How the reformed defamation laws will affect journalists

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An analysis of the changes

Defamation Bills have been tabled in the parliaments of Queensland, New South Wales, Victoria and the ACT after two years of negotiation between Attorneys-General, two discussion papers and extensive public debate. The Bills at this writing faced the difficult path to assent, so whether they reached the stage of enactment retaining any semblance of uniformity remained to be seen. This article assumes they will have a large degree of common ground but some significant differences. It looks at their implications for working journalists. The background to the reforms and an outline of their scope has already been published in the AJR. (Wells, 1991a, pp. 39-44).

A draft Bill in Queensland provided the model for the Bills tabled simultaneously in New South Wales and Victoria and soon after in the ACT. (Unless otherwise mentioned, references in this paper to sections of the new legislation refer to the Queensland Bill.) Queensland Attorney-General Dean Wells identified three important advantages for his state in the reforms: the law would be removed from the Criminal Code (an anomaly for civil actions); "forum shopping" between jurisdictions would be reduced; and the use of stop writs would be substantially limited if not eliminated (Wells, 1991a, p. 40).

The Attorneys decided on "complementary" reforms in a number of areas, including the defences of justification (including the notion of contextual truth), innocent publication, qualified privilege and absolute privilege; the reduction of the limitation period for actions and the disposal

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of dormant writs; the introduction of a system of court-endorsed correction statements; and the retention of a restricted action for criminal defamation. They essentially left alone the defence of fair comment, although Queensland (Defamation Bill 1992, Division 7), New South Wales and the ACT chose to present it in statutory form, while Victoria chose to leave that area to the common law.

The justification (truth) defence has represented the greatest anomaly among defamation laws in the various jurisdictions. The defence ranges from the common law position — that truth alone is a complete defence — to the statutory defence in some jurisdictions of truth published in the “public interest” or for the “public benefit”. The Bill adopts the defence of truth alone except when the defamatory statement concerns the plaintiff’s private affairs, in which case the defendant must prove the published matter was both true and in the public interest. The aim is to distinguish between publications relating to the public and private spheres.

This defence covers “private matters”, which are defined as relating to the “health, private behaviour, home life or personal or family relationships of the individual”. The Bill devotes a whole section to examples of situations in which the publication of a matter concerning a person’s private affairs is warranted in the public interest (Defamation Bill 1992 (Qld), s.26). These examples cover situations in which publication is made “reasonably to preserve a person’s safety or to protect a person’s property” (s.26) and where such material on a private matter was already recorded in a public document (s.26, Example 4).

Example 2 offers situations in which private topics might be relevant to a matter of public interest, including the “public, commercial or professional activities of a person”; the “suitability or candidature of a person for a public, commercial or professional office”; “a decision taken or likely to be taken, in relation to a public, commercial or professional matter, by a person who occupies, or is a candidate for election or appointment to, a public, commercial or professional office”; “any property or service offered to the public”; public administration or the administration of justice; but only if the matter “is of legitimate concern to the public or a sufficiently wide section of the public.” (s.26, Example 2).

Example 3 allows publication of a private matter where “the imputation contradicts or qualifies a claim made publicly by the plaintiff concerning the plaintiff’s private affairs and the claim is directly relevant to a public issue in which the plaintiff is involved.” (s.26, Example 3). This takes the defence a long way towards the US public figure test in that publication of true private matters will be excused if plaintiffs have held themselves out publicly as leading a particular moral private life or if they make a public presentation or a claim to a particular private moral behaviour. The plaintiffs in these circumstances must have actively mixed their public and private lives.

