

AN INTRODUCTION TO THE AUSTRALIAN UNIFORM DEFAMATION ACTS OF 2005-2006

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I. *Introduction*

On 1 January 2006, the six Australian States came to share, for the first time in their history, substantially uniform defamation laws.¹ By April of the same year, the remaining two jurisdictions of the Australian Capital Territory and Northern Territory had followed suit.²

As a result of this landmark harmonisation of the laws of eight separate jurisdictions in the Australian federal system, the law of defamation now reflects the modern structure of a media organised nationally. The fact that there is now a single layer of rules rather than a patchwork of eight different substantive legal regimes provides greater certainty to the public in asserting their rights to reputation and the media in determining what can be safely published across state borders. Insofar as the costs of compliance will be lower, time and money will be saved in litigation, and there will be less need for the media to exercise self-censorship for fear of falling foul of the law, this harmonisation represents a victory for free speech. And while Sydney, the capital of New South Wales and city where most of the national media are concentrated, is expected to remain the libel capital of the nation, plaintiffs will be discouraged from forum shopping in search of a more favourable verdict or larger award of damages.

In this paper, I introduce the background to the enactment of the uniform Acts and the main provisions of the New South Wales Act in the hope that it will attract the interest of Japanese scholars and inspire them to explore the implications and finer points of this modern legislative scheme further.

II. *Background*

Prior to the enactment of the uniform Acts, there was no uniformity in the law of defamation between the States and Territories.³ In Queensland and Tasmania, both the cause of action and defences were codified to the exclusion of the common law. In New South Wales,

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¹ On this day, the following uniform Acts entered into force: *Defamation Act 2005* (NSW); *Defamation Act 2005* (Vic.); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (WA); *Defamation Act 2005* (Tas.).

² *Civil Law (Wrongs) Act 2002* as amended by the *Civil Law (Wrongs) Amendment Act 2006* (ACT), entering into force on 23 February 2006; *Defamation Act 2006* (NT), entering into force on 26 April 2006.

³ Des Butler and Sharon Rodrick, *Australian Media Law* (2nd ed.) (Sydney: Lawbook Co., 2004), para. 2.25.

the cause of action was largely determined by reference to the common law, while some of the defences were provided by statute. In the Australian Capital Territory, the cause of action was governed by the common law, while defences were provided by statute and the common law. In other jurisdictions, both the cause of action and defences were governed by the common law, supplemented in various ways by statute. The inconsistencies between the eight jurisdictions were most apparent in the area of defences due to codification and supplementation by statutes varying in their terms.⁴

The result was “a confusing morass of uncertainty”⁵ for the national media especially, since defamatory matter is deemed under the common law to be published in each place in which it is read, seen or heard,⁶ and courts had to consider the laws of several jurisdictions when dealing with defamatory matter published widely in Australia. This problem was exacerbated by the rule that a plaintiff could recover for injury to reputation in relation to the entire publication, including publications in other jurisdictions subject to different laws,⁷ provided this was done in a single action.⁸ Also, the same matter published simultaneously in more than one jurisdiction could be the basis for recovery of damages in some jurisdictions but not in others on account of differences, for example, in the availability of defences.⁹ Needless to say, such inconsistencies in the law have at times caused hardship to media companies and were perceived as having a potentially chilling effect on free speech.

In 1979, the Australian Law Reform Commission, reporting on *Unfair Publication: Defamation and Privacy*,¹⁰ commented:

The laws are complex and conflict from one part of the country to another. It is not reasonable to expect editors, producers and journalists to know and apply eight separate defamation laws in publishing newspapers and magazines circulating throughout Australia and in selecting material for transmission on national broadcasting and television programs. In most jurisdictions the content of the law has been substantially unrevised this century. The law takes little account of changed social conditions, technological advances and the growth of national consciousness and national communication.

The Commission recommended that the patchwork of existing statutes and case law be replaced by a codified, uniform law of defamation throughout Australia.¹¹

The need for uniformity in the law of defamation was generally accepted, and the issue remained fairly constantly on the agenda of the Standing Committee of Attorneys-General (SCAG) from 1980. However, little progress was made towards achieving uniformity despite

⁴ *Id.*, para. 2.305.

