



Australian Government

Attorney-General's Department

Revised outline of a possible national defamation law

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SUMMARY OF PROPOSALS

The causes of action and related issues

The Act would define defamatory matter as published matter which tends to:

- adversely affect the reputation of a person
- deter others from associating or dealing with a person
- expose a person to ridicule, or
- injure a person in their occupation or financial standing.

To ensure that there are not a multiplicity of actions on the same subject, the Act would prevent a person from bringing more than one proceeding in respect of the same matter unless doing so was necessary to obtain a different remedy or the publication was materially different. It would also provide that a person who publishes defamatory matter concerning a group or class would be liable to a member of the group or class in certain circumstances.

A cause of action would be available to a representative of a deceased or a surviving spouse, parent, child or sibling. The action would only be available for publication within three years of death. Damages would not be available. The Act would also provide that actions commenced in defamation should continue after the death of either party but would restrict the remedies available to the plaintiff's estate.

Defences

The Act would provide a defence if the published matter is true and relates to a subject of public interest. It would treat published matter as relating to a subject of public interest unless it involves an unwarranted disclosure of specified 'private affairs'. The defence would thus be somewhat broader than the corresponding defences in New South Wales, Queensland, Tasmania and the Australian Capital Territory.

The Act would create a defence of contextual truth. It would be available where the proceedings are based on all or any of the matter contained in a publication and the defendant shows that the false charge in the publication does no additional harm to the plaintiff because of the more serious charges in the publication which are true and relate to a subject of public interest.

The Act would codify the defence of honest opinion. A defendant could obtain the defence by showing that:

- the matter complained of related to a subject of public interest
- it expressed the defendant's honestly held opinion
- the opinion was based on facts expressly or impliedly referred to in the matter, or generally known at the time of the publication, and
- the facts were substantially true or were covered by the defences of absolute privilege, qualified privilege or fair report.

The requirement that the opinion be 'based on' facts would involve a rational connection between the facts and the opinion formed. Prejudiced and biased opinions, therefore, would be afforded protection if they have some rational connection with the facts to which the publication refers.

Related opinion defences would cater for defendants who are not authors of the published matter. A defendant whose agent, employee or independent contractor published defamatory matter would obtain a defence by showing that:

- the matter complained of related to a subject of public interest
- it amounted to opinion
- it was based on facts expressly or impliedly referred to in the matter, or generally known at the time of publication
- the facts were substantially true or were covered by the defences of absolute privilege, qualified privilege or fair report
- the opinion did not purport to be the defendant's, and
- the defendant honestly believed the opinion to be the author's.

A defendant who publishes an opinion by a stranger, such as a newspaper that publishes a letter to the editor, would have a similar defence. However, the defendant would not have to believe that the opinion was genuinely held by the author; it would be enough to show that:

- the opinion did not purport to be the opinion of the defendants, their agents, employees or independent contractors, and
- there were no reasonable grounds to believe that the opinion was not honestly held by the author.

The Act would provide a defence of absolute privilege to the publication of defamatory matter in the course of proceedings in Commonwealth, State and Territory legislatures, courts, and quasi-judicial and administrative bodies. It would also provide a defence to certain communications involving Commonwealth, State and Territory ministers. Absolute privilege could be extended to other circumstances identified by regulation.

The defence of qualified privilege would be available to a defendant who could show *either* that the matter was published in any of a number of specified circumstances (such as in response to an attack on the defendant's reputation) *or* that its publication was otherwise reasonable in all the circumstances.

To make out the defence based on reasonableness, the defendant would have to show that:

- they believed on reasonable grounds that a recipient had an interest in receiving information on some subject
- the publication was made in the course of giving to the recipient information on that subject, and
- the publication was reasonable in all the circumstances.

In determining whether the defendant's publication was reasonable in all the circumstances, the following matters would be relevant:

- whether the matter relates to a subject of public interest
- the seriousness of the charges conveyed by the matter
- the adequacy of any steps taken by the defendant to check the accuracy of any facts referred to in the matter

- whether the defendant believed that any facts referred to in the matter were untrue
- the adequacy of any opportunity given to the plaintiff to comment on the matter before it was published
- whether the publication in effect conveyed the gist of the plaintiff's side of the story
- the manner of the publication
- the language of the publication, and
- the number of people to whom it was published.

The Act would create defences for the fair and accurate report of specified public proceedings or the fair and accurate copy or summary of a public document. It would create a limited defence for trivial defamation.

The defence of innocent dissemination would have two limbs: the first covering internet service providers and internet content hosts; the second covering all other 'distributors'.

The first limb would give effect to the current policy of the *Broadcasting Services Act 1992*.

The second would cover all other distributors and employees or agents of such persons. It would be a defence for them to show that:

- they did not know that the published matter contained the alleged defamatory material, and
- it was reasonable for them, having regard to the nature of the matter and any facts of which they were aware, not to monitor or check its contents for defamatory material.

The Act would continue the defences of 'release', 'consent' and 'illegality'.

Procedures

The Act would provide for a limitation period of 12 months from the date of publication. A court could, however, extend this period to a maximum of three years from the date of publication if it decided that it was just and reasonable to do so.

State and Territory Supreme Courts and the Federal Court would be granted concurrent jurisdiction to hear causes of action arising under the Act. The Act would provide that appeals from first instance proceedings could be heard only by the Federal Court.

Juries would have a role in deciding whether a publication is defamatory and whether a defence is available, but they would have no role in awarding damages. Juries would be available in the Federal Court and in those State and Territory courts for which State or Territory legislation permits their use. Further consideration is being given to whether, in such courts, the Act should provide common criteria for judges to apply in deciding whether to order a jury trial. State and Territory laws would govern who may sit on a jury and what size the jury should be in State and Territory courts.

To facilitate the speedy resolution of defamation proceedings, the court would be required to strike out proceedings for want of prosecution in certain circumstances.

The Act would encourage use of alternative dispute resolution (ADR) processes such as mediation, case appraisal or evaluation, and early ‘neutral evaluation’, before defamation actions proceed to trial. The Act would not replace but supplement existing ADR referral mechanisms, so as not to introduce additional costs. The court would be given discretion to refer proceedings, either with or without the consent of the parties, to an existing ADR process.

Remedies and related issues

The Act would include a range of provisions aimed at encouraging plaintiffs and defendants to take steps that would vindicate the reputation of plaintiffs. In essence, action on the part of defendants that would lead to vindication of reputation would result in lower damages. The Act would also include new remedies designed to reduce the law’s emphasis on damages.

The Act would provide a strong incentive for publishers to give an adequate right of reply.

The Act would encourage potential defendants to be more forthcoming about their errors by providing that an apology would not be an express or implied admission of liability. But because apologies should be published swiftly and with prominence if they are to restore the plaintiff’s reputation, the Act would provide that an apology could mitigate damages, or be taken into account in deciding whether or not to grant a declaration or make correction orders, only in limited circumstances.

The Act would give the court the power to make correction orders, but only after it had found for the plaintiff.

The Act would facilitate a coherent approach to damages by:

- setting out the factors relevant to an assessment of damages, and
- maintaining the position regarding damages and joint tortfeasors.

Other elements of the national law

The Act would permit corporations to sue for defamation. The traditional common law limitations on damages they could recover would, however, be maintained. Artificial persons such as local councils and similar elected bodies would not be able to sue.

The Act would provide that, where a number of people are responsible for publication, each of them has a separate defence of honest opinion and qualified privilege.

The Act would make it clear that it is not intended to affect the operation of State and Territory legislation dealing with criminal defamation.

Scope of the national law

The application provisions of the national law would ensure that the Act is limited to matters within Commonwealth constitutional power. However, the proposed law would be a code for most defamation proceedings. It would cover the kinds of defamatory publications which raise the greatest jurisdictional and practical problems: those which cross State and Territory boundaries. It would thus reduce the complexity of the law.

A reference of power from the States to the Commonwealth Parliament in accordance with s51(xxxvii) of the Constitution would remove even these limitations. It would ensure that the Act could be a code for all defamation actions.

INTRODUCTION: THE NEED FOR A NATIONAL LAW

In March 2004 the Attorney-General's Department released its discussion paper, *Outline of a possible national defamation law*.

The introduction to that paper included some general observations:

- defamation law in Australia is constituted by a patchwork of common law and State and Territory statutes
- the Australian Law Reform Commission concluded in 1979¹ not only that significant changes were needed 'in the substantive law governing rights of action and defence', but that 'the laws [were] complex and [conflicted] from one part of the country to another'
- the Commission recommended replacing that patchwork with a codified, uniform law
- no great progress towards uniformity has been made since 1979, and
- the development of a national media and the internet makes differences between Australian States and Territories increasingly hard to justify.

The release of the discussion paper was the first step towards developing a draft Bill for a national defamation law that could be enacted by the Commonwealth Parliament pursuant to the existing constitutional powers of the Commonwealth. Such a law would be a national code for defamation.

In developing the more detailed proposal set out below the Attorney-General's Department took into account the comments received during consultations with legal practitioners, media representatives and other interested parties in Sydney, Melbourne, Brisbane, Adelaide and Perth. It also took into account numerous submissions that were received in relation to the discussion paper. More than 20 of those submissions involved close consideration of the discussion paper and were prepared by experts in the field.

References below to 'the Act' are intended as short-hand references to a national code that could be enacted by the Commonwealth Parliament. The attached draft provisions cover important aspects of the proposal. These are the cause of action in publication of defamatory matter, the defence of truth and public interest, the defence of contextual truth, the defence of honest opinion, and the defences of absolute and qualified privilege, fair report and triviality. The intention is to facilitate understanding and further discussion of these aspects in particular.

Comments in response to the proposal should be provided to the Department no later than 31 October 2004.

¹ Australian Law Reform Commission (ALRC), *Unfair Publication: Defamation and Privacy*, Report No 11, 1979.

THE CAUSES OF ACTION AND RELATED ISSUES

Action for publication of defamatory matter

At common law, a person has a cause of action against another for the publication of defamatory ‘matter’ such as words, gestures or images. By contrast, in New South Wales, Queensland and Tasmania, a person has a cause of action for the publication of a defamatory imputation; that is, a defamatory allegation or charge.

Some have argued that making the cause of action dependent on the publication of imputations saves resources and court time by clearly identifying the issues at trial. However, other practitioners, judges, and academic commentators have claimed that it fosters complex interlocutory skirmishing and distracts from the real issue. In *Chakravarti v Advertiser Newspapers*, for instance, Kirby J commented:²

In some jurisdictions (eg, New South Wales) each imputation upon which a plaintiff relies in a defamation action is no longer a particular of what is to be put forward at the trial. It is a separate cause of action... In such a statutory context, the need for exact precision in the statement of each cause of action is obvious and essential. This statutory approach has certain advantages. However, it also has disadvantages. It has led to many pre-trial applications, complex interlocutory proceedings and a potential for injustice, depending upon the ingenuity and skill of the pleader of the imputations... Because readers and viewers are not favoured with pleaded imputations when they receive the matter complained of, there is a risk that the attention at the trial will be deflected from the item actually said to have harmed the plaintiff’s reputation to an evaluation of pleaded imputations and a debate about whether they truly arise.

The Act would not make the cause of action depend on the publication of a defamatory imputation. It would provide for a single cause of action for the publication of defamatory matter, regardless of the number of imputations it may contain.³

Draft provisions covering these aspects are set out in the annexure.⁴

Definition of defamatory matter

In general terms, the common law treats published matter as defamatory if it tends to damage the plaintiff’s reputation or to exclude the plaintiff from society.⁵ The question whether matter has this tendency is answered by asking how ordinary, reasonable people would react to it.⁶

² (1998) 193 CLR 519, 578.

³ The Act would also provide for defendants to specify any defamatory meanings that they seek to prove true and any defamatory meanings that they seek to defend as honest opinion, and to give details of the matters on which they rely in support of those claims.

⁴ See clauses 6 and 7.

⁵ Gillooly M, *The Law of Defamation in Australia and New Zealand*, 1998, p 43; Tobin T and Sexton M (eds), *Australian Defamation Law and Practice*, volume 1, para 3010.

⁶ Judges have described these persons in slightly different ways: ‘right thinking members of the community’ (*Slatyer v Daily Telegraph Newspaper* (1908) 6 CLR 1, 7); ‘right-thinking members of society generally’ (*Sim v Stretch* (1936) 52 TLR 669, 671); ‘ordinary decent folk in the community’ (*Gardiner v John Fairfax & Sons* (1942) 42 SR (NSW) 171, 172); ‘an ordinary person’ (*Mirror Newspapers v World Hosts* (1979) 141 CLR 632, 638); ‘ordinary reasonable people’ (*Hepburn v TCN Channel Nine* [1983] 2 NSWLR 682, 686); and ‘ordinary people of reasonable intelligence’ (*Mount Cook Group v Johnstone Motors* [1990] 2 NZLR 488, 497).

