

Submission to the Defamation Working Party
Model Defamation Amendment Provisions 2020 (Draft d15)
Prepared by Bennett + Co, Corporate and Commercial
Media Law Group

About the writers:

Bennett + Co Corporate & Commercial Law

Bennett + Co is a pre-eminent Perth based legal practice and market leader in the area of litigation. Our practice spans a broad range of litigation expertise, including an established and specialist defamation practice.

The 2019 edition of the Doyle's Guide for Western Australia, ranked Bennett + Co as a first tier firm in the category "*Leading Commercial Litigation & Dispute Resolution Law Firms*". Principal and leader of the firm's Media Law Group, Martin Bennett was, for the third consecutive year, recognised as pre-eminent in the category "*Leading Commercial Litigation & Dispute Resolution Lawyers*".

Our litigation experience is extensive. Since the inception of the firm in 2011, our litigation team has obtained 535 judgments across the Australian jurisdictions, including most notably 9 judgments from the High Court of Australia, 8 from the Full Court of the Federal Court of Australia, 50 from the Federal Court of Australia, 67 from the WA Supreme Court of Appeal and 342 judgments from the WA Supreme Court.

Specialist defamation expertise - Media Law Group

Defamation is a key aspect of Bennett + Co's practice. We have had conduct of some of the most prominent defamation cases in the Supreme Court of Western Australia (and arguably Australia), representing a variety of high net worth individuals, public officers and politicians, lawyers, sporting and other public personalities, business people and company directors.

Our defamation practice is predominantly, but not exclusively, focused upon advising plaintiffs, and others aggrieved by defamatory publications.

Bennett + Co's specialist Media Law Group comprises 14 solicitors¹ with the conduct of defamation matters ranging in experience from 1 to 42 years. Our collective experience working on defamation matters exceeds 85 years.

Martin Bennett, the head of the Media Law Group, has been involved in defamation litigation since his articulated year in 1978 and has maintained a strong focus on defamation advice and litigation throughout his extensive career. Bennett & Co, the firm of which Martin was the founding and Managing Partner from 1988 to 2006 was also recognised as a specialist defamation practice. Martin has been involved in 2 defamation matters which proceeded to appeals before the High Court of Australia, *Bridge v Toser*² in 1978 and *Coyne v Citizen Finance*³ in 1991, the latter of which stood as the highest award of damages for defamation in Western Australia until 2015.

The Media Law Group maintains active group communications to ensure that new judgments, media stories and developments in the law are circulated and discussed amongst the group. We meet regularly to discuss the status and progress of current defamation actions within the firm, exchange ideas for the progress of those actions, discuss developments in the law and create methods of ensuring that the group's collective defamation knowledge is accessible to all practitioners in the group.

Since the inception of Bennett + Co in 2011, we have advised and provided representation to over 170 different clients regarding in excess of 200 defamation matters. In the same period we have been involved in 4 defamation trials before the Supreme Court of Western Australia⁴, and have obtained 94 reported decisions in defamation proceedings before the Supreme Court of Western Australia.

Of particular note was the judgment obtained in *Rayney v State of Western Australia (No 9)*⁵ for the second highest award of damages for defamation in Australian legal history⁶ following the longest running defamation trial in Western Australian legal history⁷.

With the extensive experience described above in mind, Bennett + Co's Media Law Group is uniquely placed to provide a detailed and considered view on how the proposed

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² [1978] WAR 177

³ (1991) 172 (CLR) 211

⁴ *Jensen v Nationwide News & Anor* [2019] WASC 451; *Rayney v State of Western Australia (No 9)* [2017] WASC 367; *Kingsfield Holdings Pty Ltd v Rutherford* [2016] WASC 117; and *Sims v Jooste [No 2]* [2014] WASC 373

⁵ [2017] WASC 367

⁶ \$2,62 million

⁷ 47 days

amendments to the Uniform Defamation Laws are likely to play out in actual practice, and their likely effect upon litigants and, in particular, plaintiffs in defamation actions.

It is respectfully submitted that Working Party should have particular regard to these submissions as they present a view of the amendments based upon our practical experience and from the perspective of what is a predominantly, but not exclusively, a plaintiff focused defamation practice.

Initial observations

Positive case flow management principles - the need for the just and efficient determination of litigation

As is further elucidated in the following pages of this submission, it is our firm view that a large number of the amendments contained in the present draft of the *Model Defamation Amendment Provisions 2020* would have the effect, if implemented, of significantly increasing interlocutory disputes and the overall cost of litigation to all litigants in defamation proceedings.