The provision would not be extended to people who do no more than present a particular public appearance without making positive claims to a particular private behaviour. This would reinforce decisions like that of Chappell v. TCN Channel Nine [1988] 14 NSWLR 153. There, the plaintiff
was granted an injunction to prevent the program *A Current Affair* broadcasting a story based upon imputations published in the *Truth* newspaper that cricketer Greg Chappell had committed adultery with a particular woman and that he had engaged in sexual activities of an unusual nature (at p.156). Hunt J. granted the injunction on the basis that there was no real ground the defendant could rely upon to argue the publication would be in the "public interest", saying:

A public figure's private behaviour or character can become a matter of public interest in one of two ways — either because it affects the performance of his public duties ... or because he makes it such a matter himself. If the plaintiff had deliberately put himself forward to the public as subscribing to such high standards in his private behaviour ... he cannot then be heard to say that the public does not have the right to pronounce the judgment which he asked of it (at p.167).

Since Chappell had not done so, the defence failed on this point. However, if the Chappell case had been tried in Victoria and if the imputations had been proved true, the television station would have succeeded on the truth-alone argument. Under the proposed legislation, even with the truth of the imputations proven, the station's case would founder on the public interest requirement of s.24(2) because the defamatory matter clearly concerns the plaintiff's private affairs. Under Example 3 of the proposed s.26, the publication of such a true private imputation would be warranted in the public interest only if it contradicted a claim made publicly by plaintiffs concerning their private affairs and it was directly relevant to a public issue in which they were involved. Thus, the reformulated section as exemplified here signals the end of Melbourne *Truth*-style exposes of the private lives of the rich and famous, unless they have held themselves out to be of high moral fibre and that claim relates to a public issue in which they are involved.

The proposed Bill also contains a provision similar to s.16 of the NSW Defamation Act, which allows a defence of "contextual truth" where a minor element of a publication is not proved to be true but does not materially or further injure the plaintiff because the major imputations are proved true (s.25). This is designed to counter a common law rule that every element of the allegation must be proved for the justification defence to succeed. It would stop instances such as occurred in *Thiess v. TCN Channel Nine* (Supreme Court Queensland, 29 January 1991 - 26 April 1991, Gazette of Law and Journalism, No. 15, May-June 1991, pp. 5-7), which resulted from allegations made on the television program *A Current Affair*.

The jury found some major imputations were substantially true — that Sir Leslie Thiess had bribed former Premier Sir Joh Bjelke-Petersen "on a large scale and on many occasions" between 1980 and 1985 and that he had cheated and defrauded his shareholders and his business partners. However, Channel Nine failed to justify imputations that Sir Leslie had used bribery to win three prisons contracts. Nevertheless, the jury awarded
Sir Leslie $50,050 in damages — the state’s second largest defamation verdict.

The option of a public interest test for private matters will be more favourable to the media in New South Wales, Queensland and the ACT, where media defendants have to prove a true defamatory publication was also in the “public interest” or for the “public benefit”. This onus has fallen upon the media on many occasions which had nothing to do with privacy — matters to do with corporations, government and administration. So, in those states the provision is casting a narrower net, requiring the media to prove public interest only in cases of privacy intrusion.

However, the privacy provisions might well have other, more subtle effects. The reformed law places the word “privacy” in the media vocabulary. It will require reporters and editors to weigh up a new factor when considering the legal consequences of a story.

The defence of qualified privilege presented the Attorneys with their greatest challenge and resulted in different solutions in New South Wales, Queensland and Victoria. Each adopted the new uniform section, as well as incorporating their existing law into their respective Bills, which makes the result far from uniform. The reforms have been criticised for this anomaly, particularly in Queensland where the Bar Association has argued that the previous s.377 defence of qualified protection has operated well and should stand alone (Bar Association, 1992, p.4.)

Qualified privilege represents a concession for defamatory publications which might not be true but are, nevertheless, well intentioned and in the public interest. Under current law, each of the three jurisdictions has different versions of the defence. Victoria has the common law version which grants qualified privilege to a statement if it is made in the performance of any legal, moral or social duty, to a person having a corresponding interest or duty to receive it. (Adam v. Ward [1917] AC 309). While the defence has proved useful in situations of one-to-one correspondence (such as when an employer writes a character reference for a former employee to a prospective employer), it has been held on a number of occasions that media publishers do not have a duty or interest to publish material and cannot claim qualified privilege as a defence. (Morosi v. Mirror Newspapers Ltd [1977] 2 NSWLR 749; Truth (NZ) Ltd v. Holloway [1960] NZLR 69 (CA); Australian Consolidated Press Ltd v. Bond (1984) 56 ACTR 14 at 25.)

