NSW Legislative Assembly Hansard

Defamation Bill

Extract from NSW Legislative Assembly Hansard and Papers Tuesday 13 September 2005.

Second Reading

Mr BOB DEBUS (Blue Mountains—Attorney General, Minister for the Environment, and Minister for the Arts) [7.44 p.m.]: I move:

That this bill be now read a second time.

The Defamation Bill will repeal and replace the Defamation Act 1974. Before I proceed to outline the bill's main provisions, I would like to spend a few moments reflecting on the vital role that defamation law plays in our society. There are basically three groups who find defamation law exceptionally interesting and exciting. They are public figures, major broadcasters and publishers, and, of course, lawyers. The reason they become so excited is that they are usually the main protagonists and may stand to win, lose or earn hundreds of thousands of dollars from defamation cases.

The rest of the community could be forgiven for thinking defamation law is largely irrelevant and does not impinge on day-to-day life in any meaningful way. But such a view would be profoundly mistaken. Put simply, defamation concerns the publication of material to a third person that harms the standing or reputation of another. Anyone who writes a letter or a book, who uses email, chats over the Internet or publishes a blog can potentially face an expensive civil suit if he or she is careless with his or her comments. Defamation law is the point at which two very important interests intersect. On the one hand there is society's interest in freedom of expression and, on the other, there is the individual's interest in protecting his or her reputation from unwarranted attack. Both of these interests are recognised in a host of international instruments, including the International Covenant on Civil and Political Rights. Article 17 of that covenant states that no-one shall be subjected to " … unlawful attacks on his honour and reputation" and "everyone has the right to the protection of the law against such … attacks". Article 19 of the International Covenant on Civil and Political Rights states:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 19 also recognises that the right to freedom of expression is not absolute and may be subject to laws that are necessary to respect the reputations of others. In Australia the right to reputation is primarily protected by State and Territory defamation laws. There is no similar discrete law protecting the right to freedom of expression, though the defence is available under defamation law to some extent to fill this gap. Importantly, too, the High Court of Australia has found that there is implicit in the Australian Constitution a freedom of communication with respect to political or governmental matters.

The defamation laws in each Australian jurisdiction have progressively diverged since the mid-nineteenth century. This situation was tolerable while publications were largely confined within State and Territory borders. But it became both frustrating and ridiculous once those borders metaphorically collapsed. During the latter half of the twentieth century the most astounding developments in information technology completely revolutionised the way we communicate. Once, handwritten letters had to be sent by ship to friends and loved ones in other States and countries. Later, the telephone helped to bridge the distance—albeit from a fixed phone on a kitchen wall or table. Now, it is commonplace for material to be simultaneously published across the nation, and indeed across the planet. The Internet makes it possible for individuals as well as major corporate publishers to transmit information and misinformation—both truth and lies—to potentially vast audiences.

The Standing Committee of Attorneys-General [SCAG] acknowledged the need to bring the State and Territory laws back into alignment, and tried for some 25 years to achieve that objective. However, there were always several obstacles in its way. For a start, the relevant laws in each jurisdiction were drafted in different centuries. Secondly, some States had codified their law, while others relied more heavily on the common law. Finally, there were protracted disagreements about some aspects of the law. SCAG had all but given up on uniform defamation law until—if I may say so, Mr Deputy Speaker—I arranged for the matter to be reinstated on its agenda in July 2002. Substantial agreement was reached fairly quickly on the core principles that would form the basis for the new model provisions. These were then developed and refined through considerable negotiation and consultation.

The proposed framework for State and Territory uniform defamation laws was released for public comment in July 2004 and received considerable support from key stakeholders. This was followed by the historic endorsement of the model provisions by the State and Territory Ministers in November 2004. When enacted, the model provisions will bring an end to the substantive differences that have made Australian defamation law

needlessly complex. For the first time people who publish or broadcast on a national basis will consider just one defamation law, not eight. This new law will ensure that personal reputation is given due respect and protection but at the same time ensure that freedom of expression is also properly safeguarded.

