

Defamation Act 2006

By Sarah Wilke, Policy, Department of Justice.

The Defamation Act 2006 came into operation on 26 April 2006 as part of a scheme of national uniform defamation law. It repealed and replaced the NT Defamation Act and made consequential amendments to the Juries Act and the Limitations Act.

The law of defamation in Australia had been inconsistent and varied amongst the jurisdictions. In some jurisdictions, the common law was the source of defamation law with either minor or substantial statutory amendment whilst in Tasmania and Queensland the law had been codified. In the Northern Territory defamation was substantially common law with minor statutory modifications. Although there was consistency as to what constituted a defamatory statement there was variation as to defences.

HISTORY

Reform to the law of defamation in Australia had been under national consideration for almost 30 years without success. In July 2004 the Standing Committee of Attorneys-General released a framework for uniform defamation law to the public for comment. It was considered timely, if not overdue, given the undesirability of inconsistent defamation laws and the reality of modern communications. It was the case that statements published in the national media, for example by television broadcasters, were actionable in a number of, but not all jurisdictions giving plaintiffs the incentive to “forum shop” for the most attractive law to apply to their case.

The framework received considerable support from stakeholders and led to the development of a draft Model Bill which was enacted in all States in 2005, and in the both the ACT and the Northern Territory in 2006. An Intergovernmental Agreement was signed by all Attorneys-General to maintain uniformity of the laws.

THE REFORM

The principal features of the Act are:

- the retention (with some modifications) of the common law of defamation to determine civil liability for defamation;
- the continuation of the abolition of the distinction at common law between slander and libel;
- the creation of a statutory cap on the amount of damages for non-economic loss that may be awarded in civil proceedings for defamation;
- the enactment of provisions to facilitate the resolution of civil disputes about the publication of



- defamatory matter without litigation;
- the abolition of exemplary and punitive damages in civil proceedings for defamation;
- the establishment of truth alone as a defence to a civil action for defamation;
- the imposition of a limitation period for civil actions for defamation of one year, subject to an extension (in limited circumstances) to a period of up to three years following publication; and
- the abolition of the role of juries in defamation proceedings.

The last of these was the only point of difference amongst the jurisdictions and is discussed later in the paper. I will now discuss some of these key features of the Defamation Act 2006 in terms of modifications to the old law of defamation in the Territory.

DAMAGES

There is now a cap of \$250,000 on damages for non-economic loss that may be awarded in a defamation case with the amount to be adjusted annually by notice in the Gazette. Previously there was no limit on the amount of damages awarded, and by contrast with amounts awarded for pain and suffering in personal injuries cases involving catastrophic physical injury, appeared excessive.

Consistent with reforms to the law of tort, the Act also abolishes exemplary (“punitive”) damages but retains the ability of courts to award aggravated damages. This will occur in circumstances where the conduct of the defendant has been improper, unjustifiable, or lacking in bona fides. Their conduct must be misconduct and the misconduct must have caused a further actual harm to the plaintiff.

For the purpose of assessing damages the Act sets out a number of mitigating factors including –

- the fact that the defendant has made an apology;
- the fact that the defendant has published a correction, and
- whether the plaintiff has already recovered

damages for the same or a similar matter in relation to any other publication.

These factors will not limit the matters a court can take into account in mitigation of damages, as was previously the case. Furthermore the Act will provide that in determining a costs award, the court may have regard to the manner in which the parties conducted their cases including any misuse of a party's superior financial position to hinder the early resolution of proceedings. This feature was aimed at encouraging appropriate settlement of proceedings.

DISPUTE RESOLUTION

A major feature of the Act is the provision for the resolution of disputes without litigation. This process may be used before, or as an alternative to, litigation and provision for apologies. It allows a publisher to make an offer of amends where they have received a "concerns notice" from an aggrieved person. The Act specifies what an offer must or may obtain. If the offer is accepted, no further action is available. This pre-litigation procedure was designed to provide a strong incentive for voluntary and timely corrections to be published. The old Act had the same mechanism however it only operated once litigation had commenced. It is important to note that a published apology will not constitute an admission of liability and will not be relevant to the determination of fault. Previously apologies could only be made following litigation.

JURIES

The Northern Territory did not retain juries for defamation as civil juries have seldom been used in the last 30 years. This does not interfere with the uniform operation of the national scheme as the issue is one of procedure rather than substance. In jurisdictions where juries have been retained their role is limited to determining liability only. In the Northern Territory judges will determine both liability and damages.

LIMITATION PERIOD

The limitation period for the commencement of an action is reduced from three years to one from the date of publication. This was intended to encourage immediate attention to alleged defamations, however a court can extend the period up to three years if satisfied that it was not reasonable to commence an action within the one year period.

CORPORATIONS

Another major feature of the Act is the removal of a corporation's right to sue for defamation. The States and Territories, as a matter of policy, aimed the law squarely at protecting the personal reputation of the individual. This reflected concerns about the potential for abuse of the action by large corporate

bodies to stifle criticism of their operations either by the threat of proceedings or the actual issue of proceedings.

