Uniform defamation law

With proposals from the federal government for a new national defamation law and the states and territories combining in an attempt to 'harmonise' their various laws, the possibility of unified defamation law has improved, according to PROFESSOR KEN McKINNON and JACK R HERMAN.

At the end of July the two proposals for reform of Australian defamation laws were tabled. At present there are eight separate laws (in the various states and territories) but no federal defamation law. Following the Council's strong initiative for the reform of defamation law commencing in 2001, which resulted in amendments to the law in NSW and a special report in Western Australia, the Standing Committee of Attorneys-General (SCAG), decided in 2003 to renew its formerly fruitless pursuit of national reform. SCAG initiated an officers' group to develop "harmonised" state laws rather than a completely uniform law for all states or an over-riding federal law. The federal Attorney-General Philip Ruddock, however, while calling for greater uniformity of laws among the states and territories, separately developed an initial discussion paper outlining a possible super-arching federal law.

In July, after consultation with various interest groups, both the federal Attorney-General and the states' ministers released draft reform proposals. If accepted the SCAG document would move the states towards more uniform and modernised defamation law. Although, from the Press Council's point of view, more would be needed to protect free speech and from the media's point of view further development would be desirable, the SCAG reform proposals would eliminate many of the problems arising from the need for publications to comply with eight quite different defamation standards.

The Commonwealth document, while a vast improvement on the earlier discussion paper, still contains unattractive proposals. Neither the states' proposal nor that of the Commonwealth is as yet in its final form.

Settlement of disputes

The Press Council believes that defamation law should have as its primary role the speedy restoration of injured reputation, rather than awards of monetary damages. The current system, which encourages drawn-out proceedings, not finalised for several years, needs to be changed in ways that simplify the process by eliminating litigation and substituting a series of pre-trial remedies leading to clarification, correction and/or apology.

The SCAG paper has proposed an "offer of amends" procedure based on NSW law, which aims to encourage voluntary settlement of disputes between parties at an early stage. The current NSW voluntary provisions have one particular aspect which provides an incentive for plaintiffs to negotiate a settlement: it establishes a defence for publishers where a plaintiff refuses to accept a reasonable offer of settlement. The Commonwealth, by contrast, proposes an alternative dispute resolution (ADR) process which the court will have discretion to utilise. Whereas the NSW scheme aims to have parties negotiate a settlement prior to the matter reaching court, the Commonwealth scheme seems to assume that ADR will not be attempted until court proceedings have commenced.

Both the Commonwealth and the states propose that courts should have the power to issue correction orders. However, SCAG has recommended that defendants should have the option of paying damages in lieu of a correction if they elect to do so. The Commonwealth, by contrast, has not only rejected the contention that court-ordered corrections are an infringement on free speech, it also proposes that corrections should be published with the same prominence as the defamatory matter. In the Council's view, such corrections should only arise where the parties have agreed to mediation by the court and have agreed to abide by the court's determination.

Cause of action and who can sue

Both proposals indicate that there will be a single cause of action in relation to the published matter, regardless of the number of imputations arising. Provided the courts follow the clear intent of the proposed changes, the technical 'game' of trying to eke out from the actual meaning of the words as many imputations as a lawyer can force upon the material (even when such interpretations were never intended or indeed conveyed) will be replaced by an interpretation of the material as a whole, based on the ordinary meaning of the words. This would be a major advance in reform of Australian defamation law.

The SCAG paper proposes that uniform law should use the common law test of defamation, which holds that a publication is defamatory "if it is likely to cause ordinary, reasonable persons to think the less of the plaintiff or to shun or avoid the plaintiff". The Commonwealth paper proposes that a defamatory matter is one which conveys an imputation which "tends to" adversely affect a person's reputation in the estimation of the public or "a substantial and reputable section of the public", deters members of the public from associating with a person, exposes a person to ridicule or adversely affects a person's occupation, trade, office or official standing. By altering the definition of defamation, the Commonwealth's proposal jeopardises decades of precedents which have settled the tests for what is defamatory. If the Commonwealth definition were made law, the issue of what is and is not defamatory would be open to reconsideration by the courts, leading to a period of uncertainty and lengthier hearings.

