Defamation Law for a New Decade

Sophie Dawson, Partner (Australia), and **Phil Gwyn,** Associate (UK), Bird & Bird, discuss what lies ahead for defamation law in the new decade.[1]

1. Introduction

2020 and 2021 are set to be years of potentially profound change for Australia. As those of us who lack the healthcare and other skills to be of practical assistance in the current crisis make our small contribution by working from home, we contemplate the changes to society likely to be brought about not only by the rapid change in our working and living habits, but also potentially by the extensive changes being considered in relation to the laws which affect freedom of speech, civil rights and privacy issues. While our physical freedom is (hopefully temporarily) hampered by the virus, many media lawyers are hopeful that freedom of speech may be enhanced.

This article focusses on changes proposed to defamation law as part of the review of the model defamation provisions by the Council of Attorneys-General (**CAG**). The other law reform processes affecting freedom of speech which are currently on foot include the reviews of privacy law and of content laws and the various proposed codes arising from the ACCC's Digital Platforms Report in 2019. Those reforms are outside of the scope of this article.

The changes to defamation law proposed can be divided into two categories - the fundamental changes and the "fix-ups". The changes with the most potential impact are the proposed introduction of a serious harm test and the proposed single publication rule. There are also changes to the requirement that a concerns notice be issued prior to proceedings. The fix-ups include proposals aimed at changing contextual truth, statutory qualified privilege, honest opinion and jury provisions so that they achieve their original objectives.

We will deal with the fundamental changes first.

2. Background: The CAG Review

The last defamation law reform process seems like yesterday, but was in fact 15 years ago. In late 2004, CAG endorsed model defamation provisions. An intergovernmental agreement is in place under which there is a model defamation law working party which reports to CAG on proposals to amend defamation laws. In 2018, CAG reconvened the working party to review the model defamation provisions. In February 2019, the committee published a discussion paper and sought submissions. In December 2019, the working party published a consultation draft of proposed amendments to the model defamation provisions. Despite challenging times, there has not yet been any announcement to suggest that the reform process will deviate from the current reform timetable which anticipates the enactment of changes to the model law by the states and territories in June this year.

It has never been more important to strike the right balance when it comes to Australia's media laws. As was recognised in the ACCC's Digital Platforms Inquiry Report last year, Australian media organisations face significant challenges due to the movement of advertising dollars to digital platforms as well as globalisation and convergence more generally.

Communication laws play an important part in the competitive landscape for Australian media organisations which compete against media organisations in other places such as the US which have more media-friendly laws.

They also affect the ability and willingness of journalists and others to engage in quality journalism which the courts have repeatedly recognised is important to preserve our political and judicial systems. Overly restrictive or harsh laws might deter people from risking defamation actions in the face of shrinking advertising revenues.

This article only considers particular aspects of the proposed defamation law reforms. It focusses on how two of the reforms in question compare with their international counterparts.

3. The significant changes

(a) Serious Harm

While the final form of the relevant provision is yet to be determined, with the adoption of a serious harm test in Australia, Australia will be following in the footsteps of the United Kingdom. If the current reform timetable remains on foot, within the year media lawyers will be poring over UK case authorities dealing with the serious harm test, and undoubtedly the most important of those is *Lachaux.*

Significantly, the proposed test is worded differently from its UK counterpart. This section considers the UK case law, and whether or not the differences in wording are likely to have any practical significance.

The UK serious harm test alters the test for what is defamatory and is as follows:

(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

1 With thanks to Phil Sherrell and Joel Parsons for their assistance in preparing this article.

(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

The current wording of the proposed Australian test is as follows:

(1) An individual has no cause of action for defamation in relation to the publication of defamatory matter about the individual unless the individual proves that the publication has caused, or is likely to cause, serious harm to the reputation of the individual.

(2) An excluded corporation referred to in section 9 has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless the corporation proves that the publication has caused, or is likely to cause—

  (a) serious harm to the reputation of the corporation, and

  (b) serious financial loss.

Thus, the Australian serious harm provision, if enacted, will alter the position by requiring serious harm as a prerequisite to a cause of action, but will not change the test for what is "defamatory" as has occurred in the UK.

The effect of the provision is nonetheless likely to be similar to that in the UK, as Australian Courts will no doubt look to UK authorities to apply the new provision.

UK Case law: what does it mean for us?

Next, we briefly consider some key UK cases. Those cases show the serious harm test can be met including in relation to social media publications. There is a question in those circumstances about the effect that the introduction of the test will have on the volume of defamation litigation in Australia, and particularly in relation to the question of whether it will reduce the large number of claims by individuals against other individuals in relation to social media publications which are currently in the Courts.

