



THE UNIVERSITY OF  
**SYDNEY**

Mr Paul McKnight  
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30 April 2019

Dear Mr McKnight,

**Review of Model Defamation Provisions**

I refer to your letter, dated 28 February 2019, inviting me to make a submission to the Defamation Working Party's Review of the Model Defamation Provisions. Please find attached my submission. I have answered the questions about which I had a detailed and considered view. I would be happy to discuss further with you anything arising from my submission.

Yours faithfully,

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## Question 2.

The question as posed asks whether the Model Defamation provisions should be amended to broaden or narrow the right of corporations to sue for defamation. Rather than the binary choice of broadening or narrowing, there is another position to adopt in relation to the issue: the existing provisions could, and should, be refined. I support the restriction on corporations being able to sue for defamation, though not necessarily for the reasons advanced in the Discussion Paper, but think that the existing form of the restriction is problematic in a number of respects and should be revisited.

The Discussion Paper records that the purpose of the restriction on the right of corporations is to limit the ability of large, for-profit corporations to have recourse to defamation law to protect their reputations. It is not directed at the ability of small and medium-sized corporations to use defamation law to protect their reputations. The legislative policy underpinning the Model Defamation Provision seems to be largely pragmatic, with some principled backing: there is a concern that corporations may seek to use defamation law to ‘chill’ speech but there is an implicit recognition that not all corporations are the same; that, for small and medium-sized corporations, their reputations may be more readily identified with the personal and professional reputations of their corporators than is the case with large, for-profit corporations; and that small and medium-sized corporations may not have the resources to pursue other legal and non-legal means of protecting their reputations.

It is appropriate that the right of large, for-profit corporations to sue for defamation should be restricted so as not to permit them to ‘chill’ or inhibit, whilst preserving the right of small and medium-sized corporations to protect their reputations by recourse to defamation law. The question becomes whether the means selected in the legislative provision is the most appropriate one to achieve this legislative policy.

As I have previously argued:

‘It is always open to the legislature to curtail or to abrogate common law rights, such as the right of corporations to sue for defamation. Defamation law does not protect all reputations or all aspects of reputation. Merely because an entity has a reputation does not mean that defamation law must intervene to protect it. Corporations are artificial entities and, whilst they enjoy many of the rights natural persons do, they do not enjoy all of them. For instance, they do not enjoy a privilege against self-incrimination, a privilege against exposure to penalties or a right to privacy. Reasonable minds may differ over the policy to restrict significantly the right of corporations to sue for defamation. What is clear, though, is that the restriction, as legislated, is problematic and warrants review and reform. The criticism that the restriction operates arbitrarily, having selected the figure of 10 employees as the “bright line”, remains valid.’<sup>1</sup>

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<sup>1</sup> David Rolph, *Defamation Law*, 1<sup>st</sup> ed., Thomson Reuters, Pyrmont, 2016, [5.110] (footnotes omitted). See also David Rolph, ‘Corporations’ Right to Sue for Defamation: An Australian Perspective’ (2011) 22 *Entertainment Law Review* 195, 196.

It may be that the figure of ten employees is too low, in light of these statistics.<sup>2</sup> More fundamentally, however, using the number of employees as the measure for whether a for-profit corporation should be able to sue for defamation or not is arbitrary. Other means of distinguishing between large corporations, on the one hand, and small and medium-sized corporations, on the other hand, might be considered, such as annual turnover, profits or total asset size. These may also be arbitrary but may be a less crude means of drawing the distinction sought to be made than the number of employees.

It should be noted that the three-year law reform process which led to the enactment of the *Defamation Act 2013* (UK) considered, but rejected, the Australian approach to the right of corporations to sue for defamation.<sup>3</sup> Instead, the approach ultimately favoured was the introduction of the requirement that a ‘body that trades for profit’ needed to prove that the harm to its reputation caused or was likely to cause ‘serious financial loss’ to it. This raises the issue of principle: Why apply the restriction to for-profit corporations but not other entities trading for profit? As a matter of principle, is there something particular about for-profit corporations which mean that the restriction should apply to it and not equally to other entities trading for profit?<sup>4</sup>

If the legislative policy of cl 9 of the Model Defamation Provisions is to ensure that large, for-profit corporations do not use defamation law to ‘chill’ or inhibit, there may have been unintended consequences to the reform which need to be addressed. One of the significant ways in which defamation law protects freedom of speech is in its strong disposition against the grant of an interlocutory injunction to restrain an apprehended publication.<sup>5</sup> This protection of freedom of speech may have been unintentionally undermined by the imposition of the restriction on corporations being able to sue for defamation. As I have previously argued:

‘The reform was motivated in part by a concern that large corporations could use the threat of defamation litigation to “chill” speech. Depriving corporations of a right to sue for defamation did not deprive them of all legal means to protect their reputations. Other causes of action, such as injurious falsehood or misleading or deceptive conduct, would still be available, albeit with more onerous requirements. One important feature of defamation law, however, is its restrictive approach to injunctive relief. This is not shared by these other causes of action. Compelling corporations to rely upon alternative causes of action to defamation, for which injunctive relief is more readily available, has had the unintended consequence of allowing corporations to stop speech entirely. No attention was given to this issue in the law reform process which led to the introduction of the national, uniform defamation laws. A reform designed to prevent corporations from “chilling” speech has

