

**Law Council of Australia
Business Law Section
Media and Communications Committee**

**SUBMISSION TO THE MINISTRY OF JUSTICE
OF THE UNITED KINGDOM ON CONSULTATION PAPER CP3/11
DRAFT DEFAMATION BILL**

May 2011

Introduction

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Media and Communications Committee (**Committee**) forms part of the Business Law Section of the Law Council. Its members are pre-eminent lawyers and academics involved in the practice and teaching of, and research concerning, media and communications law in Australia.

The Committee has reviewed the Ministry of Justice's Consultation Paper CP3/11 on proposed defamation law reform for England and Wales.

Australia has been through a prolonged period of debate about the reform of defamation laws, which can be traced back in substantial part to a 1979 report of the Australian Law Reform Commission.¹ The debate culminated in the adoption of uniform national legislation that came into force in 2006.²

A number of the matters upon which comment has been sought by the Ministry of Justice concern proposed reforms that have been implemented, attempted or rejected in Australia. The Committee therefore offers by this submission some insights into its collective experience in relation to those matters.

Q1–2. Substantial Harm Test

The Committee sees merit in the adoption of a mechanism capable of quickly disposing of trivial defamation claims. The common law jurisprudence of England and Wales has developed considerably further in this area than the corresponding Australian jurisprudence.³

The Committee makes two submissions in respect of questions 1 and 2.

First, if a threshold test is to be adopted, the Committee queries the rationale for retaining any distinction between libel and slander. The historical policy underlying the distinction is seemingly that written or permanent publications have a greater capacity to cause harm than oral or transient publications.⁴ The distinction can give rise to anomalies in its application: very serious slanders that fall outside the established exceptions and that do not cause special damage are not actionable at common law, whereas many much less serious libels are automatically actionable. Furthermore, there can be doubt about whether particular forms of defamatory publication, particularly via the new media, constitute libel or slander.⁵ A substantial harm threshold of the kind proposed would seem to obviate the need to retain the distinction between libel and slander. The abolition of the distinction would simplify the law and remove anomalies.

The distinction between libel and slander has been abolished throughout Australia,⁶ and has been abolished or rendered irrelevant by legislation in most Canadian provinces and

¹ ALRC Report No 11, *Unfair Publication: Defamation and Privacy* (1979).

² Defamation Act 2005 (NSW, Qld, SA, Tas, Vic, WA), Civil Law (Wrongs) Act 2002 (ACT), Ch 9; Defamation Act 2006 (NT).

³ eg *Jameel v Dow Jones & Co Inc* [2005] QB 946; *Smith v ADVFN plc* [2008] EWHC 1797 (QB); *Budu v British Broadcasting Corporation* [2010] EWHC 616 (QB).

⁴ eg *King v Lake* (1660) 1 Hard 470; 145 ER 552, 553.

⁵ Collins, *The Law of Defamation and the Internet* (3rd ed, 2010), Chapter 4.

⁶ Defamation Act 2005 (NSW, Qld, SA, Tas, Vic, WA), s 7; Civil Law (Wrongs) Act 2002 (ACT), s 119; Defamation Act 2006 (NT), s 6.

territories,⁷ Ireland⁸ and New Zealand.⁹ The Committee's view is that the abolition of the distinction in Australia was not controversial and has led to desirable simplification of the law.

Secondly, the Committee draws the attention of the Ministry to a statutory defence of triviality that applies throughout Australia. It takes the following form:¹⁰

It is 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.

The Australian defence focuses upon the circumstances in which the publication occurs; the form of the publication and whether the defamed person in fact suffered harm is irrelevant.¹¹

The Committee sees merit in the Australian triviality defence. If a corresponding defence were to be adopted in England and Wales, it could operate in addition to the proposed substantial harm threshold. There will, for example, be cases where the publication of defamatory matter has caused substantial harm, but where the circumstances of publication were such that that harm was not reasonably foreseeable. In such cases, a triviality defence might assist in ensuring compatibility between the law of defamation and the guarantee of freedom of expression in article 10 of the European Convention on Human Rights.

Q3. Slander of Women Act 1891

The Committee does not express a view in relation to question 3, beyond observing that if the distinction between libel and slander were to be abolished, oral allegations to the effect that any person is unchaste or adulterous, assuming them to be defamatory, would be actionable without proof of special damage.

Q4–5. Responsible Publication on Matter of Public Interest

Clause 2 of the draft Bill is similar in some respects to the statutory defence of qualified privilege for provision of certain information that applies in Australia:¹²

- (1) There is a defence of qualified privilege for 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; and
 - (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
 - (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.
- (2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.

⁷ Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Prince Edward Island, the Yukon.

⁸ Defamation Act 2009, s 6.

⁹ Defamation Act 1992, s 4.

¹⁰ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 33; Defamation Act 2005 (SA), s 31; Civil Law (Wrongs) Act 2002 (ACT), s 139D; Defamation Act 2006 (NT), s 30.

¹¹ *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 799; *Jones v Sutton* (2004) 61 NSWLR 614.