In making any amendment to legislation affecting litigation before the Courts of Australia, the legislature must ensure that the just and efficient determination of disputes remains a primary consideration. In a society which seeks, in the most general sense, to achieve more cost effective resolution of disputes, measures which increase the cost of litigation should be discouraged.

In our experience, the typical cost of a *single* interlocutory dispute of the nature which arise at an early stage of defamation proceedings is between \$10,000 and \$60,000.

The probability of increased costs of defamation litigation is of obvious significance to all litigants, but must also to be considered in the context of a jurisdiction in which there is frequently a cavernous disparity between the financial resources of the individual plaintiff litigant and the corporate media defendant.

Impediments to the potential plaintiff:

The proposed amendments are said to address the changing, electronic, landscape which sees a diversification in the identity and qualification of publishers and an extension in the proliferation and permanence of publications. Whilst Bennett + Co welcomes a detailed and considered review of the *Uniform Defamation Laws*, the proposed amendments have the effect of implementing a number of significant hurdles to potential plaintiffs.

Accepting that a balance must be struck between freedom of expression and the restrictions which are necessary to protect reputational interests, we are concerned to ensure that

plaintiffs seeking to vindicate reputations have the ability to do so, if necessary, via the Courts without unnecessary impediment or delay.

Absence of considered reform relating to digital and social media publications:

As a further, preliminary, observation it is noted that – despite the considerable public comment regarding the government’s intention to include in these reforms measures which would allow large social media organisations to be brought to account for damaging and defamatory content⁸, and to otherwise deal in a considered way with the changing nature of ‘publication’ in an electronic world, the reforms presently proposed do little (if anything) to address those increasingly significant issues.

Reputation matters

*The purest treasure mortal times afford
Is spotless reputation; that way,
Men are but gilded loam, or painted clay...
Mine honour is my life. Both grow in one.
Take honour from me, and my life is done.*

~ Shakespeare, *Richard II*, Act I, sc i

Reputation is fundamentally important to human beings. For many of us, it is more important than money; even the Bible recognised as much.⁹ It is an aspect of our dignity. It is a fundamental human right.¹⁰ When our reputation is destroyed, we are destroyed. By protecting a person’s interest in their reputation, defamation law is fundamentally important. Legislative changes which propose to undermine that fundamental role should be treated with great caution.

A core theme of the proposed amendments to the Model Defamation Provisions is the erosion of the protection that defamation law affords to reputation. Some aspects of the proposed amendments are warranted, but others are not.

At various places, the Background Paper to the proposed amendments refers to the views of ‘stakeholders’ as informing the process. A quick review of the submissions to the last stage of the reform process shows that many were composed by organisations and individuals often associated with defendants. Of course, it was entirely appropriate that these people expressed their view. But their view should not be conflated with the public interest. Allowing media companies and their defenders to map the boundaries of defamation law is akin to insurance companies determining the outlines of personal injury law, or allowing

⁸ For example, the remarks of the Federal Attorney General, the Honourable Christian Porter MP, to the National Press Club on 20 November 2019.

⁹ *Proverbs* 22:1 and *Ecclesiastes* 7:1.

¹⁰ See International Covenant on Civil and Political Rights, art 17(1); *Human Rights Act 2004* (ACT) s 12; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13; *Human Rights Act 2019* (Qld) s 25.

banks to determine what financial regulation is in consumers' interests. Serving sectional (commercial) interests does not advance the broader public interest.

Unlike defendants, defamation plaintiffs do not have an industry association or the institutional resources of a media corporate. They do not make law reform submissions. Few would even support the cause of a defamation plaintiff until they experience defamation first hand. Bennett + Co would be one of the few (if only) plaintiff-specialist defamation litigation firms with any motivation to supply a view contrary to other 'stakeholders'.

The proposed amendments to the Model Defamation Provisions have completely ignored the legitimate interests of plaintiffs. Defamation plaintiffs are not some caricature of a vexatious litigant with an axe to grind. These are real people, many of whom have had their lives destroyed. It is critically important that, when defamatory publications cause pain and destruction, these people have a means to access justice.

We should recognise that the right to protect one's reputation is a right which is not recognised or protected by any other cause of action available at law. An action for defamation is, and always has been, unique in the key respect that there is no requirement to prove specific economic loss because the law recognises that damage to reputation is presumed (in that it is inevitable) once a plaintiff has established publication of a defamatory imputation.