The two statutory attempts to extend the common law in this area — in New South Wales and Queensland — met with differing degrees of success. In New South Wales, s.22 of the 1974 Act appeared to be broad enough in its application to afford a defence to the media by allowing for the recipient (and not necessarily the publisher) to have “an interest or apparent interest in having information on some subject”, so long as the matter is published “in the course of giving to him information on that subject” and “the conduct of the publisher in publishing that matter is reasonable in the circumstances” (Defamation Act 1974 (NSW), s.22(1).) The sticking point was the third requirement — that the publisher’s conduct be “reasonable in the circumstances”. Lord Griffiths said:
A newspaper with a wide circulation that publishes defamatory comments on untrue facts will in the ordinary course of events have no light task to satisfy a judge that it was reasonable to do so. Those in public life must have broad back and be prepared to accept harsh criticism but they are at least entitled to expect that care should be taken to check that the facts upon which such criticism is based are true (Austin v. Mirror Newspapers Ltd (PC) [1986] 1 AC 299 at 313).

The courts have applied this reasonableness test strictly. In Austin v. Mirror Newspapers their Lordships went so far as to hint that a negligence-type test of "reasonable care" should apply to journalists researching stories:

There will of course be cases in which despite all reasonable care the journalist gets the facts wrong, but a member of the public is at least entitled to expect that a journalist will take reasonable care to get his facts right before he launches an attack upon him in a daily newspaper (at p.318).

The statutory qualified privilege defence in Queensland and Tasmania has proven more favourable to the media. Section 377 of the Queensland Criminal Code allows a lawful excuse for the publication of defamatory matter in a range of circumstances, including s.377(5) which allows a publication made in good faith for the purpose of giving information to someone who has, or is believed to have, "such an interest in knowing the truth as to make his conduct in making the publication reasonable under the circumstances." The sub-section has been interpreted broadly. The Queensland defence has traditionally been the "bread and butter defence" in that State (Wells, 1991b, p.7).

Applegarth notes that media defendants are sometimes unwilling or unable to prove the truth of a defamatory imputation — with good reason. In some cases journalists might act honestly and without negligence and get their facts wrong, such as where information from a reliable source remains uncontradicted after reasonable inquiries (Applegarth, 1990, p.28). It could also happen where the media defendant gets its facts right, but cannot afford to prove the matter in court or faces ethical breaches in revealing sources in doing so. Victoria retains the common law defence plus the new section, New South Wales offers the common law defence as well as a revamp of its old s.22 defence plus the new section, while Queensland boasts the common law defence, a repeat of its former s.377 defence (s.28) and the new s.29.

The new section offers qualified privilege as a defence if the publication relates to a matter of public interest, it was made in good faith and after appropriate inquiries. (s.29(1)). Subsections 2 and 3 are designed to aid the interpretation of subsection 1. Subsection 2 provides that a relevant factor in deciding whether matter was published in good faith is whether the publisher or his employees were willing to publish a reply when asked to do so by the defamed person. Subsection 3 provides that a relevant factor in deciding whether there had been "appropriate inquiries" before
publication should be whether the publisher "gave the plaintiff an opportunity to confirm or deny the truth of any statement made in the publication or any imputations carried by the published matter (unless such a course would have been inappropriate)". Subsection 4 allows for a system of court-ordered replies endorsed by the judge or an appointed mediator if the defendant has made out the qualified privilege defence and the judge decides the statement is false.