At common law, matter will only be held to damage a person's reputation if it imputes some element of blameworthiness on their part or if it shows them in a ridiculous light. Matter will tend to exclude a person from society if it causes them to be 'shunned and avoided'⁷ irrespective of any effect on their reputation. However, matter that tends to damage a person in their trade or occupation but which does not tend to cause reputational damage or to exclude them from society is not defamatory.

The Act would define defamatory matter as published matter which tends to:

- adversely affect the reputation of a person
- deter others from associating or dealing with a person
- expose a person to ridicule, or
- injure a person in their occupation or financial standing.

The first three limbs of this definition are intended to reflect the common law but to recast it in modern terms. The first limb corresponds to the requirement that matter must tend to damage a person's reputation in view of ordinary, reasonable people. The second, which is similar to the formulation in the *American Restatement (Second) of Torts*,⁸ corresponds to the requirement that matter must cause the person to be shunned or avoided. The third expresses the rule regarding matter that has a tendency to expose a person to ridicule.⁹

The fourth limb, however, would adopt the position in Queensland and Tasmania. In those States, it is not necessary to show that a statement which tends to injure a person in his profession or trade also damages that person's reputation or leads to their social exclusion. Thus, a plaintiff can sue for a false claim that they have ceased to carry on business or that their farm has been closed because of a highly contagious virus. The Act would afford protection against such damaging claims.

For the purpose of the definition above, it would be sufficient if the plaintiff's reputation was adversely affected in the estimation of a substantial and reputable section of the community or if a substantial and reputable section of the community was deterred from associating or dealing with the plaintiff. This reflects the position at common law.¹⁰

Restrictions on multiple actions

To ensure that there is not a multiplicity of actions on the same subject, the Act would generally prevent a person from bringing more than one proceeding in respect of the same matter unless doing so was necessary to obtain a different remedy or the publication was materially different. Put differently, a person could not repeatedly sue a defendant for publishing the same defamatory material unless the earlier proceedings (whether under the national or State law) involved a publication to, say, a smaller audience, or the remedy sought in the later proceedings under the Act (such as a correction order) was not available in the earlier proceedings.

⁷ *Yousoupoff v Metro-Goldwyn-Mayer Pictures* (1934) 50 TLR 581, 587.

⁸ The Restatement (1977), § 559 provides: 'A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him'.

⁹ See *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449; *Ettinghausen v Australian Consolidated Press* (1991) 23 NSWLR 443; *Berkoff v Burchill* [1996] 4 All ER 1008.

¹⁰ *Hepburn v TCN Channel Nine* [1983] 2 NSWLR 682.

It would, however, be possible to bring further proceedings in the case of deliberate publications of the same matter after the plaintiff had already obtained a remedy in earlier proceedings. This is to ensure that a defendant cannot publish the same matter some time after judgment has been obtained against them and claim that the plaintiff is barred from bringing any further proceedings in respect of the deliberate publication.

The Act would retain the powers of the courts to deal with vexatious proceedings and abuse of process at common law.

A draft provision covering these aspects is set out in the annexure.¹¹

Defamatory matter and groups

At common law, the publication of defamatory matter about a group can only be sued upon by a member of that group who can establish that it refers to them as an individual. As Wilcox J explained in *Mann v The Medicine Group*:¹²

[A] statement concerning members of a class generally is actionable at the instance of a member of that class only if the member is able to point to circumstances which would indicate to a reasonable reader or hearer that the statement refers particularly to him or her.

The Act is intended to reflect this rule. It would provide that a person who publishes allegedly defamatory matter concerning a group or class would be liable to a member of the group or class if:

- the group or class is sufficiently small that the matter complained of can reasonably be understood to refer to such a member, or
- the circumstances of the publication of the matter reasonably gives rise to the conclusion that it refers particularly to such a member.

Defamation of the dead

The current law of defamation offers no remedy against false, unfair or unjust attacks on the reputations of a deceased. Thus, a family whose late father and husband is mistakenly identified with a self-confessed murderer,¹³ a widow whose husband it is suggested may have been involved in drug trafficking,¹⁴ and a son whose late father is unfairly maligned for consorting with prostitutes have no means of clearing their names.¹⁵ Law reform commissions in Australia,¹⁶ New Zealand,¹⁷

¹¹ See clause 8.

¹² (1992) 38 FCR 400, 402-403.

¹³ The plight of family members was well described by the dissenting judgment of the New York Court of Appeals in *Rose v Daily Mirror Inc* 284 NY 335, 339 (1940): ‘A respectable family whose husband and father has just passed away awakes the next morning to find blazoned forth in a morning newspaper that decedent was a notorious criminal, thus blackening the family and all its members.’

¹⁴ *Gonzales v Times Herald Printing Co* 513 SW 2d 124 (1974).

¹⁵ The facts are drawn from the case of *Wright v Lord Gladstone*, discussed in Hooper D, *Public Scandal, Odium and Contempt*, 1984, p 8.

¹⁶ See ALRC, *Unfair Publication: Defamation and Privacy*, Report No 11, 1979; Law Reform Commission of Western Australia, *Report on Defamation*, Project No 8, 1979; Community Law Reform Committee of the Australian Capital Territory, *Defamation*, Report No 10, 1995.

¹⁷ New Zealand Committee on Defamation, *Recommendations on the Law of Defamation*, Report, 1977.

the United Kingdom¹⁸ and Ireland¹⁹ have identified the lack of any remedy as a weakness of current arrangements, as has the Uniform Law Conference of Canada.²⁰

Three main arguments have been advanced against proposals to introduce an action for defamation of the dead: first, defamation law is about protecting reputation, and the dead have none; secondly, the death of the person defamed makes it impossible for defendants to establish truth through cross-examination; and thirdly, a new cause of action would inhibit contemporary historical writing.

Several points can be made in response. First, a person's reputation *can* suffer after their death, and it is somewhat unreal to assert otherwise. If reputation perished with a person, it would be hard to explain why many people now alive are concerned about how they will be regarded after their death. It would be equally hard to explain why families have any legitimate basis for trying to protect the reputation of dead loved ones.

Secondly, the suggested practical difficulties with cross-examination seem to be exaggerated. The death of a person does not render a statement about them incapable of proof. Nor does it render the defendant incapable of relying on defences such as absolute or qualified privilege, which do not depend on the ability to cross-examine the person defamed.

Finally, the evidence that historical writing will be curtailed is lacking. Various law reform commissions have doubted whether there would be any appreciable impact on such writing.²¹

The Act would, therefore, implement the ALRC's recommendation regarding defamation of the dead. A cause of action would be available to a representative of the deceased or a surviving spouse, parent, child or sibling against each publisher of defamatory matter. The action would only be available for publication within three years of death, thereby ensuring that some protection is offered to relatives for a reasonable period but also ensuring that matters are instituted before time has made it too difficult to gather evidence for a trial. Damages, however, would not be available; the remedies would instead be a correction order, declaration or injunction. Furthermore, where a plaintiff has brought proceedings for defamation of a particular deceased, the deceased's representative, surviving spouse, parent, child or sibling could not institute any further proceeding in respect of the same defamatory matter except with leave of the court.

Survival of actions

Survival of actions legislation in the States and Territories has substantially abrogated the common law rule that a personal action dies with the person. Defamation, however, remains the exception. In all Australian jurisdictions except Tasmania, defamation actions do not survive the death of the plaintiff or defendant.²²

Some of the arguments against survival of actions mirror those against defamation of the dead. In particular, it is claimed that the dead have no reputation that the law should protect, and the death of

¹⁸ *Report of the Committee on Defamation*, 1975.

¹⁹ Irish Law Reform Commission, *Report on the Civil Law of Defamation*, 1991.

²⁰ See section 3 of the Defamation Act, April 1996, drafted by the Uniform Law Conference of Canada.

²¹ See ALRC, *Unfair Publication: Defamation and Privacy*, Report No 11, 1979, p 55 (noting that the Commission had received no objection from anyone concerned with historical or biographical writing after it released its proposal for defamation of the dead). See also *Report of the Committee on Defamation*, 1975, para 420; Irish Law Reform Commission, *Report on the Civil Law of Defamation*, 1991, p 84.

²² By contrast, a considerable number of American States, including Connecticut, Florida, Michigan, New York, Pennsylvania, Utah, Virginia and Wisconsin, allow the survival of defamation actions.

the person defamed makes it impossible for the defendants to establish truth through cross-examination. The responses to these arguments in the context of defamation of the dead have been set out above, and they apply equally in the context of survival of actions.

In any event, the treatment of defamation action in most Australian jurisdictions is anomalous. If actions for false imprisonment, civil battery and injurious falsehood do not expire with the plaintiff but accrue for the benefit of their estate, there seems little justification for treating defamation actions differently. As one American court has remarked:²³

Why should a claim for a damaged leg survive one's death, where a claim for damaged name does not? After death, the leg cannot be healed, but the reputation can.

As a general matter, therefore, the Act would provide for survival of actions, as the ALRC recommended. However, while the ALRC recommended that actions commenced in defamation should continue after the death of either party, the case for allowing the plaintiff's estate to recover general damages (including damages for emotional distress) seems more difficult to sustain. The Act would therefore restrict the remedies available to the plaintiff's estate to special damages and the non-monetary remedies of an injunction, declaration or correction order.

²³ *MacDonald v Time Inc* 554 F Supp 1053, 1054 (DNJ, 1983).

DEFENCES

Truth and the public interest

At common law, it is a complete defence to publication if the matter complained of is true. In *Rofe v Smith's Newspapers*, Street ACJ explained the rationale for the defence in these terms:²⁴

The reason upon which this rule of law rests...is that, as the object of civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it...

This rationale does not recognise that certain statements can be true but profoundly damaging or hurtful, while conferring little or no benefit to recipients. In other words, by elevating truth-telling to a supreme good, it allows no room for privacy or any other countervailing interest, no matter how strong.

Various submissions have recognised that privacy concerns are important but have suggested they should be dealt with in separate privacy legislation. It is noteworthy, however, that since the ALRC recommended privacy legislation in 1979, no jurisdiction has enacted it. In addition, the future of an action for invasion of privacy at common law is unclear.²⁵ Absent legislative or common law rights, the case for conferring a limited right of privacy in the defamation context is compelling.

The Act would provide a defence to a defamatory charge or allegation if it is true and relates to a subject of public interest.²⁶ However, the Act would treat a charge as relating to a subject of public interest unless it involves an unwarranted disclosure of specified private affairs.²⁷ The Act would also set out a list of *warranted* disclosures of private affairs. These would range from discussion about any property or service offered to the public to the conduct of persons in their public, commercial or professional capacity.²⁸

The truth defence would thus be somewhat broader than the corresponding defences in New South Wales, Queensland, Tasmania and the Australian Capital Territory. In those jurisdictions, the requirement of 'public interest' or 'public benefit' functions primarily to discourage damaging or hurtful statements about a person's private life but may also limit discussion of other matters.²⁹ A defendant under the Act would have greater scope to rely upon truth alone, since it would be explicit that an unwarranted disclosure of private affairs was the only limitation.

²⁴ (1924) 25 SR (NSW) 4, 21-22.

²⁵ See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 208 CLR 199; *Grosse v Purvis* [2003] QDC 151 (unreported, Skoien J, 16 June 2003); *Campbell v MGN Ltd* [2004] UKHL 22 (6 May 2004).

²⁶ At common law, the defendant needed to show that each defamatory charge, or imputation, conveyed by the matter complained of was true. Under the Act, it would be clear that a defendant could show only one charge was true and then deal with the remaining charges under other defences.

²⁷ The draft provision draws on the definition of 'private affairs' in the draft Bill developed by the Attorneys-General of New South Wales, Queensland and Victoria in 1991.

²⁸ Such disclosures would be based on those described by the ALRC and the draft Bill developed by the Attorneys-General of New South Wales, Queensland and Victoria in 1991.

²⁹ See, for example, *Green v Schneller* [2000] Aust Torts Rep 63,892 (on national television the defendant, who had been involved in a long running neighbourhood dispute with the plaintiff, accused the latter of violent and intimidatory conduct; the judge rejected any notion that the defamatory imputations related to a matter of public interest).

For the purposes of the defence, a charge or allegation would be regarded as true if the defendant establishes that it was substantially true. This would reflect the position at common law.³⁰ A separate defence would be available to those who show that the charge complained of pales into insignificance beside the truth of the other charges conveyed by the publication. That ‘contextual truth’ defence is discussed more fully below.

A draft provision covering this aspect is set out in the annexure.³¹

Contextual truth

A plaintiff in a defamation action can choose which parts of a publication they sue upon. This gives rise to the possibility that a plaintiff may artificially confine the dispute between the parties to a relatively minor charge, which, in context, does not harm the plaintiff’s reputation. For example, assume a publication makes two claims: the plaintiff is a murderer (which happens to be true) and they stole some raffle tickets (which is false). The plaintiff could decide to sue only on the claim that they stole some raffle tickets and so avoid dealing with the more serious charge.³² Even if there is no attempt to confine the dispute to the minor charge, the result might be that the defendant is forced to pay damages for defamation when the charge of theft does no additional harm to the plaintiff because of the truth of the other charge.

