

## AUSTRALIAN DEFAMATION UPDATE

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### NEW DEFAMATION LAW FOR THE ACT

#### Introduction

The ACT Legislative Assembly passed the *Defamation Act 2001* on 30 August 2001 (the new Act). The new Act will commence operation on 1 July 2002, and will replace the *Defamation Act 1901* (NSW) (the 1901 Act) and the *Defamation Amendment Act 1909* (NSW) (the 1909 Act), which each presently apply in the ACT.

Although, for the most part, the new Act contains welcome modernisations to the archaic language of the 1901 and 1909 Acts, it also contains a number of important changes to the law of defamation in the ACT. The changes are not, however, as sweeping as those originally proposed by the Territory Government.<sup>2</sup> There also appear to be some disturbing drafting errors and anomalies in the new Act, which was passed despite a Standing Committee report advocating that the legislation be rejected.<sup>3</sup> The following is a brief overview of the major changes to the law contained in the civil defamation provisions of the new Act.<sup>4</sup>

#### Common law continues to apply

The new Act is not a codification of the law of defamation. The cause of action for defamation continues to arise as a matter of common law in the ACT, and common law defences continue to be available.<sup>5</sup> The new Act, for example, does not affect the matters which the plaintiff must prove in a defamation action, and is silent in relation to common law defences such as fair comment and absolute privilege. Although the new Act contains statutory defences of qualified privilege, those defences will, as at

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<sup>2</sup> See Matt Collins, 'Reform in the ACT' (2000) 5(2) *Media & Arts Law Review* 97.

<sup>3</sup> Standing Committee on Justice and Community Safety (ACT), *The Defamation Bill 1999*, Report No 14 (May 2001).

<sup>4</sup> The new Act also modernises and modifies the law of criminal defamation in the Territory: see *Defamation Act 2001* (ACT) ss 27–39.

<sup>5</sup> *Ibid* s 40.

present, operate concurrently with the common law duty-interest and fair reports forms of qualified privilege.

[336] **Defence of justification**

Section 16 of the new Act provides that defendants have a defence where they establish 'the truth of the published matter in accordance with the common law' and 'that it was for the public benefit that the matter should be published'. At first blush, this provision appears merely to replicate the requirement presently set out in s 6 of the *Defamation Act 1901* (NSW).

There appears, however, to be a serious error in the drafting of s 16. Unlike s 6 of the 1901 Act, s 16 of the new Act does not state that truth shall not amount to a defence *unless* it was for the public benefit that the matter should be published. In other words, unlike s 6 of the 1901 Act, s 16 of the new Act does not expressly exclude the common law defence of truth simpliciter. Because the new Act does not limit other defences available to defendants,<sup>6</sup> it may be that s 16 has to be read in the same way as s 356 of the *Criminal Code* (WA); that is, as establishing a statutory justification defence which applies as an alternative to the common law defence of truth simpliciter.<sup>7</sup> This was clearly not the Assembly's intention.<sup>8</sup> If this analysis is correct, then unless the new Act is amended, it may be that truth simpliciter will be a defence under ACT law after 1 July 2002.

**Offer of amends procedure**

The new Act establishes a complicated offer of amends procedure,<sup>9</sup> which follows in many respects that set out in ss 2–4 of the *Defamation Act 1996* (UK),<sup>10</sup> and which is

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<sup>6</sup> Ibid.

<sup>7</sup> See *Gobbart v West Australian Newspapers Ltd* [1968] WAR 113; *West Australian Newspapers Ltd v Bridge* (1979) 141 CLR 535, 544 (Jacobs J); *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* (1985) 58 ALR 549, 597 (Toohey J).

<sup>8</sup> Hansard, ACT Legislative Assembly, 30 August 2001, 3817: 'In relation to the defence of truth, the Government has been persuaded to change its position. This amendment withdraws provisions designed to return the ACT to the common law position where truth alone is a defence.'

<sup>9</sup> *Defamation Act 2001* (ACT) ss 6–11.

<sup>10</sup> For an example of the application of the UK provisions, see *Green v Times Newspapers Ltd* (English High Court, Gray J, 17 January 2001).

similar in some respects to offer of amends procedures operating in New South Wales and Tasmania.<sup>11</sup>

Unlike the offer of amends procedures in the UK, NSW and Tasmania, however, the ACT mechanism is available even in cases where the publisher is not 'innocent'.<sup>12</sup> The procedure is available even where the defamatory publication was made intentionally, recklessly or negligently.