The section's three key terms — that the matter be "of public interest", "in good faith" and "after appropriate inquiries" — are to be left to judicial interpretation, just as their predecessors had been with mixed results. There is a sound body of interpretation of the term "public interest". The "in good faith" requirement also carries with it some interpretative baggage — having been a key expression in s.377 of the Queensland Criminal Code which has been imported into the Queensland version of the new Bill. Courts in the other jurisdictions face a smorgasbord of options in their interpretation of the "good faith" phrase. At the very least this leaves the way open for substantial differences between interpretations in the various jurisdictions on a key element of the common qualified privilege defence.

The Attorneys have offered some help to the judges by designating that a relevant factor in deciding whether a matter is published in good faith is whether the publisher or his/her representatives were willing to publish a reply "when asked to do so by the plaintiff" (s.27(2)). This reflects the Attorneys' concern that both the publishers and the victims of defamatory imputations should act quickly to minimise the damage of defamatory imputations as soon as possible after publication. If the defamed person does not request publication of a reply, obviously the relevant factor does not come into play. If such a request is made, and the publisher complies with the request, it becomes an indication of the publisher's good faith and serves the secondary function of at least partly remedying the damage to the plaintiff's reputation. If a request is made and the publisher refuses to comply, it is an indication of a lack of good faith, depriving the publisher of the defence. Even if the publisher succeeds and the judge decides the statement is false, the judge can order the defendant to publish a reply approved by the court or a court-appointed mediator (s.29(4)). The plaintiff's co-operation in the formulation of such a reply becomes a consideration in the court's assessment of damages and costs under s.63.

The final requirement — that the publication was made after "appropriate inquiries" — leaves a similarly wide scope for interpretation and holds the key to the whole Section 29 defence. If it is interpreted in accordance with the spirit of the discussion papers, it will offer a broader defence to the media than the element of the existing New South Wales s.22 defence which proved the stumbling block: "the conduct of the publisher in publishing that matter is reasonable in the circumstances" (s.29(3)). In the new s.29 defence, the Attorneys offer judges a relevant factor to consider: whether before publication the publisher "gave the plaintiff an opportunity to confirm or deny the truth of the statements
made in the publication or any imputations carried by the matter (unless such a course would have been inappropriate)” (s.29 (3)).

The Attorneys’ intention here seems to be to encourage a pre-publication right of response in all potentially defamatory publications. However, the wording raises as many questions as it answers: Does such a confirmation or denial of the truth have to be published or merely sought? If it does have to be published, at what length? Does it refer just to the potentially damaging statements or all statements? When would such a course have been “inappropriate”? And, perhaps most importantly, would journalists have to disclose their sources to prove they made appropriate inquiries? Certainly the Bar Association believes they would, which would make the defence of limited use to investigative reporters (Bar Association, p.4).

The Attorneys seem to have opened an interpretative can of worms by trying to assist judges with their interpretation of “appropriate inquiries”. At one extreme, the courts are faced with the Privy Council’s narrow interpretation of the New South Wales s.22 provision, mentioned above (Austin v. Mirror Newspapers Ltd (PC) [1986] 1 AC 299 at 313). Under such an interpretation, any inquiry short of a complete and thorough one, perhaps much more meticulous than is available within a newspaper’s 24-hour deadline, might be deemed inappropriate (Morosi v. Mirror Newspapers Ltd [1977] 2 NSWLR 749, at 797-8). At the other extreme, it is open for courts to find that little or no inquiry is “appropriate” (Calwell v. Ipec Australia Ltd (1975) 135 CLR 321, at 335-6). Queensland Attorney-General Wells described the defence as a “supplementary one mainly for the benefit of the media” (Wells, 1991b, p.8). If interpreted conservatively, it might prove less useful to the media than the New South Wales s.22 defence — virtually leaving the status quo for qualified privilege applying in all jurisdictions and an attempt at reform in this important area wasted. However, if the courts are inspired by the spirit of the new legislation and choose to interpret the defence broadly, the s.29 defence could well prove to be for the benefit of the media, as Attorney-General Wells predicted.

