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Review of Model Defamation Provisions
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30 April 2019

Dear Sir

REVIEW OF MODEL DEFAMATION PROVISIONS

- 1 I refer to the Discussion Paper for the Review of Model Defamation Provisions ('the Provisions') issued by the Council of Attorneys-General ('COAG').
- 2 I address the questions set out in the COAG Discussion Paper below.
- 3 Before doing so, I note that the Discussion Paper makes reference to submissions I made to the 2011 review under section 49 of the Defamation Act 2005 ('the Act'). Those submissions enclosed extracts from the Second Edition of my text '*Defamation Law in Australia*' ('the Text'), with reference to case law up to the date of publication in 2011.
- 4 I now update those submissions generally by enclosing a copy of Chapter 43 of the Third Edition of the Text on '*Reform*' and a copy of the Third Edition itself. The Text considers many of the reform issues in detail, with reference to case law up to the date of publication in 2017.

Reasons for Reform

- 5 At the time of the introduction of the Act in New South Wales on 1 January 2006, it was contemplated there was a need for ongoing review and reform of the Act which was scheduled to take place 5 years after the Act commenced. Unfortunately, that review was not completed in 2011 when certain deficiencies were apparent and could have been corrected. There is now a greater sense of urgency to reform those particular deficiencies and to modernise the Act.
- 6 The Discussion Paper raises some technical refinements that might be made to the Act, given the deficiencies and ambiguities identified through the operation of the Act in practice.

- 7 These refinements include clarification to the Provisions relating to Offers to Make Amends (Questions 4-6), Contextual Truth (Question 9), the Defence of Honest Opinion (Questions 12-13) and Multiple Proceedings and Consolidation (Question 17).
- 8 There are also improvements that could be made to the Act, consistent with what is described by some as '*international best practice*', by adopting provisions from the Defamation Act 2013 (UK) ('**UK Defamation Act**'). In accepting such improvements, it follows that other provisions and practices applicable in the UK may need to be incorporated in Australia to ensure the balance in the UK between freedom of speech and protection of reputation is equally struck here in pursuit of international best practice.
- 9 These improvements include suggested Provisions for the Single Publication Rule (Question 3), Defences for Publication of Public Documents and Fair Summaries (Question 10), the Serious Harm Threshold (Question 14), and the consequential consideration of the entitlement of Corporations to sue (Question 2) and flexibility of Limitation Provisions. Best practice would also suggest that the statutory right to trial by jury should be removed in favour of '*the interests of justice*' only (Questions 7-8), as applies in the UK, with the resulting procedural advantages in early determination of meaning and other matters by judge alone.
- 10 The most significant change however since the Act came into force is the enormous impact social media has had on the world of publication. Everyone on social media has become a publisher and everyone has the power through social media to disseminate news, information and comment. It is a world where free speech may truly exist. It enables the free flow of communication anytime, anywhere, by anyone. Paradoxically, that freedom is frequently abused, scandalised and manipulated for malicious purposes.
- 11 It is in this wider context that the discussion of defamation law reform needs to take place, to ensure consistency with other laws, in addition to the technical deficiencies and international improvements mooted.
- 12 These are the issues of primacy or most importance for the Act into the future. They concern the Defence of Innocent Dissemination (Question 15), the Defence of Reasonable Publication (Question 11), and nonmonetary Remedies and the Cap on Damages (Question 16).

The Questions

- 13 The Discussion Paper sets out 18 Questions for discussion.
- 14 **Question 1** is whether the Policy Objectives of the Provisions contained in Section 3 of the Act below remain valid:

'(a) to enact provisions to promote uniform laws of defamation in Australia;

- (b) *to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance;*
- (c) *to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter; and*
- (d) *to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.'*

15 I accept that the Policy Objectives articulated above remain valid. I would make two submissions about those Objectives:

(i) **Uniformity**

Jurisdictional differences between States and Territories need to be eliminated as much as possible by way of reform to achieve uniformity. The issues arising from social media are not limited to the law of defamation and are common across other areas of law which involve the question of publication. In many instances they concern Commonwealth legislation. It is, in my view, overwhelmingly important for the future regulation of communications in Australia, that these laws be consistent. The Commonwealth Government should legislate a Defamation Act consistent with the Act agreed between the States and Territories to ensure a uniform Commonwealth law applies to internet publications generally, not simply by a collection of intrastate laws agreed by provincial governments as currently exists.

(ii) **Proceedings**

There is a lack of uniformity in the approach to procedural issues between different jurisdictions. This is most pronounced in relation to the defence of justification and the Hore-Lacy '*permissible variation*'. It has also been seen in the different approach to practice and procedure adopted in the Federal Court compared with State and Territory jurisdictions. However, the one perceived advantage, if not others, of the Federal Court, is the efficiency and speed with which defamation proceedings are progressed to trial. This leads me to the submission that there should be an additional Objective incorporated in the Act namely:

- '(e) *to ensure the procedural rules applicable to defamation proceedings facilitate the just, quick and cheap determination of the real issues in the proceedings*'.

16 The remaining Questions in the Discussion Paper are grouped under the relevant parts of the Act.

The Issues of Most Importance

17 The features of social media, with anonymity and publication to whomever and wherever in the world, raise issues of intense complexity for the law and particularly the law of defamation. Both the frenzy to judge and find guilt, and the willingness to bully, threaten and abuse, challenge the rule of law itself, let alone undermine the ideals of freedom of speech.

(i) Digital Publishers and the Defence of Innocent Dissemination

In this context, the issue of most importance should be whether, and if so the extent to which, social media/digital platforms ('Digital Publishers') should be immune from action for defamation.

Only a few years ago, it might have been easy to accept that Digital Publishers, like telephone carriers, have little or no control over the information published on their platforms and should be entitled to immunity from liability for content provided by third parties.

