A conversation with the New South Wales Solicitor-General regarding Stage 2 defamation law reforms

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The current defamation reform process was initiated by the New South Wales Attorney-General in 2019 and is ongoing. Stage 1 resulted in the 2021 amendments to the *Defamation Act 2005* (NSW) and the uniform legislation in the other states, except Western Australia, and in the ACT. A discussion on those Stage 1 reforms between the Solicitor-General and *Bar News* can be found in the Winter 2022 edition of *Bar News:* at 90–1.

Those Stage 1 reforms included major changes to the uniform Defamation Acts. For example, the cause of action itself was changed to include a new serious harm test (s 10A), such that a person no longer has claim for defamation unless the defamatory publication has caused or is likely to cause serious harm to that person's reputation. Additionally, a new defence was introduced, the defence of publication in the public interest (s 29A). Lastly, a Concerns Notice procedure was introduced preventing commencement of proceedings without compliance with that procedure (pt 3, div 1), with the intention of producing an early stage, non-litigious resolution to defamation claims.

In this issue, *Bar News* welcomes the opportunity to continue this discussion with the New South Wales Solicitor-General Michael Sexton SC, by focussing on Stage 2 of the Defamation reforms.

Like Stage 1, the Stage 2 reforms make large-scale changes to the uniform Defamation Acts. The following interview with the Solicitor-General covers the most significant of those reforms, namely an exemption for digital intermediaries with no involvement in active publishing and/or those who provide pure search engine results only (div 2A); an extension to the absolute privilege defence (s 27(2)(b)(i)); and a new defence for publishers based on an 'accessible complaints mechanism' (s 31A).

The Solicitor-General has been, and still is, a member of the Defamation Working Party, which advises the various attorneys-general, and of the Expert Panel, which advises the New South Wales Attorney-General. The Solicitor-General did not undertake this interview in any of those capacities or on behalf of those bodies but as the author of *Australian Defamation Law and Practice* and as someone who has had an extensive career in media law prior to his appointment as Solicitor-General.

David Helvadjian (DV): Mr Solicitor, on 17 October 2023 the Defamation Amendment Bill 2023 (NSW) was passed, which will amend the *Defamation Act 2005* (NSW). It has been agreed by the Standing Committee of Attorneys-General that the amendments will come into operation in all jurisdictions except South Australia on 1 July 2024. Can you explain what the most significant reforms are?

Solicitor-General (SG): Yes, there are two parts to these reforms: pt A and pt B.

In pt A, the first major reforms are those that provide exemptions for digital intermediaries, defined as 'a person, other than an author, originator or poster of the matter, who provides or administers the online service by means of which the matter is published'.

Firstly, there will be an exemption for those digital intermediaries who are, in effect, passive intermediaries in the process of people's use of the internet – so, simple caching, conduit and hosting of content services – and these are defined terms with examples in the legislation. Secondly, there will be an exemption for those digital intermediaries who provide pure search engine results that might link to defamatory material or have defamatory content in the search result.

However, this exemption is limited to situations where the search engine provider has provided an automated process for the user to generate the result or the hyperlink to the defamatory material. So, it would not cover, for example, defamatory content that is provided by the search engine provider to the user through an autocomplete suggested search term, or if the digital intermediary promotes or prioritises the search result or hyperlink because of a payment or other benefit derived from that action.

Solicitor-General for New South Wales, Michael Sexton SC

An additional major reform is the defence in s 31A for digital intermediaries who may not fall under the exemptions – for example, a community message board or a sponsored Google search result.

If the digital intermediary has an accessible complaints mechanism (another defined term focussed on making it easy for people to complain) and receives a written complaint that complies with the requirements in the legislation, then the digital intermediary, to have access to this defence, has seven days from receiving the complaint to take reasonable access prevention steps. Access prevention steps are defined as:

> a step –
>
> (a) to remove the matter, or
>
> (b) to block, disable or otherwise prevent access, whether by some or all persons, to the matter

– and obviously the focus of the defence is whether the steps taken were reasonable in the circumstances. If established, the defence can only be defeated by the plaintiff proving the defendant was actuated by malice in establishing or providing the online service.

Part B of the reforms extends the defence of absolute privilege to defamatory publications made to an official of a police force or service of an Australian jurisdiction while they are acting in

their official capacity and also provides guidance to jurisdictions when considering any further extensions to absolute privilege.

Those are the most significant, but there are also reforms regarding preliminary discovery, orders regarding taking down or limiting access to defamatory material, reforms to the giving of notices, and newly defined terms.

DH: That seems to be a lot of change to the existing defamation laws. Was there any consideration that that might be too much reform in one process?

SG: There was certainly an awareness that there was a lot of reform in Stage 2 but, more importantly, there was a realisation that these reforms were needed and they couldn't really be put off any longer. Obviously, when the uniform Acts were passed in 2005 the internet was not only in its infancy but social media and Facebook were not even close to being what they are today in terms of use and centrality to our communication. So, in some respects these reforms are overdue; but it was important to not rush them and to find the balance to address current technology but also provide a legislative framework that could be applied to future technological advances too. I think these reforms achieve that.

DH: In your opinion, how will these latest reforms affect the volume of defamation claims and also the number of interlocutory disputes?

SG: It is hoped that what these reforms will do is lessen the amount of litigation against what might be termed the passive entities and, instead, ensure the focus remains on the original poster of the allegedly defamatory material. Over the years there has been much litigation against entities in Australia and the UK, often as the second defendants, that has produced a wilderness of inconsistent decisions. These reforms will hopefully bring the focus back to the real parties.

