The difficult road to uniform defamation laws

Various proposals to reform the myriad of different defamation laws that operate within Australia have come and gone over the past 20 years. It seems, however, that the state and Commonwealth Attorneys-General may now be on the brink of introducing uniform defamation laws. Partner Belinda Thompson and Law Clerk Maree Norton consider the current struggle to achieve reform.

The road to reform

In March 2004, Commonwealth Attorney-General Philip Ruddock released an Outline of Possible National Defamation Law, making clear his ambition to oversee the introduction of uniform defamation laws throughout Australia. Mr Ruddock emphasised that, if the states failed to cooperate and achieve uniformity of laws by 1 January 2006, the Federal Government would not hesitate to invoke a raft of constitutional powers to allow it to enact Commonwealth defamation legislation.

While motivated by a desire to bring about uniformity of defamation laws throughout the country, such a measure is, however, likely to result in further legal fragmentation, as certain matters (such as defamation matters involving private parties) would be beyond the scope of the Commonwealth legislation. Consequently, agreement between the Commonwealth, states and territories represents the best vehicle for achieving uniformity.

In July 2004, the Standing Committee of Attorneys-General (SCAG) released its own Proposal for Uniform Defamation Laws (SCAG proposal). In the time that has followed, the states and the Commonwealth have been trying to overcome differences between their respective proposals.
The SCAG proposal

Under the SCAG proposal, uniform defamation legislation will not exclude the existing common law. Permitting the new legislative regime to co-exist with the common law will allow defamation principles to develop to meet the challenges that will continue to arise due to the ever-changing nature of communication in this digital age. Significant aspects of the common law that are incorporated into the SCAG proposal (and which the Commonwealth has indicated it agrees with) are as follows.

- The cause of action will arise out of the publication of defamatory material, rather than each individual imputation, as is the case under the *Defamation Act 1974* (NSW). The New South Wales approach has been criticised for increasing the complexity and cost of defamation proceedings.¹

- While the Commonwealth proposal initially favoured the introduction of a limited right to sue on behalf of a deceased relative, this reform has been rejected by the states. Consequently, the common law’s exclusion of actions brought on behalf of the deceased will continue to apply.

- The High Court’s approach to online jurisdictional issues in *Dow Jones & Co Inc v Gutnick*² will not be tempered by legislative reform. Consequently, Australian law will continue to recognise the place where material is downloaded (rather than the jurisdiction in which such material is uploaded) to be the place of publication and, consequently, the material will be subject to the defamation law of that jurisdiction.

- Truth alone will be a complete defence. This will involve the removal of the current requirement in some states (including Queensland and Tasmania) that, in order for the defence of truth to be made out, defamatory statements must be true and there must be a public interest in their communication (or, in the case of NSW, the publication must be of public benefit).

  This public interest requirement is said to guard against publication of private facts about a person that are no more than sensational or scandalous, thus importing a privacy element into defamation law. However, defamation law is concerned with the protection of reputation, not privacy, and a public interest component confuses these two imperatives.

  The SCAG proposal recognises this. If privacy is to receive protection under the law, it should be through a means appropriately adapted to that end, not through ad hoc additions to the law of defamation.

- The defence of innocent dissemination will continue to be available to those involved in the publication chain who are unaware of the defamatory nature of a publication, and who have no editorial control over the publication. SCAG considers retention of this defence to be particularly important in relation to online publications which, by their nature, involve a string of parties, not all of whom should be required to supervise content, as such a requirement would give rise to significant cost implications.³

One significant way in which the SCAG proposal deviates from the common law is in regard to the defence of qualified privilege. At common law, this defence seeks to facilitate the communication of information in the discharge of legal, social or moral obligations. In order for the defence to apply, the party making an otherwise defamatory statement must be subject to a duty to make the statement, and the statement must be made to a party bearing a corresponding interest in receiving the information. Examples of circumstances in which the defence may apply include where an employer prepares a character reference for a former employee, or where a corporation makes disclosures required by a government body, such as the Australian Securities & Investments Commission. Where such communications are defamatory in nature, the employer or corporate defendant may be absolved of liability by arguing the defence of qualified privilege.