With more knowledge of how the digital mechanisms work, with the realisation that they distribute news and information at significant advantage over traditional media outlets, and with a better understanding of the extent of personal information they collect, unwittingly volunteered by users, the reform of defamation legislation should confront the enormous power, control and oversight the Global Internet Companies wield. An immunity would entrench that power.

Question 15 raises the issue of whether the existing protections by way of the innocent dissemination defence in the Act for Digital Publishers is sufficient and would a specific '*safe harbour*' provision be beneficial and consistent with the overall Objectives of the Provisions.

In any given case, whether the Digital Publisher is an innocent disseminator is a question of fact. It would be beneficial for the discussion if further detailed investigation was conducted which examined the nature of dissemination by various means of digital publication. The Victorian Court of Appeal in *Google Inc v Truklja* [2016] VSCA333 grappled with the issue, in the absence of such evidence. Its attempt based on limited knowledge was severely criticised by the High Court in *Google Inc v Truklja* [2018] HCA25. Digital Publishers should provide the necessary information for this discussion to educate lawyers and judges so that the application of the law may be properly examined on a fully informed basis.

There was community disgust and condemnation of the live streaming of the video images of the Christchurch massacre by Digital Publishers in March 2019. The Commonwealth Government reacted to that disgust and condemnation by rushing through legislation to criminalise the

dissemination of such live footage. Leaving aside the political debate about the merits of that legislation, the issue requires much more depth of understanding and intelligent policy making. There is a logical and troubling extension of such legislation. Words can be just as powerful as images but words and images published 'live' is the very essence of social media and the internet and the freedom of speech that has existed by its operation. If control and filters are now to be imposed by governments, there are very complex questions to be addressed.

While the community may well applaud the attempt to control digital publications to stop violent images, hate speech and criminal communications, the first point to be made is that within Australia, this is a Commonwealth Government responsibility and needs to be addressed at that level, not by negotiated agreement of the States and Territories.

The second point to be made is that a number of Digital Publishers such as Google Inc, Twitter Inc and Facebook Inc are incorporated in the United States. If liability is established under defamation law against them in Australia, the judgment may not be enforceable in the United States because of the collective effect of the First Amendment of the United States Constitution, section 230 of the *Communications Decency Act 1996 (US)* and the *Speech Act 2010 (US)*. As a result, the law as it applies in Australia is different to that which applies in the United States.

Social media and the internet involve publications across laws of any number of nations and the issue will not be resolved by one or other jurisdiction legislating for the protection of its own citizens. This is an international issue which must be addressed by Treaty or Convention, possibly through the United Nations, to ensure that consistency and fairness apply through the rule of law. This has been achieved by international cooperation in such obvious areas as the law applicable to aircraft, shipping and international arbitration. Given the range of publications and laws that apply to social media and the internet, this is a matter of utmost public importance.

As the Discussion Paper notes, a number of jurisdictions have already legislated or judgments have held that internet search engines must restrict content that appears on their platforms after notice has been given. Judgments have been delivered in Australia to this effect in *Truklja v Google Inc* [2012] VSC553; and *Google Inc v Duffy* [2017] SASCFC130. This view is consistent with common sense but raises issues of complexity and practicality.

The complexity arises from the imposed responsibility on the Digital Publisher to make a decision as to whether a matter is defamatory or not and remove it if it is.

In the clearest of cases, it will be obvious that it is defamatory and the Digital Publisher should remove the defamation. The '*best practice*' of the *UK Defamation Act* section 5 provides a defence for the operator of a website to show that it was not the operator who posted the defamatory matter on the relevant website, but if the claimant can show that it was not possible for the claimant to identify the person who did post the statement, and the claimant gave the operator notice of the complaint in relation to the matter, the website operator can be held liable if it fails to respond to the notice of complaint as required.

That is not a simple question as might apply to instances of hate speech for example. It could lead to innumerable notifications being examined and decided by a body which does not have the commercial interest or the depth of legal resources to make those decisions.

Digital Publishers and, indeed, claimants, would benefit from a clear take down procedure to apply to online content as suggested in the Discussion Paper. However, consideration should be given to the introduction of an independent regulator, not a court, that might be given power to quickly and cheaply adjudicate take down requests. This may relieve the responsibility of the Digital Publisher from potential liability if it makes the wrong decision. The complainant would also know that an independent neutral body would make the decision without delay and without significant cost, particularly in those instances where the original publisher is anonymous or cannot be identified.

This regulator, I suggest, might be a Commonwealth statutory regulator, similar to the ACCC, with enforcement powers. Given the implications for freedom of speech, the framework would have to include judicial appeals from the regulator's decisions. The real benefit however would be to remove the onerous imposition of responsibility and potential liability on Digital Publishers for failure to remove defamatory content after complaint has been made.

(ii) Fake News and the Statutory Cap

Freedom of speech exercised without responsibility enables deliberately false and deceitful information to be disseminated. For this reason, and having regard to the ease and speed of dissemination in social media and the internet, the presumption of falsity in favour of claimants should remain and aggravated damages for defamatory conduct of this kind should not be capped.

I refer you to the commentary in Chapter 43 of the Text. In recent times, judges have disregarded the statutory cap when the conduct of the defendant has aggravated the plaintiff and an award of aggravated damages has been warranted. Although there has been some debate as to

whether this result was intended by the legislation when first enacted, it is a development supported by the premise that the statutory cap is a '*cut off*' rather than the top end of a range and that when the defendant's conduct is egregious for lacking bona fides, being improper or unjustifiable, there should not be any artificial limit placed on the award of damages.

I support the view that the statutory cap should not apply in such circumstances as it does not provide an '*effective and fair*' remedy to a person who has been seriously defamed by a spiteful, malicious or deceitful defendant. By the same token, it should not mean that whenever an award of aggravated damages is warranted, the amount of compensation should exceed the cap. The award is determined under the Act by a judge, not a jury, and it can be assumed that the judge will act reasonably and fairly in making such awards.