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<sup>2</sup> According to the Australian Bureau of Statistics, as at June 2018, 93.8% of Australian employing businesses employ fewer than 20 employees. Of this percentage, 71.5% engage between 1 and 4 employees, with the remaining 22.3% employing between 5 and 19 employees. However, only 37.6% of Australian businesses are companies, the remainder being sole proprietors, trading trusts and partnerships. See <https://www.abs.gov.au/ausstats/abs@.nsf/DetailsPage/8165.0June%202014%20to%20June%202018?OpenDocument> (accessed 29 April 2019).

<sup>3</sup> House of Commons and House of Lords, Joint Committee on Draft Defamation Bill, *First Report*, 12 October 2011, [111]-[112].

<sup>4</sup> *Jameel v Wall Street Journal Europe SprL* [2007] 1 AC 359, 398-99 (Lord Scott of Foscote); [2006] UKHL 44.

<sup>5</sup> *Bonnard v Perryman* [1891] 2 Ch 269, 284 (Lord Coleridge CJ); *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57, 67-68 (Gleeson CJ and Crennan J); [2006] HCA 46.

perversely led to a situation where they can more readily stop it entirely. Any future law reform process might usefully revisit this difficult issue of practical importance.<sup>6</sup>

### Question 3.

I support the Model Defamation Provisions being amended to introduce a ‘single publication rule’ for the purposes of overcoming the effect of potentially indefinite limitation periods, particularly for online archived material. This reform would be sensible and should be straightforward. Indeed it is overdue. The limitation period for defamation claims under the ‘single publication rule’ should be one year, with the possibility of an extension for up to three years in specified circumstances (as now occurs under the current formulation of the limitation period for defamation claims).<sup>7</sup>

It is undesirable to attempt to limit a ‘single publication rule’ to online publications for several reasons. Defamation law should aim to be as medium-neutral as possible; technology-specific rules should be avoided, where possible. There does not seem to be any principled basis for treating online publications as a special case. Online publications may make the problem of effective limitation periods for defamation acute but the problem did not originate with them and is not limited to them. The case of *Duke of Brunswick v Harmer* (1849) 117 ER 75, the foundation of the ‘multiple publication rule’, concerned the application of a limitation period to a hard copy periodical sourced from a physical archive almost two decades after its first publication. A further problem with seeking to limit a ‘single publication rule’ to online publications is that many newspapers and magazines still have hard copy and electronic versions distributed. Defamation cases have been brought where both the hard copy and the electronic versions of the matters have been sued upon.<sup>8</sup> It would be anomalous if the limitation period for a hard copy and an electronic version of the same article were different. Similarly, radio and television broadcasts can now occur live but the same content can also be captured and archived by broadcasters, to be streamed online or, in relation to radio, downloaded as a podcast, at a later time.

I would also support a ‘single publication rule’ operating only in relation to subsequent publications by the same publisher, as occurs under the *Defamation Act 2013* (UK) s 8. The purpose of the ‘single publication rule’ is to allow a publisher to control its liability for its own torts by knowing the length of time for which it will be answerable for what it published. Ordinarily, a publisher will not be liable for the torts of a third party. If, in operation, the restriction of a ‘single publication rule’ to subsequent publications by different publishers creates practical difficulties, the issue may need to be revisited.

### Question 7.

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<sup>6</sup> David Rolph, *Defamation Law*, 1<sup>st</sup> ed., Thomson Reuters, Pyrmont, 2016, [5.110] (footnotes omitted). See also David Rolph, ‘Corporations’ Right to Sue for Defamation: An Australian Perspective’ (2011) 22 *Entertainment Law Review* 195, 199-200.

<sup>7</sup> *Limitation Act 1985* (ACT) s 21B; *Limitation Act 1981* (NT) ss 12 and 44A; *Limitation Act 1969* (NSW) ss 14B and 56A; *Limitation of Actions Act 1974* (Qld) ss 10AA and 32A; *Limitation of Actions Act 1936* (SA) ss 37; *Defamation Act 2005* (Tas) s 20A; *Limitation of Actions Act 1958* (Vic) ss 5 and 23B; *Limitation Act 2005* (WA) ss 15 and 40.

<sup>8</sup> See, for example, *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33; [2015] FCA 652; *Cummings v Fairfax Digital Australia & New Zealand Pty Ltd* [2018] NSWCA 325.

I remain of the view that it is appropriate to continue to have juries involved in defamation cases. The issue of defamatory meaning is fundamentally a matter of impression,<sup>9</sup> to be assessed by reference to the standard of the ordinary, reasonable reader or listener or viewer, who is a layperson and not a lawyer.<sup>10</sup> Juries are able to reflect this standard more closely than judges and are more representative of the community than judges.<sup>11</sup> Given the interests involved in defamation – the protection of reputation and freedom of speech<sup>12</sup> – interests in which every person has a stake – ordinary people sitting on juries should continue to play a role in defamation cases.

