NEW SOUTH WALES
BAR ASSOCIATION

14 May 2019

The Hon Mark Speakman SC MP
Attorney General of New South Wales
GPO Box 5341
SYDNEY NSW 2001

Dear Mr Speakman

NSW Bar Association Submission to the Council of Attorneys-General Review of Model Defamation Provisions

Please find attached a copy of the NSW Bar Association submission to the above Review which was provided to the Law Council of Australia.

I note that the expert committee was not able to reach a consensus on question 5 (see paragraphs 42-48 of the submission). The New South Wales Bar Association expressed support for the recommendation stated in paragraph 48 of the submission. This was communicated to the LCA.

If you have any questions, Sandy Dawson SC, who co-chaired the expert committee with Lyndelle Barnett would be happy to meet with you to discuss any aspects of the submission.

Yours sincerely

Greg Tolhurst
Executive Director

NEW SOUTH WALES BAR ASSOCIATION SUBMISSION

COUNCIL OF ATTORNEYS-GENERAL REVIEW OF MODEL DEFAMATION PROVISIONS

NSW Bar Association

Defamation Law Committee

180 Phillip Street, Sydney

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Introduction

The New South Wales Bar Association ('the Association') welcomes the opportunity to contribute to the Council of Attorneys-General's review of the Model Defamation Provisions ('MDP'). This submission has been prepared on behalf of the Association by a committee comprising Bruce McClintock SC, Tom Blackburn SC, Peter Gray SC, Kieran Smark SC, James Hmelnitsky SC, Sandy Dawson SC, Matthew Richardson, Sue Chrysanthou, Richard Potter, Matthew Lewis and Lyndelle Barnett (the 'Committee'), all of whom have considerable experience in the area, appearing both for plaintiffs and defendants, including media organisations.

These submissions incorporate and update submissions from the Association provided in 2011 such that this submission replaces those earlier submissions.

In February 2019 the Council of Attorneys-General released a discussion paper ('Discussion Paper') and invited submissions on the questions set out in the Discussion Paper.

References in these submissions to sections of the Model Defamation Provisions are references to the *Defamation Act* 2005 (NSW) (the 'Act').

The aim of a law of defamation should be to provide a mechanism whereby the courts can determine the truth or falsity of allegations about persons in a quick, just and cheap manner, thus achieving the appropriate balance between the right of individuals to protect their reputations and freedom of speech.[1]

Further, the Committee advocates recognition of the fact that:

> *"The value of human dignity ...is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as*

[1] As endorsed by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

well as the individual reputation of each person built upon his or her own individual achievements ".[2]

Over recent years, changing technology and the increased use of the internet and social media has seen new challenges arise in the way defamation law is applied in practice.

It is imperative that Australia, let alone NSW, is both seen to have, and does have, a modern and consistently applied law of defamation which at the very least meets the world's best practice in the defamation community and embraces, and is underpinned by, contemporary thoughts.

Bruce McClintock SC
Tom Blackburn SC
Peter Gray SC
Kieran Smark SC
James Hmelnitsky SC
Sandy Dawson SC
Matthew Richardson
Sue Chrysanthou
Richard Potter
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Lyndelle Barnett

[2] Per the South African Constitutional Court in *Khumalo v Holomisa* [2002] ZACC 12 [27].

Question 1

Do the policy objectives of the Model Defamation Provisions remain valid?

1. Section 3 provides that the objects of the Act are as follows:

   (a) to enact provisions to promote uniform laws of defamation in Australia, and

   (b) to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance, and

   (c) to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter, and

   (d) to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.

2. The Committee considers that each of the objectives of the Model Defamation Provisions remains valid.

Question 2

Should the Model Defamation Provisions be amended to broaden or to narrow the right of corporations to sue for defamation?

3. Section 9 of the Act provides:

Certain corporations do not have a cause of action for defamation

(1) A corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication.

(2) A corporation is an excluded corporation if:

(a) the objects for which it is formed do not include obtaining financial gain for its members or corporators, or

(b) it employs fewer than 10 persons and is not related to another corporation, and the corporation is not a public body.

(3) In counting employees for the purposes of subsection (2) (b), part-time employees are to be taken into account as an appropriate fraction of a full-time equivalent.

(4) In determining whether a corporation is related to another corporation for the purposes of subsection (2) (b), section 50 of the Corporations Act 2001 of the Commonwealth applies as if references to bodies corporate in that section were references to corporation within the meaning of this section.

(5) Subsection (1) does not affect any cause of action for defamation that an individual associated with a corporation has in relation to the publication of defamatory matter about the individual even if the publication of the same matter also defames the corporation.

(6) In this section:

"corporation" includes any body corporate or corporation constituted by or under a law of any country (including by exercise of a prerogative right), whether or not a public body.

"public body" means a local government body or other governmental or public authority constituted by or under a law of any country.

4. At common law, a corporation could sue for defamation. However, because it is an artificial entity and does have feelings, it could not recover damages for hurt to feelings but rather could only be injured "in its pocket".[3]

5. The Act (replicating the terms of its predecessor) removed that common law right of corporations to sue for defamation.

6. Certain exceptions are provided:

   (a) not for profit corporations; and

   (b) corporations employing fewer than ten employees that not related to other corporations,

   are entitled to sue for defamation.

7. The Committee submits that there is adequate protection for corporations in the form of alternative avenues, and accordingly there is no need to broaden the rights of corporations to sue for defamation. Those alternative avenues are discussed below.

8. First, section 9(5) provides that where an individual associated with a corporation has been defamed him/her-self may still commence a claim in defamation even if the publication also defames the corporation. In other words, corporate reputations can still be protected by an individual director suing over the damage caused to his or her individual reputation.

9. Secondly, the corporation may be able to bring proceedings for injurious falsehood. The essential elements of injurious falsehood were helpfully set out by Brereton

[3] *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 262 per Lord Reid.

J in *AMI Australia Holdings Pty Ltd & Another v Fairfax Media Publications Pty Ltd & Ors* (2010) NSWSC 1395 and comprise:

(a) A false statement of or pertaining to the plaintiff's goods or business;

(b) Malice on the part of the defendant; and

(c) Actual damage as a consequence.

10. Thirdly, a corporation may be able to bring proceedings for misleading or deceptive conduct pursuant to section 18 Australian Consumer Law contained in the *Competition and Consumer Act 2010* (Cth) ('ACL') (formerly *Trade Practices Act 1974* (Cth) ('TPA')). Section 18 states:

> *"A corporation shall not, in trade and commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".*

11. In light of the above, the Committee does not recommend that there be any change to the right of corporations to sue for defamation.

12. The Committee does however recommend that consideration be given to the definition of "excluded corporation" in section 9(2), and in particular the requirement that a corporation "employ" fewer than 10 persons. *In Born Brands Pty Ltd v Nine Network Australia Pty Ltd* (2014) 88 NSWLR 421 at [104] Basten JA, with whom Meagher JA and Tobias AJA agreed, doubted whether the approach taken by Nicholas J in *Redeemer Baptist School Ltd v Glossop* [2006] NSWSC 1201 would apply to the Act given the explicit reference to counting "employees". However the Court did not resolve whether the reference to "employees" would extend to individuals engaged in the day to day operations of the corporation and subject to its direction and control, including, for example, persons supplied by labour hire firms.

13. The approach in *Born Brands* creates uncertainty as to the proper construction of section 9(2) and leaves the policy behind the "excluded corporation" exception, namely, to retain the right to sue for defamation only for small businesses and not for profit corporations, open to be circumvented. That is, there is potential for a large trading corporation to be an "excluded corporation" if it conducts its business

through the use of independent contractors or directors/shareholders who are not "employees". With the rise of the gig economy, this could result potentially result in large corporations retaining the right to sue (although it is likely that most corporations participating in business of this kind would be related to another corporation and accordingly not fall within the exception in any event). Consideration should be given to whether a definition that is more closely aligned with the way corporations conduct business would be more consistent with achieving the policy objectives of the exception.

Recommendation

14. In light of the above, the Committee recommends that consideration be given to amending section 9(2)(b) to better reflect the way modern corporations conduct their businesses, by clarifying that the persons to be counted as "employees" include individuals engaged in the day to day operations of the corporation and subject to its direction and control, including, for example, persons supplied by labour hire firms.

Question 3

(a) Should the Model Defamation Provisions be amended to include a 'single publication rule'?

(b) If the single publication rule is supported:

(i) should the time limit that operates in relation to the first publication of the matter be the same as the limitation period for all defamation claims?

(ii) should the rule apply to online publications only?

(iii) should the rule operate only in relation to the same publisher, similar to section 8 (single publication rule) of the Defamation Act 2013(UK)?