The use of the phrase "tends to" is a matter of concern, since it lowers the threshold for assessing the degree of harm which a plaintiff must establish. There is a real difference between the phrase "likely to", which implies a certain level of probability, and "tends to", which implies that only a small risk of harm will be sufficient to establish defamation. The use of the word "reputable" in the Commonwealth's proposed definition also has the effect of shifting the standard of proof for plaintiffs. In common law, the "ordinary, reasonable" member of the public in whose perception defamation is measured must be "right thinking". But "reputable" implies something more - it implies that the section of the public which is to be used as the standard must have a certain standing in the community beyond that of the ordinary, reasonable individual. The Council sees as preferable adherence to the common law definition.

There are differences in the proposals on causes of action and who can sue. The Commonwealth continues to propose that a cause of action in defamation should be available on behalf of deceased persons who have been defamed (within three years of their death). The SCAG paper does not make any similar proposal. A difficulty of the Commonwealth provision lies in the inability in a case to test the truth in the absence of the deceased person on whose behalf injury is claimed.

There has been concern in recent years that corporations have been using defamation law as a way of shutting up small, community-based organisations who have been protesting the corporation's actions detrimental to the environment or their employees. The SCAG proposal would remove the ability of corporations to exploit defamation actions to silence their critics and would allow more leeway for the publication of information on matters of public interest and concern on the grounds that corporations have other means of protecting their reputations. The SCAG proposal is for a general prohibition on the right of corporations to sue for defamation, although that prohibition would not apply to not-for-profit organisations. The Commonwealth proposal would permit corporations to sue for defamation and, therefore, to continue to (mis)use defamation law against community groups.

Defences

The states' discussion paper recommends that "as a minimum standard, the defendant needs to establish that the defamatory matter is in substance true". This sounds promising, but the discussion preceding that recommendation suggests that SCAG may ultimately decide to proceed with a defence of truth together with public interest. Most media organisations believe that there should be a defence of truth alone, consistent with that available in Victoria, rather than some formula which requires that the defence demonstrate that, in addition to being true, the material served some public interest or public benefit.

The Commonwealth proposal will require both truth and public benefit to be shown for the defence to succeed but goes further by seeking to set down a definition of 'public interest' in its draft bill. Essentially it defines matters of public interest as being those matters which are not private (i.e. matters which do not relate to a person's "health, private behaviour, financial affairs, home life, personal relationships or family relationships"), although it specifies a number of instances where a matter will be regarded as being of public interest notwithstanding that it relates to a private matter. This new definition will create a field-day for lawyers (and much uncertainty for litigants) as it remains open to interpretation.

Additionally, it is a definition that seems to establish a new tort of privacy. Under the Commonwealth proposal, a newspaper which publishes details of a person's private life would not be able to claim public interest in respect of those details unless one of the specific instances applied. The list of specific instances provided appears to account for most of the obvious situations. However, the real danger with this definition is that courts would have no flexibility to accommodate situations not anticipated by legislators.

Qualified privilege is an area of critical importance. Currently, the media publishes articles of opinion and comment that are defensible at defamation law if they pass the test of "fair comment". In relation to qualified privilege, SCAG is proposing that the NSW provisions be adopted in any uniform law. These seek to enact the criteria set down by the House of Lords in *Reynolds v Times Newspapers Ltd*, in which factors which might be taken into account when deciding whether publication was reasonable were enumerated. The proposed Commonwealth defence is similar but not identical with the NSW provisions.

In its discussion paper, the Commonwealth expressed its preference for a requirement that an opinion or comment be "reasonable" in order to be able to rely on the defence of fair comment. The SCAG proposal does not include such a requirement. In the Commonwealth's revised proposal it has refrained from using the word "reasonable" in relation to the defence of honest opinion. However, in order for the defence of honest opinion to be available under the proposed Commonwealth legislation complex and difficult requirements would have to be met: opinions would have to be based on facts, the facts would have to be either true or covered by the privilege defences, and those facts would either have to be asserted or implied together with the opinion unless they were generally known to the public, or to "a substantial and reputable section" of the public. At the very least, the word 'reputable' should be omitted.

Both the Commonwealth and the states have rejected any suggestion that a "public figure" defence be introduced. There is a strong argument to support a defence similar to that available in the US, where a 'public figure' has a higher standard of proof than that available to private citizens, needing to demonstrate that the publication was malicious before they can succeed. Given the public interest and concern in the activities of 'public figures', the Council believes that there should be a greater leeway for investigation of their public activities, and a 'public figure' defence would provide such a leeway.

