

LEVEL

TWENTY
SEVEN

CHAMBERS



Update on Defamation Law in Queensland

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>> Introduction and background to amendments



Model Defamation Provisions (MDPs)

Enacted in the *Defamation Act 2005* (Qld)

Model Defamation Law Working Party:

- functions include reporting to the Council of Attorneys-General on proposals to amend the MDPs

Council of Attorneys-General reconvened the DWP in 2018 and a review took place in 2019 and 2020 which included a public consultation process

>> Introduction and background to amendments

- > DWP recommended amendments to the MDPs: the MDP Amendment Provisions (MDAPs)
- > The *Defamation (Model Provisions) and Other Legislation Amendment Bill 2021* was introduced with the principle object to amend the *Defamation Act* and the *Limitation of Actions Act 1974* to implement the MDAPs
- > Aims of the MDAPs – too many to list here!

>> When do these changes apply?



- > Transitional provisions, s 50: Amendments apply only in relation to publications after the commencement of the amendment (1 July 2021)

>> Introduction of the serious harm threshold

> Section 10A:

- (1) It is an element (the serious harm element) of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.*
- (2) For the purposes of subsection (1), harm to the reputation of an excluded corporation is not serious harm unless it has caused, or is likely to cause, the corporation serious financial loss.*

>> Introduction of the serious harm threshold

Strong push for inclusion of serious harm test in Australia:

- too many trivial proceedings
- one of the aims of the MDAPs is to strike the right balance between protecting reputations and ensuring that defamation law does not place unreasonable limits on freedom of expression.

Provisions for early determination of the issue hoped to encourage early resolution of defamation proceedings

Introduction of serious harm test coupled with the removal of triviality defence (s 33) effectively shifts onus from defendant to plaintiff

>> Brief background on serious harm threshold in UK and proportionality principle in Australia

> UK serious harm test (common law)

- *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946
- *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985

> Statutory serious harm filter in s 1 of the UK Defamation Act.

- *Lachaux v Independent Print* [2020] AC 612



>> Brief background on serious harm threshold in UK and proportionality principle in Australia

s 1 *Defamation Act 2013* has changed the approach established in *Jameel and Thornton*

- Raises threshold of seriousness and requires its application be determined by reference to actual facts about its impact, not just to meaning of the words

Statement must carry more than a 'tendency' to harm

Plaintiffs must prove serious harm caused by reference to the consequences of the publication, rather than the publication itself

Investigation of actual impact of the statement

Extent of the publication and the identity and reaction

>> Proportionality principle in Australia

Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460

- whether the published matter is likely to lead an ordinary reasonable person to think less of the plaintiff

Bleyer v Google Inc (2014) 898 NSWLR 670

- proportionality principle recognised as a head of abuse of process (in reliance on *Jameel*)

Bristow v Adams [2012] NSWCA 166

>> Proportionality principle in Australia

Watney v Kencian & Anor [2017] QCA 116

Smith v Lucht [2014] QDC 302

Habib v Radio 2UE Sydney Pty Ltd [2009] NSWCA 231

Farrow v Nationwide News Pty Ltd [2017] NSWCA 246

Kostov v Nationwide News Pty Ltd [2018] NSWSC 858

>> Proportionality principle in Australia

> What will the Australian test look like?

- Australian amendments based on s1 of UK Defamation Act
- Adopts the concepts of *cause or likely to cause serious harm*
- Refer: Judgment of Lord Sumption in *Lachaux*



>> Concerns notice now mandatory

- > New s 12A - when a notice is a concerns notice (includes informing the publisher of the serious harm that has been caused or likely to be caused)

- > New s 12B - defamation proceedings cannot be commenced without:
 - concerns notice particularising the defamatory imputations alleged, being given to the proposed defendant; and
 - the period in which the defendant can make an offer of amends has elapsed

- > Court may grant leave for proceedings to be commenced despite non-compliance

>> Concerns notice now mandatory

> s 15 amendments include minimum period offer must be left open and subsection (1A) - outlines additional matters an offer to make amends may include.

> s 18 - effect of a failure to accept a reasonable offer to make amends:

- precondition in subsection (1)(a) amended to provide that the offer must be made as soon as reasonably practicable after the publisher was given a concerns notice
- precondition in subsection (1)(b) amended so the defence can be relied on if the publisher was ready and willing, on acceptance of the offer, to carry out the terms
- new subsection (3) - judicial officer not the jury determines whether this defence is established.

>> Jury trials – election can be revoked only with consent or leave

> New subsection (1A)

> New subsections (3) and (3A) allow election for a jury trial to be revoked if both parties consent, or if both parties do not consent, the court grants leave if it is satisfied it is in the interests of justice





>> Multiple proceedings – leave required to sue associates of previously sued defendant

> s 23 - now requires leave of the Court to bring proceedings against associates of the previous defendant.

>> Contextual truth defence clarified

Old vs new
section 26:

Pre-amendment

It is a defence to the publication of defamatory matter if the defendant proves that—

- (a) the matter carried, ~~in addition to the defamatory imputations of which the plaintiff complains,~~ 1 or more other imputations (*contextual imputations*) that are substantially true; and
- (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

Post-amendment

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter carried 1 or more imputations that are substantially true (*contextual imputations*); and
 - (b) any defamatory imputations of which the plaintiff complains that are not contextual imputations and are also carried by the matter do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.
- (2) The contextual imputations on which the defendant may rely to establish the defence include imputations of which the plaintiff complains.

>> Contextual truth defence clarified

Hepburn v TCN Channel Nine Pty Ltd [1984] 1 NSWLR 386 at 396-397 per Hunt J c/f later decisions...

