persons (Section 9).

This provision contrasts with the Common Law and by which a trading corporation was generally able to pursue a claim for defamation provided that the corporation could demonstrate that the defamatory material had injured or was likely to injure its reputation or had otherwise caused loss to the corporation.

Interestingly, the Commonwealth wanted to preserve the right of corporation to be able to sue, but the States were not in favour of that.

- Where publication occurs in more than one State or Territory, the proceedings should properly be brought in the State or Territory in which the harm has its closest connection (Section 11).

Section 11(3) identifies factors that should be taken into account by a Court in determining in which State or Territory any harm has its closest connection. Those factors include:

- ❖ The place where the plaintiff was ordinarily residence at the time of publication;
 - ❖ The extent of publication in each relevant Australian jurisdictional area;
 - ❖ The extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area; and
 - ❖ Any other matter that the Court considers relevant.
- A party may elect for the proceedings to be tried by a Jury (Section 21). If no election is made, the trial will be before a Judge. See below – Role of Juries and Judicial Officers.

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- There is a limit on general damages, unless the Court otherwise orders, of \$250,000 (Section 35).

It is likely that the limit of \$250,000 will be exceeded if the circumstances of the publication, including the conduct of the defendant in publishing the matter, justify it. However, it will be interesting to see what findings the Courts make to justify such an award.

A plaintiff is also entitled to claim special damages for economic loss.

- Exemplary or punitive damages may not be awarded (Section 37).
- A Court must generally order indemnity costs if a defendant unreasonably failed to make a settlement offer or unreasonably failed to agree to a settlement offer proposed by a plaintiff (Section 40).

Likewise, a plaintiff who unreasonably failed to accept a settlement offer and whose proceedings were unsuccessful will generally be ordered to pay a defendant's costs upon an indemnity basis.

- If there is a statement on a document that it is printed, produced, published or distributed by or for a particular person, that statement is evidence of such printing, production, publication or distribution.

Turning now to some of the more significant provisions:

An offer to make amends and apologies

The relevant provisions are contained in Sections 12 – 19.

The purpose of the provisions is to encourage a resolution of defamation claims without recourse to litigation.

A summary of the provisions is as follows:

- An aggrieved person can serve upon the publisher of defamatory material a “concerns notice”.
- The “concerns notice” should be in writing and should identify the imputations alleged to arise. If the publisher is of the view that the “concerns notice” does not adequately particularise the imputations, the publisher is entitled to serve a written notice (“a further particulars notice”) requesting further particulars of the alleged imputations.
- The aggrieved person should provide the further particulars within 14 days after being given the notice. If the aggrieved person does not do so, then he or she is taken not to have served a “concerns notice”.
- Following service of a “concerns notice”, the publisher of the defamatory material can make an offer to make amends. Section 14(1) imposes time limits for the making of an offer to make amends.
- The offer to make amends must:
 - (a) be in writing;
 - (b) be readily identifiable as an offer to make amends under the Act;
 - (c) if the offer is limited to any particular defamatory imputation, it must state that the offer is so limited and particularise the imputations to which the offer is limited;
 - (d) include an offer to publish a reasonable correction of the matter in question;
 - (e) include an offer to pay the expenses reasonably incurred by the aggrieved person including expenses reasonably incurred by the aggrieved person in considering the offer; and
 - (f) *may* including any other kind of offer to redress the harm sustained by the aggrieved person including but not limited to:
 - (i) an offer to publish an apology; or

- (ii) an offer to pay compensation for any economic or non-economic loss; or
- (iii) the particulars of any correction or apology made, or action taken, before the date of the offer.

An offer to pay compensation may comprise or include any one or more of the following:

- (a) An offer to pay a stated amount;
- (b) An offer to pay an amount to be agreed between the publisher and the aggrieved person;
- (c) An offer to pay an amount determined by an Arbitrator; and
- (d) An offer to pay an amount determined by a Court.

The benefit to a publisher in making an offer to make amends is that, if it is not accepted, the making of it will afford a defence to the action for defamation provided that the Court holds that the offer was, in all the circumstances, reasonable.

Whether the offer was reasonable in all the circumstances will have regard to the “usual” range of matters, including the factors that the Court firstly must and secondly may have regard to, as provided for in Section 18(2).

Role of Juries and Judicial Officers

A plaintiff or a defendant may elect for the proceedings to be tried by a Jury unless the Court otherwise orders.

Generally, the Court may otherwise order where the trial involves a prolonged examination of records or other issues that cannot be conveniently considered and resolved by a Jury.

The Jury however has a limited role. The Jury is responsible for determining whether or not the defendant published defamatory matter about the plaintiff and also whether or not any defence raised by the defendant has been established.

However, it is the Judicial Officer who will determine the amount of damages to be awarded.

The Jury is responsible for delivering a single verdict in relation to all causes of action rather than, as happened previously (certainly in New South Wales), delivering a verdict in respect of each alleged imputation.

Defences

Many of the defences substantially reflect defences previously available although there are differences.

The principal defences available are as follows:

- That the imputations are substantially true.

That defence also exists where there are other imputations (the contextual imputations) that are true even if the specific imputation complained of is not substantially true.

Previously, for a publisher to succeed with a defence of truth, it was also necessary to demonstrate that there was a public interest or public benefit in so publishing. That requirement has been removed by the new law.

- That the defamatory matter was published on an occasion of absolute privilege.

Such occasions include publication in the course of the proceedings of a Parliamentary body, a Court and other statutory bodies.

- That the matter complained of was no more than a fair report of “proceedings of public concern”.

“Proceedings of public concern” are defined in Section 29(4). They include a range of bodies, organisations, Courts, enquiries, associations, meetings and the like.

- That a defence of qualified privilege applies to the publication.

That defence generally applies where:

- ❖ The recipient has an interest in having information on the subject;
- ❖ The matter is published to the recipient in the course of giving to the recipient information on that subject; and
- ❖ The conduct of the defendant in the publication is reasonable in all the circumstances.

A recipient has an apparent interest in having information on some subject if, and only if, at the time of publication, the defendant believes on reasonable grounds that the recipient has that interest.

In determining whether the conduct of the defendant in publishing the matter is reasonable in all the circumstances, the Court may take into account:

- ❖ The extent to which the matter published is of public interest;
- ❖ The extent of which the matter published relates to the performance of the public functions or activities of the person;
- ❖ The seriousness of any defamatory imputation carried by the matter published;
- ❖ The extent to which the matter published distinguishes between suspicions, allegations and proven facts;
- ❖ Whether it was in the public interest for the matter published to be published expeditiously;
- ❖ The nature of the business environment in which the defendant operates;
- ❖ The sources of the information and the integrity of those sources;

- ❖ Whether the matter contained the substance of the aggrieved person'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 aggrieved person;
 - ❖ Any other steps taken to verify the information; and
 - ❖ Any other circumstances that the Court considers relevant.
- That the matter was an honest opinion, and which will apply if the defendant proves that:
 - ❖ The matter was an expression of opinion of the defendant, rather than a statement of fact;
 - ❖ The opinion related to a matter of public interest; and
 - ❖ The opinion is based on proper material.

Such a defence can be defeated if it can be established that the opinion was not honestly held by the defendant.

- There is a defence of innocent dissemination if the defendant proves that:
 - ❖ The defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor (which is defined by Section 32(2));
 - ❖ The defendant neither knew, nor ought reasonably have known, that the matter was defamatory; and
 - ❖ The defendant's lack of knowledge was not due to any negligence on the part of the defendant.
- That the matter complained of was trivial, in that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.

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