Question 3(a)

15. The Committee supports the inclusion of a single publication rule in the MDP.

16. While, as the Discussion Paper notes, a single publication rule has to date been rejected at common law[4], it has become apparent that the multiple publication rule does not adequately accommodate digital publication, particularly given the prevalence of online archives. The multiple publication rule permits a plaintiff to commence proceedings in relation to an online publication first published many years before and well after the expiry of the uniform limitation period of one year[5], on the basis of a handful of downloads in the 12 months before action, despite never having taken action in relation to the initial publication of the matter later complained of.

17. In circumstances where it is a matter of common experience that the vast majority of downloads occur in the first days after initial publication, and therefore have the greatest impact on the plaintiff's reputation, there is a real question as to the proportionality of an action which necessarily excludes those publications and any claim for the damage they caused.

[4] *Dow Jones & Co v Gutnick* (2002) 210 CLR 575.
[5] In NSW the relevant provision is s 14B of the *Limitation Act 1969* (NSW).

18. Adherence to the multiple publication rule in the online environment therefore operates to subvert the limitation period and the policy behind it (the timely determination of claims for defamation),[6] which otherwise bars an action being brought more than one year after publication, subject to the possibility of extension of the period to up to 3 years where it was not reasonable to have commenced within the year after publication.[7]

Question 3(b)(i)

19. The inclusion of a single publication rule will accordingly complement and support the one year limitation period, and should impose the same time limit. The possibility of the limitation period being extended by up to three years from the date of initial publication preserves the position of a plaintiff who can establish that it was not reasonable to commence proceedings in the first 12 months after that initial publication.

Question 3(b)(ii)

20. The Committee does not consider there to be any good reason for the single publication rule to be restricted to online publications only, despite it being likely to have its greatest impact in relation to such publications. There will otherwise be an imbalance between online and print publications, with libraries and other archives of print material being exposed to greater risk than online operators.

21. Also, the sale of books (in hard print form) including reprint editions, which remain in bookshops or libraries a year on from first publication are also just as affected as online archives.

Question 3(b)(iii)

22. The Committee considers that section 8 of the *Defamation Act* 2013 (UK) ('UK Act') is an appropriate model for a single publication rule, which provides as follows:

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[6] Second Reading Speech, *Defamation Amendment Bill* 2002 (NSW).
[7] *Limitation Act 1969* (NSW), s 56A.

8 Single publication rule

This section applies if a person—

(a) publishes a statement to the public ("the first publication"), and

(b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

(2) In subsection (1) "publication to the public" includes publication to a section of the public.

(3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—

(a) the level of prominence that a statement is given;

(b) the extent of the subsequent publication.

(6) Where this section applies—

(a) it does not affect the court's discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and

(b) the reference in subsection (1)(a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section.

23. While there are credible arguments for the rule not being restricted to the same publisher, the Committee is of the view that the rule should operate only in relation

to the same publisher, as the UK Act provides. Any extension of the operation of the rule to different publishers who publish the same matter can be considered when the MDP are reviewed in future, when the impact of the operation of the rule in practice will be known.

24. There is a concern that the inflexible application of a single publication rule could lead to substantial unfairness. For instance, persons who are ultimately acquitted of a serious crime after many years could be left with no remedy in respect of older online publications proclaiming their guilt. It would also be possible for persons to discover a serious defamation circulating online even after the expiry of the limitation period. Accordingly, any single publication rule included in the MDP should provide the Court with the power to grant leave to a plaintiff to commence proceedings in relation to later publications where the initial publication is statute barred if it is satisfied that it was not reasonably practicable for the plaintiff to have commenced an action within the limitation period applicable to the initial publication. This test reflects the test applicable to extensions of the limitation period in section 56A of the *Limitation Act* 1969 (NSW).

25. Any such power should also be subject to the serious harm requirement, adoption of which the Committee recommends (see Question 14 below). This would ensure that the grant of leave would only be in cases where serious harm was involved.

26. It may be that ultimately takedown orders (see Question 15 below) or compulsory corrections would be a more appropriate remedy than damages in these circumstances.

Recommendation

27. The Committee recommends the inclusion of a single publication rule into the MDP in the form of section 8 of the UK Act.

28. The Committee recommends that the Court be given the power to grant leave to a plaintiff to commence proceedings in relation to later publications where the initial publication is statute barred if it is satisfied that it was not reasonably practicable for the plaintiff to have commenced an action within the limitation period applicable

to the initial publication, subject to the plaintiff establishing the threshold of serious harm.

Question 4

(a) Should the Model Defamation Provisions be amended to clarify how clauses 14 (when offer to make amends may be made) and 18 (effect of failure to accept reasonable offer to make amends) interact, and, particularly, how the requirement that an offer be made 'as soon as practicable' under clause 18 should be applied?

(b) Should the Model Defamation Provisions be amended to clarify clause 18(1)(b) and how long an offer of amends remains open in order for it to be able to be relied upon as a defence, and if so, how?

(c) Should the Model Defamation Provisions be amended to clarify that the withdrawal of an offer to make amends by the offeror is not the only way to terminate an offer to make amends, that it may also be terminated by being rejected by the plaintiff, either expressly or impliedly (for example, by making a counter offer or commencing proceedings), and that this does not deny a defendant a defence under clause 18

Question 4(a)

29. Section 14 of the Act provides:

When offer to make amends may be made

(1) An offer to make amends cannot be made if:

(a) 28 days have elapsed since the publisher was given a concerns notice by the aggrieved person, or

(b) a defence has been served in an action brought by the aggrieved person against the publisher in relation to the matter in question.

(2) A notice is a concerns notice for the purposes of this section if the notice:

(a) is in writing, and

(b) informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question (the imputations of concern).

(3) If an aggrieved person gives the publisher a concerns notice, but fails to particularise the imputations of concern adequately, the publisher may give the aggrieved person a written notice (a further particulars notice) requesting the aggrieved person to provide reasonable further particulars about the imputations of concern as specified in the further particulars notice.

(4) An aggrieved person to whom a further particulars notice is given must provide the reasonable further particulars specified in the notice within 14 days (or any further period agreed by the publisher and aggrieved person) after being given the notice.

(5) An aggrieved person who fails to provide the reasonable further particulars specified in a further particulars notice within the applicable period is taken not to have given the publisher a concerns notice for the purposes of this section.

30. Section 18 of the Act provides:

Effect of failure to accept reasonable offer to make amends

(1) If an offer to make amends is made in relation to the matter in question but is not accepted, it is a defence to an action for defamation against the publisher in relation to the matter if:

(a) the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory, and

(b) at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer, and

(c) in all the circumstances the offer was reasonable.

(2) In determining whether an offer to make amends is reasonable, a court:

(a) must have regard to any correction or apology published before any trial arising out of the matter in question, including the extent to which the correction or apology is brought to the attention of the audience of the matter in question taking into account:

(i) the prominence given to the correction or apology as published in comparison to the prominence given to the matter in question as published, and

(ii) the period that elapses between publication of the matter in question and publication of the correction or apology, and

(b) may have regard to:

(i) whether the aggrieved person refused to accept an offer that was limited to any particular defamatory imputations because the aggrieved person did not agree with the publisher about the imputations that the matter in question carried, and

(ii) any other matter that the court considers relevant.

31. Two difficulties arise in relation to the interaction of sections 14 and 18.

32. First, there is an apparent inconsistency between section 14(1)(a) which provides for a period of 28 days after the publisher was given a concerns notice to make an offer of amends, and section 18(1)(a) which requires that an offer be made *"as soon as practicable after becoming aware that the matter is or may be defamatory"*. It may be open to a plaintiff to argue that an offer made after 28 days was not made *"as soon as practicable"*, and thereby defeat the defence.

33. Secondly, the requirement in section 18(1)(a) is not connected with receipt of a concerns notice. That is, the time runs from when the publisher becomes aware that the matter is or may be defamatory. Depending on the nature of the publication, there will be circumstances where a publisher is aware at the time of publication that a publication may be defamatory, but may believe it to be defensible. This raises difficulties where the plaintiff does not complain about the defamatory

matter until sometime after its publication. In those circumstances a defendant may be deprived of the defence because any offer made after receipt of a concerns notice may some significant time after the publisher was aware the publication may be defamatory. A publisher cannot be expected to make an offer, even though no complaint has been received from the plaintiff in order to obtain the protection of the defence.

34. To operate as a defence, it should be sufficient if the offer is made within 28 days after a complaint is made by the plaintiff to the defendant.

Question 4(b)

35. Section 18(1)(b) requires that the offer of amends, if it is to be relied upon as a defence, must be able to be accepted "at any time before the trial". This gives rise to considerable uncertainty and may also give rise about questions as to liability for costs.

