NEW SOUTH WALES

SOLICITOR GENERAL

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Ms Kathrina Lo
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Legislation, Policy and Criminal Law Review Division
Department of Justice and Attorney General
Level 14
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Dear Ms Lo

I have set out below a submission in relation to the review that is being conducted by the Attorney General of the Defamation Act 2005 ("the Act").

I should say at the outset that I had some involvement in the work leading to the formulation of the Act and I was a member of the Attorney General's Task Force on Defamation Law Reform which reported to the then Attorney General in April 2002. I have been for the last two decades the co-author of Australian Defamation Law and Practice (LexisNexis).

General policy issues

The Act was designed to strike a balance between the two competing interests of protection of individual reputation and freedom of speech. It is inevitable that no legislation on this subject will satisfy all interested groups in the community. Media organisations and other publishers want the balance tilted more strongly in favour of freedom of speech. Those who represent the interests of plaintiffs are concerned to ensure that redress is available for individuals whose reputation has been damaged by the publication of defamatory material.

The Act was largely based on the Defamation Act 1974 (NSW) which was the most comprehensive of the statutes on this subject in the various Australian jurisdictions. The

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1974 legislation was, in my view, the best model and the Act remains, in my opinion – subject to the question of the public figure test discussed below – a reasonable balance between the two competing interests that it regulates.

It is not surprising, however, that questions have arisen in litigation about the proper construction of some of the provisions of the Act. This is legislation that is the subject of constant litigation, much of it involving large media organisations with the financial resources to test the meaning of any provision that might give rise to some doubt. A number of these questions of construction are discussed below and it may be that some need to be addressed by amending legislation. But this is, in my view, no criticism of the original drafters of the Act and it should not be thought that any amendments will prevent questions arising in the future about some provisions in the Act.

Process of amending legislation

If it is ultimately considered that some amendments are desirable to the Act, these will presumably need to be submitted to the Standing Committee of Attorneys General ("SCAG") to be considered along with any proposals from the other Australian jurisdictions. If the Act is to remain part of a scheme of uniform legislation, the proposals from the various jurisdictions will need to be considered by a group of SCAG officers so that a series of common amendments can then be proposed to the Ministers.

The role of juries under the Act

In all jurisdictions except South Australia, the Australian Capital Territory and the Northern Territory the issues of publication and meaning and the question of what defences might be allowable (except for some aspects of statutory qualified privilege) are decided by a jury under s 22 of the Act. Damages are, however, awarded by the judge.

There has been some criticism of the role of juries, particularly by McClellan CJ at CL. This criticism is, in my view, misconceived. It might be noted that it is always open to the parties to dispense with a jury by agreement and that there is provision for the court to do so in circumstances where the volume or nature of the evidence would cause particular problems for a jury. The chief objection to jury trials appears to be that they are more time-consuming. This may be true in some instances but it needs to be offset against the fact that many

plaintiffs do not wish to face a jury trial because, for example, they have a good technical case in libel but have some unattractive aspects of their character or conduct which might weigh much more heavily with a jury than with a judge. There are, therefore, in my view, many cases that are not commenced and so many trials that do not eventuate under a system where trial by jury is the norm. This is reflected, in my opinion, in the pattern of defamation actions over recent decades in New South Wales, where juries have generally been available, and in the Australian Capital Territory, where they have never been available.

In addition, there is a good argument that a jury is a singularly appropriate tribunal to decide questions of liability in defamation cases. The majority of these cases involve the conduct of public figures or the conduct of media organisations – or both. These are broadly political questions on which views within the Australian community are on occasions likely to differ sharply. A jury of four, without the requirement of giving reasons for their assessment, is likely to provide a better synthesis of community views that a judge.

Limitation on actions by corporations

Under s 9 of the Act a corporation does not have a cause of action in defamation unless it falls within a limited category of excluded corporate entities. It is not possible for a statutory corporation to fall within this category. This was one of the recommendations of the 2002 Task Force that was originally implemented in the Defamation Act 1974 and then incorporated into the Act. This provision has, in my view, worked well and underlined the fact that large corporations are well able to respond to adverse publicity without recourse to the law of defamation. In any event, they still have available to them the torts of injurious falsehood and passing off, together with a range of remedies under the Trade Practices Act 1975 (Cth) and the Fair Trading Act 1987.

Question of public figure test

The defences of common law qualified privilege and statutory qualified privilege under s 30 of the Act are both technically available to media defendants but have traditionally proved difficult for such defendants to successfully rely on. There is also, of course, a defence available under the decision of the High Court in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 where the publication occurs in the course of a discussion

of a political or government matters and the making of the publication was reasonable. The High Court said (at 574) in relation to this second requirement:

> Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.

It might be thought that these conditions of reasonability will often be difficult for media defendants to meet.

If it were thought desirable to shift this existing balance between protection of reputation and freedom of speech towards the latter in relation to political discussion, it could really only be done, by the legislative step of introducing a "public figure test" of the kind established by the United States Supreme Court in New York Times v Sullivan (1964) 376 US 254. The effect of this decision is that in the United States a public figure – which is a broader category than that of politicians – can only succeed in a defamation action if malice is demonstrated on the part of the defendant. It should be noted, however, that the question of malice has allowed extensive examination of a defendant's conduct and the reliability of his or her sources of information. It would, of course, be possible in the Australian context to confine a public figure doctrine to holders of public office and candidates for elected public office.