Defamation is also unique in the sense that an aggrieved person can rarely, if ever, truly remedy the hurt, distress, loss and damage they suffer as a result of a defamation by any award (or offer) of financial recompense, in the same way that a person suing for many other causes of action can do. In that way, the remedies available to plaintiffs in defamation are—and will always remain— inadequate. For the sake of justice, any amendment which is to be made to the Uniform Defamation Laws cannot therefore operate to further limit defamation plaintiffs' access to justice, or the remedies that they are presently able to obtain.

In the developing digital age in which we live, the need to ensure proper protections for personal reputation is more critical than it has ever been. The ease with which defamatory matter can be published, and re-published, in the context of social media and online means that a person's reputation can be damaged beyond repair almost immediately by a malicious and defamatory publication on social, or other internet based media, far more quickly than was ever previously the case with publications made in the traditional 'paper' news media.

The proposed reforms unfairly favour the potential defendant to defamation proceedings. In an electronic age, where a publisher can disseminate matter vastly more quickly and widely, and the consequent damage to an aggrieved person's reputation can be significant and even irreparable, any proposed reforms ought, provide for more adequate recognition of the historical rights and remedies of the aggrieved person.

A more appropriate reform for ‘the digital age’ would be to increase access to justice for ‘regular’ people who have their reputations damaged on social media. Under current laws, many of these people cannot afford access to justice. The proposed reforms may exacerbate that situation by causing significant increases in costs and complexity at the interlocutory level, thus discouraging properly-aggrieved claimants from commencing, or progressing, a defamation action.

Section 7A(1) – Serious harm required for cause of action for defamation

The proposed “serious harm” requirement proposes a new threshold test for a cause of action in defamation. Fundamentally, the test challenges the long held presumption that defamation is actionable per se, that is, there will be a measure of damage to reputation without actual the need for formal proof.

Every plaintiff bringing or considering bringing an action, in a subjective sense, considers that they have suffered at least some harm. But what amounts to serious harm and how is this to be determined objectively? The likelihood of significant interlocutory dispute (and therefore initial cost and delay for the parties) in this regard is real and has the potential to dissuade litigants from seeking to vindicate their civil right.

It is our expectation that, if this amendment proceeds, almost every new action before the Court will be the subject of a complex interlocutory dispute (at an early stage) to determine the question of ‘serious harm’. Even following an initial bank of decisions on this question¹¹, given the complexities and subjective nature of the human condition and the diversity of publications, what amounts to serious harm for one plaintiff is unlikely to amount to serious harm for another.

A similar requirement was introduced into the UK *Defamation Act 2013*. Despite the passage of time since the introduction of that legislation in the United Kingdom, there is relatively little authority providing guidance on what our Courts may ultimately regard as serious harm¹².

For example, material of limited circulation but published to persons of significance to a plaintiff, say, an employer, may be more damaging in a reputational sense than a wider publicised matter on social media.

This being the case, “serious harm” is unlikely to be a matter capable of determination without proper and careful consideration. It is not simply a legal issue for preliminary

¹¹ ...including those presently emanating from the United Kingdom

¹² See *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334, [2018] 2 WLR 387; *Cooke & Anor v MGN Ltd & Anor* [2014] EWHC 2831 (QB); *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB); *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414, [2011] 1 WLR 1985 (QB) and *Ecclestone v Telegraph Media Group Ltd* [2009] EWHC 2779 (QB)

determination by a Judge at an early stage of proceedings. Evidence would need to be led on matters that would ordinarily be within the purview of damages assessment, including:

1. the identities of the parties;
2. the extent or reach of the publication;
3. the location and permanence of the publication;
4. the nature of the publication, including the seriousness of the imputations;
5. the conduct of the parties.

Further, “serious harm” is a matter for which there is already accommodation in the assessment of damages, in that the Court is to ensure that there is an appropriate and rational relationship between the harm sustained and the amount of damages awarded¹³.

Regard must also be had for the existence of the triviality defence¹⁴ (if it remains). The defence is concerned with the circumstances of publication at the time of publication and the likelihood of reputational harm ensuing. Whilst the onus is high – with defendants required to establish the unlikelihood of harm being suffered at all – the defence has the potential to dispose of actions that are of a spurious or trifling nature in an “unlikely to cause harm”¹⁵ sense.