The leading UK case is the Lachaux case: *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27. In that case, the Supreme Court Justices unanimously rejected the appeal of The Independent and the Evening Standard from the High Court and Court of Appeal decision that serious harm had been caused to the claimant, Bruno Lachaux.

According to the judgment, the appellants had separately published stories detailing the divorce and subsequent custody battle between Bruno Lachaux, a French aerospace engineer, and Afsana Lachaux. The couple lived in Dubai at the relevant time, with Bruno initiating divorce proceedings in April 2011 to seek custody of their son, Louis. Afsana went into hiding, with a UAE court then awarding custody to Bruno. Mr Lachaux then found and reclaimed Louis, whilst instituting criminal proceedings against Afsana for alleged abduction.

In early 2014, the appellants published stories detailing the events described above. Bruno sued in the High Court for defamation, with the High Court deciding that the articles complained of each conveyed multiple defamatory meanings, including: that Bruno had been violent and abusive towards his wife, that he had hidden Louis' passport to prevent Afsana removing him from the UAE, that he had used UAE law and courts to deprive Afsana of custody and contact with their son, that he had callously and without justification reclaimed Louis, and that he had wrongly alleged that Afsana had abducted Louis.

In the Supreme Court, Lord Sumption delivered one of his final judgments in dismissing the appeal, which was agreed upon by the remaining four Supreme Court Justices. However, Lord Sumption differed from the Court of Appeal in his analysis of section 1(1) of the *Defamation Act 2013* (UK), thereby providing a fuller explanation of the meaning of "serious harm" within that section.

The Court concluded that the threshold of "serious harm" within section 1(1) must exceed the threshold previously established in the cases of *Jameel* and *Thornton*, and that this requirement must be applied in reference to the actual facts of the statement's impact, not just to the meaning of the words themselves.

The Court noted that the focus on the actual or likely impact of a statement is a significant departure from the common law. At common law, damage is conclusively presumed once defamatory meaning is established.

Key common law principles were nonetheless applied when applying this test. They included:

(a) The "repetition rule", to the effect that "a statement that someone else has made a defamatory statement about the claimant, although literally true, is treated as equivalent to a direct statement to the same effect. The policy is that "repeating someone else's libellous statement is just as bad as making the statement directly": *Lewis v Daily Telegraph* [1964] AC 234, 260 (Lord Reid)": *Lachaux* at paragraph 23; and

(b) the *Dingle* rule (see *Associated Newspapers Ltd v Dingle* [1964] AC 371), the effect of which, in Lord Sumption's words, is "to treat evidence of damage to the claimant's reputation done by earlier publications of the same matter as legally irrelevant to the question what damage was done by the particular publication complained of": at paragraph 24.

It will be interesting to see whether the same approach will be taken to the Australian test in circumstances in which it seems likely to separate

the serious harm requirement from the test for what is defamatory. Australian courts will need to decide how much of the existing case law concerning defamatory meaning to carry across to the new provision.

It is instructive to consider the approach taken in that case to establishing serious harm, which provides some guidance as to the types of evidence which are likely to be put on in defamation cases after the test is introduced. Lord Sumption's description of the evidence is as follows:

> "On the footing that (as I would hold) Mr Lachaux must demonstrate as a fact that the harm caused by the publications complained of was serious, Warby J held that it was. He heard evidence from Mr Lachaux himself and three other witnesses of fact, and received written evidence from his solicitor. He also received agreed figures, some of them estimates, of the print runs and estimated readership of the publications complained of and the user numbers for online publications. He based his finding of serious harm on (i) the scale of the publications; (ii) the fact that the statements complained of had come to the attention of at least one identifiable person in the United Kingdom who knew Mr Lachaux and (iii) that they were likely to have come to the attention of others who either knew him or would come to know him in future; and (iv) the gravity of the statements themselves, according to the meaning attributed to them by Sir David Eady. Mr Lachaux would have been entitled to produce evidence from those who had read the statements about its impact on them. But I do not accept, any more than the judge did, that his case must necessarily fail for want of such evidence. The judge's finding was based on a combination of the meaning of the words, the situation of Mr Lachaux, the circumstances of publication and the inherent probabilities. There is no reason why inferences of fact as to the seriousness of the harm done to Mr Lachaux's reputation should not be drawn from considerations of this kind. Warby J's task was to evaluate the material before him, and arrive at a conclusion on an issue on which precision will rarely be possible. A concurrent assessment of the facts was made by the Court of Appeal. Findings of this kind would only rarely be disturbed by this court, in the absence of some error of principle potentially critical to the outcome."

