The passage of state defamation laws

In response to pressure from the Federal Government, the states have introduced ‘uniform’ defamation laws, and the Northern Territory will soon do so. However, the legislation is not entirely uniform and the Australian Capital Territory will have other statutory regulation. Partner Belinda Thompson and Articled Clerk Erin Hawthorne summarise the changes in defamation law under these new Acts and outline issues that may lead to ongoing reform.

Impetus for legislation

In Australia, defamation law developed through both common law and statute. This led to inconsistencies arising between different jurisdictions, and publications that were actionable as defamatory in one state were not necessarily actionable in another. The need for law reform has been recognised since the late 1970s. The Commonwealth Government put pressure on the states to enact uniform legislation in 2004 by releasing draft federal legislation. As a result, the Standing Committee of Attorneys-General (SCAG) released its proposal for uniform defamation laws in July 2004.

In 2004, Mr Ruddock emphasised that, if uniform state legislation was not passed by 1 January 2006, the Commonwealth would pass its defamation legislation. In light of this impending deadline, each of the state governments passed legislation in 2005 modelled on the SCAG proposals. Some key provisions of these new Acts are discussed below.

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In early 2006, the Northern Territory introduced its own Defamation Bill 2006, also modelled on the SCAG proposals. Until that Bill is passed, the NT Defamation Act 1938 and common law will continue to apply. While the two Australian Capital Territory statutes dealing with defamation (the Civil Law (Wrongs) Act 2002 and the Defamation (Criminal Proceedings) Act 2001) adopt some provisions of the SCAG model, the ACT Acts are otherwise different to the SCAG model. There are no Bills currently before the ACT parliament regarding further defamation law reform.

**Details of the new Acts**

Each of the states has passed a Defamation Act 2005. Each of the state’s legislation is modelled on the SCAG model, as is the NT Defamation Bill 2006. Key features are that the legislation:

- preserves and modifies the common law of defamation;
- establishes that the cause of action arises out of the publication of defamatory material, rather than each individual imputation;
- encourages and provides a framework for the settlement of disputes.

The framework allows parties to make an offer to make amends. This offer may be made at any time unless 28 days or more have elapsed after the publisher of the alleged defamatory statement has been given a concerns notice or a defence has been served.

The offer must:

- be in writing;
- include an offer to publish a reasonable correction of the matter in question;
- if the material containing the matter has been given to someone else with the publisher’s knowledge, include an offer to take reasonable steps to tell that other person the matter is or may be defamatory;
- state any limitations on the offer; and
- include an offer to pay expenses incurred by the aggrieved person up to that date and any expenses incurred in reasonable consideration of the offer.

The offer may also include any other kind of offer that will redress the harm sustained by the aggrieved person.

If the offer is accepted and a publisher carries out the terms of the accepted offer, the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher in relation to the matter in question (even if the offer was limited to particular defamatory imputations). A court may make costs orders in relation to proceedings up to, and including, acceptance of an offer to make amends.

If a publisher makes a reasonable offer as soon as is practicable after becoming aware the published material may be defamatory, and the publisher is ready and willing to carry out the terms of the offer at any time before trial, the unaccepted offer will constitute a defence to an action for defamation.

All statements and admissions made in connection with making or accepting an offer are inadmissible, except in relation to certain matters including orders for costs, defences based on the offers made and other ‘offer-related’ issues.

- abolishes the distinction between slander and libel;
- creates a statutory cap on the damages that may be awarded for non-economic loss;

This amount (currently set at $250,000) will be adjusted from time to time. Courts retain a discretion to award damages in excess of this amount if satisfied that the circumstances warrant an award of aggravated damages.

- abolishes exemplary and punitive damages in civil proceedings;
- prevents most corporations from suing for defamation;

Non-profit corporations and corporations with less than 10 employees that are not public body corporations are allowed to sue for defamation. Corporations other than these corporations may not sue for defamation.

- reduces the limitation period from six years to one year;

The court retains the discretion to extend this period.

- retains the defences of truth, absolute privilege and innocent dissemination

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2. Relating to offers to make amends; the defence of fair report of a matter of public concern; and defence for publication of public documents.
Some states previously required that to establish the defence of justification, the statement not only had to be true, but also that the subject matter had to be of public interest or that the publication had to be of public benefit. Some other states allowed truth alone to be a defence, but required the defendant to prove the truth of all material statements in the published matter.

The new state Acts provide the defence of justification, which provides a complete defence to an action for defamation if the defendant proves the matter published was substantially true. The new state Acts also clarify that the defence of contextual truth is available in all states in Australia.

- introduces the defence of honest opinion;
  - If the defendant proves that the published matter was an expression of opinion rather than a statement of fact, related to a matter of public interest and the opinion was based on proper material, this will constitute a defence against an action for defamation. The plaintiff can defeat this defence by showing that the opinion was not honestly held.

  While this appears similar to the previous defence of fair comment, it only requires the defendant to show the opinion was based on proper materials, rather than true facts. The defence will not be defeated by the plaintiff showing that the statements were made maliciously.

- preserves the common law prohibition on actions for defamation on behalf of or against a dead person; and

- does not provide alternative remedies such as right of reply.

3. Queensland, Tasmania and the Australian Capital Territory required the matter to be true and published for the public benefit. In New South Wales, the statutory truth defence required the imputations to be true and to relate to a matter of public interest or be made upon an occasion of qualified privilege.

4. Victoria, Western Australia, South Australia and the Northern Territory required the defendant to prove the truth of all material statements in the published matter.

### Ongoing issues

The Commonwealth Government has indicated it will continue to support reform in areas where there is room for improvement and regards the passage of the (substantially) uniform legislation as both a major breakthrough and a platform for further reform.

The Commonwealth Government has expressed concern that the state laws do not adequately protect the reputation of businesses. In May 2005, the New South Wales Attorney-General explained the states’ decision to deny most corporations the right to sue for defamation as a protection of free speech against the threat that corporations might use their economic strength to stifle critics.

He asserted that large corporations have ample legal protection for legitimate commercial interests, including actions for injurious falsehood and applications for relief under the *Trade Practices Act 1974* (Cth).

These arguments do not, however, justify denying corporations the right to seek redress for damage to their reputation, particularly in circumstances where there is no evidence that any corporate right of action for defamation has been, or would be, misused and business may have legitimate concerns in seeking legal redress for defamatory publications.

Notwithstanding the new state defamation laws, differences remain between the jurisdictions. For example, in Queensland, New South Wales, Tasmania, Victoria and Western Australia either party may elect for the matter to be tried by a jury. South Australia and the territories do not allow parties to elect this option. Other key differences still exist between the states’ and NT’s new legislation and the ACT’s statutory scheme. Mr Ruddock has recently described this situation as ‘regrettable’. It awaits to be seen whether further reform will follow.

5. NSW Legislative Assembly debates, 4 May 2005.

6. The NT Defamation Bill 2006 will abolish the role of juries in defamation proceedings.
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