36. By way of example, an offer of amends may be made prior to the commencement of proceedings in response to a concerns notice but not accepted at that time by the plaintiff. The plaintiff then commences proceedings but ultimately accepts the offer of amends just prior to the commencement of the trial after both sides have incurred substantial costs. The Act does not provide for which party would be liable for those costs and it would potentially give rise to an unfairness to the defendant.

37. This uncertainty has been clarified by two appellate courts. In *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175 (Queensland Court of Appeal) and in *Zoef v Nationwide News Pty Limited* (2016) 92 NSWLR 570 (New South Wales Court of Appeal) it was held that an offer may be open for a finite period of time and need not be open until the first day of trial.

38. However, it is preferable that the legislature clarify this issue to remove the risk of section 18(1)(b) being construed differently between jurisdictions.

Question 4(c)

39. Part 3, Division 1 of the Act is silent as to whether an offer may be terminated by any means other than by it being withdrawn in writing by the offeror (see section 16(1)). In *Nationwide News Pty Ltd v Vass* [2018] NSWCA 259 the New South Wales Court of Appeal held that a counter offer made by a plaintiff, under a statutory regime other than the Act, namely the *Uniform Civil Procedure Rules* 2005 (NSW) ('UCPR'), did not operate as a counter-offer which terminated the offer.

40. A consequence of this construction may be that there would be an incentive for a plaintiff to not accept an offer of amends until the last minute, and instead make counter offers or commence proceedings with the safety net of the offer of amends remaining open. This runs contrary to the legislature's intention to encourage early resolution of disputes.

Recommendation

41. In light of the above, and the answer to question 6 below, the Committee recommends:

    (a) Section 14(2) be amended to clarify that a concerns notice should inform the publisher of the publication on which the plaintiff relies to establish the cause of action, sufficient to enable the publication to be identified (*cf* rule 15.19(1)(a) of the UCPR);

    (b) Section 14(3) be amended to clarify that a further particulars notice may also request further particulars of the publication to enable the publication to be identified;

    (c) Section 15 be amended to provide that an offer of amends must be open for acceptance for at least 28 days;

    (d) Section 16 be amended to clarify that an offer to make amends will be deemed to be rejected, and accordingly terminated, by a counter offer by the plaintiff or by the plaintiff commencing proceedings;

(e) Section 18(1)(a) be amended to permit a defence to arise when a reasonable offer of amends is made within 28 days after the service of a concerns notice by a prospective plaintiff or if no concerns notice is served prior to the commencement of proceedings, within 28 days after the service of the statement of claim.

(f) Section 18(1)(b) be amended so that it requires the publisher to be ready and willing to carry out the terms of the offer during the time it is open for acceptance.

Question 5

Should a jury be required to return a verdict on all other matters before determining whether an offer to make amends defence is established, having regard to issues of fairness and trial efficiency?

42. The Committee was unable to reach a consensus on this issue.

43. Some members of the Committee take the view that as damages is an issue reserved for the judge (section 22 of the Act), and that because the assessment of the reasonableness of an offer of amends inevitably involves consideration of quantum, that the offer of amends defence should be determined by a judge. If this course is adopted there will be no risk of jury prejudice arising from the jury having knowledge of the fact or terms of an offer of amends.

44. Other members of the Committee are of the opinion that the defence should be determined by the jury, and that there is no impediment to the jury determining the defence based upon the fact that the judge determines damages.

45. If the position remains that the defence is to be determined by the jury, the Committee understands the concerns raised by the Law Council of Australia in relation to the potential for jury prejudice if the jury has before it an offer of amends when considering other issues in a case. The counter argument is that a multi-stage approach to the jury's determination is not in the interests of modern case management principles.

46. The Committee respectfully submits that there is no clear correct answer to this issue, mainly because each case will differ depending on its facts. There will be cases where no prejudice is likely to arise, and the parties may be content for the jury to see an offer of amends during its main deliberations. There may be cases where parties are opposed to this. For this reason the Committee recommends that this be a matter for the trial judge in any particular case upon the application of any party.

Recommendation

47. Some members of the Committee recommend that section 22 of the Act be amended to provide for the judicial officer to determine any defence under section 18 of the Act.

48. In the event that the position remains that the defence is to be determined by the jury, the Committee recommends that section 18 be amended to provide for a discretion on the part of the Court to order, on the application of the plaintiff or the defendant, that the issue arising in relation to a defence under section 18 be decided by the jury separately to and after the jury's determination of other issues in the case.

Question 6

Should amendments be made to the offer to make amends provisions in the Model Defamation Provisions to:

(a) require that a concerns notice specify where the matter in question was published?

(b) clarify that clause 15(1)(d) (an offer to make amends must include an offer to publish a reasonable correction) does not require an apology?

(c) provide for indemnity costs to be awarded in a defendant's favour where the plaintiff issues proceedings before the expiration of any period of time in which an offer to make amends may be made, in the event the court subsequently finds that an offer of amends made to the plaintiff after proceedings were commenced was reasonable?

Question 6(a)

49. Publication is a key element required to be established to found a cause of action for defamation. However, as it is presently drafted there is no requirement for a concerns notice to inform the publisher of the publication complained of. This has the potential to visit an unfairness on the defendant if they are unable to identify the publication complained of. A concerns notice should be required to inform the publisher of at least the key elements making up a cause of action for defamation, in the same way a Statement of Claim is required to.

50. Accordingly, as set out in paragraph 41(a) above the Committee recommends that section 14(2) be amended to clarify that a concerns notice should inform the publisher of the publication on which the plaintiff relies to establish the cause of action, sufficient to enable the publication to be identified.

Question 6(b)

51. The Committee does not consider that there is any necessity for amendment in this regard. As it is presently drafted section 15 draws a distinction between a correction (section 15(1)(d)) and an apology (section 15(1)(g)(i)). The Committee is of the

view that section 15(1)(d), properly construed, does not require the publication of an apology.

Question 6(c)

52. Section 40(2) of the Act provides:

> *(2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise):*
>
> ...
>
> *(b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.*

53. The situation described in question 6(c) is likely to result in an award of indemnity costs in the defendant's favour as a result of section 40(2), in that, if the Court finds that the offer of amends was reasonable it is likely that the defence under section 18 will succeed and the plaintiff will be found to have unreasonably failed to accept the offer.

54. Accordingly, the Committee is of the view that there is no necessity for any amendment in this regard.

Question 7

Should clause 21 (election for defamation proceedings to be tried by jury) be amended to clarify that the court may dispense with a jury on application by the opposing party, or on its own motion, where the court considers that to do so would be in the interests of justice (which may include case management considerations)?

55. In most but not all of the State and Territory jurisdictions, including NSW, section 21 of the Act provides:

> ***Election for defamation proceedings to be tried by jury***
>
> *(1) Unless the court orders otherwise, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury.*
>
> *(2) An election must be:*
>
> *(a) made at the time and in the manner prescribed by the rules of court for the court in which the proceedings are to be tried, and*
>
> *(b) accompanied by the fee (if any) prescribed by the regulations made under the Civil Procedure Act 2005 for the requisition of a jury in that court.*
>
> *(3) Without limiting subsection (1), a court may order that defamation proceedings are not to be tried by jury if:*
>
> *(a) the trial requires a prolonged examination of records, or*
>
> *(b) the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.*

56. In those jurisdictions, the Act gives a plaintiff and a defendant in defamation proceedings the right to elect a trial before a jury, unless the court orders otherwise.

57. Should either party elect to have a jury, the jury is to determine the issues of liability and defences whilst the judge sitting alone is to assess damages.

58. The importance of the role of the jury in defamation proceedings has long been recognised. In *Channel Seven Sydney Pty Ltd v Senator Concetta Fieravanti-Wells* (2011) 81 NSWLR 315, after setting out[8] the statutory history of the use of jury trials, McColl JA (with whom Giles JA and Handley AJA agreed) stated at [68]:

> *"This discussion of the statutory history of the use of jury trial in this State illustrates the legislative recognition of the importance of their role in defamation proceedings. The guiding principle in proceedings/actions other than defamation is that they are not to be tried by jury. No such guiding principle governs the question of whether a jury tries a defamation case."*

59. A number of judicial statements in relation to the role of the jury in defamation proceedings were helpfully collated by McColl JA in *Fieravanti-Wells* at [69]-[79], including the following:

> *"[72] The importance of the role of juries in defamation proceedings has been frequently emphasised. In Cassell & Co Ltd v Broome [1972] AC 1027 at 1065 the Lord Chancellor, Lord Hailsham described the jury as 'where either party desires it, the only legal and constitutional tribunal for deciding libel cases, including the award of damages.' In Sutcliffe v Pressdram Ltd [1991] 1 QB 153 at 181–182 Nourse LJ stated that '[t]he primacy of the jury in defamation cases was settled by Fox's Libel Act 1792' and that '[t]he great end of those who achieved the passing of the 1792 Act was to secure the freedom of the press against the possibility of judges being disposed in favour of the Crown'. While his Lordship posited that 'the object of the rule established by the Act of 1792 may have wasted into insignificance', he was of the opinion that:*
>
> > *'... its justification is as valid as it ever was. The question whether someone's reputation has or has not been falsely discredited ought to be tried by other ordinary men and women and, as Lord Camden said, it is the jury who are the people of England.'*

[8] At [53]-[67].

