



# Council of Attorneys-General Review of Model Defamation Provisions

Peter Bartlett, Dean Levitan, Annabelle Ritchie and Dougal Hurley  
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## MinterEllison submissions on the Draft Model Defamation Amendment Provisions

### 1. Introduction

- 1.1 The Model Defamation Law Working Party established by the Council of Attorneys-General (**CAG**)(**Working Group**) provides stakeholders with an opportunity to comment on draft amendments to Australia's defamation laws. The Working Group is led by the New South Wales Department of Justice but aims to identify areas for national reform.
- 1.2 MinterEllison<sup>1</sup> welcomes the opportunity to make submissions on the Australasian Parliamentary Counsel's Committee's public consultation legislation which proposes amendments to the Model Defamation Provisions (**MDPs**)(**Draft Bill**)<sup>2</sup> and to provide comments on reforms not contemplated in the Draft Bill.
- 1.3 These submissions comment on the Draft Bill and the accompanying Background Paper. For clarity, MinterEllison broadly supports the provisions of the Draft Bill and has omitted reference to provisions or recommendations for which it does not have specific comments.
- 1.4 The Working Group will undertake a separate 'Stage 2' review process to consider potential amendments to the MDPs that address the responsibilities and liability of digital platforms for defamatory content published online. MinterEllison has therefore not included recommendations which relate to the 'Stage 2' review.

### 2. Background

- 2.1 Prior to the introduction of the *Defamation Act 2005* (**2005 Act**), each Australian jurisdiction had its own regime for regulating defamation actions. While Queensland and Tasmania had codified their laws, other jurisdictions retained the common law but supplemented or altered it through legislation to varying degrees. Inconsistencies between jurisdictions contributed to case management inefficiencies and forum shopping.
- 2.2 In November 2004, State and Territory Attorneys-General endorsed the MDPs. This was done in recognition of the need for uniform defamation law in Australia. Each jurisdiction subsequently enacted the MDPs through its own legislation. The *2005 Act* had its practical effectiveness curtailed by the need to achieve unanimous support amongst the States and Territories and the Commonwealth.
- 2.3 All States and Territories are parties to the MDP Intergovernmental Agreement (**IGA**). The IGA establishes the Working Group, which reports to CAG on proposals to amend the MDPs and acts as a forum for discussion of issues affecting the protection of reputation, freedom of expression and publication.
- 2.4 Many stakeholders agree that Australia's defamation laws are slanted strongly in favour of plaintiffs and represent a pervasive limitation on journalism. These laws inhibit the public's right to know and are used as a weapon to threaten and attack legitimate reporting. Our defamation laws also have a chilling effect on stories

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<sup>1</sup> This submission is made by the MinterEllison Media Group.

<sup>2</sup> Available at <<https://www.justice.nsw.gov.au/defamationreview>>.



that might otherwise be pursued by journalists and editors. Complex judicially created rules do not produce the right outcome in each case and adversely affect claimants and defendants alike.

- 2.5 Our current laws fail to strike the appropriate balance between protecting an individual's reputation and the fundamental right to freedom of expression – the mechanism by which we organise our society. The balance must be fundamentally shifted by strengthening the defences to defamation claims.
- 2.6 Australia can ill afford to put off a major overhaul of defamation laws any longer. Comparable common law jurisdictions provide a blueprint for reform. Most notably, the *Defamation Act 2013* (UK) continues to evidence how wide-ranging reforms can recalibrate the existing structure of the common law and generally tilt the balance towards freedom of expression. We should not demur from redevising the defamation laws that Dr Matthew Collins QC aptly compared to '*Frankenstein's monster: countless complications and piecemeal reforms riveted to the rusting hulk of a centuries' old cause of action*'.<sup>3</sup>
- 2.7 MinterEllison makes the following recommendations for reform:
  - (a) Amendment to the section 30 qualified privilege defence through the introduction of a statutory defence of publication on a matter of public interest. A defence analogous to section 4 of the *Defamation Act 2013* (UK) is preferable to a defence with a focus on "responsible communication";
  - (b) The introduction of a serious harm test which requires plaintiffs to establish that a publication caused, or is likely to cause, serious harm to their reputation. MinterEllison welcomes the introduction of a serious harm test which largely mirrors s 1(1) of the *Defamation Act 2013* (UK) and recommends amendments to avoid procedural issues that have emerged in the United Kingdom;
  - (c) Amendments to section 35 in order to clarify the nature of the cap on damages for non-economic loss and ensure that aggravation falls within a reasonable range of assessment; and
  - (d) The introduction of a single publication rule to provide that the applicable one-year limitation period runs from the date material is uploaded to the internet.
- 2.8 MinterEllison makes specific recommendations regarding its preferred drafting and, where applicable, suggested amendments to the Draft Bill for consideration in the alternative.

