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A review of Australia's defamation reforms after a year of operation

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Abstract

Australia introduced near-uniform defamation laws in 2006, replacing a complex array of laws in its eight state and territory jurisdictions. The reformed laws introduced several consistencies, including a one year limitation period, an expedited offer of amends process, a cap on non-economic damages, and a suite of defences in addition to the common law defences which were preserved. The changes were the fruits of compromise between attorneys-general at both levels of government and industry lobbyists. This article suggests that, while the early indications are that there have been some positive outcomes for media defendants, the laws may have contributed to some potential restrictions on free expression in the areas investigative journalism and privacy.

Introduction

When near uniform defamation laws were introduced throughout Australia in 2006 they were generally welcomed by industry leaders for their uniformity, even though journalists in some states and territories had given up some advantages in the process. This article outlines the main reforms, reviews their impact one year on, and identifies some key trends which have the potential to impact upon free expression in the medium to long term.

Background, degree of uniformity and key aspects of the legislation

Prior to 2006, defamation laws differed across the eight Australian states and territories, making them a complex anachronism in the new millennium of cross-jurisdictional publishing technologies. After considerable pressure upon attorneys-general by the federal government over the 2004-2006 period, and representations by industry

lobby groups and organisations like the Australian Press Council and the Media Entertainment and Arts Alliance, near-uniform laws were introduced in all states from January 1, 2006, and in both territories a few months later.

The near-uniformity was significant historically because it had taken more than 150 years to achieve. Defamation was first cast into legislative form in Australia in the mid-19th century in the form of the *Defamation Act 1847* (NSW). After the separation of the states, some chose to repeal the Act and revert to the common law of Britain, some adopted it as it stood, while others enacted their own legislation. At Federation in 1901, the Commonwealth Government was not granted power under the Constitution to deal with matters of defamation law. Instead, it was left to the states. This explains why, in eight states and territories in Australia, there were eight different defamation laws, representing a bizarre amalgam of legislation and case law, driving the push for the reformed laws which were introduced in 2006.

In a historic occasion of cooperation among Australia's states and territories, all eight enacted almost uniform defamation laws in 2006, after nearly two decades of failed attempts to do so. The surviving differences were relatively minor, with South Australia and the ACT not using juries in defamation trials, Tasmania refusing to erase the right of the dead to sue, and some jurisdictions choosing to add a schedule of privileged occasions to the basic list in the Act. In all state jurisdictions, the legislation is now known as the *Defamation Act 2005*. In the Australian Capital Territory it forms Chapter 9 of the *Civil Law (Wrongs) Act 2002* and in the Northern Territory it is the *Defamation Act 2006*. Sections are also numbered differently in the ACT and Northern Territory legislation and, for much of the Act, also differently in South Australia. For the sake of simplicity, in this article it will be referred to as the 'Defamation Act' and the relevant section numbered as it applies to the uniform states. Equivalent sections from differing jurisdictions will be bracketed, thus, for example: Section 7 of the Defamation Act (s. 119 ACT; s. 6 NT).

Section 3 of the Act (s. 115 ACT; s. 2 NT) sets out the objects of the reformed laws, namely:

- to promote uniformity;

• to ensure defamation laws do not place ‘unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance’;

• to ‘provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter’; and

• to ‘promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter’.

These objects addressed some of the chief criticisms of defamation law over recent decades, which included:

• the practice of ‘forum shopping’, where plaintiffs would seek out the most favourable jurisdiction to launch their action;

• the concept of ‘libel chill’, where journalists and publishers would be reluctant to pursue an important story under threat of defamation action;

• the view that damages did not restore reputations and fast apologies might be more effective; and

• the expense of long drawn-out court battles where reputations were further damaged in the process (Pearson, 2007, p. 179).

Section 6 of the Act (s. 118 ACT; s. 5 NT) preserved the common law (or ‘general law’), meaning the case law that has been handed down from Britain over centuries will still apply unless the legislation specifically states otherwise. This brings the decisions of the state and territory Supreme Courts into play as judges look to other jurisdictions for interpretation now that the case law based on their old legislation has been rendered almost useless. And of course it means High Court decisions on important defamation principles will remain important, while their technical ruminations on particular aspects of the old statutes will be less so. This means any analysis just one year after the reforms can only be tentative because a superior court decision or interpretation can shift the balance in an instant.