I will now turn to the main provisions of the bill. As I said, the Defamation Bill repeals and replaces the current Defamation Act 1974. Essentially, the bill retains some of the best features of the present New South Wales Defamation Act 1974, jettisons some of its more problematic provisions, and introduces some worthwhile reforms. Part 1 sets out some of the definitions used in the bill, as well as its proposed objects. In brief, these objects are to promote uniform laws of defamation in Australia to ensure that defamation law does not place unreasonable limits on freedom of expression, to provide effective and fair remedies for people who are defamed, and to promote speedy and non-litigious dispute resolution. The present New South Wales Defamation Act contains a very similar statement of objects. The only essential difference between the existing and proposed objects is the reference to enacting provisions to promote uniformity in Australian defamation laws.

Part 2 sets out the general principles of the proposed law. Clause 6 makes it clear that the new Act will not displace the general law in relation to the tort of defamation. The general law will continue to apply, except to the extent that the new law provides otherwise. Most importantly, the common law test for determining what is defamatory is preserved by the bill. This is the way the law currently operates in New South Wales. Clause 7 preserves the existing law in New South Wales by abolishing the distinction between libel and slander. Clause 8 will bring a significant but very welcome change to New South Wales law. Under the present New South Wales law each defamatory imputation or meaning gives rise to a separate cause of action. In all other jurisdictions it is the publication of defamatory matter that gives rise to the action. In a speech to university students some years ago the former Supreme Court defamation list judge, the Hon. Justice David Levine, RFD, lamented the "excruciating and sterile technicalities" that result from making the imputation the cause of action. His Honour said:

Fortnight after fortnight I have to deal with arguments concerning whether a pleaded imputation is proper in form and is capable of arising from the relevant publication … The amount of the court's time, let alone litigants' resources, expended profligately in the determination of what words, sentences and phrases mean is positively scandalous: and this is at the initiation of proceedings … Matters of principle have been elevated to an obsessive preoccupation, the playthings of forensic ingenuity, fantasy and imagination at the expense of the early, quick and cheap litigation of real issues that affect the people involved in libel actions … The question is not simply what does a publication mean and whether what it means is defamatory. The jury has to determine, in the no doubt novel environment for the jurors of the courtroom and the jury room, whether the words that constitute the imputation carefully crafted by lawyers are in fact carried by the publication complained of to ordinary reasonable people.

Clause 8 will finally put an end to the needless complexity that His Honour described. Clause 8 reflects the position at common law by making it clear that it is the publication of defamatory matter that is the basis for a civil action for defamation. Both the New South Wales Law Society and the New South Wales Bar Association strongly support this long-awaited change.

Clause 9 concerns the right of corporations to sue for defamation. The submissions received by the State and Territory Attorneys General on this issue overwhelmingly supported the complete ban on corporations suing, or allowing only non-profit organisations to sue. The simple fact is that corporations are not people and they do not have personal reputations to protect. Their interest is purely commercial. The commercial reputations they enjoy are often the product of expensive marketing campaigns and there are other legal actions, including actions for injurious falsehood, that corporations can take to defend their interests.

The Commonwealth's preferred position is that all corporations, regardless of size, power and wealth should have the right to sue. While the State and Territory Attorneys General found this proposition to be unacceptable, in a spirit of compromise we agreed to a small business exemption. Consequently, clause 9 provides that small businesses with fewer than 10 employees may sue for defamation. This is the current law in New South Wales. Clause 9 clarifies that small businesses related to other businesses in terms of section 50 of the Commonwealth Corporations Act 2001 are not able to sue. The Commonwealth definition of a related body corporate includes both a subsidiary and a holding company of another body corporate.

Clause 9 also makes it clear that not-for-profit organisations, such as charities, will have standing to sue for defamation. These types of organisations are less likely to be identified with particular individuals and are less likely to have the resources to pursue alternative remedies. I must stress that the bill does not preclude an individual who is a member, officer or employee of a corporation, regardless of its size, from suing for defamation if they are personally defamed. Clause 10 preserves the existing position at general law by precluding actions for defamation in relation to or against dead people.