¹² Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 30; Defamation Act 2005 (SA), s 28; Civil Law (Wrongs) Act 2002 (ACT), s 139A; Defamation Act 2006 (NT), s 27.

- (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account —
- (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.
- (4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.
- (5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

Subsection (3) of the Australian defence was derived from Lord Nicholls factors in *Reynolds v Times Newspapers Ltd.*¹³ The Australian defence was derived from section 22 of the now-repealed Defamation Act 1974 (NSW).

The Australian defence applies to the reasonable discussion of any topic made to a person with an interest or apparent interest in having information on that topic. It is therefore a liberalisation of the common law duty and interest form of qualified privilege. Essentially, the common law requirement that the publication be made pursuant to a legal, social or moral duty has been replaced with a statutory criterion of reasonableness.

The Australian defence is, generally speaking, not as broad as the proposed clause 2 defence, because it will not usually operate to protect the reasonable discussion of any matter of public interest: the criterion for the operation of the defence is, in respect of any particular recipient, that he or she have a (legitimate) interest or apparent interest in having information on the subject matter of the publication.

Despite some hints in the authorities,¹⁴ Australian courts have not yet developed a neutral reportage defence of the kind that is available, albeit in limited circumstances, in England and Wales.

The Committee supports the proposed clause 2 defence, and notes the observation in the proposed explanatory memorandum that the factors in clause 2(2) 'are not intended to be interpreted as a checklist or set of hurdles for defendants to overcome'. That observation is important. The Australian experience has been that the factors in subsection (3) of the

¹³ [2001] 2 AC 127, 205.

¹⁴ eg *Makim v John Fairfax & Sons Ltd* (1990) Aust Def Rep 50,075, 40,526.

statutory defence have too often been regarded as obstacles to the operation of the defence.¹⁵ For that reason, the Committee doubts that the Australian statutory defence has in practice had much of a liberalising effect on the ability of publishers to report on matters of public interest. In practice, any material factual error, even in the absence of negligence on the part of the publisher, has tended to prove fatal to the operation of the defence. The Committee thus urges the retention of an extrinsic statement of the kind found in the proposed explanatory memorandum to guide courts in the application of the clause 2(2) factors.

In one significant respect, the Australian statutory defence affords greater protection to publishers than the proposed clause 2 defence. The Australian defence protects the reasonable discussion of matters that are not in the public interest with any recipient who has an interest or apparent interest in having information on that subject matter. The clause 2 defence would not protect publishers in similar circumstances. The Committee sees merit in this aspect of the Australian defence. It operates to protect publishers who reasonably raise defamatory allegations with appropriate persons or bodies, even in the absence of a legal, social or moral duty to do so.

Q6–9. Abolition of the Common Law Defence of Justification

In Australia, statutory defences of truth¹⁶ and contextual truth¹⁷ operate alongside the common law defence of justification. Australian courts have, however, considerably restricted the operation of the common law principles derived from authorities such as *Polly Peck Holdings plc v Trelford*¹⁸ and *Lucas-Box v News Group Newspapers Ltd.*¹⁹

Prior to the adoption of uniform national defamation laws, statutory defences of truth operated in New South Wales, Queensland and Tasmania to the exclusion of the common law defence of justification. In those jurisdictions, the gist of the cause of action for defamation was the publication of an imputation, rather than the publication of defamatory matter. One consequence of the non-availability of the common law defence of justification in those jurisdictions was that there was no room for the application of the principles in *Polly Peck* and *Lucas-Box*.²⁰ As a consequence, defamation practice, particularly in New South Wales, became characterised by a very high degree of interlocutory disputation concerning the meaning of the allegedly defamatory publication. In substance, leaving to one side statutory defences of contextual truth, a defendant could not seek to defend a defamation action by pleading and setting out to justify an imputation that differed from an imputation pleaded by the claimant, even where the imputations had a common sting, and irrespective of whether the defendant's imputation was cast at a higher or a lower level of generality than the claimant's imputation. A further consequence was that claimants could, by the clever crafting of an imputation, potentially deprive a defendant of a justification defence founded upon what a jury was likely to consider to be the 'real' meaning of the publication.

The Committee thus sees real dangers in the proposed abolition of the common law defence of justification. By focusing on proof of the truth of the 'imputation conveyed by' a

¹⁵ Most of the caselaw concerns the application of section 22 of the now-repealed Defamation Act 1974 (NSW). The current Australian defence is derived from the section 22 defence.

¹⁶ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 25; Defamation Act 2005 (SA), s 23; Civil Law (Wrongs) Act 2002 (ACT), s 135; Defamation Act 2006 (NT), s 22.

¹⁷ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 26; Defamation Act 2005 (SA), s 24; Civil Law (Wrongs) Act 2002 (ACT), s 136; Defamation Act 2006 (NT), s 23.

¹⁸ [1986] QB 1000.

¹⁹ [1986] 1 WLR 147. The alteration of the common law principles by Australian courts are themselves matters of concern to many members of the Committee: see eg *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667.

