

the assessment of damages and need to be considered in the settlement negotiation process for this reason. Publishers will still need to offer apologies in many cases to meet the 'reasonableness' requirement in s18 so this does not introduce any greater uncertainty. In any case section 18 is a more holistic evaluation and requires the parties to litigate over the terms of the offer – something that the legislation aims to avoid.

Recommendation 14(b):

The Consultation Draft proposes that the Australian legislation follow the development in the UK of introducing a 'serious harm' threshold. This is consistent with the recommendation to repeal the defence of triviality (Recommendation 14(b)). If this threshold is introduced I support the latter recommendation.

Recommendation 16:

This recommendation seeks to maintain a cap on non-economic damages separate from an award of aggravated damages. What is needed is clarity about the purpose of imposing a cap and the reasons for assessing general and aggravated damages separately. Any proposed changes raise for consideration the purpose and function of general damages and aggravated damages and whether there is really a distinction in their purpose (they are both to compensate for non-economic loss). Aggravated are damages for one type of loss - general damages for injury to feelings. This amendment reinforces the strained distinction between general and aggravated compensatory damages.

This point is made by Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) in Chapter 12 at 232 in support of its recommendation that aggravated damages not be available for the tort they recommend be introduced but that aggravating (and mitigating) circumstances be considered in the assessment of general non-economic damages. The ALRC considers that awards of exemplary damages in 'exceptional cases' to mark the disapproval of the court are appropriate, rather than large awards of aggravated damages.

The ALRC's proposals make sense from a functional point of view of damages and I refer you to the reasoning behind recommendations 12-2, 12-3 and 12.4 in the Privacy Report. I recognise however that the abolition of aggravated damages in the Defamation Act with no exemplary damages available does not sit well with the imposing a cap on general damages and based on the current cap would seriously undercompensate some plaintiffs.

Additional comments:

I also recommend consideration by given to including two other provisions of the UK Defamation Act 2013. The first is section 12 which provides a means of vindication for the parties by conferring power on a court to order a summary of its judgement to be published. The second is the summary disposal of claims provision in clause 8(3).

Yours sincerely,



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Alternative Remedies in Australian Defamation Law' Ch 28, *New Directions for Law in Australia: Essays in Contemporary Law Reform*, edited by Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton, (ANU Press 2017, 311-319); Carroll and Berryman, 'Making Amends by Apologising for Defamatory Publications: Developments in the 21st Century', Barker, Fairweather and Grantham (eds), *Private Law in the 21st Century* (2017, Hart Publishing, Oxford) 479-499.