

Council of Attorneys-General

Review of Model Defamation Provisions

February 2019

Discussion Paper

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Questions

Question 1

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

Question 2

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

Question 3

- (a) Should the Model Defamation Provisions be amended to include a 'single publication rule'?
- (b) If the single publication rule is supported:
 - (i) should the time limit that operates in relation to the first publication of the matter be the same as the limitation period for all defamation claims?
 - (ii) should the rule apply to online publications only?
 - (iii) should the rule should operate only in relation to the same publisher, similar to section 8 (single publication rule) of the *Defamation Act 2013* (UK)?

Question 4

- (a) Should the Model Defamation Provisions be amended to clarify how clauses 14 (when offer to make amends may be made) and 18 (effect of failure to accept reasonable offer to make amends) interact, and, particularly, how the requirement that an offer be made 'as soon as practicable' under clause 18 should be applied?
- (b) Should the Model Defamation Provisions be amended to clarify clause 18(1)(b) and how long an offer of amends remains open in order for it to be able to be relied upon as a defence, and if so, how?
- (c) Should the Model Defamation Provisions be amended to clarify that the withdrawal of an offer to make amends by the offeror is not the only way to terminate an offer to make amends, that it may also be terminated by being rejected by the plaintiff, either expressly or impliedly (for example, by making a counter offer or commencing proceedings), and that this does not deny a defendant a defence under clause 18?

Question 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?

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 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)?

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?

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?

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?
- (a) 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?

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?

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?

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?

Question 14

- (a) Should a 'serious harm' or other threshold test be introduced into the Model Defamation Provisions, similar to the test in section 1 (serious harm) of the *Defamation Act 2013* (UK)?
- (b) If a serious harm test is supported:
 - (i) should proportionality and other case management considerations be incorporated into the serious harm test?
 - (ii) should the defence of triviality be retained or abolished if a serious harm test is introduced?

Question 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 16

- (a) Should clause 35 be amended to clarify whether it fixes the top end of a range of damages that may be awarded, or whether it operates as a cut-off?
- (b) Should clause 35(2) be amended to clarify whether or not the cap for non-economic damages is applicable once the court is satisfied that aggravated damages are appropriate?

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'?

Question 18

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

Glossary

Buckley	<i>The Herald & Weekly Times Pty Ltd v Buckley</i> (2009) 21 VR 661
CAG	Council of Attorneys-General
IGA	Intergovernmental Agreement
NSW Review	Statutory Review – Defamation Act 2005 (NSW)
Reynolds	<i>Reynolds v Times Newspapers Ltd</i> [2001] 2 AC 127

1. Introduction

- 1.1 Each State and Territory in Australia has substantially uniform defamation law. The Model Defamation Provisions were endorsed by the former Standing Committee of Attorneys-General in November 2004 and each state and territory enacted legislation to implement them, collectively referred to as the National Uniform Defamation Law. The Model Defamation Provisions are available on the Australasian Parliamentary Counsel's Committee website at www.pcc.gov.au.¹
- 1.2 In June 2018 the Council of Attorneys-General agreed to reconvene the Defamation Working Party to consider whether the policy objectives of the Model Defamation Provisions remain valid and whether the provisions remain appropriate to achieve these objectives.
- 1.3 The Terms of Reference for the Defamation Working Party are set out in Appendix 1.
- 1.4 This chapter provides background to the Model Defamation Provisions and the Review and assesses the continued validity of the policy objectives of the Model Defamation Provisions.

Submissions

- 1.5 Submissions are invited on the questions set out in this Discussion Paper and any related matters.
- 1.6 Submissions will be made public unless otherwise requested.
- 1.7 **The closing date for submissions is 30 April 2019.**
- 1.8 Submissions should be sent to:

policy@justice.nsw.gov.au

or

Review of Model Defamation Provisions
C/o Justice Strategy and Policy Division
NSW Department of Justice
GPO Box 31
Sydney NSW 2001

Background

- 1.9 Defamation in Australia is regulated by both statute and the common law. The purpose of defamation law is to protect people's reputation and provide a dispute

1 See <https://www.pcc.gov.au/uniform/pcc-279-94-d10.pdf>.

resolution framework to vindicate a defamed person's reputation. Australia has abolished the distinction between 'libel' (defamation in a permanent form, such as written communication) and 'slander' (defamation in impermanent form, such as speech), and both are now commonly referred to as 'defamation'. The Model Defamation Provisions provide the statutory legal framework for balancing freedom of expression and freedom to publish information in the public interest on the one hand with the right of individuals to have their reputations protected from defamatory publications and the right to remedies for such publications on the other hand. Since the Model Defamation Provisions were developed, the manner in which information is published and transmitted has changed significantly, particularly with the exponential growth in reliance on digital publications and communications, interactive online forums and blogs. Information flows are even less bound by territorial borders than they were when the Model Defamation Provisions were adopted.

1.10 The NSW Department of Justice recently completed a statutory review of the *Defamation Act 2005* (NSW), the Report of which (**NSW Review**) was tabled in the NSW Parliament on 7 June 2018.² The Report concluded that the Act's core policy objective - balancing freedom of expression and publication in the public interest, with protection of individuals from defamatory publications - remains valid, but that the Act would benefit from some amendment and modernisation. This Discussion Paper draws upon the NSW Review and submissions made to that review, and other sources.

1.11 In 2018 the Centre for Media Transition, University of Technology Sydney, published a report *Trends in Digital Defamation: Defendants, Plaintiffs, Platforms* which reviewed defamation cases heard over the five year period to 2017³ and found as follows:

- NSW was the preferred forum for defamation actions and more matters reached a substantive decision⁴ in NSW than in all other jurisdictions combined (95 cases for NSW, compared with 94 cases in all other jurisdictions).
- As well as the 189 cases with substantive decisions located through searches, there were 609 related decisions (for example, separate rulings on evidence). There were also 322 other matters⁵ in the system, including appeals from earlier decisions and preliminary decisions on new matters. The report acknowledged a complete picture of legal action on defamation would include other matters that were the subject of summary dismissals and the many matters settled before a claim is filed in court.
- Of the 189 cases: 51.3% were digital cases, only 21% of the plaintiffs in judgments could be considered public figures, and only 25.9% of the defendant 'publishers' were media companies.
- Overall, about a third of plaintiffs were successful.

2 See <https://www.justice.nsw.gov.au/justicepolicy/Documents/defamation-act-statutory-review-report.pdf>.

3 The report considered defamation actions heard in all states and territories from 2013 to 2017 inclusive and compiled the results based on 'cases' rather than decisions.

4 A court decision in favour of either a plaintiff or defendant on the matter overall, and not including costs issues, pre-trial decisions on evidence, judgments on imputations alone or, at the other end of an action or a decision of a higher court on appeal.

5 Matters not related to a case with a substantive decision between 2013 and 2017 inclusive.

- Of the 87 awards of damages, 38 were for \$100,000 or more.
- The number of defamation cases – that is, matters for which there was a substantive decision in that year – was almost the same in 2017 as it was in 2007 (30 compared to 29 cases). The number of decisions was the same: 131 in each year.

Objectives of the Model Defamation Provisions

- 1.12 The objectives of the Model Defamation Provisions are set out in clause 3. These are to:
- a. enact provisions to promote uniform laws of defamation in Australia;
 - b. 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;
 - c. provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter; and
 - d. promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.
- 1.13 The Model Defamation Provisions attempt to strike a balance between protecting individuals from reputational damage from defamatory publications, while also ensuring that freedom of expression is not unduly curtailed, and that information in the public interest is released. National consistency is also a key policy objective, and, as noted above, one that continues to be important.
- 1.14 The NSW Review concluded that the objectives of the NSW Act (and so the objectives of the Model Defamation Provisions) remain valid, and that, with some minor exceptions, its terms remain appropriate to achieve those objectives. However, the NSW Review also concluded that the Act, and by implication the Model Defamation Provisions, would benefit from some amendments to clarify the application of terms, reduce ambiguity, and better articulate how some of its legal principles apply.

Question 1

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

2. General principles

2.1 Part 2 of the Model Defamation Provisions deals with general principles, including:

- who may bring defamation actions;
- the choice of law rules that apply; and
- limitation issues.

Corporations

2.2 Division 2 of the Model Defamation Provisions sets out the parties that have a cause of action for defamation. Clause 9 provides that a corporation has no cause of action unless it is an excluded corporation at the time of the publication, being a corporation which is not a public body and:

- (a) whose objects for formation do not include obtaining financial gain for its members or corporators; or
- (b) which is not related to another corporation, and employs fewer than 10 people.

Public bodies, such as local government bodies or other government or public authorities established by statute, cannot sue for defamation.⁶

2.3 Under the common law, all corporations could sue for defamation and recover damages for financial loss. NSW legislation in 2002 precluded corporations, including statutory bodies, from suing in libel with the only exception being a corporation that employed fewer than ten persons at the relevant time and had no subsidiaries. This question was subsequently considered at length in the development of the Model Defamation Provisions.

2.4 A number of submissions to the NSW Review suggested amendments to clause 9. Some submissions argued for narrowing clause 9's application to preclude all corporations from pursuing causes of action for defamation, in the interest of promoting freedom of expression and public scrutiny of all corporate bodies.⁷ The NSW Bar Association argued to expand clause 9, to permit all corporations to sue for defamation, on the basis that corporate reputations are also critically important and are a legitimate interest that needs to be protected.⁸ These submissions cited examples from the UK in particular, where all corporations retain the right to sue.

2.5 The conclusion of the Standing Committee of Attorneys-General in 2004 that precluding larger, for-profit corporations from suing for defamation was appropriate and necessary to meet the overall objectives of the Model Defamation Provisions was based on a number of reasons, including the following:

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6. Clause 14 of the Model Defamation Provisions.
 7. Submissions from Australia's Right to Know, Free TV Australia, and Joint Media Organisations. Also discussion of this proposal in the submission from the Law Council of Australia.
 8. Submission from the NSW Bar Association.