As to additional interlocutory disputes, there is a new section (s 10E) which is modelled on the current s 10A(5). Section 10A(5) requires serious harm to be determined prior to final hearing unless there are special circumstances. Likewise, s 10E will bring forward the determination of whether a digital intermediary is an exempt digital intermediary. Strictly speaking, this does create a 'new' interlocutory process, but that is preferred to having an entity brought into litigation and having to go through the whole journey of the litigation and not have its exemption determined other than as part of the final hearing. So, this approach saves exempt digital intermediaries the time and cost of having to participate in the whole litigation.

DH: One of the hotly contested issues in the various submissions regarding pt A was whether the reforms go too far in protecting large overseas organisations. Do you have a view on whether that balance has been correctly found?

SG: Well, with respect to the digital intermediary exemptions, I do not think there is any concern as to that, because these reforms provide appropriate protection to entities which are passively providing the infrastructure, as it were, for society's use of the internet – so, caching, conduit and hosting services, and pure search engine results providers, etc.

With respect to the digital intermediary defence in s 31A, there was another proposal before that defence was accepted, referred to as Model 3A, in the consultation drafts, which I personally thought was preferable. Rather than giving the digital intermediary a defence if they do some action based on the complaint, Model 3A instead gave the digital intermediaries 14 days to share with the aggrieved person the identity or contact details of the original poster and, if that could not be done due to not being able to identify them or receive their consent to share their contact details, the digital intermediary could have taken steps to remove access to the publication. I think this would have better focussed the digital intermediaries on what is really important, which is, connecting the two sides of the dispute.

DH: The proposal that was accepted as the new defence in s 31A only gives seven days for digital intermediaries to respond to the complaint with reasonable access prevention steps (another defined term). That time frame seems short to me. Is there not a risk that rather than engage with a complaint in seven days, the large digital intermediaries will instead just delete any comment or post that is the subject of a complaint to avail themselves of the defence and that will have a disproportionate effect on freedom of speech?

SG: Yes, there is that risk, and as I just mentioned, this is one of the downsides of the form of the defence selected.

With respect to the time frame, I think regardless of the time frame selected there would always be some who say it is too long or too short, so I think one needs to just select a time frame that seeks to balance those competing views, and I think seven days does do that. With respect to the actions taken within that time frame, the risk is clear that the digital intermediaries may just delete the material. In some cases that will be the right step to take, but in others it might not be, but it is clear a decision has been taken that that risk is acceptable notwithstanding what it might mean for freedom of speech.

DH: Regarding pt B, the extension of absolute privilege to reports made to the police, do you think this reform takes absolute privilege too far, given people could make defamatory accusations against people to try and generate a police investigation or unfavourable media coverage?

SG: Well, firstly, this reform seeks to clarify some uncertainty as to whether the common law in Australia provided absolute privilege to reports made to law enforcement bodies. Secondly, in England it has been the law for some time that reports to law enforcement bodies are covered by absolute privilege. Thirdly, of course, there are always the provisions of legislation such as s 307B *Crimes Act 1900* (NSW), which makes it an offence to falsely report to the police.

However, again, there is a policy decision that has been made here that had to balance two sides. On the one hand there is a desire that those who go to the police should have complete freedom to report fully and with no hinderances so that the police can have as much information as possible as they determine what next steps to take. On the other, there is, of course, the risk that that people [will] misuse this freedom to make malicious reports.

DH: Western Australia and the Northern Territory have still not enacted Stage 1 reforms and South Australia is not yet enacting Stage 2 pt A reforms. Can you share your views on the issue with that lack of uniformity across Australia?

SG: The whole purpose of the reforms that lead to the uniform Defamation Acts of 2005 was to reduce the discrepancy that appeared to exist [in] the various jurisdictions. In truth, prior to those reforms, I personally found doing trials that the majority of the defamation laws [were] substantially uniform in practice regardless whether a jurisdiction's laws were codified, common law, or partly both. But the uniform Acts provided a very important mechanism to ensure there was consistency. Therefore, any move away from that uniformity is, in my opinion, undesirable.

Firstly, it can give rise to forum shopping. We already see many defamation litigations choosing the Federal Court over the state courts because of a perceived benefit to plaintiffs in the form of the absence of a jury, so to then have an increase in forum selection because the substantive law is different would be concerning. Secondly, significant discrepancies across Australia may raise calls for the federal government to step in and cover the field with a Commonwealth defamation act. Some may welcome that, but I think it would be unnecessary. The uniform Defamation Acts have been working very well over the years to ensure consistency across Australia. It would be a shame to lose that.

DH: One area of constant discussion is how the amount of defamation litigation can be reduced. The new serious harm test certainly seems to be working, but do you have a view on other avenues for achieving a reduction?

SG: Well, I have always been of the opinion – and I experienced this when I was at the Bar – that many defamation plaintiffs do not like having to face juries. If there were more jury trials of defamation claims, I believe that [would] reduce the volume of litigation. Many plaintiffs commence in the Federal Court because, as a starting point, they do not allow juries. If that jurisdiction allowed or granted leave more frequently for jury trials, then that would reduce the volume of litigation, in my opinion.

DH: Last time we spoke about Stage 1 reforms, I asked you to give our readers a sneak peek for Stage 2. Now that we are talking about Stage 2, I have to ask: is there a Stage 3 coming, and what can we expect?

SG: While there is nothing I can tell you about any Stage 3 now, what is clear is, these laws require continual supervision and, indeed, as technology changes, possibly reform. New technology arises all the time that can directly or indirectly affect defamation law. That said, it is hoped that these new reforms in Stage 2 are drafted in such a way that they will provide guidance to the courts when new technologies arise. For example, it is hoped that it would be quite clear whether a new technology is, firstly, a digital intermediary; secondly, whether the service it provides is captured by ss 10C and 10D; and if not, whether it can avail itself of the defence in s 31A.

DH: Mr Solicitor, thank you so much for being willing to speak to *Bar News* today. BN