The bill also includes a "choice of law" rule. While the bill implements a uniform scheme, the State and Territory Ministers considered a "choice of law" provision would nonetheless be desirable. The provision in clause 10 will

help courts decide which State or Territory law should apply when defamatory matter is published wholly in one jurisdiction or in more than one jurisdiction. If the matter is published in one jurisdiction only, the relevant substantive law will be the law of that jurisdiction. If the matter is published in several jurisdictions, the relevant substantive law will be the law applicable in the jurisdiction with which the harm occasioned by the publication has its closest connection. In working out the jurisdiction of closest connection, the court will consider a range of factors, including where the plaintiff ordinarily resided, the extent to which the matter was published in each jurisdiction, and the extent of the harm sustained by the plaintiff in each jurisdiction.

Although, as I have said, the bill will implement a uniform defamation law regime in the Australian States and Territories, a "choice of law" rule will still have some work to do. For example, it will allow a court to take into account whether a particular State or Territory has a unique provision in another law which protects a public authority from civil liability for actions taken in good faith and in the exercise of their statutory functions.

Part 3 re-enacts, with some drafting and other minor modifications, part 2A of the New South Wales Defamation Act 1974. This part sets up a procedure whereby parties may make and accept "offers of amends" to avoid expensive civil litigation. A publisher who makes a reasonable "offer of amends" may get the benefit of a defence to any subsequent defamation action. Failure to make or accept a reasonable offer may also attract cost penalties. The "offer of amends" procedure may be used instead of rules of court or other laws that relate to payment into court or offers of compromise. This is important because these types of provisions tend to be available only once litigation has started. It is also significant that the "offer of amends" procedure does not preclude the making or acceptance of other settlement offers. This ensures that parties have every conceivable opportunity to settle their differences before proceeding to trial.

As part 3 essentially re-enacts part 2A of the existing Act, I will not go through it clause by clause. There are just a few changes that I would like to highlight. The first is that the publication of an apology will no longer be a mandatory component of an offer of amends. This should encourage more publishers to use the "offer of amends" procedure, particularly where a publisher believes that the matter published was both truthful and fair but wishes to settle the case without an expensive hearing. While an apology will be an optional component of a valid offer of amends, a published apology will still be relevant to a court's determination as to whether an offer rejected by a complainant was reasonable.

Still on the subject of apologies, clause 20 expressly provides that an apology does not constitute an admission of liability. This is designed to encourage defendants to say sorry. Sorry is a singularly powerful word that is capable of vindicating a defamed person's reputation, and healing the hurt caused by an ill-conceived or careless publication. Clause 20 is in similar terms to section 69 of the New South Wales Civil Liability Act 2002. Another modification to the existing "offer of amends" procedure is that clause 14 allows publishers to seek further particulars from an aggrieved party. Without the ability to obtain further information, publishers could otherwise be forced to respond to very general assertions that their publications are defamatory. If publishers are to take full advantage of the "offer of amends" provisions they will need to be able to frame offers that address the particular parts of publications that are alleged to be defamatory.

Part 4 of the bill deals with the conduct of defamation litigation. Clause 21 will allow either party to elect to have proceedings determined by a jury unless the court orders otherwise. The grounds on which a court may order otherwise include that the trial requires a prolonged examination of records, or the trial involves technical, scientific or other issues that cannot conveniently be considered by and resolved by a jury. Clause 21 will replace similar provisions in the District Court Act 1973 and the Supreme Court Act 1970.

Clause 22 sets out the respective roles that judges and juries will play in defamation actions. Under the existing law in New South Wales, the respective roles of the judge and jury are set out in section 7A of the Defamation Act 1974. That section states that the judge decides whether the matter complained of is reasonably capable of carrying the imputation pleaded by the plaintiff; and whether the imputation is reasonably capable of bearing a defamatory meaning. The jury decides whether the matter complained of carries the imputation and whether the imputation is defamatory. If the jury decides in the affirmative, the judge decides whether the defendant has established a defence, and the amount of damages.