The current position under the Model Defamation Provisions requiring a jury, where empanelled, to determine the issues of defamatory meaning and questions of fact relating to defences, maintains an appropriate level of community involvement in a defamation proceeding. I think it is appropriate that the presiding judge determine the level of damages to be awarded in the event that the plaintiff succeeds in establishing liability and the defendant fails to establish a defence. I would not support returning the task of assessing damages to the jury.

I also support the current position under the Model Defamation Provisions under which either party may elect to have a jury. I think this provisions strikes an appropriate balance – there are now many defamation cases litigated in Australian jurisdictions where juries are available which are heard and determined by a judge sitting alone. I think it is appropriate that the parties have a choice as to the mode of trial, rather than the statute prescribing it.

I do not support expanding the right of an opposing party or the court of its own motion to seek to dispense with a jury, where the other party had invoked the right to trial by jury, on the broader basis that it would be in the interests of justice to do so, particularly where those interests of justice are founded upon case management considerations. As the Discussion Paper notes, whether defamation cases should be heard by judges sitting alone or with a jury remains contentious and a matter about which reasonable minds can differ. The Model Defamation Provisions strike a pragmatic balance between the two competing positions. I would not support any change which unsettled this delicate balance.

One aspect of the law relating to the use of juries in defamation cases which remains unsettled, which is not identified in the Discussion Paper, is the division of opinion amongst intermediate appellate courts as to whether a party's election to trial by jury is irrevocable or not. In *Kencian v Watney* [2016] 2 Qd R 357; [2015] QCA 212, the Queensland Court of Appeal held that a party who elected to have a defamation case tried by a jury under the *Defamation Act 2005* (Qld) s 21(1) could unilaterally withdraw that election. The New South Wales Court of Appeal reached the opposite conclusion in *Chel v Fairfax Media Publications Pty Ltd (No 2)* (2015) 90 NSWLR 309; [2015] NSWCA 379. It is undesirable to have different approaches to this issue within Australia under what are intended to be national, uniform defamation laws. The Defamation Working Party should address this issue and cl 21 of the Model Defamation Provisions should be amended to make the position clear. My own preference would be to follow the New South Wales Court of

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<sup>9</sup> *Lewis v Daily Telegraph Ltd* [1964] AC 234, 260 (Lord Reid).

<sup>10</sup> *Ibid*, 258 (Lord Reid); *Farquhar v Bottom* [1980] 2 NSWLR 380, 386 (Hunt J).

<sup>11</sup> *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 502 (Murphy J); *Hepburn v TCN Channel Nine Pty Ltd* [1984] 1 NSWLR 386, 405 (Hunt J); *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 240 (McHugh J).

<sup>12</sup> David Rolph, *Defamation Law*, 1<sup>st</sup> ed., Thomson Reuters, Pyrmont, 2016, [1.40].

Appeal's decision in *Chel v Fairfax Media Publications Pty Ltd (No 2)* (2015) 90 NSWLR 309; [2015] NSWCA 379. I found their Honours' reasoning persuasive.

### Question 8.

I would support the amendment of the *Federal Court of Australia Act 1976* (Cth) to provide for jury trials in the Federal Court of Australia unless the court dispenses with a jury for the reasons set out in cl 21(3) of the Model Defamation Provisions. One of the stated objects of the Model Defamation Provisions is to 'enact provisions to promote uniform defamation laws in Australia'. This object remains valid. After such a long period of substantial diversity between defamation laws across Australia, anything that can be done to promote uniformity under the Model Provisions should be done. The inconsistency between the *Federal Court of Australia Act 1976* (Cth) ss 39 and 40 and the *Defamation Act 2005* (NSW) ss 21 and 22, with the Commonwealth legislation prevailing, as identified by the Full Federal Court in *Wing v Fairfax Media Publications Pty Ltd* (2017) 255 FCR 61; [2017] FCAFC 191, has the effect that a jury will rarely, if ever, be empanelled in a defamation case in the Federal Court of Australia. This position detracts from the uniformity of the Model Defamation Provisions. This would not be a significant problem, had it not become clear since the decision of the Full Federal Court in *Crosby v Kelly* (2012) 203 FCR 451; [2012] FCAFC 96 that the Federal Court of Australia has jurisdiction to hear 'pure' defamation claims, which jurisdiction is being invoked by applicants with some enthusiasm.<sup>13</sup>

Having indicated my support for an amendment to the *Federal Court of Australia Act 1976* (Cth) to introduce a right to trial by jury in defamation claims in that forum, I am aware that this is unlikely to occur. Such a reform could only occur following consultation with the Federal Court of Australia and with political will on the part of the Federal Government to amend the Federal Court's constituting legislation. Neither major political party has expressed a view on defamation law reform as part of their respective policy platforms at the 2019 Federal election. (This may be contrasted with the 2010 general election in the United Kingdom, at which the policy platforms of all three major parties included a commitment to defamation law reform – a significant reason for the success of the three-year defamation law reform process culminating in the passage of the *Defamation Act 2013* (UK).) In the absence of political will at a Federal level, this reform seems unlikely to occur.

