Courts split over FoI defamation threat to whistleblowers

Introduction

Suppose you are a 'whistleblower' and you write a letter to a government department that defames a person. And suppose that person retrieves the document by virtue of the *Freedom of Information Act* (FoI Act). The whistleblower would be protected by the Act from a defamation action, right? Wrong. Or, more correctly, it depends on what state you live in. As a result of recent decisions in Queensland and New South Wales, authors of documents subject to discovery under the FoI Act may find they are not protected from actions for defamation.

This is despite the operation of s 91 sub-s 91(1)(b) of the Commonwealth *Freedom of Information Act 1982*. The meaning of this provision, which is mirrored in the FoI legislation of the states, has been the subject of a number of conflicting decisions. Section 91 provides:

> (1) Where access has been given to a document and:
>
> (a) the access was required or permitted by this Act to be given or would, but for the operation of subsection 12(2) or of that subsection 12(3), or of that subsection as modified by regulations made in pursuance of subsection 12(3), having so required to be given; or
>
> (b) the access was authorised by a Minister, or by an officer having authority under section 23 or 54, to make decisions in respect of requests, in the bona fide belief that the access was required by this Act to be given;
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> no action of defamation or breach of confidence or infringement of copyright lies against the commonwealth, an agency, a Minister or officer by reason of the authorising or giving of the access, and no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the giving of the access lies against the author of the document or any other person by reason of that author or other person having supplied the document to any agency or Minister.

The matter of what for the purposes of this article may be described as the 'protection from defamation action clause' arose most recently in *Pal v Weir*[1] in Cairns before White DCJ. In an action for damages for defamation the plaintiff's action was based on two alleged publications. One of these included publication of a letter concerning the plaintiff to the then Queensland Premier, a number of Members of Parliament, a local government officer and the producer of the ABC Television Four Corners program. White DC J took the view that the construction of paragraph (d) should be approached in a manner consistent with, and against the background of the provisions of the Queensland *Defamation Act* 1899 especially as it relates to publication.[2] Although the *Defamation Act* does not define what publication means the cases dealing with the tort of defamation maintain the plaintiff must establish that the material complained of has been communicated to a third person.[3] The first point White DCJ raised was that what is protected by the FoI Act is 'any publication'. The second point, according to his Honour, was that the protected publication is *not* any publication involved in the supplying of the document to an agency or minister but a publication involved in, or resulting from 'the giving of access'. His Honour argued that if the legislature intended to protect the original publication of the document to an agency or minister from an action for defamation or breach of confidence, it could have easily said so, but it did not. Secondly, in His Honour's view, paragraph (b) did not protect documents: it only protected publications. Furthermore, it did not protect all publications of a document, only those 'involved in or resulting from the giving of the access'.[4] His Honour could not be persuaded that the publication of a letter by supplying it to an agency or minister could possibly be characterised as being involved in or resulting from the giving of access.

A contrary view

The matter also arose in July last year in NSW in *Ainsworth v Burden*[5] but the decision there was the reverse. There, the plaintiff acting under the *Freedom of Information Act 1989* (NSW), obtained a copy of a letter written by the defendant to a Minister of the Crown which allegedly defamed him. He brought an action for defamation based on the publication to the Minister. The defendant applied for the action to be permanently stayed on the ground that the publication was the subject of absolute privilege under s 64(1)(b) of the Act that essentially mirrors the Commonwealth FoI Act. Simpson J held that the publication of the letter to the Minister was protected by sub-s (1)(b). Her Honour indicated she preferred a plain words interpretation of the sub-section that protects the author of a document who has supplied the document to a Minister, against actions for defamation as a result of a grant of access to the document.[6] Significantly though, her interpretation was reached by excluding the words of limitation, namely: 'publication involved in, or resulting from, the giving of access'.

Her Honour agreed with the proposition that the purpose behind the FoI Act supports the notion that the author of a document is protected in respect of the original publication of that document, where the plaintiff comes into possession of the document as a result of the FoI Act. This simply means that the legislature determined that the Act would not become a source of material to be used against individuals providing information to government Ministers or agencies. It was Her Honour's view that the sub-section was constructed in such a way that a plaintiff who comes into possession of a defamatory document by means other than the Act is not prevented from taking action. It is only where the procedures provided by the Act have the effect of disclosing a document that the protection afforded by the section arises.

Her Honour was guided by a decision by the Full Court of the Supreme Court of South Australia in *Morgan v Mallard*.[7] There a document, which the appellant claimed defamed her, came into her hands as a result of the process of discovery. It was held that, absent a grant of leave, the plaintiff could not use the document so produced in order to found an action for defamation. However, in coming to that view, the Full Court considered whether the appellant would be able to use the same

letter if she obtained it as a result of an application under the *Freedom of Information Act 1991* (SA).