It was considered that corporations have the ability to prevent public comment by pursuing costly litigation that private individuals have no capacity to defend. An example is that of the famous "McLibel" action in England in which the McDonald's corporation sought to stifle criticism by two private citizens who had publicly criticised aspects of the company's business. Large corporations have the economic means to address public criticism using other means such as their own publications or advertising. Nonetheless individuals within corporations, such as CEOs who have been personally defamed are not precluded from bringing actions on their own behalf.

The Act does however provide an exemption for certain corporations that do not operate for financial gain, such as community or charitable organisations, or organisations that employ fewer than 10 employees and that are not related to another corporation. This exemption allows small business entities such as family businesses or non-profit organisations to protect their trade by bringing defamation actions where necessary.

DEFENCES

While a number of defences in the Act exist at general law and were therefore part of defamation law in the Northern Territory they were not part of the previous NT Defamation Act. These include the defences of qualified privilege, innocent dissemination and justification. Others such as the defences of absolute privilege, of publication of public documents and of fair report of proceedings of public concern existed under the previous NT Defamation Act and continue, however have been reframed. The Act also introduces a number of new defences, one of which is the defence of contextual truth. This defence deals with the case where a number of imputations arise from a publication and the plaintiff chooses to proceed with one or more but not all of them. In these circumstances the defendant may have a defence of contextual truth if they can prove that in the context, in addition to the allegedly defamatory statements, the other statements are substantially true, and that the allegedly defamatory statements do not further harm the reputation of the plaintiff.

Previously if a publication made several statements, some of which were true and some false, a plaintiff could sue only in respect of the untrue statements leaving the defendant to prove the truth only of the untrue statements. That gave rise to the possibility that a plaintiff might artificially confine the dispute to a relatively minor imputation which if considered in the wider context did not actually harm the plain-

tiff's reputation. This had the potential to operate unfairly because the plaintiff could recover damages for the untrue statement even though in reality no further harm to their reputation could be said to have occurred in the context of the publication as a whole.

Another new defence, the defence of triviality can now be relied on if the defendant is able to prove that the circumstances of the publication were such that the plaintiff was unlikely to suffer any harm. This defence did not exist previously in the NT law.

The defence of qualified privilege in the Act reflects the more liberal approach to the defence as stated by the House of Lords in *Reynolds v Time Newspapers Ltd* (2001) 2 AC 127. The defence is broader than it was under general law because the interest the recipient must have or apparently have is not as limited. This was thought necessary because proving the necessary reciprocity of duty and interest posed difficulties for mass media defendants publishing potentially defamatory material to the world at large. In essence, the defence will apply where the defendant can prove that the recipient has an interest or apparent interest in receiving information on some subject, the matter is published in the course of providing that information and the conduct of the defendant is reasonable in the circumstances.

The defence of innocent dissemination clarifies the position of internet and other electronic and communication service providers. It means that these businesses will not automatically be treated as the primary distributor of defamatory material contained in an e-mail sent using the service. A defendant can now rely on this defence if they can prove that they did not know and could not reasonably be expected to know that the material was defamatory and that that lack of knowledge was not due to any negligence. Other businesses such as newsagents and bookstores will also benefit from the defence.

The law of criminal defamation was not part of this reform but will be further considered as part of the ongoing Criminal Code Reforms. The Act will not have retrospective operation and will therefore only apply to defamatory statements occurring on or after commencement on 26 April 2006. The previous Act will continue to apply to such statements made before the commencement of the Defamation Act 2006.



Northern Territory Government

Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse

The Northern Territory Government's Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse has been established to find better ways to protect Aboriginal children from sexual abuse. Rex Wild QC and Ms Pat Anderson have been appointed Co-Chairmen of the Board.

In particular, the Board's task will be to:

- Examine the extent, nature and contributing factors to sexual abuse of Aboriginal children, with a particular focus on unreported incidences of such abuse.
- Identify barriers and issues associated with the provision of effective responses to and protection against sexual abuse for Aboriginal children.
- Consider practices, procedures and resources of NT Government agencies with direct responsibilities in this area (Family & Children's Services and Police), and also consider how all tiers of government and non-government agencies might contribute to a more effective protection and response network.
- Consider how the NT Government can help support communities to effectively prevent and tackle child sexual abuse.

Written submissions are sought from members of the public, non-government organisations, and interest groups by Friday, 29 September 2006. Submissions can be lodged with the Board's Secretariat by any of the following means:

By post: GPO Box 4396, Darwin NT 0801
By fax: 08 8999 5523
By email: Inquiry.childprotection@nt.gov.au

The Board will also make arrangements for oral submissions in appropriate cases.

For further information, please contact the Board's Secretariat on:

Telephone: 08 8999 5515
Freecall: 1800 788 825 or
Website: www.inquirysaac.nt.gov.au