It should be noted that South Australia, the Australian Capital Territory and the Northern Territory do not allow for the use of juries in defamation cases. The differential treatment of juries amongst Australian jurisdictions is an example of the way in which the national, uniform defamation laws, as enacted, provide for substantial, not strict, uniformity.<sup>14</sup> The disconformity of those jurisdictions with the treatment of juries under the Model Defamation Provisions may not be as significant an issue as any disconformity on the part of the Federal Court of Australia, as those jurisdictions do not have the same volume of defamation cases relative to the other Australian jurisdictions which permit the use of juries in defamation cases, such as New South Wales and Victoria, and the emerging defamation jurisdiction of the Federal Court.

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<sup>13</sup> See also the recent discussion of the jurisdiction of the Federal Court of Australia to deal with 'pure' defamation claims in *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583, [6]-[18] (Lee J).

<sup>14</sup> David Rolph, 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal* 207, 208, 226-27.

The potential use of juries in defamation cases in the Federal Court of Australia points to a broader issue which should be addressed. The Discussion Paper does not seek to grapple with the Federal Court's exercise of jurisdiction over 'pure' defamation claims and whether this necessitates any changes to substantive defamation law in Australia. At the time the national, uniform defamation laws were enacted and, indeed, even at the time submissions closed for the statutory review of the *Defamation Act 2005* (NSW), the prospect of the Federal Court exercising jurisdiction over 'pure' defamation claims in the way it has rapidly developed over the past few years was unforeseen. The Defamation Working party should give detailed consideration to the implications of the Federal Court of Australia exercising jurisdiction over 'pure' defamation claims, beyond the narrow issue of the use of juries.

### **Question 9.**

I strongly support the amendment of cl 26 of the Model Defamation Provisions to be closer to the defence of contextual truth under the *Defamation Act 1974* (NSW) s 16 (repealed). I regard this reform as urgent and overdue. The unfortunate drafting of cl 26 of the Model Defamation Provisions, precluding the practice of 'pleading back' the plaintiff's imputations as part of the defendant's contextual imputations, renders the defence of contextual truth ineffective. The practice of 'pleading back' was 'the whole purpose of the defence of contextual truth', according to Hunt J (as his Honour then was) in *Hepburn v TCN Channel Nine Pty Ltd*.<sup>15</sup> The difficulties with the drafting of this clause cannot be readily avoided by interpretation. Simpson J (as her Honour then was) in *Kermode v Fairfax Media Publications Pty Ltd* found that the practice of 'pleading back' was precluded by the terms of the *Defamation Act 2005* (NSW) s 26 and, towards the end of her judgment, recorded her conclusions:

'So strongly am I of the view:

- (i) that the construction I have adopted is not only correct, it is the only one open;
- (ii) that that result does not achieve what the Parliament had in mind; and
- (iii) that that result significantly diminishes the value of the s 26 defence;

that I propose, through the avenues available, to draw these reasons to the attention of those charged with the responsibility of statutory reform.'<sup>16</sup>

The problems arising from the drafting of the defence of contextual truth are well-known to defamation practitioners and scholars. They must be fixed.

### **Question 10.**

At the outset, I should perhaps declare a conflict of interest: as an academic who publishes in peer-reviewed academic journals, I would obviously benefit from the protection of peer-review statements published in an academic or scientific journal (not that I would abuse the privilege myself). I am not sure that the intrusion of defamation law into academic literature published in peer-reviewed journals is a significant problem in Australia. There may be isolated instances. In

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<sup>15</sup> [1984] 1 NSWLR 386, 397.

<sup>16</sup> [2010] NSWSC 852, [56].

my experience as a long-time editor of the *Sydney Law Review*, I did not encounter much content which gave me cause for concern about the risk of liability for defamation. My support for this particular reform originates in principle: I do not think that free academic inquiry should be inhibited by the threat of defamation litigation. The constraints of editorial control and peer review, as well as academics' proper professional focus on the subject-matter rather than the person discussing the subject-matter, should act as a check on defamation.

The problem of the intrusion of defamation into free academic inquiry is not limited to peer-reviewed journals. Anecdotally, I am aware that there have been instances where pre-publication threats have been made in relation to the publication of research monographs. The financial margins involved in academic book publishing are slim to non-existent, making the management of the risk of liability for defamation a difficult commercial calculation. There are also risks of liability for defamation where an academic seeks to disseminate his or her research to a broader community by participating in public debate. The dissemination of academic expertise can inform and educate the public and should be encouraged, particularly given the substantial public investment made in universities. It may be accepted that editorial control and peer review are not constraints acting upon the dissemination of academic expertise through engagement in public debate, although both may be present in the publication of academic books. (Not all academic publishers subject book manuscripts to peer review, although many do. Obviously, there is editorial control by academic publishers over the publication of books.) If the 'chilling' effect of defamation law on free academic inquiry is being considered, it is worth thinking about it holistically, rather than limiting consideration to academic journals, which is only one vehicle for academics to disseminate their research expertise. The *Defamation Act 2013* (UK) s 6 is a useful starting-point for any reform on this front but there is scope for reform beyond that.