²⁰ *Robinson v Laws* [2003] 1 Qd R 81; *Jones v John Fairfax Publications Pty Ltd* (2005) 67 NSWLR 434.

defamatory statement (clause 3(1)), as opposed to the truth of the publication, there is a risk that courts will become bogged down with interlocutory disputation of the kind that plagued some Australian jurisdictions, notably New South Wales, before the uniform national reforms.

If a statutory defence is to be adopted in substitution for the common law defence, doubt about the continued availability of the principles in *Polly Peck* and *Lucas-Box* must, in the Committee's view, be addressed.

Suppose, for example, that a claimant alleges that a publication conveys a *Chase* Level 1 meaning (that is, that the claimant is guilty of some criminal misconduct).²¹ Should a defendant in such a case be entitled to contend that the publication in fact conveys only a *Chase* Level 2 meaning (that is, that there are reasonable grounds to suspect that the claimant is guilty of some criminal misconduct) and seek to justify such a meaning? Or, in such a case, if the court were to find that the publication in fact only conveys a *Chase* Level 2 meaning, should the defendant be entitled to a verdict, because the claimant has failed to prove the imputation alleged in his or her claim form?

To take another example, suppose a claimant complains that a publication conveys an imputation that he or she is guilty of a specific act of criminal misconduct. Suppose the defendant cannot justify that imputation, but could justify a broader imputation, to the effect that the claimant has been guilty of a number of other acts of the same kind of criminal misconduct.²² Should the claimant be entitled to a verdict in such a case, because the defendant cannot justify the claimant's pleaded imputation? Or should the defendant in such a case be entitled to plead and justify a broader imputation with a common sting?

The Committee's view is that defendants ought to be entitled to plead and justify any meaning that is fairly conveyed by a publication. Where they justify such a meaning, and it has a common sting with a meaning complained of by the claimant, they ought to have a defence of justification. Where they justify such a meaning, but the meaning does not have a common sting with that complained of by the claimant, they ought to have a defence of contextual truth if the truth of their meaning is such as to 'swamp' the reputational effect of any meaning alleged by the claimant that they cannot justify.

The Committee's view is that this outcome is best achieved by retaining the common law defence of justification, supplemented by a statutory defence of contextual truth.

The Australian formulation of the defence of contextual truth is as follows:²³

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 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 imputation.

There is a difficulty with the drafting of the Australian provision. It only operates where the contextual imputations are 'additional' to those of which the claimant complains. A claimant can thus potentially deprive a defendant of the benefit of a contextual truth defence

²¹ *Chase v News Group Newspapers Ltd* [2003] EMLR 11, para 45.

²² cf *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412.

²³ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 26; Defamation Act 2005 (SA), s 24; Civil Law (Wrongs) Act 2002 (ACT), s 136; Defamation Act 2006 (NT), s 23.

by pleading all possible contextual imputations; even those that the claimant knows can be justified.

Proposed clause 3(3) avoids that error. The clause does not, however, make it clear that a defendant may establish a defence of contextual truth by proving the substantial truth of some of the imputations pleaded by the plaintiff and/or by pleading and justifying distinct imputations of which the claimant has not complained. The Committee urges that that matter be clarified. It would be undesirable if a defendant could only establish a defence of contextual truth by relying on imputations of which the claimant has complained. To take a simple example: suppose a publication conveys three distinct imputations: that the claimant is a murderer, and a rapist, and a jay-walker. Suppose that the first two of those imputations is true, but the third is not. Suppose finally that the claimant sues only in respect of the jay-walking imputation. In such a case, the Committee believes a defendant ought to be able to establish a defence of contextual truth by pleading and justifying the murder and rape imputations, provided of course that the truth of those imputations is such that the jay-walking imputation does not materially injure the claimant's reputation.

Q10–12. Honest Opinion

In Australia, a statutory honest opinion defence operates alongside the common law defence of fair comment. The statutory defence is in the following terms:²⁴

- (1) It is a defence to the publication of defamatory matter if the defendant proves that:
 - (a) the matter was an expression of opinion of the defendant rather than a statement of fact, and
 - (b) the opinion related to a matter of public interest, and
 - (c) the opinion is based on proper material.
- (2) It is a defence to the publication of defamatory matter if the defendant proves that:
 - (a) the matter was an expression of opinion of an employee or agent of the defendant rather than a statement of fact, and
 - (b) the opinion related to a matter of public interest, and
 - (c) the opinion is based on proper material.
- (3) It is a defence to the publication of defamatory matter if the defendant proves that:
 - (a) the matter was an expression of opinion of a person (the "commentator"), other than the defendant or an employee or agent of the defendant, rather than a statement of fact, and
 - (b) the opinion related to a matter of public interest, and
 - (c) the opinion is based on proper material.
- (4) A defence established under this section is defeated if, and only if, the plaintiff proves that:
 - (a) in the case of a defence under subsection (1)--the opinion was not honestly held by the defendant at the time the defamatory matter was published, or
 - (b) in the case of a defence under subsection (2)--the defendant did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published, or
 - (c) in the case of a defence under subsection (3)--the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time the defamatory matter was published.

²⁴ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 31; Defamation Act 2005 (SA), s 22; Civil Law (Wrongs) Act 2002 (ACT), s 139B; Defamation Act 2006 (NT), s 28.