⁵ *Id.*, para. 2.30.

⁶ *Gorton v. Australian Broadcasting Commission* (1973) 22 FLR 181; *Dow Jones & Company Inc. v. Gutnick* (2002) 194 ALR 433.

⁷ *Waterhouse v. Australian Broadcasting Corporation* (1986) 87 FLR 369.

⁸ *Maple v. David Syme & Co. Ltd* [1975] 1 NSWLR 97; *Meckiff v. Simpson* [1968] VR 62.

⁹ Butler and Rodrick (2004), *op. cit.*, para. 2.35.

This phenomenon is well illustrated by the case of *Gorton v. Australian Broadcasting Commission* (1973) 22 FLR 181, where a media defendant was able to establish a defence under New South Wales law, but not under the laws of Victoria or the Australian Capital Territory, with respect to the same broadcast.

¹⁰ Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (Law Reform Commission Report No. 11) (Canberra: Australian Government Publishing Service, 1979), p. ix.

¹¹ *Id.*, pp. ix-xi.

the fact that the development of national media and the Internet made differences between the jurisdictions increasingly difficult to justify.¹²

The States and Territories were finally spurred into action in March 2004 with the publication of a discussion paper, *Outline of Possible National Defamation Law*, by the Commonwealth Attorney-General's Department threatening to invoke a range of federal constitutional powers (such as the corporations power, interstate trade and commerce power, and telecommunications power) to enact legislation which would largely prevail over state and territory law in the event that the States and Territories failed to introduce legislation themselves. This proposed course of action would have added further complexity and difficulty by adding a ninth jurisdiction to Australian defamation law and no doubt led to numerous constitutional challenges in the courts.

The States and Territories responded by releasing a *Proposal for Uniform Defamation Laws* in July 2004. In the Preamble to its *Proposal*, the State and Territory Ministers of SCAG stated their commitment to "eliminating all unnecessary and unhelpful differences between the defamation laws of the States and Territories" and "developing and implementing uniform defamation laws to discourage forum shopping", and expressed the following three reasons for their opposition to a uniform Commonwealth defamation law:

First, as the Commonwealth acknowledges in its outline for a national defamation law, the Commonwealth lacks the Constitutional power to completely 'cover the field' in this area.

Secondly, a Commonwealth law would simply add a ninth layer to Australian defamation law.

Thirdly, acceptance of a national defamation law would mean that the Commonwealth would be in a position to determine where the balance should be struck between freedom of expression and the protection of personal reputation. A Commonwealth codification of defamation law carries with it the danger that the balance maintained by the States and Territories will be lost and never retrieved.

The Commonwealth Government also published a *Revised Outline of Possible National Defamation Law* in July 2004, making some changes and clarifications in response to concerns raised during the consultation process.

The States and Territories ultimately agreed to enact textually uniform "core provisions" to complement the common law with the capacity to accommodate local procedures and institutions. A bill containing *Model Defamation Provisions* was released in November 2004 and enacted by each of the States in 2005 and the two Territories in early 2006. The uniform Acts are underpinned by an intergovernmental agreement between all the States and Territories to ensure that the laws remain uniform and to facilitate ongoing law reform.

The contents of the States and Territories' *Proposal* and the *Model Defamation Provisions* differed from the revised Commonwealth Government proposals in several respects, and were drafted after extensive consultation with the Australian Press Council, national and regional media organisations, free speech and civil liberties groups, academics, specialist practitioners,

¹² For detailed discussions of past efforts towards uniformity, see Mark Pearson, "Towards Uniform Defamation Laws: The Australian Experiment", (1992) 13 *Journal of Media Law & Practice* 276 and Andrew T. Kenyon, *Defamation: Comparative Law and Practice* (Abingdon, Oxfordshire and New York: UCL Press, 2006), pp. 362-364.

law societies, bar associations, and judicial bodies.

It is important to note that the uniform Acts have not codified the common law. They repeal previous legislation relating to defamation, reinstate the common law in each State and Territory, and specify a set of common statutory defences,¹³ but do not represent either a comprehensive or significant reform of substantive doctrines.

I will now introduce the key provisions of the uniform Acts.