In addition to the duty and interest requirements of the common law defence, the SCAG proposal includes a requirement that the communication be ‘reasonable in the circumstances’ (as currently required in NSW). This reform has been criticised on the basis that it will render it more difficult to make out this defence, which is commonly relied on by non-media defendants, including corporate defendants.⁴ The difficulties defendants have experienced to date in establishing that a publication was reasonable bears out this concern.

While SCAG believes that the requirement of ‘reasonableness’ will ‘[ensure] the flow of “high quality” information’, the inclusion of such an

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². [2002] HCA 56.

³. Supra note 1, paragraph 4.9.2.

amorphous requirement does run the risk of stifling the communication of such information. Despite the incorporation of guidelines, modelled on the NSW Act, to assist in the determination of what might be ‘reasonable in the circumstances’, a reasonableness requirement may make it difficult for this defence to be made out, even in circumstances where the relevant duty and interest exist and there is no evidence that the publication was motivated by malice. This, in turn, could have a chilling effect on freedom of speech in relation to communications made under moral, social and legal duties.

A final noteworthy aspect of the SCAG proposal is the capping of damages, in line with trends in general tort law.

**Persistent sticking points**

Despite agreement regarding the above features of the reform package, several points of difference persist between the Commonwealth and the states:

- Disagreement continues regarding the desired degree of uniformity between the various Australian jurisdictions. The Commonwealth seeks total uniformity through mirror legislation, including a mechanism to ensure that later legislative changes do not undermine uniformity. In contrast, SCAG proposes a two-tier approach, whereby there would be substantive uniformity in all jurisdictions concerning the cause of action and available defences, while also allowing a measure of difference vis-à-vis procedural matters.

- While the states maintain that corporations must be barred from bringing actions in defamation, the Commonwealth continues to demand that corporations be able to sue for defamation. The basis of this conflict lies in differing views regarding whether corporations already have sufficient access to remedies and resources necessary to defend their reputation while under attack.5

The SCAG proposal does not provide any convincing rationale for denying corporate plaintiffs a right to sue for defamation. This proposal is not only inconsistent with the separate legal personality accorded to corporations at law, it also overlooks the fact that individuals do not have a monopoly on the interest in maintaining reputation.6 Reputation is also of crucial importance to the business of corporate entities, which should not be denied the right to protect unwarranted attacks upon their reputation. There is no evidence that corporations misuse the ability to seek redress for defamation.

A recent study suggests that the Australian media currently exercises caution regarding the defamation of corporate entities.7 While the law must be ever mindful of striking an appropriate balance between protecting reputation and allowing freedom of speech, the total removal of the right of corporate entities to sue in defamation would cause the pendulum to swing too far in one direction.

- The Commonwealth continues to insist upon the introduction of ‘corrections orders’ by courts, whereby a defendant would be required to print corrections. The states object to this reform on the basis that it would interfere with freedom of the press. The Commonwealth push towards alternative remedies is well-intentioned, and adapted to recognise that many plaintiffs seek public vindication through an apology. However, the imposition of mandatory corrections orders at the end of the often lengthy process of litigation will likely prove untimely and of little real consequence to plaintiffs, while encroaching unnecessarily upon the freedom of the media.

**Next steps?**

The wheels of reform seem to be gathering speed, and commentators are more optimistic than ever that legislative change is imminent. The recent release of a draft Bill in South Australia, and the anticipated NSW Bill, are promising. Despite this, recent comments made by Mr Ruddock at the recent SCAG meeting suggest that he is unwilling to back down on his position regarding corporate plaintiffs and alternative remedies, and will press ahead with a national code if the states continue to oppose these reforms. For the time being, defamation reform remains a vexed issue.

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