[73] Kirby P pointed out the relevance of jury trials in defamation cases in Bond Corporation Holdings Ltd v Australian Broadcasting Commission [1989] NSWCA 22; [1973–96] A Def R 50–050 at 40–325 as being that '[i]ssues of reputation are not readily susceptible to the normative activity with which judges are familiar ... [the] large room for evaluation, impression and opinion... [that] [i]t is better, for finality and community acceptance that such decisions should be made by a group of citizens reflecting current community standards than by a judge ... [and] ... the opinion of a multi-member jury may be safer and wiser than the opinion of a judge, sitting alone.'

[74] As Rares J recently explained in Ra v Nationwide News Pty Ltd [2009] FCA 1308; (2009) 182 FCR 148 at [19]:

> *'One of the great virtues of having a jury try the substantial factual issues in a defamation action is that they represent the very audience to which the defamatory publication was addressed. In assessing whether or not a publication, first, is defamatory in the sense complained of and, secondly, has been defended under defences such as truth, honest opinion or fair report, a jury of ordinary reasonable people is able to evaluate the competing factual issues bringing to bear the moral and social standards that they share with the community at large. And, they are better placed than judicial officers to assess how ordinary reasonable people understand mass media publications.'"*

60. The Committee agrees with the statements set out above and supports the parties' right to elect trial by jury.

61. The Committee opposes any amendment to section 21 of the Act to allow the Court to dispense with trial by jury of its own motion. The parties to proceedings are necessarily more familiar with the issues that are likely to arise in a case, the issues that will be contentious and the nature of the evidence, than the Court, particularly in the early stages of a proceeding. For this reason, the parties are more likely to be in a position to judge whether there is a basis for the Court to exercise the discretion to order that the proceedings not be tried by jury. In NSW, as noted in

the Discussion Paper, the Court of Appeal has held that the court does not have the power under the present provision to dispense with the jury in the absence of an application by a party.[9]

62. The Committee also opposes any amendment to section 21 of the Act to allow case management considerations to be taken into account in the exercise of the Court's discretion. There is a real risk that in allowing case management considerations to be taken into account the parties' right to elect for trial by jury, and the substantive right that accrues once an election has been properly made[10], will be completely abrogated in favour of case management considerations. Such a balancing exercise should not be introduced.

Recommendation

63. The Committee recommends that clause 21 of the Model Defamation Provisions be amended as follows to make clear that an application to dispense with trial by jury may only be made by a party:

Election for defamation proceedings to be tried by jury

(1) Unless the court orders otherwise on the application of a party to the proceedings, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury.

...

(3) Without limiting subsection (1), on the application of a party to the proceedings, a court may order that defamation proceedings are not to be tried by jury if:

...

[9] *Fieravanti-Wells* at [94]; see also *Chel v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWCA 379 at [8] and [38].
[10] *Fieravanti-Wells* at [5] and [138].

Question 8

Should the Federal Court of Australia Act 1976 (Cth) be amended to provide for jury trials in the Federal Court in defamation actions unless that court dispenses with a jury for the reasons set out in clause 21(3) of the Model Defamation Provisions–depending on the answer to question 7 –on an application by the opposing party or on its own motion?

64. Since the decision of the Full Court of the Federal Court of Australia in *Crosby v Kelly* (2012) 203 FCR 451, there has been a significant increase in the number of defamation cases brought in the Federal Court of Australia. In particular, a significant number of cases brought against the mass media are now brought in the Federal Court.

65. In *Wing v Fairfax Media Publications Pty Ltd* (2017) 255 FCR 61 the Full Court of the Federal Court of Australia found, at [23], [27] and [28], that sections 21 and 22 of the Act were not binding on the Federal Court and were not picked up by section 79 of the *Judiciary Act* because a law of the Commonwealth (that is, sections 39 and 40 of the *Federal Court of Australia Act* 1976 (Cth)) otherwise provided. Sections 21 and 22 were found, at [34] and [49] to have no application to defamation proceedings in the Federal Court, including in relation to the Court's exercise of discretion in section 40.

66. As set out above, in most but not all State and Territory jurisdictions, section 21 of the Act gives both the plaintiff and the defendant a defeasible right to trial by jury.

67. Section 39 of the *Federal Court of Australia Act* provides that the normal mode of trial in the Federal Court is by a judge sitting alone, unless the Court or a Judge otherwise orders. Section 40 provides the Court with a discretion to order otherwise if the Court is satisfied that the ends of justice appear to render it expedient to do so. While section 40 provides a party with the right to make an application for a trial by jury, it does not provide any party with an entitlement to make an election for trial by jury.

68. The consequence of the different regimes is that, despite most State and Territory legislatures having conferred upon both parties a right to elect for trial by jury (assuming section 21 retains the right for both parties to make an election for trial by jury), only the plaintiff has that right in practice. It is the plaintiff who elects the forum in which to bring proceedings. In those jurisdictions, if the plaintiff desires a trial by jury, he/she will bring proceedings in the Supreme or District Court, if the plaintiff does not want a trial by jury he/she will bring proceedings in the Federal Court and the defendant will have little to no say over this unless it is able to establish the test set out in section 40.

69. There are obvious disadvantages and imperfections in this state of affairs.

70. The Committee was unable to reach a consensus on this issue.

71. Some members of the Committee consider that the present state of affairs may encourage forum shopping and operates to the disadvantage of defendants. For this reason, these members of the Committee consider that the *Federal Court of Australia Act* should be amended to insert clauses equivalent to clauses 21 and 22 of the MDP to apply in proceedings including a cause of action for defamation. This is unlikely to be burdensome, given the Federal Court's criminal jurisdiction, and the contemplation of jury trials in civil matters in section 40 of the *Federal Court of Austrlalia Act* and the availability of resources such as courtrooms with jury facilities.

72. Those members also consider that given the Federal Circuit Court will also be vested with jurisdiction to determine defamation proceedings in certain cases, consideration should also be given as to whether amendments are required to section 53 of the *Federal Circuit Court of Australia Act* 1999 (Cth) for the same reasons as those set out above. However, it is acknowledged that this would involve a significant change in circumstances where the *Federal Circuit Court of Australia Act* does not provide for trial by jury in any circumstance, as opposed to the *Federal Court of Australia Act* which provides for jury trial in some cases.

73. However, other members of the Committee do not support such amendments to the *Federal Court of Australia Act* (or the *Federal Circuit Court of Australia Act*). While the benefits of a consistent approach across the Courts are obvious, the fact

is that for various historical reasons the Federal Court, the Federal Circuit Court, the Supreme and District Courts of South Australia, the Supreme Court of the ACT and various other lower Courts (including the Magistrates Courts in the ACT, South Australia, Victoria and Tasmania) either exclude juries in civil matters or permit them only in limited circumstances. At the same time all or most of these Courts (at least arguably) have jurisdiction to hear defamation cases.

74. Despite concerns about an inconsistent approach between the jurisdictions, these members of the Committee feel that a submission contributing to the (relatively narrow subject) of defamation law reform is not the appropriate vehicle for advice on what could amount to substantial changes to procedures in any of these Courts. Such changes might for example give rise to issues of resourcing and other policy considerations of which the Committee would not be aware.

75. Further, these members of the Committee consider that in respect of the lower Courts, any introduction of juries (tending in many cases to increase the length of trials and costs) would seem to be inconsistent with the thrust of the single publication and serious harm recommendations discussed in other parts of the submission.

Recommendation

76. Some members of the Committee recommend that the *Federal Court of Australia Act* be amended to insert clauses equivalent to clauses 21 and 22 of the MDP to apply in proceedings including a cause of action for defamation, and that consideration be given to amending section 53 of the *Federal Circuit Court of Australia Act* in the same manner.

77. Other members of the Committee do not support the above recommendation.

78. Noting the Committee was unable to reach consensus on this question, the executive of the NSW Bar Association supports the recommendation set out in paragraph 76.