(iii) Defence of Reasonable Publication

Defamatory accusations are often published responsibly, but without sufficient evidence to prove truth. As the community is entitled to expect the truth to be published about a person's reputation, in cases of responsible but deficient evidence, should the law allow an exceptional defence for the publication on a subject of public importance in the 'interests of the public'?

This question raises two significant issues, the first being the determination of the meaning of the Matter Complained Of and the second being the protection of responsible conduct by publishers when acting in the 'interests of the public'.

In many cases it can be seen that the contest about meaning is between an imputation that the plaintiff is guilty (contended by the plaintiff) and an imputation of reasonable suspicion (contended by the defendant publisher). If the guilt imputation is held to be conveyed, and in the absence of a defence of truth, the defendant publisher usually has poor prospects of establishing that the conduct was reasonable to publish. It is common sense that if the publisher only intends to suggest that the plaintiff is reasonably suspected of defamatory conduct, and the publisher cannot prove that the plaintiff is guilty of that conduct, then it will not be reasonable to publish matter which conveys the imputation that the plaintiff is guilty.

However, a different approach, and fairer approach, might be to say that if the subject matter is in the interests of the public to be published, and the defendant publisher acts with care in formulating a reasonable belief in the truth of the defamatory allegations against the plaintiff, that even though the matter conveys the imputation that the plaintiff is guilty of the conduct alleged, the law will provide an exceptional defence to protect

the reasonable belief of the defendant publisher in having proceeded to publish. A reasonable belief in the truth would imply that reasonable checks have been made prior to publication.

The defence must be an exceptional one, however, because of community expectation that publishers should only seek to publish the truth, not flawed or careless subjective interpretations of the truth.

The law has attempted to define reasonableness in this context, under section 30 of the Act, section 4 of the *UK Defamation Act*, the *Reynolds Defence*, the *Lange Defence* and the New Zealand *Durie Defence*. These defences may be compared as set out below:

Defamation Act 2005 s 30(3)	Defamation Act 2013 (UK) s 4	<i>Lange v Australian Broadcasting Corporation [1997] HCA 25</i>	<i>Reynolds v Times Newspapers Ltd [2001] 2AC 127</i>	<i>Durie v Gardiner [2018] NZCA 278</i>
(a) the extent to which the matter published is of public interest;	statement complained of was, or formed part of, a statement on a matter of public interest (s 4(1)(a)); the defendant reasonably believed that publishing the statement complained of was in the public interest (s 4(1)(b))		the nature of the information, and the extent to which the subject matter is a matter of public concern	the degree of public importance [67](b)
(b) the extent to which the matter published relates to the performance of the public functions or activities of the person;				
(c) the seriousness of any defamatory imputation carried by the matter published;			the seriousness of the allegation	the seriousness of the allegation [67](a)
(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts;			the status of the information	
(e) whether it was in the public interest in the circumstances for the matter published to			the urgency of the matter	the urgency of the matter [67](c)

	Defamation Act 2005 s 30(3)	Defamation Act 2013 (UK) s 4	<i>Lange v Australian Broadcasting Corporation [1997] HCA 25</i>	<i>Reynolds v Times Newspapers Ltd [2001] 2AC 127</i>	<i>Durie v Gardiner [2018] NZCA 278</i>
	be published expeditiously;				
(f)	the nature of the business environment in which the defendant operates;	the court must make such allowance for editorial judgment as it considers appropriate (s 4(4))			
(g)	the sources of the information in the matter published and the integrity of those sources;		the defendant had reasonable grounds for believing the defamatory imputation was true; the defendant did not believe the imputation to be untrue	the source of the information	the reliability of any source [67](d)
(h)	whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person;	the court must disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by the statement – where the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party (s 4(3))	the defendant sought a response from the person defamed and published the response unless impracticable or unnecessary	whether comment was sought from the plaintiff and whether the article contained the gist of the plaintiff's side of the story	whether comment was sought from the plaintiff and accurately reported [67](e)
(i)	any other steps taken to verify the information in the matter published;		the defendant took proper steps to verify the accuracy of the material	the steps taken to verify the information	
(j)	any other circumstances that the court considers relevant.	the court must have regard to all the circumstances of the case (s 4(2))		the tone of the article, the circumstances of the publication, including the timing	the tone of the publication [67](f), and the inclusion of defamatory statements not necessary to community on the matter of public interest [67](g)

In my view, the central element of such a defence is that the belief in the truth of the imputation is 'reasonable'. In order for it to be reasonable, it

is a necessary premise that the defendant honestly believes the imputation is true.

The reasonableness of that belief must then be tested by an objective consideration of the facts which may, not will, provide the defendant with the benefit of this exceptional defence. Such exceptional protections are provided to barristers and surgeons in the course of their professional work. I see a similar protection, as necessary, for professional journalists who carry out skilful and sometimes dangerous investigative work to reveal the truth about matters of public importance and hold power to account even though they may lack all of the evidence to prove guilt to the standard of proof required.

It is in the public interest in these times of manipulation of the news and reputations by use of social media and the internet, that a professional journalist can report with a margin of error, but with due care having regard to the fragile nature of reputation and the risk that reputations can be easily destroyed.

(iv) Privacy and Data Protection

The community is also entitled to expect that private information about a person is not published or misused to that person's detriment. The law should provide a meaningful restraint particularly on private information which can be so easily distributed by social media.

At the time of the introduction of the Act, it was anticipated, at least in New South Wales, that by the removal of the public interest element from the defence of truth, which had previously applied in New South Wales for over 150 years, there would be statutory reform to create a cause of action for '*serious invasion of privacy*'.