To address this problem, the Act would create a defence of contextual truth. Subject to one qualification, it would be available where the proceedings are based on all or any of the matter contained in a publication and the defendant shows that the false charge in the publication does no additional harm because of the more serious charge in the publication which they can prove to be true. The qualification is that the defendant would have to show that the true charge relates to a subject of public interest.³³ Similar defences already exist in s16 of the *Defamation Act 1974* (NSW) and s18 of the *Defamation Act 1957* (Tas).

A draft provision covering this aspect is set out in the annexure.³⁴

Honest opinion

In *Herald & Weekly Times Ltd v Popovic*,³⁵ Gillard AJA (with whom Winneke ACJ and Warren AJA agreed) described the elements of the defence of fair comment in these terms:

The defence of fair comment has in the past been somewhat complex because of the differing views as to what constitutes the essential elements of the defence. However, in my opinion, over the last 25 years, the elements of the defence have been settled. In *Duncan and Neill on Defamation*, the elements are stated as follows –

‘(a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can consist of or include inferences of fact, must be recognisable as

³⁰ See *Howden v Truth and Sportsman Ltd* (1937) 58 CLR 416, 420 (Dixon J).

³¹ See clause 9.

³² A *Polly Peck* defence would not apply in this situation given that the charges, for the purpose of the example, would be separate and distinct.

³³ For what relates to a subject of public interest, see ‘Truth and the public interest’ above.

³⁴ See clause 10.

³⁵ [2003] VSCA 161, [259].

comment; (d) the comment must satisfy the following objective test: could any fair minded man honestly express that opinion on the proved facts?’

The defence is lost if the plaintiff can show that the comment was actuated by malice.

There are at least two problems with the current defence. First, there seems to be no requirement the defendant show that the published matter expressed their genuine, or honestly held, opinion. The onus is on the plaintiff to show that it did not. This seems difficult to justify.

Secondly, the objective element, as currently formulated, is hard to understand and apply. A comment is protected by the defence if it is one that an honest person could have made, no matter how obstinate, prejudiced or exaggerated their views. However, as the Irish Law Reform Commission pointed out, any comment in the world could be attributed to an honest person if they are allowed to be exaggerated, obstinate and prejudiced.³⁶ If the objective element is to play a role, it must be differently expressed.

The Act attempts to capture the essence of the defence at common law in codifying the defence of honest opinion. To claim the defence, the defendant would have to show that:

- the matter complained of related to a subject of public interest
- it expressed the defendant’s honestly held opinion
- the opinion was based on facts expressly or impliedly referred to in the matter, or generally known at the time of the publication, and
- the facts were substantially true or were covered by the defences of absolute privilege, qualified privilege or fair report.

The requirement that the opinion be ‘based on’ facts requires a rational connection between the facts and the opinion formed. An opinion which bears no rational relationship to the facts will fall outside of the defence. Prejudiced and biased opinions, therefore, will be afforded protection if they have some rational connection with the facts to which the publication refers. This appears to be the position under the *Defamation Act 1974 (NSW)*³⁷ and under the common law.³⁸

Related defences would cater for defendants who are not authors of the published matter. In the case of a defendant whose agent, employee or independent contractor has published defamatory matter, it would be a defence to show that:

- the matter complained of related to a subject of public interest
- it amounted to opinion
- it was based on facts expressly or impliedly referred to in the matter, or generally known at the time of publication
- the facts were substantially true or were covered by the defences of absolute privilege, qualified privilege or fair report

³⁶ Irish Law Reform Commission, *Consultation Paper on the Civil Law of Defamation*, 1991, p 274.

³⁷ See *Radio 2UE Sydney Pty Ltd v Goldsworthy* [2000] NSWCA 130, [7]-[8] (Mason P).

³⁸ See, for example, *O’Shaughnessy v Mirror Newspapers Ltd* (1970) 72 SR (NSW) 347, 361 (Jacobs and Mason JJA): ‘[D]efamatory matter which appears to be comment on facts stated or known but is not an inference or conclusion which an honest man, however biased or prejudiced, might reasonably draw from the facts so stated or known will not be treated as comment, but, *because it simply does not flow and is not capable of being regarded as flowing from the facts, will be treated as an independent allegation of fact*’ (emphasis added).

- the opinion did not purport to be the defendant's, and
- the defendant honestly believed the opinion to be the author's.

A defendant who published the opinion of a stranger, such as a newspaper that published a letter to the editor, would have a defence if they showed that:

- the matter complained of related to a subject of public interest
- it amounted to opinion
- it was based on facts expressly or impliedly referred to in the matter, or generally known at the time of publication
- the facts were substantially true or were covered by the defences of absolute privilege, qualified privilege or fair report
- the matter did not purport to be the opinion of the defendants, or their agents or employees, and
- there were no reasonable grounds to believe that it was not the honest opinion of the author.

One of the more difficult aspects of any defence based on comment or opinion is the distinction between statements of fact and opinion. The Act would attempt to provide factors for guidance. It would provide that the arbiter of fact (judge or jury) should consider:

- the extent to which the defamatory statements are objectively verifiable or provable
- the extent to which the statements were made in a context in which they are likely to be understood as opinion or rhetorical hyperbole and not as statements of fact, and
- the language used, including its common meaning and the extent to which qualifying or cautionary language, or a disclaimer, was employed.

These factors, which go to the conceptual distinction that must be drawn and are reflected in academic work in the United States,³⁹ require some explanation. First, statements that cannot be verified or proved ('It was a foolish decision') are not statements of fact.⁴⁰ Secondly, the general context of the communication will influence whether the statements are properly regarded as factual or not. Statements made in a work of fiction, for example, should be presumptively construed as opinion. In contrast, a 'news' story should be presumptively construed as factual. However, the emphasis in all instances should be on the overall context of the communication and on how the statements were reasonably understood in that context.⁴¹ Finally, the use of qualifying language such as 'In my opinion' or a disclaimer may suggest that a statement is opinion rather than fact.

A draft provision covering this aspect is set out in the annexure.⁴²

Statutory absolute privilege

The common law provides a defendant with complete, or absolute, protection against liability for defamation in a limited number of situations. In broad terms, this absolute privilege applies to the

³⁹ See the Annenberg Washington Program Report, which was produced by the Libel Reform Project of the Annenberg Washington Program in Communications Policies Studies at Northwestern University. The Report is regarded as one of the more comprehensive proposals for reform of libel law in the United States.

⁴⁰ The obverse, however, need not be true.

⁴¹ Annenberg Washington Program Report, p 20.

⁴² See clause 11.

publication of defamatory matter in the course of parliamentary, court and quasi-judicial proceedings. It also applies to communications in the nature of acts of state. The width of some of these categories at common law is uncertain.

The Act would provide a defence of absolute privilege to the publication of defamatory matter in the course of proceedings in Commonwealth, State and Territory legislatures,⁴³ courts, and quasi-judicial and administrative bodies. It would also provide a defence to certain communications involving Commonwealth, State and Territory ministers. Absolute privilege could be extended to other circumstances identified by regulation. This should make it easier to identify what is and is not covered by privilege.

The definition of ‘parliamentary proceedings’ will be taken largely from s16(2) of the *Parliamentary Privileges Act 1987* (Cth). The definition of ‘proceedings’ of courts, royal commissions and Commonwealth administrative tribunals will include all words and acts done for the purposes of or incidental to such proceedings.

A draft provision covering this aspect is set out in the annexure.⁴⁴

Statutory qualified privilege

The common law position

In general terms, the common law of qualified privilege protects defamatory matter if the defendant has an interest or duty to publish the matter and the person hearing or reading it had a corresponding interest or duty to receive it – that is, if there is ‘reciprocity’.⁴⁵ The defence cannot be relied upon if the plaintiff establishes that the publication was actuated by malice; that is, some improper purpose. In most cases, the defendant’s knowledge that the matter was false or their reckless indifference to its truth or falsity will be sufficient to show that the publication was actuated by malice.⁴⁶

Publications to the world at large do not generally fulfil the reciprocity requirement. This traditionally made it difficult for the mass media to rely on qualified privilege, even when they were providing information on political and governmental matters. In *Lange v Australian Broadcasting Corporation*,⁴⁷ however, the High Court held that where the publication concerned governmental and political matters and it was not possible to show reciprocity because the publication was made to too wide an audience, the defendant could nonetheless claim qualified privilege if they established that their conduct in publishing the matter was reasonable. The Court elaborated:⁴⁸

[A]s a general rule a defendant's conduct in publishing material giving rise to a defamatory imputation would not be reasonable unless the defendant had reasonable grounds for believing

⁴³ The *Parliamentary Privileges Act 1987* and equivalent State and Territory legislation currently afford parliamentarians and others a defence of absolute privilege in relation to proceedings in parliament. There is no intention to limit the ambit of that defence.

⁴⁴ See clause 12.

⁴⁵ *Adam v Ward* [1917] AC 309, 334.

⁴⁶ *Horrocks v Lowe* [1975] AC 135, 149 (Lord Diplock).

⁴⁷ (1997) 189 CLR 520. The Court in *Lange* unanimously repudiated the conclusion of the majority in *Theophanous v Herald & Weekly Times* (1994) 182 CLR 211. In *Theophanous*, the majority concluded that, where political communication was involved, the Constitution created a defence to actions in defamation where the defendant established that it was unaware of the falsity of the material, it did not publish the material recklessly, and the publication was reasonable in the circumstances.

⁴⁸ (1997) 189 CLR 520, 574.

the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.

Qualified privilege under the Act: first aspect

The defence of qualified privilege would have two aspects: the first covering publications in any one of a number of specified circumstances; the second covering publications that are otherwise reasonable in all the circumstances.

The defence would cover a person who publishes defamatory matter without an improper purpose in any of the following circumstances or for any of the following purposes:

- in the course of censuring or imposing a sanction on another for conduct where the publisher has lawful authority to pass the censure or impose the sanction
- to seek redress for some wrong or grievance from a person whom the defendant believes on reasonable grounds to have authority to deal with the subject matter of the wrong or grievance
- to protect the interests of the person making the publication, or of some other person
- to answer an inquiry about a subject by a person whom the defendant believes on reasonable grounds to be a person whose interests are affected by the subject of the inquiry
- in response to an invitation or challenge by the person defamed
- to answer or refute some other defamatory matter published by the person defamed, whether in relation to the defendant or another, and
- in the course of conveying information during an election campaign from electors, candidates or their helpers to the electors on the suitability or record of a candidate.

With the exception of the last category, which reflects the High Court's decision in *Roberts v Bass*,⁴⁹ this list closely resembles portions of s16(1) of the *Defamation Act 1889* (Qld). As with that provision, the categories differ from the common law position because they do not require the defendant to show that they had an interest or duty in publishing the matter and the recipient had a corresponding interest in receiving it. However, unlike the position under the *Defamation Act 1889* (Qld), the onus of showing a publication was not made for an improper purpose would lie with the defendant. The defendant is better placed to discharge that onus than the plaintiff.

The requirement that the defendant show that the sole or dominant purpose in making the publication was not improper is intended to reflect the common law concept of malice. The Act would provide that an improper purpose would include publishing matter where the defendant:

- believed it to be false, or was recklessly indifferent to its truth or falsity, and
- did not believe, or had no reasonable grounds to believe, that they were under a legal or ethical obligation to publish the matter regardless of their belief as to truth or falsity.

This provision would cover cases where the defendant may believe that something is false but be obliged to convey the information to someone else. An example is where a police officer may be

⁴⁹ (2002) 212 CLR 1.

bound to report statements about another officer to a superior even if they believe that the statements happen to be false.⁵⁰ Such statements would be privileged at common law.

The Act would also make it clear that simply because the defendant does not believe that are under a duty to publish the matter does not mean that they have acted for an improper purpose.

Qualified privilege under the Act: second aspect

The second aspect of the defence would cover defamatory matter if its publication is otherwise reasonable in all the circumstances. This aspect would be broadly modelled on s22 of the *Defamation Act 1974* (NSW).⁵¹

To claim the defence, the defendant would have to show that:

- they believed on reasonable grounds that a recipient had an interest⁵² in receiving information on some subject
- the publication was made in the course of giving to the recipient information on that subject, and
- the publication was reasonable in all the circumstances.

In determining whether the defendant's publication was reasonable in all the circumstances, any or all of the following matters could be considered:

- whether the matter relates to a subject of public interest
- the seriousness of the charges conveyed by the matter
- the adequacy of any steps taken by the defendant to check the accuracy of any facts referred to in the matter
- whether the defendant believed that any facts referred to in the matter were untrue
- the adequacy of any opportunity given to the plaintiff to comment on the matter before it was published
- whether the publication in effect conveyed the gist of the plaintiff's side of the story
- the manner of the publication
- the language of the publication, and
- the number of people to whom the matter has been published.