Defence of contextual truth

Section 26 of the Act provides a defence of contextual truth in the following terms:

> 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, one 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.

In Kermode v Fairfax Media Publications Pty Ltd (2010) NSWSC 852 Simpson J considered that this provision did not allow the defendant to plead as contextual imputations any of the imputations originally pleaded by the plaintiff, on the basis that the plaintiff's own imputations cannot be described as "in addition to the defamatory imputations of which the plaintiff complains". It might be noted that Nicholas J took a contrary view in Corby v Channel Seven Sydney Pty Ltd (NSWSC, unreported, 20 February 2008). Simpson J assumed that this kind of reliance on the plaintiff's imputations was available under s 16 of the Defamation Act 1974, although it is not at all clear that this was so. See the comments of Priestly JA in Waterhouse v Hickie (1995) Aust Tort Rep 81-347 (at 62-490); and the apparent assumption of Hunt J Jackson v John Fairfax & Sons Ltd [1981] 1 NSWLR 36 (at 39-40).

It may be that this question will be considered by the Court of Appeal but, if the view of Simpson J is ultimately upheld, this may well be a case for an amendment to the legislation, given that the defence of contextual truth cannot operate to its full extent unless a defendant can plead as contextual imputations one or more of the imputations originally pleaded by the plaintiff.

Division of functions between judge and jury under statutory qualified privilege

One question that arises under the Act is the division of functions between judge and jury under the defence of statutory qualified privilege set out in s 30. At common law the question of whether an occasion is one of qualified privilege is an issue of law to be determined by the judge, albeit on facts found by the jury if those facts be in dispute. Section 22(2) of the Act provides, however, that the jury is to determine whether a defendant has published defamatory material about the plaintiff and "if so, whether any defence raised by the defendant has been established". This would not affect the traditional division of functions in the case of a common law defence of qualified privilege because it is also stated

that this provision does not require or permit a jury to determine any issue that at general law is an issue to be determined by the judge. But it leaves open the question of whether the elements of statutory qualified privilege set out in s 30(1) are in the same category. Under s 22 of the Defamation Act 1974 – the equivalent of s 30 in the present Act – the division of functions between judge and jury had been held to be the same as at common law. This was also the finding of McClellan CJ at CL in Davis v Nationwide News Pty Limited (2008) 71 NSWLR 606 in relation to s 30. It might, however, be useful if any doubt on this question were removed by an amendment to s 22.

Matter and meanings in relation to defences of statutory qualified privilege and honest opinion

There has been some discussion in academic journals as to whether the defences of statutory qualified privilege under s 30 and honest opinion under s 31 are directed to the words of the publication or the meanings – also known as imputations – pleaded by the plaintiff. See eg Gould, "The proper focus of defamation defences and the challenge of inconsistency" (2010) 33 Aust Bar Rev 258. It is very doubtful, however, in my view, whether this distinction would normally have any practical effect, given the fact that any meanings on which the plaintiff might succeed have to arise out of the words in question. In any event, this is not a question that could be easily or effectively dealt with, in my opinion, by way of legislation and can be left to the courts to consider, if it ever arises in a way that does have some practical effect in a particular case.

Operation of cap on damages in relation to separate causes of action in one proceedings

The cap on damages for non-economic loss in s 35 is placed on damages that "may be awarded in defamation proceedings". In Davis v Nationwide News Pty Limited [2008] NSWSC 699, McClellan CJ at CL took the view that the maximum amount of damages for non-economic loss was applicable to the award that might be made to the plaintiff in particular proceedings, notwithstanding the fact that those proceedings involved multiple causes of action. It may be that the cap should not apply to quite separate and distinct publications relating to a plaintiff that had been made by the same publisher. Otherwise, a plaintiff would have no incentive to bring these causes of action in the same proceedings. A defendant could, of course, apply to have the various causes of action consolidated in the one proceedings, but the Victorian Court of Appeal refused such an application in Buckley v

Herald & Weekly Times Pty Ltd [2009] VSCA 118. In the case of publications by the same defendant which have the same meaning or effect, there is already presumably no incentive for the plaintiff to bring separate proceedings because the existence of each of the other publications can be taken into account by way of mitigation under s 38(1) in the awarding of damages, provided that the plaintiff has recovered damages or brought proceedings in relation to the other publications.

Limitation of actions

There is no provision in the Act concerning limitation of actions but s 14B of the Limitation Act 1969 reflects the uniform position in Australian jurisdictions that an action in defamation is not maintainable if brought after the end of a limitation period of one year running from the date of publication of the matter complained of. There is then some lack of uniformity in the slightly different tests that are set out in the various jurisdictions for allowing an extension of the one year period. There is no reason, however, in my view, why these slight differences as between jurisdictions in relation to this question need to be addressed in this review.

Terms of review

The review conducted by the Attorney General is designed to determine whether the policy objectives of the Act remain valid and whether the terms of the legislation remain appropriate to securing those objectives. As to the first question, the chief policy objective of the Act – the regulation of actions in defamation in a way that provides a balance between protection of individual reputation and freedom of speech – obviously remains valid. As to the second question, the terms of the legislation generally, in my view, remain appropriate to securing that objective. I have, however, discussed above some questions that arise out of particular provisions of the legislation and it may be that some of these need to be addressed by relatively minor amendments to the Act.

Yours sincerely

M G Sexton SC