III. *Key Provisions*

While all of the uniform Acts are based on the *Model Defamation Provisions*, slight differences exist between the provisions enacted in each jurisdiction, including the numbering of sections. The section numbers below refer to the provisions in the New South Wales Act.

1. **Objects of the Act** (section 3)

Four objects of the Act are stated in section 3 as follows:

- (a) to enact provisions to promote uniform laws of defamation in Australia,
- (b) to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance,
- (c) to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter,
- (d) to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.

2. **The Relationship Between the Act and the Common Law** (sections 6-7)

Section 6 provides that the Act relates to the tort of defamation at “general law” (common law and equity) and does not affect the operation of such law except to the extent that the Act provides expressly or by necessary implication. Thus, the Uniform Acts do not represent a codification of the common law.

The common law distinction between libel and slander is abolished under section 7, making the publication of defamatory matter of any kind actionable without proof of special damage.¹⁴ In simple terms this means that a plaintiff who was the subject of a defamatory publication in transitory, non-permanent form, such as mere gesture or idle gossip, will be able to bring an action without having first to prove economic loss stemming from the publication.

¹³ Rhonda Breit, “Uniform Defamation Laws in Australia: Have They Struck a Better Balance” (Communications Policy and Research Forum 2006), p. 1.

¹⁴ At common law, libel is a defamatory statement in writing or other permanent form and is actionable *per se* without the plaintiff having to prove damage, whereas slander is a defamatory statement in oral or transient form (including mere gestures and body language) and requires proof by the plaintiff of special damage (material loss or actual pecuniary loss), except in certain limited cases where the statement relates to such matters as a criminal offence, contagious disease, or unfitness for a calling or profession.

The distinction between libel and slander had already been abolished in Queensland, Tasmania, and the Australian Capital Territory, while slander was actionable without proof of special damage in New South Wales.

3. Causes of Action for Defamation (sections 8-10)

Section 8 provides that a person has a single cause of action for defamation in relation to the publication of defamatory matter about such person even if the matter carries more than one defamatory imputation about the person. This provision prevents a person from bringing multiple actions with respect to a single publication.

Corporations are precluded under section 9 from bringing actions for defamation in relation to the publication of defamatory matter about such corporations unless, at the time of the publication, the corporation was either a small business unrelated to another corporation and employing less than ten people or a not-for-profit organisation. For the purpose of determining the number of employees, part-time workers are counted as an appropriate fraction of a full-time equivalent. One of the reasons for the enactment of this provision was ministerial concern that large corporations had in the past used the possibility of bringing defamation actions to silence those who had expressed a view in the public interest.

Similarly, actions cannot, under section 10, be brought by any person (including a personal representative of a deceased person) to assert, continue or enforce a defamation action in relation to the publication of defamatory material about a deceased person (whether published before or after his or her death) or by a person who has died since publishing the matter. Thus, actions for defamation of the dead are not recognised in any jurisdiction except Tasmania, which has elected to retain the right of action on behalf of the dead.

4. Choice of Law for Defamation Proceedings (section 11)

Section 11 seeks to resolve choice of law issues between the eight Australian jurisdictions by ceding responsibility to the jurisdiction with which the harm occasioned by the publication as a whole has its closest connection.

Section 11(1) provides that if a matter is published wholly within a particular “Australian jurisdictional area” (in most cases, state or territory), then the substantive law that is applicable in that area must be applied in that jurisdiction to determine any defamation action based on the publication. However, where there is a “multiple publication” of matter in more than one Australian jurisdiction, section 11(2) provides that the substantive law applicable in the jurisdiction with which the harm occasioned by the publication as a whole has its closest connection must be applied. Under section 11(3), a court may take into account the place at the time of publication where the plaintiff was ordinarily resident (or in the case of a corporation, the place where the corporation had its principal place of business at the time), the extent of publication and extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area, and any other matter that the court considers relevant, in determining which jurisdiction has the closest connection with the harm occasioned by a publication.

“Multiple publication” is defined in section 11(5) as meaning publication by a particular person of the same, or substantially the same, matter in substantially the same form to two or more persons.