Bleby J, with whom Mullighan and Wicks JJ agreed, wrote:

> (31) In this case, to the extent that the letter in question has been produced to the appellant under the provisions of the Freedom of Information Act 1991, s50 (1)(b) would prevent her from using it for the purpose of maintaining the present action for defamation. That is because it is the subject of protection under s51 (b) as a document produced by reason of the author having supplied it to Workcover Corp. However, because it was also supplied to her in a different capacity, as a litigant in the Magistrate's Court, she may be able to use it either with the consent of the respondent or by leave of that Court.[8]

A similar question came before JC Gibson DCJ in *McFarlane v the Commonwealth of Australia*[9] Again the legislation contained substantially the same provisions to s 91 of the *Freedom of Information Act 1982* (Cth). Gibson DCJ came to a conclusion similar to that reached in *Morgan*.

The latest decision

However, when *Ainsworth v Burden*[10] came on appeal before the New South Wales Court of Appeal in April of this year it was held the section only protected publications pursuant to the Act, and did not protect the original publication to the Minister. The Full Bench following *Pal v Weir* said the statutory language must be construed in the context of the general principles of the law of defamation.[11] That is, each republication of defamatory matter is a new publication, which exposes the republisher to liability in defamation. Republication may also expose the original publisher to further liability where the republication was the natural and probable result of the original publication[12] either on a fresh cause of action or for increased damages on the original cause of action.[13] It was their Honour's view that, in the absence of statutory protection, public authorities and their employees who, under FoI legislation, released documents containing defamatory imputations against third parties, or who were involved in the decision-making process heading to such release, would be exposed to actions for defamation.[14]

People writing to a Minister, public authority, or a public servant complaining of alleged crimes, other wrongdoing or alleged abuses in public administration, may be protected by qualified privilege under common law or statute, subject to the condition at common law that the publication must not be more extensive than the privilege justifies.[15] Therefore, according to the Full Bench in *Ainsworth v Burden*, without statutory protection a person publishing defamatory matter to a public servant or politician, on what otherwise would have been an occasion of qualified privilege, loses that privilege if republication to third persons was the natural and probable result of that publication. Republication pursuant to the legislation would be outside the protection of the qualified privilege which would not protect publication to third persons.[16] While this argument may be legally correct, one wonders whether a 'whistleblower' would have this degree of knowledge of what constitutes defamation when writing a letter on what he or she genuinely thinks is a matter in the public interest. Ignorance of the law is, of course, no excuse but surely the FoI Act should be devoid of legal technicalities if it is to do the job Parliament intended. It is unlikely to achieve this level of user friendliness if a whistleblower has to seek legal advice before writing a letter to the relevant public official.

Protection from republication

Section 64 (1)(a) protects public officials from liability for republication of defamatory matter pursuant to the Act. Section 64(1)(b) extends that protection to the author and other persons. Protection for other people was necessary because someone other than the author may have sent the document to the public official. For example, an employee may have made a report to his employer, which the latter sent to the public official. The employer would have republished the defamatory material and thus been exposed, like the author, to defamation proceedings arising out of its further republication pursuant to the Act unless statutory protection had been provided. But its protection is limited to 'any publication involved in, or resulting from, the giving of access' under the Act. As noted above, these were not considered words of limitation by the Primary Judge. Protection is conferred by s 64(1)(b) where liability could arise because ('by reason of') the author or other person supplied the document to a public official. According to Handley JA, with whom Hodgson JA and Grove J agreed, that is the reason for protection being given. However, in their opinion the words 'by reason of' do not define its scope. This is defined by the words 'in respect of any publication involved in, or resulting from the giving of access'. Protection is not given in respect of other publications, made to the public official or anyone else.[17] Under this reasoning the section gives no protection to the author or other person merely because the plaintiff became aware of the document by obtaining access to it under the Act and would not otherwise have known that he had been defamed, or been in a position to prove this. The protection is not given against the use of the document; it is given against an action for defamation in respect of defined publications.

In the opinion of Handley JA, the evident purpose of s 64 was to ensure that the Act did not widen liability for defamation by a side wind. There is nothing in s 64 to indicate that it was intended to protect publications made independently of the Act.