- (5) For the purposes of this section, an opinion is based on "proper material" if it is based on material that:
- (a) is substantially true, or
 - (b) was published on an occasion of absolute or qualified privilege (whether under this 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.
- (6) An opinion does not cease to be based on proper material only 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.

Although the common law defence of fair comment survives in Australia, the Committee's view is that for all practical purposes it has been superseded by the more liberal statutory honest opinion defence. First, the statutory formulation removes the objective 'fairness' requirement that applies at common law.²⁵ Secondly, unlike the position at common law, malice does not defeat the statutory defence.²⁶ Thirdly, there is no express requirement in the statutory formulation that the facts upon which the opinion is based be stated or indicated in the material, or matters of general notoriety.²⁷

The Committee makes the following observations about proposed clause 4:

- (a) There has been much debate in the Australian authorities about the distinction between statements of fact and expressions of opinion/comment. The distinction is particularly difficult where an assertion of fact is sought to be defended as a comment on the basis that it is a deduction, inference or conclusion drawn from other facts.²⁸ In light of the sometimes elusive nature of the distinction, the Committee queries whether there needs to be a definition of 'opinion' in the proposed statutory defence. It would be difficult to improve upon the much-cited formulation of Cussen J in *Clarke v Norton*:²⁹
- something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark, observation, etc.
- (b) The Committee agrees that the authorities have adequately dealt with the meaning of the term 'matter of public interest',³⁰ and that further refinement in a statutory definition is undesirable.
- (c) The Committee queries the rationale for retaining a requirement that, in order to attract the protection of the defence, the opinion must be one that an honest person could have held. Objective fairness seems to us to be inconsistent with the notion that the defence should be one of 'honest' opinion, rather than 'fair' comment.

²⁵ eg *Merivale v Carson* (1887) 20 QBD 275, 284; *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, 463.

²⁶ Although it may be that there is little practical difference between the modern understanding of malice in this branch of the law and the exclusions in subsection (4) of the statutory defence.

²⁷ cf eg *Tse Wai Chun v Cheng* [2001] EMLR 31; *Joseph v Spiller* [2010] 3 WLR 1791. There is some doubt as to the significance of the exclusion of this requirement: *Herald & Weekly Times Pty Ltd v Buckley* (2009) 21 VR 661, para 84.

²⁸ eg *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245; *John Fairfax Publications Pty Ltd v O'Shane* (2005) Aust Torts Rep 81-879; *State of New South Wales v IG Index plc* (2007) 17 VR 87; *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245; *Cleary v Hore-Lacy (No 2)* (2009) 21 VR 87.

²⁹ [1910] VLR 494, 499.

³⁰ eg *London Artists Ltd v Littler* [1969] 2 QB 375, 391; *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183, 221.

Furthermore, we are unaware of any modern decision in any common law jurisdiction where a defence of fair comment has failed because a defendant was unable to establish the requirement of objective fairness. As already noted, this requirement has been abandoned in the statutory honest opinion defence that operates in Australia. Its abolition does not seem to the Committee to have attracted any controversy. The requirement has also been abandoned in New Zealand³¹ and Ireland.³²

- (d) The Committee also queries how condition 3 of the proposed formulation would work in practice. The proposed condition is that the opinion be one ‘that an honest person could have held on the basis of a fact which existed at the time the statement was published or a privileged statement published before the statement complained of’. Suppose, for example, that a publication contained an expression of opinion by a defendant, D, that there were reasonable grounds to suspect that the claimant, C, was guilty of the murder of a third party, T.³³ Suppose further that the following facts existed at the time of the publication: (fact 1) C and another person, X, were present at the time of T’s death; (fact 2) T died from gunshot wounds; (fact 3) both C and X own guns; (fact 4) X was holding a smoking gun at the time police attended the scene, while C was unarmed. On the basis of all four of those facts, it would seem that an opinion to the effect that there were reasonable grounds to suspect that C was the murderer would not be capable of being held by an honest person. On the present formulation of the clause 4 defence, however, it would seem that D would be entitled to the benefit of the defence. D could argue that an honest person could have held the opinion that there were reasonable grounds to suspect that C was the murderer based on facts 1, 2 and 3. This hardly seems consistent with the notion of an honest opinion defence, at least in a case where D was aware of fact 4.
- (e) Finally, the Committee notes that clause 4 distinguishes between the publication of an opinion of the defendant, and the publication by a defendant of an opinion of an ‘author’. In the latter case, a defendant would have a defence, where conditions 1 to 3 are made out, except where the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion expressed. The Australian statutory honest opinion defences are somewhat more liberal than the clause 4 defence in cases involving the publication by a defendant of the opinion of another. The Australian legislation establishes three distinct defences: a defence for the publication of an opinion of the defendant (subsection (1)); a defence for the publication of an opinion of an employee or agent of the defendant (subsection (2)); and a defence for the publication of an opinion by a third party commentator published by the defendant (subsection (3)). In the case of the publication of an opinion of an employee or agent of the defendant, the Australian defence only fails where the claimant shows that the defendant ‘did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published’ (subsection (4)(b)). In the case of the publication by a defendant of a commentator’s opinion (which would include, for example, the publication of opinions contained in letters to the editor, by talkback radio callers, or in online forum postings), the defence only fails where the defendant ‘had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time the defamatory matter was published’ (subsection (4)(c)). The Committee favours the

³¹ Defamation Act 1992, s 10.