In relation to express protection of fair reports of proceedings at a press conference for the discussion of a matter of public interest, I would not object to cl 29 of the Model Defamation Provisions being amended to include this. The provision already covers a range of report. To the extent that this new category of publication is not covered by an existing category of publication, I do not have a problem incorporating this new category.

### **Question 11.**

The issues relating to the statutory defence of qualified privilege are amongst the most complex raised by the Discussion Paper.

A significant gap in the common law of defamation was the long-held refusal by courts to recognise a broad-based defence to defamation for publication to the world at large on a matter of public interest.<sup>17</sup> Over the past two decades, appellate courts in the United Kingdom,<sup>18</sup> Canada<sup>19</sup> and, most recently, New Zealand,<sup>20</sup> have revisited the issue, engaging with the murky and complex

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<sup>17</sup> *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43, 48 (*per curiam*); *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 782 (*per curiam*); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 250 (Brennan J).

<sup>18</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

<sup>19</sup> *Grant v Torstar Corp* 2009 SCC 61; [2009] 3 SCR 640.

<sup>20</sup> *Durie v Gardiner* [2018] 3 NZLR 131; [2018] NZCA 278.



history of qualified privilege in its formative period in the nineteenth century<sup>21</sup> and revising their view. It is important to emphasise that it has been courts in these jurisdictions, not legislatures, which have first recognised the various forms of this new defence. A full explanation as to why Australian courts have not recognised a common law defence of publication on a matter of public interest, as courts in the United Kingdom, Canada and New Zealand have, is beyond the scope of this submission. It is worth pointing out that attempts to apply *Reynolds v Times Newspapers Ltd* in Australia have been repeatedly rejected.<sup>22</sup> Perhaps as a consequence of this, arguments have not been made to develop Australian defamation law along the lines of the United Kingdom, Canada and New Zealand. This has left Australia lagging behind the Commonwealth jurisdictions to which it would ordinarily compare itself. The presence of a statutory defence of qualified privilege, which, in principle, seems to cover similar territory as a defence of publication on a matter of public interest may have acted as a further disincentive to the recognition of the latter defence. Whatever the reason, it is clear that the defence of publication on a matter of public interest, in its various forms, arose in the United Kingdom, Canada and New Zealand as a result of common law development, whereas what it being contemplated in Australia is the introduction of a statutory defence. The enactment of the statutory defence of publication on a matter of public interest under the *Defamation Act 2013* (UK) s 4 was the culmination of almost fifteen years of judicial development of the common law variant. I have reservations about the efficacy of seeking to transplant a statutory defence from one jurisdiction to another, where one has shown receptivity to the defence and the other has been indifferent to it. There is a real chance that such a transplant will not take. So, although I support the development of a broad-based defence of publication on a matter of public interest, there is a live issue as to whether such a defence should originate from the courts or should be legislated into existence.

Even if a statutory defence of publication on a matter of public interest were to be legislated, there would be similar difficulties arising from it as have arisen from the statutory defence of qualified privilege in its current form. The statutory defence of qualified privilege under the Model Defamation Provisions turns upon the defendant establishing the reasonableness of its conduct in the circumstances of publication. This is an open-textured test. Similarly, the statutory defence of publication on a matter of public interest under the *Defamation Act 2013* (UK) s 4 turns upon whether the matter complained of was a statement on a matter of public interest and whether the publisher reasonably believed that publishing the statement was in the public interest. This is also an open-textured test. Concepts of reasonableness and public interest are flexible, so as to be capable of being applied to a range of circumstances. They can be applied strictly or beneficially. The experience of the predecessor provision to the current statutory defence of qualified privilege in New South Wales, the *Defamation Act 1974* (NSW) s 22 (repealed), was that it was frequently pleaded but rarely successful.<sup>23</sup> As the Discussion Paper notes, the experience under the national, uniform defamation laws is that defendants, albeit in non-media cases, have been successful in a number of cases in establishing a statutory defence of qualified privilege. The experience in the

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<sup>21</sup> Paul Mitchell, *The Making of the Modern Law of Defamation*, Hart Publishing, Oxford, 2005, ch 7.

<sup>22</sup> See, eg, *John Fairfax & Sons Ltd v Vilo* (2001) 52 NSWLR 373, 380-81 (Heydon JA); [2001] NSWCA 290; *Skalkos v Assaf* (2002) Aust Torts Reports 81-644, 68, 529 (Mason P); [2002] NSWCA 14; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [1165]-[1170] (*per curiam*); *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484, 499 (McColl JA); [2007] NSWCA 364. The *Reynolds* defence has been held not to have any impact upon the interpretation of the statutory defence of qualified privilege: see *Daily Examiner Pty Ltd v Mundine* [2012] NSWCA 195, [128] (*per curiam*).