Processes have been simplified. Journalism students will be grateful that they no longer have to study the distinctions between libel and slander, with the difference abolished under s. 7 of the Act (s. 119 ACT; s. 6 NT). Section 8 (s. 120 ACT; s. 7 NT) streamlines the process by limiting a plaintiff to a single cause of action over a particular

publication, even though there may be multiple imputations in a defamatory item. Section 23 (s. 133 ACT; s. 20 NT; s. 21 SA) prevents a plaintiff suing the same defendant twice for publication of the same or like matter without special permission.

The most positive outcome for journalists, aside from the uniformity itself, is that plaintiffs have just 12 months in which to bring an action, unless they can convince a court to extend that to three years in special circumstances. This takes the worry in some jurisdictions of litigants having up to six years to bring their actions under the previous laws.

The Defamation Act also settles the issue of where plaintiffs are entitled to bring their actions at s. 11 (s. 123 ACT; s. 10 NT). If the matter is published wholly within a single jurisdiction, the law of that state or territory will apply. If, however, it is published across borders, the court will apply the law of the state or territory where the harm 'has its closest connection'. In gauging the 'closest connection, the court will look to:

- where the plaintiff lived or had its principal place of business;
- the extent of publication in each jurisdiction;
- the extent of harm sustained in each jurisdiction; and
- any other matter the court considers relevant.

Large companies are prevented from suing under the reformed laws. Section 9 (s. 121 ACT; s. 8 NT) states that corporations must be non-profit enterprises or have fewer than ten employees and be unrelated to another corporation to have the right to bring an action. This raises the prospect of corporations looking to alternative actions such as injurious falsehood or the misleading and deceptive conduct provisions of the Trade Practices Act to bring their actions. Section 9 of the Act (s. 121 ACT; s. 8 NT) also stops 'public bodies'— governmental authorities and local councils — from bringing a defamation action, but of course their senior executives could sue for anything that damages their own reputations.

The reforms offer an advantage to media defendants who act quickly to offer amends or apologise to a plaintiff. The reformed laws establish under sections 12–19 (ss. 124–31 ACT; ss. 11–18 NT) a set of procedures where publishers can make a without-prejudice offer of amends to an aggrieved person. Such an offer must satisfy guidelines as to its timing, content and potential withdrawal. If a judge later finds an offer was

reasonable and had met the requirements, s. 18 (s. 130 ACT; s. 17 NT) establishes it as a defence if the plaintiff has rejected it. Section 20 (s. 132 ACT; s. 19 NT) gives an incentive for publishers to issue quick apologies by stating that apologies do not constitute an admission of fault or liability and cannot be used in civil proceedings as evidence of fault or liability. This is reinforced by section 38 (s. 139I ACT; s. 35 NT; s. 36 SA) which permits evidence of corrections and apologies as part of a case for mitigation of damages.

The statutory defences

As mentioned earlier, the common law survives, so defendants have the new statutory defences available to them as well as the suite of defences formerly existing under the common law. This is covered by s. 6 of the Act (s. 118 ACT; s. 5 NT) and s. 24 (s. 134 ACT; s. 21 NT; s. 22 SA).

Truth is now a complete defence in all jurisdictions under s. 25 (s.135 ACT; s. 22 NT; s.23 SA), whereas previously three states and a territory had additional privacy-based requirements. In Queensland, Tasmania, the ACT or New South Wales, imputations had to be both true and 'in the public interest' or 'to the public benefit' to win the legislative defence. Now they need only be true.

That said, media organisations need not be too gleeful about this, for two reasons:

a. Truth was rarely used as a defence because it could be too hard to find the evidence to prove it, and it also required proving the truth of an arising imputation, which could be difficult;

b. Stripping away the privacy riders in those four jurisdictions has strengthened the call for a new tort of invasion of privacy, discussed below.