### 3. Amendment to section 30 Qualified Privilege Defence

#### The current law and consultation draft provision:

- 3.1 Section 30(1) of the *2005 Act* establishes that the defence of qualified privilege will be available where the defendant can show that:
  - (a) the recipient has an interest or apparent interest in having information on the subject; and
  - (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
  - (c) the conduct of the defendant is reasonable in the circumstances.
- 3.2 Conduct will be considered reasonable in light of factors set out in section 30(3), including: the extent that the matter was in the public interest, the seriousness of the imputation, whether the publication distinguishes between facts and allegations, the integrity of sources and steps taken to verify the information published. This defence will be defeated by a finding of malice.

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<sup>3</sup> Matthew Collins, 'Reflections on the *Defamation Act 2013*, one year after Royal Assent', *Inform's Blog* (online, January 2020) <<https://inform.org/2014/04/25/reflections-on-the-defamation-act-2013-one-year-after-royal-assent-matthew-collins/>>.



- 3.3 The statutory defence was originally introduced to counter the inaccessibility of common law qualified privilege for media defendants.<sup>4</sup> The removal of a reciprocal interest-duty requirement and the inclusion of public interest as a relevant consideration has not facilitated the use of the statutory defence by the media.
- 3.4 Australian courts have persistently rejected the existence of any general duty on behalf of a major media publisher to communicate with its readership or audience on matters of public interest. Latham CJ noted in *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 at 513 that the press cannot itself make a matter of public interest by publishing statements about it, and that there is:
- no principle of law which entitles a newspaper to publish a defamatory statement of fact about an individual merely because a statement is made in the course of dealing with a matter of public interest.*
- 3.5 As highlighted in MinterEllison's Defamation Law Reform Campaign 2018, where the matter is published to the general public, media defendants have also struggled to demonstrate that the recipient has the requisite 'interest in having information on the subject'. 'Interest' in this context *'is not simply a matter of curiosity, but a matter of substance apart from its mere quality of news'*.<sup>5</sup> Subjects that are deemed to be of broad public interest are narrowly confined. In the past, pertinent issues like corruption<sup>6</sup> and animal cruelty<sup>7</sup> have been excluded.
- 3.6 Even where a subset of the public at large are found to have the requisite interest, a partial defence will only be available. The defence will still fail in respect of publication to those persons outside that subset without the requisite interest.<sup>8</sup> This significantly undermines the utility of the defence for media companies.
- 3.7 As previously outlined by MinterEllison, subsection 30(1)(b) further limits the application of the defence, substantially narrowing the content of an article that may be protected by a statutory qualified privilege defence. In *Rogers v Nationwide News* (2003) 216 CLR 327, the conduct of the Australian Tax Office in taxing a damages claim was found to be of interest to the public, however reporting the details of the damages claim itself fell outside the parameters of subsection 30(1)(b). Similarly, in *De Poi v Advertiser News* [2015] SADC 21, although dishonest election practices were found to be of general public interest, this interest did not extend to the conduct of one specific WorkSafe director. In both cases, despite the stories broadly going to public concerns, the media outlets were unable to establish the defence.
- 3.8 An additional problem is that the considerations in section 30(3) are often treated as a series of independent hurdles to be overcome rather than factors the court may take into account when judging the reasonableness of a defendant's conduct. The absence of one will often draw the focus of the court and eclipse other positive steps taken in accordance with section 30(3). In *John Fairfax Publications v Zunter* [2006] NSWCA 227, prior to the publication, a journalist unsuccessfully attempted to reach the plaintiff by road and telephone. Another employee of the defendant reached the plaintiff by river and impressed upon him to contact the defendant, but to no avail. Notwithstanding these efforts, the court found that the defendant had not acted reasonably in publishing the story.
- 3.9 In *Gayle v Fairfax Media Publications* [2018] NSWSC 1838, in which MinterEllison acted for Fairfax Media, despite the assiduous vetting of the story with all relevant individuals and stakeholders, the jury found the media publisher to have not acted reasonably. This case highlights the unreasonable burden placed on publishers who seek to establish a statutory qualified privilege defence.