Since then the Australian Law Reform Commission has published a Report making recommendations for a statutory cause of action of this nature but there has been no legislative implementation of the recommendations. This issue is particularly pressing in view of the misuse of private information on social media and the internet and having regard to international best practice in other jurisdictions to protect it, such as the European Union General Data Protection Regulation. The cause of action for serious invasion of privacy should be progressed in accordance with international best practice at the same time as the defamation law reform process.

(v) Nonmonetary Remedies

Apologies and corrections are already part and parcel of the dispute resolution mechanisms in the Act, yet much of the antagonism in disputes

is the monetary value of the claimed defamation. There should be a speedy nonmonetary remedy that can be established, particularly for trivial cases, thereby displacing damages as the remedy up to a minimum monetary threshold, similar to personal injuries thresholds at a minimum percentage of the statutory cap (see below). This would be greatly assisted by a clear take down procedure with regulation by a government authority.

The 28 day period provided for an offer of amends is too long in an online world where the intensity of the harm can be magnified by dissemination on social media and the internet, instantly and globally from the date of publication. 7 to 14 days would be a more realistic and fairer time response period.

(vi) **Serious harm threshold**

It is suggested that section 1(1) of the *UK Defamation Act* which establishes a serious harm threshold for a plaintiff should be introduced into Australia.

The test of what amounts to '*serious harm*' is not simple or straightforward. There is a question as to whether the extent of harm can be determined before all relevant evidence available at trial, and just by reference to the imputations pleaded by the plaintiff: *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334.

The extent of publication possible on social media and the internet and the expansive network of the grapevine effect would tend, in the absence of evidence, to make the threshold of '*serious harm*' impractical to apply in practice prior to the trial.

I suggest there should be a minimum percentage threshold based on the statutory cap to deal with trivial claims.

For example, if the minimum monetary threshold was imposed at 10% of the current statutory cap, any award less than \$40,000 would entitle the court to refuse to award damages and costs. The effect of such a threshold is the self-inhibiting effect upon plaintiffs not to bring proceedings in the event that they might fall below the threshold with the risk that not only would the plaintiff recover nothing by way of damages and costs but may be liable for the defendant's costs.

If such a threshold were introduced, the defence of triviality would no longer serve a useful purpose.

Having introduced a minimum percentage threshold, it would be desirable to introduce a clear take down procedure to contain and minimise continuing harm which might otherwise increase damage beyond the threshold.

This would provide a nonmonetary and proportionate remedy in those costly cases currently swamping the courts over social media posts to a small number of recipients.

(vii) Meaning and Imputations

It is a long established rule that the meaning of the publication is to be understood based on the ordinary reasonable person's general impression, not by applying a lawyer's interpretation, which is logical, precise and analytical. It comes as a surprise to litigants when this rule is turned on its head by the 'imputations' in the pleadings, skilfully crafted by specialist lawyers, asserting the meaning. Pleading 'imputations', as a matter of practice and procedure, must be logical, precise and analytical. They are a lawyer's construct of language, not the general impression readers receive. They were introduced for case management purposes, particularly to enable a defendant to know the case it was to meet, and the case/defence it had to prove where the onus was upon the defendant to prove an affirmative defence such as truth or comment. This process needs to be changed to make defamation law as simple, speedy and affordable as possible in accordance with the proposed new Policy Objective (e) above.

I have addressed the issue in detail in Chapter 43 of the Text and raised the desirability of early determination of the meaning, particularly having regard to the defence of truth (Chapter 19.8 of the Text) and the cost of access to justice.

(viii) The Cause of Action

The cause of action is based on publication of the 'matter' complained of (section 8 of the Act). The defences are (mostly) based on the imputations conveyed.

The affirmative defences are pleaded by way of confession and avoidance. However, the procedural law has allowed defendants the opportunity to 'confess' in the alternative, so that they might deny the imputations as pleaded were conveyed by the matter complained of and at the same time plead in the alternative that if some or all of the imputations were conveyed, they may avoid liability under one or other of the affirmative defences of truth, honest opinion, qualified privilege or other defence.

Pursuant to the proposed Policy Objective (e), this practice should be removed to avoid cost and delay but in fairness to defendants, the determination of the meaning of the matter complained of could be made

at an early hearing as now applies with speed and cost effectiveness in the UK.

18 International Best Practice

(a) Single publication rule - Limitation period

The '*single publication rule*' under consideration is the provision in Section 8 of the *UK Defamation Act*. This position is closely connected to the limitation period where the one year limitation period commences on the date of first publication by a given publisher. Any cause of action for subsequent publications by that publisher is treated as having accrued on the date of the first publication unless the subsequent publication is materially different.

By comparison, it is not the 'single publication rule' considered by the High Court in *Dow Jones & Company Inc v Gutnick* [2002] HCA56 which concerned the place of publication and the place of damage to reputation from publication. Instead the issue for discussion concerns the retention of material online for an unlimited amount of time whereby the publisher would potentially face an ongoing potential liability regardless of the limitation period.

As it currently applies, the strict time limit of 12 months for the commencement of defamation action from the date of publication has worked unfairly for plaintiffs where extensions of time of up to three years are rare because of the wording of the relevant sections of the *Limitation Act*.

In most cases, the critical questions are when did the plaintiff become aware of the defamatory publication and what did the plaintiff do about it during the one year. While on the one hand it can be accepted that it is artificial and too onerous to allow the limitation period to remain running while ever the matter remains online, it is also artificial and unjust to restrict the cause of action to a 12 month period when the harm or extent of harm may not be suffered until after that time period has passed.

The preferable course is to amend the wording of the *Limitation Act* to provide the court a discretion to extend time '*where it may be just and reasonable to do so*' or '*in the interests of justice*' rather than the current wording that '*that it was not reasonable in the circumstances for the plaintiff to have commenced the action within one year from the date of the publication*'.