Various submissions criticised the 'reasonableness' requirement as inappropriate for defendants, especially those in the media. They also claimed that the s22 defence, along with the *Lange* defence (with which it has much in common), imposes an impossible burden. It was stated that the restrictive way in which judges have interpreted them has meant that they are, in effect, a dead

⁵⁰ The example is taken from *Roberts v Bass* (2002) 212 CLR 1, 31 [76] (Gaudron, McHugh and Gummow JJ).

⁵¹ In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 575, the High Court indicated that s22 of the *Defamation Act 1974* (NSW) ensured that the law of defamation in New South Wales did not place an undue burden on communications falling within the protection of the Constitution.

⁵² 'Interest' under s22 of the *Defamation Act 1974* (NSW) connotes that 'the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news': *Barbaro v Amalgamated Television Services* (1985) 1 NSWLR 30, 40. The meaning under the Act is intended to be the same.

letter. Several submissions regarded the test enunciated by the House of Lords in *Reynolds v Times Newspapers*⁵³ as preferable.

These criticisms can be countered. The suggestion that there is something inappropriate about applying a standard of reasonableness to media defendants is hard to sustain. As Tipping J remarked in the New Zealand Court of Appeal:⁵⁴

It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power and capacity to cause harm and distress are considerable if that power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. It may be asked whether the public interest in freedom of expression is so great that the accountability which society requires of others, should not also to this extent be required of the news media.

A defence of reasonableness ensures that all defendants must exercise reasonable care.

The claim that a reasonableness defence imposes an impossible burden on defendants seems to assume that the Act will be interpreted in the same way as s22 of the *Defamation Act 1974* (NSW) and the *Lange* decision. Yet there are at least three significant reasons for distinguishing the proposed defence, even if its similarities with *Reynolds* are put to one side. First, *Lange* concerns only government and political matters, a category which lower courts have interpreted as excluding most criticism of judges⁵⁵ and commercial entities.⁵⁶ By contrast, under the Act consideration is directed to whether the matter relates to a ‘subject of public interest’.⁵⁷ This is a far wider category.

Secondly, the Act would not provide that defendants must generally believe in the truth of each charge that they intended to convey, a requirement distilled from judicial exegesis of s22.⁵⁸ On the contrary, the only factor that concerns belief is ‘whether the defendant believed that any facts referred to in the matter were untrue’. A lack of belief in facts that the defendant publishes will show a lack of good faith under s16(2) of the *Defamation Act 1889* (Qld) and, save for exceptional circumstances, malice at common law. It is therefore appropriate that it remain a factor in determining reasonableness.

Thirdly, the Act would not provide that the defendant’s conclusions must follow ‘logically, fairly and reasonably’ from the information obtained, another requirement distilled from judicial exegesis of s22.⁵⁹

These intended differences of operation would be noted in extrinsic materials, which could be called in aid in construing the legislation.

The claim that *Reynolds* is a considerable advance over the proposed defence may also be doubted. Many proposed factors correspond to those in *Reynolds*.⁶⁰ In that case, Lord Nicholls outlined the

⁵³ [2001] 2 AC 127.

⁵⁴ *Lange v Atkinson* [1998] 3 NZLR 424, 477.

⁵⁵ *Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161.

⁵⁶ For example, *NRMA v John Fairfax Publications* [2002] NSWSC 563 (unreported, Macready M, 26 June 2002).

⁵⁷ The publication of matter that does not relate to a subject of public interest is very unlikely to be regarded as reasonable.

⁵⁸ *Morgan v John Fairfax & Sons [No 2]* (1991) 23 NSWLR 374, 387.

⁵⁹ *Morgan v John Fairfax & Sons [No 2]* (1991) 23 NSWLR 374, 388.

⁶⁰ *Reynolds* did not endorse a test of reasonable publication. Nonetheless, Lord Nicholls himself suggested that there might not be significant difference between a test that required consideration of a variety of factors to determine

following factors for determining if qualified privilege would be available to a mass media defendant:⁶¹

- The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
- The nature of the information, and the extent to which the subject matter is a matter of public concern.
- The source of the information. Some informants have no direct knowledge of the event. Some have their own axes to grind, or are being paid for their stories.
- Steps taken to verify the story.
- The status of the information. The allegation may have already been the subject of an investigation which commands respect.
- The urgency of the matter. News is often a perishable commodity.
- Whether comment was sought from the claimant. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary.
- Whether the article contained the gist of the claimant's side of the story.
- The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations and statements of fact.
- The circumstances of publication, including the timing.

Reynolds thus requires consideration of the seriousness of the charge,⁶² the extent to which the subject matter is one of public concern, the steps taken to verify the story, whether comment was sought from the plaintiff, and whether the gist of the plaintiff's side was reported. The reasonableness test in the proposed defence incorporates these factors specifically. Further, the reliability of the source of the information is covered by 'the adequacy of any steps taken by the defendant to check the accuracy of any facts'.

One key difference between the Act and *Reynolds* is that the former contains no factor dealing with 'the urgency of matter'.⁶³ It is difficult to see how the public good could be served by hastily published statements that are both defamatory and wrong. That is particularly so when there may be alternatives to publication, such as referring allegations of criminality or misconduct to the appropriate investigative authorities, or making further inquiries. This aspect of *Reynolds* therefore forms no part of the test of reasonableness.

Draft provisions covering these aspects are set out in the annexure.⁶⁴

whether qualified privilege existed and one which excluded qualified privilege if the defendant's conduct in making the publication was 'unreasonable': [2001] 2 AC 127, 203.

⁶¹ [2001] 2 AC 127, 205. His Lordship made it clear that the factors were illustrative only.

⁶² The greater the seriousness of the allegation the more care will be required in checking the facts on which it is based: see *Austin v Mirror Newspapers Ltd* [1986] AC 299, 317.

⁶³ Paragraph 22(2A)(e) of the *Defamation Act 1974* (NSW) now refers to 'whether it was necessary in the circumstances for the matter to be published expeditiously'.

⁶⁴ See clauses 13 and 14.

Fair report

The common law provides a defence of qualified privilege to fair and accurate reports of parliamentary and judicial proceedings. The defence also applies to reports of the proceedings of other bodies where it appears that it is in the public interest for the report to be privileged.⁶⁵ It may not be easy to determine whether the defence applies to reports of particular bodies.

To provide greater certainty, the Act would create defences for the fair and accurate report of certain public proceedings or the fair and accurate copy or summary of a public document.⁶⁶ The defences would be similar to those in ss24 to 26 of the *Defamation Act 1974* (NSW) and ss128 and 129 of the *Civil Law (Wrongs) Act 2002* (ACT). However, so long as the report, copy or summary was fair and accurate, the defence would be available, regardless of the defendant's motive in publishing the matter.

A separate defence would cater for those who fairly and accurately republished a report of an earlier report but who had no reasonable grounds for believing it to be inaccurate or unfair.

A draft provision covering this aspect is set out in the annexure.⁶⁷

Triviality

The Act would create a limited defence for trivial defamation. The defence would cover a person who shows that the publication of the matter was unlikely to cause the plaintiff to suffer any harm because each person to whom the matter was published is well acquainted with the plaintiff.

The proposed defence would resemble s13 of the *Defamation Act 1974* (NSW) as interpreted in cases such as *Perkins v NSW Aboriginal Land Council*.⁶⁸ Like s13, it is intended to be available only in limited situations, such as 'where a slightly defamatory statement is made in jocular circumstances to a few people in a private home'.⁶⁹ It is not intended to apply to publications in the mass media.

However, unlike s 13 the *Defamation Act 1974* (NSW), the proposed defence would, in effect, turn solely on the limited number of persons to whom the matter is published and their acquaintance with the plaintiff. For that reason, the reputation of the plaintiff, as known to the recipients, will be relevant to deciding whether the publication of the matter is unlikely to cause harm.

A draft provision covering this aspect is set out in the annexure.⁷⁰

⁶⁵ *Perera v Peiris* [1949] AC 1, 21.

⁶⁶ Section 10 of the *Parliamentary Privileges Act 1987* currently affords a defence of qualified privilege in relation to a fair and accurate report of proceedings in parliament. There is no intention to limit the ambit of that defence.

⁶⁷ See clause 15.

⁶⁸ Supreme Court of New South Wales, unreported, Badgery-Parker J, 15 August 1997.

⁶⁹ *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 800. See also *Perkins v NSW Aboriginal Land Council* (Supreme Court of New South Wales, unreported, Badgery-Parker J, 15 August 1997), 27: 'It would be relatively easy to make out the defence [of triviality] in circumstances where the publication was to a small number of persons well acquainted with the plaintiff and able themselves to make a judgment of their own knowledge as to the likelihood that there was any substance in the imputation conveyed.'

⁷⁰ See clause 16.

Innocent dissemination

At common law, all persons who participate in a publication share the liability for its publication, including the author, editor, publisher, the printer, retailer, and even a librarian.⁷¹ To ameliorate the effects of this rule, the common law has developed a defence of innocent dissemination. This protects ‘subordinate’ distributors such as vendors of a book or a newspaper if they can demonstrate three things: they did not know that the publication was defamatory; their ignorance was not due to negligence; and they had no ground for supposing that the publication was likely to contain defamatory material.⁷²

The position of internet service providers as innocent disseminators has not been the subject of significant Australian authority. In *Thompson v Australian Capital Television Pty Ltd*, however, Brennan CJ, Dawson and Toohey JJ suggested that there was ‘no reason in principle why a mere distributor of electronic material should not be able to rely upon the defence of innocent dissemination if the circumstances so permit’.⁷³ In *Dow Jones & Co v Gutnick*, Callinan J observed that whether such a defence might be available to publishers on the internet would depend upon the particular facts and circumstances of the case.⁷⁴

Commonwealth regulation of internet service providers and internet content hosts

Schedule 5 of the *Broadcasting Services Act 1992* (the Broadcasting Services Act) sets up a complaints based regime for regulation of ‘prohibited’ or ‘potentially prohibited content’ on the internet. The Schedule broadly provides that internet service providers (ISPs) and internet content hosts (ICHs) are required to remove content following formal notification from the Australian Broadcasting Authority, but are not required to monitor content actively.

Clause 91 of Schedule 5 provides a ‘defence’ for ISPs and ICHs that may be required to monitor content under State or Territory laws, including rules of the common law or equity.⁷⁵ Its terms are intended to provide a defence even to State or Territory laws and rules of the common law that would impose liability on ISPs and ICHs for unwittingly carrying defamatory material.⁷⁶

Innocent dissemination under the Act

The defence of innocent dissemination would have two limbs: the first covering ISPs and ICHs; the second covering all other ‘distributors’.

The first limb would continue to give effect to the current policy of the Broadcasting Services Act.

⁷¹ Gillooly M, *The Law of Defamation in Australia and New Zealand*, 1998, p 247.

⁷² *Emmens v Pottle* (1885) 16 QBD 354.

⁷³ (1996) 186 CLR 574, 589.

⁷⁴ (2002) 210 CLR 575, 652.

⁷⁵ The Explanatory Memorandum to the Broadcasting Services Amendment (Online Services) Bill 1999 (the Bill that inserted Schedule 5 into the Broadcasting Services Act) describes clause 91 as intending ‘to give practical effect to the principle that, in general, the Commonwealth will provide a nationally consistent framework for the regulation of the activities of Internet service providers and Internet content hosts, while the States and Territories will continue to carry primary responsibility for regulating content providers and users’.

⁷⁶ For similar conclusions, see Eisenberg J, ‘Safely out of sight: the impact of the new online content legislation on defamation law’ (2000) 23 *University of New South Wales Law Journal* 232; Collins M, ‘Liability of internet intermediaries in Australian defamation law’ (2000) *Media & Arts Law Review* 209.

The second limb of the defence would cover all other ‘distributors’, or employees or agents of such persons. It would be a defence for them to show that:

- they did not know that the publication contained the alleged defamatory material, and
- it was reasonable for them, having regard to the nature of the publication and any facts of which they were aware, not to monitor or check its contents for defamatory matter.

This defence would resemble the defence of innocent dissemination at common law but it would expressly cover some situations where the present law is unclear. This would be done by creating a wide definition of ‘distributor’ based, in part, on s1 of the *Defamation Act 1996* (UK).

The defence would not be available to persons who are authors, editors and commercial publishers (the latter being defined to include public broadcasting) and others who were concerned in the determination of the matter.⁷⁷ Such persons would not be regarded as subordinate publishers at common law. They are therefore excluded from the statutory defence.

Consent and other defences

Defendants in defamation can rely on three other defences besides those already mentioned: release, consent and illegality. The defence of release is available if the plaintiff releases the defendant from liability for the publication complained of, and the release is supported by consideration such as money or is given under seal. Such releases, as commentators have noted, are the basis of all court settlements.⁷⁸

A defendant can also establish that the plaintiff consented to publication of the defamatory matter.⁷⁹ This defence, however, requires unusual circumstances to succeed.