In considering the necessity, or otherwise, for the introduction of a serious harm threshold, regard must also be had to the practical realities of defamation litigation. The significant costs and existing interlocutory hurdles which *already* impact upon any represented plaintiff in defamation proceedings are such that, in the ordinary course, a potential claimant with a frivolous claim for defamation would be counselled against, and is (or ought be) dissuaded from commencing proceedings in respect of a publication which did little or no damage to their reputation. In circumstances involving of a minor and/or frivolous publication which does limited, if any, damage to the claimant’s reputation, a practitioner properly advising the potential claimant apprises their client that the substantial costs of the proceedings and the probability that the costs of the litigation would be disproportionate to any gains (financial or otherwise) likely to be achieved. Properly advised, a reasonable person aggrieved by a frivolous or ‘trivial’ defamation does not take the significant and costly step of instigating superior court litigation.

¹³ Section 34 Defamation Act 2005 (WA) and the equivalent in the States and Territories.

¹⁴ Section 33 Defamation Act 2005 (WA) and the equivalent in the States and Territories: “*It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.*”

¹⁵ *Jones v Sutton* (2004) 61 NSWLR 614 and *Ainsworth v Burden* [2006] NSWCA 199.

Bennett + Co therefore supports the retention of the triviality defence presently captured by s 33 of the *Uniform Defamation Laws*, and the exclusion of any requirement for ‘serious harm’.

Section 7A(2) – Serious harm and serious financial loss for “excluded corporations”

There are already limitations upon a corporate entity’s ability to bring an action under the Uniform Defamation Laws¹⁶. Corporate plaintiffs are limited to those “excluded”, that is, small private entities or not for profits that are not related to other corporations¹⁷. The proposed inclusion of section 7A(2) provides two additional and onerous threshold tests to excluded entities seeking to bring action – a “serious harm” test and a “serious financial loss” test.

It is misapprehension of the realities of business to suggest that corporate entities do not have a reputation worthy of protection without proof of specific economic loss. Many corporations, including small businesses, attribute a significant sum to their goodwill (in effect, their business reputation) in their corporate balance sheets. Reputational matters impact significantly on a business’s operations and overall financial value.

The above observations as they relate to “serious harm” are equally applicable to the corporate plaintiff. Critically, the new thresholds also provide that defamation is not actionable by an excluded corporation without proof of special damages. At common law, it has long been held that once the publication of defamatory matter is established, there is a presumption some damage will inevitably be caused to reputation by the publication. In other words, in order to sustain an action in defamation, there is no need to show actual or direct financial loss. The proposed amendment seeks to deliberately override the common law position and that set out in the Uniform Defamation Laws that “... *the publication of defamatory matter of any kind is actionable without proof of special damage*”¹⁸ and disregards the central object of defamation law, to protect reputation.

Also of significance and a matter which is likely to lead to increased interlocutory disputation are the words “serious financial loss”. This question raises pivotal issues of causation, calling for a detailed examination of the financial position of the corporation prior to and post publication. These are not matters for summary determination at an early stage of proceedings but will be, in practice, incapable of determination without discovery of financial materials and, critically, issues going to causation.

¹⁶ Section 9 of the Defamation Act 2005 (WA) and the equivalent in the States and Territories.

¹⁷ Section 9(2) of the Defamation Act 2005 (WA) and the equivalent in the States and Territories.

¹⁸ Section 7(2) of the Defamation Act 2005 (WA) and the equivalent in the States and Territories.

Section 12A – Defamation proceedings cannot be commenced without concerns notice

Concerns notice regime

Bennett + Co supports the subsisting concerns notice regime. An issue arising from the proposed amendments is the impediment to a plaintiff immediately commencing proceedings in circumstances of urgency.

Our practice has observed that in the vast majority cases, excluding matters of urgency, the existing concerns notice regime has been properly adopted and utilised. Parties, for the most part, have a desire to resolve matters without recourse to litigation.

Whilst it is also frequently the case that media corporates respond to concerns notices by raising issues of capacity, meaning and qualified privilege as a basis to refuse to make, or to make unreasonably low, offers of amends (particularly in cases of graver defamations published to a wide audience), we consider that the existing provisions in the Uniform Defamation Laws – by availing defendants of a defence if the plaintiff unreasonably refuses to accept a reasonable offer of amends¹⁹ – already provides sufficient incentive for parties to utilise the regime.

The present climate of electronic publishers lends itself to fast and far-reaching publication. If urgency requires a plaintiff to immediately commence proceedings or to seek injunctive relief, a mandated concerns notice and timeframes provide an impediment to the mitigation of damage. This is not capable of protecting an aggrieved party with the speed required in this electronic climate.