(b) Defences for publication of public documents and fair summaries

At times, scientists and academics are sued over publications critical of others in the course of debate. Although arguably such publications would be protected under other defences contained in the Act, a provision similar to

section 6 of the *UK Defamation Act* would provide clearer protection to such publications. Similarly, reportage of fair and accurate statements of proceedings at a press conference on a discussion of a matter of public interest, may be better protected as provided in section 7 of the *UK Defamation Act* expressly as a matter of qualified privilege.

(c) Juries

Juries in defamation proceedings are seen by many as the touchstone of the community, best equipped to reasonably interpret the natural and ordinary meaning of matters published and apply community standards by which the defamation and defences may be determined. However, juries are not uniformly used across the jurisdictions of Australia and to the extent that they are used, they are a rarity and an anachronism in the justice system, virtually the only civil proceeding in which they are still used. Consumer protection cases for example, where one would think the touchstone of the community was otherwise necessary involving a determination of misrepresentations to the public, do not involve juries but are determined by judges. The general rule should be that juries not be used in defamation cases, unless the court determines it is in the interests of justice to do so in any particular case.

(d) Corporations

If a minimum threshold were introduced, such as the serious harm test or the minimum percentage statutory cap, the restriction on corporations being able to sue should be removed as a matter of fairness. However, a corporation would need to establish the relevant harm in its pocket, namely economic loss. This would be similar to the definition of serious harm for corporations contained in section 1(2) of the *UK Defamation Act* where corporate plaintiffs must show actual or likely serious financial economic loss. The Act could be amended to make it clear that the only relevant harm suffered by a corporation is financial loss, that it is not entitled to general damages for non-economic loss and that if a minimum threshold was introduced, the corporation would need to establish economic loss above that threshold.

19 Technical Refinements

- (a) Offers to Make Amends
- (b) Contextual Truth
- (c) Defence of Honest Opinion
- (d) Multiple Proceedings and Consolidation

The individual technical refinements identified above are dealt with in Chapter 43 of the Text. I consider these are drafting matters or refinements to be made to the Act.

20 General Principles (Part 2 of the Act)

- (a) (Question 2) - Corporations - should the Act be amended to broaden or to narrow the right of corporations to sue for defamation? ***Yes, amended to broaden the right particularly if a serious harm or minimum percentage threshold is introduced.***
- (b) (Question 3) - The 'Single Publication' rule - should the Act be amended to include a 'single publication rule', ***Yes*** and if so,
 - (i) should the time limit that operates in relation to the first publication of the matter be the same as the limitation period for all defamation claims; ***Yes but the limitation period must be capable of being extended at the discretion of the court in the interests of justice, and requires consequential amendment to the Limitation Act.***
 - (ii) should the rule apply to online publications only; ***No.***
 - (iii) should the rule operate only in relation to the same publisher, similar to Section 8 (Single Publication Rule) of the Defamation Act 2013 (UK)? ***Yes.***

21 Resolution of Civil Disputes Without Litigation (Part 3 of the Act)

- (a) (Question 4) - Offers to Make Amends -
 - (i) should the Act be amended to clarify how sections 14 (when offers to make amends may be made) and 18 (effect of failure to accept reasonable offer to make amends) interact, and particularly, how the requirement that an offer be made 'as soon as practicable' under Section 18 should be applied? ***Yes - see submission that in the context of digital publication, the 28 day period to make an offer is too long and that 7 or at most 14 days would be fairer.***
 - (ii) should the Act be amended to clarify Section 18(1)(b) and how long an offer of amends remains open in order for it to be relied upon as a defence, and if so, how? ***Yes.***
 - (iii) should the Act be amended to clarify that the withdrawal of an offer to make amends by the offeror is not the only way to terminate an offer to make amends, that it may also be terminated by being rejected by the plaintiff, either expressly or impliedly (for example, by making a

counter offer or commencing proceedings), and that this does not deny a defendant a defence under Section 18? **Yes.**

- (b) (Question 5) - should a jury be required to return a verdict on all other matters before determining whether an offer to make amends defence is established, having regard to issues of fairness and trial efficiency? **Yes.**
- (c) (Question 6) - should amendments be made to the offer to make amends provisions in the Act to:
 - (iv) Require that a Concerns Notice specify where the matter in question was published; **Yes.**
 - (v) Clarify that Section 15(1)(d) (an offer to make amends must include an offer to publish a reasonable correction), does not require an apology; **Yes.**
 - (vi) Provide for indemnity costs to be awarded in a defendant's favour where the plaintiff has issued proceedings before the expiration of any period of time in which an offer to make amends may be made, in the event the court subsequently finds that an offer of amends made to the plaintiff after proceedings were commenced was reasonable? **Yes.**

22 Judicial Officers and Juries (Part 4, Division 1 of the Act)

- (a) (Question 7) - should section 21 (election for defamation proceedings to be tried by jury) be amended to clarify that the court may dispense with a jury on application by the opposing party, or on its own motion, where the court considers that to do so would be in the interests of justice (which may include case management considerations)? ***The provision should remove the use of juries as of right and make the use of juries only possible where the court considers it would be in the interests of justice to do so.***
- (b) (Question 8) - should the Federal Court of Australia Act 1976 (Commonwealth) be amended to provide for jury trials in the Federal Court in defamation actions unless that court dispenses with a jury for the reasons set out in Section 21(3) of the Act - (depending on the answer to Question 7) - on an application by the opposing party or on its own motion? ***No, see submission to Question 7.***

23 Defences (Part 4, Division 2 of the Act)

- (a) (Question 9) - Defence of Contextual Truth - should Section 26 of the Act (defence of contextual truth) be amended to be closer to Section 16 (defence of contextual truth) of the (now repealed) Defamation Act 1974 (NSW) to ensure the section applies as intended? **Yes.**