Furthermore, a defendant can establish that the plaintiff seeks to recover compensation for damage to reputation acquired in the course of carrying out an illegal trade or business. The operation of the defence has been explained thus.⁸⁰

If the source of the injured reputation is illegality, the law will not protect it at all, even from injury resulting from imputations travelling far beyond the mere charge of illegality. So far as the libel “touches and concerns” the plaintiff in relation to a reputation illegally attained, he can have no redress, not because the defendant has a justification but because the law does not regard such as reputation as proper to be protected, however it may be impinged upon by, and whatever the precise terms of, the libel.

The Act would continue to provide for all these defences.

⁷⁷ Users of the internet other than ISPs and ICHs may be regulated by other Commonwealth legislation. See, for example, sections 36 and 39B of the *Copyright Act 1968*.

⁷⁸ Gillooly M, *The Law of Defamation in Australia and New Zealand*, 1998, p 263.

⁷⁹ This is based on the maxim *volenti non fit injuria*, which applies to torts generally.

⁸⁰ *Smith’s Newspapers Ltd v Becker* (1932) 47 CLR 279, 311 (Evatt J); *Wilkinson v Sporting Life Publications* (1933) 49 CLR 365, 379 (Evatt J).

PROCEDURES

Limitation period

Consistent with an emphasis on the speedy resolution of defamation actions, the Act would provide for a limitation period of 12 months from the date of publication. A court could, however, extend this period to a maximum of three years from the date of publication if it decided that it was just and reasonable to do so. This is the position in New South Wales.

Concerns have been raised about the position of book publishers and those who maintain online archives under the limitation period. It should be recalled that, at common law, the cause of action in defamation arises upon publication of the defamatory matter; that is, communication of the defamatory words, gestures etc to a third party.⁸¹ Since books can stay in libraries for decades, there is a potential to circumvent the limitation period whenever persons borrow them. The same problem arises for those who maintain online archives, which can be accessed years after the original articles have been printed and sold.⁸²

Further consideration is being given to whether it might be feasible to introduce a specific archive defence that would apply to online and traditional archives or to refine the limitation period to cover such archives.

Jurisdiction of State, Territory and federal courts

State and Territory Supreme Courts and the Federal Court would be granted concurrent jurisdiction to hear causes of action arising under the Act.

The Act would provide that appeals from first instance proceedings would only be heard by the Federal Court. This step is expected to assist in achieving uniformity in the interpretation of the Act. It should also foster consistency in awards of damages. The Federal Court already has exclusive appellate jurisdiction in matters arising under Commonwealth legislation.⁸³

Consideration is being given to whether lower State and Territory courts which currently hear defamation proceedings should be granted jurisdiction over causes of action arising under the Act. Affordability and access to justice could be seen as strong reasons for granting them such jurisdiction.

Similarly, consideration is being given to whether the Federal Magistrates Court should be granted jurisdiction.

Any decision to give lower courts jurisdiction in this area would not, however, affect the question of appeals.

⁸¹ *Duke of Brunswick and Luneberg v Harmer* (1849) 117 ER 75.

⁸² *Loutchansky v Times Newspapers Ltd (Nos 2, 3 & 5)* [2002] QB 783.

⁸³ See s401 of the *Designs Act 1906* (Cth); s131B of the *Copyright Act 1968* (Cth); s195 of the *Trade Marks Act 1995* (Cth); s158 of the *Patents Act 1990* (Cth); and s422 of the *Workplace Relations Act 1996* (Cth).

Juries

The role of juries in defamation trials in Australia varies significantly. In South Australia and the Australian Capital Territory, they have no role.⁸⁴ In New South Wales, their role is basically restricted to determining whether an imputation is conveyed and is defamatory; the judge determines other issues. In Queensland and Victoria, trial by jury is at the election of either party, and the jury determines damages. In Western Australia, the position is similar. In the Northern Territory and in the Federal Court, juries, while available if a court makes an order, do not sit in practice.

Various submissions have argued that juries should play some role in defamation trials. They have stated that the jury is more representative of the community and defamation actions essentially turn on questions about a person's reputation in the community. They have also suggested that judges are likely to be more adverse to defendants.

Against this, it must be acknowledged that the use of civil juries has declined in recent decades.⁸⁵ In New South Wales, for instance, the general position is that civil proceedings are to be heard by a judge alone.⁸⁶ In South Australia and the Australian Capital Territory, civil juries are not available for any cases.⁸⁷ In the Northern Territory, the situation is similar to that in New South Wales, and civil juries are rare.⁸⁸

Defamation cases have reflected this trend. As noted above, in South Australia, the Australian Capital Territory and the Northern Territory, juries in defamation cases are either legally or practically unavailable. In New South Wales, the jury's role in defamation trials has been preserved but severely truncated: the jury no longer determines defences or damages. Further, while juries for defamation are legally available in Western Australia, they appear to be uncommon.

It must also be acknowledged that there are limits to the Commonwealth's constitutional capacity to establish uniform national arrangements for jury trials. The most constitutionally secure course would be to restrict juries to those State courts that allow for them. This means that juries may play no part in South Australia (except in the Federal Court), and their role in other States would depend on the rules or legislation in place for particular courts.

Nevertheless, juries generally have a degree of acceptance in relation to defamation trials that cannot be ignored. It would seem that the involvement of juries in the substance of trials may contribute to public confidence in a national defamation law. On that basis, there is a good argument for involving juries.

The role of juries

In general terms, juries could be involved in determining one or more of:

- whether published matter is defamatory

⁸⁴ All civil trials in South Australia and in the Australian Capital Territory are by judge alone.

⁸⁵ The decline of civil juries is noted in Cairns B, *Australian Civil Procedure*, 5th ed, 2002, p 469; Kirby M, 'Australia's Courts – A Quarter Century of Change', paper delivered at Judicial Conference of Australia, Gold Coast, Queensland, 7 November 1998, p 5.

⁸⁶ See s85 of the *Supreme Court Act 1970* (NSW); s76A of the *District Court Act 1973* (NSW).

⁸⁷ See s5 of *Juries Act 1927* (SA); s22 of the *Supreme Court Act 1933* (ACT).

⁸⁸ In the Northern Territory, civil cases in the Supreme Court are generally to be tried by judge alone unless the court makes an order for jury trial: see s7 of the *Juries Act* (NT). Judges rarely make an order for jury trial.

- whether any defence is available, and
- what damages to award.

Limiting juries to the question whether published matter is defamatory would in some respects be similar to the approach adopted in New South Wales. However, it may be difficult to reconcile with the broader rationale of jury participation in trials (which will, of course, often involve the consideration of defences). It would for that reason be more appropriate to allow juries also to play a role in considering defences.

The use of juries to assess damages, on the other hand, is more problematic. In particular, it would be very difficult in practice to ensure that juries adopt a consistent approach to defamation awards. For that reason, under the Act, juries would play a role in deciding whether a publication is defamatory and whether a defence is available, but they would have no role in awarding damages.

Juries to be restricted to courts which allow for them

In light of the constitutional limits noted above, juries would be restricted under the Act to those State and Territory courts for which State or Territory legislation requires or permits the use of juries. Juries would also be available in the Federal Court.

Courts may use the same criteria in deciding on jury trials

In some jurisdictions, trial by jury takes place at the election of either party. This means that it is relatively simple for parties to obtain a jury trial. In other jurisdictions, jury trial is at the discretion of the court.

One of the potential advantages of a national law is that the same basic procedures would operate throughout Australia. A fundamental objective of a national law would be to remove the incentive to forum shop. This has occurred to a significant extent under the current procedures of State and Territory law. Further consideration is therefore being given to whether a national law should provide common criteria for judges to apply in deciding whether to order a jury trial.

State and Territory procedural laws to be adopted

State and Territory laws would govern who may sit on a jury and what size the jury should be in State and Territory courts. This is unlikely to encourage forum shopping as few plaintiffs are likely to sue in a particular State on the basis, for example, that a jury there consists of four as opposed to seven people.

Speedy resolution of proceedings

Strike out power

To facilitate the speedy resolution of defamation proceedings, the court would be required to strike out proceedings for want of prosecution if:

- the defendant applied to have them struck out
- no date had been fixed for the trial of the proceedings, and

- no other step had been taken in the proceedings within 12 months immediately preceding the date of the defendant's application.

The provision would be based on s50 of the *Defamation Act 1992* (NZ).

Summary judgment

Many State and Territory courts as well as the Federal Court have incorporated summary judgment procedures into their rules.⁸⁹ The summary judgment procedure generally enables a judge to dismiss proceedings at an early stage when it is apparent that a claim has no substance and there are no other matters in dispute. Judgment is awarded to the plaintiff or defendant, depending on whose claim is dismissed. This means that the case does not have to proceed to an unnecessary hearing and parties are spared time and expense.

The *Defamation Act 1996* (UK) also provides for summary disposal of defamation proceedings.⁹⁰ However, the usefulness of the procedure seems limited. The court can only dispose of the whole of the claim, not parts of it. Further, the court cannot summarily dispose of the claim unless it is satisfied that 'summary relief' would adequately compensate the plaintiff for the wrong suffered. Since such relief is defined to include damages not exceeding £10,000, this means that plaintiffs whose claims are worth more than that sum would not seek summary disposal even if the defendant has no realistic prospect of succeeding.

The Attorney-General's Department's *Federal Civil Justice System Strategy Paper* recommended that the Government support legislation to enable the federal courts to give summary judgment on the whole of a claim or on a particular issue if they consider that:⁹¹

- the applicant or the respondent has no real prospect of succeeding on the claim or issue, and
- there is no other reason why the case or issue should be disposed of at trial.

It seems generally appropriate to confer such a power, which is like rules 292 and 293 of Queensland's Uniform Civil Procedure Rules and Part 24.2 of the United Kingdom's Civil Procedure Rules,⁹² on a court hearing defamation claims under a national law.

In making summary judgment, the court could award any remedy within its power, including injunction, declaration, damages and correction orders.

The summary judgment procedure would be in addition to any existing power of the court to grant summary judgment. It would thus supplement, but not replace, existing State and Territory procedures.

⁸⁹ For example, Order 20 Rule 1 Federal Court Rules enables an applicant to seek summary judgment where the defendant has no defence or answer to the applicant's claim, or no defence; and see Supreme Court Rules (ACT) - Order 15, Supreme Court Rules 1970 (NSW) - Section 13.2, Supreme Court Rules (NT) Order 21 (Judgment in default) and Order 22 (Summary judgment for plaintiff), Supreme Court (General Civil Procedure) Rules 1996 (Vic) Order 21 and Order 22 and Queensland Uniform Civil Procedure Rules (rules 292 and 293).

⁹⁰ See ss8-10 of the *Defamation Act 1996* (UK).

⁹¹ Attorney-General's Department, *Federal Civil System Strategy Paper*, 2003, pp 223-224.

⁹² The United Kingdom Rules require a court to consider that there is no other *compelling* reason why the case or issue should be disposed of at trial.

Alternative Dispute Resolution

ADR, although not appropriate for all disputes, can offer many benefits to participants, including a less intimidating process that allows the parties greater control over the outcome and a more expedient and cost effective method of resolving a dispute.⁹³ Some ADR processes such as mediation can also get to the ‘underlying’ and intangible issues driving the litigation, such as loss of face, negative relationships, and so on.

The Act would encourage use of ADR processes such as mediation,⁹⁴ case appraisal⁹⁵ and early neutral evaluation⁹⁶ before defamation actions proceed to trial. The Act would not replace but supplement existing ADR referral mechanisms, so as not to introduce additional costs. The court would be given discretion to refer proceedings, either with or without the consent of the parties, to any existing ADR process which was consistent with the separation of powers under the Constitution.⁹⁷ The court would base referral on whether ADR is likely to provide appropriate assistance to the court and the parties.

The Act would encourage parties to make appropriate use of any ADR processes by including cost incentives. In ADR processes such as case appraisal or early neutral evaluation, the Act would require the court to take into account the recommendation or decision made by the ADR practitioner or judicial officer when awarding costs. Where a facilitative ADR process such as mediation is used, the Act would require the court to award the costs of the ADR process against the unsuccessful party if the matter proceeds to trial.⁹⁸

⁹³ ALRC, *ADR – its role in federal dispute resolution*, Issues Paper No. 25 June 1998, para 2.9.

⁹⁴ ‘Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted’: National Alternative Dispute Resolution Advisory Council (NADRAC), *Dispute Resolution Terms*, September 2003, p 9.

⁹⁵ ‘Case appraisal is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved’: NADRAC, *Dispute Resolution Terms*, September 2003, p 4.

⁹⁶ ‘Early neutral evaluation is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute’: NADRAC, *Dispute Resolution Terms*, September 2003, p 6.

