



News Alert - New uniform defamation laws

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Introduction

On 1 January 2006, new uniform defamation legislation came into force throughout the states of Australia and in the Australian Capital Territory.

Unfortunately, the Northern Territory is lagging behind and is yet to introduce the new legislation.

The push for uniform defamation laws, revived by the Commonwealth Attorney General, Philip Ruddock, has led to each state enacting their preferred uniform defamation model. This means all defamation Codes are repealed (as well as sections 3A, 5, 5A, 6, 7, 8 and 12 of the Wrongs Act 1958 (Vic)) and finally, Australia has one piece of legislation governing its defamation law.

Which publications are affected?

The existing common law of defamation (and other existing legislation throughout the states) continues to apply to any publication that occurs **before 1 January 2006** and to any publication that occurs on or after 1 January 2006, which is the subject of a claim described as follows:

1. a claim made for defamation in respect of two publications, which are the same or substantially similar, and published either by the same or different defendants; AND
2. one of the publications occurred after 1 January 2006; AND
3. the other publication occurred before 1 January 2006 and within 12 months of the later publication at (2).

Companies cannot sue

- Companies cannot sue for defamation unless they are a private body and are either a not-for-profit organisation or employ fewer than 10 people and are unrelated to another corporation.
- This does not prevent an individual associated with a company from suing for defamation merely because defamatory material also defames the company too.

The dead cannot sue

- Except for Tasmania, neither the dead nor their representatives can sue for defamation – a claim for defamation dies with the plaintiff. In Tasmania, a claim can be made by an estate on behalf of a deceased for material published prior to death, and an estate is required to defend a defamation claim where it was commenced prior to the death of the defamer.

No distinction between libel and slander

- The distinction at common law has been uniformly abolished. This means a claim can be made for publication of any defamatory material without having to prove actual loss.

Cause of action is publication of defamatory matter

- The publication of defamatory matter (not the proven defamatory imputations) gives rise to a single cause of action.

A uniform offer of amends procedure

- Defendants can voluntarily follow the 'without prejudice' procedure set out in the new defamation Acts to make an offer of amends to settle the whole or part of a complaint.
- The Act stipulates a timeframe – no offer can be made after 28 days of receipt of the notice of the complaint or if a defence has been served.
- The Act stipulates the content of the offer, which **must** include a reasonable correction and an offer to pay expenses.
- Offers can be withdrawn and a new offer made.
- The rejection of a reasonable offer provides a publisher with a defence to any defamation claim.
- If an unsuccessful party unreasonably failed to make or accept an offer of amends, they can be ordered to pay indemnity costs at trial (see section Damages and costs below).

- Any statement or admission made in connection with an offer is not admissible in any proceedings. An apology does not constitute an admission of fault or liability.

Defences

- The Acts provide statutory defences of justification, contextual truth, fair reporting of a public document or a proceeding of public concern, absolute privilege, qualified privilege, honest opinion, triviality and innocent dissemination. These are in addition to any other defence or exclusion of liability available at common law (unless modified by the Acts) or under statute (unless repealed by the Acts).

Justification

- It is a defence if the defendant proves that the defamatory imputations pleaded are substantially true. There is now no additional public benefit/public interest requirement. This is consistent with the common law.

Contextual truth

- Contextual truth is now available to defendants both for contextual imputations that are separate and distinct, as well as those which are substantially similar to, the defamatory imputations the plaintiff complains about.
- The new defence is wider than was previously available under either common law Polly Peck or statutory contextual truth defences.
- There is no public interest requirement.

Absolute privilege

- Little has changed for this defence.
- Victoria, Western Australia and Tasmania are yet to schedule additional lists of publications, which will be absolutely privileged, whilst New South Wales has a comprehensive list. Queensland, South Australia and the Australian Capital Territory have not enacted schedules.

Fair reporting

- There are now defences for the fair reporting of public documents and proceedings of public concern (as generally defined in the Acts).
- New South Wales has also scheduled a comprehensive list of specific public documents and proceedings of public concern. Victoria, Western Australia and Tasmania are yet to schedule additional lists. Queensland, South Australia and the Australian Capital Territory have not enacted any schedules.
- The defences are defeated if the plaintiff proves that the material was not published honestly for the information of the public or for the advancement of education.
- The exclusion of liability for faithful and accurate reporting of court proceedings available under section 4 of the Victorian Wrongs Act 1958 is not affected by the new Victorian Act.