Question 9

Should clause 26 (defence of contextual truth) be amended to be closer to section 16 (defence of contextual truth) of the (now repealed) Defamation Act 1974(NSW), to ensure the clause applies as intended?

79. Section 26 of the Act provides as follows:

> ***Defence of contextual truth***
>
> *It is a defence to the publication of defamatory matter if the defendant proves that:*
>
> *(a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations) that are substantially true, and*
>
> *(b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.*

80. There can be little doubt that the defence as currently enacted does not operate in the manner that the legislature intended, or to achieve its legislative purpose.

81. In *Besser v Kermode* (2011) 81 NSWLR 157 the New South Wales Court of Appeal held that section 26 does not permit the defendant to "plead back" the imputations pleaded by the plaintiff as contextual imputations.

82. Following from this decision it has become a practice of plaintiffs in defamation cases where a defence of contextual truth has been pleaded to apply to amend to "adopt" contextual imputations pleaded by the defendant, thereby depriving the defendant of the ability to rely upon them as contextual imputations (see, for example, *Federal Capital Press of Australia Pty Ltd v Balzola* [2015] NSWCA 285). Such applications are not always successful however. Leave was recently refused in *Dominello v Harbour Radio Pty Limited t/as 2GB* [2019] NSWSC 403.

83. It has also been found that a defendant is not entitled to rely upon imputations pleaded by the plaintiff and found to be substantially true as contextual imputations (*Fairfax Digital Australia & New Zealand Pty Limited v Kazal* (2018) 97 NSWLR

547). Whilst a defendant may rely upon such imputations in mitigation of damages, they are not able to be used by the defendant in a way which may entitle the defendant to a verdict.

84. The consequence of this series of decisions is that in practice the defence of contextual truth has in many cases been rendered futile and the statutory purpose is not achieved.

85. For these reasons the Committee recommends that section 26 be amended as set out below.

Recommendation

86. The contextual truth defence should be amended so that it achieves its statutory purpose. The Committee recommends the following amendments, which are based upon the amendments proposed by the Victorian Bar Association with minor modifications:

Defence of contextual truth

(1) It is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter carried~~, in addition to the defamatory imputations of which the plaintiff complains,~~ one or more ~~other~~ imputations ~~(contextual imputations)~~ that are substantially true (contextual imputation(s)), and

(b) the defamatory imputations of which the plaintiff complains and found to be carried by the matter, but which the defendant has not proved to be substantially true, do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputation(s).

(2) A contextual imputation must differ in substance from the plaintiff's imputations and any other contextual imputation alleged to be carried by the same matter.

Question 10

(a) ***Should the Model Defamation Provisions be amended to provide greater protection to peer reviewed statements published in an academic or scientific journal, and to fair reports of proceedings at a press conference?***

(b) ***If so, what is the preferred approach to amendments to achieve this aim–for example, should provisions similar to those in the Defamation Act 2013 (UK) be adopted?***

87. The Committee does not consider that any amendment of the MDA is required to provide greater protection to peer reviewed statements published in an academic or scientific journal, or to fair reports of proceedings at a press conference.

88. In the Committee's view, there is adequate protection for such publications both at common law and in the current legislation. The defence of qualified privilege at common law and pursuant to section 30, as well as (depending on the nature of the press conference and who it is held by) the defence pursuant to section 29 of the Act are likely to apply to the publications referred to.

Question 11

(a) Should the 'reasonableness test' in clause 30 of the Model Defamation Provisions (defence of qualified privileged for provision of certain information) be amended?

(b) Should the existing threshold to establish the defence be lowered?

(c) Should the UK approach to the defence be adopted in Australia?

(d) Should the defence clarify, in proceedings where a jury has been empanelled, what, if any, aspects of the defence of statutory qualified privilege are to be determined by the jury?

Questions 11(a)-(c)

89. Section 3(b) of the Act provides that one of the objects of the Act is:

> *"to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance."*

90. The defence that is designed to achieve this object is the defence provided by section 30, namely a defence of statutory qualified privilege.

91. There can be no doubt that this object is important to a working democracy. The ability of the media to report on matters of public interest and importance cannot be overstated.

92. However, the defence is rarely effective at trial, particularly in cases involving mass media publications. The consequence of this is that object 3(b) is arguably not achieved by the current Act.

93. One factor that some members of the Committee consider contributes to the lack of practical utility of the defence in cases involving mass media publications is that it is often very difficult for the defence to succeed in cases where confidential sources are relied upon. This is despite the availability of the journalist's privilege provided by section 126K of the *Evidence Act* 1995. In cases where a journalist is unable, due to obligations of confidence and ethical obligations, to reveal the identity of

their source, it is argued that the defendant has failed to discharge the onus of establishing reasonableness.

94. Accordingly, some members of the Committee recommend that the defence be amended and consider that section 4 of the UK Act is a useful model in that it places a greater emphasis on public interest.

95. If a reasonableness requirement remains in the defence, those members recommend that section 30(3) be amended to better reflect responsible journalistic practice. Factors that may be demonstrative of reasonableness which should be matters that may be taken into account include:

    (a) Whether it was in the public interest that the material be published (currently encapsulated in substance in 30(3)(a));

    (b) Whether the publishers reasonably believed that it was in the public interest that the material be published;

    (c) Whether the publishers took reasonable steps to verify the facts stated in the publication (currently encapsulated in substance 30(3)(i));

    (d) Whether the publishers made reasonable attempts to contact the complainant and ascertain their side of the story (currently encapsulated in substance 30(3)(h));

    (e) Whether the publishers relied upon sources that they reasonably believed to be sources of integrity (currently encapsulated in substance 30(3)(g), although this recommended requirement removes the source's identity being taken into account in light of the issue referred to in 93 above); and

    (f) Whether the publishers reasonably believed what they published to be true.

96. Further, those members recommend that there be flexibility in the defence to enable publishers to put forward evidence and submissions of any other factor or factors that, in the circumstances of the particular case, the publishers contend are demonstrative of the reasonableness of their conduct. Whether the publisher's submission in any particular case is accepted will be a matter for the tribunal of fact. However, allowing flexibility in the defence in this way provides that the defence

is not hamstrung by inflexible requirements and that the tribunal can be invited to consider reasonableness having regard to all of the circumstances in a particular case.

Question 11(d)

97. In most but not all State and Territory jurisdictions, section 22 of the Act provides as follows:

Roles of judicial officers and juries in defamation proceedings

(1) This section applies to defamation proceedings that are tried by jury.

(2) The jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established.

(3) If the jury finds that the defendant has published defamatory matter about the plaintiff and that no defence has been established, the judicial officer and not the jury is to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.

(4) If the proceedings relate to more than one cause of action for defamation, the jury must give a single verdict in relation to all causes of action on which the plaintiff relies unless the judicial officer orders otherwise.

(5) Nothing in this section:

(a) affects any law or practice relating to special verdicts, or

(b) requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer.

98. As presently drafted, section 30(1) provides three elements which must be proved in order for a defence to be established, as follows:

Defence of qualified privilege for provision of certain information

(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that:

(a) *the recipient has an interest or apparent interest in having information on some subject, and*

(b) *the matter is published to the recipient in the course of giving to the recipient information on that subject, and*

(c) *the conduct of the defendant in publishing that matter is reasonable in the circumstances.*

99. For the purposes of the duty and interest form of the qualified privilege defence at common law, it is for the judge to determine, as a matter of law, whether the publisher had a relevant duty to or interest in publishing the matter complained of, and whether each recipient had a reciprocal duty or interest in receiving of the publication (often referred to as the 'community of interest').

100. The elements in 30(1)(a) and (b) are derived from, but are not equivalent to, the 'community of interest' requirement in the duty and interest form of qualified privilege at common law. The statutory requirements are intended to be of broader application than the requirement in the common law defence.

101. Due to its connection to the 'community of interest' requirement in the common law defence it has generally been accepted that the requirements in 30(1)(a) and (b) are matters that at general law were to be determined by the judicial officer, although this is a matter which is debatable.

102. However, the requirement in section 30(1)(c) has been subject to greater controversy.

103. In *Davis v Nationwide News Pty Limited* (2008) 71 NSWLR 606 McClellan CJ at CL held that reasonableness was an issue which at common law was to be determined by the judge. In *Daniels v State of New South Wales (No 6)* [2015] NSWSC 1074, McCallum J gave extensive consideration to *Davis* and other authorities, before disagreeing with McClellan CJ's conclusion, and holding that the issue of reasonableness was a question for the jury.

104. In *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, Dixon J inclined to the conclusion reached by McCallum J in *Daniels*, holding that the element of reasonableness for the purpose of s 30(1)(c) was a quintessential jury question.