- if corporations were able to sue for defamation, their resource capacity to commence proceedings, including in strategic litigation against public participation ('SLAPP') suits, may deter publication of material the release of which is in the public interest;
 - as 'reputation' is principally a personal right, compensation for harm to reputation should only be extended to natural persons; and
 - corporations have other options to defend their corporate reputations, such as making complaints to the Press Council of Australia, and pursuing other types of legal actions, including under provisions in the *Competition and Consumer Act 2010* (Cth) and for the tort of injurious falsehood.
- 2.6 Australia's approach of limiting capacity to sue for defamation to only smaller corporations differs from that of other countries with similar legal histories. For example, in most states of the United States, a corporation can sue in defamation where an untrue 'actionable statement' has been made in writing or orally to a third person, and has caused the corporation damage. Similarly, in New Zealand, the *Defamation Act 1992* (NZ) has the effect that a 'body corporate' can bring a claim for defamation where the defamatory publication has, or is likely to, cause the body corporate a pecuniary loss.⁹ Canada allows corporations to sue in defamation in the same way as natural persons, although some Canadian academics have suggested that Canada follow the Australian approach, citing corporations' disproportionate resource and influence as compared to individuals having a potentially chilling effect on free speech.¹⁰
- 2.7 The *Defamation Act 2013* (UK) maintains the right of corporations to sue for defamation on the same basis as natural persons (that is, only where they can prove 'serious harm'), regardless of their size or whether they operate for profit. However, the UK Act does provide an effective limitation by defining 'serious harm' for corporate plaintiffs narrowly to mean actual or likely serious financial loss. A few cases have considered how serious financial loss is to be established, and what extent of loss constitutes 'serious'. For example, it has been held that 'serious' financial loss for a body that trades for profit must depend on context, but, as indicated by the damages awarded in that case (£10,000), need not be particularly extensive.¹¹
- 2.8 The decision of the Standing Committee of Attorneys-General to permit only excluded corporations to retain the right to sue in defamation recognised that non-profit bodies are less likely to have the resources to pursue alternative causes of action, and that small, for-profit bodies may be disproportionately affected by a defamatory publication and less likely to weather its consequences.
- 2.9 The arguments for and against restricting the rights of corporations to bring causes of action for defamation were examined extensively in the development of the Model Defamation Provisions. While noting that there may be circumstances in which corporations do suffer harm because of defamatory statements, it may be that the balance struck by clause 9 of the Model Defamation Provisions continues to be appropriate. Submissions are invited on whether, in light of the approaches in other

9. *Defamation Act 1992* (NZ), section 6.

10. See for example Hilary Young, 'Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs' *University of British Columbia Law Review* Vol. 46 No. 2, 2013.

11. *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB).

countries, particularly the United Kingdom, clause 9 should be retained as is, or whether it should be amended.

Question 2

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

The single publication rule

- 2.10 Defamation occurs whenever a defamatory meaning is communicated to somebody other than the person being defamed (a third party). Under the Model Defamation provisions, a person who has been defamed has one year in which to commence proceedings. In the case of internet materials, communication occurs whenever a third party downloads the material. This is known as the ‘multiple publication rule.’
- 2.11 Several submissions to the NSW Review argued that a multiple publication rule is ill-suited to the digital age, which allows for the wide and rapid dissemination of publications, and that a ‘single publication rule’ should be adopted.¹² However, the single publication rule has been rejected in Australia by both the NSW Supreme Court in *McLean v David Syme & Co Ltd*,¹³ and, more recently and in relation to online publications, by the High Court in *Dow Jones & Co v Gutnick*.¹⁴
- 2.12 In *Dow Jones & Co v Gutnick*, the High Court held that the damage to reputation giving rise to a tort of defamation will generally only occur when the publication is in comprehensible form. In the case of internet materials, it ruled that the publication is in comprehensible form when downloaded onto the computer of the reader. This could have the consequence that, for the purposes of the multiple publication rule, each time an internet user accesses and downloads information from a webpage, this constitutes a ‘publication’ that may give rise to separate causes of action each with its own limitation period.¹⁵ A plaintiff may therefore have a cause of action in relation to a single matter that has been subject to multiple ‘republishings’ for or over many years.
- 2.13 In its submission to the NSW Review, Australia’s Right To Know noted that the current rule poses challenges for media organisations and other companies that maintain online archives. Australia’s Right To Know suggested that it is undesirable for a new limitation period to commence each time a person downloads potentially defamatory material, as the effect is to expose the publisher to potential litigation indefinitely into the future, even if no concerns were raised or action commenced within the year after first publication.¹⁶ This may have the unintended consequence of deterring parties from establishing or maintaining digital archives. If defamatory material brought to the notice of an archive publisher or internet search engine operator continues to be published, these entities may be liable. In some European cases, such publishers and operators have been found liable even if the original

12. For example, submission from the Communications Alliance.

13. *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513 at 520 and 528.

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

15. See for example: *Alex v Australian Broadcasting Corporation* (2015) 20 DCLR (NSW) 179; *Gacic v John Fairfax Publications Pty Ltd* (2015) 91 NSWLR 485.

16. Submission from Australia’s Right To Know.

publisher published lawfully at the time.¹⁷ This issue is discussed further later in this paper, in relation to the defence of innocent dissemination and safe harbour provisions.

- 2.14 Submissions to the NSW Review from Australia's Right To Know and the Law Council of Australia also noted that permitting actions to be commenced potentially years after first publication may also raise evidentiary difficulties.¹⁸ If actions are effectively allowed to be brought years after first publication, evidence relevant to both the plaintiff and the defendant may have been lost or destroyed in the interim, which may potentially adversely affect either or both parties' prospects.
- 2.15 Some other jurisdictions, including several US states, Ireland and the UK, have adopted a single publication rule. For example, section 8 of the *Defamation Act 2013* (UK) has the effect that the one-year limitation period (as with National Uniform Defamation Law jurisdictions, subject to extension) commences on the date of first publication by a given publisher. Any cause of action for subsequent publications by that publisher is treated as having accrued on the date of the first publication, unless the subsequent publication is materially different.
- 2.16 In the digital age, the notion of a limitation period running from the date of download is problematic and there are arguments on both sides. On the one hand, it means that the limitation period is effectively nullified while the material remains on the internet. Publishers who released material years ago may remain liable even though no issues were raised at the time of original publication and the material is rarely accessed. On the other hand, unlike hard copy material stored in libraries or archives, the material on the internet is more readily accessed by search engines, and may continue to do damage into the future. In balancing these arguments, it should be kept in mind that damages in defamation proceedings are awarded for all probable damage, past and future, caused by the publication.¹⁹

Question 3

- (a) Should the Model Defamation Provisions be amended to include a 'single publication rule'?
- (b) If the single publication rule is supported:
- (i) should the time limit that operates in relation to the first publication of the matter be the same as the limitation period for all defamation claims?
 - (ii) should the rule apply to online publications only?
 - (iii) should the rule should operate only in relation to the same publisher, similar to section 8 (single publication rule) of the *Defamation Act 2013* (UK)?

17. See: *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* Court of Justice of the European Union, C-131/12, 13 May 2014.

18. Submissions from Australia's Right To Know and the Law Council of Australia.

19. T K Tobin and M G Sexton, *Australian Defamation Law and Practice*, LexisNexis, Sydney, 2018, 21,001.

3. Resolution of civil disputes without litigation

- 3.1 Part 3 of the Model Defamation Provisions encourages parties to pursue options to resolve disputes concerning publication of potentially defamatory matters through means other than litigation. The two dispute resolution options available are offers to make amends, and apologies. Offers to make amends were raised in a number of submissions to the NSW Review,²⁰ and are discussed below.

Offers to make amends

- 3.2 Under Division 1 of Part 3 of the Model Defamation Provisions, the publisher of potentially defamatory content may make an offer to make amends to an aggrieved person, generally taken to be without prejudice. An offers to make amends cannot be made if 28 days have elapsed since the aggrieved person issues a 'concerns notice' (a written notice informing the publisher of defamatory imputations that he or she is concerned have been published),²¹ or a defence to any action brought by the aggrieved person has been served.²²
- 3.3 The required content of an offer to make amends is specified in clause 15. The required content includes offers to:
- publish a reasonable correction of the matter;
 - take reasonable steps to tell other persons to whom the material has been given that the material is or may be defamatory of the aggrieved person; and
 - pay the expenses of the aggrieved person reasonably incurred before the offer was made, and while the aggrieved person is considering the offer.
- 3.4 Offers of amends may also contain any other offers, including offers to publish an apology, and to pay compensation for any economic or non-economic loss suffered by the aggrieved person.
- 3.5 Under clause 17, if an offer to make amends is accepted by an aggrieved person and then carried out by the publisher, the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher. Under clause 18, if an offer is not accepted, it is a defence to an action for defamation against the publisher if:
- the publisher made the offer as soon as practicable after becoming aware that the relevant matter may be defamatory;
 - the publisher was, prior to trial, ready and willing to carry out the terms of the offer if accepted; and

20. Submissions from Australia's Right to Know, p. 6; Free TV Australia, p. 6; the Law Council of Australia, p. 10; the Law Society of NSW, p. 2; Mr Patrick George, including extract from 'Defamation Law in Australia', p. 575; and Associate Professor David Rolph, including 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal* 207 at 244-245.

