



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders' individual rights and liberties since 1967

Watching Them While They're Watching You

Review of Model Defamation Provisions
C/o Justice Strategy and Policy Division
NSW Department of Justice

policy@justice.nsw.gov.au

Dear Madam/Sir

Please accept this short submission in relation to the review of the Model Defamation Provisions.

The QCCL is an organisation of volunteers which has for more than 50 years sought to defend the civil liberties of Queenslanders.

The QCCL has throughout its history defended freedom of speech, particularly in the context of politics. That history motivates this submission.

Political speech

As noted above, political speech is the core of freedom of speech.

It is the Council's submission that the defamation law of 2005 fails to adequately protect freedom of political speech.

The American position that a public figure cannot succeed in a lawsuit for defamation unless there is proof that the publisher acted with actual malice by knowing the falsity of the allegations or by reckless disregard for the truth has very strong appeal. Though we recognise the difficulties the US has faced in defining a public figure.

However, we do not have to go that far to improve freedom of political speech in this country.

It is our submission that the law in relation to qualified privilege provided for in the Griffith code provided a far better protection for freedom of speech in the political context than that provided in the

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2005 Act¹. It is our strong recommendation that the law on this topic from the Griffith defamation code should be reinstated².

The relevant provisions are set out below:

16 Qualified protection — excuse

(1) It is a lawful excuse for the publication of defamatory matter — ...

(c) if the publication is made in good faith for the protection of the interests of the person making the publication, or of some other person, or for the public good; ...

(e) if the publication is made in good faith for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has, or is believed, on reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make the person's conduct in making the publication reasonable under the circumstances; ...

(h) if the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair.

Subparagraph (h) was particularly powerful.

The decision in *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183, illustrated the power of this defence. However as noted by Kenyon and Walker³

Bellino is also significant because it narrowed the scope of para (h) of the Code defence. But even once narrowed, para (h) continued to offer substantial protection. Paragraph (h) protected publications made in the course of, or for the purposes of, the discussion of a subject of public interest where the public discussion was for the public benefit. The term 'subject of public interest' had been treated broadly in earlier cases: for example, 'the world-wide conflict between Communism and non-Communism' and 'the policies of the government concerning measures that should be taken for the military defence of Australia' were held to fall within the defence. The High Court in *Bellino* restricted the concept to 'the conduct of any person whose conduct, inherently, expressly or inferentially, invites public criticism or discussion'.

For this reason, if reinstated the defence should be amended so that the law reflects the minority position in *Bellino* – see the discussion in *Grundmann v Georgeson* [1996] QCA 189 at pages 9-10 per Dowsett J.

¹ see Andrew T Kenyon And Sophie Walker *The Cost of Losing the Code: Historical Protection of Public Debate in Australian Defamation Law* 2014 38 Melbourne University Law Review 554 for detailed argument in favour of this view

² Criticisms of procedural aspects of the Code should not prevent a return to the substantive law. Those issues can be dealt with separately.

³ *ibid*

Corporations

The QCCL accepts that there is a legitimate reason to restrict the right of large corporations to sue, namely the fact that because of their financial resources they have the capacity to silence their critics. However, it is our submission that the approach which has been taken to achieve this result is flawed.⁴

The practical reality is that most corporations are in fact the alter ego of a person or small number of persons, usually consisting of immediate family or a least people who are related. In those situations, the corporate entity is simply a device to try to avoid personal liability and/or to reduce tax. For practical purposes, when the company is defamed, the people behind it are defamed. That is certainly how they see it.

In those circumstances, what should be looked at is whether the company in question can be seen as nothing more nor less than the alter ego of those who run it or own it. In that regard, we would suggest the test should be to look at the ownership structure of the business.

The starting point should be that clearly, no public company, whether listed or not, should be entitled to sue for damages for defamation.

However, it would be our submission that the following types of companies should be able to sue:

1 there is one director and one shareholder.

2 where there are multiple directors and shareholders, but they are all closely related (to encompass for example the small family run businesses of husband, wife and children).

3 where the name of the company, is in fact or contains the name or names of the current directors or shareholders

These are some ideas which might be further developed. They also have the benefit that in many cases a search of the public records will be able to identify whether the company you are saying something about is likely to be able to sue you. Because in the current circumstances it is almost impossible for somebody outside the company to know whether it falls within the definition of a corporation that can sue.