5. Resolution of Civil Disputes Without Litigation (sections 12-20)

Sections 12-19 of the Act establish an alternative dispute resolution mechanism intended to encourage early and voluntary settlement of disputes prior to the commencement of legal proceedings. Under this procedure, publishers may seek to resolve civil disputes without

litigation by making formal offers to make amends to aggrieved persons. Such offers must include an offer to publish a reasonable correction, and once accepted by a plaintiff, the agreement becomes enforceable by a court.

Under section 12, these provisions apply where a person (the “publisher”) publishes matter that is, or may be, defamatory of another person (the “aggrieved person”). These provisions may be used instead of any rules of court or any other law in relation to the payment into court or offers of compromise, and do not prevent a publisher or aggrieved person from making or accepting a settlement offer in relation to the publication otherwise than in accordance with these provisions.

A publisher may make, pursuant to section 13, an offer to make amends to an aggrieved person either in relation to the matter in question generally or limited to any particular defamatory imputations that the publisher accepts that the matter carries. Where the publication was made by two or more persons, an offer to make amends by one or more of them will not affect the liability of the other or others. Moreover, the offer will be taken to have been made without prejudice unless the offer provides otherwise.

A publisher is, however, precluded under section 14 from making an offer to make amends once 28 days have elapsed since the publisher was given a “concerns notice” by the aggrieved person, or if a defence has been served in an action brought by the aggrieved person against the publisher in relation to the matter in question.

A concerns notice is a notice in writing informing the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about such person by the matter in question. If an aggrieved person gives the publisher a concerns notice, but fails to particularise the imputations of concern adequately, the publisher may give such person a written “further particulars notice” requesting that he or she provide reasonable further particulars about the imputations of concern as specified in the further particulars notice. The aggrieved person must then provide the particulars specified in the notice within 14 days (or any further period agreed by the publisher and aggrieved person) or will be deemed not to have given the publisher a concerns notice for the purposes of section 14.

The requisite contents of a valid offer to make amends are laid down in section 15(1) and may be summarised as follows:

- (a) the offer must be in writing;
- (b) the offer must be readily identifiable as an offer to make amends;
- (c) if the offer is limited to any particular defamatory imputations, it must state that the offer is so limited and particularise the imputations to which the offer is limited;
- (d) the offer must include an offer to publish, or join in publishing, a reasonable correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited;
- (e) if material containing the matter has been given to someone else by the publisher or with the publisher’s knowledge, the offer must include an offer to take, or join in taking, reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person;
- (f) the offer must include an offer to pay the expenses reasonably incurred by the aggrieved person both before the offer was made and in considering the offer; and
- (g) the offer may include any other kind of offer, or particulars of any other action taken

by the publisher, to redress the harm sustained by the aggrieved person because of the matter in question, including (but not limited to):

- (i) an offer to publish, or join in publishing, an apology in relation to the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited, or
- (ii) an offer to pay compensation for any economic or non-economic loss of the aggrieved person, or
- (iii) the particulars of any correction or apology made, or action taken, before the date of the offer.

Section 15(2) provides that an offer to pay compensation may include an offer to pay a stated amount, an amount to be agreed between the publisher and the aggrieved person, or an amount determined by an arbitrator or court.

If an offer to make amends is accepted, a court may, under section 15(3), determine on the application of either party the amount of compensation to be paid under the offer, if the terms of the offer provide for such a determination, and any other question that arises as to what must be done to carry out the terms of the offer.

Section 16 provides that an offer to make amends may be withdrawn prior to acceptance by notice in writing to the aggrieved person. The publisher may then make a renewed offer, which may (but need not) be in the same terms as the withdrawn offer. Such offer will be treated as a new offer, but the 28-day limit specified in section 14 does not prevent the making of a renewed offer that is not in the same terms as the withdrawn offer if the renewed offer represents a genuine attempt by the publisher to address matters of concern raised by the aggrieved person about the withdrawn offer and the renewed offer is made within 14 days after the withdrawal of the withdrawn offer or any other period agreed by the publisher and aggrieved person.

The effect of an acceptance of an offer to make an amends and the carrying out of its terms (including payment of any compensation) by the publisher is, under section 17, that the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher in relation to that matter even if the offer was limited to any particular defamatory imputations. A court may order the publisher to pay the aggrieved person the expenses reasonably incurred by the aggrieved person as a result of accepting the offer and order any costs incurred by the aggrieved person that form part of those expenses to be assessed on an indemnity basis.