105. In *Gayle v Fairfax Media Publication Pty Limited (No 2)* [2018] NSWSC 1838 McCallum J gave further consideration to the question and determined that the requirement of reasonableness is a question for the judicial officer. This decision is presently subject to an appeal.

106. In these circumstances the Committee recommends that the legislature make explicit which elements of the defence of qualified privilege (if any) are to be determined by the jury (if empanelled).

107. Both McCallum J in *Daniels* and Dixon J in *Wilson* held that the reasonableness requirement in section 30 cases will often call for a finding of fact based upon matters which a jury is better placed to adjudicate upon, applying community standards, than a judge sitting alone. The Committee respectfully agrees, and recommends that the legislature make clear that the requirement of reasonableness is to be determined by the jury.

Recommendation

108. That section 30 be amended to give increased protection to the publication of matters of public interest and importance, and to better reflect responsible journalistic practices, as discussed in paragraphs 94 to 96 above.

109. That the legislature make explicit that the element of reasonableness is to be determined by the jury (if empanelled).

Question 12

Should the statutory defence of honest opinion be amended in relation to contextual material relating to the proper basis of the opinion, in particular, to better articulate if and how that defence applies to digital publications?

110. The defence of honest opinion (or, fair comment), like the defence of qualified privilege, is of profound significance to defamation law. The right to express an honest opinion has been called a "bulwark of free speech".[11]

111. At common law it is a requirement of the defence that the facts upon which the comment is based are expressly stated, sufficiently referred to or notorious.[12] The rationale behind this requirement includes so that the recipient of the publication can judge for themselves whether the comment is well founded. In this regard the common law defence seeks to a balance between the plaintiff's interest in reputation and competing interests in free speech.

112. The Committee considers that this rationale applies equally to the defence provided by section 31. While the Committee recognises the issues raised in the Discussion Paper concerning online publications, those concerns do not vitiate, in the opinion of the Committee, the rationale of the defence.

113. In *The Herald & Weekly Times Pty Ltd v Buckley* (200921 VR 661 the Victorian Court of Appeal held that the requirement that the basis of the opinion be referenced did apply equally to the statutory defence provided by section 31.

114. However, this requirement is not expressly stated to apply in the language of the section. Accordingly, the Committee recommends that section 31 be amended to make this explicit, by reference to the High Court's explanation of the operation of that element of the common law defence in *Manock*, by including a clause as follows.

[11] Gatley on Libel and Slander, 11th edition, 2008, Sweet and Maxwell at 12.1.
[12] *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.

Recommendation

115. That section 31 be amended to include a clause in substance as follows:

> *For the purposes of this section, an opinion is* ***based on*** *proper material if the facts upon which the opinion is based are expressly stated or referred to in the matter (including by means such as hyperlink) or are notorious.*

Question 13

Should clause 31(4)(b) of the Model Defamation Provisions (employer's defence of honest opinion in context of publication by employee or agent is defeated if defendant did not believe opinion was honestly held by the employee or agent at time of publication) be amended to reduce potential for journalists to be sued personally or jointly with their employers?

116. Pursuant to 31(4)(b) of the Act, a defence of honest opinion, where the opinion relied upon is that of an employee or agent of the defendant, can only be defeated if the defendant did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published.

117. Whilst minds differ about this, some members of the profession believe that in practical terms, the present defeasance provisions lead to the necessary joinder of the journalist so as to defeat the defence.[13] Such practice is now regarded a commonplace amongst the profession.

118. It was previously thought that this practice was unwise as explained by Justice Hunt who was Defamation List Judge between 1979 to 1991:

> *"It is unwise to multiply the number of defendants unnecessarily. If the defendant is a newspaper, there is no need to add as defendants the editor or the journalist, and there may be disadvantages for your client in doing so, unless there is an admission which is otherwise inadmissible ... The newspaper is in any event almost invariably vicariously responsible for the malice of its journalists, and the interrogatories directed to the newspaper must be answered by reference to the relevant journalist's state of mind".*[14]

[13] See by way of example, *Davis v Nationwide News Pty Ltd* [2008] NSWSC 699; *Rogers v Nine Network Australia Pty Ltd* [2008] NSWDC 275; *Ahmed v Harbour Radio Pty Ltd* [2010] NSWSC 676 and *Dank v Rothfield* [2015] NSWCA 193.

[14] Per Justice Hunt in *Seidler v John Fairfax & Sons Ltd* [1983] 2 NSWLR 390 at 392 to 394.

119. It was further thought inappropriate to join journalists to proceedings in light of them being rarely responsible for the headlines, subheadings or captions on any accompanying photographs, and as a sense or the context of the material which he submitted may have been substantially altered by a sub editor, his personal responsibility for what was in fact published in the newspaper could well be different from the responsibility of the newspaper itself.[15]

120. It may be considered that current practice is unnecessary, costly and, is not within the spirit of the overriding objective of the *Uniform Civil Procedure Rules*, namely for the resolution of litigation in a just, quick and cheap way.

121. However, in light of the fact that the weight of judicial authority (see in particular *Dank v Rothfield* [2015] NSWCA 193), indicates that such joinder is not necessitated by the current form of section 31(4)(b), the Committee considers that there is no need to amend section 31(4)(b).

[15] *Gorton v ABC & Walsh* (1973) 1 ACTR 6 at 8; *Brazel v John Fairfax & Sons Ltd* (Hunt J, 17 February 1989, unreported) at pages 13-14; *Rogers v Nine Network Australia Pty Ltd* (No 2) [2008] NSWDC 275.

Question 14

(a) Should a 'serious harm' or other threshold test be introduced into the Model Defamation Provisions, similar to the test in section 1 (serious harm) of the Defamation Act 2013(UK)?

(b) If a serious harm test is supported:

(i) should proportionality and other case management considerations be incorporated into the serious harm test?

(ii) should the defence of triviality be retained or abolished if a serious harm test is introduced?

Question 14(a)

122. The Committee supports the introduction of a serious harm threshold into the MDP.

123. Since the Act came into force in 2005, a significant number of trivial defamation claims - related to the internet and the use of social media - have been filed in both the NSW Supreme Court and the NSW District Court.[16]

124. It should be observed that whilst there may be some exceptions, claims of the kind at issue do not usually involve the mass media. Rather they concern a dispute between natural persons who are, more often than not, self-represented. The case management of these proceedings invariably involves a disproportionate amount of judicial time and resources when the likely award of damages and vindication will be small or the meanings contended for are barely, if at all, defamatory.

125. Whether there exists a threshold of serious harm at common law was recently considered by her Honour Justice McCallum in *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858. Her Honour said, in *obiter*, having considered the decision of Tugendhat J in *Thornton v Telegraph Media Group Ltd*,[17] that a threshold of seriousness exists as an element of the cause of action in Australia. An application

[16] See for example: "*NSW to review defamation laws as social media claims soar*", SMH 21 March 2018; "*Free press backwater: how to change the defamation laws that stifle Australian journalism*", The Guardian 30 November 2018; "*Judge Judith calls for united front on defamation reform*", The Australian 9 April 2018.

[17] [2010] EWHC 1414 (QB); [2011] 1 WLR 1985.

for leave to appeal was recently dismissed by the NSW Court of Appeal, although the Court stated that if this was the primary ground upon which the proceedings had been dismissed it may have been sufficient to warrant a grant of leave: *Kostov v Nationwide News Pty Ltd* [2019] NSWCA 84.

126. Notwithstanding this example of one judicial view that a threshold of serious harm already exists in the common law, there are powerful reasons to give statutory force to a threshold in the MDP. Such a provision would not only ensure consistency between jurisdictions, but would also provide certainty as to when it is appropriate to exclude such claims and fortify courts in bringing an end defamation claims that have little merit.

127. Section 1 of the UK Act provides as follows:

Serious harm

(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

128. The purpose of this section was to raise the bar and "build on"[18] cases such as *Thornton v Telegraph Media Group* and *Jameel (Yousef) v Dow Jones & Co Inc*.[19] However, since coming into force, the language used in section 1 has raised significant questions in that jurisdiction including the extent to which the bar has been raised by the section and, importantly, whether its proper construction abrogates the presumption of damage in defamation law.

129. The Committee is aware that the Supreme Court of the United Kingdom is currently reserved on questions of this kind in the case of *Lachaux v Independent Print Ltd.*[20]

[18] See the Explanatory Notes to the DA(EW) at paragraphs [10]-[11].
[19] [2005] EWCA Civ 74.
[20] UKSC 2017/0175 on appeal from the Court of Appeal in [2017] EWCA Civ 1334. Argument concluded on 14 November 2018.