Clause 22 of the bill makes it clear that the jury will decide whether a matter complained about is defamatory, and whether any defences have been established. This expanded role for juries will bring New South Wales back into line with the law in other jurisdictions. It will also put an end to separate section 7A trials in New South Wales which have proved to be increasingly unpopular, as I have previously said, with judges, litigants and their legal representatives. Clause 22 provides that the judge will continue to determine issues such as whether an occasion is one of absolute or qualified privilege, and will be solely responsible for determining damages.
Clause 23 provides that the leave of the court is required for further proceedings for defamation to be brought against the same person in respect of the publication of the same or like matter. This essentially re-enacts section 9 (3) of the present Act.
Part 4 division 2 of the bill concerns defences to defamation actions. Clause 24 makes it clear that defences set out in division 2 are additional to any other defence available to the defendant, including those available under the general law. This clause also states that if a defence may be defeated by proof that the publication was

actuated by malice, the general law will determine whether or not the publication was actuated by malice. Clause 25 sets out the defence of justification. It provides a defence to the publication of defamatory matter if the defendant proves the substantial truth of the defamatory imputations carried by the matter of which the plaintiff complains. That defence reflects the defence of justification at general law, where truth alone is a defence to the publication of defamatory matter.

Perhaps the single greatest obstacle to uniform defamation laws over the past 25 years has been the inability of the States and Territories to reach agreement in relation to the truth defence. At present, truth alone is a defence to defamation actions in South Australia, Victoria, Western Australia and the Northern Territory, as well as in England and New Zealand. In Queensland, Tasmania and the Australian Capital Territory it is necessary to prove both truth and public benefit. Only in New South Wales is it necessary to prove both truth and public interest. It is likely that our convict past had something to do with the abandonment by New South Wales of the common law defence of truth alone. The rationale for the common law defence of truth alone was put very succinctly in *Rofe v Smith Newspapers*, (1924) 25 SR (NSW) 4:

The reason upon which this rule rests …is that, as the object of the civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it…

The common law position means that a person is not entitled to receive compensation, which could of course be hundreds of thousands of dollars, merely because something truthful about them has been published. It also means that a person cannot be held legally liable and forced to pay damages merely for telling the truth. This does not mean, however, that the defence of truth, or justification as it is known, is easy to establish. Defendants are much more likely to invoke other defences, such as fair comment or honest opinion, where the truth of the publication is not the central issue. This is because when the defence of truth is invoked, the defendant has the onerous task of proving to the satisfaction of the court that the allegedly defamatory statement was, in fact, true. For this reason—I emphasise this point—I fully expect that the proposed change to the law will pass largely unnoticed. It will continue to be the case that publishers will risk significant liability if they publish defamatory material that they cannot prove to be substantially true, as defined in clause 4.

Clause 26 provides for a defence of contextual truth. There is already a defence of contextual truth under the existing New South Wales Act. The purpose of the defence is basically to prevent plaintiffs from taking relatively minor imputations out of their context within a substantially true publication. Clause 27 provides that it is a defence to the publication of defamatory matter if the defendant proves that the matter was published on an occasion of absolute privilege. These absolutely privileged occasions include: proceedings of parliamentary bodies, as defined in clause 4; proceedings of courts and tribunals, as defined in clause 4, including royal commissions and special commissions of inquiry; occasions of absolute privilege under corresponding provisions in other Australian jurisdictions; and the circumstances specified in schedule 1 to the bill.

The defence of absolute privilege recognises that, at certain times, society's interest in free speech must prevail over other considerations. It simply would not be possible to effectively perform judicial, legislative and other official functions without the freedom to make statements that might be defamatory in other contexts. The publications listed in schedule 1 were drawn from part 3 of the New South Wales Defamation Act 1974 and include publications by a range of bodies, including the Ombudsman, the Independent Commission Against Corruption, and the Police Integrity Commission.

Clause 28 sets out the defence for publication of public documents. It provides that it is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in a public document or a fair copy of a public document, or a fair summary of, or a fair extract from, a public document. "Public document" is defined in the bill to cover a wide range of material including parliamentary reports, civil judgments and other publicly available material, including the documents referred to in schedule 2 to the bill. Clause 28 is equivalent to the defence set out in section 25 of the Defamation Act 1974 and schedule 2 essentially replicates the list of documents referred to in clause 3, schedule 2 to the Defamation Act 1974.