However, the explanatory notes to the Queensland Bill offer some guidance:

The new defence is no open slather for the media to publish false and defamatory statements with impunity. Quite apart from the public interest requirement (which contain a privacy component), it implies at the least a duty of fairness on the part of publishers: asking questions of all sides and publishing their responses and, in some cases, giving a right of reply. A publisher seeking to make use of the defence cannot hide behind some anonymous or confidential sources which, in some cases, may make the defence of little use (Clause 29).

Of course, the final sentence confirms the uselessness of the defence for investigative journalism, leaving defendants in such instances to rely on the s.28 good faith defence.
Media defendants in Victoria should welcome the new qualified privilege defence. Even interpreted most narrowly, it would still offer more than the existing common law duty/interest defence. The real test of the defence will come in New South Wales, in cases where the media might have failed with a s.22 defence on the ground that they did not believe in the truth of the imputation or that the publisher's conduct had not been reasonable in the circumstances.

Such a case was Austin v. Mirror Newspapers [1986] AC 299 which concerned an article in Sydney's Daily Mirror by journalist Ron Casey about the training methods of the plaintiff, a rugby league trainer. The trial jury found imputations proved that the trainer was an "incompetent conditioner" and that his methods were "wrong and incompetent" and that these imputations were defamatory. However, the judge upheld the defence of qualified privilege under s.22. On appeal to the Privy Council, the defence failed on the issue of whether the newspaper's conduct was "reasonable in the circumstances". The Privy Council found that Casey had not taken reasonable care to check the facts before he wrote his article, stating that "the public need to be protected against irresponsible journalism" (at p.318).

The defence would have failed at least as easily under the new Section 29. The main stumbling block would be the requirement under s.29(1) that the publication was made after "appropriate inquiries" and the relevant factor under s.29(3) that the publisher gave the plaintiff the chance to confirm or deny the truth of the statements or their imputations. Casey had relied upon only two sources for his story — another journalist's article on the topic which he misquoted, and video tape of five matches the team had played that season, which Lord Griffiths found was totally insufficient (at pp.317-8). Not having interviewed the plaintiff on the matter, Casey could hardly be seen to have made "appropriate inquiries", particularly in view of the relevant factor Section 29 provides the court for guidance. The defence would clearly fail under the proposed legislation — and would possibly never even have been attempted in court.

The future of the proposed qualified privilege section is at the mercy of the courts' interpretation. Either way, it strikes at the heart of journalists' reporting methods and requires by law a duty upon journalists to present "both sides" of the story.

Reform in the area of innocent publication should put an end to one of the most cited anomalies in defamation law — the Artemus Jones situation, born in the case of E. Hulton & Co v. Jones [1910] AC 20 where an amusing article about the escapades of a fictitious "Artemus Jones" was found defamatory of an actual Artemus Jones of whom the writer and publisher were entirely ignorant. The Attorneys have incorporated a provision similar to Division 8 of the New South Wales Defamation Act which allows for publishers in these circumstances to make an "offer of amends" to the defamed person including an offer to publish a reasonable correction and apology and take reasonable steps to notify recipients of the publication that the material is defamatory (Defamation Act 1974
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(NSW) s.37). If the publisher takes such steps and the offer of amends is
carried out correctly, the offer then becomes a defence if the defamed
person decides to refuse the offer and proceed in the courts (Defamation
Bill 1991 (Qld), Division 3 of Part 4.)

The reforms expand the defence of absolute privilege to include all
proceedings in Parliament, all parliamentary papers, publications to or by
the Parliamentary Commissioner, proceedings in courts, statutory, par-
liamentary and governmental inquiries and reports of such inquiries (s.27
and Schedule 1). Protection of publication of fair and accurate reports of
proceedings and official documents has been extended to a wide range of
national and international governmental and quasi-governmental bodies,
courts, councils, companies, certain associations and public meetings
discussing matters of public interest (ss.30-31 and Schedule 2). Previously
absolute privilege had only applied to speeches in the House and matters
ordered by the House to be printed (Wells, 1991b, p.9). However, privi-
lege for members of Parliament is limited to what they might say in the
course of a speech; and by implication not to interjections or repetition
outside the House (Schedule 1 (1) (1)).