Of greater potential use is the new 'contextual truth' defence which was formerly only available in NSW and Tasmania. Section 26 of the Act (s. 136 ACT; s. 23 NT; s. 24 SA) allows the defence to publisher who cannot prove a lesser allegation but can prove the truth of a more serious, related imputation. This defence has been used often in NSW in recent years.

Official occasions are well protected under the reformed laws, and quite consistently across jurisdictions. The absolute privilege defence at s. 27 of the Act (s. 137

ACT; s. 24 NT; s. 25 SA) remains substantially similar, offering a defence to defamatory matter stated during court or parliamentary proceedings, to documents tabled there and to publications under the order or authority of such a body. Section 28 (s. 138 ACT; s. 25 NT; s. 26 SA) protects the publication of public documents, both the actual document and fair extracts or summaries. It lists several types of documents covered and provides for the addition of more in schedules to the Act in the various jurisdictions.

The fair report defence is encapsulated in s. 29 of the Act (s. 139 ACT; s. 26 NT; s. 27 SA), where the reportage of specified proceedings of public concern is given qualified protection as long as the report is fair. Publishers lose the defence if 'the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education'. The defence applies to fair reports of public proceedings of:

• a parliamentary body;

• an international organisation of any countries or of the governments of any countries;

• an international conference at which the governments of any countries are represented;

• the International Court of Justice, or any other judicial or arbitral tribunal, for the decision of any matter in dispute between nations;

• any other international judicial or arbitral tribunal;

• a court or arbitral tribunal of any country;

• an inquiry held under the law of any country or under the authority of the government of any country;

• a local government body of any Australian jurisdiction;

• a law reform body of any country;

• a public meeting (with or without restriction on the people attending) of shareholders of a public company held anywhere in Australia;

• a public meeting (with or without restriction on the people attending) held anywhere in Australia if the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for public office.

Working journalists might take heart from the inclusion of council and public meetings in that list, although the public meeting protection requires the matter related to a matter of public interest. This section also has provision for states and territories to add their own schedules, and the NSW Act already has a further 17 types of protected proceedings listed at Schedule 3.

Qualified privilege – the defence used for an important matter of public interest where the truth cannot be proven - has always been a difficult defence for the media in most jurisdictions, in both its common law and statutory versions. The previous NSW version, dating back to that state's 1974 legislation, had been interpreted so narrowly by the courts that judges required media defendants to have acted so 'reasonably' that they might as well have tried to prove the truth. It was a demanding standard, amended in 2002 to accommodate principles developed by the House of Lords in the landmark 2001 Reynolds case in the United Kingdom. It was this version of the qualified privilege defence that proved the model for the most recent reforms under s. 30 of the Act (s. 139A ACT; s. 27 NT; s. 28 SA).

Publishers of defamatory matter must prove three things to win the defence:

- the recipient has an interest or apparent interest in having information on some subject,
- the matter is published to the recipient in the course of giving to the recipient information on that subject, and
- the conduct of the defendant in publishing that matter is reasonable in the circumstances. (At subsection 1).

Subsection 2 requires the media publisher to believe its readers, listeners or viewers have an apparent interest in having the defamatory information. At subsection 3, the Act includes some clarification of whether a publisher's behaviour was 'reasonable in the circumstances'. It is here the legislation lists the factors courts might take into account in determining 'reasonableness':

(a) the extent to which the matter published is of public interest,
(b) the extent to which the matter published relates to the performance of the public functions or activities of the person,

(c) the seriousness of any defamatory imputation carried by the matter published,

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously,

(f) the nature of the business environment in which the defendant operates,

(g) the sources of the information in the matter published and the integrity of those sources,

(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,

(i) any other steps taken to verify the information in the matter published,

(j) any other circumstances that the court considers relevant.

This list extends the principles developed in the 2001 Reynolds case by offering guidelines to journalists on the depth of reporting required to win this public interest, non-truth defence. Worrying is the mention of journalists' sources at (g) which may sound the death knell for reporters wanting to use confidential sources as part of an investigative expose.

The two states where the old legislation offered the media the best qualified privilege defence were Queensland and Tasmania, and sadly that has been dispensed with in the negotiations for uniformity. That was the defence the *Courier-Mail* and the Four Corners teams used to investigate and report on the corruption matters leading to the Fitzgerald Inquiry in the late 1980s.

