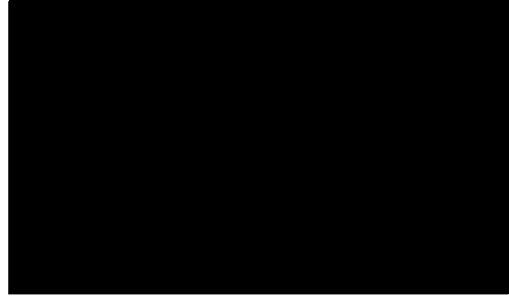


**TOM MOLOMBY SC**



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Review of Model Defamation Provisions  
c/- Policy, Reform and Legislation  
NSW Department of Communities and Justice  
GPO Box 31  
SYDNEY NSW 2001

### **Review of the Model Defamation Provisions**

The draft Model Defamation Amendment Provisions contain some useful and even badly needed changes, such as the rectification of the contextual truth defence. However, I regret to have to say that several aspects are inadequate, misleadingly and superficially argued, and heavily biased in favour of defendants. To demonstrate this, I examine below four separate issues –

#### **1. Offer to make amends**

The Background Paper directs considerable space and attention to this issue. However, it never puts it properly in context, nor acknowledges the true effect of the proposal for amendment.

The offer to make amends is a truly radical procedure. There is nothing like it in any other area of the law. The normal rule in litigation is that if a plaintiff does not accept an offer by a defendant, and then at trial achieves a result that is no better than the offer, the plaintiff must pay the costs of the defendant from the date of the offer. The purpose of that rule is to encourage proper consideration of offers. That rule applies to all civil litigation, including defamation cases.

Under that rule, a plaintiff who did not accept an offer of, say, \$150,000 from a defendant, but then at trial, though successful, was awarded only \$100,000, would have to pay the defendant's costs from the date of the

offer. The defendant would have to pay the plaintiff's costs up to the date of the offer, and the damages of \$100,000.

The offer to make amends goes way beyond that procedure. Under the offer to make amends procedure, the making of a reasonable offer that is not accepted constitutes a complete defence. A plaintiff who does not accept a reasonable offer to make amends, even if he proves that he has been seriously and inexcusably defamed, and is awarded major damages, loses the trial. Such a plaintiff does not retain any damages awarded, nor even get the benefit of the offer that was not accepted. Worse, the defendant may continue to publish the defamation forever, even though found to be grossly defamatory and outrageously false. That is a perverse result likely to bring the law into disrepute.

The offer to make amends procedure, with its thoroughly draconian consequences, obviously places major pressure on plaintiffs. There is no equivalent pressure on defendants.

What I have outlined to this point applies to the offer of amends procedure as it was introduced in the 2005 Acts. Its true effect was not pointed out then, as it is even now not being acknowledged. There are, however, two qualifications. To be able to rely on an offer to make amends as a defence, a defendant has to make it as soon as practicable after becoming aware that the publication is or may be defamatory, and has to be ready and willing to carry out the terms of the offer at any time up to the trial. (Section 18(1)(b) NSW Defamation Act). This provision at least requires something beyond the usual from a defendant in return for such an extraordinary benefit. Unfortunately, a single judge in New South Wales decided that it was sufficient to satisfy this provision if the offer was open at any time, in the sense of at some time. But as that is necessarily so with all offers (if not open at some time they would not be offers), his interpretation of the section reduces it to meaninglessness. This consequence of the interpretation was not drawn to his attention, and the decision is plainly wrong. However, it has been used by the review as the reason for a radical change whose consequences are not at all acknowledged. *"To resolve this confusion"*, the Background paper says, *"it is recommended that provisions make explicit that an offer to make amends does not need to remain open until the first day of trial."* There is no confusion, there is a decision that is plainly wrong, and a statute with a clear meaning. *"To resolve confusion"* is vacuous as a reason; what needs explanation when a choice is being made between two options is why one is being chosen over the other. The Background paper offers no explanation for this at all. A radical change is being slipped through under the thoroughly misleading guise of *"to resolve confusion"*.

This change is unlikely to promote speedy and non-litigious methods of resolving disputes.

In the initial phase of learning of a defamatory publication about them, plaintiffs are often angry and indignant. For that reason I often advise to send a concerns notice, but otherwise do nothing for two or three months until it can be seen how the dust settles. Offended parties in the initial phase are often not in a state of mind conducive to settlement. Yet if offers are to be open for as little as 28 days – as I’m sure many will be – they are going to be made in the period where the case is least likely to settle. This will not at all assist the peace-making objectives of the legislation. I have had cases where offers have been accepted by plaintiffs very substantial periods after proceedings have begun. The proposed change will exclude the chance of that happening again.

This is a bad proposal, put forward without adequate examination or explanation in a context where the true nature of what is happening is not revealed or acknowledged.