<sup>23</sup> David Rolph, *Defamation Law*, 1<sup>st</sup> ed., Thomson Reuters, Pyrmont, 2016, [11.130].

United Kingdom in relation to the *Reynolds* defence is instructive. In its first few years of operation, trial judges applied the *Reynolds* defence strictly, treating Lord Nicholls of Birkenhead's non-exhaustive list of ten relevant factors<sup>24</sup> (now replicated in cl 30(3) of the Model Defamation Provisions) as if it were a checklist to be satisfied in every case, such that Lord Hoffman in *Jameel v Wall Street Journal Europe* had to remind trial judges that the *Reynolds* defence was a beneficial one, intended to encourage responsible journalism and to discourage irresponsible journalism, and should thus be applied bearing that in mind.<sup>25</sup> It is worth noting that White J expressed agreement with this view in *Hockey v Fairfax Media Publications Pty Ltd*.<sup>26</sup> Consequently, I am not convinced that legislative amendment to the standard prescribed under the statutory defence of qualified privilege will address the problems arising from it. I also do not support lowering the standard from one of reasonableness. I am not sure I understand what is being contemplated by this question in the Discussion Paper. The essence of the problem here is not the statutory provision as drafted, which might be fixed by amendment, but by concerns about the way in which the statutory provision is being applied.

If a statutory defence of publication on a matter of public interest were to be adopted, there is a further question of whether the statutory defence of qualified privilege should be retained or replaced. The answer to this question would ultimately turn upon whether the two defences substantially overlapped to the extent that the existing statutory defence of qualified privilege had no further effective work to do. This would depend upon the precise form of any proposed defence of publication on a matter of public interest. My preliminary view would be that the statutory defence of qualified privilege ought to be retained as there may be circumstances in which a defendant publishes matter in which recipients have an interest or apparent interest (the first element of the statutory defence of qualified privilege) but the matter is not one of public interest, and the relationship between publisher and recipient may not meet the more stringent requirements of a common law defence of qualified privilege.

If the statutory defence of qualified privilege is retained, I would strongly support the amendment of cl 30 of the Model Defamation Provisions to specify what the respective roles of judge and jury are in relation to this defence, for cases where a jury is empanelled. As the Discussion Paper notes, the absence of any clear legislative guidance has been productive of confusion and has resulted in divided authority. In relation to the most contentious aspect of the defence, namely whether the issue of the reasonableness of the defendant's conduct in the circumstances of publication should be determined by the judge or the jury, my preference would be that the issue should be determined by the jury, as the issue is a question of fact.

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<sup>24</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205.

<sup>25</sup> *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, 384; [2006] UKHL 44. A similar injunction occurs in many cases on the *Reynolds* defence. See, for example, *Bonnick v Morris* [2003] 1 AC 300, 309; [2002] UKPC 31; *Seaga v Harper* [2009] 1 AC 1, 9; [2008] UKPC 9; *Flood v Times Newspapers Ltd* [2012] 2 AC 273, 312 (Lord Mance JSC); [2012] UKSC 11.

<sup>26</sup> (2015) 237 FCR 33, 76; [2015] FCA 652.

#### Question 14.

My response to this question is similar to my response to the question on the defence of qualified privilege. I support Australian defamation law recognising a minimum threshold of seriousness. The issue is whether this should be left to courts to develop or whether it should be legislated.

The minimum threshold of seriousness was first recognised by Tugendhat J in *Thornton v Telegraph Media Group Ltd.*<sup>27</sup> His Lordship reviewed the various tests for what is defamatory and identified a common requirement amongst all of them that, in order for a matter to be defamatory, it had to reach a minimum threshold of seriousness. Although Tugendhat J's reasoning was buttressed by reference to human rights considerations, the source of the minimum threshold of seriousness was the common law of defamation. The minimum threshold of seriousness was subsequently applied to dismiss defamation proceedings that failed to satisfy it. It was then transmuted into the statutory test of 'serious harm' now embodied in the *Defamation Act 2013* (UK) s 1(1).

The case law indicates that few attempts have been made to invite Australian courts to recognise a minimum threshold of seriousness as part of the common law of Australia. The Full Court of the Supreme Court of South Australia in *Lesses v Maras* refused to recognise a minimum threshold of seriousness as part of Australian law.<sup>28</sup> More recently, however, McCallum J (as her Honour then was) in *Kostov v Nationwide News Pty Ltd*, did recognise it.<sup>29</sup> In contrast to the *Jameel* principle of proportionality, which seems to be gaining acceptance in Australia, after some initial resistance, it could not be said at this stage that the minimum threshold of seriousness has established itself in Australian law. Given that the *Defamation Act 2013* (UK) s 1(1) built upon existing case law by the English courts and there is no comparable case law in Australia, a legal transplant of a statutory threshold of 'serious harm' may not take.