21. Model Defamation Provisions, clause 14(1)(a).

22. Model Defamation Provisions, clause 14(1)(b).

- the offer was reasonable.
- 3.6 Clause 19 provides that evidence of any statement or admission made in connection with making or accepting an offer is not admissible as evidence in any civil or criminal proceedings, other than in connection with a provision of Division 1 of Part 3, or determining costs in defamation proceedings.
- 3.7 Most submissions to the NSW Review indicated general support for the offers of amends provisions.²³ These provisions were generally perceived as a useful tool for early settlement and keeping disputes out of the courts, potentially reducing the stress and expense of parties, and reducing stress on the justice system. Some submissions observed that media organisations have availed themselves of these provisions in a number of cases since their introduction, and have resolved a majority of complaints by the offer of amends procedure. However, a small number of submissions raised concerns with some aspects of the Division, which are discussed below.

Timeframe for making offers to make amends

- 3.8 Some stakeholders raised concerns about the timeframe within which an offer of amends must be made.
- 3.9 Clause 14(1) states that an offer of amends cannot be made if 28 days have elapsed since receipt of a concerns notice or after the delivery of a defence. Clause 18(1)(a) and (b), however, provide that it is a defence if a publisher made an offer 'as soon as practicable' after becoming aware the matter was defamatory, and was ready and willing at any time before trial to carry out the terms of the offer if accepted.
- 3.10 The Law Council of Australia submitted that the clause 18(1) defence is too restrictive, and suggested that a publisher should be able to rely as a defence on an offer to make amends made at any time within the 28 days prescribed under clause 14. The Law Council of Australia submitted that publishers reasonably need time to assess whether a matter is defamatory, as well as the strength of any potential defences, before making an offer of amends; and that if up to 28 days are taken to assess these issues, rather than making an offer at the earliest possible moment, a publisher should not be disadvantaged.
- 3.11 The NSW Bar Association submitted that the wording of clause 18 has the effect that a publisher is effectively required to make an offer as soon as it becomes aware of a matter, potentially on the day of, or even before, receiving a concerns notice or otherwise risk losing its capacity to rely on the defence. The NSW Bar Association submitted that clause 18 should be reworded to state that the offer must have been made within a reasonable time after the date the aggrieved person makes the complaint, either through a complaints notice or statement of claim (whichever is first).
- 3.12 The intersection of clauses 14 and 18 creates some potential for confusion. An offer under this Division can be made where content is or may be defamatory, effectively

23. Submissions from Australia's Right to Know, p. 6; Free TV Australia, p. 6; the Law Council of Australia, p. 10, the Law Society of NSW, p. 2; and Mr Patrick George, including extract of 'Defamation Law in Australia', p. 575. On the question of how frequently the provision is likely to be used, see submission from Associate Professor David Rolph, 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal* 207 at 244-245.

allowing offers in relation to content that is not proven to be defamatory. Clause 18 provides that a defence for failing to accept an offer can be relied on where the defendant made a reasonable offer as soon as practicable after becoming aware that a matter was or may be defamatory. Taken to its extreme, that may mean publishers should make offers the day they publish material that they are aware may be (but is not certainly) defamatory, whether or not the person subject to the material would also take that view or complain. Alternatively, despite clause 14, there is arguably potential for an offer made on the 28th day after issue of a concerns notice to be viewed as having not been made 'as soon as practicable', and thus precluding the defendant from relying on the clause 18 defence.

- 3.13 Australia's Right To Know also submitted that clause 18(1)(b) could be read as requiring a publisher to be 'ready, willing and able' to carry out the terms of the offer at all times from the date of offer up to the date of a trial's commencement. This is not consistent with the view taken in *Bushara v Nobananbas Pty Ltd*, in which Justice Nicholas rejected the argument that the words 'at any time' meant that the offer must have been held open until the trial to be valid for the purposes of the defence.²⁴ Other courts have found that an offer to make amends may be able to be relied upon even if it was only open for a fixed term of reasonable duration.²⁵ However, Basten JA in *Nationwide News Pty Ltd v Vass* [2018] NSWCA 259 stated '...there is, however, a real question as to whether the publisher could rely upon an offer made for a limited period, ceasing well before the date of the trial, if it were ready and willing to carry out the terms of the offer only during that period.'
- 3.14 This may leave some uncertainty about how clause 18(1)(b) is to be interpreted, and the required duration for an offer.
- 3.15 Further, stakeholders have subsequently raised concerns about clause 16(1) of the Model Defamation Provisions, which provides that an offer to make amends may be withdrawn before it is accepted by notice in writing given to the aggrieved person. Some stakeholders have suggested amendments to make it clear that withdrawing an offer to make amends in writing is not the only way to terminate the offer, and that it may also be terminated if the offer is expressly or impliedly rejected by a plaintiff (e.g. by making a counter offer or commencing proceedings).
- 3.16 *Nationwide News Pty Ltd v Vass*²⁶ involved notices of amends expressed to 'remain open to be accepted until commencement of the trial, unless withdrawn in writing'. After receiving a concerns notice from the plaintiff (Mr Vass), the defendant (Nationwide) sent an offer to make amends that did not include an offer to pay damages. The plaintiff responded that this offer was not reasonable and then made an offer of compromise pursuant to the Uniform Civil Procedures Rules (NSW). The defendant withdrew their offer to make amends in writing, and made a second offer of amends that included an offer to pay damages. The plaintiff then made another offer of compromise. Six months after the offer had been made, the plaintiff sent another offer of compromise pursuant to the Uniform Civil Procedure Rules (NSW). Nine months after the second offer of amends had been made (five weeks prior to trial) the plaintiff wrote to the defendant accepting the second offer of amends. The defendant disputed that the offer remained open but the NSW Court of Appeal held the offer had been validly accepted. This case was complicated by the statement in the offer of amends that it remained open until the commencement of the trial

24. *Bushara v Nobananbas Pty Ltd* [2012] NSWSC 63 at [10]-[14].

25. *Zoef v Nationwide News Pty Ltd* [2016] NSWCA 283; *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175.

26. [2018] NSWCA 259.

unless withdrawn in writing. McColl JA did, however, indicate that she found that the legislature did not intend the amends provisions to be construed by reference to ordinary contractual principles.

- 3.17 This case has led some stakeholders to suggest that the Model Defamation Provisions should be amended to clarify that the withdrawal of an offer to make amends is not the only way to terminate the offer, that it may also be terminated by being rejected by the plaintiff, either expressly or impliedly (for example by making a counter offer or commencing proceedings), and that this does not deny a defendant a defence under clause 18.

Question 4

- (a) Should the Model Defamation Provisions be amended to clarify how clauses 14 (when offer to make amends may be made) and 18 (effect of failure to accept reasonable offer to make amends) interact, and, particularly, how the requirement that an offer be made 'as soon as practicable' under clause 18 should be applied?
- (b) Should the Model Defamation Provisions be amended to clarify clause 18(1)(b) and how long should an offer of amends remain open for in order for it to be able to be relied upon as a defence, and if so, how?
- (c) Should the Model Defamation Provisions be amended to clarify that the withdrawal of an offer to make amends by the offeror is not the only way to terminate an offer to make amends, that it may also be terminated by being rejected by the plaintiff, either expressly or impliedly (for example, by making a counter offer or commencing proceedings), and that this does not deny a defendant a defence under clause 18?

Offers to amend and jury prejudice

- 3.18 The Law Council of Australia raised concerns during the NSW Review that clauses 15, 18 and 19 may create potential for jury prejudice. This is because clause 18 allows a reasonable, unaccepted offer to publish a correction under clause 15 to be relied on in defence to an action for defamation. The Council argued that defendants may be discouraged from relying on the offer of amends as a defence for fear that it may affect the success of any other defences (for example that the statement was not defamatory). Clause 19 attempts to remedy the situation by providing that evidence of a statement of admission made in connection with an offer is not admissible. However, the Law Council of Australia expressed concern that this 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.
- 3.19 The Law Council of Australia suggested that this undermines the intent of the provision to encourage offers, and suggested that a jury be required to return a verdict on all other issues before the offer to make amends defence is put before them. The defendant would need to put the plaintiff on notice of the defendant's intention to rely on this defence.
- 3.20 However, consideration should be given to the consequences of such a multi-stage approach and whether it could protract court proceedings.

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?

Other issues relating to offers to make amends

3.21 Stakeholders have subsequently raised other concerns about the offers to make amends provisions, including:

- There is no requirement for an aggrieved person to list the URL of the alleged defamatory material in a concerns notice (a concerns notice is a notice in writing that informs the publisher of the imputations of concern – clause 14(2))
- Although clause 15 does not require an offer to make amends to include an apology, some stakeholders have submitted that plaintiff lawyers often assert that a correction which does not include an apology is not a ‘reasonable’ offer pursuant to clause 18(1). In the second reading speech for the *Defamation Act 2005* (NSW), the then NSW Attorney General stated:

“... the publication of an apology will no longer be a mandatory component of an offer of amends. This should encourage more publishers to use the ‘offer of amends’ procedure, particularly where a publisher believes that the matter published was both truthful and fair but wishes to settle the case without an expensive hearing. While an apology will be an optional component of a valid offer of amends, a published apology will still be relevant to a court’s determination as to whether an offer rejected by a complainant was reasonable.”

- Clause 14(1)(a) provides for 28 days for a defendant to assess a claim and determine whether to make an offer of amends. However, some stakeholders assert that plaintiff lawyers often commence proceedings before this time period has elapsed.

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?

4. The role of judicial officers and juries in defamation proceedings

- 4.1 Division 1 of Part 4 of the Model Defamation Provisions deals with the roles of judges and juries, which have always been significant issues in defamation law.
- 4.2 Prior to the National Uniform Defamation Law's introduction, there was a lack of uniformity in relation to the respective roles of juries and judges in defamation proceedings. Having abolished juries in civil litigation, defamation cases in the ACT and South Australia were heard by judge alone, and Northern Territory cases were also heard by judge alone unless ordered otherwise. In Queensland, Victoria, Tasmania and Western Australia, juries determined defences, damages and liability. In NSW, juries considered whether matters carried pleaded imputations, were defamatory and were published by the defendant, while judges determined defences and damages.
- 4.3 The National Uniform Defamation Law has reduced, but not fully overcome, these inconsistencies across Australian jurisdictions. Juries continue to have no role in any ACT, South Australian or Northern Territory defamation cases.
- 4.4 In the remaining jurisdictions, defamation proceedings may be tried by jury on election by either party, unless the court orders otherwise.²⁷
- 4.5 In jurisdictions with jury trials, a court may make an order under clause 21(3) that a trial not be by jury, despite an election for trial by jury by one of the parties, where the trial requires a prolonged examination or records, or the trial involves technical, scientific or other issues that cannot be conveniently considered and resolved by a jury.²⁸ The NSW Court of Appeal has held that a clause 21(3) order should only be made on the application of a party, not on the court's own motion.²⁹ Where a case is tried by jury, the jury must decide issues of fact concerning whether the defendant published defamatory matter and whether any defences are established (except for some aspects of statutory qualified privilege),³⁰ with the judge retaining responsibility for issues of law.³¹

Concerns about the current situation

- 4.6 Several submissions to the NSW Review suggested that, notwithstanding increased harmonisation, the remaining inconsistencies in the role of juries in different National Uniform Defamation Law jurisdictions undermine the Model Defamation Provision's objective of promoting uniformity, and may not fully address issues of forum shopping.³²

27. Model Defamation Provisions, clause 21.

28. Model Defamation Provisions, clause 21(3). See also *Mallick v McGeown* [2008] NSWSC 129.

29. *Channel Seven Sydney Pty Ltd v Senator Concetta Fierravanti-Wells* [2011] NSWCA 246.

30. Model Defamation Provisions, clause 22.

31. Model Defamation Provisions, clause 22(5)(b).

32. Submissions from the Law Council of Australia, p. 5; and Associate Professor David Rolph, including 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal* 207 at 225-226.

- 4.7 The Law Council of Australia observed that actions that arguably should have been brought in NSW were being brought in the ACT, presumably on the basis that plaintiffs perceive their prospects of success as being greater before a judge sitting alone, and to avoid a defendant electing trial by jury.³³
- 4.8 The question of whether defamation matters should be heard by judges, juries or both was a contentious issue in the development of the Model Defamation Provisions, and strong views continue to be held. This reflects the differing positions of jurisdictions.
- 4.9 This may remain an area where jurisdictions differ. However, the former Chief Judge of the NSW District Court, the Hon Justice Blanch AM, has proposed that clause 21(3) (which is provided for jurisdictions that wish to have jury trials) be amended to allow courts to reject applications for jury trials of its own motion where they are satisfied that to do so would be in the interests of justice in all the circumstances.³⁴ This would restrict the number of jury trials, but may have some advantages in terms of case management and efficient operation of the court. However, it would represent a significant departure from the general law of civil procedure. It is important to note, however, that use of juries in civil trials other than for defamation is now extremely rare.

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)?

Constitutional inconsistency

- 4.10 In *Wing v Fairfax Media Publications Media Pty Limited* [2017] FCAFC 191 the Federal Court found that sections 21 and 22 of the *Defamation Act 2005* (NSW) are inconsistent with sections 39 and 40 of the *Federal Court of Australia Act 1976*. In accordance with section 109 of the Australian Constitution, this has the effect that, to the extent that the State law alters, impairs or detracts from the operation of the *Federal Court of Australia Act 1976*, the State Act is inconsistent and inoperative.
- 4.11 Clauses 21 and 22 of the Model Defamation Provisions have been provided for, and adopted by, those jurisdictions that have opted to allow jury trials for defamation proceedings. Clause 21 provides that a plaintiff or defendant in a defamation proceeding may elect for the proceedings to be tried by jury. Clause 22 outlines the division of functions between a jury and a judge, and establishes that the jury is to determine whether the defendant has published defamatory material, and whether any defences are established, but that damages are to be determined by the judge.

33. Submission from the Law Council of Australia, p. 5.

34. Submission from the Hon Justice Blanch, pp. 1-2. For other submissions concerning a reduced role for juries, or greater judicial discretion regarding their use, see submissions from the Hon. Justice McClellan; and Mr Patrick George, including 'Defamation Law in Australia' extract, pp. 574-5.

- 4.12 Under section 39 of the *Federal Court of Australia Act 1976*, civil trials are conducted by a judge alone, unless the court orders otherwise, while section 40 provides that the Court may direct the jury to consider any issue, including damages.
- 4.13 In *Wing v Fairfax Media Publications Media Pty Limited* [2017] FCAFC 191 the Federal Court found that there is direct inconsistency between sections 39 and 40 of the *Federal Court of Australia Act 1976* and sections 21 and 22 of the NSW Act. As a result, sections 21 and 22 are not binding on the Federal Court.
- 4.14 It is important to note that if a case involving clauses 21 and 22 of the Model Defamation Provisions were heard before a state court, the *Federal Court of Australia Act 1976* would not apply, and there would therefore be no operative 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 or – depending on the answer to question 7 – on an application by the opposing party or on its own motion?

5. Defences

- 5.1 Division 2 of Part 4 of the Model Defamation Provisions deals with defences to defamation claims. This is one of the more significant parts of the Model Defamation Provisions and a number of defences are considered below.

Defence of contextual truth

- 5.2 A publication might include several distinct allegations. Under the common law of defamation, a plaintiff can select which allegations to raise in a defamation action. They are not required to complain about all of the allegations in the publication. This means that a plaintiff can complain about minor (but false) allegations in the publication and not put the major (but true) allegations before the court. Previously, under the common law, a defendant was not permitted to argue that the publication was substantially true, or that the minor, false claims were justified by the major, true claims.
- 5.3 Clause 26 of the Model Defamation Provisions addressed this issue by providing the defence of 'contextual truth'. The contextual truth defence is designed to prevent plaintiffs from taking out of context relatively minor defamatory imputations within a publication that otherwise contains content that is substantially true.
- 5.4 Clause 26 was designed to be modelled on section 16 of the *Defamation Act 1974* (NSW), however, the defence as articulated under clause 26 has a much more limited application.
- 5.5 Section 16 of the *Defamation Act 1974* (NSW) provided that it was a defence to a claim that a publication was defamatory if the contextual imputations (that is, the content that contextualises the defamatory imputations) are substantially true, and the plaintiff's reputation is not further damaged by the defamatory imputation. Section 16 allowed the defendant to raise an imputation that the plaintiff had not pleaded, as well as to argue that an imputation pleaded by the plaintiff was true (a practice known as 'pleading back'). This allowed the judge or jury to balance the effect of true and false imputations in a publication.
- 5.6 Although intended to mirror former section 16, clause 26 as drafted provides that a defendant can only plead the substantial truth of an imputation that is 'in addition to' the defamatory imputations that are specifically complained of by a plaintiff. This has the effect that, if a plaintiff claims that all imputations in a given context are defamatory (even if some are substantially true), there will be no substantially true imputations left for a defendant to rely on in their defence. More critically, if a defendant seeks to rely on substantially true imputations that have not been pleaded by a plaintiff, a plaintiff can amend their statement of claim to also adopt those imputations, thus depriving the defendant of the full effect of the defence.
- 5.7 All of the submissions received in the NSW Review that discussed clause 26 suggested that the current drafting of the contextual truth defence is not achieving its intended objectives and that it should be amended to better reflect the content of the former section 16.³⁵ The Law Council of Australia, for example, noted that the

35. Submissions from Australia's Right To Know, pp. 14-18; Free TV Australia, pp. 1-2; Joint Media Organisations, pp. 3-4; the Law Council of Australia, pp. 14-18; the NSW Bar Association, pp. 27-29.

drafting encourages a plaintiff either to plead true imputations at the outset, or amend their statement of claim after a defence of contextual truth has been pleaded to include the defendant's imputations. The defendant will then only be able to rely on the truth of the pleaded imputations in partial justification of the claim, rather than to support a contextual truth defence, and will be unable to defeat the plaintiff's cause of action in its entirety. This potentially enables a plaintiff to recover damages for minor imputations even where the defendant could otherwise have demonstrated that a more serious imputation was true and the minor imputation would not further harm the plaintiff's reputation.³⁶

- 5.8 The current wording of clause 26 appears to have clear unintended consequences.

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?

Defences for publication of public documents and fair summaries

- 5.9 Clause 28 of the Model Defamation Provisions establishes the defence for publication of public documents. It is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in:
- (a) a public document or a fair copy of a public document; or
 - (b) a fair summary of, or a fair extract from, a public document.
- 5.10 Public documents include reports or papers of parliamentary bodies, judgments and orders of courts or tribunals, documents issued by the government for public information, and documents held by an Australian jurisdiction, statutory authority or court or under legislation that are open to inspection.³⁷
- 5.11 The 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'.³⁸
- 5.12 Clause 29 establishes the defence of fair report of proceedings of public concern. It is a defence to the publication of defamatory material 'if the defendant proves the matter was, or was contained in, a fair report of any proceedings of public concern'.
- 5.13 Proceedings of public concern include proceedings of parliament, public proceedings of a court or tribunal, and proceedings of government inquiries.
- 5.14 The Joint Media Organisations submitted to the NSW Review that both the definition of 'public documents' for the purposes of clause 28, and the definition of 'proceedings of public concern' for the purposes of clause 29, should be expanded to replicate the *Defamation Act 2013* (UK) and cover the following:

36. See for example, *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 85 and *Fairfax Media Publications v Zeccola* [2015] NSWCA 329.

37. Model Defamation Provisions, clause 28(4).

38. Model Defamation Provisions, clause 28(3).

- documents issued or published by, and presentations at, a scientific or academic conference, and
 - press conferences held to discuss matters of public interest.
- 5.15 Sections 6 and 7 of the *Defamation Act 2013* (UK) were intended to ensure that scientists and academics can engage in vigorous and uninhibited debate, and to address the ‘convincing evidence that defamation law is being used to silence responsible members of the medical and scientific community in order to protect products and profits’.³⁹
- Section 6(1) to 6(3) provides that statements relating to scientific or academic matters that have been subject to independent expert review and are published in a scientific or academic journal are ‘privileged’ and cannot be subject to defamation proceedings.
 - Section 6(4) to 6(5) provides that assessments of the scientific or academic merit of privileged statements are also privileged if they were written by one or more of independent reviewers in the course of the review of the original privileged statement, as are publications of fair and accurate copies, extracts or summaries of privileged statements or their assessment.⁴⁰
 - Section 7 provides that ‘a fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest’ is subject to ‘qualified privilege’.
- 5.16 Robust, thorough and critical evaluation is essential to scientific and academic work, and members of the scientific and academic community should be free to conduct their analysis and critiques without fear of litigation. However, the other general defences under the Model Defamation Provisions already provide significant protection from defamation for matters published in peer-reviewed scientific or academic articles. Nonetheless, given the importance of the issues and the developments in the UK, further consideration should be given to this issue.

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?

Defence of qualified privilege

- 5.17 The qualified privilege defence recognises that there are limited circumstances where a person has a legal, moral or social duty to communicate information to a recipient who has a corresponding interest in receiving it - for example, giving a job reference, answering police inquiries, or parent-teacher interviews.

39. Joint Committee on the Draft Defamation Bill, *First Report Draft Defamation Bill* (2011), p. 47.

40. *Defamation Act 2013* (UK), section 6(5).

- 5.18 Historically, the qualified privilege defence has had limited application, as it could generally not be relied on by media defendants whose publications are to a broad and untargeted audience.⁴¹
- 5.19 Clause 30 of the Model Defamation Provisions captures the defence of qualified privilege. It applies to the publication of material where:
- the recipient has an interest or apparent interest in having information on some subject;
 - the matter is published to the recipient in the course of giving to the recipient information on that subject; and
 - the conduct of the defendant in publishing that matter is reasonable in the circumstances.
- 5.20 Clause 30(3) provides a non-exhaustive list of factors which the court may take into account when assessing whether the defendant's conduct was reasonable. These are derived from the list set out by Lord Nicholls in the United Kingdom House of Lords decision in *Reynolds v Times Newspapers Ltd* (**Reynolds**).⁴² These include:
- the extent to which the matter published was in the public interest and/or relates to the performance of the public functions or activities of the plaintiff;
 - the seriousness of the defamatory imputations;
 - the extent to which the matter published distinguishes between suspicion, allegation and proven fact;
 - whether there was public interest in expeditious publishing;
 - whether reasonable steps were taken to publish both 'sides' of a story; and
 - the steps taken to verify the published matter.
- 5.21 Since the introduction of the uniform scheme, the statutory qualified privilege defence has been successfully established on a number of occasions, although the majority of defendants were not media organisations and the defamatory material was not published to a wide audience.⁴³
- 5.22 Media stakeholders submitted to the NSW Review that an overly restrictive approach has been taken to the clause 30 reasonableness test.⁴⁴ Australia's Right To Know submitted that the high threshold demanded by the reasonableness test renders the qualified privilege defence of little use. Australia's Right To Know also argued that the defence has 'put Australian media and members of the public who publish material about matters of public concern at much greater risk than their US

41. *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at [263]-[264] (McHugh J).

42. *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

43. See for example, *Chetwynd v Armidale Dumaresque Council* [2010] NSWSC 690; *Haddon v Forsyth* [2011] NSWSC 123; and *O'Hara v Sims* [2009] QCA 186.

44. Submissions from Australia's Right To Know, pp. 18-22; Free TV Australia, pp. 2-3; and Joint Media Organisations, p. 4. See also concerns raised in submission from the Law Council of Australia, p. 21.

and UK counterparts, and [this] has made Australia less attractive as a home for content businesses.¹⁴⁵

- 5.23 Stakeholders, particularly from the media, indicated support for the more flexible approach adopted in the UK.⁴⁶ The *Defamation Act 2013* (UK) replaces the Reynolds defence with a statutory defence of ‘publication on a matter of public interest’. Under section 4 of that Act, a defendant must show that, firstly, the statement was on a matter of public interest, and, secondly, that the defendant reasonably believed that publishing the particular statement was in the public interest.⁴⁷ In determining ‘reasonable belief’, the court is to have regard to all the circumstances of the case and ‘make such allowance for editorial judgement as it considers appropriate’.⁴⁸ While there is no express requirement for the defendant to demonstrate that they met a particular standard of responsible journalism, or that they satisfied any or all of the Reynolds factors, these may be considered.
- 5.24 Australia’s Right To Know and Free TV Australia submitted that the UK approach should be adopted in Australia, and that the Model Defamation Provisions should be changed to reflect this. The NSW Bar Association and the Law Council of Australia considered that the statutory qualified privilege defence is well adapted to achieving the objects of the Model Defamation Provisions. The Law Society did consider, however, that the clause 30(3) factors could possibly be misapplied as ‘hurdles’ for a publisher to overcome, rather than as a non-exhaustive list of indicators as to the reasonableness of their conduct. However, it considered this issue would be best addressed through a wider review involving all National Uniform Defamation Law jurisdictions, once a greater body of authorities is established.
- 5.25 There is a question of whether there is sufficient evidence to demonstrate that change is necessary. However, the Defamation Working Party wishes to consider this issue in light of the authorities in other Australian jurisdictions and the emerging UK experience.
- 5.26 At common law, the question of qualified privilege is an issue of law determined by a judge (although based on the facts as they are found by the jury). However, clause 22(2) of the Model Defamation Provisions states that in defamation proceedings tried by a jury, the jury is to determine whether a defendant has published defamatory matter about a plaintiff and, if so, whether any defence is established. This has created some confusion as to whether clause 22 requires any issue relevant to the defence of qualified privilege to be determined by the jury.
- 5.27 Australia’s Right To Know indicated during the NSW Review that questions under clause 30 should be determined by a jury or, at a minimum, the issue of reasonableness in clause 30(1)(c) should be an issue for the jury. This may, however, not be appropriate as the issue of whether material is privileged is a question of law.
- 5.28 In *Davis v Nationwide News Pty Ltd*,⁴⁹ Justice Peter McClellan AM held that questions arising under section 30 of the *Defamation Act 2005* (NSW) are to be

45. See submission from Australia’s Right To Know, pp. 20-21.

46. Submissions from Australia’s Right to Know, pp. 19-21; Dr Joseph Fernandez, pp. 41-45; Free TV Australia, pp. 2-3; Mr Patrick George, including ‘Defamation Law in Australia’ extract, p. 574; Joint Media Organisations, p. 4; and Associate Professor David Rolph, including ‘A critique of the national, uniform defamation laws’ (2008) 16 *Torts Law Journal* 207 at 232-235.

47. *Defamation Act 2013* (UK), section 4(1).

48. *Defamation Act 2013* (UK), section 4.

49. *Davis v Nationwide News Pty Ltd* [2008] NSWSC 669.

determined by a judge. Justice McClellan noted that section 22(5) expressly states that:

“nothing in this section... requires or permits a jury to determine any issue that, at general law, is an issue to be determined by a judicial officer”.⁵⁰

- 5.29 In the more recent case of *Daniels v State of New South Wales (No 6)*, Justice McCallum expressed doubt about this conclusion.⁵¹ Justice McCallum held that, where there is a dispute about 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), determining reasonableness would be a question for the jury in accordance with clause 22(2).⁵² In *Gayle v Fairfax Media Publications Pty Ltd (No 2)*⁵³, however, Justice McCallum abandoned this view and held that the question of reasonableness should be determined by the trial judge, noting the decisions of the Victorian Court of Appeal in *Herald & Weekly Times Ltd v Popovic*⁵⁴ and Kaye J of the Victorian Supreme Court in *Belbin v Lower Murray Urban and Rural Water Corporation*.⁵⁵
- 5.30 There appears to remain some doubt as to the division of functions between judges and juries under clause 30, which raises the question of whether there should be an amendment to clarify the clause’s application.

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?

Defence of honest opinion

- 5.31 Clause 31 of the Model Defamation Provisions sets out the defence of honest opinion, whereby it is a defence to the publication of defamatory matter if the defendant proves that:
- the matter was an expression of the defendant’s opinion (or the defendant’s employee’s or agent’s opinion, or the opinion of a commentator published by the defendant), rather than a statement of fact;
 - the opinion related to a matter of public interest; and

50. *Davis v Nationwide News Pty Ltd* [2008] NSWSC 669 at [4].

51. *Daniels v State of New South Wales (No 6)* [2015] NSWSC 1074 at [28].

52. *Daniels v State of New South Wales (No 6)* [2015] NSWSC 1074 at [34].

53. *Gayle v Fairfax Media Publications Pty Ltd (No 2)* [2018] NSWSC 1838.

54. *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1.

55. *Belbin v Lower Murray Urban and Rural Water Corporation* [2012] VSC 535.

- the opinion is based on ‘proper material’.
- 5.32 This defence can be pleaded concurrently with the common law defence of ‘fair comment’. To satisfy the common law defence, the defendant must prove that the defamatory material was a statement of comment or opinion rather than a statement of fact; the subject matter was in the public interest; and the comment was fair (that is, it was honestly held, even if obstinate, foolish, offensive or prejudiced). The ‘fairness’ of the comment is determined with reference to what an honest person would express on the basis of the generally accessible and sufficiently linked facts, which must be either well known or specified in a publication.⁵⁶
- 5.33 The fair comment and honest opinion defences are of great significance to the media, as they enable open discussion and allow considerable latitude to those who express their opinion on facts. Among other things, they allow the publication of restaurant, art, literary and concert reviews, review and comment on sporting events, and comment on public affairs.
- 5.34 Stakeholder submissions to the NSW Review, and academic commentary, suggest there is a lack of clarity as to when an opinion relates to a matter of ‘public interest’, and what constitutes ‘proper material’ upon which such an opinion must be based.⁵⁷
- 5.35 Clause 31(5) defines ‘proper material’ as material that is: substantially true; ‘published on an occasion of absolute or qualified privilege’; or published on an occasion attracting the defence under clause 28 or 29. However, this does not make clear whether the proper material must be published in the same publication as the purportedly defamatory material.
- 5.36 Several stakeholders have argued that, on a literal reading, the defamatory matter would not need to appear in the same publication as material demonstrating the defamatory matter’s ‘substantial truth’, or within a publication subject to privilege.⁵⁸ However, Victorian case law has provided some guidance on the application of this provision of the Model Defamation Provisions. In *The Herald & Weekly Times Pty Ltd v Buckley* (**Buckley**), the Victorian Court of Appeal held that there is nothing in the National Uniform Defamation Law to suggest that the statutory defence should be expanded to include opinions based on facts that are not specified in the purportedly defamatory publication, or that are generally ‘well known’ but not directly referenced.⁵⁹
- 5.37 Some submissions to the NSW Review suggested that the Court’s finding in *Buckley* restricted the defence’s application beyond the objectives of the Model Defamation Provisions.⁶⁰ However, that conclusion is not clear. Limiting use of the defence to cases where purportedly defamatory matter is contextualised with ‘proper material’ demonstrating its substantial truth is consistent with the Model Defamation Provision’s objectives. It is in the public interest, and appropriate in order to ensure people’s reputations are not unduly damaged, for statements of ‘opinion’ that may adversely affect a person’s reputation to be contextualised by

56. *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at [253] (Gleeson CJ).

57. Submissions from Australia’s Right to Know, pp. 23-27; Free TV Australia, pp. 3-4; the NSW Bar Association, pp. 33-35; and Associate Professor David Rolph, including ‘A critique of the national, uniform defamation laws’ (2008) 16 *Torts Law Journal* 207 at 235-237.

58. Submissions from Australia’s Right to Know, pp. 23-24; Free TV Australia, pp. 3-4; Joint Media Organisations, pp. 4-5; and the Law Council of Australia, p. 19.

59. *The Herald & Weekly Times Pty Ltd v Buckley* (2009) 21 VR 661 at [84].

60. Submissions from Australia’s Right to Know at p. 25; Free TV Australia pp. 3-4; and the Law Council of Australia, p. 19.

supporting material that evidences the basis upon which the opinion is honestly held. Without this requirement, it would arguably be possible for a defamatory matter to be published without any context, and material indicative of its substantial truth to be found after the fact, and only upon a plaintiff bringing a cause of action.

Digital publications

- 5.38 However, some submissions raised concern that the clause 31 requirement that an opinion be based on proper material does not reflect the way opinions are typically communicated or ‘published’ online.⁶¹ In the internet age, people often ‘publish’ opinions on blogs, social media sites, or in text message or tweets, including in response to ‘group chats’ or preceding discussions, without detailed contextualising material. Australia’s Right To Know noted that to require citizens to check whether their opinions are based on ‘sustainably true’ facts, and represent those facts in their online publications, is impractical and unworkable. As Justice Kirby (in relation to the ‘fair comment’ defence, though relevant with respect to honest opinion) observed in *Channel Seven Adelaide Pty Ltd v Manock*, ‘[m]any of the new electronic technologies by which publications are now made... place a high premium on brevity’.⁶² Justice Kirby considered that:

“In the circumstances of abbreviated electronic publications, it is therefore not unreasonable to treat as sufficiently ‘identified’ facts that are referred to in the matter complained of which the recipient can conveniently and with reasonable promptness access. Such a principle would apply fairly... to facts conveniently and readily accessible in interactive forms of electronic communication for which, likewise, the fair comment defence continues to play an important role in protecting free expression.”⁶³

- 5.39 Many of the ways in which people now communicate online include quick, real-time sharing of opinions and published chat ‘conversations’ that differ substantially from traditional forms of publication. Consideration of the suitability and application of the honest opinion defence to digital publications is warranted.

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?

Joinder of journalists to proceedings against media publishers

- 5.40 Clause 31 provides that it is a defence to the publication of defamatory matter if the defendant proves that:
- the matter was the defendant’s employee’s or agent’s opinion (subclause (2)); or
 - the matter was the opinion of a commentator published by the defendant (subclause (3)); and

61. Submissions from Australia’s Right to Know, p. 23; and Free TV Australia, p. 3.

62. *Channel 7 Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at [160] (Kirby J).

63. *Channel 7 Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at [165] (Kirby J).

- the opinion related to a matter of public interest, and was based on proper material.
- 5.41 Under clause 31(4), the clause 31(2) and 31(3) defences can only be defeated if the plaintiff can show (respectively) that the defendant did not believe that the employee or agent honestly held the opinion at the time of publication, or that the defendant had reasonable grounds to believe that the commentator did not honestly hold the opinion at the time of publication.
- 5.42 A number of stakeholders to the NSW Review indicated that clause 31(2) and 31(3) could lead to an increase in defamation cases against individual journalists, rather than their employers, or a joinder of journalists to cases against their employers.⁶⁴ The Law Council of Australia, for example, submitted that plaintiffs could be inclined to sue journalists personally, rather than their employers, to avoid the risk that their employers can establish a defence under clause 31(2) that cannot be defeated by clause 31(4). The NSW Bar Association suggested the defence as currently worded creates unnecessary complexity, as different defendants will have differing levels of legal responsibility in relation to a given publication.
- 5.43 A number of submissions suggested that further consideration of the wording of clause 31(2) and (3) defences to prevent claims being made against journalists personally, or the joinder of journalists as parties to proceedings, is necessary. Evidence as to whether this has in fact occurred was not presented to the NSW Review.

Question 13

Should clause 31(4) of the Model Defamation Provisions (which includes 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?

Defence of triviality

- 5.44 Clause 33 provides that it is a defence to the publication of defamatory matter if the defendant proves that the circumstances of the publication were such that the plaintiff was unlikely to sustain harm. This defence serves a useful purpose central to the objects of the Model Defamation Provisions (balancing freedom of expression against protection of people's reputations from harm), by recognising that critical commentary of trivial implications can be a legitimate form of expression. The defence operates to provide a protection for those exercising freedom of expression in a way that is unlikely to harm another person's reputation, and its availability potentially deters claimants from pursuing trivial claims.
- 5.45 Although the triviality defence is generally recognised as useful and necessary, particularly in the digital era, two issues were raised by stakeholders in the NSW Review. First, the defence's focus on 'the circumstances of publication' has potential to limit its application to publications of limited circulation, rather than limited

64. Submissions from Mr Patrick George, including 'Defamation Law in Australia' extract, p. 574; the Law Council of Australia, p. 20; and the NSW Bar Association, pp. 33-35.

readership.⁶⁵ This may render the defence of limited use in relation to online publications (which may not be widely read, but may be widely circulated).⁶⁶ Second, some stakeholders suggested that the law of defamation would be better served if the concept of triviality were a threshold for successful claims, rather than a defence (that is, if plaintiffs were required to establish that a defamatory statement was not trivial, rather than a defendant having to prove it was trivial).⁶⁷ Arguably, reversing the onus in this respect would deter trivial, vexatious or spurious claims and better protect freedom of expression, as well as reduce strain on the justice system. However, consideration would need to be given to how this would interact with other principles and presumptions. For instance, currently damage to reputation is presumed once the tribunal of fact has found there to be the publication of defamatory imputations.⁶⁸

- 5.46 Some overseas jurisdictions have decided to manage trivial actions by introducing a threshold of harm, placing the onus on the claimant to establish that a defamatory matter materially affected his or her reputation. Section 1(1) in the *Defamation Act 2013* (UK), for example, provides that ‘a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant’.⁶⁹ Recent case law in New Zealand has shown support for introduction of a ‘minimum harm’ threshold, mirroring the UK approach.⁷⁰ The UK approach arguably reduces the prospect of spurious claims, deters prospective claimants threatening defamation to discourage people making legitimate publications, and ensures that only matters that have caused a demonstrable harm to claimants can be pursued through the courts. This approach may disadvantage claimants, however, by requiring them to establish a demonstrable ‘serious harm’ at the outset, whether or not the publication was indeed defamatory, and whether or not harm was caused.
- 5.47 In Australia, trivial claims have also been managed by the courts through the application of proportionality reasoning. In *Bleyer v Google Inc* [2014] NSWSC 897, for example, Justice McCallum indicated that it would be open to NSW courts to stay or dismiss proceedings if there was a sufficient disproportionality between the cost of the proceedings and the vindication sought by the plaintiff. This finding was based on section 60 of the *Civil Procedure Act 2005* (NSW), which provides that ‘the practice and procedure of the court should be implemented with the object of resolving the issues in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute’. This option may not be open to courts of other jurisdictions, such as Queensland and the ACT, which do not have equivalent provisions in their civil procedure laws.
- 5.48 The defence of triviality serves an important function. However, as discussed below, the approaches of other jurisdictions, such as the UK, may also offer value in deterring trivial claims. Consideration should be given to whether a threshold test,

65. Submission from Associate Professor David Rolph, including ‘A critique of the national, uniform defamation laws’ (2008) 16 *Torts Law Journal* 207, p. 239.

66. See for example, *Stanton v Fell* [2013] NSWSC 1001; *Cao v Liu* [2013] NSWDC 8.

67. Submissions from Communications Alliance, p. 12; and Joint Media Organisations, p. 2. See also discussion of removing the presumption of harm and reversing the onus of proof in the submissions from Dr Joseph Fernandez; and Associate Professor David Rolph, including ‘A critique of the national, uniform defamation laws’ (2008) 16 *Torts Law Journal* 207, p. 214.

68. The common law distinction between slander and libel has been abolished by statute.

69. The Supreme Court of the United Kingdom will consider the ‘serious harm’ test in *Lachaux v Independent Print Limited* UKSC 2017/0175 which was heard on 13th and 14th November 2018, with a reserved decision.

70. *CPA Australia v NZICA* [2015] NZHC 1854.

rather than a defence, would offer a more efficient and effective way to manage trivial claims.

Question 14

- (a) Should a 'serious harm' or other threshold test be introduced into the Model Defamation Provisions, similar to section 1 (serious harm) of the Defamation Act 2013 (UK)?
- (b) If a serious harm test is supported:
- (i) should proportionality and other case management considerations be incorporated into the serious harm test?
 - (ii) should the defence of triviality be retained or abolished if a serious harm test is introduced?

Defence of innocent dissemination and safe harbours

5.49 Clause 32 sets out the defence of innocent dissemination. This provides that it is a defence to the publication of defamatory matter if the defendant proves that:

- it was published merely in the defendant's capacity of, or as an employee or agent of, a subordinate distributor;
- the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and
- the defendant's lack of knowledge was not due to the defendant's negligence.

5.50 For the purposes of the defence, a 'subordinate distributor' is a person who was not the first or primary distributor of the matter; was not the author or originator of the matter; and did not have any capacity to exercise editorial control over the content or publication of the matter prior to first publication. This may include:

- providers of postal and similar services;
- broadcasters of live programs;
- operators or providers of any equipment, system or service, by means of which matter is retrieved, copied, distributed or made available in electronic form; and
- operators of, or providers of access to, communications systems by which the matter is transmitted by a person over whom the operator or provider has no effective control.

The scope and utility of the existing defence

5.51 While clause 32 appears to allow internet service providers and online search engines to defend defamation claims in relation to material published or

disseminated via their systems,⁷¹ several submissions to the NSW Review indicated that its utility in this context is unclear.⁷²

- 5.52 The Law Council of Australia argued that, while internet service providers and search engines may not author or have capacity to exercise editorial control over the content of a matter, many internet service providers ‘publish’ material uploaded to their servers, which may make them ‘originators’ under clause 32(2)(b). Further, internet service providers often have usage agreements that permit them, in certain circumstances, to delete or modify content stored on their servers, with the effect that they arguably have ‘capacity to exercise editorial control’. It was argued that despite the apparent legislative intent, such characteristics mean that an internet service provider may not be able to establish that they are ‘subordinate distributors’ entitled to the benefit of the defence. The Law Council of Australia recommended that clause 32(3) be amended to make it clear that each of the categories of persons referred to in clause 32(3)(a)-(h) will automatically be ‘subordinate distributors’ for the purposes of the defence.
- 5.53 Media stakeholder submissions also drew attention to the level of editorial control that they can realistically exercise in the changing media landscape. ninemsn and the Communications Alliance submitted that, for the purposes of clause 32(1)(b), it is unclear what level of monitoring a media organisation is required to undertake to successfully establish that it neither knew nor should have known that the matter was defamatory.⁷³ ninemsn noted that:
- it has safeguards in place to help ensure content meets regulatory requirements, including requirements with respect to publication of defamatory matters;
 - its content offering includes content prepared by ninemsn, as well as by third party affiliates and general users (including comments on articles);
 - due to the volume of the material it hosts, and the speed at which it is updated, it is not feasible from a resourcing perspective to manually review all third party content for objectionable material;
 - even if networks could manually review all third party material, editorial staff are not always able to determine whether content is defamatory.⁷⁴
- 5.54 Search engines can also face difficulties in using the defence in matters involving their ‘dissemination’ of materials they have not authored and have no editorial control over.⁷⁵ For example, the Victorian Supreme Court has held that search engines cannot be held liable as ‘first’ or ‘primary’ publishers. However they can be liable as secondary publishers where they have notice of a defamatory publication and the power to stop publication, for instance by blocking the URL, but fail to do so within a reasonable time.⁷⁶

71. Submission from Associate Professor David Rolph, including ‘A critique of the national, uniform defamation laws’ (2008) 16 Torts Law Journal, p. 238.

72. Submissions from the Communications Alliance, p. 8; the Law Council of Australia pp. 21-23; and ninemsn, p. 3.

73. Submissions from Communications Alliance, p. 8; ninemsn, p. 3.

74. Submission from ninemsn, pp. 2-3.

75. See for example, *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; *Rana v Google Australia Pty Ltd* [2013] FCA 60 at [58].

76. *Truklja v Google Inc (No 5)* [2012] VSC 553; *Google Inc v Duffy* [2017] SASFC 130.

5.55 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. The Communications Alliance submitted in the NSW Review that requiring search engines to act promptly on all such requests would be a significant and potentially unmanageable administrative burden; search engine operators:

“would be forced, for economic and administrative reasons, to err on the side of blocking access to content complained of, with little or any regard to the merits of the complaint.”⁷⁷

5.56 This has significant potential to obstruct freedom of expression. The Communications Alliance also observed that a search engine operator can only block access to certain URLs, but cannot prevent access to related URLs via other search engines or by typing the URL into the browser.⁷⁸ Similarly, a takedown request would not prevent a first or primary publisher simply re-publishing the relevant material to a new URL.

5.57 Despite the logistical challenges, several overseas judgments have required internet search engines to restrict content that appears on their platforms. For example:

- the Supreme Court of Canada upheld an injunction to prevent Google from displaying websites selling a particular product that unlawfully used the plaintiff’s intellectual property on any of its search results worldwide⁷⁹ (although an injunction preventing enforcement in the US was later granted by United States District Court);⁸⁰
- the Court of Justice of the European Union held that: Google is required to remove links to web pages published by third parties where publication is incompatible with European Union’s 1995 Data Protection Directive; search engine operators are required to consider the merits of data removal requests; and citizens may escalate the matter to judicial or supervisory authorities if required;⁸¹
- the Austrian Court of Appeal ruled that, once notified of hate speech on its platform, Facebook could not claim the defence of being a mere distributor and was required to delete the offending post and all identical posts across its entire global platform.⁸²

5.58 Some countries have also passed laws to clarify search engines’ and social media companies’ obligations. For example, in 2017, Germany also passed a Network Enforcement Law that obliges social media companies to remove or block publications that violate laws against hate speech and defamation: content must be removed within 24 hours to 7 days, and companies that do not comply can face fines of millions of euros.⁸³

77. Submission from Communications Alliance, pp. 5-6.

78. Submission from Communications Alliance, p. 5.

79. *Google Inc. v. Equustek Solutions Inc.* (2017) 1 SCR 34.

80. *Google LLC v. Equustek Solutions, Inc., et al.*, No. 5:17-cv-04207-EJD, 2017 WL 5000834 (N.D. Cal. Nov. 2, 2017).

81. *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (Court of Justice of the European Union, C-131/12, 13 May 2014).

82. *Die Grünen v. Facebook Ireland Limited* [Austrian Court of Appeal], 5 R 5/17t, 5 May 2017.

83. *Beschlussempfehlung und Bericht [Resolution and Report]*, Deutscher Bundestag: Drucksache [BT] 18/13013, <http://dip21.bundestag.de/dip21/btd/18/130/1813013.pdf> (Ger.).

Safe harbour provisions and takedown processes

- 5.59 A number of submissions to the NSW Review suggested that the Model Defamation Provisions should be amended to include a specific ‘safe harbour’ provision to protect hosts and carriers of digital content from liability for content produced by third parties. The Communications Alliance and ninemsn, for example, submitted that lack of clarity around the scope of liability for digital content hosts and online intermediaries in relation to content posted by third parties has led to Australian media and online hosts taking a conservative approach to third party content.⁸⁴ This may be stymying freedom of expression, encouraging Australian users to look to overseas companies for information and placing Australian businesses at a disadvantage in comparison with others competing in the digital economies and operating in less stringent regulatory environments.
- 5.60 Some other jurisdictions have taken an arguably more lenient approach to ‘safe harbours’. Section 5 of the *Defamation Act 2013* (UK), for instance, provides that it is a defence for the operator of a website to show that it was not the operator who posted the defamatory matter on the relevant website. The defence is defeated if the claimant can show that it was not possible for the claimant to identify the person who did post the statement; the claimant gave the operator notice of the complaint in relation to the matter; and the website operator failed to respond to the notice of complaint as required.
- 5.61 Article 14 of the EU Electronic Commerce Directive and section 230 of the 1996 Communications Decency Act (US) provide further overseas examples. Article 14 exempts hosting platforms from liability in specific circumstances, while section 230 states that ‘no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider’. Section 230 effectively grants broad immunity to certain hosts of interactive online services such as blogs, forums and news websites, where the relevant hosted content was created by third parties. Both ninemsn and the Communications Alliance cited section 230 as useful in allowing website operators that incorporate or are dependent on user-generated content to thrive.⁸⁵
- 5.62 While there is no specific ‘safe harbour’ provision in Australia, the innocent dissemination defence (discussed above), as well as the broad immunity for online content platforms in the *Broadcasting Services Act 1992* (Cth), do provide a degree of coverage. As relevant, schedule 5, clause 91 of the *Broadcasting Services Act 1992* (Cth) states that a State or Territory law has no effect to the extent that it subjects an internet content host or internet service provider to liability for hosting or carrying particular content where the internet content host was not aware of the nature of the content. However, several stakeholders submitted in the NSW Review that clause 91 is of limited utility, as:
- it is unclear whether it provides protection for search engine providers, social networking sites or chat and messaging services; and
 - the vast volumes of content hosted and carried can make it difficult for internet content hosts and internet service providers to immediately remove content as soon as they are ‘aware’ that it has been flagged as potentially problematic.⁸⁶

84. Submission from ninemsn, p. 3.

85. Submissions from Communications Alliance, p. 8; and ninemsn, p. 4.

86. Submissions from Communication Alliance pp. 7-8; and ninemsn, p. 3.

- 5.63 This issue is one of the most complex to address and has implications beyond defamation law alone. In addition, technology, practice and international legislation and jurisprudence have developed rapidly. The Australian Competition and Consumer Commission is currently conducting a Digital Platforms Inquiry into competition in the media and advertising services markets. The Commission's preliminary report considers defamation laws and their application to digital platforms.⁸⁷
- 5.64 The Defamation Working Party proposes to consider whether the existing defences, in particular the innocent dissemination defence, and the existing protections for internet content hosts and internet service providers under the *Broadcasting Services Act 1992* (Cth) are sufficient to allow Australian organisations to compete in the digital era. Consideration could also be given to other alternatives to a formal 'safe harbour' provision, such as a clear takedown process to apply to online content. For example, guidance could be developed as to:
- how complainants should notify a publisher of a complaint about a digital publication and make formal takedown requests;
 - what information should be included in a takedown request; and
 - how, and the timeframes within which, publishers are to respond to takedown requests.

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?

87. Australian Competition and Consumer Commission, *Digital Platforms Inquiry - Preliminary Report*, December 2018, pp. 144-146; www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/preliminary-report.

6. Remedies

- 6.1 Division 3 of Part 4 of the Model Defamation Provisions sets out the remedies available to plaintiffs whose reputations are harmed by publication of defamatory matter.

The caps on damages

- 6.2 Clause 34 provides that, in determining the amount of damages to be awarded, the court is to ensure there is an appropriate and rational relationship between harm caused and the amount of damages awarded.
- 6.3 Clause 35 provides that, unless the situation warrants an award of aggravated damages, the maximum amount of damages for non-economic loss is \$250,000, adjusted annually in accordance with the percentage change in average weekly earnings of full time adults - currently \$398,500. The amount of damages payable for economic loss is uncapped, however, and can still result in large damages awards. For example, in 2017 the Supreme Court of WA awarded a Perth barrister \$2.62 million for defamation arising from a series of media conferences relating to the murder of his wife.⁸⁸
- 6.4 Clause 36 provides that exemplary or punitive damages cannot be awarded.
- 6.5 Submissions to the NSW Review indicated differing views on the clauses relating to awards of damages. Some saw the cap on non-economic loss, absent under the common law, as an advantage of the national model, promoting consistency, predictability and deterring forum shopping.⁸⁹ For example, Australia's Right To Know submitted that the cap has reduced 'the lottery effect of unlimited damages', and placed the focus of defamation cases more squarely on repairing harm done rather than on adversarial courtroom processes. Australia's Right To Know also suggested that the cap may encourage potential litigants to focus on alternative dispute resolution methods, and has facilitated the earlier resolution of matters.⁹⁰
- 6.6 Other stakeholders submitted that, by introducing the cap, some potential defendants may feel safer in publishing defamatory matters. It was argued that, with advance knowledge of the maximum damages that can be awarded, larger media organisations in particular may choose to publish defamatory matter and simply absorb damages as part of their business costs rather than modifying the content of a potentially defamatory publication.
- 6.7 Clause 35(1) sets the maximum amount for non-economic loss damages. The courts have considered whether this fixes the top end of a 'range' of damages that may be awarded for non-economic loss, or whether it operates as a cut-off. There have been a number of first-instance decisions of the Supreme Court of New South

⁸⁸ *Rayney v The State of Western Australia* [No. 9] [2017] WASC 367.

⁸⁹ Submissions from Australia's Right to Know, pp. 11-14; the Law Council of Australia, p. 23; and Associate Professor David Rolph, p. 2.

⁹⁰ Submission from Australia's Right To Know, p. 7.

Wales where it has been treated as establishing the top end of a range.⁹¹ However, other courts, including the Victorian Court of Appeal in *Bauer Media Pty Ltd v Rebel Wilson [No 2]*⁹² and the Full Court of the Supreme Court of South Australia in *Lesses v Maras [No 2]*⁹³, have held that it operates as a cut-off. That is, does the cap:

- establish the highest sum awardable in a range of sums available (with the cap being the maximum awarded for the worst damage), or
- is it a simple cut-off where non-economic loss damages are assessed and only awarded up to the cap?

6.8 Clause 35(2) provides that a court may award damages for non-economic loss that exceed the maximum damages amount applicable only if the court is satisfied that the circumstances of the publication of the defamatory matter are such as to warrant an award of aggravated damages. This could be interpreted so that the cap for non-economic loss damages may be exceeded but only to the extent that an award of aggravated damages is warranted. The Victorian Court of Appeal in *Bauer Media Pty Ltd v Rebel Wilson [No 2]* rejected this and held instead that, if a court is satisfied that an award of aggravated damages is appropriate, the statutory cap on non-economic loss is inapplicable.

6.9 Some stakeholders have suggested that these decisions do not reflect how clause 35 was intended to operate, do not promote consistency across jurisdictions and do not achieve proportionality with non-economic loss damages for personal injury matters.

Question 16

- (a) Should clause 35 be amended to clarify whether it fixes the top end of a range of damages that may be awarded, or whether it operates as a cut-off?
- (b) Should clause 35(2) be amended to clarify whether or not the cap for non-economic damages is applicable once the court is satisfied that aggravated damages are appropriate?

Multiple proceedings and consolidation

6.10 As noted above, clause 35 establishes a maximum amount of damages for non-economic loss (absent aggravated damages). This maximum amount applies in 'defamation proceedings' and not per cause of action or per publication.

6.11 One stakeholder during the NSW Review raised the concern that plaintiffs may be disadvantaged by this statutory cap. He submitted that, if a plaintiff institutes

91. *Attrill v Christie* [2007] NSWSC 1386; *Born Brands Pty Ltd v Nine Network Australian Pty Ltd [No 6]* [2013] NSWSC 1651; *Visscher v Maritime Union of Australia [No 6]* [2014] NSWSC 350; *Chel v Fairfax Media Publications Pty Ltd [No 7]* [2017] NSWSC 996.

92. [2018] VSCA 154.

93. [2017] SASCFC 132

proceedings that include multiple causes of action in relation to multiple publications, he or she can still only recover \$250,000 (or as adjusted).⁹⁴

- 6.12 Other stakeholders, including from media and legal stakeholders, were concerned that applying the cap in this way could encourage plaintiffs to attempt to circumvent the cap by instituting multiple proceedings against different defendants, rather than a single proceeding against multiple defendants.⁹⁵ This is noting that clause 23 precludes plaintiffs bringing multiple proceedings for damages relating to the same or like matter against the same defendant without leave of the court.
- 6.13 While defendants can apply to the courts for orders consolidating proceedings, stakeholders submitted that these orders are not easily obtained.⁹⁶ Several stakeholders cited the Victorian Court of Appeal's decision in *Buckley v The Herald and Weekly Times Pty Ltd*⁹⁷, in which it was held that, in general, consolidation orders should only be made on rare occasions and should be limited to cases where the multiple actions brought could have been confined to one writ. The Court also considered that consolidation orders should not be made where they could expose a plaintiff to a substantial risk of real prejudice, including because only one cap on damages would apply.

Potential amendments

- 6.14 During the NSW Review, stakeholders provided a number of suggestions as to how clause 35's potentially adverse consequences for both plaintiffs and defendants might be addressed. The NSW Bar Association recommended, for instance, that the cap be removed altogether, or, alternatively, that clause 35 be amended so that the cap applies per cause of action, not per defamation proceedings.⁹⁸ Another suggestion is that the cap should be applied to separate and distinct publications made by the same publisher, to help encourage plaintiffs to bring those causes of action together in the one set of proceedings. The Law Council of Australia suggested that, instead of amending clause 35, clause 23 should be amended to require plaintiffs to consolidate claims relating to the publications of the same or substantially the same matter (irrespective of whether the matter is published by the same or different publishers or in the same medium).⁹⁹
- 6.15 The cap on damages for non-economic loss raises issues for both plaintiffs and defendants. While it has offered some benefits in terms of consistency and predictability, it may also present some disadvantages, in terms of either reduced damages for plaintiffs, or increased numbers of claims.

94. Submission from Mr Patrick George, including *Defamation Law in Australia* (2012), p. 575.

95. See submissions from the Australia's Right To Know, pp. 12-14; Free TV Australia, p. 5; the NSW Bar Association, pp. 41-43.

96. Submissions from Australia's Right to Know, pp. 11-14; the Law Council of Australia, pp. 24-25; the NSW Bar Association, p. 42.

97. [2009] VSCA 118.

98. Submission from the NSW Bar Association, p. 43.

99. Submission from the Law Council of Australia, pp. 4-5.

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'?

Other Issues

Question 18

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

Appendix 1: Terms of Reference for the Defamation Working Party

1. The Defamation Working Party (**DWP**) is comprised of one nominated representative from each Australian state and territory jurisdiction and established under the auspices of the Council of Attorneys General (**CAG**). The DWP is to be chaired by a representative from the New South Wales (NSW) Department of Justice. NSW will also be represented by its Solicitor General. All other jurisdictions will have one nominated representative.
2. The DWP will consider whether the policy objectives of the Model Defamation Provisions (**MDPs**) remain valid and whether the MDPs remain appropriate to achieve these objectives. The objectives of the MDPs are stipulated in section 3 and are as follows:
 - (a) to enact provisions to promote uniform laws of defamation in Australia;
 - (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;
 - (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.
3. In considering the above, the DWP will have reference to the following:
 - (a) the recommendations and findings of the June 2018 statutory review of the *Defamation Act 2005* (NSW);
 - (b) any proposals for reform tabled by individual members of the DWP;
 - (c) relevant developments in case law in Australian jurisdictions and internationally;
 - (d) relevant developments in technology since the commencement of the MDPs; and
 - (e) any other relevant matters.
4. The DWP will make recommendations to CAG for any reforms to the MDPs it considers necessary and report on progress to each CAG meeting.