In summary, under the new Act, publishers may 'offer to make amends' to aggrieved persons within 14 days of being told by the aggrieved person that a publication is or may be defamatory of him or her, or before service of a defence in defamation proceedings concerning the publication, whichever is the earlier.<sup>13</sup> The offer must be in writing, and contain various matters,<sup>14</sup> and may relate either to the publication generally, or to a particular defamatory meaning which the publisher accepts is conveyed by the publication.<sup>15</sup> The offer must include, among other matters, an offer to publish 'a reasonable correction (if any)' and 'a reasonable apology (if any)',<sup>16</sup> and an offer to pay the aggrieved person's expenses.<sup>17</sup>

[337] Where the offer is accepted by the aggrieved person, and performed by the publisher, the aggrieved person must not begin or continue an action against the publisher in relation to the matter in question.<sup>18</sup> An offer of amends which is accepted may be enforced by the court.<sup>19</sup>

Where an offer of amends is not accepted, the publisher has, under s 10 of the new Act, a defence to a defamation action in relation to the matter in question if the offer was made as soon as practicable after the publisher became aware that the matter was or might be defamatory, the publisher was ready and willing to perform the terms of

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<sup>11</sup> *Defamation Act 1974* (NSW) ss 36–45; *Defamation Act 1957* (Tas) s 17.

<sup>12</sup> Cf *Defamation Act 1996* (UK) s 4(3); *Defamation Act 1974* (NSW) ss 36–37; *Defamation Act 1957* (Tas) s 17(5).

<sup>13</sup> *Defamation Act 2001* (ACT) s 6(5).

<sup>14</sup> *Ibid* s 6(3).

<sup>15</sup> *Ibid* s 6(2).

<sup>16</sup> *Ibid* s 6(3)(c), (d).

<sup>17</sup> *Ibid* s 6(3)(g).

<sup>18</sup> *Ibid* s 8(3).

<sup>19</sup> *Ibid* s 8(1), (2).

the offer, and 'in all the circumstances the offer was reasonable'.<sup>20</sup> In determining whether an offer was reasonable, the court may take any relevant matters into account, but must in any case have regard to any correction or apology published by the publisher, including the extent to which the correction or apology was brought to the attention of the audience of the matter in question, having regard to its prominence and the period which elapsed between the original publication and the publication of the correction and apology.<sup>21</sup>

This last requirement appears to confuse two quite distinct matters; namely the offer to publish a correction and apology which must be included in an offer of amends, and the actual publication of an apology by a defendant as a means of mitigating damages. Suppose, for example, that a publisher makes an offer to make amends, which is rejected by the aggrieved person, and that the publisher then publishes a full and frank apology for the purpose of mitigating damages at trial. In such a case, the fact of publication of the apology is not logically probative of the reasonableness of the offer to make amends, yet the new Act requires the court to have regard to it. This aspect of the offer to make amends procedure in the new Act ought to be reviewed. Surely, for the purpose of determining whether an offer to make amends was reasonable, it is only the circumstances of the original publication and the terms of the offer itself which should be considered, not the publisher's conduct after the offer was rejected.

Section 6 of the new Act further provides that an offer to make amends may include an offer to pay compensation for any economic loss suffered by the aggrieved person,<sup>22</sup> but may *only* include an offer to pay compensation for the harm to the aggrieved person's reputation if the publication imputes criminal behaviour by the aggrieved person.<sup>23</sup> This appears to impose a serious limitation on the potential utility of the offer of amends procedure. Suppose, for example, that a publisher publishes material which is seriously defamatory of an aggrieved person, but which does not impute criminal behaviour. In such a case, the publisher may not include in an offer of amends an offer to pay compensation for the harm to the aggrieved person's

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<sup>20</sup> Ibid s 10.

<sup>21</sup> Ibid s 7.

<sup>22</sup> Ibid s 6(3)(i).

reputation. In the absence of an offer to pay such compensation, however, the offer of amends is unlikely to be accepted by the aggrieved person, and unlikely to be accepted by the court as being 'reasonable' in all the circumstances. Put another way, in such cases, the offer of amends procedure will be unlikely to be of any value to a publisher, whereas perversely it will potentially be available in many cases which involve imputations of equally or more serious criminal conduct. It is not at all clear why publishers should be (effectively) prevented from taking advantage of the offer of amends procedure in [338] cases involving serious defamatory imputations which fall short of imputing criminal conduct. The limitation in the new Act does not find any equivalent in the offer of amends procedure which operates in the UK. There is no facility for offering to pay compensation in the offer of amends procedures in NSW or Tasmania, although it must be remembered, as outlined above, that those procedures only apply in cases involving 'innocent' publications.