Where an aggrieved person fails to accept a reasonable offer to make amends, section 18(1) provides that it will be a defence to an action for defamation against the publisher in relation to that matter if (a) the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory, (b) the publisher was ready and willing, at any time before the trial, to carry out the terms of the offer upon acceptance by the aggrieved person, and (c) the offer was reasonable in all the circumstances. In determining, under section 18(2), whether an offer to make amends is reasonable, a court:

- (a) must have regard to any correction or apology published before any trial arising out of the matter in question, including the extent to which the correction or apology is brought to the attention of the audience of the matter in question taking into account:

- (i) the prominence given to the correction or apology as published, and
 - (ii) the period that elapses between publication of the matter in question and publication of the correction or apology, and
- (b) may have regard to:
- (i) whether the aggrieved person refused to accept an offer that was limited to any particular defamatory imputations because the aggrieved person did not agree with the publisher about the imputations that the matter in question carried, and
 - (ii) any other matter that the court considers relevant.

Section 19 facilitates communication between the parties by providing that evidence of any statement or admission made in connection with the making or acceptance of an offer to make amends is not admissible as evidence in any legal proceedings (whether criminal or civil), but does not preclude the admission of such evidence in determining costs in defamation proceedings.

Section 20 addresses the effect of an apology on liability for defamation. Under this section, an apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published by the person does not constitute an express or implied admission of fault or liability by that person and is not relevant to the determination of fault or liability of that person in connection with that matter. Likewise, evidence of an apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published by the person is not admissible in any civil proceedings as evidence of the fault or liability of that person in connection with that matter.

6. Litigation of Civil Disputes in General (sections 21-23)

Section 21 provides that unless a court orders otherwise, a plaintiff or defendant in defamation proceedings may elect to have the case tried by a jury.¹⁵ A court could order that a case not be tried by jury if, for instance, the trial will require a prolonged examination of records or involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

Where the proceedings are tried by jury, its role is limited under section 22 to determining whether the defendant has published defamatory matter about the plaintiff and if so, whether any defence raised by the defendant has been established. It is the judge — and not the jury — who will determine the amount of damages (if any) to be awarded the plaintiff and all unresolved issues of fact and law relating to the determination of that amount. Where the proceedings relate to more than one cause of action for defamation, the jury must give a single verdict in relation to all causes of action on which the plaintiff relies unless the judicial officer orders otherwise.

Section 23 precludes a person who has already brought a defamation action in any jurisdiction from bringing further proceedings for damages against the same defendant in relation to the same or any other publication of the same or like matter except with the leave of the court in which the further proceedings are to be brought.

¹⁵ As civil juries were abolished in South Australia in 1928, there is no provision equivalent to sections 21 and 22 in the South Australian Act. Civil juries are not used in practice in the Australian Capital Territory or Northern Territory either.

7. Defences to Actions for Defamation (sections 24-33)

Sections 25 to 33 provide for the defences of justification, contextual truth, absolute privilege, publication of public documents, fair report of proceedings of public concern, qualified privilege for provision of certain information, honest opinion, innocent dissemination, and triviality. Each of these will be discussed below.

By virtue of section 24, these defences are additional to any other one available to the defendant (including under the general law) and do not vitiate, limit or abrogate any other defence. Where proof that a publication was actuated by malice would vitiate a defence, the general law will be applied to determine whether a particular publication of matter was in fact actuated by malice.

Justification is a complete defence under section 25, and a defendant can escape liability by proving that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.¹⁶

Similarly, section 26 introduces a new defence of contextual truth, making it 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, one or more 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.

Section 27 provides a defence of absolute privilege for matter published in the course of the proceedings of an Australian parliamentary body, court or tribunal. Similarly, section 28 provides a defence for publication of (a) public documents and fair copies of public documents and (b) fair summaries of, or fair extracts from, public documents, while section 29 provides a defence for matter published in fair reports of any of a wide range of proceedings of public concern, such as the proceedings in public of parliamentary bodies, international organisations, international conferences, international judicial or arbitral tribunals, local government bodies, learned societies, sport or recreation associations, trade associations, public meetings of shareholders of public companies, ombudsmen, and law reform bodies. For the two latter defences to apply, however, the defamatory matter must be published honestly for either the information of the public or the advancement of education.