Similar concerns are applicable with respect to the additional requirement at section 12(1)(a) to provide “each proposed defendant” with a concerns notice. In our experience, publishers may necessarily be added to a matter throughout the course of an action as identities are revealed and more information comes to light. To require completion of the concerns notice regime prior to the addition of a defendant does not reflect the reality of practice.

Whilst the proposed amendments at section 12A(3)(b) provide the Court with the ability to grant leave to commence proceedings in the event of non-compliance if the event of “exceptional circumstances”, the circumstances are not defined. Do exceptional circumstances relate to urgency? Seriousness of imputations? Proliferation of the relevant publication? It is not desirable, especially in circumstances of urgency, for a plaintiff to be curtailed by potential interlocutory questions or to be tasked with an application for leave.

¹⁹ Section 18 Defamation Act 2005 (WA) and the equivalent in the States and Territories.

Particularisation of imputations

A second issue is the requirement for a plaintiff to be, effectively, wedded to their imputations. Proposed section 12A(1)(b) requires imputations, that may subsequently be relied upon in proceedings, to be set out in a concerns notice. Whilst allowance is made at proposed section 12A(2)(b) for some variation (“*Sub-section 1(b) does not prevent reliance upon imputations that are substantially the same*”), this new requirement ignores that formulation of imputations is an art not a science.

Courts have accepted that imputations are always capable of further refinement²⁰. In our experience, much initial disputation at an interlocutory level between the parties centres on the formulation of imputations and their distillation from the published materials. Critically, the alleged defamatory imputations form the heart of the dispute.

To be constrained to an initial formulation also does not reflect case management considerations. Principles of positive case flow and proportionality dictate that parties should always be looking to eliminate delays and promote the just determination of litigation in an efficient and timely manner²¹. This is achieved by review and refinement of a case and amendment in order to narrow the real issues for trial, including as to the pleaded imputations. The potential result of this proposed requirement is that prospective plaintiffs will need to allege all possible imputations in a concerns notice so as not to be shut out from relying upon them later. This will have the effect of concealing, rather than elucidating, the issues to be resolved between the parties.

Further, the “substantially similar” carve out will, again, result in interlocutory dispute. In practice, it will not afford a plaintiff any leeway to amend imputations as a result of conferral or consideration by Counsel. This may lead to a plaintiff being shut out of an otherwise viable case. This prejudice to the plaintiff would usually outweigh the prejudice that the defendant was suffer as a result of an amendment to the plaintiff’s case.

Section 14 – When offer to make amends may be made

We do not take particular issue with the proposed amendments to this section, other than to note the ambiguity of the phrase “*location where the matter in question can be accessed*” at section 14(2)(a1). The reference appears directed at catering for electronic publications. Clarity should be provided as to whether this locational information is required for all publications. How would this section apply to a publication made in a book or newspaper, or indeed a publication which is made by the exchange of emails or other hardcopy

²⁰ *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135 at 137.

²¹ Sections 4A and 4B *Rules of the Supreme Court 1971* (WA).

correspondence between private individuals? How would it apply to a slanderous publication, not recorded in writing or in any digital format?

Section 15 – Content of offer to make amends

The addition of the words “*or a clarification*” of “*or additional information about*” at section 15(d) will unnecessarily dilute the requirement for a publisher to offer to publish a correction. This is not in the interests of a plaintiff. A correction already encapsulates these concepts in any event.

The additional words proposed dilute the correction to which an aggrieved person would otherwise be entitled under the present law. How can a publisher cure a genuinely grave defamation by simply providing “additional information” about the content of a publication without otherwise seeking to correct the defamatory material. In our view these additional words add nothing to the existing requirement for a reasonable correction, save to dilute the things to which a claimant would otherwise be entitled as a means of vindicating their reputation.

Section 18 – Effect of failure to accept reasonable offer to make amends

The proposed amendment to section 18(1), whilst relatively minor on its face, also has the potential to significantly water down an *unrepresented* plaintiff’s rights. The existing law provides that it is a defence to a defamation action if a publisher demonstrates that it made an offer of amends as soon as “practicable after becoming aware that the matter is or maybe defamatory”. The proposed amendments dilute the plaintiff’s position by allowing the defence to be made out where it is deemed that an offer was made as soon as “reasonably practicable”. The existing law suggests that a publisher should consider making a reasonable offer of amends not following receipt of a concerns notice (as is now proposed) but as soon as it “becomes aware that the matter is or may be defamatory”.