Qualified privilege

- This is similar to the defence which was available in the now repealed *Defamation Act 1974* (NSW).
- Publishers are not required to be under a duty or to have an interest in publishing information on a particular subject. They must instead prove either that the recipient had an interest, or they had reasonable grounds to believe that the recipient had an interest, in having information on some subject and the defamatory matter was published to the recipient in the course of giving them information on that subject.
- The publisher's conduct in publishing must also be reasonable. The Acts list the circumstances the court may take into account to decide whether the defendant's conduct in publishing was reasonable. Except for one new circumstance, which could assist the media, namely the nature of the business environment in which the defendant operates, they are the same as those circumstances added to the NSW Act by the 2002 amendments.
- This requirement to prove reasonableness could be considered a major draw back to the common law States because what is 'reasonable' has been interpreted narrowly by the New South Wales courts, making this defence very difficult to rely on for the media.
- The defence is defeated if the plaintiff proves the defendant acted with malice. Proof of malice is determined according to the common law.
- The common law defences (eg, as applicable to political discussion) have been preserved. [Lange]
- For Queensland and Tasmania it remains to be seen what the practical effect on the media will be following the repeal of the codified defence for publications made in good faith in the course of, or for the purpose of, the discussion of some subject of public interest the public discussion of which was for the public benefit.

Honest opinion/Fair comment

- Little has changed. The position for the common law states regarding fair comment of a stranger, which had been in flux prior to the new legislation, has now been clarified. The defence applies unless the plaintiff can establish that the publisher had reasonable grounds to believe that the opinion was not honestly held by the stranger at the time the matter was published.

Defence of innocent dissemination

- This statutory defence essentially adopts the English common law defence by protecting subordinate publishers. Subordinate publishers will not be liable for defamatory publication on services they provide, unless they knew or ought reasonably to have known the material was defamatory or their lack of knowledge was due to negligence on their behalf.
- This new defence extends the protection currently available to ISPs and internet content hosts under clause 91(1) of Schedule 5 of the Broadcasting Services Act 1992 (Cth) to cover a range of providers of internet and other electronic and communication services who will generally be considered subordinate distributors. This includes wholesalers and retailers of publications and broadcasters of a live programme (where they have no effective control over the person who makes the defamatory statements).

Triviality

- This defence is new to the common law states and is available if the defendant can prove that the circumstances of publication were such that the defendant was unlikely to sustain any harm.

Damages and costs

- Damages awards are required to have an appropriate and rational relationship with the harm sustained.
- There is a new cap on damages for non-economic loss of **A\$250,000**. However, the cap will be annually adjusted according to an index and can be exceeded where the court is 'satisfied' that the circumstances are such as to warrant an award of aggravated damages. This means that plaintiffs will more frequently plead aggravated damages.
- No award of exemplary or punitive damage can be made.
- Damages are assessed by the trial judge.
- A number of factors can be relied on in mitigation of damages, eg: an apology or correction and whether the plaintiff has brought proceedings for defamation in relation to another publication, which has the same meaning or effect as the publication in question.
- When making costs orders, the court may have regard to the way in which the parties conducted their case.
- A court must generally award indemnity costs (a much higher proportion of costs than the usual party/party costs) against an unsuccessful party if the court is satisfied that the party unreasonably failed to make or accept an offer of amends.

Limitation of actions

- Proceedings can only be started within one year (rather than six in Victoria) after publication of the defamatory material, except by order of the court in certain situations or in relation to claims referred to in 'Which publications are affected' above.

Judges and juries

- Either a plaintiff or defendant can choose whether to have a jury or judge alone hear the case, except in South Australia and the Australian Capital Territory where there are no juries.
- Juries will not decide on damages.
- Juries will only decide two issues. First, if the publication complained of is defamatory and second if the publication is defamatory, has any defence raised been established.

Criminal libel

- While not the primary focus of the uniform defamation Acts, Western Australia, New South Wales, Tasmania, Queensland, South Australia and the Australian Capital Territory have maintained criminal libel where a person publishes material knowing it to be false or without regard to whether it is true or false, and they intend to cause serious harm. The same defences apply as for civil defamation. Consent of the relevant Director of Public Prosecutions is generally required before an action can be commenced.
- Victoria retains section 10 of the Wrongs Act, which makes it an offence to maliciously publish a defamatory libel knowing it to be false. A defence requires proof of both the truth and public benefit of the material. An action can only be instituted by the Attorney-General or with the leave of the court. It has otherwise not referred to this in its uniform legislation.

Further information

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