Under section 30, a defence of qualified privilege attaches to the publication of defamatory matter to a person (the “recipient”) if the defendant proves that (a) the recipient has an interest or apparent interest in having information on some subject, (b) the matter is published to the recipient in the course of giving the recipient information on that subject, and (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances. This defence will be defeated if the plaintiff proves that the publication was actuated by malice, but not merely because the defamatory matter was published for reward.

For the purposes of this section, a recipient is deemed to have an apparent interest in

¹⁶ This represents a return to the common law rule which applied in Victoria, South Australia, Western Australia, and the Northern Territory, but which was modified by statute in other jurisdictions to require that the publication also be in the public interest (in New South Wales) or for public benefit (in Queensland, Tasmania, and the Australian Capital Territory).

Although the requirements of public interest and public benefit afforded the subjects of media reports some protection against unwarranted invasions of their privacy, such indirect attempts to regulate privacy were seen as not being appropriate for the law of defamation.

having information on some subject if, and only if, at the time of the publication, the defendant believes on reasonable grounds that the recipient has that interest.

As to whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, section 30(3) provides that the court may take into account the following factors:

- (a) the extent to which the matter published is of public interest, and
- (b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and
- (c) the seriousness of any defamatory imputation carried by the matter published, and
- (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and
- (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and
- (f) the nature of the business environment in which the defendant operates, and
- (g) the sources of the information in the matter published and the integrity of those sources, and
- (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and
- (i) any other steps taken to verify the information in the matter published, and
- (j) any other circumstances that the court considers relevant.

Section 31 affords a defence of honest opinion to a defendant who proves that (a) the published matter was an expression of opinion of the defendant, his or her employee or agent, or other person (the "commentator") rather than a statement of fact, (b) the opinion related to a matter of public interest, and (c) the opinion was based on proper material. A defence established under this section will be defeated only if the plaintiff proves that the defendant did not honestly hold the belief, the defendant did not believe that the opinion was honestly held by the employee or agent, or the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator, as the case may be, at the time the defamatory matter was published.

For the purposes of this section, an opinion is deemed to be based on "proper material" if it is based on material that (a) is substantially true, (b) was published on an occasion of absolute or qualified privilege (whether under the Act or at general law), or (c) was published on an occasion that attracted the protection of a defence under this section or section 28 or 29. An opinion does not cease to be based on proper material merely because some of the material on which it is based is not proper material if the opinion might reasonably be based on such of the material as is proper material.

Section 32 modernises and codifies the common law defence of innocent dissemination to protect parties such as booksellers and Internet service providers who are unaware they have distributed material containing defamatory content. Under this section, it is a defence to the publication of defamatory matter if the defendant proves that he or she (a) published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, (b) neither knew, nor ought reasonably to have known, that the matter was defamatory, and (c) that lack of knowledge was not due to any negligence on his or her part. For the purposes

of this section, “subordinate distributor” means a person who was not the first or primary distributor, author or originator of the matter, and did not have any capacity to exercise editorial control over the content of the matter (or over publication of the matter) before it was first published.

Under section 32(3), a person is not the first or primary distributor of the matter merely because he or she was involved in the publication of the matter in the capacity of:

- (a) a bookseller, newsagent or news-vendor, or
- (b) a librarian, or
- (c) a wholesaler or retailer of the matter, or
- (d) a provider of postal or similar services by means of which the matter is published, or
- (e) a broadcaster of a live programme (whether on television, radio or otherwise) containing the matter in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter, or
- (f) a provider of services consisting of:
 - (i) the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded, or
 - (ii) the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form, or
- (g) an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control, or
- (h) a person who, on the instructions or at the direction of another person, prints or produces, reprints or reproduces or distributes the matter for or on behalf of that other person.

Finally, section 33 addresses the problem of vexatious litigants by establishing a defence of triviality, making it a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.