- (b) (Question 10) - Defences for Publication of Public Documents and Fair Summaries -
- (i) should the Act be amended to provide greater protection to peer reviewed statements published in an academic or scientific journal, and fair reports of proceedings at a press conference; **Yes.**
 - (ii) and if so, what is the preferred approach to amendments to achieve this aim - for example, should provisions similar to those in the Defamation Act 2013 (UK) be adopted? **Yes, the UK provisions.**
- (c) (Question 11) - Defence of Qualified Privilege -
- (i) should the '*reasonableness test*' in Section 30 of the Act (defence of qualified privilege for provision of certain information) be amended; **Yes, with a simpler formulation of 'reasonable belief in the truth'.**
 - (ii) should the existing threshold to establish the defence be lowered; **In substance, no.**
 - (iii) should the UK approach to the defence be adopted in Australia; **See submission above.**
 - (iv) should the defence clarify, in proceedings where a jury has been empanelled, what if any aspects of the defence of statutory qualified privilege are to be determined by the jury? **Yes, if juries continue to be used.**
- (d) (Question 12/Question 13) - Defence of Honest Opinion -
- (i) should the defence be amended in relation to contextual material relating to the proper basis of the opinion, in particular to better articulate if and how that defence applies to digital publications; **Yes.**
 - (ii) should Section 31(4) of the Act (employer's defence of honest opinion) be amended to reduce potential for journalist employees to be sued personally or jointly with their employers; **Yes.**
- (e) (Question 14) - Defence of Triviality -
- (i) should a '*serious harm*' or other threshold be introduced into the Act, similar to Section 1 (serious harm) of the Defamation Act 2013 (UK); **Yes.**
- and if so,

- (ii) should proportionality and other case management considerations be incorporated into the serious harm test; **No, there is a need for an objective test.**
 - (iii) should the defence of triviality be retained or abolished, if a serious harm test is introduced? **Abolished.**
- (f) (Question 15) - Defence of Innocent Dissemination -
- (i) should the innocent dissemination defence in Section 32 be amended to better reflect the operation of Internet Service Providers, Internet Content Hosts, social media, search engines, and other digital content aggregators as publishers; **Yes.**
 - (ii) Are existing protections for Digital Publishers sufficient; **Yes.**
 - (iii) Would a sufficient 'safe harbour' provision be beneficial and consistent with the overall objects of the Act; **No.**
 - (iv) Are clear 'takedown' procedures for Digital Publishers necessary and if so, how should any such provisions be expressed? **Yes.**

24 Remedies (Part 4, Division 3 of the Act)

- (a) (Question 16) - Cap on Damages -
- (i) should Section 35 be amended to clarify whether it fixes the top end of a range of damages that may be awarded or whether it operates as a cut-off; **Yes, cut off.**
 - (ii) Should Section 35(2) be amended to clarify whether or not the cap for non-economic damages is applicable once the court is satisfied that aggravated damages are appropriate? **Yes, but to confirm that the cap is not applicable once the court is satisfied that aggravated damages are appropriate.**
- (b) (Question 17) - Multiple proceedings and consolidation -
- (i) should the interaction between Sections 35 (damages for non-economic loss limited) and 23 (leave required for further proceedings in relation to publication of the same defamatory matter) of the Act be clarified; **Yes.**
 - (ii) is further legislative guidance required on the circumstances in which the consolidation of separate defamation proceedings will or will not be appropriate; **Yes.**

- (iii) should the statutory cap on damages contained in Section 35 of the Act apply to each cause of action rather than each '*defamation proceedings*'? **Yes.**

25 The final question (**Question 18**) is a catch all - are there any other issues relating to the defamation law that should be considered? ***See the Issues of Most Importance set out above.***

Yours sincerely



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Kennedys

Enclosure

CHAPTER 43

REFORM

REVIEW OF THE ACT 43.1

UNIFORMITY 43.2

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ALTERNATIVE DISPUTE RESOLUTION 43.5

REVIEW OF THE ACT

43.1 Under s 49 of the Defamation Act 2005, the Minister in New South Wales was required to review the operation of the Act after five years from the date of assent of the Act. This provision is exclusive to New South Wales. The date of assent was 26 October 2005. A report on the outcome of the review was to be tabled in Parliament within 12 months after the end of the period of five years. No report was tabled in 2011, if such a review was carried out.

The Act has been in operation for over 10 years now and that time has given more scope to review the Act's benefits, limitations and deficiencies. The provisions of the Act are finely balanced and the effect of any change needs to be carefully measured in any review of the Act. A change to increase freedom of speech might decrease protection of reputation, and vice versa. The Act strikes a balance between these competing interests.

UNIFORMITY

43.2 A review of the Act should necessarily start with the objects of the Act set out in s 3. The utility of the New South Wales review would depend upon whether any recommended changes to the Act would be agreed uniformly across the other states and territories. If not, a change might separate New South Wales from other jurisdictions and defeat one of the major objects of the Act in s 3(a) of uniformity.

Meaning

One of the most important procedural matters in defamation proceedings is the pleading of the meaning (the imputations) of the matter complained of. The practice of pleading the natural and ordinary meaning of the defamatory matter should be considered in a review to ensure uniformity and simplicity. The procedural rules of different jurisdictions in Australia have caused a lack of uniformity in the pleading of imputations, and defences to those imputations, particularly arising from the court rules and practices in New South Wales compared with other states and territories (see **19.8**).

It is proposed in **19.8** that the meaning of the matter complained of should be determined in the proceedings as soon as possible after commencement, desirably after the close of pleadings, to ensure that the trial itself is conducted on a fair basis to both plaintiff and defendant, having regard to the objects of the Act.

Juries

Juries are not used in every jurisdiction in Australia for defamation trials (see **Chapter 17**). The difference permits a degree of forum shopping and a lack of uniformity.

It is proposed in **19.8** that in New South Wales (and elsewhere where applicable in Australia) juries should not be used in defamation proceedings except with the leave of the court and only then be ordered in exceptional cases.

