



Justice

# Statutory Review

## *Defamation Act 2005*

June 2018

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## Statutory Review - *Defamation Act 2005*

Justice Strategy and Policy  
NSW Department of Justice  
Email: [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)  
Phone: 02 8346 1281  
Fax: 02 8061 9370  
Level 3, Henry Deane Building, 20 Lee St, SYDNEY 2000  
GPO Box 31 SYDNEY 2001

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If you need an interpreter ring 131 450 and ask the operator to ph: 02 8224 5330.  
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Phone: 02 8688 7507  
Fax: 02 8688 9626  
TTY: 02 8688 7733 for people who have a speech or hearing impairment.

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ISBN: 978-1-922254-07-81

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## Recommendations

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### Recommendation 1

Recommend that this Report, including its subsequent recommendations, be referred to the Council of Attorneys-General with a view to the Council reconvening the Defamation Working Party to consider possible amendments to the Model Defamation Provisions.

### Recommendation 2

Recommend that the Council of Attorneys-General ask the Defamation Working Party to review the Model Defamation Provisions equivalent to section 9 (certain corporations do not have cause of action for defamation) to determine whether the capacity of corporations to sue for defamation should be amended.

### Recommendation 3

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions should be amended to include a 'single publication rule'. If the single publication rule is supported, it is recommended that attention be given to the following issues:

- (a) whether the time limit that operates in relation to the first publication of the matter should be the same as the limitation period for all defamation claims;
- (b) whether the rule should apply to online publications only;
- (c) whether the rule should operate only in relation to the same publisher, similar to section 8 (single publication rule) of the *Defamation Act 2013* (UK).

### Recommendation 4

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions should be amended to clarify how the provisions equivalent to section 14 (when offer to make amends may be made) and section 18 (effect of failure to accept reasonable offer to make amends) of the *Defamation Act 2005* (NSW) interact, and, particularly, how the requirement that an offer be made 'as soon as practicable' under section 18 is to be applied.

### **Recommendation 5**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether a jury should 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.

### **Recommendation 6**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provision equivalent to section 21 (election for defamation proceedings to be tried by jury) of the *Defamation Act 2005* (NSW) should 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).

### **Recommendation 7**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions equivalent to section 21 (election for defamation proceedings to be tried by jury) and section 22 (roles of judicial officers and juries in defamation proceedings) of the *Defamation Act 2005* (NSW) should be amended to remove or address the extent of any inconsistency with the *Federal Court of Australia Act 1979* (Cth).

### **Recommendation 8**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provision equivalent to section 26 (defence of contextual truth) of the *Defamation Act 2005* (NSW) should be amended to be closer to its predecessor, section 16 (defence of contextual truth) of the *Defamation Act 1974* (NSW), to ensure the clause applies as intended.

### **Recommendation 9**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to:

- (a) consider whether section 6 (peer-reviewed statement in scientific or academic journal) and section 7 (report protected by privilege) of the *Defamation Act 2013* (UK) should be replicated in the Model Defamation Provisions;

- (b) consider whether the definitions of ‘public document’ and ‘proceedings of public concern’ in the Model Defamation Provisions equivalent to section 28 (defence for publication of public documents) and section 29 (defence of fair report of proceedings of public concern) of the *Defamation Act 2005* (NSW) should be expanded to protect peer-reviewed statements published in an academic or scientific journal.

#### **Recommendation 10**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the ‘reasonableness test’ in the Model Defamation Provision equivalent to section 30 (defence of qualified privilege for provision of certain information) in the *Defamation Act 2005* (NSW) should be amended, including consideration of whether:

- (a) the existing threshold to establish the defence should be lowered; and
- (b) the UK approach should be adopted in Australia.

#### **Recommendation 11**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions equivalent to section 30 (defence of qualified privilege for provision of certain information) of the *Defamation Act 2005* (NSW) should be amended to 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.

#### **Recommendation 12**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the statutory defence of honest opinion should 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.

#### **Recommendation 13**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions equivalent to section 31(4)(b) (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) of the *Defamation Act 2005* (NSW) should be amended to reduce the potential for journalists to be sued personally or jointly with their employers.

#### **Recommendation 14**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to review application and effect of section 1 (serious harm) of the *Defamation Act 2013* (UK) and consider whether:

- (a) a 'serious harm' or other threshold test should be introduced into the Model Defamation Provisions;
- (b) proportionality and other case management considerations could or should be incorporated into a serious harm test;
- (a) the defence of triviality should be retained or abolished if a serious harm test is introduced.

#### **Recommendation 15**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether:

- (a) the innocent dissemination defence requires amendment to better reflect the operation of Internet Service Providers, Internet Content Hosts and search engines as publishers;
- (b) existing protections for digital publishers are sufficient;
- (c) a specific safe harbour provision would be beneficial and consistent with the overall objectives of the Model Defamation Provisions;
- (d) clear takedown procedures for digital publishers are necessary, and, if so, how any such provisions should be expressed.

#### **Recommendation 16**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider:

- (a) the interaction of the Model Defamation Provisions equivalent to section 35 (damages for non-economic loss limited) and section 23 (leave required for further proceedings in relation to publication of same defamatory matter) of the *Defamation Act 2005* (NSW), including any further examples of matters in other jurisdictions where plaintiffs have issued separate proceedings and/or defendants have applied for a consolidation order; and
- (b) whether further legislative guidance is required on the circumstances in which the consolidation of separate defamation proceedings will or will not be appropriate; or
- (c) whether the statutory cap on damages contained in the Model Defamation Provisions equivalent to section 35 of the *Defamation Act 2005* (NSW) should apply to each cause of action rather than each 'defamation proceedings'.

## Glossary

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CAG	Council of Attorneys-General
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CDA	<i>Communications Decency Act</i> (USA)
FCA Act	<i>Federal Court of Australia Act 1979</i> (Cth)
ICH	Internet Content Host
IGA	Intergovernmental Agreement
ISP	Internet Service Providers
MDP	Model Defamation Provisions
NUDL	National Uniform Defamation Law
SCAG	Standing Committee of Attorneys-Generals
SCLJ	Standing Council on Law and Justice
The Act	<i>Defamation Act 2005</i> (NSW)
The UK Act	<i>Defamation Act 2013</i> (UK)

## 1. Introduction: the policy objective of the Act

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- 1.1 This is the report of the statutory review of the *Defamation Act 2005* (**the Act**), which implements the Model Defamation Provisions (**MDP**) in NSW. The MDP were developed by the Model Defamation Law Working Party (**Defamation Working Party**) established by the former Standing Committee of Attorneys-General (**SCAG**), and endorsed by SCAG in November 2004. Each state and territory has enacted legislation to implement the MDP, collectively referred to as the National Uniform Defamation Law (**NUDL**).
- 1.2 This chapter provides background to the Act and the Review and assesses the continued validity of its policy objectives.