⁹⁷ There would be a real question whether binding case appraisal mechanisms, such as those under Part 8 of the *Supreme Court of Queensland Act 1991* (Qld) and Chapter 9, Part 4 of the Uniform Civil Procedures Rules 1999 (Qld), could be used in the exercise of federal jurisdiction. The Act would therefore preclude courts from referring parties to such mechanisms.

⁹⁸ Careful consideration will be given to defining what constitutes ‘the costs of the ADR process’. Further, if the ADR is offered for free by the court, the requirement to award ADR costs would not apply.

REMEDIES AND RELATED ISSUES

Vindication of reputation

The Act would include a range of provisions aimed at encouraging plaintiffs and defendants to take steps that would vindicate the reputation of plaintiffs, where appropriate. In essence, action on the part of defendants that would lead to vindication of reputation would result in reduced damages.

The Act would also include new remedies designed to reduce the law's emphasis on damages as the sole remedy for defamation.

Right of reply

In many countries in Europe, individuals who are mentioned in newspapers, radio or television broadcasts have access to legally enforceable right of reply.⁹⁹ The rights apply regardless of whether the person identified has been harmed or defamed in any way. The rationale for such rights is to protect the individual from the presentation of inaccurate facts about them, and to give the individual protection against attacks on their dignity and reputation.¹⁰⁰

No right of reply provisions exist in Australian law, although some State defences incorporate the publication of a reasonable letter by way of explanation or contradiction as a precondition to establishing certain defences.¹⁰¹ In principle, however, it seems desirable for publishers in the news media to publish replies to all potentially defamatory statements. Such replies ensure that the public hears both sides of a story. They may also help to defuse feelings of frustration that often result in litigation. At the same time, it is unclear whether it would be appropriate to make the right of reply a legally enforceable right, as it is in Europe. The benefits of litigation directed solely to the provision of such a right are debateable.

The Act would provide a strong incentive for publishers to give an adequate right of reply. The basic features of the scheme would be threefold:

- First, a person claiming to be defamed in a 'news medium'¹⁰² may, within 14 days of becoming aware of the matter, request the defendant in writing to publish, or cause to be published, in the same medium as the publication complained of, with substantially similar prominence, and at the earliest opportunity, a reply. The reply would have to be provided at the same time as the request.
- Secondly, compliance with the plaintiff's request would mitigate or eliminate any damages and, subject to one qualification, would afford protection to the defendant against any subsequent defamation action by a third party.

⁹⁹ In France, for instance, article 13 of the Act of 29 July 1881 on press freedom obliges the director of a written publication to insert the reply of any person, physical or legal, who has been named or designated in the publication free of charge and within a specified time period. The individual requesting the right of reply need not show that the original statement was false or that it caused harm. The mere mention of the individual's name is sufficient.

¹⁰⁰ See Council of Europe, Committee of Ministers, *Resolution (74)26 On the Right of Reply – Position of the Individual in relation to the Press*.

¹⁰¹ See, for example, s 7 of the *Wrongs Act 1936* (SA); s 5 of the *Wrongs Act 1958* (Vic); s 2 of the *Newspaper Libel and Registration Act 1884* (WA).

¹⁰² This term could be defined in a number of ways. Section 2 of the *Defamation Act 1992* (NZ), however, defines it as a 'medium for the dissemination, to the public or a section of the public, of news, or observations on the news, or advertisements'.

- Thirdly, if the defendant fails to comply with a reasonable request and loses any subsequent defamation action, the failure would be taken into account in assessing damages and the possibility of indemnity costs¹⁰³ against the defendant would arise.¹⁰⁴

The Act would provide guidance about when a request by a plaintiff should be considered reasonable and about the factors relevant to the publication of the reply; for example, the maximum length of replies,¹⁰⁵ the meaning of publication at the earliest opportunity,¹⁰⁶ and the meaning of substantially similar prominence.¹⁰⁷

A defendant who published a reply as requested would be granted absolute immunity from actions for defamation by third parties if they did not alter the content of the reply in any material way. The author of the reply, however, would be answerable to defamation proceedings in the same way as the author of any other statement, although they would be able to rely on qualified privilege provided that they did not have an improper purpose in making the reply.¹⁰⁸ This will prevent persons from availing of the right to defame others while ensuring that those who publish replies are not exposed to further liability.

Apologies

Full and complete apologies¹⁰⁹ offered shortly after publication of defamatory matter may do more than damages to restore the plaintiff's reputation. They may also remove the impetus for any litigation.

The Act would encourage potential defendants to be more forthcoming about their errors by providing that an apology would not be an express or implied admission of liability. But because apologies should be published swiftly and with prominence if they are to restore the plaintiff's reputation, the Act would provide that an apology could only mitigate damages, or be taken into account in deciding whether or not to grant a declaration or make correction orders, in limited circumstances. The defendant would have to show that they published, at the earliest opportunity after becoming aware that the matter was false or defamatory, an apology that was of substantially similar prominence to the original defamatory story or article.

Publication at the earliest opportunity, and whether the apology is of substantially similar prominence to the original story or article, would be determined under the same principles as those set out under replies above. The basic issue is whether the published apology is likely to reach substantially the same audience as the original publication as soon as possible.

¹⁰³ In *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59, 74, Sir Robert Megarry VC defined indemnity costs as all costs except those that were of an unreasonable amount or were unreasonably incurred, and the benefit of the doubt would be given to the person receiving the costs.

¹⁰⁴ The Act's provisions in this regard could be modelled on s26(3) of the *Defamation Act 1992* (NZ).

¹⁰⁵ The maximum length of a reply would be either 300 words or the approximate length of the story or article complained of (whichever is the longer).

¹⁰⁶ The Act would provide that replies within a timeframe prescribed by regulation would be taken to have been made at the earliest opportunity. Absent such a timeframe, publication at the earliest practical opportunity would depend on the medium in which the original story or article was published. For example, in the case of daily newspapers, the reply would generally need to be printed within three days after receipt of the reply.

¹⁰⁷ What is required will depend on the medium in which the article or story complained of is published. For example, if the original story is a printed article in a newspaper or periodical, the defendant would generally have to publish a reply in the same size print, with a heading of similar size to that of the original story, and in the same part of the publication as the original story.

¹⁰⁸ See 'Qualified privilege under the Act: first aspect' above.

¹⁰⁹ The term 'apologies' would be defined to include retractions and voluntary corrections.

In addition, the apology or retraction must be full and complete. What amounts to a full and complete apology will depend on the circumstances. In many cases where a simple error was made, it would be sufficient to acknowledge the error and identify the true facts. In other cases, such as where the defendant was recklessly indifferent to the truth or falsity of the facts before the publication, the defendant could expect no benefit from an apology unless they clearly acknowledged their shortcomings and identified the true facts.

Correction orders

Correction orders offer a potentially powerful means of vindicating a plaintiff's reputation; they involve the defendant being compelled to set right a statement defamatory of the plaintiff, in a way that is calculated to reach the same audience as the original publication. Such orders may also diminish the law's preoccupation with damages as the sole remedy for defamation.

Concerns have been raised, however, that it may be unfair to compel defendants to publish statements which they did not believe to be true. It was suggested that this would be an impermissible intrusion into defendants' freedom of speech, and that defendants should have the option of paying damages rather than being compelled to publish a correction. However, it is difficult to understand why correction orders should be regarded as intruding upon freedom of speech when their role is limited to rectifying defamatory matter that was published by the defendant in the first place.

Accordingly, the Act would give the court power to make correction orders that would compel a defendant to correct a statement defamatory of the plaintiff, but the court could also require the defendant to include summaries of aspects of the case. Except where the plaintiff otherwise agreed, the court would have to ensure that, as far as practicable, the correction had substantially similar prominence to the original defamatory statement and would be likely to reach the same audience.¹¹⁰

To give parties an incentive to pursue correction orders rather than damages, the Act would provide that if the court finds for a plaintiff who has sought only correction orders, the court must award them indemnity costs unless there are special reasons for not doing so.¹¹¹

Correction orders could only be made after the court had found for the plaintiff. It does not seem practical to require the court to make correction orders without the benefit of having heard the evidence.

Defamation damages

Common law

Damages in defamation proceedings are traditionally divided into compensatory damages, aggravated compensatory damages and exemplary damages.

Compensatory damages in civil proceedings generally serve to restore the plaintiff to the position they were in before the wrongdoing, and such damages are said to have the same function in

¹¹⁰ The criteria for substantially similar prominence would be based on those for replies (discussed above) if the publication was in a news medium. If the publication did not occur in a news medium, however, the court could recommend publication in any medium likely to reach a reasonably equivalent audience, such as the largest circulating newspaper in the region.

¹¹¹ The Act's provisions in this regard could be modelled on s26(3) of the *Defamation Act 1992* (NZ).

defamation. However, because a person's reputation is difficult to assess in strictly monetary terms, it has long been understood that compensatory damages function both to vindicate the plaintiff's reputation to the public and to console the plaintiff for the wrong done.¹¹²

Aggravated compensatory damages are a subset of compensatory damages and are similarly awarded to compensate the plaintiff for loss. Aggravated compensatory damages are awarded for an aggravation of the loss suffered by the plaintiff due to the improper manner in which the defendant perpetrated the wrong or their improper conduct subsequent to the wrong.¹¹³

Unlike the compensatory forms of damages, exemplary damages are not concerned with restoring the plaintiff to the position they were in before the wrongdoing. Instead, exemplary damages are intended to punish the defendant and to deter similar conduct by others, and for this reason they have sometimes been called 'punitive damages'.¹¹⁴

Damages in defamation raise a number of issues for a national law. In broad terms, the Act would:

- set out the factors relevant to an assessment of damages, and
- maintain the position under the current law regarding damages and joint tortfeasors.

Factors relevant to assessment of damages

Aggravated compensatory damages and exemplary damages are often confused or found difficult to distinguish. As Windeyer J observed:¹¹⁵

[W]hatever be the practice in torts other than defamation, the distinction between aggravated and exemplary damages is not easy to make in defamation, either historically or analytically; and in practice it is hard to preserve.

Some of the confusion arises because the same factors may both aggravate the plaintiff's loss and also be judged worthy of punishment irrespective of that loss. Malice is an example. At common law, the defendant's malice can justify awards of both aggravated damages and exemplary damages. This led Windeyer J in *Uren* to observe:¹¹⁶

[W]hy is the degree of the indignity that the plaintiff suffers to be measured by considering what was in the mind of the defendant, the malice or motive which moved him? It seems to me that in truth a punitive or vindictive element does lurk in many cases in which the damages were aggravated by the defendant's conduct.

The Act would recognise the practical (and perhaps theoretical) difficulty of maintaining a separation between awards of compensatory and exemplary damages. It would therefore require courts to award a single sum of damages that would be sufficient to:

- vindicate the reputation of the plaintiff
- console the plaintiff for the distress caused by the wrong

¹¹² *Uren v John Fairfax & Sons (Uren)* (1966) 117 CLR 118, 150 (Windeyer J).

¹¹³ Circumstances justifying aggravated damages include responding to a plaintiff's request for an apology with uproarious laughter (*Fielding v Variety Inc* [1967] 2 QB 841, 849, 851) and conducting litigation in an improper or unjustifiable way (*Triggell v Pheeney* (1951) 82 CLR 497).

¹¹⁴ See *XL Petroleum Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 471; *Lamb v Cotogno* (1987) 164 CLR 1, 9.

¹¹⁵ (1966) 117 CLR 118, 149.

¹¹⁶ (1966) 117 CLR 118, 151-152.

- provide reparation for harm done to the plaintiff’s reputation, and
- in exceptional cases, punish and deter extreme conduct.

The Act would then set out the factors that a court must consider in assessing damages. These factors, which are broadly consistent with those under existing law, would include:

- the nature and gravity of any allegation in the defamatory matter
- the manner and extent of its publication
- the extent to which the conduct of the defendant, including conduct subsequent to publishing the defamatory matter, tended to:
 - adversely affect the reputation of the plaintiff
 - injure the feelings or health of the plaintiff
 - injure the plaintiff in their occupation or financial standing, or
 - deter other persons from associating or dealing with the plaintiff
- the importance to the plaintiff of their reputation in the eyes of particular or all recipients of the publication
- the defendant’s state of mind
- the nature and extent of the benefit that the defendant derived or intended to derive from their conduct
- whether the defendant made an apology in respect of the defamatory matter
- whether the defendant published an adequate reply in respect of the defamatory matter
- any pecuniary loss suffered or likely to be suffered by the plaintiff
- any delay between the publication of the defamatory matter and the decision of the court for which the plaintiff is responsible, and
- any delay between the publication of the defamatory matter and the decision of the court for which the defendant is responsible.

Many factors would be based on those enumerated in clause 28 of the Draft Bill prepared by the ALRC and on ss29, 30 and 31 of the *Defamation Act 1992* (NZ), but they would reflect the content of the proposals regarding the right of reply, apologies and correction orders.