8. Remedies (sections 34-39)

In determining the amount of damages to be awarded in a defamation proceeding, a court is required, under section 34, to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

Courts may award full recovery in defamation proceedings for economic loss, but the maximum amount of damages they may award for non-economic loss is capped, under section 35, at \$250,000.¹⁷ This maximum is adjusted prior to July 1 each year to reflect changes in the average weekly earnings of full-time adult workers in Australia over the past year, and was last fixed at \$267,500 on 15 June 2007. A court may still, however, order a defendant to pay damages for non-economic loss in excess of this amount if, and only if, it is satisfied that the circumstances of the publication of the defamatory matter are such as to warrant an award of

¹⁷ This provision reflects SCAG’s desire to ensure that general damages for non-economic loss are no greater than those available in personal injury actions.

aggravated damages.¹⁸

In awarding damages for defamation, a court is required, under section 36, to disregard the malice or other state of mind of the defendant at the time of publication of the defamatory matter or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff.

Awards of exemplary or punitive damages in defamation cases are abolished under section 37.¹⁹

The factors which a defendant may plead in mitigation of damages for the publication of defamatory matter are listed in section 38 to include the facts that (a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter, (b) the defendant has published a correction of the defamatory matter, or (c) the plaintiff has already recovered damages, brought proceedings, or received or agreed to receive compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter. However, this provision does not limit the matters that can be taken into account by a court in mitigation of damages.

Finally, section 39 provides that a court may assess the damages to be awarded a plaintiff for multiple causes of action as a single sum.

9. Costs in Defamation Proceedings (section 40)

Section 40 provides that a court, in awarding costs in defamation proceedings, may have regard to the way in which the parties to the proceedings have conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings) and any other matters that the court considers relevant. Where costs are to be awarded to a successful party in an action, the court is required (unless the interests of justice require otherwise) to order costs of and incidental to the proceedings to be assessed on an indemnity basis if it is satisfied that the unsuccessful party unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the successful party.²⁰ Here, "settlement offer" means any offer to settle the proceedings prior to judgment, and includes an offer to make amends (whether made before or after the proceedings are commenced) that was reasonable at the time it was made.

10. Miscellaneous (sections 41-44, etc.)

The Act also lays down some evidentiary and procedural rules relating to proof of publication (section 41), proof of prior criminal convictions (section 42), self-incrimination (section 43), and service of notices and other documents (section 44).

It should also be noted that the *Model Defamation Provisions* permitted each jurisdiction to enact the uniform provisions fixing a limitation period of one year for commencing defamation actions²¹ and providing for criminal defamation²² by incorporating these into

¹⁸ Under the common law, aggravated damages may be awarded where the defendant's conduct has aggravated the plaintiff's subjective hurt. The defendant's conduct need not be malicious, but must be capable of amounting to conduct which is unjustifiable, improper, or lacking in bona fides.

¹⁹ Exemplary or punitive damages in defamation cases had already been abolished in New South Wales.

²⁰ This provision can be seen as placing significant pressure on the parties to resolve their dispute prior to trial.

²¹ Section 12 of the *Model Defamation Provisions*.

²² Part 5 (sections 45-47) of the *Model Defamation Provisions*.

either their defamation legislation or their respective statute of limitations and criminal legislation. New South Wales elected to do this by amendments to the *Limitation Act* 1969 (NSW) and *Crimes Act* 1900 (NSW).

IV. *Some Final Remarks*

As we have seen, the uniform Acts have finally achieved the uniformity of defamation laws across Australia that had eluded so many governments since 1979. These reforms ensure that unreasonable limits are not placed on publications and discussions of public interest, provide effective and appropriate remedies for aggrieved persons, and promote speedy and non-litigious methods for resolving disputes and avoiding protracted litigation. In doing so, they recognise the fact that early vindication of the reputation of a person who has been defamed is often more important than obtaining financial compensation at a later date. The past variations in the application of defamation law, which resulted in forum shopping and considerable uncertainty for journalists, media organisations and other entities, have also been removed.

While each of the provisions introduced in this paper merits further scholarship, those relating to the offer to make amends (sections 12-19), the effect of apologies (section 20), the defence of contextual truth (section 26), the defence of honest opinion (section 31), the defence of innocent dissemination (section 32), and remedies (sections 34-39) would probably be of most interest to Japanese scholars.

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