³² Defamation Act 2009, s 20.

³³ Depending on the context, such a statement could be a ‘comment’ in the sense that it is a deduction, inference or conclusion drawn from facts.

Australian formulations. Rather than imposing a negligence standard upon defendants who publish the opinions of others, the Australian legislation focuses upon the actual state of knowledge of the defendant.

Q13–15. Absolute and Qualified Privilege

The Committee does not make any submissions in relation to the proposed reformulation of the statutory categories of absolute and qualified privilege in clause 5 of the draft Bill. They seem to the Committee to be matters that turn upon public policy questions in England and Wales. The Committee observes, however, that the statutory categories of absolute and qualified privilege in Australia's uniform national defamation legislation seem to be working well and may be of some utility to those drafting corresponding provisions in England and Wales.³⁴

The Committee sees merit in retaining, alongside the statutory defences, the common law defences of absolute and qualified privilege. As the common law authorities explain, the categories of privilege are not closed.³⁵ The common law remains potentially relevant on occasions that are analogous to, but not entirely within, those expressly identified as statutory occasions of privilege.

Q16–17. Single Publication Rule

The Committee supports the adoption of a single publication rule as an effective mechanism for avoiding indefinite exposure to liability, particularly for those who maintain online archives. The Committee sees little risk of injustice being done to claimants by the adoption of a single publication rule, provided that courts retain a discretion to extend the limitation period in appropriate cases, and provided that time runs afresh when a substantial republication of defamatory matter occurs.

Australia has not adopted a single publication rule. Indeed, the Australian High Court has expressly rejected the adoption of such a rule at common law.³⁶

Q19–20. Libel Tourism

Although not unknown in Australia, libel tourism has not been a feature of defamation litigation to the extent seen in England and Canada.³⁷ *Forum non conveniens* issues have, however, frequently arisen in the intra-Australian context.

The Committee has reservations about clause 7 of the draft Bill, which would oblige courts in England and Wales to decline jurisdiction, in cases falling outside the operation of Brussels I and the Lugano Convention, except where 'England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement'.

In the first place, the proposed test involves a different standard for intra-European and other cases. It is not apparent to the Committee why the intra-European position ought not simply to apply in all cases in England and Wales, so that a foreign claimant could bring a defamation action in England and Wales against a foreign publisher but only recover such

³⁴ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), ss 27–29; Defamation Act 2005 (SA), ss 25–27; Civil Law (Wrongs) Act 2002 (ACT), s 137–139; Defamation Act 2006 (NT), ss 24–26.

³⁵ eg *Gibbons v Duffell* (1932) 47 CLR 520, 528; *W v Westminster City Council* [2004] EWHC 2866 (QB), para 25.

³⁶ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

³⁷ The key cases are surveyed in Collins, *The Law of Defamation and the Internet* (3rd ed, 2010), chapter 27.

damage as has been done by the distribution of the defamatory matter within England and Wales, and not elsewhere.³⁸ Adoption of a single test would, in the Committee's view, advance both simplicity and certainty in the law.

Secondly, the explanatory memorandum suggests that in applying the test, a court in England and Wales would consider not just the claim sought to be brought by the claimant (which will usually, of necessity, be a claim limited to publications occurring in England and Wales³⁹), but the 'overall global picture'. The example given in the explanatory memorandum is of a statement published 100,000 times in Australia and only 5,000 times in England. In such a case, it seems that clause 7 would operate to require an English court to decline to exercise jurisdiction. Suppose, however, that the claimant in such a case resided in England and enjoyed a substantial reputation there, but was largely unknown in Australia, or that the publisher was based in some third country. It would seem to be unjust that, in such a case, the claimant would effectively be compelled to litigate in Australia or some third country. These problems are not merely theoretical. Proposed clause 7 would, for example, presumably have operated to prevent the claimants from bringing proceedings in cases which could not properly be described as libel tourism, such as *Schapira v Ahronson*⁴⁰ or (if it had arisen in England or Wales) *Dow Jones & Co Inc v Gutnick*.⁴¹

The test for *forum non conveniens* in England and Wales is whether there is a 'clearly more appropriate' place for the hearing and determination of the action.⁴² In Australia, a more parochial test applies, namely whether Australia is a 'clearly inappropriate' place for the hearing and determination of the action.⁴³ Neither test is entirely satisfactory in its application to defamation actions.

The experience of members of the Committee has been that the practicalities are such that only the most well-resourced and tenacious foreigners bring defamation actions outside their home jurisdictions. Further, as noted in the Consultation Paper, the SPEECH Act in the United States will likely act as a disincentive to foreigners bringing defamation actions against American publishers abroad. For these reasons, the Committee is inclined to the view that the position under Brussels I and the Lugano Convention ought to be adopted in all cases involving defamation actions against foreign defendants.