130. In order to avoid questions of the proper construction of section 1 arising in this jurisdiction, it may be preferable for the legislature to be explicit in relation to the matters that the Court may take into account in considering whether a publication has caused or is likely to cause reputational serious harm. Such matters may include:

(a) The seriousness of the imputation or imputations alleged to be conveyed by the matter;

(b) The extent of the alleged publication;

(c) The alleged audience of the publication; and

(d) The circumstances of the publication.

131. The Committee also considers that the MDP should be specific as to when and how the threshold question is to be addressed, and that the issue ought be addressed at any early stage in the proceedings, namely, before a Defence has been filed. The Committee further considers that the MDP should be specific that the onus is on the plaintiff to establish that the threshold is met if called upon to do so on the application of an opposing party or by the Court of its own motion. Such an onus provision is needed because in cases that may not meet the threshold defendants may be unrepresented and not aware of the ability to make an application in this regard.

132. However, whatever form that threshold takes in the MDP, the Committee submits that it would be highly undesirable to introduce in Australia a statutory threshold of seriousness which has the implicit effect of abrogating the presumption of damage, which is a well-established feature of defamation law.

Question 14(b)(i)

133. The Committee notes the "proportionality principle" as applied in *Bleyer v Google Inc* [2014] NSWSC 898, derives from the English case of *Jameel* (cited above).

134. Furthermore, the Explanatory Notes to the UK Act reveals that section 1 to that Act was drafted as a consequence of both *Jameel* and *Thornton*.

135. The Committee considers that, in principle, it would be appropriate for a court to take into account case-management principles when considering whether a case overcomes the serious harm threshold. However, in light of provisions such ss. 56-60 of the *Civil Procedure Act* 2005 (NSW), the Committee does not consider it necessary for the MDP to incorporate the proportionality principle (or other case management considerations) into a serious harm test.

Question 14(b)(ii)

136. Notwithstanding the Committee's support for a threshold of serious harm being included in the MDP, it does not support the abolition of the defence of triviality.

137. There is a significant difference between protecting the integrity of the court process and protecting defendants. As succinctly explained by McCallum J in *Bleyer* (at [59]):

> *"... defences protect defendants. The existence of a defence to the action is of little avail to the court in protecting the integrity of its own processes (assuming, as I think I should, that includes the fair and just allocation of finite resources)".*

In this regard, the Queensland case of *Smith v Lucht*[21] (the "Dennis Denuto" case) is a clear example of why the defence of triviality should not be abolished. That claim commenced in early June 2013 based on a number of meanings related to the fact the Plaintiff had been referred to as "Dennis Denuto" from the film "The Castle". Having failed to persuade the court to strike the claim out on proportionality grounds in mid-November 2014, the defendant eventually succeeded in establishing the defence of triviality (at trial) in late November 2015. The appeal was finally determined in late October 2016 after significant legal cost and judicial time and resources were deployed. Putting aside the issue of whether the use of court resources was proportionate, it is striking that but for the defence of triviality, the defendant may have lost that case.

[21] [2016] QCA 267.

Recommendation

138. A statutory threshold of serious harm should be introduced into the MDP.

139. In the Committee's view it is preferable for the legislature:

    (a) to state explicitly the matters the Court may take into account in considering whether a publication has caused or is likely to cause serious harm; and

    (b) to make it plain that the issue should be determined as early as possible.

140. That statutory threshold of serious harm:

    (a) does not need to incorporate a proportionality test (or other case management considerations); and

    (b) should not seek to abolish the defence of triviality.

Question 15

(a) Does the innocent dissemination defence require amendment to better reflect the operation of Internet Service Providers, Internet Content Hosts, social media, search engines, and other digital content aggregators as publishers?

(b) Are existing protections for digital publishers sufficient?

(c) Would a specific 'safe harbour' provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions?

(d) Are clear 'takedown' procedures for digital publishers necessary, and, if so, how should any such provisions be expressed?

141. The Committee considers that there does need to be consideration given to whether the present state of the law adequately balances the protection from liability of Internet Service Providers, Internet Content Hosts, social media, search engines and other digital content aggregators (collectively, 'digital publishers'), and the ability for people aggrieved by material published on the Internet to achieve redress. However, the Committee considers that amending the innocent dissemination defence is not the preferable course.

142. The defence of innocent dissemination provided by section 32 of the Act is designed to protect from liability subordinate distributors of defamatory content. The application of that defence extends well beyond digital publishers, for example to newsagents, printers, librarians etc, and appears to be effective in protecting such persons from liability. Accordingly, the defence ought be retained in its current form to achieve the object for which it was enacted.

143. The Committee does however consider that there needs to be reform in the law to address the problems that have arisen in connection with the rise of the Internet and digital publishers. These problems are not limited to defamation and call for law reform on a broader level. Problems arise also in relation to intellectual property infringement, vilification and hate speech, dissemination of material relating to terrorism and use of the Internet for other illegal activities. For this reason the

Committee considers that law reform in this regard will be more effectively achieved at a Federal level.

144. From a defamation perspective, the problems that the Committee considers exist on the current state of the law are as follows.

145. First, the Committee considers that digital publishers are not adequately protected from liability in relation to the publication of content that they have not authored and in respect of which they are not the primary distributor. Whilst a digital publisher may rely upon the defence of innocent dissemination and/or the protection provided by clause 91 of Schedule 5 of the *Broadcasting Services Act* 1992 (Cth), these provisions apply only until the point that the digital publisher is made aware of the content and that it might be defamatory. After such time the digital publisher may be found liable as a publisher if it does not take steps to remove the offending material.

146. This has the capacity to visit a significant burden on digital publishers in circumstances where they are unlikely to be in a position to adjudicate whether the content is in fact defamatory or whether it is defensible. Digital publishers are left with two equally unpalatable choices:

    (a) take a risk avoidance approach and remove all material complained of, with the effect that there is a significant imposition on freedom of expression; or

    (b) adopt an approach of leaving material available for download until adjudicated upon by a court (so as not to impose on freedom of expression), which could result in significant liability and increased cost of business in having to defend proceedings brought by aggrieved persons.

147. Secondly, the Committee considers that there are inadequate avenues for aggrieved persons to seek redress in relation to content published on websites hosted by digital publishers. For example, there have been cases where aggrieved persons seek to have offending material removed, even by court order directed to the author/primary publisher, but:

    (a) the author/primary publisher's identity is unknown, leading to the aggrieved person either having no person to seek redress from or having to take

sometimes expensive action to seek preliminary discovery against the digital publisher in order to ascertain the identity of the author/primary publisher; and/or

(b) that person may refuse to comply with the request/order, and may not have means to satisfy an award of damages. Whilst this may give rise to a liability for contempt of court, it does not achieve the aim of having the offending material removed and it is difficult for the aggrieved person to obtain effective relief.

148. Even in cases where a court order is directed to a digital publisher there can often be difficulties with enforcement where the digital publisher is domiciled in the United States due to the difficulty in enforcing orders of Australian courts in defamation proceedings in the United States (see the *Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act* and like provisions enacted in various states in the United States). In cases against such digital publishers it is the experience of the Committee that the digital publishers refuse to take any action, often citing the First Amendment of the United States Constitution.

149. Accordingly, the Committee considers that there needs to be consideration given to law reform to address these problems and to find an adequate balance between competing interests, in addition to law reform to address the problems arising in other areas as referred to in paragraph 143 above. As these issues relate to areas broader than defamation the Committee considers that these policy issues should be addressed with the benefit of input from stakeholders in other areas of the law, and at a Federal level, particularly given the content of clauses 90 and 91 of the *Broadcasting Services Act*.

150. Any 'safe harbour' provision will need to be addressed in this context given a 'safe harbour' provision may be appropriate in some contexts but not necessarily in all. For example, it is difficult to see how any 'safe harbour' provision could be appropriate in relation to the dissemination of material relating to terrorism or other illegal activities.

151. A further matter that the Committee considers should be considered in the context of any 'safe harbour' provision is whether as a matter of regulation digital publishers conducting business in Australian should be required to maintain a presence in the jurisdiction such that there is a legal entity against which orders can be made and enforced, and judgments satisfied. The purpose of this requirement would be to address the problem referred to in paragraph 148 above.

152. Similarly, 'takedown' provisions and orders for compulsory corrections should also be addressed in this broader context. Such provisions have the potential to be of great importance to persons aggrieved by publications on the Internet in circumstances where theymay be the only avenue for redress if the author/primary publisher of the material refuses to take it down, even if ordered to do so by the Court.