Specific mitigating factors

Two mitigating factors would operate to reduce damages. First, the Act would permit the defendant to lead evidence of specific misconduct to establish the plaintiff’s bad reputation. At common law, defendants can lead general evidence of the plaintiff’s bad reputation as a mitigating factor in any award of damages. However, they are not usually entitled to lead evidence of specific misconduct.¹¹⁷ The reason that courts have given is that to admit such evidence would ‘throw upon the plaintiff the difficulty of showing a uniform propriety of conduct during his whole life’;¹¹⁸ in other words, it may degenerate into a witch hunt of the plaintiff’s past life.

¹¹⁷ *Scott v Sampson* (1882) 8 QB 491.

¹¹⁸ *Scott v Sampson* (1882) 8 QB 491, 505 (referring to *Jones v Stevens* (1822) 147 ER 458, 468).

It seems possible to meet the concern of the common law by permitting evidence of specific misconduct to be adduced only if it is relevant to the aspect of the person's reputation which is at issue in the defamation proceedings. This approach was recommended by the ALRC and is embodied in s30 of the *Defamation Act 1992* (NZ). Accordingly, the Act would include a provision akin to that in New Zealand.

Secondly, the Act also would require the court to consider the terms of any declaration or correction order made, or proposed to be made, in mitigation of damages. Such declarations and corrections orders may well help vindicate the plaintiff's reputation and warrant substantially lower damages.

Damages and joint tortfeasors

At common law, a joint tort gave rise to only one cause of action and could result in only one award of damages.¹¹⁹ This meant that if two persons had published defamatory matter and one had acted with malice and the other had not, it would not have been possible to award exemplary damages or aggravated damages against one but not the other.

This rule has been abrogated by statute in every Australian jurisdiction. The Act would reflect that situation.

¹¹⁹ *XL Petroleum Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 454.

OTHER ELEMENTS OF THE NATIONAL LAW

Corporations and other classes of plaintiffs

Corporations

At common law, trading corporations can maintain an action in defamation for statements which adversely affect their trading or business reputations. Such corporations are limited to recovering damages for actual or likely financial loss.¹²⁰ They are not entitled to damages as consolation for the wrong done to their reputation, and they cannot access aggravated damages for emotional distress, since they have no feelings.¹²¹

It has been argued that the right of corporations to sue for defamation should be abolished or restricted. Supporters of abolition commonly argue that corporations do not have an interest comparable to that of natural persons and are adequately protected by remedies under the *Trade Practices Act 1974* (Cth) and the tort of injurious falsehood. Supporters of restriction have expressed concern about the ability of corporations with 'deep pockets' to stifle community debate and have suggested that such corporations can defend their interests without resort to defamation. That view has prompted the New South Wales parliament to restrict the right to sue to corporations that have fewer than 10 employees and have no subsidiaries.¹²² It has prompted a Western Australian committee to recommend that corporations other than non-profit corporations should be permitted to bring proceedings only with the leave of the court,¹²³ along with suggestions from other quarters that only corporations under a specified turnover should be permitted to sue.

A number of points can be made in response to these arguments. First, as the Irish Law Reform Commission pointed out, while the type of reputation enjoyed by corporations is somewhat different from that belonging to an individual and traditionally recognised by the common law, it is clear that such bodies have reputations which can be assailed.¹²⁴

Secondly, to restrict corporations to relying on injurious falsehood and remedies that involved proof of financial loss would arguably impose on them an unreasonable burden. If a company has a bad reputation, the financial loss sustained will be through individuals or bodies deciding not to trade or associate with it. Such loss is very difficult to prove.¹²⁵

Thirdly, proposals to limit the right to sue to certain corporations have proven to be arbitrary. It is difficult to see why a family business with, say, 11 employees should be forbidden to sue while another business with eight employees should not. It is equally difficult to see why a corporation with a turnover of, say, \$250,000 should be forbidden to sue when another business with a lower turnover should not. It is, moreover, undesirable to force all corporations, other than non-profit ones, to seek the leave of the court simply to determine whether they can sue. Few, if any, other potential litigants in tortious actions are subject to such an uncertain requirement just because of who they are.

¹²⁰ Non-trading corporations that are able to acquire property for income or revenue may also be able to bring defamation actions for allegations that could affect these financial interests: *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344, 355-356.

¹²¹ As Lord Reid put it in *Lewis v Daily Telegraph Ltd* [1964] 1 AC 234, 262: 'A company cannot be injured in its feelings, it can only be injured in its pocket.'

¹²² Section 8A of the *Defamation Act 1974* (NSW).

¹²³ *Committee Report on Reform to the Law of Defamation in Western Australia*, September 2003.

¹²⁴ Irish Law Reform Commission, *Report on the Civil Law of Defamation*, 1991, p 86.

¹²⁵ Irish Law Reform Commission, *Report on the Civil Law of Defamation*, 1991, p 86.

Fourthly, the fact that some corporations are large and well resourced is arguably beside the point. Both large and small corporations have reputations which can suffer loss through the publication of defamatory matter. The same can be said of wealthy and less wealthy individuals. If the resources of the parties are to be a primary consideration in reformulating the scope of defamation, attention will need to be paid to the fact that many defendants are themselves corporations with ‘deep pockets’.

It follows from these considerations that the Act would permit corporations to sue for defamation. The traditional common law limitations on damages they could recover would, however, be maintained.

Elected government bodies

At common law, artificial persons such as local councils and similar elected bodies cannot sue for defamation. The rationale for this rule is that it is incongruous to regard them as having ‘governing reputations’ which the common law will protect against criticism on the part of citizens.¹²⁶ The Act would maintain the present position.

Joint publishers

Where a number of people are responsible for publication, the common law provides each of them with a separate defence of fair comment and qualified privilege.¹²⁷ Thus, if one of two co-publishers is found to have acted out of malice, and thereby cannot rely on fair comment or qualified privilege, the other may still be able to claim a defence.

The Act would deal with joint publishers in a similar way. It would provide that a defence of honest opinion would not fail merely because the opinion expressed by any person jointly responsible with the defendant for the publication of the matter was not that person’s genuine opinion. It would also provide that a defence of qualified privilege would not fail merely because any person jointly responsible with the defendant for the publication of the matter acted for an improper purpose. These provisions would be based on s20 of the *Defamation Act 1992* (NZ).

Criminal defamation

The Act would make it clear that it is not intended to affect the operation of State and Territory legislation dealing with criminal defamation.

¹²⁶ *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680; *NSW Aboriginal Land Council v Jones* (1998) 43 NSWLR 300.

¹²⁷ *Thomas v Bradbury, Agnew & Co Ltd* [1906] 2 KB 627, 638; *Stephens v Western Australian Newspapers* (1994) 182 CLR 211, 253-255; *Roberts v Bass* (2002) 212 CLR 1, 65-66 [181]-[182].

SCOPE OF THE NATIONAL LAW: APPLICATION PROVISIONS

The application provisions of the national law would ensure that the Act was limited to matters within Commonwealth constitutional power. Putting to one side the possibility of a reference of power to the Commonwealth, it is proposed that the Act would be limited primarily to defamatory publications made:

- in a territory
- by persons or corporations resident in a territory
- in the course of trade and commerce among the States
- by the use of postal, telegraphic, telephonic and like services (defined to include radio, television and the internet)
- by a trading or financial corporation formed within the limits of the Commonwealth, or a foreign corporation, or
- in relation to the activities of a trading or financial corporation formed within the limits of the Commonwealth, or a foreign corporation.

The proposed law would thus be a code for most defamation proceedings. It would cover the kinds of defamatory publications which raise the greatest jurisdictional and practical problems: those which cross State and Territory boundaries. It would thus reduce the complexity of the law. The only significant areas that would remain within State jurisdiction would involve some defamatory publications made by one individual against another.

A reference of power from the States to the Commonwealth Parliament under s51(xxxvii) of the Constitution would, however, remove even these limitations. It would ensure that the Act would be a code for all defamation actions.

ANNEXURE: DEFAMATION BILL PROVISIONS

Part 1—Preliminary

^{^1} Definitions

In this Act, unless the contrary intention appears:

defamation action means an action under section ^{^6}.

defamatory imputation means an imputation that tends to:

- (a) adversely affect the reputation of a person in the estimation of members of the public (or of a substantial and reputable section of the public); or
- (b) deter members of the public (or members of a substantial and reputable section of the public) from associating or dealing with a person; or
- (c) expose a person to ridicule; or
- (d) adversely affect a person's occupation, trade, office or financial standing.

defamatory matter means matter that conveys a defamatory imputation.

matter means words, gestures, images and any other means by which meaning is conveyed.

publish has the meaning given by section ^{^2}.

subject of public interest has the meaning given by section ^{^4}.

Territory includes an external Territory.

true has a meaning affected by section ^{^5}.

^{^2} Meaning of *publish*

- (1) For the purposes of this Act, defamatory matter about a person is ***published*** if it is communicated to someone other than that person.
- (2) Despite subsection (1), defamatory matter about a person is taken not to be ***published*** if it is communicated in circumstances in which it could not reasonably be anticipated that the matter would be communicated to someone other than that person.

^{^3} When defamatory matter is taken to be about a person

- (1) Defamatory matter is taken to be about a person if the matter can reasonably be understood to be about the person.
- (2) Without limiting subsection (1), defamatory matter is taken to be about a person if:
 - (a) the matter is about a group of which the person is a member and the group is sufficiently small that a reference to the group can reasonably be understood to be a reference to each member of the group; or
 - (b) the matter is about a group of which the person is a member and the circumstances of the publication of the matter reasonably give rise to the conclusion that the matter refers particularly to each member of the group.

^{^4} Meaning of *subject of public interest*

For the purposes of this Act, defamatory matter about a person, a defamatory imputation about a person or an opinion about a person is taken to relate to a ***subject of public interest*** unless:

- (a) the matter, imputation or opinion relates to the person's health, private behaviour, financial affairs, home life, personal relationships or family relationships; and
- (b) none of the following apply to the matter, imputation or opinion:
 - (i) it relates to the person's public, commercial or professional activities;
 - (ii) it relates to the person's suitability or candidature for a public, commercial or professional office or position;
 - (iii) it relates to a decision taken, or likely to be taken, by the person in a public, commercial or professional capacity;
 - (iv) it relates to property or services offered to the public;
 - (v) it relates to public administration;
 - (vi) it relates to the administration of justice;
 - (vii) it is reasonable to publish the matter (or, in the case of an imputation or an opinion, the matter conveying the imputation or expressing the opinion) in order to preserve the safety or property of any person;
 - (viii) the matter (or, in the case of an imputation or an opinion, the matter that conveys or expresses the imputation or opinion) is published in response to something introduced into public debate by the person himself or herself, otherwise than by way of response to something introduced into public debate by someone else.

^5 Truth of imputations and facts

For the purposes of this Act, an imputation or fact is taken to be *true* if the imputation or fact is substantially true or does not differ materially from the truth.

Part 2—Defamation action

^6 Cause of action for defamation

Subject to Part 3, if a person (the *defendant*) publishes defamatory matter about another person (the *plaintiff*), the plaintiff has a cause of action under this section against the defendant in relation to the publication of the matter.

^7 One cause of action regardless of how many imputations

A publication of defamatory matter about the plaintiff gives rise to a single cause of action under section ^6, regardless of the number of defamatory imputations about the plaintiff conveyed by the matter.

^8 One proceeding against each publisher of matter regardless of how many publications

(1) If:

- (a) the plaintiff brings proceedings (the *earlier proceedings*) against a defendant based on the defamatory nature of matter (whether under this Act or otherwise); and
- (b) the same, or substantially the same, matter has been published by the defendant more than once; and
- (c) the earlier proceedings relate to only one or only some of those publications; the plaintiff cannot bring a defamation action, or another defamation action, against that defendant in relation to another of those publications unless the defamation action is necessary to allow the plaintiff:
 - (d) to seek a remedy for a publication that is materially different from the publication of publications in relation to which the earlier proceedings are brought; or
 - (e) to seek a remedy different from a remedy already sought or obtained in the earlier proceedings.

(2) If:

- (a) the plaintiff has brought proceedings (the *earlier proceedings*) against a defendant based on the defamatory nature of matter (whether under this Act or otherwise); and
- (b) the defendant subsequently publishes the same matter, or substantially the same matter; the plaintiff cannot bring a defamation action, or another defamation action, against that defendant in relation to a subsequent publication unless:
 - (c) the defamation action is necessary to allow the plaintiff:
 - (i) to seek a remedy for a publication that is materially different from the publication or publications in relation to which the earlier proceedings are brought; or
 - (ii) to seek a remedy different from a remedy already sought or obtained in the earlier proceedings; or
 - (d) if a remedy has been granted in the earlier proceedings—the subsequent publication is intentional.

(3) This section does not affect the powers of any court in relation to vexatious proceedings or abuse of process.

Part 3—Defences to a defamation action

^9 True and relates to subject of public interest

It is a defence to a defamation action, to the extent to which it relates to a defamatory imputation, if the defendant proves that the imputation:

- (a) is true; and
- (b) relates to a subject of public interest.