If a statutory threshold of 'serious harm' were to be introduced in Australia, detailed consideration should be given to the substantial case law that has developed in the United Kingdom over the proper interpretation of the *Defamation Act 2013* (UK) s 1(1). This case law highlights a range of issues that should be considered when seeking to introduce a statutory threshold of 'serious harm'. For example, will the statutory threshold of 'serious harm' abrogate the presumption of damage to reputation, which is a fundamental feature of the common law of defamation? The precise wording of the provision will be critical to determining this. It should also be noted in this context that the national, uniform defamation laws now abrogate the distinction between libel and slander, presuming damage to reputation in all defamation cases.<sup>30</sup> Any statutory threshold of 'serious harm' would need to be construed not only according to its own terms but, consistently with orthodox approaches to statutory construction, in the context of the legislation as a whole.

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<sup>27</sup> [2011] 1 WLR 1985; [2010] EWHC 1414 (QB).

<sup>28</sup> (2017) 128 SASR 292, 317-18 (*per curiam*); [2017] SASFC 48.

<sup>29</sup> [2018] NSWSC 858, [31]-[42].

<sup>30</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 119(1); *Defamation Act 2006* (NT) s 6(1); *Defamation Act 2005* (NSW) s 7(1); *Defamation Act 2005* (Qld) s 7(1); *Defamation Act 2005* (SA) s 7(1); *Defamation Act 2005* (Tas) s 7(1); *Defamation Act 2005* (Vic) s 7(1); *Defamation Act 2005* (WA) s 7(1).

Another issue which arises from the case law on the statutory threshold of ‘serious harm under the *Defamation Act 2013* (UK) s 1(1) is whether a plaintiff is obliged to adduce evidence to establish that actual or likely harm resulted from the publication of whether it was open to the plaintiff to invite the court to infer that actual or likely harm was established. If evidence may or must be adduced, what sorts of evidence can be relied upon to satisfy this threshold requirement? If actual or likely harm may be established by inference, what matters may be had regard to? For example, could the terms of the matter itself be sufficient to draw the inference that the statutory threshold of ‘serious harm’ had been satisfied? Could regard be had to relevant aspects of context in order to infer that the statutory threshold of ‘serious harm’ had been satisfied?

It should be noted that, at the time of writing, the United Kingdom Supreme Court had reserved its decision in *Lachaux v Independent Print Ltd*.<sup>31</sup> Its judgment will be its first consideration of the operation of the *Defamation Act 2013* (UK) s 1(1) and will hopefully resolve a number of the doctrinal and practical issues identified in the case law by lower courts. If a statutory threshold of ‘serious harm’ modelled on the *Defamation Act 2013* (UK) s 1(1) were to be introduced in Australia, it would seem prudent to wait until that decision has been handed down.

If a minimum threshold of seriousness were to be legislated in Australia, some consideration might be given to whether the threshold should be cast in terms of ‘substantial harm’ or ‘serious harm’.

If a minimum threshold of seriousness were to be legislated in Australia, I would not support incorporating aspects of proportionality, derived from *Jameel v Dow Jones & Co Inc*<sup>32</sup> and *Bleyer v Google Inc*,<sup>33</sup> into it. The juridical basis of the principle of proportionality is abuse of process. A court has the power to protect its own processes against abuse. Unlike the minimum threshold of seriousness, which originates from the principles of defamation law itself and is specific to defamation law, the principle of proportionality is not limited to defamation cases. As the United Kingdom case law demonstrates, the *Jameel* principle may be applied to other causes of action, although, in practice, it has had particular application to defamation cases, given the relative ease with which liability for defamation has been established until recently. Given that a proceeding needs to be characterised as an abuse of process before it can be stayed on the basis of the principle of proportionality, the principle of proportionality is only going to be able to be relied upon successfully by defendants in rare cases. By contrast, a minimum threshold of seriousness could be more readily invoked by defendants to deal with trivial cases. Given the differences between them, I think it would introduce unnecessary conceptual confusion to incorporate considerations of proportionality and abuse of process into any statutory minimum threshold of seriousness. To do so may also undermine the efficacy of the minimum threshold of seriousness, by imposing too high a bar for defendants to surmount in order to have proceedings struck out.

If a statutory threshold of ‘serious harm’ were to be enacted, I would support the retention of the defence of triviality. I think it should be open to defendants to make the forensic choice as to whether to object to the proceedings on the basis of the statutory threshold of ‘serious harm’ or to

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<sup>31</sup> As to the decision at first instance, see *Lachaux v Independent Print Ltd* [2016] QB 402; [2015] EWHC 2242 (QB). As to the decision of the Court of Appeal, see *Lachaux v Independent Print Ltd* [2018] QB 594; [2017] EWCA Civ 1334.

<sup>32</sup> [2005] QB 946; [2005] EWCA Civ 75.