Question 16

(a) ***Should clause 35 be amended to clarify whether it fixes the top end of a range of damages that may be awarded, or whether it operates as a cut-off?***

(b) ***Should clause 35(2) be amended to clarify whether or not the cap for non-economic damages is applicable once the court is satisfied that aggravated damages are appropriate?***

153. The two matters raised by Question 16 have, as the Discussion Paper notes, been the subject of recent judicial consideration in *Bauer Media Pty Ltd v Rebel Wilson [No 2]*[22]. As a result of the Victorian Court of Appeal's decision, it is now beyond dispute that, unless amended, section 35 operates as a cut-off and that the cap is not applicable once the court is satisfied that aggravated damages are appropriate. This is despite different views having been expressed in previous cases at first instance, as recorded in footnote 91 of the Discussion Paper.

154. Further, there is authority that the words "the circumstances of the publication of the defamatory matter" do not confine when the cap is inapplicable to aggravation by reason of the circumstances at the time of publication.[23]

155. The Committee considers that greater clarity in section 35 could be achieved by making provision for aggravated damages, if warranted, to be awarded separately to general compensatory damages, rather than as part of an award of compensatory damages. In that way, the cap will serve its intended purpose in limiting the award of *general compensatory* damages so as to preserve proportionality with non-economic loss damages for personal injury matters.

[22] [2018] VSCA 154.
[23] *Rayney v Western Australia (No 9)* [2017] WASC 367.

Recommendation

156. The Committee recommends that section 35 be amended to provide for aggravated damages, if warranted, to be awarded as a separate amount, independently of an award for general compensatory damages, with the amount of general compensatory damages to be subject to the cap in all circumstances.

Question 17

(a) Should the interaction between Model Defamation Provisions clauses 35 (damages for non-economic loss limited) and 23 (leave required for further proceedings in relation to publication of same defamatory matter) be clarified?

(b) Is further legislative guidance required on the circumstances in which the consolidation of separate defamation proceedings will or will not be appropriate?

(c) Should the statutory cap on damages contained in Model Defamation Provisions clause 35 apply to each cause of action rather than each 'defamation proceedings'?

157. The Committee's combined experience is that because of the statutory cap on damages applies to each "defamation proceedings", multiple proceedings are encouraged where a single proceeding would have been preferable. This has arisen in at least two ways.

158. First, where a publisher publishes across different mastheads or platforms, multiple proceedings are commenced. Fairfax as a defendant is a good example. Where the same article is published in *The Sydney Morning Herald*, *The Canberra Times* and *The Age*, both in print and online, at least three sets of proceedings will be commenced. On some occasions, separate proceedings are commenced in respect of the online version of the matter complained of (as occurred in *Cummings v Fairfax Digital Australia & New Zealand Pty Ltd*[24]). Section 23 does not apply in such circumstances because, although publication is by an entity in the Fairfax Group, the different proceedings are not "against the same defendant."

159. There is, in reality, little benefit in a plaintiff commencing multiple proceedings in this way, as was demonstrated by McCallum J's recent decision in *Gayle v Fairfax Media Publications Pty Ltd (No 2)*[25], where separate proceedings were commenced for publication of the same article in three mastheads against the relevant Fairfax

[24] [2018] NSWCA 325.
[25] [2018] NSWSC 1838.

publishing entities. When awarding damages, her Honour[26] indicated what she would have awarded were she giving separate awards in each proceeding without regard to the other two proceedings, which totalled $550,000, but reduced the amount to an overall amount of $300,000 taking into account the mitigating effect of other awards referred to in section 38(1)(d).

160. Nonetheless, it is desirable for reasons of costs and case-management, that proceedings are not constituted this way. The Committee considers that an amendment should be made to prevent the commencement of separate proceedings which in substance relate to the same matter by the same publisher, but which are not presently caught by section 23.

161. Secondly, where different publishers publish the same matter, where separate awards against each are appropriate, a plaintiff is forced to bring separate proceedings against each publisher so as to avoid one cap applying to proceedings as a whole. The Committee considers that a plaintiff in those circumstances should be able to bring one set of proceedings without that prejudice and that damages against each defendant should be awarded as if separate proceedings were commenced against each of them.

Recommendation

162. The Committee recommends that section 23 be amended to prevent multiple proceedings being commenced against *associated* defendants in respect of the same or like matter. That could be achieved by adding after the words "same defendant" the words "or any employee, agent or associated entity (as that term is defined in the *Corporations Act 2001* (Cth)) of that defendant."

163. The Committee recommends that section 35 be amended to preserve a separate cap against separate defendants where a plaintiff commences one proceeding against multiple defendants who have published related matter. That could be achieved by inserting as sub-section (1A), the following provision:

[26] [2018] NSWSC 1838 at [44]-[45].

"Without limiting the operation of section 38, where the defamation proceedings are against more than one defendant and leave pursuant to section 23 is not required, the maximum damages amount applies to each defendant separately in respect of the defamatory matter for which that defendant is sued."

Question 18

Are there any other issues relating to defamation law that should be considered?

164. The Committee considers that at least the following three further matters should be considered.

Definition of 'matter'

165. Section 4 of the Act provides the following definition for 'matter':

> ***matter*** *includes:*
>
> *(a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical, and*
>
> *(b) a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication, and*
>
> *(c) a letter, note or other writing, and*
>
> *(d) a picture, gesture or oral utterance, and*
>
> *(e) any other thing by means of which something may be communicated to a person.*

166. The Committee is of the view that this definition does not sit comfortably with the manner in which this word is used throughout the Act.

167. The introduction of the Act in New South Wales brought about significant change to the law of defamation in this state in that, by section 8, it provides that the publication of the defamatory 'matter' was the cause of action, not each individual imputation as had previously been the position.

168. In that sense, the Committee understands that where the word 'matter' is used throughout the Act it is intended to refer to the whole of the publication which is sued on by the plaintiff, usually referred to as 'the matter complained of'. However, this is not clear from the definition.

Recommendation

169. The Committee recommends that the definition of 'matter' be amended as follows:

matter *means the whole of the publication complained of and includes:*

(a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical, and

(b) a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication, and

(c) a letter, note or other writing, and

(d) a picture, gesture or oral utterance, and

(e) any other thing by means of which something may be communicated to a person.

Costs in a claim where one party dies after the commencement of proceedings

170. Section 10 of the Act provides:

No cause of action for defamation of, or against, deceased persons

A person (including a personal representative of a deceased person) cannot assert, continue or enforce a cause of action for defamation in relation to:

(a) the publication of defamatory matter about a deceased person (whether published before or after his or her death), or

(b) the publication of defamatory matter by a person who has died since publishing the matter.

171. The consequence of this is that in cases where one party dies during the course of proceedings the proceedings come to an end, irrespective of how far the proceedings have progressed. Arguably, in these circumstances, the Court has no power to make orders for costs of the proceedings. This situation may give rise to great unfairness on the part of a party. For example, take a situation where a

plaintiff brings proceedings for defamation but the defendant dies just before the hearing. The plaintiff would be left in a position where not only can he/she not continue to assert their cause of action, but they will also not be in a position to seek an order for and recover costs, even if the defendant's defence had been doomed to fail. The same situation may arise in the other direction in circumstances where a plaintiff who brings an unmeritorious case dies before the case has been determined. The defendant will be left without an ability to recover its costs incurred in defending the proceedings.

172. There will of course be cases where the Court is unable to determine liability for costs without determining the merits of the case and it would not be in the interests of case management principles to do so. However, the Committee considers it is in the interests of justice for the Court to retain a discretion to determine liability for costs in any particular case, if it considers it is in the interests to do so.

Recommendation

173. The Committee recommends that section 10 be amended to include a clause in substance as follows:

Nothing in this section prevents a Court from determining questions of costs in any proceedings commenced before the death of a party if the Court considers it is in the interests of justice to determine costs.

Section 40(2)(b)

174. Section 40(2) of the Act provides:

Costs in defamation proceedings

...

(2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise):

(a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity

basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff, or

(b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

175. As presently drafted there is a disparity between section 40(2)(a) and (2)(b) in that (2)(a) provides an incentive on the part of a defendant to make a reasonable settlement offer, lest it be exposed to the risk of an indemnity costs order, whereas section 2(b) provides no such incentive on the part of a plaintiff. This disparity visits an unfairness on defendants in that even if defendants are successful they may not get the benefit of an indemnity costs order unless they have made an offer which the plaintiff unreasonably failed to accept, whereas a successful plaintiff may obtain an indemnity costs order by doing nothing, so long as the defendant also did nothing.

176. The Committee recommends that this situation be rectified by amending section 40(2)(b) so that it is equivalent to section 40(2)(a).

Recommendation

177. Section 40(2)(b) be amended as follows:

(b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to make a settlement offer of or accept a settlement offer made by the defendant.