Clause 29 sets out the defences of fair report of proceedings of public concern. It is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern. A defence is also available if the defendant proves that the matter was, or was contained in, an earlier published report of proceedings of public concern, and the matter was, or was contained in, a fair copy, summary or extract from an earlier published report, and the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair. The term "proceedings of public concern" is defined in the bill to cover a wide range of proceedings including those of parliamentary committees, commissions of inquiry, law reform bodies, local councils, a range of corporate, professional, trade, sport and recreation bodies, as well as the proceedings of bodies referred to in schedule 3 to the bill.

Clause 29 is equivalent to the defence set out in section 24 of the Defamation Act 1974, and schedule 3 essentially replicates the list of proceedings found in clause 2 of schedule 2 to the Defamation Act 1974. I

should also mention that clauses 28 to 30 facilitate a national defamation scheme by extending the defences in those clauses to publications and proceedings referred to in the schedules to corresponding State and Territory laws.

Clause 30 provides for a defence of qualified privilege. This is a particularly important defence, as it provides protection in a range of situations where there is a moral or legal duty to make what might otherwise be defamatory statements. Some typical examples include the reporting of suspected crimes to the police and the provision of employment references. Clause 30 is based on the provisions of section 22 of the New South Wales Defamation Act 1974. The clause provides that it is a defence to the publication of defamatory matter if the defendant proves that the recipient has an interest or apparent interest in having information on some subject; and the matter is published to the recipient, in the course of giving to the recipient information on that subject, and the conduct of the defendant in publishing that matter is reasonable in the circumstances.

Clause 30 lists a number of factors that the court may take into account in determining whether the defendant acted reasonably. The list is the same as that which is currently set out in the Defamation Act 1974, with a few minor modifications. The first is the substitution of the words "public interest" in place of "necessary" in the subclause that refers to expeditious publication. The second is the inclusion in the list of relevant factors one which relates to the business environment in which the defendant operates. Clause 31 provides for a number of defences relating to the publication of matter that expresses an opinion that is honestly held by its maker rather than a statement of fact. The clause distinguishes three situations, namely, where the opinion was that of the defendant, where the opinion was that of the defendant's employee or agent, and where the opinion was that of a third party.

In each case, the opinion must relate to a matter of public interest and it must be based on proper material. "Proper material" is defined in the clause to mean material that is substantially true, was published on an occasion of absolute or qualified privilege, or was published on an occasion that attracted the protection afforded by clauses 28 or 29. The equivalent defence under the current law is found in division 7 of the Defamation Act 1974. Clause 32 sets out the defence of innocent dissemination. The proposed defence largely follows the defence of innocent dissemination at common law, which is the law that currently applies in New South Wales. Clause 32 states that it is a defence to the publication of defamatory matter if the defendant proves that the defendant published the matter in the capacity, or as an employee or agent, of a subordinate distributor—typical examples would be book sellers and librarians; the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and the defendant's ignorance was not due to the defendant's own negligence.

The main difference between the proposed defence and the common law is that clause 32 seeks to accommodate providers of Internet and other electronic and communication services. These kinds of service providers will be treated as subordinate distributors, unless a service provider was, in fact, the author or originator of the defamatory matter, or had the capacity to exercise editorial control over the matter. It is simply not realistic to expect an Internet service provider, for example, to monitor the content of every transmitted item for potentially defamatory material. In a similar vein, broadcasters and operators of communication systems will not generally be liable for publications by persons over whom they have no effective control. Clause 33 sets out a defence of triviality. It provides a defence where the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm. The equivalent provision is found in section 13 of the Defamation Act 1974.

Part 4 division 3 relates to the remedies available to successful plaintiffs. Like the current New South Wales defamation law, clause 34 requires there to be an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded. Under the general law, damages for economic loss are awarded to successful plaintiffs to compensate them for pecuniary loss, such as loss of income and, in the case of personal injury actions, any medical, rehabilitation and care expenses they have incurred or are likely to incur. Damages for non-economic loss, or general damages, are awarded to compensate plaintiffs for the less tangible harm they have suffered. For example, in personal injury actions, general damages compensate for pain and suffering. In defamation actions, damages compensate for injury to feelings and loss of esteem.