### A national scheme balancing freedom of expression and protection of reputation

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- 1.3 The Act provides the legal framework for balancing freedom of expression and freedom to publish information in the public interest with the right of individuals to have their reputations protected from defamatory publications, and the right to remedies for such publications. The Act was enacted in 2005 and replaced the *Defamation Act 1974* (NSW).
- 1.4 The Act was adopted following a national reform process commenced by the former SCAG in 2002. SCAG recognised that the increasing use of the internet to ‘publish’ and distribute information made defamation legislation, inconsistent across Australia’s states and territories, increasingly unwieldy and ill-suited to modern situations. SCAG recognised the benefit of a uniform scheme for promoting certainty for defendants and prospective defendants, limiting forum shopping and recognising that on-line publications are not territorially confined in the same way as in the past newspapers, magazines and other traditional media have been (recognising that in 2002 even traditional media crossed state and territory borders significantly).
- 1.5 SCAG adopted the Model Defamation Provisions Intergovernmental Agreement (**MDP IGA**). The MDP IGA established a Working Party to develop MDP, which were endorsed by SCAG in November 2004. All Australian states and territories have now enacted legislation to adopt the MDP, which together comprise NUDL.
- 1.6 To ensure the consistency of the NUDL is maintained, the MDP IGA requires all jurisdictions that are party to the MDP IGA to report any issues affecting protection of reputation or freedom of expression and publication generally that may require inter-jurisdictional consideration to SCAG (or its successor; now the Council of Attorneys-General (**CAG**)). It also specifically requires that, where a jurisdiction party to the MDP IGA party considers that a clause of the MDP or a provision of its own implementing legislation requires amendment, the party must refer the relevant clause or provision to SCAG (or its successor) for consideration. SCAG can then determine whether to reconvene the Defamation Working Party and ask it with considering whether the MDP should be amendment. If all parties agree to adopt a proposal amending the MDP, the parties are then expected to make a corresponding amendment to their implementing legislation, thereby retaining consistency across all parties.

- 1.7 The NSW Government continues to view the development and adoption of the MDP as a significant development in this area of law in Australia, and supports retaining national uniformity. However, the NSW Government also recognises that, since the MDP 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 MDP were adopted, which NSW considers necessitates some of the MDP being revisited and potentially amended. This Review examines the MDP generally, and the NSW implementing legislation, the Defamation Act 2005, more specifically, to identify areas that CAG may wish the Defamation Working Party to consider further.

## Conduct of the Review

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- 1.8 This Review was conducted under section 49 of the Act. Section 49 requires the Minister responsible for the Act (the Attorney General) to review the Act as soon as possible after the period of five years from assent to determine whether its policy objectives remain valid, and whether its terms remain appropriate for securing those objectives.
- 1.9 The Act received assent on 26 October 2005. The Review was commenced in 2011, however, its finalisation has been delayed, principally due to competing Government priorities, efforts to reflect developments in defamation law, both in Australia and overseas, updates to include new case law and other factors requiring further consideration and consultation.
- 1.10 The Review involved consideration of submissions from a range of interested parties, consultation with key stakeholders, correspondence received from stakeholders between 2012 and 2017, and careful analysis of cases heard in NSW, other Australian and international jurisdictions. It has also involved a comparative assessment of other countries' defamation frameworks and examining recent reforms and developments in defamation law in other countries, including the commencement of the *Defamation Act 2013* (UK) in the United Kingdom on 1 January 2014. More information about the conduct of the Review is in Appendix 1, and a list of stakeholders who made a submission to the Review is provided in Appendix 2.
- 1.11 While the Review focuses on the NSW Act, because that Act forms part of the NUDL, the Review's conclusions about the operation and effect of specific provisions are likely to also be relevant to other NUDL jurisdictions, which have adopted equivalent provisions. In light of this, and NSW's commitment under the MDP IGA, the Review identifies specific concerns, but recommends that CAG reconvene the Defamation Working Party to address them more fully and develop any necessary amendments. The Review presents a first step towards further cooperative work at the national level to help ensure the NUDL remains modern, fit for purpose and nationally consistent, and that views and experiences of all NUDL jurisdictions inform any legislative reform.

## Validity of the policy objectives of the Act

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- 1.12 The objectives of the Act are set out under section 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 Act, like the MDP, attempts 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 Review concludes that the objectives of the Act remain valid, and that, with some minor exceptions, its terms remain appropriate to achieve those objectives. The views of stakeholders expressed in submissions, correspondence and direct consultation over the course of the Review period also indicated that the Act is generally well supported, and operates effectively.<sup>1</sup> However, drawing on legislative and case law analysis and the views and experience of stakeholders, the Review also concludes that the Act, and by implication, the MDP, would benefit from some amendments to clarify the application of terms, reduce ambiguity, and better articulate how some of its legal principles apply. Because the Act forms part of a national scheme, however, it is suggested that the next stage of work be conducted under the auspices of CAG.
- 1.15 The NSW Government suggests that CAG be invited to consider this Report, and to agree to reconvene the Defamation Working Party. The Defamation Working Party can then review the MDP, with reference to both this Report and the experiences of other jurisdictions, and develop any proposed amendments to the MDP for CAG's consideration and approval.

#### **Recommendation 1**

Recommend that this Report, including its subsequent recommendations, be referred to the Council of Attorneys-General with a view to the Council reconvening the Defamation Working Party to consider possible amendments to the Model Defamation Provisions.

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1. For submissions generally supportive of the Act, see Australia's Right To Know, at p. 1; Free TV Australia, at p. 1; the Law Council of Australia, at p. 2; the Law Society of NSW, at p. 1; the Media, Entertainment and Arts Alliance, p. 1; and the NSW Solicitor General, at pp. 1-2. Most other submissions focussed on specific topics or provisions perceived to be in need of reform, rather than commenting on the operation of the Act as a whole.

## 2. General principles

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2.1 Part 2 of the Act deals with general principles, including:

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

### Causes of action for defamation

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2.2 Division 2 of the Act sets out the parties that have a cause of action for defamation. Section 8 provides that a person has a cause of action for defamation; section 10 provides that no cause of action can be made by or against a deceased person; and section 9 provides that a corporation has no cause of action unless it is an excluded corporation at the time of the publication, being:

- (a) a corporation whose objects for formation do not include obtaining financial gain for its members or corporators; or
- (b) a corporation which is not a public body, nor related to another corporation, and employs fewer than 10 people.

### Corporations

2.3 Under the common law, all corporations could sue for defamation and recover damages for financial loss. The proposal to limit that right was subsequently considered at length in the development of the MDP.

2.4 A number of submissions to the Review suggested amendments to section 9. Some submissions argued for narrowing section 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.<sup>2</sup> The NSW Bar Association argued to expand section 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.<sup>3</sup> These submissions cited examples from the UK in particular, where all corporations retain the right to sue.

2.5 SCAG's conclusion that precluding larger, for-profit corporations from suing for defamation was appropriate and necessary to meet the overall objectives of the MDP was based on a number of reasons, including the following:

- 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;

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2. Submissions from Australia's Right to Know, at p. 32, Free TV Australia, at pp. 5-6, and Joint Media Organisations, at p. 2. See also discussion of this proposal in the submission from the Law Council of Australia, at pp. 7-9.

3. Submission from the NSW Bar Association, at pp. 7-15. .

- 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) (CCA) and for the tort of injurious falsehood.
- 2.6 The decision to preclude most corporations from suing in defamation also had the effect of preventing those corporations from seeking interlocutory injunctions and relief.<sup>4</sup> However, the current arrangements under the MDP may in fact offer included corporations an easier avenue to prevent publication of potentially injurious material at the interlocutory stage.<sup>5</sup>
- 2.7 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 verbally to a third person, and has caused the corporation damage. Similarly, in New Zealand, the *Defamation Act 1992* (NZ) applies with 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.<sup>6</sup> 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.<sup>7</sup>
- 2.8 The recently enacted *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 provides 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, in *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB), it was 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.
- 2.9 SCAG’s decision 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.
- 2.10 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 MDP. While noting that there may be circumstances in which corporations do suffer harm as a result of defamatory statements, the Review holds the view that the balance

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4. As an aside, previously, where corporations had causes of action in either defamation or injurious falsehood, they were required to seek interlocutory injunctions for defamation, in which the balance was generally weighted in favour of freedom of speech.