<sup>33</sup> (2014) 88 NSWLR 670; [2014] NSWSC 897.

defend the proceedings on the basis of triviality or to raise both issues at different stages of the trial. I do not think that defendants should be precluded from raising both issues if they think it appropriate.

If the defence of triviality is to be retained, there are some reforms to it that I would recommend. Paradoxically, the defence of triviality is inefficacious in dealing with trivial defamation claims, when compared to the minimum threshold of seriousness and the principle of proportionality, in part because of its drafting. I would recommend the removal of the word, 'any', from cl 33 of the Model Defamation Provisions. In its current form, a defendant bears a very heavy burden if he or she wishes to establish a defence of triviality. A defendant would need to negative any real chance or possibility of harm. The Model Defamation Provisions should be amended so as to make it clear that a defendant does not have to discharge such a heavy burden in order to establish a defence of triviality.

The other aspect of the drafting of cl 33 of the Model Defamation Provisions which has been problematic is the reference to 'harm', without specifying what harm. There has been judicial disagreement as to whether this reference is to harm to reputation only or whether it comprehends harm to feelings. The position under cl 33 of the Model Defamation Provisions should be clarified by amending it expressly to provide state that the relevant harm is 'harm to reputation'. Reputation is the principal interest protected by the tort of defamation; the principles of defamation law are principally directed towards the protection of reputation; defamation law does not protect mere feelings, only hurt feelings parasitic upon reputational damage. There should be no difficulty in making this change to specify that the relevant harm is harm to reputation.<sup>34</sup>

#### **Question 16.**

I strongly support the view that cl 35 of the Model Defamation Provisions create a scale or range of damages for non-economic loss, rather than the maximum amount acting as a cut-off. I find the argument that the statutory cap on damages for non-economic loss acting as a cut-off problematic. For more than a decade, awards of damages have been made under the national, uniform defamation laws and in no decided case of which I am aware from my research has a judge assessed the damages; determined that the amount should exceed the cap, even though there were no aggravating circumstances; then applied the cap to cut off the damages at the maximum amount allowable. If the statutory cap were properly to operate as a cut-off, one might have expected to find at least one case in which the maximum amount was awarded. I am not convinced that the cut-off approach is the way in which judges in practice assess damages for defamation.

I also find the cut-off approach odd as a matter of statutory construction. The cut-off approach seems to proceed on the basis that the judge should assess damages for defamation by reference to common law principles, then apply the statutory cap after the assessment has been made. It seems strange that, as a matter of statutory construction, the first step one would take would be to ignore the statute, proceed as if the common law, unaffected by statute, still applies, then apply the statute

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<sup>34</sup> The interrelationship between triviality, proportionality and the minimum threshold of seriousness is explored more fully in David Rolph, 'Triviality, proportionality and a threshold of serious harm', Paper given at UNSW Defamation and Media Law Seminar, 9 August 2017: <http://glj.barnet.com.au/wp-content/uploads/2017/11/rolphtriviality.pdf> (accessed 30 April 2019).

almost as an afterthought. I am not convinced that this is what in fact judges do in practice. I think that judges approach the task of assessing damages for non-economic loss in defamation cases fully cognisant of the statutory cap, as they ought to do. In practice, I think most judges approach the task of assessing damages for non-economic loss for defamation within the statutory cap by applying an approach to statutory interpretation which is closer to treating the cap as creating a scale or range, rather than treating the cap as creating a cut-off.

In relation to the applicability of the statutory cap when a court is satisfied that there are aggravating circumstances warranting the cap to be exceeded, I do not have any substantial concerns about how the cap is currently be applied (or not applied) by courts. I agree with the Victorian Court of Appeal in *Bauer Media Pty Ltd v Wilson [No 2]* [2018] VSCA 154 that, where there are aggravating circumstances warranting damages in excess of the statutory cap, the cap is inapplicable. That approach seems to be reasonably warranted by the terms of cl 35 of the Model Defamation Provisions. I do not see any compelling reason to change this. Again, it should be emphasised that damages under the national, uniform defamation laws have now been assessed for more than a decade. It is only recently that the statutory cap has been exceeded in cases like *Bauer Media Pty Ltd v Wilson [No 2]* [2018] VSCA 154, *Rayney v State of Western Australia (No 9)* [2017] WASC 367, *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201 and *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496. Each of these cases has more than one of the following characteristics: a high-profile plaintiff with a wide reputation; defamation committed through widely disseminated publications, usually via mass media; repeated or multiple defamatory publications; malice; and substantial other aggravating factors established. The reputational damage found by the court in each of these cases was serious. These recent, high-profile defamation cases in which the statutory cap has been exceeded are atypical and reflective of the particular characteristics of those cases. It could not be confidently concluded that there is a trend towards larger awards of damages for defamation, such as to warrant concern about the efficacy of the statutory cap, when all the awards of damages for defamation made under the national, uniform defamation laws are taken into account. Law reform by reference to exceptional, rather than typical, cases may yield unintended consequences. I am not convinced that the statutory cap on damages for non-economic loss requires amendment in this regard.

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**30 April 2019.**