The finding that actual harm is relevant to the serious harm test has practical implications. It means that, in principle at least, a statement which is not defamatory (in the UK) or which is defamatory but not actionable (in Australia) due to lack of serious harm may become defamatory (UK) or actionable (in Australia) if it later results in serious harm.

How will the serious harm test affect social media cases?

The UK case law also establishes that, whilst the serious harm test may dispose of many of the social media and other online "backyarders" currently clogging up the court system, some online publications will still be actionable. The case of *Monroe v Hopkins* related to the defacement of the Memorial to the Women of WWII in Whitehall during an anti-austerity demonstration on Saturday 9 May 2015. Amongst widespread media condemnation, on 9 May the New Statesman journalist Laurie Penny tweeted under the Twitter handle @PennyRed that "I don't have a problem with this. The bravery of past generations does not oblige us to be cowed today."

In what was accepted to be a case of mistaken identity, on 18 May Ms Hopkins posted a tweet to Ms Monroe, asking:

> "scrawled on any memorials recently? Vandalised the memory of those who fought for your freedom. Grandma got any more medals?"

Following Ms Monroe's clarifications that she hadn't been involved, Ms Hopkins deleted the first tweet, replacing it with:

> "can someone explain to me – in 10 words or less – the difference between irritant @PennyRed and social anthrax @MsJackMonroe"

Following continued mud-slinging on Twitter, on 2 June Ms Hopkins tweeted: "@MsJackMonroe I was confused about identity. I got it wrong." But demands from Ms Monroe for an apology and a donation to charity were not met by Ms Hopkins, so proceedings were issued by Ms Monroe in December 2015.

As Mr Justice Warby identified in his opening remarks on 10 March 2017, the three central points in issue were: (1) the meaning of the two tweets; (2) whether these tweets amounted to defamation; and (3) whether they had caused or were likely to cause serious harm to Ms Monroe's reputation.

What did the tweets mean?

Mr Justice Warby ruled that the meaning of the first tweet was not literal, as the hypothetically reasonable readers of Ms Hopkins' Twitter feed would not believe that Ms Monroe had literally vandalised the war monument herself. However, the ordinary and natural meaning in the eyes of the reasonable reader was that Ms Monroe "condoned and approved of the fact that in the course of an anti-government protest there had been vandalisation by obscene graffiti of the women's war memorial in Whitehall, a monument to those who fought for her freedom."

In discerning the meaning of the second tweet, the judge found that when read in the context of the first tweet, the second tweet carried the innuendo meaning that Ms

Monroe condoned and approved of the defacing of the women's war memorial, despite the fact that the first tweet had been deleted by the time that the second tweet was published. In making this finding, the judge noted that the two should be read together as the first tweet had been published only shortly beforehand. Simply deleting a tweet is not a satisfactory defence to a libel claim.

Were the tweets defamatory?

In order to establish a claim in defamation, Ms Monroe's lawyers had to show that the meaning of the tweets would tend to have a substantially adverse effect on the way that right-thinking members of society generally would treat Ms Monroe.

Anticipating charges (subsequently made) that his decision would be portrayed by Ms Hopkins and her supporters as tantamount to an attack on freedom of speech, Mr Justice Warby emphasised that "the demands of pluralism in a democratic society make it important to allow room for differing views to be expressed without fear of paying damages for defamation. Hence, a statement is not defamatory if it would only tend to have an adverse effect on the attitudes to the claimant of a certain section of society."

With that said, Mr Justice Warby had no difficulty in deciding that the meaning of Ms Hopkins' tweets was defamatory as they would lower Ms Monroe in the estimation of "right-thinking people generally". In support of this conclusion, Mr Justice Warby simply stated that defacing a public monument is a crime, and that society as a whole would view both illegal acts and showing disrespect to those who gave their lives in World War II as deplorable.

Was serious harm established?

On the serious harm question, Mr Justice Warby found that "the tweets complained of have a tendency to cause harm to this claimant's reputation in the eyes of third parties, of a kind that would be serious for her."

Amongst the factors influencing the judge on this point was the extent of the tweets' publication on Twitter. Ms Hopkins' argument was that as the first tweet was an 'at reply' tweet (i.e. a tweet which begins with the Twitter handle of the recipient), only Twitter users who followed both Ms Hopkins and Ms Monroe would have received this tweet, a number that the defence estimated at just 140. Notwithstanding this fact, the judge decided that the probable audience to the tweet was in the region of 20,000. In deciding this, the judge considered that the tweet was available on Ms Hopkins' home page for 2 hours and 25 minutes, and that as Ms Hopkins received 5.74m direct profile views in May 2015, this time period equates to roughly 25,000 impressions. Although this figure is not exact as not all those Twitter users to whom the tweet was accessible will have actually read it, given that potential impressions do not take into account views through retweets, an audience of 20,000 was decided as an acceptable estimate.