If, however, a different test is to be adopted, the Committee recommends the retention of the existing English *forum non conveniens* formulation (namely, that courts in England and Wales decline to exercise jurisdiction only where some other place is a 'clearly more appropriate' forum), but with a statutory mandate requiring courts, when applying that formulation, to have regard to all of the circumstances, including all of the places in which an allegedly defamatory statement has been published, even in cases where the claimant has limited his or her claim to publications occurring in England and Wales. Such a mandate would enable courts to control more effectively cases involving forum shopping in the true sense.

³⁸ Brussels I, art 5(3); Lugano Convention, art 5(3); *Shevill v Presse Alliance SA* [1995] 2 AC 18.

³⁹ *Diamond v Sutton* (1866) LR 1 Ex 130, 132; *Berezovsky v Michaels* [2000] 2 All ER 986, 994; *King v Lewis* [2004] EWHC 168 (QB), para 18; *Mardas v New York Times Co* [2009] EMLR 8, para 39.

⁴⁰ [1999] EMLR 735.

⁴¹ (2002) 210 CLR 575.

⁴² *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460.

⁴³ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

Q21–22. Trial by Jury

In Australia, in defamation actions tried before a jury, the jury determines whether the defendant has published defamatory matter about the claimant and, if so, whether any defence raised by the defendant has been established. The judge, however, determines the amount of damages (if any) to be awarded to the claimant and all unresolved issues of fact and law relating to the determination of that amount.⁴⁴ Civil juries have been abolished in South Australia, the Australian Capital Territory and the Northern Territory. Defamation trials are commonly heard before juries in the remaining Australian States.

The Committee considers that the desirability of trial by jury is largely a question of public policy for England and Wales, and is a matter upon which it expresses no view. The Committee observes, however, that a division of responsibilities of the kind required by the Australian legislation gives rise to practical difficulties. Because juries do not give reasons for their verdicts, judges called upon to assess damages are left in the dark as to the seriousness with which the jury viewed the effect of the publication. The Committee thus favours the view that in defamation actions tried before a jury, the jury ought to determine all issues of fact, including any appropriate award of damages.

Q23–29. Publication on the Internet

The defence in section 1 of the Defamation Act 1996 is in most respects the same as the statutory defence in the Australian uniform defamation legislation.⁴⁵ Both defences have been criticised as not affording sufficient protection to Internet intermediaries, such as ISPs and Internet content hosts.

There is also, in Australia, a statutory defence for ISPs and Internet content hosts in clause 91 of Schedule 5 to the Broadcasting Services Act 1992 (Cth) that is similar, in some respects, to regulations 17 to 19 of the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013.

The common law defence of innocent dissemination survives in both the United Kingdom⁴⁶ and Australia.⁴⁷ It has been argued that in some respects the common law defence may be broader than the statutory formulations, because the former turns on whether a subordinate distributor of defamatory matter knew or ought to have known that the matter contained a ‘libel’, whereas the latter turn on whether the subordinate distributor knew or ought to have known that he or she had contributed to the publication of a ‘defamatory statement’.⁴⁸ A ‘libel’ is a defamatory statement in respect of which no defence has succeeded. A ‘defamatory statement’ is merely a statement that conveys some defamatory meaning, regardless of whether it is true, or susceptible to a defence of fair comment or privilege. The argument has, however, been rejected at first instance in England.⁴⁹

⁴⁴ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 22. Civil juries have been abolished in South Australia, the Australian Capital Territory and the Northern Territory.

⁴⁵ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 32; Defamation Act 2005 (SA), s 30; Civil Law (Wrongs) Act 2002 (ACT), s 139C; Defamation Act 2006 (NT), s 29.

⁴⁶ *Metropolitan International Schools Ltd v Designtecnica Corp* [2009] EMLR 27, para 70.

⁴⁷ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 24; Defamation Act 2005 (SA), s 22; Civil Law (Wrongs) Act 2002 (ACT), s 134; Defamation Act 2006 (NT), s 21.

⁴⁸ Milmo and Rogers (eds), *Gatley on Libel and Slander* (11th ed, 2008), para 6.27; Collins, *The Law of Defamation and the Internet* (3rd ed, 2010), paras 17.09–17.17.

⁴⁹ *Metropolitan International Schools Ltd v Designtecnica Corp* [2009] EMLR 27, paras 67–9.

Plainly, the protection for Internet intermediaries in the United Kingdom and Australia falls well short of that enjoyed by intermediaries in the United States by operation of section 230(c) of the Communications Decency Act 1996.

The experience of members of the Committee is that the current protection for intermediaries in Australian law is insufficient, and may be having a chilling effect on freedom of expression. Intermediaries in Australia tend to disable access to allegedly defamatory material upon receiving a complaint, in order to avoid the risk of subsequently being held liable for its continued publication.

The Committee raises for consideration the desirability of the adoption of a broader, statutory defence of innocent dissemination that would operate to protect persons other than the author, editor or first publisher of matter, except where they fail to take reasonable steps in an expeditious manner to disable access to material hosted on equipment within their control once they know or ought to know that the material is unlawful: that is, where they know or ought to know both that it is defamatory of a person, and that no defence is available in respect of its publication.