In defamation actions, once a court determines that a publication is defamatory, damage to reputation is presumed and does not have to be independently proved by the plaintiff. While economic loss may also be compensated, it is not usually claimed in practice. Recent changes to New South Wales civil liability law have imposed both thresholds and caps on awards of general damages in personal injury cases. In order to be eligible for the maximum award of damages for non-economic loss, which currently stands at $400,000, it is likely that a plaintiff would need to show that they have been rendered quadriplegic or severely brain damaged and will be highly dependent on the care of others for the rest of their life. By way of contrast, in the recent case of *Sleeman v Nationwide News Ltd*, 2004 NSWSC 954, a journalist from the *Sydney Morning Herald* was awarded $400,000 in damages basically because an article in *The Australian* conveyed the impression that he was a dishonest journalist.

While I have no doubt that false and defamatory statements are harmful, the fact is that reputations may be restored and injured feelings may pass after a time. The pain and suffering associated with an affliction like quadriplegia, on the other hand, will last a lifetime. The bill ensures that this glaring discrepancy in the way damages are awarded is addressed. The bill proposes an indexed cap of $250,000 for general damages, retention of aggravated damages and abolition of exemplary damages, but no cap on economic loss. Aggravated damages may be awarded where the injury to the plaintiff has been exacerbated by the conduct of the defendant, for example, if the defendant has acted maliciously.

Exemplary damages have already been abolished in New South Wales and the economic loss that may be claimed under the New South Wales law is unlimited. Therefore, the only substantive change for New South Wales law is the proposed cap on general damages of $250,000. This amount will be indexed on an annual basis by reference to the formula set out in clause 35. Clause 38 lists a number of factors that a court can take into account in mitigation of damages. These include whether the defendant has apologised or published a correction, and whether the plaintiff has already recovered damages in respect of a publication that carried the same meaning or effect as that complained of in the current proceedings. Part 4 division 4 relates to the award of costs in defamation proceedings.

Clause 40 allows the court to order costs on an indemnity basis if a party unreasonably failed to make or accept a settlement offer. The court may also have regard to the way in which the parties to the proceedings conducted their cases, including any misuse of a party's superior financial position. This provision is based on the existing New South Wales law. Part 5 sets out a number of miscellaneous procedural matters, including provision for the new Act to be reviewed within five years from the date of assent. The bill also makes a number of consequential amendments to the law, which are set out in schedules to the bill. For example, the criminal defamation provisions that currently reside in the Defamation Act 1974 are to be moved largely intact into the Crimes Act 1900. There are some minor changes.

For example, the power of the court to impose a fine has been removed. As the explanatory note to the bill makes clear, the Crimes (Sentencing Procedure) Act 1999 already allows the court to impose for indictable offences fines of up to 1,000 penalty units, currently $110,000, on individuals and 2,000 penalty units, currently $220,000 on corporations. Another change made by the bill is that in future it will be the Director of Public Prosecutions rather than the Attorney General who will consent to proceedings for criminal defamation. The relevant limitation period provisions have also been updated, but are essentially unchanged. The limitation period will continue to be one year from the date of publication, extendable to three years if the court considers it was not reasonable in the circumstances for the plaintiff to have commenced the action in time.

The enactment of the model provisions by the States and Territories represents the first stage of what will be an ongoing reform process. This first stage has been concerned with bringing each of the State and Territory laws into alignment. Given that the existing defamation statutes span three centuries, this has been no easy task. Once all of the States and Territories have enacted the same basic law, we will be turning our attention to whether any further reforms might be necessary to ensure defamation law continues to keep pace with changes in society and technology. To this end, the State and Territory Attorneys General have agreed to enter into an intergovernmental agreement. This agreement will also ensure that uniformity is maintained between the jurisdictions in the years to come.

The model defamation provisions have now been introduced in South Australia, Western Australia and Victoria, with the rest of the Australian jurisdictions expected to follow shortly. For the first time in a century and half we have the realistic prospect of a national defamation scheme. Such a scheme is needed now more than at any time in the past and I strongly urge that it be supported. I commend the bill to the House.