There have been concerns expressed about the substantial costs of defamation proceedings and the delays that occur from the use of juries. The Chief Judge at Common Law in the Supreme Court of New South Wales observed that the length of trial is three times greater in a jury trial compared to judge alone, with the substantial increase in costs that follow.¹

In contrast, juries are often said to be the ‘touchstone of the community’, particularly on the issues of the meaning of the matter complained of, whether it is defamatory and whether it is true. Yet the jury does not determine damages.

For reasons of uniformity, cost and the complexity of defamation law, it would be desirable and proportionate to change the process in New South Wales and the other relevant jurisdictions (Queensland, Victoria, Tasmania), from the right to selection of juries by the parties, to selection only by order of the court. The judge would exercise the discretion, having particular regard to the public importance of the matter published, or the need in the particular case for judgment by the claimant’s peers. This is the position adopted in the United Kingdom under s 11 of the Defamation Act 2013 (UK) where a trial for defamation is to be held without a jury unless the court orders otherwise.

Privacy

It is relevant to the review under s 49 of the Act that the removal of the public interest element from the defence of truth (which at least in New South Wales had been a

¹. Hon Justice P McClellan, ‘Eloquence and Reason — are juries appropriate for defamation trials?’ 4 November 2009, Sydney, pp 18–19.

necessary element of the defence for over 150 years) has prompted recommendations for statutory reform to create a cause of action of 'serious invasion of privacy', so far without success (see **Chapter 14**). If the initiative is not taken by the Commonwealth Parliament, as recommended by the Australian Law Reform Commission, it can be expected that the courts will develop the principles at common law by patchwork, across jurisdictions, and without uniformity or certainty.

Access to justice

The most pressing and perennial issue for review is the cost and delay of defamation proceedings. As injunctions are rarely granted in defamation cases to stop publication, a plaintiff has a primary interest in restoring his or her reputation as quickly as possible after publication, and being compensated for the damage caused. Likewise, a defendant has a primary interest in defending the publication as quickly as possible against unmeritorious plaintiffs who bring proceedings in order to silence or inhibit the defendant from publishing further.

Except in the clearest of cases, an action will not be stayed or dismissed as an abuse of process on the grounds that the resources of the court and the costs of the parties that will have to be expended to determine the claim are out of all proportion to the interest at stake.²

For these reasons, it is desirable to establish a specialist tribunal to deal with defamation cases (and media-related cases such as breach of confidence) which would allow the parties to seek a relatively speedy, consistent and cost-effective determination.

The New South Wales Supreme Court and District Court have specialist case management lists for defamation cases. Specially tailored rules for the pleading of defamation claims and defences apply.³ However, this has given rise to procedural differences with other jurisdictions tending to a lack of uniformity, and some would argue multiple interlocutory applications, resulting in unnecessary complexity, delay and cost.

The Federal Court with its Australia-wide reach would be particularly appropriate for cases involving interstate media publications and internet publications generally. The Commonwealth Government might consider the introduction of a Commonwealth Defamation Act, consistent in terms with the uniform legislation of the states and territories, and the conferral of jurisdiction on the Federal Court, with a specialist division, over interstate and internet publications in defamation cases for the same reason.

². *Bleyer v Google Inc* [2014] NSWSC 897; *Ghosh v Nine MSN Pty Ltd* [2015] NSWCA 334 at [44]; *Watney v Kencian* [2017] QCA 116.

³. See **Appendices III and IV**.

DEFENCES

43.3 The second object of the Act under s 3(b) is to ensure that the law of defamation does not place unreasonable limits on freedom of expression and on the publication and discussion of matters of public interest and importance.

Truth

The Act provides that only one cause of action arises from the publication of defamatory matter regardless of the number of defamatory imputations pleaded. The defence of truth will therefore fail if any one of the defamatory imputations cannot be proved to be true notwithstanding that the remainder may be true (see **Chapter 19**).

A true imputation of which the plaintiff complains, where there are a number of untrue imputations of which the plaintiff complains, can only be relied upon by the defendant in mitigation of damages (see **Chapter 20**).

This highlights the importance of the procedural rules relating to the pleading of the imputations of the matter complained of, not only for the purposes of uniformity, but also in fairness to a defendant. The issue is whether the meaning of the matter complained of should be restricted to those imputations of which the plaintiff complains, or be open to any imputation which the court determines the matter complained of conveys. As a matter of practice, the determination of the imputations conveyed does not take place until the trial.

It is proposed in **19.8** that the imputations of the matter complained of should be determined for the purposes of the proceedings as soon as possible after commencement, desirably after the close of pleadings. The determination would be binding on the parties and would be made regardless of whether complaint had been made by the plaintiff of the imputations found to be conveyed.

Contextual truth

Where the imputations are restricted to those of which the plaintiff complains, there may be other contextual imputations conveyed in the matter complained of. For this reason, the contextual truth defence is important to provide some protection to defendants.

There are concerns about the wording of the defence in s 26 of the Act. The main issues are, first, whether a defendant should be able to 'plead back' contextual imputations, from amongst the imputations complained of by the plaintiff, where those imputations are true, and, second, whether the plaintiff should be able to 'adopt' contextual imputations from the defence, by reason of which the defendant can no longer rely upon those imputations in support of the contextual truth defence. Section 26 could be amended so that the defendant may rely upon any imputation regardless of whether it is pleaded by the plaintiff.