5. See for example, *Beechwood Homes (NSW) Pty Ltd v Camenzuli* [2010] NSWSC 521.

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

7. 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.

struck by section 9 of the Act continues to be appropriate. Nevertheless, in light of the approaches in other countries, particularly the United Kingdom, the Review suggests that NUDL jurisdictions reflect further on the question with a view to either reconfirming their position, or potentially amending the MDP.

### **Recommendation 2**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to review the Model Defamation Provisions equivalent to section 9 (certain corporations do not have cause of action for defamation) to determine whether the capacity of corporations to sue for defamation should be amended.

## **Deceased persons**

- 2.11 Section 10 reflects the established common law position that a personal action cannot survive the death of a tortfeasor or the death of the plaintiff by precluding defamation actions in relation to, or against, deceased persons. This is the position that has also been taken in the UK, New Zealand, Canada, and most of the United States. It is noted, however, that Tasmania has not adopted the relevant MDP that precludes defamation cases by a deceased person, indicating that some differing views and inconsistencies between the NUDL jurisdictions does remain.
- 2.12 On balance, the Review considers that section 10 strikes a suitable balance between protecting a person's reputation and freedom of expression. Academic comment suggests section 10 provides an avenue for journalists who may have been concerned about potential actions for defamation (whether warranted or not) to eventually publish material in the public interest.<sup>8</sup>
- 2.13 The NSW Bar Association, however, considered that living relatives or legal representatives should be able to bring or continue an action to protect a deceased person's reputation (noting that a living person can sue for defamation if he or she is personally defamed by a statement published about a deceased relative). However, there is provision for a family member whose own reputation is defamed by a defamatory publication about their deceased relative to sue for defamation on their own behalf.
- 2.14 Two of the Act's (and the MDP's) core objectives are to ensure that defamation law does not unreasonably limit freedom of expression and to provide effective and fair remedies for people who are defamed. Section 10 aligns with these objectives. A deceased person cannot personally be 'remedied' for damage to his or her reputation. Permitting potentially defamatory material to be published after death may be the only way in which material of public interest can ever be released.
- 2.15 The Review concludes that section 10 strikes an appropriate balance between protecting an individual's reputation, which is of particular importance while the person is alive, and avoiding unreasonable limits on freedom of expression.

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8. Submission from Associate Professor David Rolph, including 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal*, 207 at p. 222.

## Choice of law in defamation proceedings

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- 2.16 The introduction of a statutory choice of law rule for defamation by the NUDL has reduced the complexity of defamation claims involving intra-national multi-jurisdictional publications. Prior to the introduction of the NUDL, at common law, the choice of law in tort applied to determine the applicable law in defamation claims. Under the common law rule, the substantive law that applies to determine a plaintiff's claim in tort is the law of the jurisdiction where the harm occasioned by that tort occurred.<sup>9</sup> This rule applies in respect of both interstate torts committed in Australia, and international torts committed in a foreign country.<sup>10</sup>
- 2.17 The application of the common law choice of law rule in defamation matters was problematic because in defamation the injury to reputation is taken to occur in the location where the defamatory publication is presented in comprehensible form to the reader. In cases involving the internet, the material is deemed to be published each time and in each place it is downloaded. This is known as the 'multiple publication' rule. Where the defamatory matter is published in more than one location, as commonly occurs, there arises a separate cause of action for each publication. The effect of the choice of law rule was that as many different defamation laws could apply as there were places of publication.<sup>11</sup> The NUDL reduced these difficulties by introducing a statutory choice of law rule for defamation proceedings.
- 2.18 Section 11 provides that where a matter is published in only one Australian jurisdiction, the substantive law applicable in the Australian jurisdictional area where the matter is published will apply in NSW to determine any cause of action for defamation.<sup>12</sup> This is consistent with the common law position. However, for material that is published in more than one Australian jurisdiction, the law that will apply in NSW will be the substantive law applicable in the jurisdiction with which the harm occasioned by the publication has the closest connection.<sup>13</sup> To determine which jurisdiction has the closest connection, the court may consider various factors listed in section 11(3), including the plaintiff's place of residence or principal place of business at the time of publication, the extent of the publication and the harm suffered by the plaintiff in each Australian jurisdiction.<sup>14</sup>
- 2.19 The statutory rule only applies to defamatory matter published within an Australian jurisdiction. Publications occurring outside Australia continue to be governed by the common law rule.
- 2.20 Stakeholders that discussed this issue in their submissions generally agreed that the introduction of a statutory choice of law rule for defamation claims is a 'practical and pragmatic reform',<sup>15</sup> in that it has created certainty and reduced opportunities for forum shopping by plaintiffs, at least within Australia. The Review concludes that

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9. *John Pfeiffer v Rogerson* (2000) 203 CLR 503.

10. *Regie Nationale des Usines v Zhang* (2002) 210 CLR 491.

11. This problem was particularly acute in the context of internet publications, given that material on the internet is taken to be published in every location in which it is downloaded: see *Dow Jones v Gutnick* (2002) 210 CLR 575.

12. *Defamation Act 2005* (NSW), section 11(1).

13. *Defamation Act 2005* (NSW), section 11(2).

14. *Defamation Act 2005* (NSW), section 11(3).

15. Submission from Associate Professor David Rolph, including 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal*, 207, p. 211.

this has been a positive development, and does not recommend any further amendments at this time.

## Unification of the limitation period

- 2.21 Prior to the introduction of the NUDL, the limitation period within which defamation proceedings had to be commenced varied across jurisdictions, ranging from one year to six years. The processes for and circumstances under which the applicable limitation periods could be extended also varied across jurisdictions.
- 2.22 In all NUDL jurisdictions, consistent with the MDPs, the limitation period for commencing defamation proceedings is now one year from the date of publication.<sup>16</sup> NUDL jurisdictions have maintained the common law's 'multiple publication rule', however, with the effect that there is not a single cause of action arising only upon the first publication of a particular matter, but rather that there is a separate cause of action that arises each time that matter is published.<sup>17</sup>
- 2.23 The Court may extend the period within which proceedings must be commenced to a maximum of three years, where it is satisfied that it was not reasonable for the plaintiff to have commenced proceedings within the one-year limitation period.<sup>18</sup>
- 2.24 NSW courts have held that, in order to be satisfied that it was not reasonable for the plaintiff to commence proceedings within a year of publication, unusual circumstances would typically apply.<sup>19</sup> Some examples include where the plaintiff was unaware of the publication within the one year limitation period, was unable to identify the publisher or prove publication,<sup>20</sup> or has pursued non-litigious processes without success.<sup>21</sup>
- 2.25 Stakeholder submissions were generally supportive of the uniform limitation period, and considered that the one-year period, with the possibility of extension, was appropriate. However, a number of submissions indicated that the multiple publication rule should be replaced by a 'single publication rule'.

## The single publication rule

- 2.26 Several submissions 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.<sup>22</sup> However, the single publication rule has been rejected in Australia by both the NSW Supreme Court in *McLean v David*

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16. In NSW, this is captured under the *Limitation Act 1969* (NSW), section 14B.

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

18. *Limitation Act 1969* (NSW), section 56A.

19. See for example: *Cassar v Network Ten Pty Limited & Ors* [2012] NSWSC 680; *Houda v State of NSW* [2012] NSWSC 1036; and *Pingel v Toowoomba Newspapers* [2010] QCA 175.

20. *Ahmed v Harbour Radio Pty Ltd* [2010] NSWSC 676, at [52]; *Riske v Oxley Insurance Brokers Pty Ltd (No 2)* [2014] NSWSC 1611.

21. *Ahmed v Harbour Radio Pty Ltd* [2010] NSWSC 676, at [52]; *Noonan v MacLennan* [2010] QCA 50, at [17].

22. See for example, submission from the Communications Alliance, p. 3.

*Syme & Co Ltd*,<sup>23</sup> and, more recently and in relation to online publications, by the High Court in *Dow Jones & Co v Gutnick*.<sup>24</sup>

- 2.27 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.<sup>25</sup> A plaintiff may therefore have a cause of action in relation to a single matter that has been subject to multiple 'repuplications' for or over many years.
- 2.28 In its submission, 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.<sup>26</sup> 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 publisher published lawfully at the time.<sup>27</sup> This issue is discussed further in Chapter 5, concerning the defence of innocent dissemination and safe harbour provisions.
- 2.29 Submissions 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.<sup>28</sup> 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.
- 2.30 Some other jurisdictions, including those of 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 NUDL jurisdictions, subject to extension)<sup>29</sup> 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.

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

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

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

26. Submission from Australia's Right To Know, p. 4, pp. 28-31.

27. 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.

28. Submissions from Australia's Right To Know, p. 28; and the Law Council of Australia, p. 4.

- 2.31 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.
- 2.32 The Review considers that further consideration of a single publication based limitation rule in consultation with stakeholders is required. It is recommended that this issue be referred to the Defamation Working Group for further deliberation.

### **Recommendation 3**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions should be amended to include a 'single publication rule'. If the single publication rule is supported, it is recommended that attention be given to the following issues:

- (a) whether the time limit that operates in relation to the first publication of the matter should be the same as the limitation period for all defamation claims;
- (b) whether the rule should apply to online publications only;
- (c) whether the rule should operate only in relation to the same publisher, similar to section 8 (single publication rule) of the *Defamation Act 2013* (UK).

### 3. Resolution of civil disputes without litigation

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- 3.1 Part 3 of the Act 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,<sup>30</sup> and are discussed below.

#### Offers to make amends

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- 3.2 Under Division 1 of Part 3 of the Act, the publisher of potentially defamatory content may make an offer to make amends to an aggrieved person, generally taken to be without prejudice. Offers to make amends can be made up to 28 days after 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),<sup>31</sup> and before a defence to any action brought by the aggrieved person has been served.<sup>32</sup>
- 3.3 The required content of an offer to make amends is specified in section 15. The required content includes offers to:
- publish a reasonable correction of the matter;
  - take reasonable steps to tell other parties that the publisher has given the material to, that the material is or may be defamatory; and
  - pay the expenses of the aggrieved person reasonable 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 section 17, if an offer to make amends is accepted, an aggrieved person cannot assert, continue or enforce an action for defamation against the relevant publisher. Under section 18, if the offer is not accepted, it is a defence to an action for defamation against the publisher if:
- the publisher made an 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
  - the offer was reasonable.

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

31. *Defamation Act 2005* (NSW), section 14(1)(a).

32. *Defamation Act 2005* (NSW), section 14(1)(b).

- 3.6 Section 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 indicated general support for the Act's offers of amends provisions.<sup>33</sup> 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 did raise concerns with some aspects of the Division, which are discussed below.

### Offers to publish corrections

- 3.8 The Law Council of Australia considered that the section 15(1)(d) requirement that publishers make a correction was potentially too prescriptive.<sup>34</sup> In particular, this submission suggested that the correction requirement could be limited to publications including false statements of fact only, noting that published opinions are neither objectively true nor false, and are therefore not suitable to be 'corrected'. Associate Professor David Rolph also submitted that the requirement to offer a correction could act as a deterrent to utilise this alternate dispute resolution mechanism, as some publishers may be reluctant to publish a statement inferring they were 'wrong'.<sup>35</sup>
- 3.9 At this time, this issue appears more theoretical than practical, and the Review does not recommend amendment to this requirement at this time.

### Timeframe for making offers to make amends

- 3.10 Some stakeholders raised concerns about the timeframe within which an offer of amends must be made.
- 3.11 Section 14(1) states that an offer of amends cannot be made later than 28 days after receipt of a concerns notice or after the delivery of a defence. Section 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.
- 3.12 The Law Council of Australia submitted that the section 18(1)(a) defence is too restrictive, and suggested that a publisher should be able to rely on an offer to make amends made at any time within the 28 days prescribed under section 14 as a defence. The Law Council of Australia considered that publishers reasonably need time to assess whether a matter is defamatory, as well as the strength of any

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33. Submissions from Australia's Right to Know, at p. 6; Free TV Australia, at p. 6; the Law Council of Australia, at p. 10, the Law Society of NSW, at p. 2; and Mr Patrick George, including extract of 'Defamation Law in Australia', at 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 pp. 244-245.

34. Submission from the Law Council of Australia, at pp. 10-11.

35. Submission from Associate Professor David Rolph, including 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal* 207, at pp. 244-245.

potential defences, before making an offer of amends. 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.

- 3.13 The NSW Bar Association submitted that the wording of section 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. This is an impractical and illogical application. The NSW Bar Association submitted that section 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).
- 3.14 The intersection of sections 14 and 18 does create some potential for confusion. An offer under this Division can be made where content is or may be defamatory, effectively allowing offers in relation to content that is not proven to be defamatory. Section 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 section 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 section 18 defence.
- 3.15 Australia's Right To Know also submitted that section 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 not consistent with the view taken in *Bushara v Nobananbas Pty Ltd & Anor*, 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.<sup>36</sup>
- 3.16 It is recommended that Working Group further review the wording of sections 14 and 18, and their concurrent application in practice, to determine whether some amendment to reduce ambiguity and to better promote achievement of the MDP objectives is required.

#### **Recommendation 4**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions should be amended to clarify how the provisions equivalent to section 14 (when offer to make amends may be made) and section 18 (effect of failure to accept reasonable offer to make amends) of the *Defamation Act 2005* (NSW) interact, and, particularly, how the requirement that an offer be made 'as soon as practicable' under section 18 is to be applied.

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36. *Bushara v Nobananbas Pty Ltd & Anor* [2012] NSWSC 63, at [10]-[14].

## Jury prejudice

- 3.17 The Law Council of Australia raised concerns that sections 15, 18 and 19 may create potential for jury prejudice. This is because s 18 allows a reasonable, unaccepted offer to publish a correction under s 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). Section 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.
- 3.18 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 their intention to rely on this defence.
- 3.19 The Review recommends that further consideration be given to the consequences for protracting the court proceedings if this multi-stage approach is required.

### **Recommendation 5**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether a jury should 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.