Both the Commonwealth and the states are proposing that there should be a defence of triviality available, where a defamed person is not likely to suffer harm. However, the proposed Commonwealth defence would be much narrower than that of the states, being "not intended to apply to publication in the mass media".

Remedies

The media have expressed the view that damages awards should be limited to compensation for actual loss. SCAG has gone a small way toward that position, by recommending that damages for non-economic loss be proportional to damages awarded for non-economic loss in personal injury proceedings. SCAG also proposes that the abolition of exemplary damages be part of any uniform defamation law.

The Commonwealth's position on damages is that, instead of different components being awarded in respect of exemplary damages, general damages, special damages and so on, a single amount be assessed. This amount would include compensation for vindication, consolation, reparation and punishment. In other words, the sum awarded would still include compensation for exemplary, general, and special damages but the assessment would not set out what proportion of the award was allocated to each component. The Commonwealth proposal also sets out issues to be taken into consideration when assessing damages and factors which act in mitigation of damages. These include apologies and corrections. However, what is not specifically included as a mitigating factor is any genuine attempt by the defendant to settle the dispute at an early stage.

Summary

The Press Council has been encouraged in the belief that for the first time in many years both the states and territories (through SCAG) and the Commonwealth are serious about defamation law reform. While bad reform would be worse than no reform, there is enough serious consideration of the issues in the discussion papers for the prospect of sensible modernisation of the law to be real. Nevertheless, there is a way to go. The next steps will be crucial. An exposure draft of the proposed SCAG legislation is to be available for comment and submissions by November. The Commonwealth has been less forthcoming about its intentions but really needs to take the same open approach. The most disastrous outcome would be the states and the Commonwealth going separate ways without public input, in a contest of wills. The Press Council will be working assiduously to keep the parties focussed on good law, to ensure that any reform results in law that adequately balances free speech and the reputations of individuals, while avoiding to the maximum extent the present roller-coaster of excessive and unpredictable litigation.

Ken McKinnon and Jack Herman

Submission to the Australian Senate Legal and Constitutional Committee Inquiry into the *National Security Information (Criminal Proceedings) Bill* 2004

The Australian Press Council expresses its gratitude for being given the opportunity to comment on the *National Security Information (Criminal Proceedings) Bill* 2004. Although the Council has made a number of criticisms of the proposed legislation, we accept that legislation is necessary in order to address the issues which arose in the *Lappas* case, and we recognise that the bill represents a sincere attempt to reconcile the need to protect security sensitive information, on the one hand, and the aim of providing the court with sufficient discretion to facilitate fair hearings, on the other.

The Press Council has a number of concerns about the content of the *National Security Information (Criminal Proceedings) Bill.* Foremost among those concerns is the breadth of the definition of "national security" which is set down in sections 8 to 12 of the bill. This definition extends to include Australia's economic interests, Australia's political relations with other countries and Australia's scientific or technological interests. The sweeping nature of this definition has the potential to include within its scope a broad range of types of information which not only relate to matters of public interest but which are appropriate matters for public debate. Just a few examples would be contracts for government tenders, analysis or forecasts of the Australian economy, proposed trade agreements with foreign governments, planned changes to Australia's telecommunications infrastructure, or reports of mismanagement within Australia's immigration detention centres.

Anything which falls within this definition may be the subject of a certificate issued by the Attorney-General under section 24 of the bill, provided that the Attorney-General "expects" that the information may be disclosed in a federal criminal proceeding. There is no requirement that the expectation must be soundly based. Thus the Attorney-General has the power to restrain a wide range of information, subject only to a court determination under section 29. The Press Council proposes that the definition of "national security" be narrowed so as to exclude information relating to matters which ought rightfully be the subject of public debate.

A second mechanism which would address the council's concerns regarding the breadth of the definition of "national security" would be to insert a provision into the proposed legislation which makes it an offence to issue a certificate for an inappropriate purpose. Such inappropriate purposes would include the concealing of incompetence, misconduct or corruption. The Attorney-General should also be prohibited from making a determination on the issuing of a certificate if he or she has a conflict of interest. If the information concerns the policies or actions of a current