This interpretation was previously reached by Deputy President Forgie of the Administrative Appeals Tribunal in the Queensland case *Re McKinnon & Powell v Department of Immigration and Ethnic Affairs.*[18] This matter concerned the Commonwealth provision. Deputy President Forgie held:

> The focus of s 91 is solely upon the republication of the matter in a document released under the FoI Act. It does not in any way attract the liability of the original author of the document when he or she sends or gives it to a Minister or agency. The initial transmission of the matter in the document is itself publication of the matter and something in respect of which an action for defamation may be brought. Section 91 does not protect the author of the document in respect of that original publication.[19]

This construction of the legislation was accepted by Handley JA in *Ainsworth v Burden* where he said the important words of limitation were: '[publication] involved in, or resulting from, the giving of access'.[20] If parliament had wished to protect defamatory publications made independently of this Act, he said, the result could have been achieved by omitting these words from s 64(1)(b).[21] In this writer's opinion this would appear to be the correct legal interpretation but it offends the spirit of FoI legislation. The challenge now is to persuade parliament to amend the legislation that omits the limiting words in the interests of FoI.

Summary

The fact that Australian courts are split over the interpretation of the defamation protection clause is highly unsatisfactory. The interpretation of the protection clause obviously leads to a balancing act between protecting an individual's reputation as opposed to the public interest in preserving the spirit of FoI. It must be remembered FoI was designed as one of the few tools available to the public to help ensure the integrity of our public officials. If a balancing test is required then surely it should come down on the side of FoI rather than the protection of an individual's reputation. As a result of the most recent decisions concerning the protection from defamation clause our 'whistleblowers' could now be forgiven if they kept 'their powder dry' for fear of a defamation writ to the detriment of the wider public interest. This is surely not what our legislators intended. It is over to them to fix it.

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3. *Pullman v Hill* (1891) 1 QB 524, 527.
4. *Pal v Weir* (2003), para 26.
5. *Ainsworth v Burden* (2002) NSWSC 620.
6. Ibid para 3-6.
7. *Morgan v Mallard* (Unreported, South Australia Supreme Court, 31 October 2001) 364.
8. Ibid, para 31.
9. *McFarlane v Commonwealth of Australia*, (Unreported, Gibson DCJ 17 June 2002).
10. *Ainsworth v Burden* (2003) NSWCA 90.
11. Ibid para 5.
12. *Speight v Gosnay* (1891) 60 LJ QB 231 Ca and *Harris v 718932 Pty Limited* (2003) NSWCA 38, para 4.
13. *Toomey v Mirror Newspapers Ltd* (1985) 1 NSWLR 173, 178 and *Harris* (above n 13) para 27.
14. *Ainsworth v Burden* (2003) NSWCA 90, para.6.
15. *Williamson v Freer* (1874) LR 9 CP 393 and *Adam v Ward* (1917) AC 309, 321, 348.
16. *Ainsworth v Burden* (2003) NSWCA 90, para. 8.
17. Ibid para 11.
18. *Re McKinnon & Powell* (1995) 40 ALD 343.
19. Ibid 346-8.
20. *Ainsworth v Burden* (2003) NSWCA 90, para 9.
21. Ibid para 13.

An update on Access to Information in South Africa

New directions in transparency[1]

A brief description of the Promotion of Access to Information Act

South Africa's new freedom of information legislation — the *Promotion of Access to Information Act 2 of 2000* (PAIA) — came fully into effect on 15 February 2002.[2] The Act is general freedom of information (FoI) legislation, largely modeled on the FoI laws of the United States and Commonwealth jurisdictions.[3] It is, however, unusual in at least two respects. First, it is based on and is backed up by a specific constitutional right of access to information, entrenched in the South African Bill of Rights. Secondly, this right, and as a consequence, the Act, is applicable not only to information in government hands but also to information held in the private sector.

The Act applies to *records* held by *public bodies* and *private bodies*, irrespective of what date the records were created. Public bodies are defined as including any functionary or entity in any branch of the state at any of its three levels: legislatures, courts, members of the executive or any government or state department at national, provincial or local level.[4] The definition also includes functionaries or institutions that are classifiable as part of the private sector when they exercise a public power or function. Private bodies are defined as any person or entity that is not a public body and that is not a natural person carrying on a trade, business or profession.[5] Putting the definition of public and private body together, the Act has extensive but not universal application. Essentially, the only bodies that are not covered by the AIA are natural persons in their private capacity. All other legal persons are either public or private bodies under the Act.

The Act creates a statutory right of access on request to any record[6] held by a public body, with the exception of records held by the Cabinet, court records and records held by members of parliament and provincial legislatures. The Act provides a similar statutory right of access to records held by private bodies, to the extent that the requester can show that a requested record is required for the exercise or protection of the rights of any person.