If the intention of this amendment is indeed to limit the matters which must be brought before the court and encourage the resolution of the proceedings without recourse to litigation then section 18(1)(A) should stand unamended. Publishers should be encouraged to make offers of amends at the earliest possible time. That time is as soon as practicable after they become aware that a publication is, or may be defamatory, not following receipt of a formal concerns notice which has strict statutory requirements.

It is conceivable that an unrepresented aggrieved person may write to their defamer and identify the nature of their hurt and distress without descending to the requirements of s 14(2) of the Act. Under the proposed reforms, there is no incentive whatsoever to a defendant to provide any reasoned response to such an offer, least of all an offer to amends within the meaning of the legislation.

The objects of the legislation should be to deter unnecessary litigation and promote the just and prompt resolution of disputes, where possible, without recourse to the Courts.

Section 21 (2A) – Election for defamation proceedings to be tried by jury

The irrevocability of an election cannot be supported by our practice. Accepting that there is competing Court of Appeal authority on this issue²², we consider the practical concerns held by the Council of Attorneys-General – wasted expenditure and forum shopping – are unwarranted.

It is our experience that the majority of costs are incurred in the immediate lead up to and during the trial of an action. To give parties the option to proceed before a judge alone, even at a late stage, allows issues for determination to be disposed of more efficiently – that is, with less cost – than before a jury.

Significantly, the proposed amendment has no regard for a change in circumstance. For example, trial by Judge alone may, in a particular case, be an effective antidote to a public climate of hostility or prejudice which may have been engendered by pre-trial publicity. The interests of justice need dictate this matter.

As to forum shopping, this is not something that we consider to be a reality of practice in our jurisdiction. In the Supreme Court of Western Australia, defamation actions are automatically entered into a Commercial and Managed Cases List and managed by a select group of experienced Judges in this area from commencement to conclusion. The managing judge for a proceeding will not change, save in the most exceptional circumstances²³.

Section 29A – Defence of responsible communication in the public interest

This proposed new defence is founded upon English common law principles that have emerged over the past decade²⁴, shifting the focus away from what was published and placing it on the conduct of the publisher allowing the protection of false and defamatory communications if they are on a matter of public interest and if they were communicated responsibly. The defence is substantially similar to qualified privilege but, critically, cannot be defeated by malice.

²² *Chel v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWCA 379 cf *Kencian v Watney* [2015] QCA 212.

²³ Such as, for example, the retirement of the managing judge.

²⁴ *Durie and Hall v Gardiner and Māori Television Service* [2018] NZCA 278.

There already exists at sections 29 and 30 the defences of fair report of proceedings of public concern and qualified privilege. The responsible communication defence appears as a hybrid of these defences.

However, the responsible communication defence is more publisher friendly than qualified privilege, expanding the subject matter it protects without limiting the defence to political communications²⁵ or importing a standard of reasonableness²⁶.

The apparent motivation for the defence – an inability of media defendants to rely on qualified privilege – does not, in our view, necessarily indicate that the objects of that defence are not being met. We consider that responsible publishers can and should be able to successfully rely on qualified privilege.

The defence is drawn in broad terms and in our view, not primarily in the interests of protecting reputation. For example, the notion of “public interest” is not confined to the operations of public institutions and the functions of those persons holding public office. Whilst public interest is not synonymous with what interests the public, the majority of matters are, at least at an interlocutory level, arguably in the public interest. Case law demonstrates the ease with which a “public interest” element can be established, Lord Denning MR in *London Artists Ltd v Littler*²⁷ held as follows:

“Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment ...”

The requirement for the publication to be “responsible” places the conduct of the publisher in focus. The nine factors at proposed section 29A(2) that the Court must take into account “to the extent they consider them relevant” should, ideally, promote high-quality reporting.

However, the defence is not limited to professional journalists and is available to anyone who publishes material of public interest via any medium. Whilst this would appear to hold bloggers and citizen journalists to a higher standard, the section 29A(2) safeguards relating to professional codes, standards and sources are of no application to this category of publisher, such that some of the factors in this section are illusory. Differences in the different codes and standards, and the potential for multiple codes and standards to apply, means that there is the potential for 2 different outcome for 2 publishers of the same material who each rely on the defence.

²⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

²⁶ Section 30 Defamation Act 2005 (WA) and the equivalent in the States and Territories.

²⁷ [1969] 2 QB 375

Fundamentally, we consider malice should always be a relevant consideration, as a publisher who has acted with malice in publishing defamatory allegations has, by definition, not acted responsibly. This is not express in the new defence, thereby offering more protection to publishers than qualified privilege.

