Avoiding defamation claims in contentious times

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The recent Federal election, coupled with heightened media interests in politics, has seen an increase in proceedings for defamation.

In the last two years alone:

- Peter Dutton brought defamation proceedings and won damages in the final judgment after a tweet referred to him as a "rape apologist"
- John Barilaro brought defamation proceedings asserting that a video on YouTube depicted him as "vile and racist" and brought him into public disrepute, ridicule and contempt, which proceedings were settled out of Court
- National MP Anne Webster successfully sued, and was awarded judgment against, Karen Brewer for false and defamatory imputations that she was associated with a "secret pedophile network".

Post Federal election, we don't see this trend disappearing. While political swipes are part and parcel of running for office, defamatory comments can have serious reputational and financial ramifications.

In this article, we provide tips to avoid being on the receiving end of a Concerns Notice or, worse, a defamation lawsuit.

DEFAMATION LAW

Defamation is a tort which enables people to sue for damages if a publication (written, verbal or an image) identifies them and causes harm to their reputation. In Australia, defamation is codified in national legislation – the *Defamation Act*.

From 1 July 2021, sweeping changes to defamation laws were enacted in New South Wales, Victoria, South Australia and Queensland. Some of the most significant changes include:

1. a new requirement (under section 10A) for the aggrieved person to prove that publication caused or is likely to cause serious harm to their reputation
2. a "Single Publication Rule", which means the limitation period of one year to commence proceedings will start from the date the material is first published and will not restart on republication (say on social media)
3. the introduction of a 'Public Interest' statutory defence (under section 29A)
4. the introduction of certain statutory requirements for Concerns Notices (under section 12A) and a requirement to serve a Concerns Notice prior to any proceedings (under section 12B).

While a number of these changes were straightforward, identifying what constitutes "serious harm" was left for aggrieved parties and defendants – and therefore the Courts – to determine.

In February 2022, in the first case dealing with this matter, the Supreme Court of New South Wales (*Newman v Whittington* [2022] NSWSC 249) indicated that serious harm is to be determined by the actual impact of the defamatory statement, not just the meaning of the words. This means that an aggrieved person must show that the words were inherently injurious to their reputation and that they caused them actual, provable, serious harm.

For further details about defamation law and the changes to Australia's statutory defamation law regime, please refer to this article.

DEFENCES IN DEFAMATION

Leaving aside the defence of truth (which is self-explanatory), the most likely defences against a defamation charge are public interest and qualified privilege.

Public interest

Section 29A of the *Defamation Act 2005* (NSW) and its uniform Australian counterparts say it is a defence to an action in defamation if the defendant proves that:

- the subject of the publication concerns an issue of public interest and
- the defendant reasonably believed that publishing the matter was in the public interest.

When assessing a 'public interest' defence, Courts will consider:

- the seriousness of any defamatory imputation the extent to which the matter published relates to the performance of the public functions or activities of the person
- the sources of the information, including their integrity
- whether the matter contained the substance of the person's

side of the story and, if not, whether a reasonable attempt was made to obtain their side of the story

- the importance of freedom of expression in issues of public interest.

A publisher may be successful in arguing that *matters concerning political parties or their policies* are in the public interest.

Qualified privilege

While Australia's Constitution does not expressly confer a right of freedom of speech on Australian citizens, there is an implied freedom of political communication at common law.[1] Until 1997, the Courts treated this implied freedom as a defence in defamation actions.[2]

However, in the 1997 case of *Lange v Australian Broadcasting Corporation*,[3] the High Court of Australia clarified that the implied constitutional freedom of political communication **does not** confer a personal right on defendants, nor does it give defendants a complete defence to a defamation action in and of itself.

Instead, the Court said, the law operates to prevent lawmakers from making defamation laws that are inconsistent with this constitutional freedom.

From this ruling came the qualified privilege statutory defence in the *Defamation Act*:

- section 30 of the *Defamation Act* states that it is a defence to the publication of defamatory subject matter if the defendant proves that the recipient of the subject matter had an interest or apparent interest in having information on the subject
- the matter was published to the recipient by the defendant in the course of giving the recipient information on the subject matter in which the recipient had an interest
- the conduct of the defendant in publishing the matter was reasonable in all of the circumstances.

Most recently, qualified privilege was relied on by the Australian Broadcasting Corporation in defence of a suit by former Australian Attorney-General, Christian Porter. The ABC said recipients of its article had an interest in information concerning the fitness of political ministers for their roles and, therefore, the publications concerned matters of public interest. That defence was never tested, as proceedings were settled out of Court.

Statutory qualified privilege has limited application. The wisest course is to avoid publishing defamatory material rather than seeking this defence after the fact.

PRACTICAL TIPS FOR AVOIDING DEFAMATION ACTIONS

Defamation proceedings are complex, expensive, time consuming and emotionally taxing. From a corporate governance and risk mitigation perspective, the safest course is to minimise the risk of such actions.

Importantly, councils can neither sue[4] nor be sued for defamation in New South Wales. However, this does not stop claims being brought against individual officers for defamatory statements made during their employment. While some councils indemnify their officers for such (provided the statements were made in good faith), litigation can often lead to other concerns for council, including the health and wellbeing of the officer.

The following steps may help prevent publications from your organisation resulting in Concerns Notices or legal proceedings:

- above all, only publish matters that are demonstrably true and supported by documentary evidence
- create and regularly review communications policies which:
  - consider your organisation's audience
  - identify permissible and non-permissible types of subject matter (for example, you might decide that political commentary is not appropriate for certain audiences)
  - establish parameters for acceptable language, as well as factual, unemotive and source-based content
- avoid labels and unproven allegations
- when commenting on political people or matters, stick to evidence-based content and avoid conjecture, opinion and unsubstantiated allegations
- focus on policies rather than people
- provide staff with regular media and communications training
- keep abreast of current defamation laws and cases
- seek legal advice before issuing controversial or contentious communications.

If you would like advice on defamation, Bartier Perry's Commercial Disputes team is experienced and available to assist. Whether you are a publisher or aggrieved person, we can advise on and review publications, issue or respond to Concerns Notices and protect your interests in your reputation.

Please contact Gavin Stuart, Adam Cutri or David de Mestre for a confidential discussion.

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1 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106; *Unions NSW v New South Wales* [2013] HCA 58.

2 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

3 (1997) 145 ALR 96.

4 *Ballina Shire Council v Ringland* [1994] 33 NSWLR 680