Jurisdictions varied in the limitation periods applying to defamation
actions from one year (Western Australia) to six years in most other states
(Attorneys-General of Qld, New South Wales and Victoria, 1990, pp. 6-7).
The reform provides for a limitation period of six months from the date
on which the plaintiff first learned of the publication, with an absolute
limitation period of three years (Schedule 4). Queensland Attorney-Gen-
eral Wells suggested this would restrict the practice of issuing defamation
writs “for the sole purpose of stifling debate” (Wells, 1991b, p.5). A writ
which has laid dormant for 12 months would be struck off for want of
prosecution (s.16). These measures should help alleviate the problem of
politically motivated stop writs which burgeoned in Queensland during
the events leading to the establishment of the Fitzgerald Inquiry into
corruption — presenting writs like swords of Damocles suspended above
the heads of reporters.

Another criticism of defamation law has been that litigants have been
more eager to be awarded high damages than to have their damaged
feelings assuaged and tarnished reputations restored. Recent high awards
of damages have added credence to this argument — notably the $600,000
awarded against Sydney Morning Herald journalist John Slee. (Carson v.
Slee, unreported, NSW Supreme Court, Sydney, June 5-9, 1989.) In an
attempt to direct attention back to minimising damage to reputation, the
Attorneys have incorporated a system of swift court-endorsed correction
statements which would be an interlocutory proceeding by way of cham-
ber application (s.48). The system would encourage defendants to act
quickly to correct defamatory material, either on their own initiative or in
response to a plaintiff’s request. The remedy would be discretionary and
would serve to weed out vexatious claims and ensure that publishers
were not penalised “because they have the misfortune of dealing with a
plaintiff who is more interested in the ‘fast bucks’ rather than a damaged
reputation” (Attorneys-General, 1991, p.36). The trial court would con-
consider the defendant’s co-operation in such a system in determining the question of damages (s.63).

The decision by all three states to retain a restricted action for criminal defamation represented a concession by Queensland, which at first wanted the action abolished (s.65). The compromise involves actions for criminal defamation being brought only after the Director of Public Prosecutions has provided a certificate (s.65(4)). The provision makes allowance for instances “where grossly unwarranted defamatory attacks are so serious as to justify the intervention of the criminal law” (Attorneys-General, 1991, p.6). This should have little concern for responsible journalists.

The major procedural difference remaining unresolved is the responsibility for determining damages. Queensland and New South Wales have decided to go it alone in their version of the Bill, with a provision that the judge has responsibility for assessing damages, while Victoria has given this role to the jury. Of course, such an issue might well prove crucial to the success of the reforms and their operation.

Although there are obviously some problems with the reforms, they should generally be welcomed the media. All journalists would benefit from the qualified privilege defence if it is interpreted reasonably. Journalists in Queensland and New South Wales can fall back on their existing qualified privilege defences if it is not. All should welcome the Attorneys’ mechanisms for minimising the damage which might be caused by innocent mistakes and their attempts to introduce correction statements and mediation options to reduce litigation.

Granted, the Victorians have had to forsake their truth-alone defence, and it is unfortunate that state has decided to continue allowing juries to decide damages. These factors might well make Melbourne the new defamation capital of the nation. But perhaps the additional privacy test is not too high a price to pay for the opportunity to instil in journalists a concern for privacy. The requirement that journalists must have made “appropriate inquiries” to claim the qualified privilege defence is also acceptable if it only requires a reasonable level of research and takes account of the deadline pressures of daily reporting, although it is disturbing that it would require revelation of confidential sources. For journalism educators, a uniform defamation law offers the bonus of taking some of the complexity out of media law instruction. The pity is that we will still have to spend some time explaining some differences, since the reforms have fallen short of genuine uniformity.

References: