



Law Council
OF AUSTRALIA

Review of Model Defamation Provisions

Defamation Working Party established by the Council of Attorneys-General
NSW Department of Justice

14 May 2019



Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive Summary	5
Introduction	7
Objectives of the Model Defamation Provisions.....	8
General Principles	10
Corporations.....	10
The single publication rule.....	14
Resolution of civil disputes without litigation	17
Offers to make amends	17
Offers to amend and jury prejudice.....	20
Other issues relating to offers to make amends.....	21
The role of judicial officers and juries in defamation proceedings	23
Concerns about the current situation.....	23
Constitutional inconsistency	26
Defences	28
Defence of contextual truth.....	28
Defences for publication of public documents and fair summaries.....	30
Defence of qualified privilege	31
Defence of honest opinion.....	38
Joinder of journalists to proceedings against media publishers	41
Defence of triviality	42
Defence of innocent dissemination and safe harbours	47
Remedies	53
The caps on damages.....	53
Multiple proceedings and consolidation	55
Other Issues	57
Law Society of New South Wales	57
The Victorian Bar.....	60
New South Wales Bar Association.....	61

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful contributions of the following organisations and Committees in the preparation of this submission:

- Law Society of New South Wales;
- New South Wales Bar Association;
- The Victorian Bar;
- Law Society of South Australia;
- Queensland Law Society; and
- Media and Communications Committee of the Law Council's Business Law Section

Executive Summary

1. The Law Council welcomes the opportunity to make a submission regarding the issues raised in the Council of Attorneys-General *Review of Model Defamation Provisions Discussion Paper (Discussion Paper)*.
2. The Model Defamation Provisions seek to appropriately balance the right of individuals to protect their reputations and the right to freedom of speech, while providing a mechanism whereby the courts can justly, expediently and inexpensively determine the truth or falsity of alleged defamatory matters.
3. The Law Council considers that each of the objectives of the Model Defamation Provisions remains valid. However, the Law Council strongly supports reform of the Model Defamation Provisions. To further ensure that the objectives of the Provisions are met, consideration should be given to amendments to the effect that it be mandatory for a judge, at the first directions hearing or case management conference, to specifically address the objects in each of sub-clauses 3(b)-(d), and how the proceeding fits within the parameters of those objects, before deciding whether, and if so how, a proceeding is to continue further.
4. The Law Council notes that the concept of defamation does not neatly apply in regard to artificial persons (i.e. corporations) and that corporations – particularly large, for-profit organisations – have other available avenues (legal and non-legal) to address what may be perceived as reputational harm. The current provision, clause 9, prevents strategic litigation by large corporations with significant resources to deter adverse publicity, while providing smaller corporations, which may be disproportionately affected by harm to their reputation, access to the defamation regime. The Law Council does not recommend that the right of corporations to sue for defamation be broadened. However, the Law Council submits that clause 9(2)(b) could be amended to better reflect modern business practice, 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 (for example, contractors and persons supplied by labour hire firms).
5. The ‘multiple publication rule’ does not adequately accommodate digital publication, particularly given the prevalence of online archives. The Law Council, therefore, strongly recommends that the Model Defamation Provisions be amended to include a ‘single publication rule’ in a form similar to section 8 of the *Defamation Act 2013 (UK) (the UK Act)*.
6. The apparent inconsistency of clauses 14 (when offer to make amends may be made) and 18 (effect of failure to accept reasonable offer to make amends) of the Model Defamation Provisions has created some uncertainty in practice. To address this concern, the Law Council recommends that clause 18 be amended to remove the requirement that an offer to make amends be made ‘as soon as practicable after becoming aware that the matter is or may be defamatory’ in order for the defence to be available, and instead require the offer to be made within 28 days of the concern notice being given to the defendant.
7. The Defence of contextual truth contained in clause 26 of the Model Defamation Provisions was intended to prevent plaintiffs from complaining about, and obtaining damages for, relatively minor false imputations whilst ignoring comparatively major true imputations conveyed by a publication. However, the unintended consequence of the drafting has been to exclude the plaintiff’s imputations from the balancing exercise the defence was supposed to encourage (i.e. between proven imputations

and unproven imputations, not between the plaintiff's imputations and the defendant's imputations). The Law Council recommends that clause 26 of the Model Defamation Provisions be amended to give better effect to its intended purpose.

8. The reasonableness defence under clause 30 of the Model Defamation Provisions was intended as a mechanism to ensure that the law of defamation does not place unreasonable limits on freedom of expression. Courts have tended to treat the concept of reasonableness as a standard of perfection which has meant that the defence has been of little practical use (particularly for media organisations). On this basis, the Law Council recommends that Model Defamation Provisions should be amended to include a provision similar to section 4 of the UK Act in order to provide a better balance between the right to publish matters of public interest and the right of the individual to protect their reputation. Additionally, the clause 30 defence should be maintained, subject to amendments to provide greater clarity, certainty and utility, and to better reflect responsible journalistic practices.
9. The Law Council supports the introduction of a serious harm test into the Model Defamation Provisions. Such a provision ensures consistency between jurisdictions, provides certainty as to when it is appropriate to exclude such claims and fortify courts in bringing to an end defamation claims that have little merit. In introducing a 'serious harm test', the Law Council recommends that the legislature state explicitly the matters the court is to consider and clearly identifies that the issue should be determined as early as possible. In the Law Council's view, the introduction of a statutory threshold of serious harm does not need to incorporate a proportionality test (or other case management considerations) but should not seek to abolish the defence of triviality.
10. Clause 23 of the Model Defamation Provisions should be amended to prevent multiple proceedings being commenced against associated defendants in respect of the same or like matter. This could be achieved by adding after the words 'same defendant' the words (or words to the effect of) 'or any employee, agent or associated entity (as that term is defined in the *Corporations Act 2001* (Cth)) of that defendant'.
11. The interaction between clauses 23 and 35 of the Model Defamation Provisions has led to a practice of multiple proceedings being commenced where a single proceeding would have been preferable. It is undesirable for proceedings to be constituted this way for reasons of costs and case-management. The Law Council therefore recommends that clause 23 of the Model Defamation Provisions be amended to prevent multiple proceedings being commenced against associated defendants in respect of the same or like matter and that clause 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.

Introduction

12. The Law Council is grateful for the significant contributions of the Law Society of New South Wales (**LSNSW**), the New South Wales Bar Association (**NSW Bar**), the Victorian Bar, the Law Society of South Australia (**LSSA**), Queensland Law Society (**QLS**) and the Media and Communications Committee of the Law Council's Business Law Section, in the preparation of this submission.

13. 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

14. Further, the Law Council 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 well as the individual reputation of each person built upon his or her own individual achievements.*²

15. The Model Defamation Provisions were introduced at a time when significant developments in digital communication were already understood or contemplated. However, 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.

16. The introduction of the Model Defamation Provisions also preceded the UN Human Rights Committee's adoption, in 2011, of General Comment 34, which provides guidance on the interpretation of Article 19 of the *UN International Covenant on Civil and Political Rights* (freedoms of opinion and expression), to which Australia is a party. The General Comment states that:

*Defamation laws must be crafted with care to ensure that they... do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expressions that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognised as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.*³

17. In the Law Council's view, it is imperative that Australia is both seen to have, and does have, a modern and consistently applied law of defamation which, at the very

¹ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 568, citing *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 131-132 (Mason CJ, Toohey and Gaudron JJ), 154-155 (Brennan J), 178 (Deane J).

² As outlined by the South African Constitutional Court in *Khumalo v Holomisa* [2002] ZACC 12, [27] (O'Regan J).

³ Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (21 July 2011) 50.

least, meets the world's best practice and embraces, and is underpinned by, contemporary thoughts.

Objectives of the Model Defamation Provisions

Question 1

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

18. Clause 3 of the Model Defamation Provisions provides that the objects of the *Defamation Act 2005* (NSW) (**the Act**) are as follows:⁴
- (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.*
19. The Law Council considers that each of the objectives of the Model Defamation Provisions remains valid. The Law Council also agrees with the statement in the Discussion Paper that the core policy objective of the Model Defamation Provisions is the 'balancing freedom of expression and publication in the public interest with protection of individuals from defamatory publications'.⁵

Promotion of uniform laws

20. The Law Council strongly supports the promotion of uniform laws of defamation in Australia. The Law Council is concerned that lack of uniformity of defamation laws in Australian jurisdictions has created an opportunity for 'forum shopping' by plaintiffs. For example, New South Wales (**NSW**), Queensland, Victoria, Western Australia and Tasmania allow a party to elect trial by jury in defamation proceedings, whereas jury trials are not permitted in the Australian Capital Territory (**ACT**), the Northern Territory and South Australia. It is now established that the Federal Court of Australia will allow a jury trial only in the most exceptional of cases. This has created a situation where plaintiffs may opt to file their claim in the Federal Court to avoid a jury trial, presuming they may obtain a better outcome by a judge sitting alone. The issue of forum shopping is addressed further below at paragraphs 116-118.
21. A 2018 report by the Centre for Media Transition, University of Technology Sydney (**UTS Report**), revealed that NSW has been, for a very considerable period, the preferred forum for defamation actions in Australia.⁶ Consideration should be given to ascertaining the reasons for this ongoing trend so as to better assess whether the

⁴ Unless otherwise stated, references in this submission to sections of the Model Defamation Provisions are references to the *Defamation Act 2005* (NSW).

⁵ Council of Attorneys-General, *Review of Model Defamation Provisions Discussion Paper* (February 2019) 10.

⁶ Centre for Media Transition, University of Technology Sydney, *Trends in Digital Defamation: Defendants, Plaintiffs, Platforms* (March 2018)
<https://www.uts.edu.au/sites/default/files/article/downloads/Trends%20in%20Digital%20Defamation_0.pdf>.

policy objectives are being achieved uniformly or remain appropriate, and whether there may be other areas for possible reform.

Freedom of expression

22. The Law Council considers that the drafting of the Model Defamation Provisions, and its implementation by the courts, has not sufficiently met the policy objectives of the Model Defamation Provisions. For example, there is a tension between clauses 3(b) and (c) of the Model Defamation Provisions, which emphasise the importance of freedom of expression and effective and fair remedies for harm to reputation, respectively. These provisions reflect the balancing exercise which should be at the heart of defamation law. However, in the Law Council's view, the burden placed on each party lacks balance. The elements that a plaintiff must establish as part of his or her onus are relatively simple (i.e. that there is publication 'of and concerning' an identified or identifiable plaintiff, which is defamatory). Arguably, the defendant publisher bears a more onerous burden in terms of threshold, cost and inconvenience in having to establish any applicable defence, including justification. In practice, courts do not always undertake a balancing exercise when deciding a defamation claim.
23. Despite the objectives of the Model Defamation Provisions, freedom of expression is not a factor to be considered in relation to any of the current defences (notably, clause 3(b) contains the sole reference to freedom of expression in the Model Defamation Provisions).

Remedies

24. Remedies that comprise compensation alone may be ineffective to repair the damage to, and vindicate, a plaintiff's reputation (for example, a successful plaintiff will be powerless to have removed false material published as part of a malicious campaign played out on social media), and may lead to unfairness for defendants.

Speedy and non-litigious methods of resolving disputes

25. In relation to clause 3(d) of the Model Defamation Provisions, the Law Council considers that the uniform laws have failed to achieve speedy and non-litigious methods of resolving disputes about the publication of defamatory matter. This is in part because there is no obligation for a plaintiff to issue a concerns notice in writing prior to commencing proceedings. Further, the technicality of defamation pleadings continues to result in protracted interlocutory encounters, prolonging the resolution of claims and increasing costs.

Recommendation

- **Consideration should be given to amending the Model Defamation Provisions to the effect that it be mandatory for a judge, at the first directions hearing or case management conference, to specifically address the objects in each of the clause 3(b), (c) and (d) and how the proceeding fits within the parameters of those objects, before deciding whether, and if so how, a proceeding is to continue further. Alternatively, it should be mandatory for a judge to specifically address each of the clauses 3(b), (c) and (d) at trial.**

26. While the Law Council agrees that the objectives remain valid, the real question is whether the Model Defamation Provisions appropriately achieve these objectives and

strikes the right balance between them. The Law Council submits that these objectives would be better served and appropriately balanced by the implementation of the changes suggested in this submission.

General Principles

Corporations

Question 2

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

27. At common law, a corporation could sue for defamation. However, because it is an artificial entity and doesn't have feelings, it could not recover damages for hurt to feelings but rather could only be injured 'in its pocket'.⁷
28. The Model Defamation Provisions (replicating the terms of its predecessor) removed that common law right of corporations to sue for defamation, except in limited circumstances.
29. Presently clause 9 of the Model Defamation Provisions provides that a corporation has no cause of action for defamation in relation to the publication of a defamatory matter about the corporation unless it was an 'excluded corporation' at the time of the publication:
 - (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.*
30. The scope to which corporations should have a right to sue for defamation is a policy question upon which reasonable minds may differ.
31. On the one hand, maintaining the restriction on corporations may encourage unjustified defamatory attacks on them by the media and others. On the other hand, lifting the restriction may stifle freedom of expression and encourage strategic lawsuits against public participation (**SLAPP**), thereby silencing individuals with genuine grievances and perpetuating power imbalances.

Possible inapplicability of defamation concepts to corporations

32. There is also force in the view that reputation is essentially a human right, and that reputation for the purposes of defamation law should be concerned with a person's character, honour and dignity.
33. The primary remedy sought in any defamation action is an award of damages. The purposes to be served by compensatory damages awarded for defamation are

⁷ *Lewis v Daily Telegraph Ltd* [1964] AC 234, 262 (Lord Reid).

consolation for the personal distress and hurt caused to the plaintiff by the publication, reparation for the harm done to the plaintiff's personal and (if relevant) business reputation, and vindication of the plaintiff's reputation.⁸

34. It can be strongly argued that concepts of 'personal distress' and 'hurt' have no application to corporations and that the concepts of 'reparation for harm done to reputation' and 'vindication' have a much greater role to play for an individual than for a corporation. 'Vindication', in particular, has an intensely personal quality to it (i.e. that the plaintiff was right all along, that the world should know they were right, and that the plaintiff can be personally satisfied that the world knows they were in the right). A company, as a legal construct, does not gain any 'personal' satisfaction from vindication.
35. Although corporations have legal personhood in certain circumstances, this does not make corporations factually equivalent to human beings who are the proper bearers of the right to freedom of expression and the right to protection of reputation that defamation law intends to protect. It can be argued that since corporations do not have human rights, any supposed 'rights' of a corporation should not outweigh the actual rights of a human being. In this regard, the LSNSW considers that the balancing act should favour a human's right to freedom of expression over a corporation's interest in protecting its reputation.
36. On such views, the cause of action ought not be available to artificial persons, whose rights are adequately protected by business torts such as injurious falsehood and commercial and consumer legislation.

Alternative recourse for corporations

37. The Law Council notes that corporations have other available avenues to address what may be perceived as reputational harm, including undertaking public relations actions and/or advertising with a view to seeking to alter public perception. Corporations can also make complaints to regulatory bodies such as the Australian Communications and Media Authority and the Press Council.
38. The Law Council additionally notes that corporations excluded under the Model Defamation Provisions do have available to them a number of legal avenues to protect their reputational interests, which are better suited to address damage than defamation. Those alternative avenues are discussed below.
39. First, clause 9(5) of the Model Defamation Provisions provides that an individual relevantly associated with a corporation subject to defamatory matter may be in a position to pursue a defamation claim in their personal capacity. In other words, corporate reputations can still be protected by an individual director suing over the damage caused to his or her individual reputation.
40. Secondly, a corporation may be able to bring proceedings for injurious falsehood. The essential elements of injurious falsehood were helpfully set out by Brereton J in *AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* and comprise:
 - (a) a false statement of or pertaining to the plaintiff's goods or business;

⁸ *Carson v John Fairfax & Sons Ltd* (1992) 178 CLR 44, 60 (Mason CJ, Deane, Dawson and Gaudron JJ), 81 (Brennan J), 90 (Toohey J), citing *John Fairfax & Sons Ltd v Carson* (1991) 24 NSWLR 259, 296-9.

- (b) publication of that statement by the defendant to a third person;
- (c) malice on the part of the defendant; and
- (d) actual damage as a consequence.⁹

41. Thirdly, a corporation may be able to bring proceedings for misleading or deceptive conduct pursuant to section 18 of the *Australian Consumer Law (ACL)* contained in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*. 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.

Law Council Position

42. It is the Law Council's view that clause 9 strikes an appropriate balance between policy considerations. The current provision prevents strategic litigation by large corporations with significant resources to deter adverse publicity, while providing smaller corporations, which may be disproportionately affected by harm to their reputation, access to the defamation regime.
43. In light of the above, the Law Council does not recommend that the right of corporations to sue for defamation be broadened.¹⁰ However, the Law Council does submit that improvements can be made to clarify the application of clause 9 of the Model Defamation Provisions.

Excluded corporations

44. The present provisions for an 'excluded corporation' in the Model Defamation Provisions create considerable confusion for publishers. Regarding clause 9(2)(a), on one view, not-for-profits, like other corporations, have no 'feelings' to hurt, and cannot be 'defamed' as such. Furthermore, many not-for-profit corporations are in fact large organisations which are quite capable of dealing with reputational issues without resorting to a claim in defamation. The Law Council submits that clause 9(2)(a) could be reconsidered to determine whether it is appropriately limiting and whether it meets relevant policy objectives.
45. As noted above, under clause 9(2)(b) of the Model Defamation Provisions, corporations with fewer than 10 employees (if they are not related to another corporation nor a public body) may have a cause of action for defamation. In the Law Council's view, the restriction of corporations with fewer than 10 employees is arbitrary and, in many cases, does not accord with modern business practice, and ought to be reconsidered.
46. In *Born Brands Pty Ltd v Nine Network Australia Pty Ltd (Born Brands)*,¹¹ 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*,¹² would apply to the Model Defamation Provisions 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

⁹ *AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* (2010) NSWSC 1395, [29] (Brereton J).

¹⁰ Please note that the Victorian Bar does not wish to express a position regarding whether the right of corporations to sue for defamation be broadened, noting that reasonable minds may differ on this issue.

¹¹ *Born Brands Pty Ltd v Nine Network Australia Pty Ltd* (2014) 88 NSWLR 421, [104] (Basten JA, Meagher JA and Tobias AJA agreeing).

¹² *Redeemer Baptist School Ltd v Glossop* [2006] NSWSC 1201 (Nicholas J).

subject to its direction and control, including, for example, persons supplied by labour hire firms.

47. The approach in *Born Brands* creates uncertainty as to the proper construction of clause 9(2) of the Model Defamation Provisions 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 using independent contractors or directors/shareholders who are not ‘employees’. With the rise of the ‘gig economy’, this could 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. For example, a corporation’s turnover might be a more appropriate criterion.

Recommendation

- **Consideration should be given to amending clause 9(2)(b) of the Model Defamation Provisions 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.**

Alternative positions

48. While the LSNSW agrees with the Law Council position that the right of corporations to sue for defamation should not be broadened, the LSNSW further recommends that consideration be given to extending the prohibition on corporations suing for defamation to all corporations, without affecting the other avenues available to corporations as outlined above. In the LSNSW’s view, this will ensure that defamation is not used to further the commercial and other interests of corporations and will promote freedom of expression and public scrutiny of all corporate bodies.
49. Alternatively, the LSNSW submits that current provisions regarding ‘excluded corporations’ should be amended to provide that any such corporation that sues for defamation must, at the outset, include a claim for measurable, actual financial loss directly attributable to the publication in question, fully particularised in the Statement of Claim itself, along with the alleged elements of causation as to how the publication caused the alleged loss.
50. Along similar lines, the Victorian Bar submits that corporations’ right to sue for defamation ought to be subject to a requirement that the corporation satisfy a ‘serious harm’ threshold. The serious harm threshold contained subsection 1(2) of the UK Act would, in the Victorian Bar’s view, constitute an appropriate limitation on a corporation’s right to sue. Subsection 1(2) of the UK Act states:

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.

51. The serious harm threshold is discussed further below at paragraphs 207-228.

The single publication rule

Question 3(a)

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

52. The Law Council strongly supports amending the Model Defamation Provisions to include a 'single publication rule'.
53. While, as the Discussion Paper notes, a single publication rule has to date been rejected at common law,¹³ it has become apparent that the multiple publication rule does not adequately accommodate digital publication, particularly given the prevalence of online archives.
54. The High Court declined to adopt a single publication rule in *Dow Jones v Gutnick*.¹⁴ In doing so, members of the Court pointed to the doctrines of *res judicata*, issue estoppel and *Anshun* estoppel as providing sufficient safeguards against the risk of a multiplicity of suits arising out of internet publication.¹⁵ The courts in England and Wales also declined to develop such a rule by way of evolution of the common law.¹⁶
55. In Australia, as a result of the multiple publication rule, it is well established that publication of defamatory material on the internet occurs each time an internet article is downloaded and comprehended by a reader, effectively re-setting the limitation period.¹⁷ The 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,¹⁸ 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.
56. Internet publishers that continue to host material that may be of important public interest, forming part of the historical public record, are exposed to defamation claims long after an article was first posted online. Further, a publisher facing a claim over an article published years earlier will often be prejudiced in its defence, in that key evidence may no longer be readily available and/or staff and sources may have moved on or become unwilling to assist.
57. 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.
58. The clear intent of the various State legislatures in introducing one-year limitation periods was that defamation actions would be pursued and resolved promptly.¹⁹ Adherence to the multiple publication rule in the online environment therefore

¹³ Council of Attorneys-General, *Review of Model Defamation Provisions Discussion Paper* (February 2019) 14, citing *Dow Jones & Co v Gutnick* (2002) 210 CLR 575.

¹⁴ *Dow Jones & Co v Gutnick* (2002) 210 CLR 575.

¹⁵ *Ibid* [36] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

¹⁶ *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2002] QB 783.

¹⁷ *Dow Jones & Co v Gutnick* (2002) 210 CLR 575.

¹⁸ In NSW the relevant provision is section 14B of the *Limitation Act 1969* (NSW).

¹⁹ See, eg, New South Wales, *Parliamentary Debates*, Legislative Council (12 November 2002); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly (30 August 2001); Queensland, *Parliamentary Debates*, Queensland Parliament (25 October 2005).

operates to subvert the limitation period and the policy behind it (the timely determination of claims for defamation), which otherwise bars an action being brought more than one year after publication. This is subject to the possibility of extension of the period to up to three years where it was not reasonable to have commenced within the year after publication (discussed further below). Despite this, the multiple publication rule continues to allow plaintiffs to sue for defamation over online publications first posted online more than one year prior to commencement.

59. The Law Council submits that a change from the multiple publication rule to the single publication rule is vital to enable publishers to continue to maintain the public record by leaving articles online in 'archived' form without the risk of being sued perhaps many years later, despite no action having been taken at the time of publication. A single publication rule would also enhance the law of defamation by better balancing the right to reputation and the right to freedom of expression, particularly with respect to online publications.
60. Several common law jurisdictions (including most US states, Ireland and more recently England and Wales) have adopted statutory single publication rules. These rules generally provide that any cause of action for subsequent publications by a publisher is treated as having accrued on the date of the first publication by that publisher, unless the subsequent publication is materially different.
61. The Law Council considers that section 8 of the UK Act is an appropriate model for a single publication rule. It provides:

8 *Single publication rule*

(1) *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.

62. 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 Model Defamation Provisions 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.²⁰
63. Any such power should also be subject to the serious harm requirement, adoption of which the Law Council recommends (see Question 14 below). This would ensure that the grant of leave would only be in cases where serious harm was involved.

Recommendation

- **The Model Defamation Provisions should be amended to include a single publication rule in a form similar to section 8 of the *Defamation Act 2013* (UK).**

Alternative position – Queensland Law Society

64. The QLS notes that there are competing arguments. However, to the extent that concerns are being raised about unintended consequences of the present position, in the absence of reliable evidence regarding such consequences occurring, the QLS is reluctant to support a change. In addition, there may be other avenues to mitigate the risks of such consequences. The QLS also considers that trends in data security and privacy must be considered in this context before introducing such a significant reform.

Question 3(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 should operate only in relation to the same publisher, similar to section 8 (single publication rule) of the *Defamation Act 2013* (UK)?

Question 3(b)(i)

65. In the Law Council's view, the inclusion of a single publication rule will 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

²⁰ This test reflects the test applicable to extensions of the limitation period in, for example, section 56A of the *Limitation Act 1969* (NSW), section 23B of the *Limitation of Actions Act 1958* (Vic) and section 37 of the *Limitation of Actions Act 1936* (SA).

was not reasonable to commence proceedings in the first 12 months after that initial publication.

Question 3(b)(ii)

66. The Law Council 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.
67. Further, 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)

68. As noted above, the Law Council considers section 8 of the UK Act to be an appropriate model for a single publication rule. Accordingly, while there are credible arguments for the rule not being restricted to the same publisher, the Law Council is of the view that the rule should operate only in relation to the same publisher, as the UK Act provides.
69. However, the Law Council also submits that related bodies corporate of the original publisher and individuals involved in the original publication (such as the journalist and editors) are protected by the single publication rule. If an entirely separate third party subsequently chooses to republish material published at an earlier date (and potentially infringe the copyright in the original material), there is no reason why the limitation period should not recommence upon the date of republication in respect of that republication and that third party. The original publisher should have legal protections legislated to avoid the potential for a cross-claim by the third party.

Resolution of civil disputes without litigation

Offers to make amends

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?

70. Two difficulties arise in relation to the interaction of clauses 14 and 18.
71. First, there is an apparent inconsistency between clause 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 clause 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.
72. Secondly, the requirement in clause 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 be 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.

73. The Law Council considers that the Model Defamation Provisions ought to be amended to harmonise the interaction between clauses 14 and 18. The requirement in clause 18, that a publisher must make an offer 'as soon as practicable after becoming aware that the matter is or may be defamatory', is unduly restrictive and uncertain. As such, the Law Council contends that the defence under clause 18 should be amended to apply in circumstances where the offer is made within 28 days after a complaint is made by the plaintiff to the defendant.

Recommendation

- **Clause 18 of the Model Defamation Provisions should be amended to remove the requirement that an offer to make amends be made 'as soon as practicable after becoming aware that the matter is or may be defamatory' in order for the defence to be available. Instead, to align it with clause 14, clause 18 should be amended to require the offer to be made within 28 days of the concern notice being given to the defendant.**

Question 4(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?

74. Clause 18(1)(b) of the Model Defamation Provisions 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.
75. 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 Model Defamation Provisions do not provide for which party would be liable for those costs and would potentially give rise to an unfairness to the defendant.
76. This uncertainty has been clarified by two appellate courts. In *Pingel v Toowoomba Newspapers Pty Ltd* (Queensland Court of Appeal),²¹ and in *Zoef v Nationwide News Pty Limited* (New South Wales Court of Appeal),²² 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.

²¹ [2010] QCA 175.

²² (2016) 92 NSWLR 570.

77. However, it is preferable that the legislature clarify this issue to remove the risk of clause 18(1)(b) being construed differently between jurisdictions.
78. In the Law Council's view, the wording of clause 18(1)(b) should be amended to provide that the offer to make amends must remain open for acceptance for, a period of not less than 28 days from the date of the offer. Such amendment would provide greater certainty to the parties, enabling offers to be specified to expire at a known date, thus providing an inducement to plaintiffs to give serious consideration to accepting sensible offers to make amends at the time they are delivered. Each of those outcomes is consistent with the object of the legislation to encourage settlement without litigation.
79. It should also be made clear that an offer to make amends is not required to remain open for acceptance at all times before trial unless withdrawn.

Question 4(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?

80. The Model Defamation Provisions are silent as to whether an offer may be terminated by any means other than by it being withdrawn in writing by the offeror (see clause 16(1)). In *Nationwide News Pty Ltd v Vass*,²³ the New South Wales Court of Appeal held that a counter offer made by a plaintiff, under a statutory regime other than the Model Defamation Provisions, namely the *Uniform Civil Procedure Rules 2005* (NSW) (***Uniform Civil Procedure Rules***), did not operate as a counter-offer which terminated the offer.
81. 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

- **The Model Defamation Provisions should 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, and that it may also be terminated by:**
 - **being rejected by the plaintiff, either expressly or impliedly;**
 - **a counter-offer made by the plaintiff;**
 - **commencement of proceedings by the plaintiff; or**
 - **expiration of the offer on a specified date at least 28 days from the date of the offer (see response to Question 4(b)),****without the defendant being denied an arguable defence under clause 18.**

²³ [2018] NSWCA.

Offers to amend and jury prejudice

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?

82. The Law Council notes the concerns expressed by the Media and Communications of the Law Council's Business Law Section in its submission made in 2011 to the statutory review of the *Defamation Act 2005* (NSW) (**the NSW Review**) that clauses 15, 18 and 19 may create potential for jury prejudice. In that submission, it was noted that the interaction of these clauses may create a difficult situation for a jury, which may be required to assess a defence of an offer to make amends and then artificially exclude that information from its deliberations when determining other defences raised by the defendant. It was suggested in that submission that amendments be made to require a jury to return a verdict on all other issues before the offer to make amends defence is put before them.
83. While the Law Council remains concerned that the interaction of clauses 15, 18 and 19 may create potential for jury prejudice, it does not wish to make an express recommendation as to how this issue is best solved.
84. There is a view that as damages is an issue reserved for the judge (clause 22 of the Model Defamation Provisions), and that because the assessment of the reasonableness of an offer of amends inevitably involves consideration of quantum, 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. Alternatively, there is a view 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.
85. If the position remains that the defence is to be determined by the jury, there remains concerns 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. Requiring a jury to return a verdict on all other matters before determining whether an offer to make amends defence is established, could be a method for addressing this issue. However, the counter argument is that a multi-stage approach to the jury's determination is not in the interests of modern case management principles. For example, if a jury were required to return a verdict on all other matters before determining whether an offer to make amends defence is established, then there is a risk that the plaintiff may have to give evidence about why the offer was unreasonable. It is undesirable to have to call the plaintiff to give evidence twice, particularly where credit may be in issue.
86. The Law Council notes that the potential for prejudice 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 also be cases in which potential for prejudice can be addressed by appropriate submissions by counsel for the parties and an appropriate direction by the judicial officer during its main deliberations. There may also be cases where parties are opposed to this.
87. As such, another alternative, in the event that the position remains that the defence is to be determined by the jury, is that clause 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 clause 18 be decided by the jury separately to and after the jury's determination of other issues in the case.

Other issues relating to offers to make amends

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)

88. 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 which is the subject of the complaint. This has the potential to visit an unfairness on the defendant if they are unable to identify the relevant publication. 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 that is required in a Statement of Claim.
89. Accordingly, the Law Council submits that clause 14(2) should 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 with sufficient information to enable the publication to be identified (including at least the name of the publication, the date of publication and, if applicable, the headline).
90. However, the Law Council has not reached a concluded view as to whether there should be a requirement to list a URL. The LSSA suggests that due to the ephemeral nature of URLs, it may not be appropriate to require their inclusion in a concerns notice.

Question 6(b)

91. As it is presently drafted, clause 15 of the Model Defamation Provisions draws a distinction between a correction (clause 15(1)(d)) and an apology (clause 15(1)(g)(i)). Clause 15(1)(d), properly construed, does not require the publication of an apology. While the Law Council notes that clarification of clause 15(1)(d) is therefore not strictly necessary, express clarification may be of some use in preventing complainants from mistakenly believing that that an apology is a requirement of an offer to make amends.
92. Some consideration should be given to whether clause 15(1)(d) incorrectly assumes that every matter complained of is capable of 'a reasonable correction'. In many instances, the complaint may not relate to a factual inaccuracy but to an omission of contextual information or implication identified by the complainant, which cannot be 'corrected' per se. However, the publisher may wish to seek to offer the publication of

a mutually acceptable form of words that may involve, for example, a clarification or the inclusion of additional information. To address this issue, the wording of clause 15(1)(d) could be amended to require the publisher, as part of an offer to make amends, to offer the publication of a reasonable correction, clarification or inclusion of additional information.

93. The absence of an apology should continue to be a relevant matter in determining whether in all the circumstances an offer was reasonable under clause 18(1)(c). The extent of a correction, clarification or inclusion of additional information as a matter of redress to the complainant should also be relevant in determining reasonableness.

Question 6(c)

94. Clause 40(2) of the Model Defamation Provisions 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.

95. 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 clause 40(2), in that, if the court finds that the offer of amends was reasonable, it is likely that the defence under clause 18 will succeed and the plaintiff will be found to have unreasonably failed to accept the offer. Accordingly, there is not strict necessity for any amendment in this regard.
96. However, clarification of clause 40(2)(b), or the insertion of a new provision to expressly provide the court with discretion to award indemnity costs in the situation envisioned in question 6(c), may be helpful to discourage plaintiffs from 'jumping the gun' and commencing proceedings within the 28-day period following the provision of a concerns notice. Whether an award of indemnity costs ought to be made should be a discretionary matter for the court and not subject to any form of presumption. There are cases where the nature of the defamation is such that plaintiffs should appropriately be permitted, without costs penalty, to issue proceedings urgently in order to protect their reputations.

The role of judicial officers and juries in defamation proceedings

Concerns about the current situation

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)?

97. Clause 21 of the Model Defamation Provisions, which applies in all jurisdictions and permits jury trials for defamation proceedings, provides:

21 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 for jury trials 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.*

98. In those jurisdictions, the plaintiff and defendant in defamation proceedings have the right to elect a trial before a jury, unless the court orders otherwise. Should either party elect to have a jury, the jury is to determine the issues of liability and defences, while the judge sitting alone is to assess damages.

99. The NSW Court of Appeal's reasoning in *Channel Seven Sydney Pty Ltd v Fierravanti-Wells* (**Fierravanti-Wells**) sets out the fundamental importance of a party's right to elect to have a trial by jury (where such a right still exists) and why a judge should not be permitted to dispense with a jury of his or her own motion.²⁴ It has been subsequently endorsed by the NSW Court of Appeal,²⁵ and by a single judge of the Western Australian Supreme Court.²⁶

100. In *Fierravanti-Wells*, after setting out the statutory history of the use of jury trials,²⁷ McColl JA (with whom Giles JA and Handley AJA agreed) stated:

²⁴ *Channel Seven Sydney Pty Ltd v Fierravanti-Wells* (2011) 81 NSWLR 315 ('*Fierravanti-Wells*').

²⁵ *Chel v Fairfax Media Publications Pty Ltd (No 2)* (2015) 90 NSWLR 309.

²⁶ *Moran v Schwartz Publishing Pty Ltd (No 5)* [2016] WASC 67, [89] (Kenneth Martin J).

²⁷ *Fierravanti-Wells*, [53]–[67].

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.²⁸

101. 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*, including the following:

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.’

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.’

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.’²⁹

102. The Law Council supports the parties’ right to elect trial by jury and opposes amendment to clause 21 to allow the court to dispense with trial by jury of its own motion. The current clause 21(3) already provides for dispensation of the jury in certain circumstances and remains appropriate.

103. 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

²⁸ Ibid [68].

²⁹ Ibid [69]–[79].

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.

104. 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.³⁰ Further, there are specific provisions for an opposing party to apply to have a jury election dispensed with.³¹ Such an application must be made within a prescribed time limit. This provides certainty to the parties as to whether or not the trial is to be by jury. To amend these provisions would produce uncertainty between the parties (particularly the party electing trial by jury) as to the approach to the case and trial preparation.
105. The Law Council also opposes any amendment to clause 21 of the Model Defamation Provisions 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,³² will be completely abrogated in favour of case management considerations. In the Law Council's view, such a balancing exercise should not be introduced.

Alternative position – The Victorian Bar

106. The Victorian Bar notes that, whilst there is a clear and principled basis for following the approach of the NSW Court of Appeal in *Fierravanti-Wells*, it must be borne in mind that several jurisdictions do not permit civil jury trials.
107. The Victorian Bar also notes that courts have scarce public resources. Active judicial case management is essential to the effective management of litigation and court resources. These matters were famously recognised by the High Court in *Aon Risk Services Australia Limited v Australian National University*.³³
108. The reality of modern communications means that courts are increasingly faced with significant numbers of self-represented litigants who attempt to prosecute or defend defamation actions, particularly in respect of publications on social media. Indeed, that has been reported as one of the triggers for the current review of defamation laws.³⁴
109. In light of the increasing pressures faced by the courts, the Victorian Bar considers that it would be appropriate to amend clause 21 of the Model Defamation Provisions to expressly provide for a court to dispense with a jury on its own motion, but only in circumstances where the court is satisfied that the conditions in clause 21(3) are met, or alternatively, that the dispensation is otherwise 'necessary in the interests of justice'. In the Victorian Bar's view, a touchstone of 'necessity' would strike the desirable balance between recognising the strong presumption in favour of juries in

³⁰ Ibid [94]. See also *Chel v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWCA 379, [8], [38] (Macfarlan JA).

³¹ See *Uniform Civil Procedure Act 2005* (NSW) r 29.2A(4).

³² *Fierravanti-Wells*, [5], [138].

³³ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 1, [92]–[93].

³⁴ Michaela Whitbourn, 'NSW to Review Defamation Laws as Social Media Claims Soar', *Sydney Morning Herald* (online), 21 March 2018 <<https://www.smh.com.au/national/nsw/defamation-laws-social-media-rebel-wilson-nsw-20180321-p4z5e4.html>>.

defamation trials (in those jurisdictions which retain civil juries) and enabling courts, in limited cases, to dispense with juries in the interests of justice.

110. Should reform to clause 21 of the Model Defamation Provisions be preferred by the legislature (as suggested by the Victorian Bar), the Law Council recommends, given the public policy reasons for jury trials outlined above, that any legislation facilitating changes of this nature clearly proscribe the relevant factors and public interest matters that the court must have regard when determining whether to dispense with a jury trial.

Constitutional inconsistency

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?

111. Since the decision of the Full Court of the Federal Court of Australia in *Crosby v Kelly*,³⁵ there has been a significant increase in the number of defamation cases brought in the Federal Court of Australia (**Federal Court**). In particular, a significant number of cases brought against the mass media are now brought in the Federal Court.
112. In *Chau Chak Wing v Fairfax Media Publications Pty Ltd (Chau)*,³⁶ the Full Court of the Federal Court of Australia found that sections 21 and 22 of the Act (i.e. clause 21 and 22 of the Model Defamation Provisions) were not binding on the Federal Court and were not picked up by section 79 of the *Judiciary Act 1903* (Cth) because a law of the Commonwealth (that is, sections 39 and 40 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**)) otherwise provided.³⁷ Sections 21 and 22 were found to have no application to defamation proceedings in the Federal Court, including in relation to the Court's exercise of discretion in section 40.³⁸
113. As set out above, in most, but not all, State and Territory jurisdictions, clause 21 of the Model Defamation Provisions gives both the plaintiff and the defendant a defeasible right to trial by jury.
114. Section 39 of the FCA 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 of the FCA Act 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.
115. 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 clause 21 of the Model Defamation Provisions 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

³⁵ (2012) 203 FCR 451.

³⁶ (2017) 255 FCR 61.

³⁷ *Ibid* [23], [27]–[28].

³⁸ *Ibid* [34], [49].

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.

116. There are obvious disadvantages and imperfections in this state of affairs. In particular, this has given rise to the opportunity for ‘forum shopping’ by plaintiffs who are able to invoke Commonwealth jurisdiction (by virtue of a plaintiff alleging that publication has occurred in the ACT or the Northern Territory, as is the case for virtually any internet publication) and who may wish to avoid a jury.
117. Given the marked increase in defamation cases being issued in and determined by the Federal Court, the Law Council submits that it is desirable that sections 39 and 40 of the of the FCA Act be amended to insert clauses equivalent to clauses 21 and 22 of the Model Defamation provisions and therefore remove the inconsistency identified by the Full Court in *Chau* in the interests of greater uniformity.³⁹ This is unlikely to be burdensome, given the Federal Court’s criminal jurisdiction,⁴⁰ and the contemplation of jury trials in civil matters in section 40 of the FCA Act and the availability of resources such as courtrooms with jury facilities.
118. The Law Council does, however, acknowledge that substantial changes to procedures to the Federal Court (or any other court currently limiting or not permitting jury trials) might, for example, give rise to issues of resourcing and other policy considerations beyond the scope of this current inquiry and should only be made in consultation with the court and policymakers.

Federal Circuit Court

119. Should such changes be made procedures to the Federal Court, and given that the Federal Circuit Court of Australia (**Federal Circuit Court**) will also be vested with jurisdiction to determine defamation proceedings in certain cases,⁴¹ consideration should also be given as to whether amendments are required to section 53 of the *Federal Circuit Court of Australia Act 1999 (Cth)* (**FCC Act**) for the same reasons as those set out above. However, it is acknowledged that this would involve a significant change in circumstances where the FCC Act does not provide for trial by jury in any circumstance, as opposed to the FCA Act which provides for jury trial in some cases.

³⁹ Ibid [51]–[60].

⁴⁰ The Commonwealth Government recently announced that the FCA’s jurisdiction would be expanded to include corporate crime: Hon Josh Frydenberg MP and Hon Christian Porter MP, ‘\$35 Million to Extend the Federal Court’s Jurisdiction to Corporate Crime’ (Media Release, 23 March 2019) <<https://www.attorneygeneral.gov.au/Media/Pages/35-Million-to-extend-the-Federal-Courts-jurisdiction-to-corporate-crime.aspx>>.

⁴¹ The Federal Circuit Court has an associated jurisdiction: *Federal Circuit Court of Australia Act 1999 (Cth)* s 18. Thus, provided that the Federal Circuit Court has federal jurisdiction in a matter, it can deal with and make orders with respect to all matters associated with the matter within federal jurisdiction. See, eg, *Goodall v Nationwide News Pty Ltd (No. 2)* [2007] FMCA 1427, where an application with respect to a breach of copyright was brought in conjunction with an application for defamation (which was dismissed); *Dale v Veda Advantage Information Services and Solution Limited* [2009] FCA 305, where an action for defamation and negligence was brought alongside an action arising under the *Privacy Act 1988 (Cth)*.

Defences

Defence of contextual truth

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?

120. Clause 26 of the Model Defamation Provisions 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.

121. This defence was designed to prevent plaintiffs from complaining about, and obtaining damages for, relatively minor false imputations whilst ignoring comparatively major true imputations conveyed by a publication.⁴² The premise underlying the defence is that, where a false imputation conveyed by a publication has not further damaged the plaintiff's reputation having regard to the truth of the publication as a whole, the defendant ought to have a complete defence, and the plaintiff ought not to be entitled to recover damages.

122. Clause 26 only applies to contextual ('other') imputations which are 'in addition to' the plaintiff's imputations. This has prevented defendants from 'pleading back' and justifying any of the plaintiff's imputations to establish the defence,⁴³ a practice previously allowed under the predecessor of clause 26, namely section 16 of the *Defamation Act 1974* (NSW). At best, a defendant may only rely upon the truth of one of the plaintiff's imputations in partial justification of the claim, rendering it 'unable to defeat the cause of action entirely'.⁴⁴

123. Following the decision of the New South Wales Court of Appeal in *Besser v Kermode*,⁴⁵ 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.⁴⁶ However, such applications are not always successful.⁴⁷

⁴² See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly (13 September 2005) 685.

⁴³ *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852, [56]. See also *Besser v Kermode* [2011] NSWCA 174.

⁴⁴ *Besser v Kermode* [2011] NSWCA 174, [89] (McColl J).

⁴⁵ [2011] NSWCA 174.

⁴⁶ See, eg, *Federal Capital Press of Australia Pty Ltd v Balzola* [2015] NSWCA 285.

⁴⁷ Leave was recently refused in *Dominello v Harbour Radio Pty Limited t/as 2GB* [2019] NSWSC 403.

124. 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.⁴⁸ 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.

125. The unintended consequence of the drafting has been to exclude the plaintiff's imputations from the balancing exercise the defence was supposed to encourage – that is, between proven imputations and unproven imputations,⁴⁹ not between the plaintiff's imputations and the defendant's imputations. This is inconsistent with the stated objective of the Model Defamation Provisions to provide 'effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter'.⁵⁰

126. The Law Council recommends that clause 26 be amended as set out below.

Recommendation

- **Clause 26 of the Model Defamation Provisions should be amended in the following terms:**

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

(a) the matter carried one or more imputations that are substantially true (contextual imputations); and

(b) any defamatory imputations of which the plaintiff complains, 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 imputations.

127. The NSW Bar submits the following additions to this recommendation (signalled with underline):

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

(a) the matter carried one or more imputations that are substantially true (*contextual imputation(s)*); and

(b) the defamatory imputations of which the plaintiff complains and found to be carried in 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 imputations.

(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.

128. The LSNSW also notes, in the alternative, that contextual truth could be incorporated into the defence of justification and that to do so may avoid continued potential confusion for litigants, lawyers and judges, and especially juries, as to what is meant by 'contextual truth'.

⁴⁸ *Fairfax Digital Australia & New Zealand Pty Limited v Kazal* (2018) 97 NSWLR 547.

⁴⁹ *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852, [27].

⁵⁰ Model Defamation Provisions, cl 3(c).

Defences for publication of public documents and fair summaries

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?

129. The Law Council does not consider it necessary amend the Model Defamation Provisions 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. In the Law Council'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 clause 30, as well as (depending on the nature of the press conference and who it is held by) the defence pursuant to clause 29 of the Model Defamation Provisions are likely to apply to the publications referred to in Question 10.

130. Clause 29 of the Model Defamation Provisions makes it a defence if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern. This defence is only defeated if the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.

131. Proceedings of public concern include:

- proceedings of a 'learned society' which is defined to mean a body, wherever formed, the objects of which include the advancement of any science and authorised by its constitution to exercise control over, or adjudicate on, matters connected with those objects and to make findings or decisions having effect in any part of Australia; and
- proceedings of a public meeting (with or without restriction on the people attending) held anywhere in Australia if the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for public office.

132. These provisions are likely to cover presentations at scientific or academic conferences as well as press conferences held to discuss matters of public interest.

133. The common law defence of qualified privilege is also likely to be capable of operating in many circumstances to protect the publication of peer-reviewed and other statements and assessments in scientific or academic journals.⁵¹

134. Further, the common law defence of fair comment and the statutory defence of honest opinion are also likely to apply to defamatory statements of opinion appearing in peer-reviewed articles in scientific or academic journals, or in assessments of such articles.⁵²

⁵¹ Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 303.

⁵² *British Chiropractic Association v Singh* [2011] 1 WLR 133. This case was used to justify the liberalisation of defamation law with respect to scientific opinions, however, the publication in issue would not have been

Alternative view – Law Society of New South Wales

135. The LSNSW considers that it is vital that academics and scientists are able to express views on matters within their expertise, which have been peer-reviewed, without fear of a defamation claim. The LSNSW strongly supports amending the Model Defamation Provisions 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.
136. The LSNSW recommends that the protection should also extend to academic books that have gone through a peer-review process, articles published in media (other than journals and books, such as newspapers, magazines and online publications) that have gone through a peer-review process, and to presentations by academics and scientists at conferences specifically held for academic and/or scientific purposes where it is expected that the audience will be comprised of academics and/or scientists.

Defence of qualified privilege

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?

137. In *Lange v Australian Broadcasting Corporation (Lange)*,⁵³ the High Court held that each member of the Australian community has an interest in receiving statements relating to government and political matters sufficient to establish a defence to defamation law, provided that the publisher acts reasonably.
138. This defence has largely proved to be a dead letter. It has never been successfully relied upon by any media organisation in a trial in Australia. Even apart from the element of reasonableness, the threshold that the publication must be of '*government and political matter*' has often been construed in a restrictive way. For instance, the following were not considered to fall within that definition:
- the actions of a company and its officer which had attracted the interest of the Australian Competition and Consumer Commission (**ACCC**);⁵⁴
 - the publication of statements made to a journalist by police;⁵⁵
 - the publication of a city council's views about the failure of one of its tenants and ratepayers to pay rent;⁵⁶

protected by the defence in section of the *Defamation Act 2013* (UK) as it appeared in a mainstream newspaper (not a scientific or academic journal) and accordingly, had not been peer-reviewed.

⁵³ (1997) 189 CLR 520.

⁵⁴ *International Financing & Investment Pty Ltd v Kent* (Supreme Court of Western Australia, Anderson J, 9 April 1998).

⁵⁵ *Deren v State of New South Wales* (1998) ATortsRep, 81-463.

⁵⁶ *Heytesbury Holdings Pty Ltd v City of Subiaco* (1998) 19 WAR 440.

- a publication about the use of legal proceedings or the threat to proceedings for the purpose of silencing opponents to the construction of a controversial bridge;⁵⁷
- a publication imputing that a Magistrate was unfit to hold office and should be removed;⁵⁸ and
- communications that are critical of the justice system that comment on the outcome of particular court hearings generally.⁵⁹

139. To a large extent, the *Lange* defence has been overtaken by the defence in clause 30 of the Model Defamation Provisions.

140. It was intended that the defence created by clause 30 of the Model Defamation Provisions would be broader than the reciprocal duty-interest qualified privilege at common law.⁶⁰ The clause was based on the former section 22 of the *Defamation Act 1974* (NSW), although it added the following express factors that the court may take into account when determining reasonableness:

- whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and
- the nature of the business environment in which the defendant operates.

141. The reasonableness test in clause 30 lists a number of factors that largely mirror the factors identified by Lord Nicholls in *Reynolds v Times Newspapers Ltd* (***Reynolds***).⁶¹

142. *Reynolds* concerned the publication by the media of an article concerning a prominent Irish politician. As Lord Nicholls observed:

*...the press discharges vital functions as a blood hound as well as a watchdog. The court should be slow to conclude that a publication is not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubt should be resolved in favour of publication.*⁶²

143. In terms of determining whether the *Reynolds* defence applied, Lord Nicholls set out a range of factors that should be taken into account, and although not exhaustive,⁶³ those are the matters that have essentially been referenced by clause 30(3).

144. Critically, the *Reynolds* defence was concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern.⁶⁴ It is important to note that, properly understood, the *Reynolds* defence is not a defence of qualified privilege.⁶⁵

145. Clause 3(b) of the Model Defamation Provisions provides that one of the objects is:

⁵⁷ *Conservation Council of SA Inc. v Chapman* (2003) 87 SASR 62.

⁵⁸ *Herald & Weekly Times v Popovic* (2003) 9 VR 1; *John Fairfax Publications Pty Ltd v O'Shane* (2005) ATortsRep 81/789; *Peek v Channel 7 Adelaide Pty Ltd* (2006) 94 SASR 196 ('Peek').

⁵⁹ *Peek*, [12], [93]–[95], [98]; *John Fairfax Publications Pty Ltd v Attorney-General for the State of New South Wales* (2000) 181 ALR 694.

⁶⁰ Explanatory Memorandum, Defamation Bill 2004 (NSW) 18.

⁶¹ (2001) 2 AC 127.

⁶² *Ibid* 205.

⁶³ *Ibid*.

⁶⁴ *Bonnick v Morris* [2013] 1 AC 300, 309.

⁶⁵ *Loutchansky v Times Newspapers Ltd* (Nos 2–5) [2002] QB 783, [36]; *Flood v Times Newspapers Ltd* [2012] 2 AC 273, [38]; *Jameel v Wall Street Journal SPRL* [2007] 1 AC 539, [46], [50].

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.

146. The defence that is designed to achieve this object is the defence provided by clause 30. There can be no doubt that this object is important to a working democracy. In particular, the ability of the media to report on matters of public interest and importance is critical. However, the defence is rarely effective at trial, particularly in cases involving mass media publications. The consequence of this is that the object contained in 3(b) is arguably not achieved by the current Model Defamation Provisions.

Question 11(a)-(b) – the reasonableness test and the threshold

147. The courts have tended to treat the concept of reasonableness as a standard of perfection (albeit with the benefit of hindsight). In practice, despite statements to the contrary,⁶⁶ and despite its discretionary element (i.e. factors the court *may* take into account), the reasonableness requirement in clause 30(3) has manifested as a series of hurdles.

148. Clause 30 has not been successfully relied upon as a defence by any media organisation in a trial in Australia. Although it is accepted that much will have depended on the circumstances of each case, the fact that the defence has never succeeded would suggest that the clause has not been successful in achieving its purpose.

149. Some notable cases illustrate the difficulties faced by media defendants in relying on the defence. For example, in *Cummings v Fairfax Digital Australia & New Zealand Pty Ltd* (**Cummings**), it was held that:

- a front-page article contained a fair summary of pleadings that had been filed in debt recovery proceedings;
- the journalist was entitled to rely upon the defence of fair summary of 'public documents' pursuant to clause 28(1); and
- the plaintiff failed to establish that the defendants had any motive or purpose in publishing other than to inform members of the public.⁶⁷

150. Despite these matters, it was held that the defendants could not avail themselves of the clause 30 defence in relation to a poster that stated 'Cummings Fighting Cruelty Claims' because the unidentified author of the poster did not act reasonably insofar as the author failed to make it clear that the allegations that Mr Cummings was fighting were made in court proceedings.⁶⁸

151. *Cummings* is emblematic of how difficult it has been for the media to establish the clause 30 defence. This is so even in circumstances where the journalism has been fair and where the article contained a proper summary of factual material.

152. A further example of the difficulties faced by media defendants is the matter of *Hockey v Fairfax Media Publications Pty Ltd*, where the plaintiff was the then Treasurer of Australia.⁶⁹ In that matter, while it was held that the content of the articles complained of did not convey the defamatory imputations asserted by the

⁶⁶ *Hockey v Fairfax Media Publications Pty Limited* (2015) 237 FCR 33, [228].

⁶⁷ [2018] NSWCA 325.

⁶⁸ *Ibid* [259] (McColl JA).

⁶⁹ (2015) 237 FCR 33.

plaintiff, the plaintiff still succeeded in respect of three separate short publications – a placard and two tweets that essentially stated: ‘Treasurer for Sale’.

153. The defendants failed to establish the clause 30 defence because they failed to establish that their conduct was reasonable, in part because they had not put to the plaintiff the imputations ultimately held by the court to be carried by their publications (and not intended by the defendants) for his response.⁷⁰

154. Another factor that may contribute 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 there is reliance upon confidential sources. This is despite the availability of the journalist’s privilege provided by section 126K of the *Evidence Act 1995* (Cth) (and equivalent state/territory legislation). 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.

155. Running a defence of statutory qualified privilege requires a great deal of work, including highly voluminous discovery for major investigative stories, extensive answers to interrogatories in the form sanctioned for this defence,⁷¹ and preparing witness statements or affidavits of journalists and/or editors. Given the failure of clause 30 to act as a viable defence for media organisations, and the cost and effort involved in running the defence, many such publishers now simply do not bother to rely upon it, knowing that in all likelihood it will be unsuccessful due to the stringent demands of ‘reasonableness’.

Question 11(c) – Should the English position be adopted?

156. In light of the foregoing, the Law Council recommends that serious consideration be given to adopting section 4 of the UK Act.

157. There are two limbs to the defence in section 4 of the UK Act:

- the matter published must be in the public interest; and
- the defendant must reasonably believe that publication of the particular statement was in the public interest.

158. In terms of the first limb and what is in the ‘public interest’,⁷² reference has been made to the decision in *Reynolds* (omitting footnotes):

It is impossible to provide any exhaustive list of matters of public interest, but the Court of Appeal’s judgment in Reynolds v Times Newspapers Ltd contains a useful passage, explaining that references in that judgment to matters of public interest were to:

‘matters relating to the public life of the community and those who take part in it, including ... activities such as the conduct of government and political life, elections and public administration ... [and] more widely ... the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private, such that there is no public interest in their disclosure.’⁷³

⁷⁰ Ibid [238], [375].

⁷¹ See *Mooney v Nationwide News Pty Limited (No 2)* [2014] NSWSC 1933.

⁷² *Doyle v Smith* [2018] EWHC 2935 (QB).

⁷³ Ibid [69].

159. As for the second limb, the defendant must establish that it reasonably believed that publication of the particular statement was in the public interest:

- (1) *It is not enough for the statement complained of to be, or to be part of, a publication on a matter of public interest. It must also be shown that the defendant reasonably believed that publication of the particular statement was in the public interest.*
- (2) *To satisfy this second requirement, which I shall call 'the Reasonable Belief requirement', the defendant must (a) prove as a fact that he believed that publishing the statement complained of was in the public interest, and (b) persuade the court that this was a reasonable belief.*
- (3) *The reasonable belief must be held at the time of publication.*
- (4) *The 'circumstances' to be considered pursuant to s 4(2) are those that go to whether or not the belief was held, and whether or not it was reasonable.*
- (5) *The focus must therefore be on things the defendant said or knew or did, or failed to do, up to the time of publication. Events that happened later, or which were unknown to the defendant at the time he played his role in the publication, are unlikely to have any or any significant bearing on the key questions.*
- (6) *The truth or falsity of the allegation complained of is not one of the relevant circumstances.*
- (7) *It is not only those who edit media publications who are entitled to the benefit of the allowance for 'editorial judgment' which s 4(4) requires ...⁷⁴*

160. Given the limitations of both the *Lange* and clause 30 defences (canvassed above), the Law Council considers that the adoption of a provision similar to section 4 of the UK Act would be likely to provide a better balance as between the right publish matters of public interest and the right of the individual to protect their reputation.

161. It should be noted that section 4 of the UK Act is a defence for publication on a matter of public interest. It is aimed at providing protection for responsible journalism by media organisations. However, clause 30 of the Model Defamation Provisions can also be relied on by individuals who make statements about topics which are not necessarily in the public interest, but in relation to which the recipient still has an interest. Comparatively, section 4 of the UK Act has given far greater protection to journalists and media organisations engaging in responsible journalism, particularly investigative journalism, than clause 30.

162. As such, consideration should be given to amending the Model Defamation Provisions include a provision equivalent to section 4 of the UK Act *in addition* to an amended clause 30 defence (which should remain available to both individuals and media defendants, subject to the modification recommended above).

163. Should the clause 30 defence be maintained, consideration should also be given to removing the phrase 'the conduct of the defendant in publishing that matter is reasonable in the circumstances' and replacing it with words to the effect of 'the defendant acted with care and diligence so as to avoid knowingly and deliberately publishing falsehoods'. This proposal offers greater clarity of the threshold required for the defence to be established.

⁷⁴ *Economou v DeFreitas* [2016] EWHC 1853 (QB), [139].

164. Rather than focus on the need by mass media defendants to establish that every recipient had the requisite interest, consideration should be given to whether the publication was honestly made to the recipients for the common convenience and welfare of society. Considering that the list in clause 30(3) is not intended to be exhaustive, as indicated by the phrase ‘any other circumstances that the court considers relevant’, a further possible area of reform of the statutory form of the defence of qualified privilege is to clarify the list. In particular, it should make clear that reasonableness *may*, not *must*, be assessed by reference to the list.

165. Factors that may be demonstrative of reasonableness (or with care and diligence) which should be matters that *may* be taken into account, include whether:

- it was in the public interest that the material be published (currently encapsulated in substance in clause 30(3)(a));
- the publishers reasonably believed that it was in the public interest that the material be published;
- the publishers took reasonable steps to verify the facts stated in the publication (currently encapsulated in substance in clause 30(3)(i));
- the publishers made reasonable attempts to contact the complainant and ascertain their side of the story (currently encapsulated in substance in clause 30(3)(h));
- the publishers relied upon sources that they reasonably believed to be sources of integrity (currently encapsulated in substance in clause 30(3)(g), although this recommended requirement removes the source’s identity being taken into account in light of the issue identified above); and
- the publishers reasonably believed what they published to be true.

166. There should also 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.

Recommendations

- **The Model Defamation Provisions should be amended to include a provision similar to section 4 of the *Defamation Act 2013* (UK) in order to provide a better balance as between the right publish matters of public interest and the right of the individual to protect their reputation.**
- **Additionally, the clause 30 defence should be maintained subject to amendments to provide greater clarity, certainty and utility, and to better reflect responsible journalistic practices.**

Question 11 (d) - What, if any, aspects of the defence of statutory qualified privilege are to be determined by the jury?

167. In the event the current clause 30 defence is to be retained, there is a practical matter that ought to be addressed by legislative reform. There is currently a divergence in the authorities about whether the third element of the clause 30 defence (whether the

conduct of the defendant in publishing the matter complained of was reasonable in the circumstances pursuant to clause 30(3)) is a matter for the judge,⁷⁵ or the jury.⁷⁶

168. 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').
169. The elements in clause 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.
170. Due to its connection to the 'community of interest' requirement in the common law defence, it has generally been accepted that the requirements in clauses 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.
171. However, the requirement in clause 30(1)(c) has been subject to greater controversy.
172. In *Davis v Nationwide News Pty Ltd (Davis)*, McClellan CJ held that reasonableness was an issue which at common law was to be determined by the judge.⁷⁷ In *Daniels v State of New South Wales (No 6) (Daniels)*,⁷⁸ 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.
173. In *Wilson v Bauer Media Pty Ltd*, Dixon J inclined to the conclusion reached by McCallum J in *Daniels*, holding that the element of reasonableness for the purpose of clause 30(1)(c) was a quintessential jury question.⁷⁹
174. In *Gayle v Fairfax Media Publication Pty Limited (No 2)*, McCallum J gave further consideration to the question and determined that the requirement of reasonableness is a question for the judicial officer.⁸⁰ At the time of writing this submission, this decision was presently subject to an appeal.
175. In the interests of certainty, the Law Council 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).
176. Both McCallum J in *Daniels* and Dixon J in *Wilson* held that the reasonableness requirement in clause 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 Law Council respectfully agrees and recommends that the legislature make clear that the requirement of reasonableness is to be determined by the jury.

⁷⁵ *Gayle v Fairfax Media Publications Pty Ltd (No 2)* [2018] NSWSC 1838; *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1; *Belbin v Lower Murray Urban and Rural Water Corporation* [2012] VSC 535.

⁷⁶ *Daniels v State of New South Wales (No 6)* [2015] NSWSC 1074, [28] (McCallum J).

⁷⁷ (2008) 71 NSWLR 606 (McClellan CJ).

⁷⁸ [2015] NSWSC 1074.

⁷⁹ [2017] VSC 521.

⁸⁰ [2018] NSWSC 1838.

177. Furthermore, the whole of the defence should be reserved for the consideration of the jury because clause 30 is fundamentally concerned with responsible journalism and the notion of the interest of recipients for the purposes of the defence is a broad one that is not to be equated with the duty and interest formulation that applies at common law. That approach would be consistent with the modern jurisprudential understanding of defences such as those in clause 30, namely that they are *sui generis* defences that are not, properly understood, a species of qualified privilege.⁸¹

Defence of honest opinion

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?

178. The Law Council does not have a settled position on this issue at this time. Various views are currently held on this matter by the Law Council's Constituent Bodies. Accordingly, the Law Council provides the varying views of the contributors to this submission for the assistance of the reviewer.

Law Society of New South Wales

179. The LSNSW supports amendment of the statutory defence of honest opinion.

180. Clause 31(1)(a) requires that 'the matter was an expression of opinion of the defendant rather than a statement of fact'. This suggests that the entirety of the 'matter' (for example, the whole of an article) was an expression of opinion. However, opinion pieces will generally contain a mixture of opinion and fact. The clause has been interpreted as referring to 'the matter complained of in its defamatory sense',⁸² and there is considerable confusion as to how the statutory defence is supposed to operate in practice.⁸³

181. In the LSNSW's view, it is simply not possible for people who wish to express an opinion to identify, in every case, the facts upon which their opinion is based, let alone set them out in full. Where tweets are limited to 280 characters and Facebook posts are often short (frequently as part of a longer conversation), a post will generally not be able to set out the proper material. Provided that the matter complained of reads as opinion and can reasonably be understood by an ordinary reasonable reader as opinion, and the opinion is held and expressed honestly by the publisher, it should be defensible as honest opinion.

Recommendation

182. The LSNSW recommends that consideration be given to addressing the confusion outlined above in clause 31(1)(a).

183. Additionally, the LSNSW recommends that the element of public interest be removed from statutory honest opinion (clause 31(1)(b)). As there is no public interest requirement for a defence of justification under clause 25, it is questionable why it should remain permissible to publish a true fact, which is not in the public interest, but

⁸¹ *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2002] QB 783, [36]; *Flood v Times Newspapers Ltd* [2012] 2 AC 273, [38]; *Jameel v Wall Street Journal SPRL* [2007] 1 AC 539, [46], [50].

⁸² *Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091, [100] (McCallum J); *Zaia v Eshow* [2017] NSWSC 1540, [73] (McCallum J).

⁸³ See, eg, *Tabbaa v Nine Network Pty Ltd (No 10)* [2018] NSWSC 468.

not permissible to publish an opinion on a matter that is not in the public interest. In the social media age, where opinions are expressed quickly and succinctly on wide variety of issues, the requirement that each opinion (in order to be defensible) is in the public interest is overly restrictive and anachronistic. To prohibit the expression of an opinion on a private matter significantly restrains free speech.

184. The approach proposed by Counsel for the defendant in the UK case of *Spiller v Joseph*⁸⁴ ought to be adopted in the reformed law to simplify and liberalise the honest opinion defence. That approach comprises:

- (a) removing the requirement that the comment relates to a matter of public interest;
- (b) providing that the subjective state of mind of the defendant is wholly irrelevant; and
- (c) restricting the defence to requirements that:
 - (i) the words complained of are comment; and
 - (ii) proof that one or more facts (or privileged statements) on which an honest person could have founded the relevant comment exist (even if those facts come into existence after publication).

185. Alternatively, the LSNSW recommends that the honest opinion defence be amended to reflect section 3 of the UK Act.

Law Society of South Australia

186. In the digital age, opinions are frequently ‘published’ on blogs, social media sites or in text messages or tweets, without detailed contextualising material. The LSSA supports proper consideration of how the honest opinion defence can be properly applied in the context of social media and digital publications. Further consideration and articulation of how the defence applies in this context is required.

New South Wales Bar Association

187. 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’.⁸⁵

188. 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.⁸⁶ 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 a balance between the plaintiff’s interest in reputation and competing interests in free speech.

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

⁸⁴ *Spiller v Joseph* [2010] UKSC 53.

⁸⁵ Patrick Milmo et al (eds), *Gatley on Libel and Slander* (Sweet and Maxwell, 11th ed, 2008) 12.1.

⁸⁶ *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.

190. In *The Herald & Weekly Times Pty Ltd v Buckley (Buckley)*,⁸⁷ 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 clause 31.

191. However, this requirement is not expressly stated to apply in the language of the clause. Accordingly, the NSW Bar recommends that clause 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.

Recommendation

192. That clause 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.*

The Victorian Bar

193. The Victorian Bar considers that the current operation of the honest opinion defence contained in clause 31 is overly protective of reputation at the expense of freedom of speech.

194. Based on the Victorian Court of Appeal decision in *Buckley*,⁸⁸ the defence only applies to opinions when the facts that they are based on appear in the publication or are otherwise apparent to the reader. It does not apply to opinions where the facts are unspecified or merely referred to in general terms. In *Buckley*, the Court held that there was no difference between the fair comment defence at common law and the honest opinion defence in the Model Defamation Provisions, as to the need for facts on which a comment or opinion are based to appear in the publication or otherwise be apparent.

195. The Victorian Bar respectfully submits that if it were the intention of the various legislatures to include this element as a requirement of the honest opinion defence, then clause 31 would have expressly said so – and it does not. This judicially imposed hurdle has created a significant obstacle to the operation of the honest opinion defence in practice.

196. The Victorian Bar is of the view that the difficulties presented by the current defence would be mitigated by adopting the second condition of the statutory defence of honest opinion in section 3 of the UK Act, namely: 'that the statement of complained of indicated, whether in general or specific terms, the basis of the opinion'.

197. It has been held that this condition:

...[simplifies] the law by providing a clear and straightforward test, which is 'intended to retain the broad features of the current common law defence as to the necessary basis for the opinion expressed but avoid the complexities which have arisen in case law, in particular to the extent to which the opinion must be based on facts which are sufficiently true and as to the extent to which the statement must explicitly or implicitly indicate the facts on which the opinion is based'.⁸⁹

⁸⁷ (2009) 21 VR 661.

⁸⁸ *Ibid* [84].

⁸⁹ *Burki v Seventy Thirty Ltd* [2018] EWHC 2151 (QB), [227]; *Burton v News Group Newspapers Ltd* [2019] EWHC 195, [79].

198. Further, it has been observed (correctly in the Victorian Bar's view):

To demand that the commentator identify "facts" on which the comment was based would impose excessively narrow limits on the scope of the defence. The basis might be factual, or it might be something broader and less tangible, such as the style of an operatic production, or the characterisation in a novel, or the policy of a political party.⁹⁰

Joinder of journalists to proceedings against media publishers

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?

199. Pursuant to clause 31(4)(b) of the Model Defamation Provisions, 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.

200. Given the role of a journalist in the publication of matter, it is commonplace and often not inappropriate for plaintiffs to pursue journalists in a defamation claim. In particular, plaintiffs commonly join journalists to secure (in practical terms) their attendance in the witness box for the purpose of assisting them to attempt to defeat a defence of honest opinion or qualified privilege.

201. Whilst minds differ about this, some members of the legal profession believe that in practical terms, the present defeasance provisions lead to the necessary joinder of the journalist so as to defeat the defence.⁹¹ Such practice is now regarded a commonplace amongst the profession.

202. It was previously thought that this practice was unwise, as explained by Justice Hunt (who was the Defamation List Judge in NSW 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.⁹²

203. It was further held to be 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 they submitted may have been substantially altered by a sub editor, their personal

⁹⁰ *Burki v Seventy Thirty Ltd* [2018] EWHC 2151 (QB), [229].

⁹¹ See, eg, *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; *Dank v Rothfield* [2015] NSWCA 193.

⁹² *Seidler v John Fairfax & Sons Ltd* [1983] 2 NSWLR 390, 3922–4 (Hunt J).

responsibility for what was in fact published in the newspaper could well be different from the responsibility of the newspaper itself.⁹³

204. 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.
205. However, in light of the fact that the weight of judicial authority (see in particular *Dank v Rothfield*)⁹⁴ indicates that such joinder is not necessitated by the current form of clause 31(4)(b), the Law Council considers that reform to amend clause 31(4)(b), when compared to other aspects of the Model Defamation Provisions, need not be a legislative priority.
206. Conversely, the LSNSW notes that, to the extent that the provision has been understood as requiring the journalist or author of the matter complained of to be sued, in addition to the corporate publisher, the provision ought to be amended so that such individuals are not unnecessarily forced into litigation.

Defence of triviality

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)?

207. The Law Council supports the introduction of a serious harm test into the Model Defamation Provisions. The precise formulation of that test is open to debate, but to the extent it discourages frivolous, vexatious or trivial claims, it is worthy of serious consideration.
208. 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.⁹⁵
209. 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.

⁹³ *Gorton v ABC & Walsh* (1973) 1 ACTR 6, 8; *Brazel v John Fairfax & Sons Ltd* (Supreme Court of New South Wales, 17 February 1989, Hunt J) 13–4; *Rogers v Nine Network Australia Pty Ltd* (No 2) [2008] NSWDC 275.

⁹⁴ [2015] NSWCA 193.

⁹⁵ See, eg, Michaela Whitbourn, 'NSW to Review Defamation Laws as Social Media Claims Soar', *Sydney Morning Herald* (online), 21 March 2018 <<https://www.smh.com.au/national/nsw/defamation-laws-social-media-rebel-wilson-nsw-20180321-p4z5e4.html>>; Richard Ackland, 'Free Press Backwater: How to Change the Defamation Laws that Stifle Australian Journalism', *The Guardian* (online), 30 November 2018 <<https://www.theguardian.com/law/2018/dec/01/free-press-backwater-how-to-change-the-defamation-laws-that-stifle-australian-journalism>>; Dana McCauley, 'Judge Judith Calls for United Front on Defamation Reform', *The Australian* (online), 9 April 2018 <<https://www.theaustralian.com.au/business/media/judge-judith-calls-for-united-front-on-defamation-reform/news-story/5d5d2b1a003475acbf7294c17b641467>>.

210. Whether there exists a threshold of serious harm at common law was recently considered by McCallum J in *Kostov v Nationwide News Pty Ltd*.⁹⁶ Her Honour said, in *obiter*, having considered the decision of Tugendhat J in *Thornton v Telegraph Media Group Ltd*,⁹⁷ that a threshold of seriousness exists as an element of the cause of action in Australia. An application 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.⁹⁸

211. 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 Model Defamation Provisions. Such a provision would not only ensure consistency between jurisdictions (certain jurisdictions, including Queensland, do not have procedural provisions to readily deal with a lack of proportionality) but would also provide certainty as to when it is appropriate to exclude such claims and fortify courts in bringing an end to defamation claims that have little merit.

212. 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.*

213. Prior to the introduction of this section, the position in England was that at common law, a claimant had to meet a threshold of ‘substantial’ harm. That threshold was propounded by Tugendhat J in *Thornton v Telegraph Media Group Limited (Thornton)*:⁹⁹

*...the publication of which [a claimant] complains may be defamatory of [them] because it substantially affects in an adverse manner the attitude of other people towards [them] or has a tendency to do so.*¹⁰⁰

214. The purpose of section 1 of the UK Act was to raise the bar, and ‘build on’,¹⁰¹ cases such as *Thornton and Jameel (Yousef) v Dow Jones & Co Inc (Jameel)*.¹⁰² 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.

⁹⁶ [2018] NSWSC 858.

⁹⁷ [2010] EWHC 1414 (QB).

⁹⁸ *Kostov v Nationwide News Pty Ltd* [2019] NSWCA 84.

⁹⁹ [2010] EWHC 1414 (QB).

¹⁰⁰ *Ibid.* This ‘seriousness’ threshold was affirmed by the Court of Appeal in *Cammish v Hughes* [2012] EWCA Civ 1655.

¹⁰¹ See Explanatory Notes, *Defamation Act 2013* (UK) [10]–[11]

<<http://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/1>>.

¹⁰² [2005] EWCA Civ 74.

215. The leading case on section 1 of the UK Act is currently the Court of Appeal decision in *Lachaux v Independent Print Ltd & Ors (Lachaux)*.¹⁰³

216. In *Lachaux*, Davis LJ (with whom the other members of the Court of Appeal agreed) set out the relevant principles. Adapted to an Australian context, they can be distilled into the following propositions:

- a serious harm threshold is intended to ‘raise the bar’ for a plaintiff from one of ‘substantiality’ to one of ‘seriousness’;
- established common law principles (noting the operation of clause 6(2) of the Model Defamation Provisions) are intended to remain unaffected by the establishment of a serious harm threshold unless that occurs expressly or by necessary intent;
- typically, serious harm can be inferred from the gravity of the imputations being alleged and any dispute about the harm actually suffered by the plaintiff is a matter for trial, and which will ultimately sound in damages;
- courts should ordinarily be slow to permit a question of serious harm to be tried as a preliminary issue, which involves the calling of substantive evidence prior to trial;
- a defendant disputing the existence of serious harm may, in an appropriate case, seek interlocutory relief from the court;¹⁰⁴ and
- all interlocutory processes in such cases should be sought to be managed in a way that is proportionate and cost-effective.

217. One advantage of adopting the English formulation of the serious harm threshold is that Australian courts could draw upon the growing jurisprudence on this provision from the English courts. However, a potential disadvantage of adopting this approach is that it might provoke interlocutory disputes about the ‘seriousness’ of the pleaded imputations and whether they satisfy the relevant ‘threshold’.

218. 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 the:

- seriousness of the imputation or imputations alleged to be conveyed by the matter;
- extent of the alleged publication;
- alleged audience of the publication; and
- circumstances of the publication.

219. The Model Defamation Provisions should be specific as to when and how the threshold question is to be addressed, and that the issue ought to be addressed at any early stage in the proceedings, namely, before a defence has been filed. Further, the Model Defamation Provisions 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

¹⁰³ [2017] EWCA Civ 1334. An appeal in *Lachaux* was heard by the Supreme Court of the United Kingdom on 13 and 14 November 2018. At the time of the preparation of this submission, the Court’s decision remained reserved.

¹⁰⁴ Such relief might include: the striking out of imputations from which an inference of serious harm could be drawn; applications for summary dismissal or summary judgment; or a declaration that the proceeding is otherwise an abuse of process (for example, on the grounds advanced in *Jameel (Mohammed) v Wall Street Journal Europe SPRL* [2007] 1 AC 359 and in *Jameel (Yousef) v Dow Jones & Co. Inc* [2005] QB 946).

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.

220. However, whatever form that threshold takes in the Model Defamation Provisions, the Law Council 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)

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(b)(i) - Proportionality and case management in the context of a serious harm threshold

221. The Law Council notes that the 'proportionality principle' as applied in *Bleyer v Google Inc (Bleyer)*¹⁰⁵ derives from the English case of *Jameel*.

222. 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*.

223. The Law Council 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, the Law Council does not support the inclusion of 'proportionality' or 'case management principles' into the assessment of a serious harm threshold. Those are matters that are best provided for, and currently sufficiently covered by, principles of case management at common law and in statutes that govern civil procedure (for example, sections 56-60 of the *Civil Procedure Act 2005 (NSW)*).

Question 14(b)(ii) – Defence of Triviality

224. Notwithstanding the Law Council's support for a threshold of serious harm being included in the Model Defamation Provisions, it does not support the abolition of the defence of triviality.

225. There is a significant difference between protecting the integrity of the court process and protecting defendants. As succinctly explained by McCallum J in *Bleyer*:

*... 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).*¹⁰⁶

226. In this regard, the Queensland case of *Smith v Lucht* (the 'Dennis Denuto' case) is a clear example of why the defence of triviality should not be abolished.¹⁰⁷ 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-

¹⁰⁵ [2014] NSWSC 898.

¹⁰⁶ *Ibid* [59].

¹⁰⁷ [2016] QCA 267.

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.

227. Conversely to the Law Council's position above, the LSNSW considers that proportionality and other case management considerations should be incorporated into the serious harm test and the defence of triviality retained. If a judge is reluctant to dismiss proceedings at an early stage on the basis of serious harm and/or proportionality (for example, they may wish to leave such questions to trial), the LSNSW submits that a defendant should still be able to argue at trial that the publication is defensible because the circumstances of publication were such that the plaintiff was unlikely to sustain any serious harm.

228. The Victorian Bar considers there would be limited utility in retaining a defence of 'triviality' if a serious harm threshold were introduced into the Model Defamation Provisions. In the Victorian Bar's view, a serious harm threshold should serve as a sufficient deterrent to unmeritorious claims that might otherwise be commenced. The abolition of the defence of triviality would not preclude applications being brought on the basis of an abuse of process or on other bases recognised at common law.¹⁰⁸

Recommendations

- **A statutory threshold of serious harm should be introduced into the Model Defamation Provisions. In doing so, it is preferable for the legislature to:**
 - **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**
 - **to make it plain that the issue should be determined as early as possible.**
- **The introduction of a statutory threshold of serious harm:**
 - **does not need to incorporate a proportionality test (or other case management considerations); and**
 - **should not seek to abolish the defence of triviality.**

¹⁰⁸ See *Jameel (Mohammed) v Wall Street Journal Europe SPRL* [2007] 1 AC 359; *Jameel (Yousef) v Dow Jones & Co. Inc* [2005] QB 946).

Defence of innocent dissemination and safe harbours

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?

Question 15(a) and (b)

229. The statutory defence of innocent dissemination sought to 'accommodate providers of internet and other electronic and communication services' as it was considered 'not realistic to expect an Internet service provider... to monitor the content of every transmitted item for potentially defamatory material'.¹⁰⁹ It was also considered that broadcasters and operators of communications systems would not generally be liable for publications by persons over whom they have no effective control.¹¹⁰

230. The Law Council considers that the defence as currently drafted does not clearly protect the different online intermediaries as was intended by parliament. Amendments should be made to clause 32 of the Model Defamation Provisions to make clear that online intermediaries who do not themselves author, edit or publish defamatory material are afforded the protection of the innocent dissemination defence until, at the very least, they are on notice of the defamatory material and have a reasonable opportunity to take it down.

Internet service providers and internet content hosts

231. The classic formulation of publication in Australia derives from the following statement approved by Isaacs J in *Webb v Bloch*:¹¹¹

*All who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication: thus, if one suggest illegal matter in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication when it has been so effected.*¹¹²

232. The High Court has recently affirmed this principle as the 'tolerably clear' law on publication.¹¹³ Subject to the availability of a defence, this rule of strict liability renders anyone who facilitates digital publications, including Internet Service Providers (**ISPs**), Internet Content Hosts (**ICHs**), social media providers such as Facebook (and administrators and moderators of Facebook groups and pages), search engines and other digital content aggregators jointly and severally liable as publishers at common

¹⁰⁹ See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly (13 September 2005) 5.

¹¹⁰ *Ibid.*

¹¹¹ (1928) 41 CLR 331.

¹¹² *Ibid* 364 (Isaacs J), citing *Parke v Prescott* (1869) LR4Ex 169.

¹¹³ *Trkulja v Google LLC* [2018] HCA 25, [39].

law. This is regardless of whether they knew about the defamatory material or intended to defame, or the precise extent of their involvement.

233. Currently, the innocent dissemination defence is available where defamatory material was published by a party only in their capacity as a subordinate distributor; they neither knew, nor ought reasonably to have known, that the matter was defamatory; and the lack of knowledge was not due to the distributor's own negligence. The term 'subordinate distributor' captures certain parties who could not be expected to have known that the content of the material they published was defamatory (for example, broadcasters of live programs).
234. On the face of the legislation, it is not clear that ISPs and search engines are 'subordinate distributors', which involves questions of mixed fact and law.¹¹⁴ The act of uploading material to a server may constitute publication, and usage agreements frequently allow ISPs to delete or modify content stored on their servers, arguably enabling them to exercise *control* over the content they publish. The burden that would be faced by ISPs and search engines, if the innocent dissemination defence is not available to them in these circumstances, is significant. It would be operationally overwhelming to manually review the massive volume of third-party content hosted for any objectionable material, let alone analyse it to identify whether content is defamatory. The speed at which new content is created adds to this burden, with the NSW Review finding that search engines 'automatically process more than a billion searches each day, often making it unfeasible to respond promptly to all requests that material not appear in search results'.¹¹⁵
235. The innocent dissemination defence cannot be divorced or considered in isolation from Commonwealth provisions which deal with internet publication, such as clauses 90 and 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth) (**Broadcasting Services Act**).¹¹⁶ The Law Council considers that these defences generally operate satisfactorily with respect to ISPs and ICHs. However, it is important to emphasise that, the protection provided by defences only applies up until the point that the digital publisher is made aware of the content and that it might be defamatory.
236. For example, in *Google Inc. v Duffy*¹¹⁷ the Full Court of the Supreme Court of South Australia upheld the decision of Blue J that Google was liable as a secondary publisher of defamatory information for hyperlinks and snippets that came up in response to search queries. The Court found that once Google was on notice that the material was defamatory and refused to remove it, it could not be found to have innocently circulated the information. As such, the Court found that it is fair and reasonable for secondary publishers to be liable for defamatory material, following proper notification and a reasonable time to take down the defamatory material. This approach again raises concerns with respect to the degree of vigilance necessary in an environment involving publication of vast quantities of information from differing sources, which creates a risk of aggregators adopting an overly conservative approach which may have ultimately impact upon freedom of expression.
237. Further, the Law Council does note that practical effect of sections 90 and 91 in *Broadcasting Services Act* is that it may be in an internet host's legal interests not to monitor things such as reader comments because section 91 only applies to laws

¹¹⁴ *Deferos v Google Inc LLC* [2018] VSCA 176.

¹¹⁵ NSW Justice, *Statutory Review – Defamation Act 2005* (June 2018) 5.56.

¹¹⁶ It would be difficult in many circumstances for online intermediaries to successfully mount justification or fair comment defences since they were not the authors of the material.

¹¹⁷ [2017] SASCFC 130.

relating to internet hosts and service providers where they are aware of the relevant content. If reader comments on news websites or Facebook pages (which may be defamatory) are not monitored, and the internet host is not aware of them, section 91 will operate to effectively override state or territory defamation laws. This places media publishers in an extremely difficult position, because section 91 requires them not to monitor reader comments to avail themselves of its protection, which is in direct opposition to their duty as a news publisher to ensure that their platforms are not used for the publication of readers' hate speech or defamatory material.

238. The dominant modern view in the common law authorities (other than in the United States) is that social media operators, such as Facebook, YouTube, Twitter, bulletin board operators, forum hosts and administrators of Facebook pages and forums can be liable as publishers of third party comments where they fail to take them down within a reasonable time of being put on notice of their existence.¹¹⁸ The Law Council considers that amendments should be made to clause 32 of the Model Defamation Provisions to make it clear that that is the position in Australia. However, clause 32 should also be reconciled with section 91 of the Broadcasting Services Act, so that media publishers who act responsibly in monitoring reader comments are not held liable in defamation for comments that they do not endorse or adopt in any way.

Defamatory meaning

239. The Law Council restates the views put forward by the Media and Communications Committee of the Law Council's Business Law Section in its 2011 submission to NSW Review.¹¹⁹ In that submission, it was argued that by limiting clause 32(1)(b) to where a subordinate distributor knows, or ought reasonably to know, that matter is 'defamatory' and not extending it to consideration of whether the matter was justified or excused by an available defence, it ultimately has the potential to chill freedom of speech.¹²⁰ This is because subordinate distributors may accede to demands for removal of defamatory matter, even where the matter may be substantially true, an honestly held opinion on a matter of public interest, or published on an occasion of privilege, as they would otherwise lose the ability to rely on the innocent dissemination defence.

240. Based on the above, the Law Council again proposes the amendments to clause 32 suggested in the 2011 submission to the NSW Review.

- Clause 32(b) should be amended to read:

the defendant neither knew, nor ought reasonably to have known, that:

(i) the matter was defamatory; and

(ii) the publication of the matter could not be justified or excused by a defence available at common law or under this Division (other than the defence in this section).

- Clause 32(3) be amended as follows:

¹¹⁸ See *Google Inc v Trkulja* [2016] VSCA 333, [244] and the subsequent discussion of *Tamiz v Google Inc* [2013] EWCA Civ 68 and *Murray v Wishart* [2014] NZCA 461 (which preferred the first analysis) and *Oriental Press Group Limited v Fevaworks Solutions Ltd* [2013] 5 HKC 253 (which preferred the second analysis). See also *Von Marburg v Aldred* [2015] VSC 467, [37].

¹¹⁹ Law Council of Australia, Submission to the Department of the Attorney-General and Justice (NSW), *Statutory Review of the Defamation Act 2005 (NSW)*, [11.6]–[11.11].

¹²⁰ *Ibid.*

remove:

Without limiting subsection (2)(a), a person is not the first or primary distributor of matter merely because the person was;

and substitute with the words:

Without limiting subsection (2), a person is a subordinate distributor if the person was merely: ...

Alternative Position – New South Wales Bar Association and Queensland Law Society

241. The NSW Bar considers that there does need to be consideration given to whether the present state of the law adequately balances the protection from liability of ISPs, ICHs, 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 NSW Bar considers that amending the innocent dissemination defence is not the preferable course.
242. The defence of innocent dissemination provided by clause 32 of the Model Defamation Provisions 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, and appears to be effective in protecting such persons from liability. Accordingly, the defence ought to be retained in its current form to achieve the object for which it was enacted.
243. The NSW Bar 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 NSW Bar considers that law reform in this regard will be more effectively achieved at a Federal level.
244. From a defamation perspective, the problems that the NSW Bar considers exist on the current state of the law are as follows.
245. First, the NSW Bar 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 section 91 of Schedule 5 of the Broadcasting Services Act, 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.
246. This has the capacity to visit a significant burden on digital publishers in circumstances where they are unlikely to be able to adjudicate whether the content is in fact defamatory or whether it is defensible. Digital publishers are left with two equally unpalatable choices:
- 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

- 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.

247. Secondly, the NSW Bar 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:

- 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
- 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.

248. 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 members of the NSW Bar that the digital publishers refuse to take any action, often citing the First Amendment of the United States Constitution.

249. Accordingly, the NSW Bar 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 noted above. As these issues relate to areas broader than defamation, the NSW Bar 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 sections 90 and 91 of the Broadcasting Services Act.

250. The QLS notes the complexity of the issues surrounding innocent dissemination and safe harbours particularly in respect of digital publications, the broader implications, and the rapid pace of change in technology, legislative and regulatory requirements, and consumer expectations. The QLS therefore suggests that more detailed consideration and wider consultation is required.

Question 15(c) and (d)

Safe harbour provision

251. The Law Council does not have a settled position at this time as to whether a 'safe harbour' provision should be introduced into the Model Defamation Provisions. We note there are strong concerns on both sides of the argument which should be carefully considered.

252. On one side, there is concern that online intermediaries allow defamatory publications to spread far and wide which can have the effect of rapidly destroying a

plaintiff's reputation. Further, online intermediaries often have the capacity to implement and enforce moderation or editorial functions to prevent defamatory material from being posted in the first place, and also to remove or take down defamatory publications after notice.

253. On the other side, there is concern that Australian defamation laws are much stricter than other jurisdictions (such as the United States, England and parts of the EU) and have a tangible chilling effect upon freedom of expression and also place Australian businesses at a disadvantage compared to their overseas competitors. Proponents of these concerns contend that defamation proceedings should not be able to be brought at all against online intermediaries unless it is not reasonably practicable for an action to be brought against the author, editor or commercial publishers of the allegedly defamatory statement. They further contend that a safe harbour which obliges website operators to quickly take down clearly unlawful material would provide a faster, clearer and more effective remedy for plaintiffs.
254. There is also a view that 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.
255. A further matter that should be considered in the context of any 'safe harbour' provision is whether as a matter of regulation digital publishers conducting business in Australia 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.
256. Some jurisdictions, including the UK and EU, have taken the approach of implementing 'safe harbour provisions' which provide more complete protection for digital content aggregators. In an international marketplace, this also gives rise to issues relating to viability of local content aggregators competing against those operating from such jurisdictions. However, there are also arguments in favour of permitting civil liability against, and an incentive for responsible conduct by, digital content aggregators, particularly in circumstances where it may be impossible or very difficult to identify, pursue or enforce relief against the primary publisher of defamatory content.
257. Another approach could be to implement safe harbour provisions which apply where the digital content provider can demonstrate that the identity and a means of contacting the party who originally posted the content was readily ascertainable (which is a reversal of onus when compared with the UK provision).
258. The Law Council notes the difficult balancing act between the above concerns and that the matter is also being considered as part of the ACCC's Digital Platforms Inquiry into competition in the media and advertising services market.¹²¹
259. The LSNSW supports the introduction of a specific 'safe harbour' provision. However, the LSNSW accepts that in certain circumstances an obviously defamatory publication ought to be removed by an internet content host, if it is to avoid the prospect of a defamation claim. A specific, step-by-step takedown procedure (as described below) would, in the LSNSW's view facilitate this.

¹²¹ Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Preliminary Report, 10 December 2018) <<https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/preliminary-report>>.

Takedown procedure

260. 'Takedown' provisions and orders for compulsory corrections should also be considered in the broader context discussed above (see the NSW Bar's response to Questions 15(c) and (d) above). Such provisions have the potential to be of great importance to persons aggrieved by publications on the internet in circumstances where they may 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.
261. The *English Defamation (Operators of Websites) Regulations 2013* (UK) provide an example of a takedown procedure. Under these regulations, an operator should, upon receiving such a notice, send on the notice to the poster within 48 hours, take down the material within 48 hours if the poster does not respond in time, and notify the claimant within 48 hours of receiving the poster's notice that the poster does not wish for the material to be taken down and providing the poster's details if consent is given.
262. The LSNSW supports (whether in an Act, or by regulation) the introduction of a simple, step-by-step 'takedown procedure' for any complaint about online material. The LSNSW submits that a timeline should be mandated for takedown of alleged defamatory material. Such a timeline could be, for example, 48 hours, unless either party is able to demonstrate that an earlier or later period was reasonable in the circumstances. If a publisher does not comply with the mandated take down process, but rather elects to keep the impugned material online, the complainant ought then be able to institute a defamation claim. If, however, the material is taken offline in accordance with the prescribed takedown procedure, the complainant should be barred from commencing any proceedings in relation to the matter.

Remedies

The caps on damages

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 noneconomic damages is applicable once the court is satisfied that aggravated damages are appropriate?

263. There is no longer any real debate as to whether clause 35 fixes the top end of a range of damages that may be awarded, or whether it operates as a cut-off, or whether the cap is applicable once the court is satisfied that aggravated damages are appropriate. That is because the primary position identified in the Discussion Paper, previously accepted by the Full Court of the Supreme Court of South Australia,¹²² and carefully reasoned by the Victorian Court of Appeal in *Bauer Media Pty Ltd v Wilson (No 2)* (***Wilson (No 2)***),¹²³ has now been accepted by single judges in the Supreme

¹²² *Lesses v Maras (No 2)* [2017] SASCFC 137.

¹²³ *Wilson (No.2)* [2018] VSCA 154.

Courts of (at least) Western Australia,¹²⁴ Queensland,¹²⁵ and New South Wales,¹²⁶ as well as a single judge in the Federal Court.¹²⁷ Accordingly, there is arguably no pressing need for ‘clarity’ as posited by Question 16.

264. What is particularly debatable, however, is whether, as a matter of policy, the current approach is appropriate. Different views have been expressed on this issue. On the one hand, the current interpretation of clause 35(2) could be considered hard to justify in principle as it may result in an increasingly two-tiered system, where similar damage suffered by one plaintiff can result in a substantially higher damages award, just because the damages were aggravated in some way that does not wholly justify the difference in the awards. On the other hand, the present interpretation may strike an appropriate balance between the competing policy goals identified in paragraphs 6.5 and 6.6 of the Discussion Paper – and in particular, maintain an appropriate incentive to media organisations (or others) to think twice before publishing indefensible defamatory material following a cost/benefit analysis.
265. Should amendment to clause 35 be pursued, some greater certainty 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 would serve its intended purpose in limiting the award of general compensatory damages to preserve proportionality with non-economic loss damages for personal injury matters.
266. Additionally, if the legislature does determine that the current policy setting ought to be changed, it should consider the NSW Court of Appeal’s statement in *Wilson (No 2)* that:
- We consider that if the Legislature seeks to confine the extent to which the maximum damages amount can be exceeded to the award of aggravated damages alone, it ought consider re-drafting s 35(2) to insert as the closing words of s 35(2) “but only to the extent that an award of aggravated damages is warranted” or some other appropriate express qualification.*¹²⁸
267. Finally, if clause 35(2) is to be reconsidered, the legislature may wish to clarify whether a finding in relation to any aggravating factor, including those which do not relate to ‘the circumstances of publication’ results in the cap being inapplicable.
268. Two of the three leading cases, where the damages awarded have exceeded the cap, have not drawn any distinction between aggravating factors, possibly because the circumstances of publication were clearly aggravating factors in those decisions.¹²⁹
269. In *Rayney v Western Australia*,¹³⁰ Chaney J was faced with an argument that the Court could only consider circumstances existing as at the date of publication when

¹²⁴ *Rayney v Western Australia* (No 9) [2017] WASC 367, [844]–[856].

¹²⁵ *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201, [755]–[762].

¹²⁶ *Pahuja v TCN Channel 9 Pty Ltd (No 3)* [2018] NSWSC 893.

¹²⁷ *Rush v Nationwide News Pty Ltd (No.7)* [2019] FCA 496, [672].

¹²⁸ *Wilson (No.2)* [2018] VSCA 154, [250].

¹²⁹ See, eg, the Victorian Court of Appeal’s discussion in *Wilson (No 2)* which generally just referred to circumstances that warrant aggravation, and used examples including careless cross-examination when discussing the parties’ arguments. However, note that this was not a live issue in this decision, given the findings of aggravation in that case clearly included the ‘circumstances of publication’: *Wilson (No.2)* [2018] VSCA 154, [236]. See also *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201, which involved numerous aggravating factors.

¹³⁰ *Rayney v Western Australia* (No 9) [2017] WASC 367.

awarding damages in excess of the cap. His Honour rejected that argument, relying on other first instance decisions,¹³¹ to find that:

*...the words used [in s35(2)] do not imply some temporal limitation... The “circumstances of the publication of the defamatory matter ... such as to warrant an award of aggravated damages” is a reference to circumstances which, at common law, aggravated damages might be awarded, whether those circumstances exist at the time of publication or arise after publication.*¹³²

270. However, that finding was not strictly necessary, as the circumstances of aggravation in that case included matters which clearly related to the circumstances of publication.¹³³

271. In the absence of clear appellate consideration of this issue, the Law Council considers there is still a live question, based on a plain reading of clause 35(2), which states (emphasis added):

... if... the circumstances of the publication of the defamatory matter ... warrant an award of aggravated damages...

272. Findings justifying aggravation in relation to post-publication matters which do not relate directly to the circumstances of publication (for example, conduct of the litigation generally or the conduct of counsel at trial), might not, on the current wording of clause 35(2), render the cap inapplicable. That outcome may be positive, as it might not incentivise allegations concerning the propriety of the conduct of the proceedings being made in every defamation claim that is brought.

Multiple proceedings and consolidation

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’?

273. The combined experience of members of the profession who have contributed to this submission is that because the statutory cap on damages applies to each ‘defamation proceeding’, multiple proceedings are encouraged where a single proceeding would have been preferable. This has arisen in at least two ways.

274. First, where a publisher publishes across different mastheads or platforms, multiple proceedings may be 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 could be

¹³¹ *Forrest v Askew* [2007] WASC 161, [68]–[74]; *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [76]–[80]; *Cripps v Vakras* [2014] VSC 279.

¹³² *Rayney v Western Australia* (No 9) [2017] WASC 367, [856].

¹³³ *Ibid* [896]–[897]. These included that the things said at the press conference went beyond what was necessary to fulfil any proper purpose and contained inaccuracies damaging to the plaintiff.

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*).¹³⁴ Section 23 does not apply in such circumstances because, although publication is by an entity (the Fairfax Group), the different proceedings are not ‘against the same defendant’.

275. There is, in reality, often 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)*,¹³⁵ where separate proceedings were commenced for publication of the same article in three mastheads against the relevant Fairfax publishing entities. When awarding damages, her Honour 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 clause 38(1)(d).¹³⁶
276. Nonetheless, it is desirable for reasons of costs and case-management that proceedings are not constituted this way. The Law Council considers that an amendment should be made to prevent the commencement of separate proceedings which in substance relates to the same matter by the same publisher, but which are not presently caught by clause 23.
277. Secondly, where different publishers publish the same matter, where separate awards against each are appropriate, a plaintiff may bring separate proceedings against each publisher to avoid one cap applying to proceedings as a whole. A plaintiff in those circumstances should be able to bring one set of proceedings without that prejudice and damages against each defendant should be awarded as if separate proceedings were commenced against each of them.
278. The Law Council understands the reference in Question 17(c) to ‘each cause of action’ to be a reference to ‘all causes of action in respect of all publications of the same matter’. Strictly speaking, every publication of defamatory matter gives rise to a separate cause of action. A newspaper article published to 100,000 recipients thus gives rise to 100,000 causes of action. Obviously, the Discussion Paper did not intend to suggest that the maximum damages in such a case should be 100,000 times the statutory cap.
279. Applying the cap to all causes of action in respect of all publications of the same matter, rather than each ‘defamation proceeding’, would be a radical change to the current regime. Plaintiffs would be encouraged to plead every instance of the same (or near same) matter published in, for example, print newspapers, websites, mobile editions and social media, in order to multiply the available damages. The Law Council does not support such a change.

¹³⁴ [2018] NSWCA 325.

¹³⁵ [2018] NSWSC 1838.

¹³⁶ *Ibid* [44]-[45].

Recommendations

- **Clause 23 of the Model Defamation Provisions should be amended to prevent multiple proceedings being commenced against associated defendants in respect of the same or like matter. This could be achieved by adding after the words ‘same defendant’ the words (or words to the effect of) ‘or any employee, agent or associated entity (as that term is defined in the *Corporations Act 2001* (Cth)) of that defendant’.**
- **Clause 35 should 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-clause (1A), the following provision:**

Without limiting the operation of clause 38, where the defamation proceedings are against more than one defendant and leave pursuant to clause 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.

Other Issues

Question 18

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

280. The contributing parties to this submission have provided several additional issues and recommendations for consideration. These are set out below.

Law Society of New South Wales

Reversal of onus of proof in terms of establishing truth or falsity of imputations

281. Currently, a heavier burden to establish their case is placed on the defendant publisher than on the plaintiff. Effectively, the requirement of defamation law is that any plaintiff who sues for defamation should do so on the basis that the imputations sued upon are, in the view of the plaintiff, false. It is therefore, in the LSNSW's view appropriate for the plaintiff to prove falsity of the imputations, rather than the onus being left to the defendant. The plaintiff will always be in the best position to know whether an imputation is true or not. A plaintiff should not be permitted to sue over imputations which he or she knows are true.

282. The reformed Model Defamation Provisions could include an additional element in the cause of action, namely that the plaintiff must establish that the imputations he or she relies upon are false. In many cases, this may simply require the plaintiff to give evidence in the witness box that each imputation is false. But the switching of the onus of establishing truth may act as a deterrent to frivolous or vexatious claims and claims brought for the purpose of silencing public debate and would therefore reduce the burden on the courts.

283. In the alternative, if falsity of the imputations is not to be made an element of the tort of defamation to be proven by the plaintiff, the LSNSW submits that a plaintiff should

still be required in his or her Statement of Claim to swear or affirm an affidavit that each of the imputations pleaded or particularised are false, on penalty of perjury.

Level of specificity required of a justification plea

284. Recent decisions have stated that if a defendant is to plead justification, it is necessary for the particulars of the defence to be articulated with the precision of an indictment.¹³⁷ The LSNSW is concerned at the tendency inherent in this approach to expect that a journalist who has undertaken a major piece of investigative journalism should, at the time of publication be in the same position as a prosecutor with a brief of evidence ready to take a matter to trial. This misunderstands the nature of investigative journalism, where it is often the case that journalists, may, in preparing an article, view documents which they may not be able copy.

285. The LSNSW considers that, particularly in the context of public interest investigative journalism, it is unrealistic to expect a publisher to refrain publishing an important piece of investigative journalism until they have a 'brief of evidence' sufficient to particularise a justification defence, and it is contrary to the objective of encouraging freedom of expression.

286. The reformed defamation laws could disavow any suggestion that a journalist must effectively have a brief of evidence ready to prove all elements of a story true as at the time of publication. Such reform will, the LSNSW submits, prevent publishers from having their defences struck out at an early stage prior to them having had the opportunity to pursue the usual interlocutory steps that a party to a civil proceeding can take advantage of in order to complete the particularisation of a pleading.

Clarification as to whether a defendant may rely upon a combination of defences in order to defend a single matter complained of.

287. Many matters may contain a variety of material, some parts of which might be subject to, for example, a justification defence, other parts to an honest opinion defence, and other parts to a fair report defence. Defendants have traditionally understood that multiple defences could be mounted to address different aspects of a particular publication. However, the NSW Court of Appeal has stated that defamation defences each work on an 'an all-or-nothing basis'.¹³⁸ This is contrary to how media defendants have traditionally approached defences to matters which involve a mixture of fact, opinion, fair report and the like.

288. The reformed laws could make clear that a defendant may cumulatively rely upon a combination of defences in response to any particular matter complained of.

Minor disputes

289. In relation to relatively minor disputes between individuals (particularly on social media), claims could be required to be commenced either in a new division of state tribunals such as the NSW Civil and Administrative Tribunal or a division of a Local Court, or alternatively, in a national tribunal dealing solely with small defamation disputes. This tribunal could require mediation as the first step, with strong encouragement for online takedown and the publication of an apology/correction to seek to resolve the matter at the earliest opportunity. Further, remedies, particularly

¹³⁷ *Rush v Nationwide News Pty Ltd* [2018] FCA 357, [52].

¹³⁸ *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* [2018] NSWCA 77, [38] (Meagher JA).

damages, in such a tribunal should be restricted, and there should be a *prima facie* presumption of no orders as to costs.

Allegations of malice

290. The LSNSW recommends that consideration be given to whether there should be consequences for a plaintiff who alleges malice against a defendant, which is ultimately found to be unsubstantiated. For example, if an allegation of malice has been made by a plaintiff, which ultimately has been found to be baseless, the plaintiff could be deprived of any costs order in his or her favour in respect of the proceedings.

Jury Verdicts

291. The LSNSW recommends that consideration be given to whether juries should be asked to give a simple general verdict as to which party should win, as opposed to being put through the arduous task of answering a series of questions where the set of questions does not ultimately identify to the jury who succeeds in the case.¹³⁹ We note that, in criminal cases, elements of the criminal offence are explained to the jury, as are each of the defences that may be relied upon, but the jury delivers a simple verdict of guilty or not guilty. In many defamation cases, after closing addresses and directions from the judge, it would be simpler, and easier, for the jury to simply be asked which side should win.

Defeasance provisions

292. The defeasance provisions make little sense in a world where people are in constant digital communication via social media and the internet, often to limited groups of people (as opposed to 'the public' at large). Further, with respect to clause 30 of the Model Defamation Provisions (defence of qualified privilege for provision of certain information), if the defendant has acted maliciously, the defendant will not have established the element of reasonableness. Malice therefore becomes irrelevant. Finally, the defeasance provisions are increasingly creating work for defendants and the courts in applications to strike out deficient replies.¹⁴⁰

Recommendation

293. In the LSNSW's view, consideration ought to be given to the need and relevance of the current defeasance provisions in the defamation laws. The LSNSW recommends that the defeasance provisions be removed altogether, and instead (if necessary) incorporate the concepts embodied in the defeasance provisions as part of the plaintiff's onus in chief in establishing his or her cause of action.

Threshold on the question of capacity

294. The LSNSW suggests that consideration be given to whether courts have adopted an overly cautious approach to the determination of the preliminary legal question of whether a matter complained of can convey the imputations contended for by the plaintiff. Consideration should be given to raising the very low threshold to the question of capacity.¹⁴¹

¹³⁹ Note the questions put to the jury in *Tabbaa v Nine Network Pty Ltd (No. 10)* [2018] NSWSC 468.

¹⁴⁰ See, eg, *Arman v Nationwide News Pty Limited* [2017] NSWDC 151; *Mosslmani by his tutor Karout v Australian Radio Network Pty Ltd* [2018] NSWDC 114.

¹⁴¹ See *Favell v Queensland Newspapers Pty Ltd* [2005] HCA 52.

Avoiding SLAPP Suits

295. The LSNSW suggests consideration of uniform legislation to avoid SLAPP suits, such as the 'Gunns 20' case.¹⁴² This is more pressing in the digital age, where individuals have an expectation of being able to express opinions and protest via social media and other internet forums. In that regard, in furtherance of the principle of freedom of expression, the LSNSW suggests that the *Protection of Public Participation Act 2008* (ACT) should be replicated across all Australian jurisdictions, providing for civil penalties where a defendant's conduct is public participation, and the plaintiff's proceeding is started or maintained against the defendant for an improper purpose.

Radical reform and drafting of the reformed legislation

296. The Discussion Paper presents an opportunity for radical reform to how defamation matters are conducted in Australia. For example, can the law be amended to remove the concept of imputations altogether, and simply ask the jury whether a particular publication is defamatory and false, and if so, are the parts of which the jury determines to be defamatory and false defensible by virtue of one or more defences relied upon by the defendant? While there is much to be said in having imputations to define the real matters that will be in issue at trial, the courts are straining under the workload of voluminous interlocutory disputes. In the LSNSW's view, the idea of truly radical reform (rather than 'tinkering around the edges' of the existing laws) should be given serious consideration as part of the reform process.

Recommendation

297. The LSNSW recommends that a panel of highly experienced practitioners in the defamation field be assembled to consider in detail the reformed defamation legislation.

The Victorian Bar

298. The Victorian Bar suggests that consideration be given to the introduction of a new remedy by way of a 'declaration of falsity'. This was a recommendation of the NSW Law Reform Commission's Report No. 75 in 1995.¹⁴³

299. While the provisions would have to be carefully drafted, in simple cases a declaration of falsity of a statement of fact in, or an imputation carried by, a publication would be likely to be quicker, cheaper and more effective as a remedy than the pursuit of defamation proceedings. There should be a presumption that there be no order as to costs in proceedings for a declaration of falsity. No damages would be available, except where the defendant failed to comply with an order for publication of a declaration of falsity.

300. The Victorian Bar suggests that by focusing the inquiry upon the truth or falsity of a statement of fact in, or an imputation carried by, a publication, declaration of falsity proceedings would not unduly hamper freedom of expression. Questions of privilege, for example, could be put to one side.

301. However, the Victorian Bar also notes that courts should retain a discretion to direct that the declaration of falsity mechanism is not appropriate, and the matter should proceed by way of a defamation claim, in any case where the defendant opposes the matter being dealt with by way of the declaration of falsity mechanism, and the

¹⁴² *Gunns Limited v Marr* [2005] VSC 251; *Gunns Ltd v Marr (No 3)* [2006] VSC 386.

¹⁴³ New South Wales Law Reform Commission, *Defamation* (Report No 75, November 1995).

publication is a statement of opinion rather than fact, or there is a triable issue as to the existence of a defence of absolute or qualified privilege, whether at common law or by statute.

302. The NSW Law Reform Commission proposed that a plaintiff should elect to bring an action either for damages or for a declaration of falsity. This is because if both could be pursued, the benefit of rapid vindication would be lost. The Victorian Bar agrees. If a defendant failed to comply with court orders regarding publication of a declaration of falsity, however, the plaintiff should be permitted to amend the proceedings to claim general damages.
303. The plaintiff would bear the onus of proving falsity, including proof that the statement complained of was one of fact. Only a pleaded fact that is said to be false, or a pleaded imputation said to be carried by the publication, would be declared false.
304. The Victorian Bar suggests that the declaration of falsity remedy should be discretionary in nature. Discretionary factors should include: the subsequent publication of a correction; circumstances where the declaration might prejudice the interest of third persons who are not parties to the proceeding; or the occurrence of subsequent events (such as a court conviction) which no longer render the statement damaging to reputation.
305. The NSW Law Reform Commission recommended that a claim for a declaration of falsity should be brought speedily (within four weeks, with extension available in exceptional circumstances to one year) and that the proceeding should only be available for hearing by judge alone. The Victorian Bar agrees with this recommendation.

New South Wales Bar Association

306. The NSW Bar considers that at least the following three further matters should be considered.

Definition of 'matter'

307. Clause 4 of the Model Defamation Provisions 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.*

308. The NSW Bar is of the view that this definition does not sit comfortably with the manner in which this word is used throughout the Model Defamation Provisions.

309. The introduction of the Act in New South Wales (applying the Model Defamation Provisions) brought about significant change to the law of defamation in this state in that, by clause 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.
310. In that sense, the NSW Bar understands that where the word 'matter' is used throughout the Model Defamation Provisions 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

311. The NSW Bar recommends that the definition of 'matter' be amended as follows:

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

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

312. Clause 10 of the Model Defamation Provisions 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.*

313. 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.
314. 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 NSW Bar 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

315. The NSW Bar recommends that clause 10 of the Model Defamation Provisions 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.

Clause 40(2)(b)

316. Clause 40(2) of the of the Model Defamation Provisions 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.

317. As presently drafted, there is a disparity between clauses 40(2)(a) and 40(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 (2)(b) provides no such incentive on the part of a plaintiff. In the NSW Bar's view, 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.

318. The NSW Bar recommends that this situation be rectified by amending clause 40(2)(b) so that it is equivalent to clause 40(2)(a).

Recommendation

319. Clause 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.