The discussion paper posits the tort of injurious falsehood as an alternative to defamation for corporations. Weinberg J summarised the law of injurious falsehood as follows⁵

196 The tort of injurious falsehood had its origins towards the end of the sixteenth century in cases involving a challenge to the plaintiff's title to land, thereby prejudicing his efforts to dispose of it. From this association the tort acquired the name "slander of title". Gradually, its scope expanded to cover disparaging remarks not only as to title, but also as to the quality of land or goods. Thus knowingly making a false assertion that the plaintiff's products were inferior, a lie calculated to injure that person in his trade, could give rise to liability.

197 Fleming, in *The Law of Torts* (9th ed, 1998), comments that today the tort is broad enough to encompass any damaging falsehood which interferes with prospective advantage, even of a non-commercial nature. The modern term for the tort is that coined by Salmond, "injurious falsehood".

198 In some respects, this tort bears a marked resemblance to defamation. Both involve a false and harmful imputation concerning the plaintiff which is made to a third party. They differ,

⁴ These views are informed by the writers legal practice, which involves acting for a large number of small subcontractors such as painters plumbers and the like, who are increasing the subject of groundless defamations on social media.

⁵ *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* [2002] FCA 860

however, in that the law of defamation protects interests in personal reputation while injurious falsehood protects interests in the disposability of a person's property, products or business. Defamation is generally actionable without proof of damage. Falsehood is presumed and liability is strict. In an action for injurious falsehood, the plaintiff must prove that he sustained actual economic loss, that the offending statement was false, and that it was made with intent to cause injury without lawful justification. The requisite state of mind is often described as malice.

199 Injurious falsehood, then, according to Fleming, consists in the publication of false statements, whether oral or in writing, concerning the plaintiff or his property, calculated to induce others not to deal with him. The falsehood must relate to the plaintiff's goods, and must be published with "malice". Originally, the averment of malice was said to have been only a superfluous pleading form, meaning nothing more than that the words were published with intent to disparage the plaintiff's title. Later however, it came to be treated as a separate element, and, as Fleming comments at 780: "...today the dominant view seems to be that malice, in the sense of some indirect, dishonest or improper motive, or at any rate an intent to injure without just cause or excuse, must be proved by the plaintiff. It is sufficient evidence of malice that the defendant knew the disparaging statement to be false... Conversely, an honest belief in an unfounded claim is not actionable; nor is mere carelessness (in contrast to recklessness or conscious indifference to truth), ..."

200 In Rogers, Winfield & Jolowicz on Tort (14th ed, 1994), the learned authors comment that malice is never easy to define in the law of tort. They say, at 307-308: "The requirement is fulfilled if the defendant knows that the statement is false or if he is reckless, ie. makes the statement not caring whether it is true or false... However, even if the defendant does believe that untrue statement there may still be malice if he is actuated by some indirect, dishonest or improper motive ..."

201 The leading case regarding this tort is *Ratcliffe v Evans* [1982] 2 QB 524. Though an action for injurious falsehood may be available in conjunction with an action for defamation, a publication need not be defamatory to ground an action for injurious falsehood.

202 Halsbury's Laws of Australia, vol 10, pars [145-835]-[145-845] asserts that malice may not be inferred from the fact of publication but will be inferred where a false publication was made with an intent to injure without just cause, and knowledge of the falsity or reckless indifference as to its truth or falsity. No action will lie where the false publication was made with mere lack of care or with an honest belief in its truth.....

206 However, in order to succeed in its claim for injurious falsehood, Innotek must prove that the statements made by Dr Wirth and Mr Apostolides were made with malice, that is with knowledge that they were false, or with reckless disregard as to their truth or falsity

This summary of the law exposes the inadequacy of the tort as an alternative to defamation for business:

1. To succeed in the tort the onus is on the plaintiff to prove malice from the beginning. Whereas in defamation the onus on this issue only shifts to the plaintiff after the other elements of the defence have been made out by the defendant
2. Secondly the corporation can only succeed if the defendant knew what they were saying to be false or were reckless as to its truth.

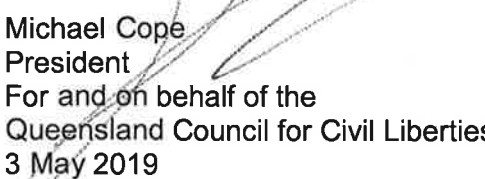
Jury trials

We support the continuation of the jury trial in defamation matters. Defamation is in our view the quintessential example of an area of the law where the view of the public should be part of the process of forming an assessment of the parties' conduct.

It is our view that in all courts in Australia the parties should be entitled to propose a jury trial. We do not think that it should be a matter for the judge on their own initiative to deprive the parties of this right.

Thank you for the opportunity to make this submission. We trust this is of assistance to you in your deliberations.

Yours Faithfully



Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
3 May 2019