

## REVIEW OF THE ACT

42.7 Under s 49 of the Defamation Act 2005, the Minister in New South Wales is to review the operation of the Act after five years from the date of assent of the Act. This is exclusive to New South Wales. The date of assent was 26 October 2005. A report on the outcome of the review is to be tabled in Parliament within 12 months after the end of the period of five years.

A review of the Act should necessarily start with the objects of the Act set out in s 3. The utility of the review will depend upon whether any recommended changes to the Act are agreed uniformly across the other states and territories. If not, it would defeat one of the major objects of the Act: s 3(a).

The next object of the Act is to ensure that the law of defamation does not place unreasonable limits on freedom of expression and on the publication and discussion of matters of public interest and importance: s 3(b).

There are certain anomalies in the wording of the Act which may need to be addressed: for example, s 31(4)(b) of the Act in relation to the defence of honest opinion to avoid the growing practice of journalists being joined as parties to proceedings for more abundant caution.<sup>12</sup>

There are also concerns about the perceived operation of the statutory qualified privilege defence under s 30 of the Act. The law appears to impose an objectionable limit on freedom of expression by reason of the complexity of the circumstances in which a publication may be judged, in the 'clear light of hindsight', to be reasonable or not.<sup>13</sup> These concerns may ease over time with determinations that find in favour of reasonable journalistic practice, which could usefully be put forward by way of expert evidence based on the circumstances of the publication.<sup>14</sup> It may also be appropriate to consider a separate statutory defence to relax the strictness of liability and excuse the defendant's conduct where the defamatory imputation was not intended to be conveyed about the plaintiff and was published without negligence, leaving s 30 to govern cases where the defamatory imputation was intended.<sup>15</sup>

In order to satisfy the third object of the Act, to provide effective and fair remedies for claimants whose reputations are harmed by the publication of defamatory matter (s 3(c) of the Act), improvements may come about more through procedural rather than major legislative change.

There have been concerns expressed about the substantial costs of defamation proceedings and the delays that occur from the use of juries. The Chief Judge at Common Law in the Supreme Court of New South Wales has observed

12. See 28.1.

13. See Chapter 25.

14. See *Rogers v Nationwide News Pty Ltd* [2003] HCA 52 at [31].

15. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 574.

that the length of trial is three times greater in a jury trial compared to judge alone, with the substantial increase in costs that follow.<sup>16</sup> Juries are often seen as the touchstone of the community, particularly in the determination of the meaning of the words, whether the matter is defamatory and in the truth of the matter. However, juries are not used in every jurisdiction in Australia. For reasons of cost and the complexity of defamation law, there are reasonable grounds for changing the process in New South Wales from juries being available as of right to being available only at the discretion of a judge, having particular regard, in exercising the discretion to allow a jury trial, to the public importance of the matter published or the need in the particular case for judgment by the claimant's peers.

It is questionable whether the cap on damages is effective and fair to a person who has been defamed, particularly in cases involving multiple publications of the same matter, where the claims must be brought against the same defendant in the same proceedings: see ss 23 and 35. The cap on the amount of damages can be eroded by the significant costs incurred in bringing proceedings which will cannibalise the amount recovered after a lengthy trial. This suggests there should be a review of the reasonableness of the maximum amount imposed by the cap, which at \$324,000 is significantly below the amount of the personal injury cap (approximately \$500,000). At the least, a review would be appropriate of whether the cap should continue to apply to all publications or causes of action 'in defamation proceedings' or more fairly, applied separately to each of the causes of action in the proceedings.

The fourth object of the Act of promoting speedy and non-litigious methods of resolving disputes about the publication of defamatory matter (s 3(d) of the Act) seems to be working reasonably well in practice, either through the commonly accepted procedure of mediation or growing acceptance that the offer of amends procedure in Div 2 of the Act promotes that outcome. A defence may be established if a reasonable offer is refused by a claimant, provided the defendant otherwise complies with the procedures set out in the Division. There are technical aspects to this defence which have not yet been tested. More reliably, s 40 of the Act enables the court to examine the reasonableness of the relevant settlement offers of the parties in relation to the question of costs.

In general, the most pressing and perennial issue is the cost and delay of defamation proceedings. As injunctions are rarely granted in defamation cases to stop publication, a plaintiff has a primary interest in restoring his or her reputation as quickly as possible after publication and being compensated for the damage caused. Likewise, a defendant has a primary interest in defending the publication against unmeritorious plaintiffs who bring proceedings to silence or inhibit the defendant from publishing further. For these reasons,

16. Hon Justice P McClellan, 'Eloquence and Reason — are juries appropriate for defamation trials?' 4 November 2009, Sydney, pp 18–19.

#### Defamation Law in Australia

there is justification in a specialist tribunal to deal with defamation cases (and media-related cases such as breach of confidence) which allows the parties to seek a relatively speedy, consistent and cost-effective determination.

The New South Wales Supreme Court has a specialist case management list for defamation cases. Specially tailored rules for the pleading of defamation claims and defences apply but this has been the source of much complexity, confusion and wasted cost and placed a heavy burden on the parties, seriously affecting their access to justice.

It is relevant to the review under s 49 of the Act that the removal of the public interest element from the defence of truth (at least in New South Wales) has initiated possible statutory reform for a cause of action of 'serious invasion of privacy'. If the initiative is not taken by parliament, as recommended by the Australian Law Reform Commission, it can be expected that the courts will develop principles for misuse of private information similar to the UK courts under the traditional head of breach of confidence.

It is conceivable in this context that if the Commonwealth Government introduces a statutory cause of action for serious invasion of privacy, it might establish a specialist tribunal in the Federal Court to hear such actions. This jurisdiction with its Australia-wide reach would be particularly appropriate for cases involving interstate media publications and internet publications generally. As part of this approach, it might also consider the introduction of a Commonwealth Defamation Act, consistent in terms with the uniform legislation of the states and territories, and the conferral of jurisdiction on the Federal Court over interstate and internet publications in defamation cases for the same reason.