Such an approach would seem to the Committee to strike the right balance between freedom of expression and the protection of reputation. It would be likely to overcome the chilling effect inherent in intermediaries reflexively disabling access to lawful material simply because a complaint has been made. At the same time, where material is demonstrably false, for example, aggrieved persons would be encouraged to bring the facts to the attention of intermediaries, who would then be exposed to the risk of liability if they did not take reasonable steps in an expeditious manner to disable access to the offending material.

The Committee in this regard draws support from the observations of Lord Denning MR in *Goldsmith v Sperrings Ltd*, who said:⁵⁰

[N]o subordinate distributor ... should be held liable for a libel ... unless he knew or ought to have known that a newspaper or periodical contained a libel on the plaintiff himself; that is to say, that it contained a libel which could not be justified or excused.

In *Metropolitan International Schools Ltd v Designtecnica Corp*, Eady J thought Lord Denning's view threw up more problems than it was likely to solve:⁵¹

How could someone hoping to avail himself of the defence know that a defence of justification was bound to fail, save in the simplest of cases? How is he/she to approach the (often controversial and uncertain) question of meaning? How much legal knowledge is to be attributed to him/her in arriving at these conclusions? What of a possible Reynolds defence?

The Committee would, however, put Eady J's first rhetorical question in a different way: why should subordinate distributors be liable save in the clearest case, such as where they actually know a defence of justification is bound to fail? The Committee also observes that the complexities of which Eady J warned may be overstated. Regulation 19 of the Electronic Commerce (EC Directive) Regulations, for example, uses the formulation we favour, by depriving content hosts of liability only where they have 'actual knowledge of *unlawful* activity or information' or are 'aware of facts or circumstances from which it would have been apparent ... that the activity or information was *unlawful*' (our emphasis). A defence of the kind we favour would thus be consistent with the Electronic Commerce Directive.

⁵⁰ [1977] 1 WLR 478, 487.

⁵¹ [2009] EMLR 27, para 69.

Q30–37. Procedural Matters

The Committee makes no submissions in respect of most of the procedural matters canvassed in questions 30 to 37 of the Consultation Paper.

By question 30, however, the Ministry has sought comment as to whether a new procedure which isolates for early determination preliminary questions, such as the meaning of an allegedly defamatory publication, would be helpful.

A mechanism somewhat similar to that floated in the Consultation Paper was tried in New South Wales, as a result of amendments to the now-repealed Defamation Act 1974 (NSW) introduced in 2002. Section 7A of that Act, prior to its repeal, provided:

- (1) If proceedings for defamation are tried before a jury, the court and not the jury is to determine whether the matter complained of is reasonably capable of carrying the imputation pleaded by the plaintiff and, if it is, whether the imputation is reasonably capable of bearing a defamatory meaning.
- (2) If the court determines that:
 - (a) the matter is not reasonably capable of carrying the imputation pleaded by the plaintiff, or
 - (b) the imputation is not reasonably capable of bearing a defamatory meaning,
 the court is to enter a verdict for the defendant in relation to the imputation pleaded.
- (3) If the court determines that:
 - (a) the matter is reasonably capable of carrying the imputation pleaded by the plaintiff, and
 - (b) the imputation is reasonably capable of bearing a defamatory meaning,
 the jury is to determine whether the matter complained of carries the imputation and, if it does, whether the imputation is defamatory.
- (4) If the jury determines that the matter complained of was published by the defendant and carries an imputation that is defamatory of the plaintiff, the court and not the jury is:
 - (a) to determine whether any defence raised by the defendant (including all issues of fact and law relating to that defence) has been established, and
 - (b) to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.
- (5) Section 86 of the *Supreme Court Act 1970* and section 76B of the *District Court Act 1973* apply subject to the provisions of this section.

The effect of section 7A, while it was in force, was that in most defamation actions in New South Wales, there were two trials: a trial by jury dealing for the most part with questions of defamatory meaning; and a separate, later trial before a judge alone dealing with defences and damages.

The rationale behind the section 7A mechanism was very similar to that underlying the procedure that is floated and discussed in paras 123–130 of the Consultation Paper.

The section 7A mechanism was, in the Committee's view, a failed experiment. In the experience of Committee members, it usually led to increased costs for all parties, principally because most defamation actions came to require two trials rather than one, but also because in a considerable number of cases there were multiple appeals: appeals from jury verdicts, usually on questions of meaning, and subsequent appeals from judge-alone decisions on defences and damages. The ultimate resolution of many defamation claims was

commensurately delayed. The section 7A mechanism also led to other distortions. Other than in hopeless cases, claimants ‘won’ their trial before a jury, which led to media reports that claimants had won their cases, when in reality the true issues – namely, the availability of defences – were yet to be heard and determined.

The section 7A mechanism was considered and rejected at the time of debate in relation to the form of Australia’s uniform national laws. In the second reading speech for the Defamation Bill 2005 (NSW) in the New South Wales Parliament, for example, the then-Attorney-General said:

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.

Q38. Corporations

The right of corporations to sue for defamation has been severely circumscribed in Australia. The relevant provision in the uniform national defamation laws is as follows:⁵²

- (1) A corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication.
- (2) A corporation is an excluded corporation if:
 - (a) the objects for which it is formed do not include obtaining financial gain for its members or corporators, or
 - (b) it employs fewer than 10 persons and is not related to another corporation, and the corporation is not a public body.
- (3) In counting employees for the purposes of subsection (2) (b), part-time employees are to be taken into account as an appropriate fraction of a full-time equivalent.
- (4) In determining whether a corporation is related to another corporation for the purposes of subsection (2) (b), section 50 of the *Corporations Act 2001* of the Commonwealth applies as if references to bodies corporate in that section were references to corporations within the meaning of this section.
- (5) Subsection (1) does not affect any cause of action for defamation that an individual associated with a corporation has in relation to the publication of defamatory matter about the individual even if the publication of the same matter also defames the corporation.
- (6) In this section:

‘corporation’ includes any body corporate or corporation constituted by or under a law of any country (including by exercise of a prerogative right), whether or not a public body.

‘public body’ means a local government body or other governmental or public authority constituted by or under a law of any country.

⁵² Defamation Act 2005 (NSW, Qld, SA, Tas, Vic, WA), s 9; Civil Law (Wrongs) Act 2002 (ACT), s 121; Defamation Act 2006 (NT), s 8.

The Committee considers the potential adoption of the Australian approach to be a matter of public policy for England and Wales. The Committee offers, however, two observations about the operation of the Australian provision.

First, the abolition of the right of most corporations to sue for defamation has, in the view of the Committee, had a liberalising effect on freedom of expression in Australia. Corporations aggrieved by the publication of defamatory matter about them are now generally confined to bringing actions for malicious falsehood. That cause of action has a number of disadvantages for a claimant relative to the cause of action for defamation, because its elements include proof by the claimant that the statement in question was false, was actuated by malice and, in most cases, caused pecuniary loss to the corporation.⁵³ Another alternative for corporations that are defamed in Australia is a defamation action by an individual associated with the corporation who is defamed by the same publication.⁵⁴

Secondly, the Committee observes that the Australian provision gives rise to anomalies. The 10-employee rule in paragraph 2(b) is arbitrary. The requirement in paragraph 2(b) that the corporation not be related to another corporation is similarly arbitrary: it operates, for example, to prevent small family enterprises with an orthodox group structure (such as a holding and an operations company) from bringing an action for defamation. There is some doubt as to how to determine the ‘objects’ for which a corporation ‘is’ formed for the purposes of paragraph 2(a). The provision is also potentially uncertain in its application for corporations with variable workforces which are defamed in material that is continuously available, such as via the Internet.

Another of the liberalising reforms in Australia’s uniform national defamation laws was the introduction of a statutory cap on damages for non-economic loss in defamation actions that do not warrant an award of aggravated damages.⁵⁵ The cap is the ‘maximum amount of damages for non-economic loss that may be awarded in defamation proceedings’.⁵⁶ The cap was A\$250,000 (approximately £165,000) at the time the legislation commenced in 2006 and is indexed annually by reference to the average weekly total full-time earnings of adults in Australia. The cap is currently A\$311,000 (approximately £205,000). The Committee considers that the statutory cap may have had a deterrent effect on the bringing of defamation claims in Australia, particularly in the period immediately following the commencement of the uniform national laws. Claimants have in some cases sought to get around the cap by issuing multiple proceedings in respect of separate publications giving rise to the same, similar or related imputations.⁵⁷ The law is unsettled as to whether the cap applies separately to all claimants suing in the same cause.

Q39–40. Public Authorities

The Committee does not address any submissions in respect of the matters raised by questions 39 and 40 of the Consultation Paper. Those matters seem to us to be questions of public policy for England and Wales.

⁵³ eg *Ratcliffe v Evans* [1892] 2 QB 524; *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388. Note that special damage is not always required in England and Wales: Defamation Act 1952, s 3.

⁵⁴ In accordance with the principles in, eg, *Knupffer v London Express Newspaper Ltd* [1944] AC 116.

⁵⁵ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), s 35; Defamation Act 2005 (SA), s 33; Civil Law (Wrongs) Act 2002 (ACT), s 139F; Defamation Act 2006 (NT), s 32.

⁵⁶ *ibid.*

⁵⁷ eg *Davis v Nationwide News Pty Ltd* [2008] NSWSC 693, paras 8–10; *Buckley v Herald & Weekly Times Pty Ltd* (2009) 24 VR 129; *Age Corporation Ltd v Beran* [2005] NSWCA 289, paras 50–1.

The Committee would be pleased, on request, to provide further submissions in relation to specific aspects of these submissions or to address other issues arising out of the Consultation Paper. Enquiries may be directed to Matthew Collins, Chair of the Committee.

A handwritten signature in blue ink, appearing to read 'mcollins', written in a cursive style.

Dr Matthew Collins, Barrister
Chair
Telephone +61 3 9225 7780
matt.collins@vicbar.com.au