As a matter of statutory interpretation, if it is intended (by the requirement for 'responsible' publication) to exclude circumstances of malice then that should be expressly stated in the provision. This is particularly so in circumstances where the immediately following section pertaining to qualified privilege expressly states that "a defence of qualified privilege... is defeated if the plaintiff proves that the publication... was actuated by malice".

It is noted that subsections 30(3)(a) and (b) are proposed to be removed from the factors to be considered in determining whether a defence of qualified privilege has been made out. In our submission the statutory defence of qualified privilege need not be amended. The exchange of information in the public interest is adequately addressed by the existing defence of qualified privilege, which brings with it the ability to defeat the defence in circumstances of malice or ulterior motive.

Section 30A – Defence of scientific or academic peer review

The need for this new defence is not apparent. We consider that qualified privilege defence at section 30 of the Uniform Defamation Laws provides adequate protections for this category of publication. Especially in circumstances where this proposed defence raises a lot of queries. What is a "scientific or academic issue"? What qualifies as a "scientific or academic journal"? How does the defence ensure the quality and integrity of the "independent review"? These matters are not defined.

There are thousands of scientific or academic journals in publication, some of which are more credible than others. Accepting that there is a need for this category of publication to further the advancement of science and research, the defence does nothing to ensure the integrity of the material being reported or of its editorial and peer review. The standards that a journal may use to determine publication can vary widely, peer review may be ad hoc or reviewers may have little vested interest in the journal.

Whilst proposed section 30A(1)(c) imports an independent review requirement by the editor of the journal and at least one person with expertise in the area, the quality of review and its implementation by the publisher are not addressed. Adequate qualitative editorial and peer review needs to be imported into this defence as it applies in both proposed section 30A(1)(c) along with the "assessment" limb of this defence at section 30A(2). Otherwise, the defence has the potential to opens the door for publications based upon, for example, false research findings, small sample sizes, conflicts of interest or researcher bias to be defensible.

Section 30A(3) is problematic in so far as it provides protections for a “fair summary” or “fair extract”. What constitutes a fair summary or extract? It is not apparent.

The defence is defeated at section 30A(5) only if the defamatory matter was not published “honestly for the information of the public or the advancement of education”. This places a high onus upon the plaintiff to establish a motivation for publication, made unnecessarily broad in circumstances where the matter can be “for the information of the public”.

Section 33 – Defence of triviality

Triviality is said to be “challenging to mount successfully” and is “arguably not adequately performing its role of excluding minor or insignificant cases where the overall circumstances of the matter suggest the plaintiff has not sustained real harm”.

In our view, there is no need to remove the defence of triviality (unless the threshold of harm is, in fact introduced rendering this defence redundant).

The perceived inability of publishers to rely upon the defence is, in our view, likely to arise from the practical fact that an aggrieved person is unlikely to bring proceedings in relation to a frivolous or trivial publication.

Section 35 – Damages for non-economic loss limited

By the express separation of general damages from aggravated damages, the proposed amendments seek to limit and codify an area sufficiently settled in case law. As held by Chaney J at [855] of *Rayney v State of Western Australia (No 9)* [2017] WASC 367 at 855 ²⁸:

“...it is well-established that aggravated damage is not a separate head of damages in defamation. Rather, it is an aspect of compensatory damages. Although on occasions courts may separately identify the amount by which damages are increased by reason of aggravation, it is not necessary that they do so. In many cases, the aggravated component of a damages award will comprise an element of the ‘inextricable considerations’ that make up the total amount awarded...”

In assessing damages, the Court in *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 made the position plain, namely, that general damages for non-economic loss is freed from the statutory cap by aggravating conduct of the defendant. The same conclusion was reached by Chaney J in *Rayney v State of Western Australia (No 9)* [2017] WASC 367 and Wigney J in *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [672].

²⁸ With Chaney J relying on *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1 at [385] and *Lower Murray Urban and Rural Water Corporation v Di Masi* (2014) 43 VR 348 at [116].

This line of authority does not provide licence for plaintiffs to seek and for Courts to award any amount for non-economic loss without regard for the statutory cap. As noted by the Court of Appeal, the “direction” under section 34 continues to apply and provides an “ever-present guide” even where an award of aggravated damages is appropriate and the Court should exercise its discretion to exceed the cap²⁹. For example, the Honourable Chief Justice Quinlan applied the provisions in the intended manner by awarding an amount of damages, inclusive of a component for circumstances of aggravation, *below the cap*, in his recent decision in *Jensen v Nationwide News Pty Ltd [No 3]*³⁰.