### **Vindication orders**

A further oddity in the drafting of the new Act appears in s 11, which provides that where an offer to make amends is not made, or no reasonable offer to make amends is made, an aggrieved person may apply to the Supreme Court 'for an order to vindicate his or her reputation'.<sup>24</sup>

It may be that the draftsman had in mind the establishment of some sort of expedited remedy of the kind set out in the summary disposal provisions of the *Defamation Act 1996* (UK).<sup>25</sup>

The new Act, however, does not define what is meant by an order to vindicate reputation, does not contain any guidance as to what an aggrieved person must prove in order to obtain such an order, and does not contain any details of the mechanism by which such an order may be sought. These deficiencies were pointed out in an earlier article in this journal concerning the Defamation Bill 1999 (ACT).<sup>26</sup> In these

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<sup>23</sup> Ibid s 6(3)(j).

<sup>24</sup> Ibid s 11.

<sup>25</sup> *Defamation Act 1996* (UK) ss 8–11; see also *Moran v Heathcote* (English High Court, Eady J, 15 January 2001); *Green v Times Newspapers Ltd* (English High Court, Gray J, 17 January 2001).

<sup>26</sup> Collins, above n 2, 103.

circumstances, quite what a court would make of s 11 is obscure, to say the least. It is respectfully suggested that the provision is meaningless in its current form.

### **Apologies in mitigation of damages**

In all Australian jurisdictions except NSW, legislation makes evidence of an apology made or offered by the defendant admissible in mitigation of damages.<sup>27</sup>

Section 20 of the new Act makes evidence of apologies made or offered by defendants admissible in mitigation of damages, but only where 'an offer to make amends has not been made'. There would not appear to be any good reason for the imposition of this limitation, particularly having regard to the problems with the offer of amends provisions described above. Take, again, the example of a defendant who makes an offer to make amends which is not accepted by the plaintiff, and who then publishes a full and frank apology for the purpose of mitigating damages at trial. In such a case, for the reasons outlined earlier, and notwithstanding the contrary indication in s 7 of the new Act, the defendant should not be able to rely on the fact of the apology to prove that the rejected offer of amends was reasonable for the purposes of establishing the defence in s 10 of the new Act. It would seem, however, that in such a case, as the defendant had made an offer of amends, he or she could not rely under s 20 on the apology to mitigate damages at trial. This seems to lead potentially to harsh and unintended outcomes.

It should be noted, however, that evidence of an apology made or offered by a defendant is admissible in mitigation of damages at common law.<sup>28</sup> It may be that defendants in cases of the kind postulated above could simply rely on their common law entitlement, and ignore s 20 entirely.

### **[339] Defence of apology and payment into court**

Section 22 of the new Act contains a modernised form of the defence of apology and payment into court. Unlike the formulation in the 1901 Act, the defence is available in

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<sup>27</sup> *Defamation Act 1889* (Qld) s 21; *Wrongs Act 1936* (SA) s 9; *Defamation Act 1957* (Tas) s 22; *Wrongs Act 1958* (Vic) s 6; *Libel Act 1843* (Imp) (applicable in WA); *Defamation Act 1938* (NT) s 8; *Defamation Act 1901* (NSW) s 5 (currently applicable in ACT).

<sup>28</sup> Eg *Smith v Harrison* (1856) 1 F & F 565; 175 ER 854; *Morrison v John Ritchie and Company and Sons Ltd* (1977) 21 ACTR 1, 5–7; *David Syme & Co Ltd v Mather* [1977] VR 516, 528.

all libel cases. Previously, it was available only in cases involving libels contained in 'any public newspaper or other periodical publication'.<sup>29</sup> The new formulation is welcome, although the defence of apology and payment into court is of limited use to defendants, because of the obligation to pay money into court by way of amends. More attractive options for defendants will be to serve an offer of compromise and plead an apology in mitigation of damages,<sup>30</sup> or to rely on the new offer of amends procedure, discussed above.

### **Damages**

Section 25 of the new Act mirrors s 46A of the *Defamation Act 1974* (NSW). It requires courts, in determining the amount of damages to be awarded, to 'ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded', and to 'take into account the ordinary level of general damages component in personal injury awards in the Territory'. This provision probably does nothing more than reflect the modern common law position.<sup>31</sup>

### **New defence of publication without negligence**

Finally, perhaps the most significant modification to civil defamation law in the ACT effected by the new Act is the creation of a new defence of publication without negligence.

Section 23 of the new Act provides:

- (1) It is a defence if the defendant establishes that the published matter (other than any published matter imputing criminal behaviour) was not published negligently.
- (2) For subsection (1), it is sufficient if —
  - (a) the defendant establishes that the defendant took reasonable steps to ensure the accuracy of the published matter; and
  - (b) the defendant gave the plaintiff a reasonable opportunity to comment on the published matter before it was published.

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<sup>29</sup> *Defamation Act 1901* (NSW) s 8.

<sup>30</sup> Patrick Milmo and WVH Rogers, *Gatley on Libel and Slander* (9th ed, 1998) para 18.16.

<sup>31</sup> Eg *John v MGN Ltd* [1997] QB 586; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 59.

This defence is unknown in any other Anglo-Australian jurisdiction, and appears likely to afford defendants, and particularly media defendants, with a powerful new defence. The following points can be made about the new defence.

- The new defence is capable of applying to any published matter, other than matter imputing criminal behaviour, whether that material is published for the public benefit or not. Suppose, for example, that a defendant publishes, without negligence, true, but defamatory details concerning the private life of a private individual. The defendant would not, in those circumstances, be entitled to the statutory justification defence in s 16 of the new Act, but would be entitled to the new defence of publication without negligence. This would appear to be an odd outcome, having regard to the Assembly's apparent intention to continue to use defamation law as a means of protecting privacy.<sup>32</sup>
- [340] The motive of the defendant is irrelevant for the purpose of the new defence. Malice, spite and ill-will on the part of a defendant will not affect the operation of the defence. The new defence may therefore be available in many cases where common law defences of fair comment or qualified privilege are not. The defence is also, for the same reason, broader than the expanded qualified privilege defence for the discussion of government and political matters articulated by the High Court in *Lange v Australian Broadcasting Corporation*.<sup>33</sup>
- Subsection (2) outlines circumstances which will be sufficient to prove an absence of negligence, but it appears that the requirements of subsection (2) are not necessary to prove an absence of negligence. In other words, it may be possible to succeed in a defence of publication without negligence even in a case where reasonable steps were not taken to ensure the accuracy of the published matter, or where the defendant was not offered a reasonable

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<sup>32</sup> See, eg, Standing Committee report, above n 3, 15–24; Hansard, ACT Legislative Assembly, above n 8, 3817.

<sup>33</sup> (1997) 189 CLR 520. Malice defeats the *Lange* defence, to the extent that it is 'not covered under the rubric of reasonableness': see (1997) 189 CLR 520, 574; *Brander v Ryan* [2001] Aust Torts Reports 81-593, 66,550–1.

opportunity to comment prior to publication.<sup>34</sup> For example, it is conceivable that the defence might be available to protect a radio announcer who reads out a false, defamatory article appearing in an authoritative newspaper, genuinely believing the article to be true, but without taking any steps to verify its accuracy or to obtain a comment from the defamed party.

- The onus of proving that the published matter was not published negligently rests on the defendant.
- The truth or falsity of the published matter is not directly relevant to the new defence.
- In light of the High Court's decision in *John Pfeiffer Pty Ltd v Rogerson*,<sup>35</sup> the defence of publication without negligence will be available in respect of publications occurring in the ACT even in defamation proceedings brought in other jurisdictions. The effect of *John Pfeiffer Pty Ltd v Rogerson* will be, however, that the defence will not be available in defamation proceedings in the ACT in respect of publications occurring outside the ACT.<sup>36</sup>

## Conclusion

In many respects, the new Act is a long overdue and commendable modernisation of the statutory modifications to the common law of defamation set out in the 1901 Act and the 1909 Act. It also, in some respects, represents a brave attempt to introduce new procedures to assist in the early resolution of defamation actions. There are, however, a number of very significant problems with the new Act. It is to be hoped that they will be addressed before the Act commences operation on 1 July 2002.

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<sup>34</sup> Cf Hansard, ACT Legislative Assembly, above n 8, 3818, which assumes the contrary: 'The provision only applies where a reasonable opportunity is given.'

<sup>35</sup> (2000) 172 ALR 625; see Matt Collins, 'Choice of law in defamation after *John Pfeiffer Pty Ltd v Rogerson*' (2001) 6(3) *Media & Arts Law Review* 171.

<sup>36</sup> Ibid; cf Collins, above n 2, 99, in which concern was expressed about the danger of forum shopping upon the unilateral adoption of a defence of publication without negligence in the ACT, having regard to the choice of law rules which prevailed in Australia prior to *John Pfeiffer Pty Ltd v Rogerson*. Those fears are allayed by the decision in *John Pfeiffer Pty Ltd v Rogerson*, although the unilateral adoption by the ACT of a new defence suggests that the holy grail of uniform Australian defamation laws may be as distant as ever.