## 2. **Honest opinion (Section 31 NSW Defamation Act)**

This is a defence of wide application. There is a serious practical problem in its drafting that has been commented on by several judges. I drew attention to this in my original response to the Discussion Paper of February 2019. The problem is not mentioned in the proposed amendments. Not a hint. It has simply been ignored. The problem is real, commented on by several judges. I did not invent it. If unresolved, it is likely to cause a waste of time and resources in future cases, as it has already in past cases. Reform that does not deal with practical problems like this is not genuine reform. I can see no reasonable explanation for the lack of attention given to this issue. Indeed, it suggests that there was a predetermined agenda for the reform process.

I reproduce what I said in my original response:

- “29. There is a fundamental problem in the drafting of Section 31 that has not been considered in the Discussion Paper. The defence is provided “to the publication of defamatory matter”. Since the earliest cases dealing with this section, judges have acknowledged a problem. In *Holmes v Fraser* [2008] NSWSC 570, Simpson J spoke of “a real difficulty in application” (at [56]). The problem is that the section appears to require that the whole publication (being the “matter”) is an expression of opinion, rather than that the

opinion be constituted by the words conveying the defamatory imputation or the imputation itself (where there is a difference between these two). Simpson J said: “On a literal construction of s 31, there is little, if any, room for concluding that “matter”, as it is used in s 31(1), ought to be construed as meaning the imputation or imputations found to have been conveyed, (as distinct from the publication as a whole) although such a construction would present the most workable result.” (at [59]).

30. In *Tabbaa v Nine Network Pty Ltd (No 10)* [2018] NSWSC 468 the drafting of the section allowed an argument by the defendant that, in relation to a television programme where a defence of justification had failed (four of twelve imputations not having been proved true), the finding by the jury that one of those imputations had been expressed as an opinion based on proper material established a defence to the whole thirty minute programme. The plaintiff accepted this position at trial. On a motion to set aside the verdict by the plaintiff under UCPR Rule 36.16 the trial judge, while refusing to allow the motion, was of the opinion that the defendant’s view of the law was not correct. He also did not accept the plaintiff’s view. The view he himself then took has not, as far as I know, been taken by anyone else. His consideration of the issue at paras 70 to 78 shows eloquently how much the section is in need of amendment.
31. I suggest that the most practical option is that mentioned by Simpson J, that is, that the defence should be expressed to be available to defend the imputations. Otherwise, in a publication conveying several defamatory imputations indefensible as true, a defence may be constituted by any one of them being proved to have been conveyed as an opinion based on proper material; alternatively, in a publication conveying several defamatory imputations found to have been conveyed as opinions, a defence could be constituted by proving any one of them alone to have been based on proper material, even though the others failed. These results seem quite absurd, and cannot have been intended.”

There is no doubt that a serious issue exists. It should be resolved.

### 3. Death of a party

This issue is likely to affect only a small number of cases, but will have a drastic impact where it does so. For hundreds of years the law provided that an action for any sort of tort terminates with the death of either party. This rule has been abolished in every other area of the law except defamation. It is continued by the Defamation Act (Section 10). Where the party who dies is the plaintiff, there is an argument in favour of the old rule, because of the essentially personal nature of reputation. But where the party who dies is the defendant, there is no rational basis for maintaining the old rule. All other actions can be continued against the estate of a defendant.

There is no conceivable justification for why an action in defamation should not be continued, too. To maintain the old rule is merely to retain a medieval relic.

The Amendment Provisions propose to *“allow a court to determine questions of costs, if it is in the interests of justice to do so, despite the death of a party, in any proceedings commenced before the death of the party.”*

In support of this, the Background paper says:

*“One stakeholder submitted that the consequence of cl 10 is that in cases where one party dies during the course of proceedings, the proceedings come to an end, irrespective of how far they have progressed. It was argued that it was in the interests of justice for the court to have discretion to determine liability for costs in any case.”*

I made a submission on this question, so I assume that I am the single “stakeholder” referred to. What the Background paper says is a misrepresentation of what I said. Contrary to the Background paper, I made no argument at all that the court should have a discretion to determine costs. I argued, as above, that an action against a person who died should continue in the same way as other actions. I even provided a redraft of Section 10 to achieve this. I mentioned that as a consequence of an action terminating through death there could be great unfairness because costs would not be recoverable, but I made no argument about costs. Indeed, I regard the proposed discretion as impractical. It is not at all clear how costs could be determined without an adjudication of the merits of the whole case.

My argument was, and remains, that there is no reason whatever why the death of a defendant should be a barrier to beginning or continuing an action.

It is disturbing that my position has been so fundamentally misrepresented. Readers of the Background paper would have no idea of the argument I made, and instead be misled into believing that I made an argument that I did not make and do not support.

Meanwhile the real issue, successfully concealed, goes unresolved.

Unfortunately the misrepresentation and concealment of the real issue evident in the treatment of this question is replicated in the treatment of others.

#### 4. **The single publication rule**

This proposed change is unnecessary and unjust. Its consequences have not been adequately examined. The failure to acknowledge its true effect, the imbalance in the argument and the bias in favour of defendants is striking.