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

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- 4.1 Division 1 of Part 4 of the Act deals with the roles of judges and juries, which have always been significant issues in defamation law.
- 4.2 Prior to the NUDL'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 NUDL has reduced, but not fully overcome, these inconsistencies across Australian jurisdictions. Juries continue to have no role in any ACT, South Australia or Northern Territory defamation cases.<sup>37</sup>
- 4.4 In the remaining jurisdictions, defamation proceedings may be tried by jury on election by either party, unless the court orders otherwise.<sup>38</sup>
- 4.5 In NSW, a court may make an order under section 21(3) that a trial not be by jury, despite an election for trial by jury by one of the parties, only 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.<sup>39</sup> The NSW Court of Appeal has held that a section 21(3) order should only be made on the application of a party, not on the court's own motion.<sup>40</sup>
- 4.6 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),<sup>41</sup> with the judge retaining responsibility for issues of law.<sup>42</sup>

### Concerns about the current situation

- 4.7 Several submissions suggested that, notwithstanding increased harmonisation, the remaining inconsistencies in the role of juries in different NUDL jurisdictions undermine the MDP's objective of promoting uniformity, and may not fully address issues of forum shopping.<sup>43</sup>

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37. *Juries Act 1962* (NT), section 6A.

38. *Defamation Act 2005* (NSW), section 21.

39. *Defamation Act 2005* (NSW), section 21(3). See also: *Mallick v McGeown* [2008] NSWSC 129.

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

41. *Defamation Act 2005* (NSW), section 22.

42. *Defamation Act 2005* (NSW), section 22(5)(b).

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

- 4.8 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.<sup>44</sup>
- 4.9 The question of whether defamation matters should be heard by judges, juries or both was a contentious issue in the development of the MDP, and strong views continue to be held. This reflects the differing positions of jurisdictions.
- 4.10 Many of the stakeholders who made submissions to this Review (acknowledging that many of the respondents were NSW-based) supported retaining the current NSW system.<sup>45</sup> Ultimately, this is a question for individual jurisdictions, and any change in NSW alone at this time will not achieve uniformity across all NUDL jurisdictions. On balance, the Review does not recommend any significant reconsideration of the NSW position. However, the former Chief Judge of the NSW District Court, the Hon Justice Blanch AM, has proposed that section 21(3) 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.<sup>46</sup> 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.

#### Recommendation 6

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provision equivalent to section 21 (election for defamation proceedings to be tried by jury) of the *Defamation Act 2005* (NSW) should 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).

### Awards of damages

- 4.11 In all NUDL jurisdictions, awards of damages are determined by judicial officers.<sup>47</sup> This decision was taken to prevent disparity in damages across jurisdictions and to reduce potential for forum shopping.<sup>48</sup>
- 4.12 Several submissions discussed the question of whether a jury should be able to award damages in those jurisdictions that allow trial by jury.<sup>49</sup> Both the Law Council

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

45. See submissions from Australia's Right To Know, at p.7; Free TV Australia, at pp. 4-5; the NSW Bar Association, at p. 22; and the NSW Solicitor General, at pp. 2-3.

46. Submission from the Hon Justice Blanch, pp 1-2. For other submissions concerning a reduce 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.

47. *Defamation Act 2005* (NSW), section 22(3).

48. SCAG Working Group of State and Territory Officers, 'Proposal for Uniform Defamation Laws', prepared by the SCAG Working Group of State and Territory Officers (2004), p. 13.

of Australia and the NSW Bar Association submitted that, in practice, the division of responsibilities between judges and juries in NSW, Queensland, Tasmania, Victoria and Western Australia has potential to give rise to serious injustice. They argued that having responsibility for determining whether a publication was defamatory resting with one party (the jury), and the responsibility of awarding damages for defamatory publications with another (the judge), creates potential for what one party may see as a serious matter to be awarded minimal damages or vice versa. The Law Council of Australia and the NSW Bar Association both saw merit in having the jury determine the award of damages.

- 4.13 In our view, uniformity in responsibility for awarding damages across all jurisdictions is preferable. The current system promotes greater consistency in damages amounts, and reduces opportunity and motivation for forum shopping. The Review does not recommend any amendments in this respect.

## Constitutional inconsistency

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- 4.14 In *Wing v Fairfax Media Publications Media Pty Limited* [2017] FCAFC 191 (**Wing**), the Federal Court found that sections 21 and 22 of the Act are inconsistent with sections 39 and 40 of the *Federal Court of Australia Act 1979* (**FCA Act**). In accordance with section 109 of the Australian Constitution, this has the effect that, to the extent that the NSW law alters, impairs or detracts from the operation of the FCA Act, then the NSW Act is inconsistent and invalid.
- 4.15 Section 21 of the NSW Act provides that a plaintiff or defendant in a defamation proceeding may elect for the proceedings to be tried by jury. Section 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.
- 4.16 Under section 39 of the FCA Act, 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.
- 4.17 In *Wing*, the Federal Court found that there is direct inconsistency between sections 39 and 40 of the FCA Act and sections 21 and 22 of the NSW Act. As a result, sections 21 and 22, are not binding on the Federal Court.
- 4.18 It is important to note that if a case involving sections 21 and 22 of the Act was heard before a state court, including the Supreme Court of NSW, the FCA Act would not apply, and there would therefore be no operative inconsistency.

### Recommendation 7

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions equivalent to sections 21 and 22 of the *Defamation Act 2005* (NSW) should be amended to

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49. Submissions from the Law Council of Australia, at pp. 11-12; the Hon. Justice McClellan, at p. 9; the NSW Bar Association, at pp. 21-23; and Associate Professor David Rolph, including 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal* 207, at pp. 225-227, 240-241.

remove or address the extent of any inconsistency with the *Federal Court of Australia Act 1979* (Cth).

## 5. Defences

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- 5.1 Division 2 of Part 4 of the Act deals with defences to defamation claims. This is one of the more significant parts of the Act, and received considerable comment from stakeholders.

### Defence of justification

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- 5.2 Prior to the adoption of the NUDL, the defence of justification in most Australian jurisdictions could be relied on only where a defendant established both that the statement is true *and* that the matter was published in the public interest. The public interest aspect was designed to offer an additional protection of individual's privacy.
- 5.3 Section 25 and its corresponding MDP provide that it is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations complained of are substantially true only, removing the requirement that publication of the substantially true material also had to be in the public interest. Removing the public interest aspect from the defence had been advocated by the Australian Law Reform Commission as far back as 1979, and by the NSW Law Reform Commission in 1993. Both bodies considered that, as privacy and defamation are distinct areas of law, protection and remedy for invasion of privacy should be effected under its own legislative framework.<sup>50</sup> **Most Australian jurisdictions have now adopted dedicated privacy legislation for the protection and remedy for invasion of privacy, including the NSW *Privacy and Personal Information Protection Act 1998*.**
- 5.4 Several stakeholders supported the simplified defence of justification as set out in section 25.<sup>51</sup> The NSW Bar Association's submission, to the contrary, considered that the public interest limb should have been retained.<sup>52</sup> The difference in stakeholder views here demonstrate that the defence reflects a tension between the public interest in ensuring the public have access to truthful and accurate information generally, and the interest of individuals in maintaining their privacy, including with respect to the dissemination of 'truthful' aspects of their identity (for example, name, conduct or decisions made).
- 5.5 Australia's Right To Know submitted that people should not be prohibited from publishing truthful statements about others, noting that it is increasingly commonplace for individuals to share information about themselves online. The NSW Bar Association, however, submitted that the public interest element of the older defence had functioned as an indirect form of privacy protection, and argued that, since its removal, an individual's privacy may be subject to greater intrusion. Other stakeholders acknowledged that removing this limb of the defence could reduce privacy protections, but noted that defamation is a specific area of law

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50. Australian Law Reform Commission (1979) *Unfair Publication: Defamation and Privacy*, Report No 11, para 124; NSW Law Reform Commission (1993) *Defamation*, Discussion Paper No 32.

51. For stakeholders in favour of the simplified defence, see submissions of Australia's Right To Know, at pp. 6-7; the Law Council of Australia, at pp. 12-14; and Associate Professor David Rolph, including 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal* 207, at pp. 228-229. See also submission of Dr Joseph Fernandez, at pp. 30-33.

52. Submission of the NSW Bar Association, at pp. 24 – 26.

designed to protect reputation rather than privacy,<sup>53</sup> which is already protected under its own framework. The Law Council of Australia submitted that reintroducing a public interest requirement into the defence would be a ‘gravely retrograde’ step.

- 5.6 While recognising the significance of this issue and the differing views, on balance the Review concludes that the current rule should be maintained.

## Defence of contextual truth

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- 5.7 Section 26 of the Act, which implements clause 26 of the MDP, provides 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.
- 5.8 Clause 26 of the MDP was designed to be modelled on section 16 of the *Defamation Act 1974* (NSW), however, the defence as articulated under clause 26 (and section 26) has a much more limited application.
- 5.9 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 claimant’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.
- 5.10 Although intended to mirror former section 16, clause 26 and section 26 of the Act as drafted provide 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 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.<sup>54</sup>
- 5.11 All of the submissions received that discussed section 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.<sup>55</sup> The Law Council of Australia, for example, noted that the 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

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53. Submissions of Australia’s Right to Know, p.7; the Law Council of Australia, pp. 13-14; and Associate Professor David Rolph, including ‘A critique of the national, uniform defamation laws’ (2008) 16 *Torts Law Journal* 207, pp. 228-229.

54. Submission of the NSW Solicitor General, at pp. 4-5. See also, *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 85 and *Fairfax Media Publications v Zeccola* [2015] NSWCA 329.

55. Submissions from Australia’s Right To Know, at pp. 14-18; Free TV Australia, at pp. 1-2; Joint Media Organisations, at pp. 3-4; the Law Council of Australia, at pp. 14-18; the NSW Bar Association, at pp. 27-29; and the NSW Solicitor General, at pp. 4-5.

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.<sup>56</sup>

- 5.12 This drafting appears to have clear unintended consequences. It is recommended that section 26 be amended to be closer to its predecessor section 16 of the *Defamation Act 1974* (NSW).

### Recommendation 8

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provision equivalent to section 26 (defence of contextual truth) of the *Defamation Act 2005* (NSW) should be amended to be closer to its predecessor, section 16 (defence of contextual truth) of the *Defamation Act 1974* (NSW), to ensure the clause applies as intended.

## Defences for publication of public documents and fair summaries

- 5.13 Under section 28 of the Act, 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.
- 5.14 The defence is only defeated if 'the plaintiff proves that the defamatory matter was not published for the information of the public or the advancement of education'.<sup>57</sup>
- 5.15 It is a defence to the publication of defamatory material under section 29 of the Act 'if the defendant proves the matter was, or was contained in, a fair report of any proceedings of public concern'.
- 5.16 The Joint Media Organisations submitted that both the definition of 'public documents' for the purposes of section 28, and the definition of 'proceedings of public concern' for the purposes of section 29, should be expanded to replicate the *Defamation Act 2013* (UK) and cover the following:
- documents issued or published by, and presentations at, a scientific or academic conference, and
  - press conferences held to discuss matters of public interest.
- 5.17 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

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

57. *Defamation Act 2005* (NSW), section 28(3).

responsible members of the medical and scientific community in order to protect products and profits'.<sup>58</sup>

- 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.<sup>59</sup>
- 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 privileged'.

5.18 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 MDP 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.

### Recommendation 9

Recommend that the Council of Attorneys-General ask the Defamation Working Party to:

- (a) consider whether section 6 (peer-reviewed statement in scientific or academic journal) and section 7 (reports protected by privilege) of the *Defamation Act 2013* (UK) should be replicated in the Model Defamation Provisions;
- (b) consider whether the definitions of 'public document' and 'proceedings of public concern' in the Model Defamation Provisions equivalent to section 28 (defence for publication of public documents) and section 29 (defence of fair report of proceedings of public concern) of the *Defamation Act 2005* (NSW) should be expanded to protect peer-reviewed statements published in an academic or scientific journal.

## Defence of qualified privilege

5.19 The qualified privilege defence, as captured in section 30 of the Act, recognises that the public interest is served by free and frank communication and that, in limited circumstances, it may be necessary to publish statements that may harm another's reputation, even if the published matters turn out to be inaccurate. Historically, the qualified privilege defence has had limited application, as it could generally not be

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

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

relied on by media defendants whose publications are to a broad and untargeted audience.<sup>60</sup>

5.20 Section 30 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.

5.21 Section 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)*.<sup>61</sup> 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 recipient;
- 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.

5.22 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.<sup>62</sup>

5.23 Media stakeholders submitted that an overly restrictive approach has been taken to the section 30 reasonableness test.<sup>63</sup> 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 and UK counterparts, and [this] has made Australia less attractive as a home for content businesses.'<sup>64</sup>

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

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

62. 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.

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

64. See submission from Australia's Right To Know, at p. 20-21.

- 5.24 Stakeholders, particularly from the media, indicated support for the more flexible approach adopted in the UK.<sup>65</sup> 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.<sup>66</sup> 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’.<sup>67</sup> 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.
- 5.25 Australia’s Right To Know and Free TV Australia submitted that the UK approach should be adopted in Australia, and that the MDP 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 MDP. The Law Society did consider, however, that the section 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 NUDL jurisdictions, once a greater body of authorities is established.
- 5.26 The Review concludes that, at this stage, there is insufficient evidence to demonstrate that change is necessary. However, the Review would support further consultation and consideration of this issue by the Working Group in light of the authorities in other Australian jurisdictions and the emerging UK experience.

#### **Recommendation 10**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the ‘reasonableness test’ in the Model Defamation Provision equivalent to section 30 (defence of qualified privileged for provision of certain information) in the *Defamation Act 2005* (NSW) should be amended, including consideration of whether:

- (a) the existing threshold to establish the defence should be lowered; and
- (b) the UK approach should be adopted in Australia.

## **Division of functions between judge and jury under statutory qualified privilege**

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- 5.27 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, section 22(2) of the Act, discussed above, states that in defamation proceedings tried by a jury, the jury is to determine whether a defendant has published

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

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

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

defamatory matter about a plaintiff and, if so, whether any defence is established. This has created some confusion as to whether section 22 requires any issue relevant to the defence of qualified privilege to be determined by the jury.

- 5.28 Australia's Right To Know considered that questions under section 30 should be determined by a jury or, at a minimum, the issue of reasonableness in section 30(1)(c) should be an issue for the jury. The NSW Solicitor General, however, considered that this would not be appropriate, as whether material is privileged is a question of law.<sup>68</sup>
- 5.29 In *Davis v Nationwide News Pty Ltd*,<sup>69</sup> Justice Peter McClellan AM, held that questions arising under section 30 are to be 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”.<sup>70</sup>

- 5.30 However, in the more recent case of *Daniels v State of New South Wales (No 6)*, Justice McCallum expressed doubt about this conclusion.<sup>71</sup> Justice McCallum held that, where there is a dispute about the third element of the section 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 section 22(2).<sup>72</sup>
- 5.31 There appears to remain some doubt as to the division of functions between judges and juries under section 30. It is therefore recommended that the Defamation Working Party consider this issue and develop an amendment to clarify the section's application.

#### Recommendation 11

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions equivalent to section 30 (defence of qualified privilege for provision of certain information) of the *Defamation Act 2005* (NSW) should be amended to 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

- 5.32 Section 31 of the Act 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;

68. Submission of the NSW Solicitor General, pp. 5-6.

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

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

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

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

- the opinion related to a matter of public interest; and
  - the opinion is based on ‘proper material’.
- 5.33 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.<sup>73</sup>
- 5.34 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.
- 5.35 Stakeholder submissions 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.<sup>74</sup>
- 5.36 Section 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 sections 28 or 29. However, this does not make clear how the ‘substantial truth’ of the material is to be determined, or whether the proper material must be published in the same publication as the purportedly defamatory material.
- 5.37 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.<sup>75</sup> However, Victorian case law has provided some guidance on the application of this MDP. In *The Herald & Weekly Times Pty Ltd v Buckley* (**Buckley**), the Victorian Court of Appeal held that there is nothing in the NUDL 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.<sup>76</sup>
- 5.38 Some submissions suggested that the Court’s finding in *Buckley* restricted the defence’s application beyond SCAG’s intent.<sup>77</sup> However, that conclusion is not clear. Requiring use of the defence to cases where purportedly defamatory matter is contextualised with ‘proper material’ demonstrating its substantial truth is consistent with the MDP’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

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

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

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

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

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

may adversely affect a person's reputation to be contextualised by 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 bring a cause of action.

## Digital publications

- 5.39 However, some submissions raised concern that the section 31 requirement that an opinion be based on proper material does not reflect the way opinions are typically communicated or 'published' online.<sup>78</sup> 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*, 'Many of the new electronic technologies by which publications are now made... place a high premium on brevity'.<sup>79</sup> 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."<sup>80</sup>

- 5.40 The Review acknowledges that 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. It is therefore recommended that further evaluation of the suitability and application of the honest opinion defence to digital publications is warranted. This evaluation would be best undertaken in consultation with all NUDL jurisdictions, with a view to potentially amending the MDP to provide further guidance on its application to such publications.

### Recommendation 12

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the statutory defence of honest opinion should 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.

78. Submissions from Australia's Right to Know, at p. 23; and Free TV Australia, at p. 3.

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

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

## Joinder of journalists to proceedings against media publishers

- 5.41 Section 31 provides that 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 (subs (2)); or
  - the matter was the opinion of a commentator published by the defendant (subs (3)); and
  - the opinion related to a matter of public interest, and was based on proper material.
- 5.42 Under section 31(4), the section 31(2) and 31(3) defences can only be defeated if the plaintiff can show that the defendant did not believe that the employee or agent honestly held the opinion at the time of publication, or had reasonable grounds to believe that the commentator did not honestly hold the opinion at the time of publication.
- 5.43 A number of stakeholders indicated that section 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.<sup>81</sup> 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 section 31(2) that cannot be defeated by section 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.
- 5.44 A number of submissions suggested that further consideration of the wording of section 31(2) and (3) defences to prevent claims being made against journalists personally, or the joinder of journalists as parties to proceedings, is necessary. The Review recommends further investigation of whether this has in fact occurred.

### Recommendation 13

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions equivalent to section 31(4)(b) (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) of the *Defamation Act 2005* (NSW) should be amended to reduce the potential for journalists to be sued personally or jointly with their employers.

## Defence of triviality

- 5.45 Section 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 MDP (balancing freedom of expression against protection of

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

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.

- 5.46 Although the triviality defence is generally recognised as useful and necessary, particularly in the digital era, two issues were raised by stakeholders. First, the defence's focus on 'the circumstances of publication' has potential to limit its application to publications of limited circulation, rather than limited readership.<sup>82</sup> This may render the defence of limited use in relation to online publications (which may not be widely read, but may be widely circulated).<sup>83</sup> Second, some stakeholders suggested that the law of defamation would be better served if the concept of triviality was 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).<sup>84</sup> Arguably, inverting 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. This question, and how trivial claims might be effectively deterred, is discussed below.
- 5.47 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'. Similarly, recent case law in New Zealand has shown support for introduction of a 'minimum harm' threshold, mirroring the UK approach.<sup>85</sup> 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.
- 5.48 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, 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.

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

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

84. Submissions from Communications Alliance, at p. 12; and Joint Media Organisations, at 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, at p. 214.

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

- 5.49 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. The Review recommends that the Working Party further explore whether a threshold test, rather than a defence, would offer a more efficient and effective way to manage trivial claims.

#### **Recommendation 14**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to review application and effect of section 1 (serious harm) of the *Defamation Act 2013* (UK) and consider whether:

- (c) a 'serious harm' or other threshold test should be introduced into the Model Defamation Provisions;
- (d) proportionality and other case management considerations could or should be incorporated into a serious harm test;
- (e) the defence of triviality should be retained or abolished if a serious harm test is introduced.

## **Defence of innocent dissemination and safe harbours**

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- 5.50 Section 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.
- 5.51 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

- 5.52 While section 32 would appear to allow internet service providers (ISPs) and online search engines to defend defamation claims in relation to material published or disseminated via their systems,<sup>86</sup> several submissions indicated that its utility in this context is unclear.<sup>87</sup>
- 5.53 The Law Council of Australia argued that, while ISPs and search engines may not author or have capacity to exercise editorial control over the content of a matter, many ISPs ‘publish’ material uploaded to their servers, which may make them ‘originators’ under section 32(2)(b). Further, ISPs 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 ISP 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 section 32(3) be amended to make it clear that each of the categories of persons referred to in paragraph section 32(3)(a)-(h) will automatically be ‘subordinate distributors’ for the purposes of the defence.
- 5.54 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 section 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.<sup>88</sup> 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.<sup>89</sup>
- 5.55 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.<sup>90</sup> 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

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

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

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

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

90. 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].

and the power to stop publication, for instance by blocking the URL, but fail to do so within a reasonable time.<sup>91</sup>

- 5.56 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 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.”<sup>92</sup>

- 5.57 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.<sup>93</sup> Similarly, a takedown request would not prevent a first or primary publisher simply re-publishing the relevant material to a new URL.

- 5.58 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 worldwide<sup>94</sup> (although an injunction preventing enforcement in the US was later granted by United States District Court);<sup>95</sup>
- 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;<sup>96</sup>
- 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.<sup>97</sup>

- 5.59 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

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

92. Submission of Communications Alliance, pp. 5-6.

93. Submission of Communications Alliance, p. 5.

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

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

96. *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).

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

removed within 24 hours to 7 days, and companies that do not comply can face fines of millions of euros.<sup>98</sup>

### Safe harbour provisions and takedown processes

- 5.60 A number of submissions suggested that the MDP 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 intermediates in relation to content posted by third parties has led to Australian media and online hosts taking a conservative approach to third party content.<sup>99</sup> 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 to others competing in the digital economies and operating in less stringent regulatory environments.
- 5.61 The Review notes that 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.
- 5.62 Article 14 of the EU Electronic Commerce Directive, and section 230 of the 1996 Communications Decency Act (US) (CDA) provides further overseas example. 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.<sup>100</sup>
- 5.63 While there is no specific 'safe harbour' provision in Australia, the innocent dissemination defence (discussed above), as well as the board immunity for online content platforms in the Broadcasting Services Act 1992 (Cth) (BSA), do provide a degree of coverage. As relevant, schedule 5, clause 91 of the BSA states that a State or Territory law has no effect to the extent that it subjects an internet content host (ICH) or ISP to liability for hosting or carrying particular content where the ICH was not aware of the nature of the content. It is noted, however, that several stakeholders submitted 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

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

99. Submission of ninemsn, p. 3.

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

- the vast volumes of content hosted and carried can make it difficult for ICHs and ISPs to immediately remove content as soon as they are 'aware' that it has been flagged as potentially problematic.<sup>101</sup>

5.64 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 over the course of this review.

5.65 It is recommended that the Working Party consider whether the existing defences, in particular the innocent dissemination defence, and the existing protections for ICHs and ISPs under the BSA are sufficient to allow Australian organisations to compete in the digital era. It is also suggested that consideration be given to other alternatives to a formal 'safe harbour' provision, such as a clear takedown process to apply to online content. For example, NUDL jurisdictions may wish to develop guidance 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.

#### **Recommendation 15**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether:

- (a) the innocent dissemination defence requires amendment to better reflect the operation of Internet Service Providers, Internet Content Hosts and search engines as publishers;
- (b) existing protections for digital publishers are sufficient;
- (c) a specific safe harbour provision would be beneficial and consistent with the overall objectives of the Model Defamation Provisions;
- (d) clear takedown procedures for digital publishers are necessary, and, if so, how any such provisions should be expressed.

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101. Submissions from Communication Alliance, at pp. 7-8, and ninemsn, p. 3.

## 6. Remedies

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

### The caps on damages

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- 6.2 Section 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 Section 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).<sup>102</sup> The amount of damages payable for economic loss is uncapped, however, and can still result in large damages awards. For instance, in the recent case of *Wilson v Bauer Media Pty Ltd*,<sup>103</sup> heard in the Victorian Supreme Court, the plaintiff, actress Rebel Wilson, was awarded \$3,917,472 in special damages for economic loss arising from the loss of opportunity for new screen roles as a result of defamatory publications.
- 6.4 Section 36 provides that exemplary damages and punitive damages cannot be awarded.
- 6.5 Stakeholders held differing views on the sections 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.<sup>104</sup> 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.<sup>105</sup>
- 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.

### Multiple proceedings and consolidation

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- 6.7 Mr Patrick George raised the concern that plaintiffs may be disadvantaged by the statutory cap's limit on maximum damages per defamation proceedings, not per

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102. *Defamation Act 2005* (NSW), section 35(1)-(2), (4).

103. *Rebel Melanie Elizabeth Wilson v Bauer Media Pty Ltd & Another* [2017] VSC 521.

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

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

cause of action or publication. He submitted that, if a plaintiff institutes proceedings that include multiple causes of action in relation to multiple publications, he or she can still only recover \$250,000 (or as adjusted).<sup>106</sup> Other submissions, including from media and legal stakeholders, were concerned that applying the cap in this way could encourage plaintiffs to institute multiple proceedings against different defendants, rather than a single proceeding against multiple defendants, to circumvent the cap.<sup>107</sup> This is noting that section 23 precludes plaintiffs bringing multiple proceedings for damages relating to the same or like matter against the same defendant without leave of the court.<sup>108</sup>

- 6.8 While defendants can apply to the courts for orders consolidating proceedings, stakeholders submitted that these orders are not easily obtained.<sup>109</sup> Several stakeholders cited the Victorian Court of Appeal's decision in *Buckley v The Herald and Weekly Times Pty Ltd* [2009] VSCA 118, in which 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

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- 6.9 Stakeholders provided a number of suggestions as to how section 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 section 35 be amended so that the cap applies per cause of action, not per defamation proceedings.<sup>110</sup> The NSW Solicitor General suggested 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.<sup>111</sup> The Law Council of Australia suggested that, instead of amending section 35, section 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).<sup>112</sup>
- 6.10 The Review recognises that the cap on damages for non-economic loss raises issues for both plaintiffs and defendants. Further, 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. It is recommended that the issue be examined in consultation with other NUDL jurisdictions to determine whether the cap remains appropriate.

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

107. See submissions from the Australia's Right To Know, pp. 12-14; Free TV Australia, p. 5; the NSW Bar Association, pp. 41-43; and the NSW Solicitor General, pp. 6-7.

108. *Defamation Act 2005* (NSW), section 23.

109. Submissions from Australia's Right to Know, at pp. 11-14; the Law Council of Australia, at pp. 24-25; the NSW Bar Association, at p. 42; and the NSW Solicitor General, at pp. 6-7.

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

111. Submission from the NSW Solicitor General, pp. 6-7.

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

**Recommendation 16**

Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider:

- (a) the interaction of the Model Defamation Provisions equivalent to section 35 (damages for non-economic loss limited) and section 23 (leave required for further proceedings in relation to publication of same defamatory matter) of the *Defamation Act 2005* (NSW), including any further examples of matters in other jurisdictions where plaintiffs have issued separate proceedings and/or defendants have applied for a consolidation order; and
- (b) whether further legislative guidance is required on the circumstances in which the consolidation of separate defamation proceedings will or will not be appropriate; or
- (c) whether the statutory cap on damages contained in the Model Defamation Provisions equivalent to section 35 of the *Defamation Act 2005* (NSW) should apply to each cause of action rather than each 'defamation proceedings'.

## Appendix 1: Conduct of the Review

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The Department of Justice conducted this Review on behalf of the Attorney General.

The Review began in November 2010, when advertisements inviting all interested parties to make submissions to the Review were published in the Sydney Morning Herald and the Daily Telegraph. The Department also wrote directly to a range of key judicial, legal and media stakeholders to invite them to make a submission. As the Act is based on model uniform provisions, the then Attorney also wrote to the Commonwealth and State and Territory Attorneys-General advising them that the Review had commenced.

A list of the submissions received in 2011 is included at Appendix 2. The majority of submissions were made by media and telecommunications stakeholders, legal stakeholders, and academic commentators. Submissions raised various issues of considerable complexity, and often expressed competing views or differing experiences and opinions.

The Report was finalised in 2018. Since 2011, the Department of Justice has considered recent case law and other developments in defamation law in NSW and elsewhere, and has updated the Report to ensure that its content and conclusions remain current.

## Appendix 2: List of Submissions

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The Hon. Justice Blanch

Australia's Right to Know (a coalition of 12 media organisations)

Communications Alliance

Dr Joseph Fernandez

Free TV Australia

Mr Patrick George, including 'Defamation Law in Australia' (extract)

Joint Media Organisations (a coalition of 15 media organisations)

Law Society of NSW

Law Council of Australia

The Hon. Justice McClellan

Mr Kevin McManus

Media, Entertainment & Arts Alliance

Mr Tom Molomby SC

ninemsn

NSW Bar Association

NSW Solicitor General

Mr Evan Whitton

Associate Professor David Rolph