Ms Hopkins' lawyers also sought to defend her by arguing that she was simply an unauthoritative voice in the "Wild West" of social media and her remarks could therefore not possibly cause serious harm to somebody's reputation. This argument was rejected by Mr Justice Warby, who noted that Ms Hopkins was a "well-known figure" and that she was a newspaper columnist for the Sun at the time.

Finally, Ms Hopkins' lawyers argued that serious harm could not be established due to her tweet of 2 June 2015 admitting that a mistake had been made. However, just as the first tweet was an 'at reply' tweet, and would only arrive on the timelines of their 140 mutual followers, so was the tweet admitting Ms Hopkins' error. Furthermore, Mr Justice Warby found that this tweet was unsatisfactory as an apology because of four key factors: (a) it was several weeks after the event; (b) it was early in the morning, at a time when tweet impressions are lower; (c) it was not self-explanatory; and (d) it carried no apology.

The judge's comments have implications for social media defamation claims in both the detailed methodology used to discern the extent of publication and the rejection of the idea that certain users of Twitter are not authoritative sources who can cause serious harm to reputation by their comments. If comments are made in error, Mr Justice Warby's judgment makes it clear that a swift, conspicuous and clear apology is the most effective way to minimise the risk of claims. Indeed, in his closing remarks he also made it clear that the case could have easily been resolved if an open offer to settle for £5,000 had been accepted.

Additionally, the judge observed that a difficultly arose because the first tweet had been deleted and that Twitter Analytics (a tool used to measure a user's impact on Twitter) was therefore unavailable to accurately determine the scale of its distribution. He also highlighted that many supposedly abusive tweets to Ms Monroe were automatically deleted by a piece of software which she used to remove offensive and threatening tweets from 'trolls'. As he highlighted, it is "the responsibility of a litigant to retain and preserve material that may become disclosable," and the responsibility of a solicitor to ensure that their client appreciates this.

It is proposed in Australia that the defence of triviality be removed as part of the reform package. This is a natural corollary of introducing the serious harm test: If the defence were to remain, this could cause the serious harm test to be read down.

(b) Single Publication Rule

The second most significant reform proposed is the introduction of a "single publication rule" in Australia.

At the moment, much news and other potentially defamatory material is published either in mass media publications, or online.

In 2002 the High Court confirmed in the *Gutnick* case that the multiple publication rule applies. The effect of this is that a new cause of action arises each time a defamatory communication is received by a new person. Moreover, the Court in *Gutnick* also confirmed that the place of each defamatory publication is the place of the recipient, and that the applicable law is that of the recipient, with the result that a single internet publication can rapidly give rise to causes of action under different laws and at different times across the world. Moreover it can continue to give rise to such causes of action indefinitely.

The choice of law aspects of the *Gutnick* decision were partially addressed by the ch0ice of law provisions in the Uniform Laws introduced in Australia in 2005. Those laws stipulate that within Australia the applicable law is that of the place with the closest connection with the harm. The substantial uniformity of Australian laws also makes choice of law less important within our borders. Interestingly, that law reform did not remedy the international choice of law position, but that does not seem to have resulted in any major practical problems.

The reform now being considered will address the limitation period aspects of the multiple publication rule. These were most famously illustrated by the Duke of Brunswick when he sent his manservant down to buy a back issue of a newspaper so that he could sue on publication of the back issue to his manservant after the limitation period expired: *Brunswick v Harmer* (1849) 14 QB 185, [1849] EngR 915, (1849) 117 ER 75.

The "single publication rule" title is taken from the US single publication rule. The proposed statutory amendment only picks up one aspect of that US rule. The US single publication rule was summarised in *Gutnick*[2] as follows:

> "Some 27 States of the United States, including California, Illinois, New York, Pennsylvania and Texas, by legislation or by judicial decision have adopted what is identified as the single publication rule. That rule is set out in §577A of the *Restatement of Torts*, 2d, (1977), which is headed "Single and Multiple Publications", and reads:
>
> "(1) Except as stated in Subsections (2) and (3), each of several communications to a third person by the same defamer is a separate publication.
>
> (2) A single communication heard at the same time by two or more third persons is a single publication.
>
> (3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.
>
> (4) As to any single publication,
>
> (a) only one action for damages can be maintained;
>
> (b) all damages suffered in all jurisdictions can be recovered in the one action; and
>
> (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions."
>
> In *Firth v State of New York*, the New York Court of Appeals decided that the one-year statute of limitation in New York runs from the first posting of defamatory matter upon an Internet site and that the single publication rule applies to that first posting."

The proposed Australian provision is as follows:

1A Single publication rule

(1) This section applies if—

(a) a person (the ***original publisher***) publishes matter to the public that is alleged to be defamatory (the ***first publication***), and

(b) the original publisher or an associate of the original publisher subsequently publishes (whether or not to the public) matter that is substantially the same.

(2) Any cause of action for defamation against the original publisher or an associate of the original publisher in respect of the subsequent publication is to be treated as having accrued on the day of the first publication for the purposes of determining when—

(a) the limitation period applicable under section 1 begins, or

(b) the 3-year period referred to in section 1B(2) begins.

(3) Subsection (2) does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

(4) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the considerations to which the court may have regard include (but are not limited to)—

(a) the level of prominence that a matter is given, and

(b) the extent of the subsequent publication.

2 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56; 210 CLR 575; 77 ALJR 255; 194 ALR 433 Per Gleeson, McHugh, Gummow & Hayne JJ .

(5) This section does not limit the power of a court under section 1B to extend the limitation period applicable under section 1.

associate of an original publisher means—

(a) an employee of the publisher, or

(b) a person publishing matter as a contractor of the publisher, or

(c) an associated entity (within the meaning of the *Corporations Act 2001* of the Commonwealth) of the publisher.

day of first publication, in relation to publication of matter on a website or in any other electronic form, means the day on which the matter was first posted or uploaded on the website or sent electronically.

public includes a section of the public.

The wording of this provision is likely to give rise to difficult questions as to when publications are relevantly "substantially" the same and when differences in the "manner" of publication are sufficient for there to be separate limitation periods where proceedings have previously been brought against the same defendant or an associate of the same defendant.

A new proposed section 23 will address the potential for multiple actions in relation to the same or like matter in Australia. It provides that leave of the court is required to bring an action in respect of matter which is the same as or like matter in relation to which proceedings have previously been brought against the same defendant or an associate of that defendant.

4. The Fix Ups

The fix ups are largely uncontroversial amongst defamation lawyers. There are clear changes required to meet the objectives of aspects of the Uniform Acts as originally drafted.

1.1 Requirement for a concerns notice

The amendments will require plaintiffs to serve a concerns notice on each defendant and to wait at least 14 days before suing.

This will enhance the settlement opportunities in relation to potential claims, and will open the door for potential defendants to make offers under the offer of amends provision. A number of tidy ups have been made to the offer of amends provisions as part of the proposed reforms, including a requirement for offers to be open for at least 28 days.

1.2 Contextual Truth

Amendments have been proposed which address the *Kermode* problem in relation to existing contextual truth defences[3]. Due to a drafting issue in relation to existing contextual truth defences, plaintiffs have been able to defeat the contextual truth defence by "pleading back" imputations relied on as contextual truth imputations.

The amendment addresses this by making it clear that imputations pleaded by a plaintiff can be relied upon as contextual imputations by a defendant.

1.3 The Zunter Problem

The statutory qualified privilege defence in the Uniform Law was designed to attract the UK *Reynolds* case law.[4] Unfortunately, the Courts interpreted the defence as imposing a very high bar of reasonableness, particularly in *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227.

The reforms address this with a new section 29A which introduces a defence of responsible publications in the public interest. They also make important adjustments to the existing statutory qualified privilege defence in section 30 to make the availability of the defence a matter for juries rather than judges, and to make it clear that the list of matters in that section (which were taken from *Reynolds* in the last round of amendments) are not comprehensive and do not all need to be taken into account.

1.4 Aggravated damages and the cap

Amendments to the limit on damages for economic loss make it clear that the maximum must only be awarded in a most serious case.

However, they also broaden the potential for aggravated damages awards by removing the previous limited provision for aggravated damages and replacing it with a broad provision allowing the award of aggravated damages where they are "warranted in the circumstances".

5. Conclusion

If enacted, the reforms to defamation laws could have a significant effect on defamation practice in Australia. The serious harm text and the single publication rule in particular could stem the flow of internet-related small claims currently clogging the Court system. Much will, however, depend on how the Courts interpret each of the new provisions. Overseas case law provides some guidance but the unique drafting of the proposed provisions will also give Australian Courts latitude to interpret them differently.

3 *Fairfax Media Publications Pty Ltd and Others v Kermode* [2011] NSWCA 174

4 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127