This proposal arises from the nature of the internet. Where once it took considerable time and trouble, today a communication can be displayed in a short time with minimum cost and effort to an audience of millions, and remain accessible indefinitely. This is a particularly daunting prospect for people who are defamed, much more so if the communication “*goes viral*” and spreads rapidly to many other sites. The simple fact is the risk of being extensively defamed has increased enormously over recent years.

One might think that the Background paper would give consideration to the vastly increased vulnerability of people who are defamed. But no. Not a word. Not a hint. The only factors considered are factors that affect defendants, and plainly have been raised by them. This is one of the stronger indications of the unjustified influence of defendants’ interests over the reform process.

The factors specified are:

- *digital publication and online archiving creates a potentially endless limitation period as material may be stored and downloaded repeatedly for an indefinite period.*

(No mention that for the very same reason plaintiffs may be subjected to potentially endless defamation for an indefinite period.)

- *there are evidentiary difficulties for publishers if material is downloaded long after the date of upload, and*
- *plaintiffs should be required to bring suit promptly.*

The disregard for the position of plaintiffs is even more remarkable when one considers that the disadvantage of which defendants complain – an endless limitation period because material may remain on line indefinitely – is their own creation. Defendants behave as if they were victims of the situation, when in fact it is they who create it. They choose to put the material on line, they could choose to take it off. They are in control of the situation, whereas those affected, the plaintiffs, are not and never could be.

The review's solution to these problems that affect defendants is to introduce a single publication rule. Such a rule is a limitation of liability that favours defendants in a major way. The effect of a single publication rule is simple; a matter is deemed to have been published once only, at the time it is first read, even by a sole person, or in the case of the proposal for an electronic publication, when it is first uploaded electronically, even if no-one reads it then. The significance of this is that the limitation period would run from that date, extendable to a maximum of three years, to begin an action.

This creates serious practical problems for plaintiffs. Essentially, a plaintiff has only one year to begin all the necessary actions.

A plaintiff who is the victim of multiple publications will be compelled to begin action against all of them within the first year of their appearance. In some cases the difficulty and expense would make it close to impossible to find all the offending publications, identify the people responsible for them, and begin an action against each of them. Yet that is what a plaintiff who wants to put a complete stop to the defamation will be forced to do by the proposed amendment.

Under the current law, an electronic publication is republished each time that someone downloads it. This allows a plaintiff to take the economic and sensible course of beginning one or two actions against the worst offenders, and then when they are resolved, to chase up the others, who, if their publications are still on line, can still be sued.

In many such cases, after a plaintiff has succeeded against the first defendant sued, it is not necessary even to begin the other cases, and quick resolutions are achieved. Under a single publication rule, that approach will no longer be possible. A plaintiff will have to embark within the first year on the expensive and wasteful task of searching for all the offending publications, identifying all their publishers, and beginning actions against all of them.

Even such hyper-vigilance will not guarantee protection to the plaintiff.

In relation to publication in electronic form, the proposed amendment takes as the day of first publication the day on which the matter was first posted or uploaded. There is no requirement that anyone have access to it. The website to which the publication was posted or uploaded could be one that is entirely unknown. The matter could sit dormant on the website for an indefinite time until someone chose to publicise it. If that occurred more than three years after the publication had been posted or uploaded, no matter what it contained, no one could sue.

There are other absurd effects of the proposed rule. A person who is successfully sued for an online publication can continue it, or if it has been taken down, reinstate it, without risk of being sued again, once the limitation period has passed.

A small subsection hidden in a schedule provides that the single publication rule applies to first publications made before the amendment comes into effect. This means that anyone who has published anything defamatory on line more than three years ago, even if it was removed for being highly defamatory, can reinstate it without any risk of being sued.

The proposed rule does not apply to a subsequent publication “if the manner of that publication is materially different from the manner of the first publication”. In the examples just given, I am speaking of a publication in the same manner as the first publication.

The proposed rule includes considerations that may be taken into account in determining whether the manner of a subsequent publication is materially different. These are ineffective for online publications. The first is “the level of prominence that a matter is given”. For some online publications, it is difficult to give any significance to the concept of “prominence”. For many, what one could conceive of as “prominence” is constantly shifting, for example, the order in which items are presented in a Google search, or the order of comments in a Facebook chain. This test is likely to be thoroughly impractical. The other test is “the extent of the subsequent publication”. Given that each download of an electronic publication constitutes a separate publication, this



test is meaningless, because each subsequent publication will be to a single person, so that the extent of each will be identical.

This rule is unnecessary, ill considered, unnecessarily favourable to defendants, very unjust to plaintiffs, and likely to increase rather than reduce expense and complexity in proceedings.

The evasion and concealment of the real issues in the four matters considered above is disturbing. So too is the obliging primacy given to the interests of defendants. This is not acceptable "reform".

Tom Melomby