Media organisations’ fears that defamation awards are out of control and incompatible with workers’ compensation awards are self-serving and misconceived. In support of the arguments, media organisations generally refer to the more significant damages awards such as those in the decisions of *Rush*³¹, *Rayney*³² and *Wagner*³³. These are the outliers and the comparisons are apt to mislead.

Awards for the tort of defamation are fundamentally different to the tort of negligence and are not comparable by nature.

The introduction of a cap has already brought with it the real and genuine possibility that media organisations can elect to take a commercial decision to publish defamatory material knowing that the commercial benefit to be attained is likely to outweigh any award of damages within the statutory cap. The more limits that are placed on damages, the greater this concern becomes.

It should also be noted that even where proceedings are tried by jury, any award of damages is to be determined by the judge³⁴. That is, judges are constrained to have regard to comparable cases and by the usual common law factors in assessing damages.

The ‘maximum damages amount’ being available ‘only in a most serious case’ introduces greater uncertainty. As one could almost always imagine a more heinous defamation, it is possible that the cap may never be awarded.

Statute of limitations – Section 1A Single publication rule

The single publication rule contradicts the long established common law rule that every communication of defamatory material founds a separate cause of action: *Dow Jones &*

²⁹ *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154) at [244].

³⁰ [2019] WASC 451.

³¹ [2018] FCAFC 70

³² [2017] WASC 367

³³ [2019] QSC 284

³⁴ Section 22(3) Defamation Act WA and the equivalent in the States and Territories.

Company Inc v Gutnick (2002) 210 CLR 575 at [27] and [124]. Critically, the common law provides that the relevant date for the purposes of the cause of action is the date on which the publication is comprehended by the recipient: *Dow Jones* at [44].

The single publication rule does not reflect the damage that may be suffered by a plaintiff in situations of on-going publication. To the extent that the publication continues to be made available over a period of time, such as on the internet, publication is continuing whenever it is accessed or read. The single publication rule should not prevent a plaintiff from being able to seek a proportionate remedy arising from the on-going damage suffered at the hand of on-going publication.

The carve outs in this proposed section, namely, matters that are “substantially the same” or if the “manner of that publication is materially different” are grey areas that will result in interlocutory dispute. The manner of publication is somewhat addressed by proposed section 1A (4) by providing that the court may consider the “level of prominence” and the “extent of publication” in determining material difference. However, this does not address the numerous ways in which a matter can now be published, especially electronically.

Journalists and media organisations often publish on-going stories which are followed for some time – in some instances, in excess of one year – with the initial allegations repeated or rehashed with each successive publication by way of background or otherwise. The single publication rule would prevent a Court from taking this scenario into account in the assessment of damage.

In our experience, media organisations in particular refuse to remove articles from the internet by way of maintaining an archive. If they choose to leave defamatory material on the internet with the effect that it will cause harm to the plaintiff, they do not deserve the benefit of a limitation provision.

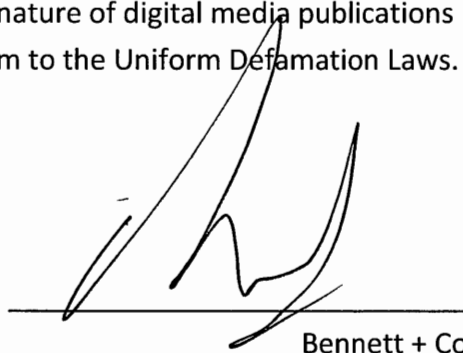
The new rule also has the unfortunate consequence of preventing a plaintiff who may have chosen not to pursue litigation, for whatever reason, from taking action in respect of subsequent substantially similar publications, irrespective of on-going publication and damage. Another unintended consequence may be that the proposed amendment forces a plaintiff to commence proceedings to ensure that they may not be prevented from doing so at a later point in time.

Conclusion

Bennett + Co’s submissions are that the reforms as presently drafted require further consideration before promulgation.

Reform based upon the present draft is, in our view, premature.

Further discussion and consultation is required to ensure that the objects of justice (including, in particular, with respect to increased costs of litigation) are best met, and the reforms required to address the prevalence and unique nature of digital media publications and republications are addressed by any proposed reform to the Uniform Defamation Laws.

A handwritten signature in black ink, consisting of several fluid, overlapping strokes, positioned above a horizontal line.

Bennett + Co