^10 Not defamatory in context

- (1) This section applies if:
 - (a) defamatory matter is published; and
 - (b) there are defamatory imputations about the plaintiff (the *residual imputations*) conveyed by the matter that:
 - (i) are not true; or
 - (ii) do not relate to a subject of public interest; and
 - (c) there are defamatory imputations about the plaintiff (the *justified imputations*) conveyed by the matter or by matter published together with it that:
 - (i) are true; and
 - (ii) relate to a subject of public interest.
- (2) It is a defence to a defamation action, to the extent to which it relates to a residual imputation, if the defendant proves that, because of the truth of the justified imputations and the relationship between those imputations and the residual imputation, the residual imputation does not tend to:
 - (a) further adversely affect the reputation of the plaintiff in the estimation of members of the public (or of a substantial and reputable section of the public); or
 - (b) further deter members of the public (or of a substantial and reputable section of the public) from associating or dealing with the plaintiff; or
 - (c) further expose the plaintiff to ridicule; or
 - (d) further adversely affect the plaintiff's occupation, trade, office or financial standing.

^11 Honest opinion

- (1) It is a defence to a defamation action, to the extent to which it relates to the publication of particular defamatory matter, if the defendant proves that:
 - (a) the matter expresses an opinion that relates to a subject of public interest; and
 - (b) the opinion is based on:
 - (i) facts asserted or implied in the matter or published together with the matter; or
 - (ii) facts generally known to the public (or to a substantial and reputable section of the public); and
 - (c) those facts:
 - (i) are true; or
 - (ii) were published earlier in circumstances covered by section ^12, ^13, ^14 or ^15; and
 - (d) if the author of the matter is the defendant—the defendant genuinely holds the opinion; and
 - (e) if the author of the matter is an employee or agent of the defendant or an independent contractor acting in the course of a contract with the defendant:
 - (i) the defendant believes the opinion to be the opinion of the author; and
 - (ii) the opinion does not purport to be the opinion of the defendant; and

- (f) if the author of the matter is not the defendant, an employee or agent of the defendant or an independent contractor acting in the course of a contract with the defendant:
 - (i) the defendant has no reasonable grounds to believe that the opinion is not honestly held by the author of the matter; and
 - (ii) the opinion does not purport to be that of the defendant, an employee or agent of the defendant or an independent contractor acting in the course of a contract with the defendant.
- (2) In determining whether something is an opinion, regard is to be had to:
 - (a) the extent to which it can be verified or proved; and
 - (b) the context in which it was published and, in particular, whether that context would have the effect that it is likely to be understood as opinion, rhetoric or hyperbole; and
 - (c) its language and, in particular, whether cautionary or qualifying language was used or a disclaimer was published together with the matter.

^12 Absolute privilege

- (1) It is a defence to a defamation action in relation to the publication of defamatory matter if the defendant proves that the publication:
 - (a) was made in the course of parliamentary proceedings; or
 - (b) was made in the course of court proceedings; or
 - (c) was made in the course of quasi-judicial or administrative proceedings; or
 - (d) was a privileged executive communication; or
 - (e) was made in circumstances specified in the regulations.

- (2) In this section:

Australian parliament means:

- (a) the Parliament of the Commonwealth; and
- (b) the Parliament of a State; and
- (c) the legislature of a Territory; and

includes a House of such a Parliament or legislature.

Australian parliamentary committee means:

- (a) a committee of an Australian parliament, including a committee established by an Act; or
- (b) a sub-committee of a committee mentioned in paragraph (a).

court proceedings means the proceedings of a court of the Commonwealth, a State or Territory (including committal proceedings in relation to an indictable offence), and includes words spoken and acts done in the course of, or for purposes of or incidental to, those proceedings.

designated officer means:

- (a) an APS employee; or
- (b) a person engaged or employed under the *Members of Parliament (Staff) Act 1984*; or
- (c) a person holding an office or appointment under a law of the Commonwealth, a State or Territory; or
- (d) a person specified in the regulations.

parliamentary proceedings means the proceedings of an Australian parliament or an Australian parliamentary committee, and includes:

- (a) words spoken and acts done in the course of, or for purposes of or incidental to, those proceedings; and
- (b) the preparation of a document for purposes of or incidental to those proceedings; and

- (c) the giving of evidence before an Australian parliament or an Australian parliamentary committee, and the evidence so given; and
- (d) the presentation or submission of a document to an Australian parliament or Australian parliamentary committee; and
- (e) the formulation, making or publication of a document, including a report, by or in accordance with an order of an Australian parliament or Australian parliamentary committee, and the document so formulated, made or published.

privileged executive communication means a communication:

- (a) made by a Minister of the Commonwealth, a State or Territory to a Minister of the Commonwealth, a State or Territory; or
- (b) made by a Minister of the Commonwealth, a State or Territory, in the course of performing the Minister's ministerial functions, to a designated officer; or
- (c) made by a designated officer, in the course of the officer's duty, to a Minister of the Commonwealth, a State or Territory.

quasi-judicial or administrative proceedings means the proceedings of:

- (a) a Royal Commission; or
- (b) a tribunal established under a law of the Commonwealth; or
- (c) a tribunal established under a law of a State or Territory that has the power to examine witnesses on oath; and

includes words spoken and acts done in the course of, or for purposes of or incidental to, those proceedings.

^13 Qualified privilege (specified circumstances)

- (1) It is a defence to a defamation action, to the extent to which it relates to the publication of particular defamatory matter, if the defendant proves that:
 - (a) the defendant's sole or dominant purpose in publishing the matter was not an improper purpose; and
 - (b) the publication was made in any of the following circumstances:
 - (i) in the course of exercising the defendant's lawful authority to censure or impose a sanction on a person;
 - (ii) for the purpose of seeking redress of a wrong or grievance, if the publication was made to a person believed by the defendant on reasonable grounds to have the lawful authority to grant that redress;
 - (iii) for the purpose of protecting the defendant's own interests or the interests of another person;
 - (iv) in answer to an inquiry by a person believed by the defendant on reasonable grounds to be a person whose interests are affected by the subject of the inquiry;
 - (v) in response to an invitation or challenge by the plaintiff (other than an invitation or challenge to repeat something that the defendant published earlier in circumstances covered by section ^12);
 - (vi) in response to defamatory matter (whether about the defendant or another) published by the plaintiff;
 - (vii) in the course of conveying information about the suitability of a candidate for election to persons believed by the defendant on reasonable grounds to be entitled to vote in the election, if the defendant is, or the information was provided to the defendant by, a person entitled to vote in the election, a candidate or person acting on behalf of a candidate.
- (2) Without limiting paragraph (1)(a), a defendant's sole or dominant purpose in publishing matter is taken to be an improper purpose if the defendant published the matter:

- (a) believing it to be false, or being recklessly indifferent as to its truth or falsity; and
 - (b) not believing, or having no reasonable grounds to believe, that the defendant was obliged (whether legally or ethically) to publish the matter regardless of the defendant's belief as to the truth or falsity of the matter.
- (3) A defendant's sole or dominant purpose in publishing matter is not taken to be an improper purpose only because the defendant did not believe that the defendant was obliged (whether legally or ethically) to publish the matter.
- (4) In subparagraph (1)(b)(vii):

election means an election to an Australian parliament (within the meaning of section ^12) or to a local government authority of a State or Territory.

^14 Qualified privilege (reasonable in the circumstances)

- (1) It is a defence to a defamation action, to the extent to which it relates to the publication of particular defamatory matter, if the defendant proves that:
- (a) the defendant believed on reasonable grounds that the person to whom the matter was published had an interest in receiving information on a subject; and
 - (b) the defendant published the matter to the person in the course of giving the person information on the subject; and
 - (c) it was reasonable in all the circumstances for the defendant to publish the matter to the person.
- (2) In determining whether it was reasonable in all the circumstances for the defendant to publish matter to the person, regard may be had to any or all of the following:
- (a) whether the matter relates to a subject of public interest;
 - (b) the seriousness of the defamatory imputations conveyed by the matter;
 - (c) whether the defendant took adequate steps to check the accuracy of any facts conveyed by the matter;
 - (d) whether the defendant believed that any facts conveyed by the matter were untrue;
 - (e) whether the defendant gave the plaintiff adequate opportunity to comment on the matter before publishing it;
 - (f) whether the matter and any matter published together with it provides balanced information about the plaintiff's perspective on the subject the matter addresses;
 - (g) the manner of publication;
 - (h) the language of the matter;
 - (i) the number of persons to whom the matter was published.

^15 Fair report

- (1) It is a defence to a defamation action, to the extent to which it relates to the publication of particular defamatory matter, if the defendant proves that:
- (a) the matter is, or is part of, a fair report of public proceedings; or
 - (b) the matter is, or is part of, a fair report of a public document.
- (2) It is a defence to a defamation action, to the extent to which it relates to the publication of particular defamatory matter, if the defendant proves that:
- (a) the matter was published earlier as, or in, a report of public proceedings or a public document; and
 - (b) the matter is, or is part of, a fair report of the report published earlier; and
 - (c) the defendant has no reasonable grounds to believe that the report published earlier was not a fair report.

(3) In this section:

learned society means a body, wherever formed:

- (a) the objects of which include the advancement of any art, science or religion or the advancement of learning in any field; and
- (b) authorised by its constitution:
 - (i) to exercise control over, or adjudicate on, matters connected with its principal objects; and
 - (ii) to make findings of decisions having effect, by law or custom, in any part of Australia.

public document means:

- (a) a report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published under the authority of the body; or
- (b) a judgment of a court of a country in a civil proceeding, or a record of the court relating to the judgment or to its enforcement or satisfaction; or
- (c) a report or other document that, under the law of a country:
 - (i) is authorised to be published; or
 - (ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body; or
- (d) a document issued by the government or a local government of a country, or by an officer, employee or agency of the country or local government, for the information of the public; or
- (e) a record or document that is open for inspection and that is kept:
 - (i) under a law of the Commonwealth, a State or Territory; or
 - (ii) by a statutory authority of the Commonwealth, a State or Territory; or
 - (iii) by a court of an Australian jurisdiction; or
 - (iv) by the Commonwealth, a State or Territory; or
- (f) a report of a tribunal about its decision and the reasons for its decision; or
- (g) a document specified in the regulations.

public proceedings means any of the following:

- (a) parliamentary proceedings, court proceedings or quasi-judicial or administrative proceedings within the meaning of section ¹²;
- (b) a proceeding in public of a parliament outside Australia;
- (c) a proceeding in public of an international organisation of countries or governments;
- (d) a proceeding in public of an international conference at which governments of countries are represented;
- (e) a proceeding in public of an international judicial or arbitral tribunal;
- (f) a proceeding in public of an inquiry held under the law of any country or under the authority of the government of any country;
- (g) a proceeding of a learned society, or of a committee or governing body of the society, under its objects (being objects mentioned in paragraph (a) of the definition of ***learned society***) if the proceeding relates to a decision or adjudication made in Australia particularly concerning:
 - (i) a member or members of the society; or
 - (ii) a person subject by contract or otherwise by law to the control of the society;
- (h) a proceeding of a sport or recreation association, or of a committee or governing body of the association, under its objects (being objects mentioned in paragraph (a) of the definition of ***sport or recreation association***) if the proceeding relates to a decision or adjudication made in Australia particularly concerning:

- (i) a member or members of the association; or
- (ii) a person subject by contract or otherwise by law to the control of the association;
- (i) a proceeding of a trade association, or of a committee or governing body of the association, under its objects (being objects mentioned in paragraph (a) of the definition of **trade association**) if the proceeding relates to a decision or adjudication made in Australia particularly concerning:
 - (i) a member or members of the association; or
 - (ii) a person subject by contract or otherwise by law to the control of the association;
- (j) proceedings specified in the regulations.

report includes summary or extract.

sport or recreation association means a body, wherever formed:

- (a) the objects of which include the promotion of any game, sport, or pastime to the playing of which or exercise of which the public is admitted as spectators or otherwise and the promotion or protection of the interests of people connected with the game, sport or pastime; and
- (b) authorised by its constitution:
 - (i) to exercise control over, or adjudicate on, matters connected with the game, sport or pastime; and
 - (ii) to make findings or decisions having effect, by law or custom, in any part of Australia.

trade association means a body, wherever formed:

- (a) the objects of which include the promotion of any trade, business, industry or profession and the promotion or protection of the interests of people engaged in it; and
- (b) authorised by its constitution:
 - (i) to exercise control over, or adjudicate on, matters connected with any trade, business, industry or profession or the conduct of people engaged in it; and
 - (ii) to make findings or decisions having effect, by law or custom, in any part of Australia.

^16 Triviality

It is a defence to a defamation action, to the extent to which it relates to the publication of particular defamatory matter, if the defendant proves that, because each person to whom the matter was published is well acquainted with the plaintiff, the publication is not likely to cause harm.