Statutory qualified privilege

There are concerns about the operation of the statutory qualified privilege defence under s 30 of the Act because of the complexity of the circumstances in which a publication may be judged, in the 'clear light of hindsight', to be reasonable or not (see **Chapter 25**). It may appear to require a standard of perfection. These concerns may ease over time with determinations that find in favour of reasonable journalistic practice, which could usefully be put forward by way of expert evidence based on the circumstances of the publication.⁴

It may also be appropriate to consider whether a separate statutory defence could be developed to relax the strictness of liability if it can be shown that the defendant did not intend to convey the defamatory imputations and published them without negligence. Section 30 of the Act would govern those cases where the defamatory imputation was intended.⁵

Honest opinion

There are also concerns about the wording of s 31(4)(b) of the Act which has led to the joinder of employees by plaintiffs for more abundant caution.⁶ Journalists are joined as a necessary party to proceedings so as to defeat the defence under s 31(4)(b) (see **28.1**). The relevant opinion is held by the employee journalist but it is the belief of the employer (that the employee honestly held the opinion) which must be shown not to have been held in order to defeat the defence. The employee is joined to ensure his or her liability if the opinion was not held, compared with the obscure test in s 31(4)(b).

Innocent dissemination

The continual advance in technology, particularly with respect to the internet and social media, has caused concerns about the liability of 'innocent' participants to a publication. Section 32(3) of the Act requires ongoing review to ensure that persons who may be considered innocent disseminators are protected by the legislation (see **29.2**). The variety of participation in a publication on the internet has made this a controversial debate, particularly when the means of publication are not well understood, and internet providers are displacing the press and traditional media in disseminating news.

Triviality

There are concerns that the statutory defence available under s 33 of the Act, where the circumstances of the publication are such that the plaintiff is unlikely to suffer harm, should be part of the matters to be proved in the cause of action and not the defence (see **Chapter 30**). Under s 1 of the Defamation Act 2013 (UK), a plaintiff is required to show that the publication of the matter complained of has caused or is likely to cause serious harm to the

⁴. See *Rogers v Nationwide News Pty Ltd* [2003] HCA 52 at [31].

⁵. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 574.

⁶. *Rodgers v Nine Network Australia Pty Ltd* [2008] NSWDC 275 at [3]; *Creighton v Nationwide News Pty Ltd* [2010] NSWDC 192 at [94].

plaintiff's reputation. In this way, the onus is on the plaintiff to prove 'serious harm' which would make the statutory defence of triviality otiose. While there may be merit in considering the introduction of this threshold, it may need to be balanced by the removal of the cap on damages so that a plaintiff can be awarded substantial damages unrestricted by a cap for serious harm so caused.

REMEDIES

43.4 The third object of the Act under s 3(c) is to ensure that effective and fair remedies are provided for claimants whose reputations are harmed by the publication of defamatory matter.

Cap on damages

The statutory cap on damages does not provide an 'effective and fair' remedy to a person who has been seriously defamed. The cap devalues the right to compensation 'at large' without restriction.

The perceived need for the cap arose out of excessive or inconsistent jury awards of damages. This need was satisfied, however, by the fact that judges are exclusively entrusted with the role of assessing damages, even in those jurisdictions where juries are used.

Another basis for imposing the cap was the perceived need for awards in defamation cases to be comparable with personal injury awards for which a statutory cap applied. However, the maximum amount imposed by the cap in defamation cases, at \$389,500 (in 2017), is significantly below the amount of the cap in personal injury cases, approximately \$605,000 (increase pending in 2017). The comparison is misconceived. An intentional act with malice calculated to cause damage cannot fairly be compared with a negligent act accidentally causing damage.⁷

The amount of damages within the statutory cap is usually eroded in any event by the significant costs incurred in bringing proceedings. This highlights the issue referred to above of the cost of access to justice in defamation cases.

At the least, a review would be appropriate for cases involving multiple publications of the same matter, where the claims must be brought against the same defendant in the same proceedings (see **Chapter 33**). The issue is whether the cap should continue to apply to all publications or causes of action 'in defamation proceedings', or more fairly, apply separately to each of the causes of action in the proceedings.

Limitation periods

The strict time limit of 12 months for the commencement of a defamation action from the date of publication can work unfairly to plaintiffs particularly where extensions of

⁷. *Rogers v Nationwide News Pty Ltd* [2003] HCA 52 at [189]; *The Gleaner Co Ltd v Abrahams* [2004] 1 AC 628 at [55].

time of up to three years are rare because of the wording of the relevant sections of the Limitation Act in each jurisdiction (see 18.6). For example, the negligence of the plaintiff's lawyers in failing to commence proceedings within time will not be sufficient to satisfy the test required for an extension of time.⁸ This is essentially unfair and unjust.

The wording for the discretion to extend time, presently 'if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced the action within 1 year from the date of the publication', should be changed to 'where it may be just and reasonable to do so'.

The quid pro quo to balance such flexibility might be the introduction of the single publication rule as provided in s 8 of the Defamation Act 2013 (UK). Under that section time accrues on the date of first publication of a statement to the public and any subsequent publication which is substantially the same (and not materially different) is to be treated as having accrued on the date of the first publication.

Corporations

The cause of action for defamation is arbitrarily limited to small corporations of less than 10 employees under s 9 of the Act. No such limit is applied in the United Kingdom. This amounts to an unfair restriction on the rights of corporations which suffer substantial financial loss from the publication of defamatory matter. A fairer position would be achieved by restricting a corporation's cause of action to special damages only, being the financial loss the corporation can prove was caused by the publication.

ALTERNATIVE DISPUTE RESOLUTION

43.5 The fourth object of the Act under s 3(d) is to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter. This seems to be working reasonably well in practice, either through the commonly accepted procedure of mediation or growing acceptance that the offer of amends procedure in Div 2 of the Act promotes that outcome.

A defence may be established if a reasonable offer is refused by a claimant, provided the defendant otherwise complies with the procedures set out in Div 2.

At the end of the trial, s 40 of the Act enables the court to examine the conduct of the parties in the proceedings and the reasonableness of any settlement offers for the purpose of orders for costs.

⁸. *Van Garderen v Channel Seven Melbourne Pty Ltd* [2016] VCC 953 at [85]–[89]; *Otto v Gold Coast Publications Pty Ltd* [2017] NSWDC 101 at [56].