The fair comment defence has been more or less preserved in the legislation, but renamed 'honest opinion' at s. 30 (s. 139B ACT; s. 28 NT; s. 29 SA).

Subsection 1 offers the three basic planks of the honest opinion defence:

(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.

Subsection 5 defines ‘proper material’ as 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 (the public documents or proceedings of public concern provisions—ss. 138–9 ACT; ss. 25–6 NT; ss. 26–7 SA).

Subsections 2 and 3 offer media defendants a defence when the opinion is that of a third party, either their own employee or a contributor. At subsection 4, the need for that distinction becomes apparent because the defendant loses the defence if it can be proved he or she (or the company) did not ‘honestly hold’ that opinion. If the opinion was that of an employee or agent, then the plaintiff would have to prove the defendant did not believe that employee or agent honestly held the opinion at the time it was published. If it was a stranger’s comment as in the case of a letter writer or a quoted source, the plaintiff would have to prove 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’ (Pearson, 2007, p. 228). If the ‘reasonableness’ aspect of subsection 4(c) is interpreted too narrowly by the courts, defendants might look to reverting to the common law fair comment defence.

Section 32 (s. 139C ACT; s. 29 NT; s. 30 SA) details the defence of ‘innocent dissemination’. This allows for defamatory publication by ‘subordinate distributors’ who were unaware of its contents and did not have editorial control over it. This defence will only really apply to third parties like newsagents, librarians, booksellers and, with some qualifications, Internet service providers (ISPs).

Finally, Section 33 (s. 139D ACT; s. 30 NT; s. 31 SA) offers the following defence of ‘triviality’: ‘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.’ This is unlikely to be used often.

Damages

Division 3 of the Act (Division 9.4.3 in the ACT) deals with remedies, and the two main reforms relate to the limit on damages and the doing away with exemplary and punitive damages. Section 34 (s. 139E ACT; s. 31 NT; s. 32 SA) instructs judges to be sure 'there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded', clearly an indication of the legislators' concern at the skyrocketing quantum of damages in recent years. Section 35 (s. 139F ACT; s. 32 NT; s. 33 SA) limits the scope for non-economic damages to $250,000, but allows for this to be increased over time. Journalists should note they will still have to pay for any pecuniary losses caused by their defamatory publications, without limit. Section 37 (s. 139H ACT; s. 34 NT; s. 35 SA) puts paid to exemplary and punitive damages, which were used to punish defendants. However the category of 'aggravated damages' survives, so there is concern courts might use this device to bump up damages beyond the $250,000 limit.

Criminal defamation

Criminal defamation has survived the reforms, despite the fact that it has been condemned internationally by press freedom bodies. The only change was to shift it from the various defamation acts into the criminal legislation of the states and territories. Victoria retained ss. 10 and 11 of its *Wrongs Act 1958*, which criminalises libel if the defendant knows the publication is false.

Early indications of impact of new laws

It is generally agreed among media industry experts and free expression groups that the near-uniformity of the reformed laws was the single most significant outcome of the whole process, ending decades of inter-jurisdictional complexity that had done little more than improve the bank balances of lawyers. Plaintiffs had the added advantage of being able to 'forum-shop'; that is, seek out the jurisdiction that best favoured their case.

As explained above, certain other features of the reformed laws had the potential to boost the confidence of journalists in their reportage. These included:

- The new one year limitation period;
- The cap on non-economic damages;

- The ban on larger corporations suing;
- The introduction of the new offer of amends processes;
- Allowing truth alone as a defence.

Senior personnel at newspapers in the nation's two largest cities report a downturn in defamation actions since the introduction of the new laws. In-house counsel at Fairfax Media in Sydney, Mark Polden (personal communication, 18/5/07) reported statements of claim for defamation against his mastheads halved in the period July 2006 – April 2007 compared the same period in the previous year (before the reforms). However, he said it was too soon to tell whether the reforms had prompted the downturn because there had also been significant fluctuations in previous periods. Threats were also down by 50 per cent on the previous year, he reported. Editorial development manager at the Herald and Weekly Times in Melbourne, Chris McLeod (personal communication, 16/5/07), said his group had not received a single writ for anything published since January 1, 2006, the day the new laws came into force. The only writ received since that date had been for a publication in 2005.