Kermode v Fairfax Media Publications Pty Ltd [2010] NSWSC 852 followed by *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157

Besser v Kermode (2011) 81 NSWLR 157

Mizikovsky v Queensland Television Limited & Ors [2014] 1 Qd R 197

Chel v Fairfax Media Publications (No 6) [2017] NSWSC 23

>> Contextual truth defence clarified

- > The amended section 26 clarifies that a defendant may plead back substantially true imputations relied on by the plaintiff, as well as those they are relying on to establish a contextual truth defence
- > Explanatory Notes to the *Defamation (Model Provisions) and Other Legislation Amendment Bill 2021*:
 - *Defence of contextual truth in the 2005 Act was intended to adopt the defence of contextual truth created by section 16 of the repealed Defamation Act 1974 of New South Wales.*
 - *[The new section 26] reformulates the defence of contextual truth to make it clear that, in order to establish the defence, a defendant may plead back substantially true imputations originally pleaded by the plaintiff.*

>> New public interest defence

- > Section 29A(1) – defence if:
 - matter concerns an issue of public interest;
 - defendant reasonably believed that the publication of the matter was in the public interest

- > Court must ‘take into account all of the circumstances of the case’ in determining ‘whether the defence is established’: s 29A(2)

- > Non-exhaustive list of relevant factors in s 29A(3)

- > Jury to decide whether defence established: s 29A(5)

>> New public interest defence (cont'd)

> Differences from qualified privilege

- No need for recipient having an interest or apparent interest – plainly can publish to the world at large
- ‘Public interest’ is wider than *Lange* matters
- Reasonableness of defendant’s conduct in publishing vs reasonableness of defendant’s belief that the publication was in the public interest
 - Focus on time of publication

>> New public interest defence (cont'd)

> What role for malice?

- Not expressly mentioned – cf s 30(4) for QP
- Origins
 - UK s 4 – itself sprang from the ‘Reynolds defence’, and those origins are relevant to its interpretation: *Serafin* [2020] 1 WLR 2455
 - *Reynolds* appeared to start as a form of qualified privilege
 - But later authorities suggested it was or had become ‘a different jurisprudential creature’, where no question of malice arose because the propriety of the defendant’s conduct was built into the matters the defendant had to establish – see *Jameel* [2007] 1 AC 359 at [46] and [146] (but cf [135])
 - *Reynolds* was held to be inconsistent with *Lange* and thus not to apply in Australia: *Vilo* (2001) 52 NSWLR 373

>> **New public interest defence (cont'd)**

> What role for malice? (cont'd)

- Can a publication actuated by malice 'concern an issue of public interest'?
- Can a defendant actuated by malice 'reasonably believe' that the publication is in the public interest?
- Is malice picked up by 'all of the circumstances of the case'?
- What would 'malice' mean in this context?

>> Qualified privilege clarification

- > Some items in the non-exhaustive list moved from qualified privilege provision (s 30(3)) into the equivalent list for the public interest provision (s 29A(3))
- > Not a checklist: s 30(3A)
- > Jury to decide whether the defence is made out: s 30(6)

>> New peer review defence

- > Section 30A – defence if:
 - Matter published in a ‘scientific or academic journal’
 - Matter ‘relates to a scientific or academic issue’
 - An ‘independent review’ of the matter’s ‘scientific or academic merit’ was carried out before publication by:
 - the editor, if they have ‘expertise in the scientific or academic issue concerned’; or
 - 1 or more persons with such expertise
 - Also protects publication of ‘assessment of the matter’ in the same journal by reviewer written in the course of the review
 - Also protects ‘fair summary of’ or ‘fair extract from’ such matters

>> **New peer review defence**

- > Defeated 'if, and only if' plaintiff proves the matter or assessment was 'not published honestly for the information of the public or the advancement of education'
- > No (separate) 'malice' defence – contrast UK s 6(6)

>> **Honest opinion clarification**

> Clarifies when an opinion is ‘based on proper material’ – if:

- The material on which it is based is:
 - Set out in ‘specific or general terms’ in the published matter; or
 - Notorious;
 - Accessible from a reference or link in the published matter; or
 - Otherwise apparent from the context; and
- That material is:
 - Substantially true; or
 - Published on an occasion of absolute or qualified privilege; or
 - Protected by ss 28 or 29 (public documents, fair report of proceedings of public concern)

>> Damages

- > Section 35 amended
- > \$250k limit on damages for 'non-economic loss' is not just a 'cap' – it is the top end of a range, which is to be awarded 'only in a most serious case' – see s 35(1) and (2)
- > Can still go beyond the limit for aggravated damages
- > But an award of aggravated damages has to be made separately to any award of damages for non-economic loss: s 35(2B)

>> Limitations period – single publication rule

> At common law

- publication occurs when received
- internet publications are therefore made every time downloaded
- never ending limitation period

> Under s 10AB of LAA:

- Cause of action for multiple publications (by a person or their ‘associates’) that are ‘substantially the same’ is taken to accrue on the date of the first publication
- Date of first publication, if in electronic form, means day on which the matter was ‘first uploaded for access or sent electronically to a recipient’
- Associate = employee, contractor or ‘associated entity’
- Does not apply to a subsequent publication if the ‘manner of that publication is materially different’

>> **Limitations period – concerns notices**

> Section 10AA

> 1 year limitation period is ‘taken to be’ extended if concerns notice is given within 56 days before the limitation period expires

> In such case, limitation is extended by 56 days minus the number of days remaining to the expiry of the limitation period

>> Limitation period – extension

> Section 32A

> 1 year limitation period can be extended up to a period of 3 years from the date of publication

> The Court ‘may’ extend ‘if the plaintiff satisfies the court that it is just and reasonable to allow an action to proceed’

- Cf previous provision: ‘must’ extend ‘if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action’

> Have regard to reasons for, and extent of, delay; unavailability or loss of cogency of evidence; etc

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