The executives reported differing approaches to the offer of amends procedures in the two cities. Polden stated that plaintiffs continued to use the pre-existing Uniform Civil Procedure Rules formal offer of compromise and that, while he had used the offer of amends procedure, he had yet to have one accepted at the time of our communication on May 18, 2007. McLeod, however, reported the Herald and Weekly Times had already used the offer of amends process three times to resolve complaints.

Polden said some complaints had lapsed after the 12 month limitation period, but suggested it had always been the case that complaints where statements of claim had not been issued after a year would rarely 'mature into an action'. To the contrary, he felt 'the 12 month cut-off may be pressing plaintiffs with very marginal cases just a little bit harder to issue – on the basis that they don't have the luxury of time (Polden, personal communication, 18/5/07). He said 'complaints from large companies have all but disappeared, while our reporting in connection with them has become a little more robust. Complaints by directors and associated parties (always a hardy perennial) are being made instead'.

In short, preliminary reports from two of the nation's leading news organisations indicated some early positive signs for media defendants. These improvements accepted, the question then becomes: "Uniformity at what price?"

Potential difficulties for free expression: qualified privilege and a tort of privacy

Two legacies of the reforms stand out as potential impediments to free expression and hurdles to investigative journalism. One was the adoption of the NSW version of the qualified privilege defence mentioned above, a provision with a long history of failure for media defendants because, while not requiring the full truth of important allegations, it required their actions to be "reasonable". In Queensland and Tasmania it replaced previous statutory defences under which some of the nation's most important investigative reporting had been undertaken, particularly the exposure of corruption in the Queensland Government in the late 1980s which led to the jailing of three ministers and the state's police commissioner (Pearson, 2007, p. 218). A further difficulty, as mentioned above, was the direction that courts look to the 'integrity' of a journalist's sources when determining the reasonableness aspect of the defence. This represents a very real hurdle to investigative reporters who have relied upon confidential sources for their information.

The new laws also did away with privacy provisions that had applied in four of those jurisdictions for at least the previous three decades. In NSW, the Australian Capital Territory, Queensland and Tasmania, defendants had to prove defamatory matter was "in the public interest" or "to the public benefit" before they could justify their publications, even if they could prove it was truthful. The wording was designed to prevent highly personal (though truthful) matters being published when they bore no relation to an individual's public role or duty. The reforms made truth alone a defence in all Australian jurisdictions, prompting veiled threats in mid-2006 by state and territory attorneys-general that if media organisations used the new defences to pursue blatant privacy breaches they might face new privacy laws (Pearson 2006).

The development gathered momentum in April 2006 when the NSW Attorney-General Bob Debus asked the NSW Law Reform Commission to consider a new statutory tort of privacy (NSWLRC, 2006). In 2007, NSW Law Reform commissioner Michael Tilbury was reported linking the move for a new statutory cause of action for privacy with the "weakening of privacy protection in defamation law" (Merritt, 2007, p. 13). A judge would decide who was at fault in privacy litigation by balancing the competing interests in privacy and the free flow of information. Merritt (2007, p. 13) reported that Mr Tilbury hoped any such legislation would be replicated in other states.

The development coincided with the release of a privacy issues paper by the NSWLRC's sister body at the national level, the Australian Law Reform Commission, which raised questions over whether 'acts of journalism' should be exempt from data protection provisions (ALRC 2006, p. 267) and whether a separate cause of action should be introduced (p. 53). The commission's inquiry is due to continue into 2008 and its outcome might well dampen the media's joy at getting uniform national defamation laws if those very reforms can be blamed for the development of privacy restrictions by the courts or by state or federal legislators.

The momentum for a new tort of privacy has increased via in a series of court cases. While Australian courts are not locked into privacy obligations through international human rights agreements like the British and Europeans, and have not yet developed a tort of privacy as the New Zealanders have (see Hosking's case), they have still looked to international developments for precedent. As in Britain, where celebrities have famously won such actions (see Douglas and Campbell cases) plaintiffs in Australia have sometimes turned to breach of confidence claims to provide redress. The Lenah Game Meats case (2001) represented the turning point, with the High Court refusing to rule out a potential privacy tort (Pearson, 2007, p. 374). It involved substantial disagreement among the High Court justices and a reluctance to progress a privacy tort in a case where the facts and pleadings did not provide a comfortable fit. Significantly, however, three of the seven justices spoke against a 70-year precedent in saying the 1937 Victoria Park Racing case would not prevent a future court from developing a privacy tort, partly because modern conditions demanded a different outcome. In 2003, a Queensland District Court judge ruled in the Grosse case that there was indeed a right to

privacy when he held the privacy of the former Sunshine Coast mayor Alison Grosse had been invaded by an ex-lover who continued to harass her after their affair had ended. As a District Court case this was an inferior court decision, and superior courts had not yet formulated a new tort when this paper was written. Decisions of the Victorian Supreme Court (Giller's case) and the Federal Court (Kalaba's case), both in 2004, were dismissive of a new breach of privacy action, although judges in both cases left the door open for its development at a later date.

However, in April 2007 a Victorian County Court judge ruled in Jane Doe's case there was an actionable right to privacy when she upheld a civil suit brought against the Australian Broadcasting Corporation and two of its journalists by a woman named on ABC radio as the victim of a sexual assault. Although the journalists had already been convicted on a criminal charge of identifying her, Judge Felicity Hampel ruled the defendants had breached a statutory duty not to identify the sexual assault victim, that they owed her a duty of care not to cause her psychiatric injury by publishing her identity, that they had breached her confidence by doing so, and that they had also breached her privacy which, the judge ruled, was an actionable wrong. She awarded damages of $234,190. The case was subject to appeal when this article was written in late May 2007. Interesting for the purposes of this article is the fact that the judge used large sections of her judgment to explain why defamation was an unsuitable action for Jane Doe's purposes which were best served via a breach of privacy suit.

While Judge Hampel did not mention the reformed laws and, indeed, the case occurred in Victoria where there had been no privacy riders to the truth defence, the judgment and its associated publicity lends weight to the possibility that plaintiffs will be looking to alternative causes of action in the new defamation era. Other candidates as alternative actions to defamation would be injurious falsehood and the misleading and deceptive conduct provisions of the Trade Practices Act (s. 52), particularly as vehicles for companies who can no longer sue for defamation. That said, the industry sources quoted earlier reported no such development at this early stage.

Conclusion

This article set out to summarise the main elements of the 2006 reforms to defamation laws in the eight Australian jurisdictions and to give some early indications of their impact upon free expression. The first aim was quite easily achieved via an annotated account of the highlights of the near-uniform laws as they affect journalists. Clearly, the primary single benefit for media organisations has been the uniformity itself, followed by the cap on damages, the one year limitation period, the prohibition on companies suing and the extension of truth alone as a defence. The second objective of the article (analysing the impact of the laws) has been, by its very nature, more problematic, both for the small period of time that has elapsed since the introduction of the reforms and the complex array of other factors feeding into the process. The two industry sources quoted offered some hope that the new laws had reduced litigation against media defendants..

However, there is cause for some concern over some potential impacts upon free expression and investigative journalism. It would be a mistake to conclude that the changes to defamation laws have driven the push for a new tort of privacy in Australia. There are many other contributing social pressures, including developments in international jurisprudence and a growing public acceptance of privacy as an important civil liberty. Nevertheless, there is evidence that some senior legal officers are using the defamation reforms as a pretext for privacy impositions upon the media. The impact of the new qualified privilege defence is a second major area of concern, particularly with regard to its effects on investigative journalism in Queensland where its earlier version was used so effectively in the past and the fact that the use of confidential sources may negate the defence. In a time where anti-terrorism laws, Freedom of Information exemptions and suppression orders are all impacting on the reportage of important public issues, journalists need a strong public interest defence to defamation. This may well have been lost as a trade-off for uniformity.

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