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<sup>4</sup> *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [26] per Gleeson CJ, Hayne and Heydon JJ.

<sup>5</sup> *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 40.

<sup>6</sup> *De Poi v Advertiser-News Weekend Publishing Company Pty Ltd* [2015] SADC 21.

<sup>7</sup> *Cummings v Fairfax Digital Australia & New Zealand* [2017] NSWSC 657.

<sup>8</sup> Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2nd ed, 2001).



3.10 In reality, the media's ability to rely on section 30 has been so limited that media lawyers are reluctant to plead it as a defence at all. Larina Mullins, Executive Counsel at Nine, summarised this problem thus:<sup>9</sup>

*The qualified privilege defence is a real issue for news media because we are always running stories that we consider are in the public interest and not just interesting to the public, to use the old cliché. These are important stories that either involve public health or politics or companies... And I hate having to say to them, how do we prove it's true because their answer back to me is, 'Well I've got confidential sources, I believe it, I've got two sources who told me this, I know it's right'.*

...

*... routinely the news media fails and the judge can't see why the entire Australian public has a right to be told this information that turned out to be wrong. That's difficult for people who don't work in the media to understand why we should have that kind of protection, but it's important.*

3.11 Australian courts have repeatedly rejected a common law defence of publication on a matter of public interest, unlike our common law counterparts in the United Kingdom, Canada and New Zealand. Repeated failures to successfully apply *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) have left Australia lagging behind comparable jurisdictions. The United Kingdom enacted a statutory defence of publication on a matter of public interest in 2013.

3.12 The Draft Bill includes the new section 29A which introduces new a public interest reporting defence modelled on the New Zealand common law defence of responsible communication on a matter of public interest:

**29A Defence of responsible communication in the public interest**

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

- (a) the matter is of public interest, and*
- (b) the publication of the matter is responsible.*

*(2) In determining for the purposes of subsection (1) whether the publication of the matter about a person is responsible, a court must take into account the following factors to the extent the court considers them relevant in the circumstances—*

- (a) the seriousness of any defamatory imputation carried by the matter published,*
- (b) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,*
- (c) the extent to which the matter published relates to the performance of the public functions or activities of the person,*
- (d) whether it was in the public interest in the circumstances for the matter to be published expeditiously,*
- (e) the extent of compliance with any applicable professional codes or standards,*
- (f) the sources of the information in the matter published, including the integrity of the sources,*
- (g) if a source of the information in the matter published is a person whose identity is being kept confidential, whether there is good reason for the person's identity to be kept confidential (including, for example, to comply with an applicable professional code or standard),*

<sup>9</sup> 'A free press finds a fierce advocate', *Justinian* (online) <<http://justinian.com.au/featurettes/a-free-press-finds-a-fierce-advocate.html>>.

(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person,

(i) any other steps taken to verify the information in the matter published.

(3) Subsection (2) does not limit the matters the court may take into account.

(4) Without affecting the application of section 22 to other defences, the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established.

**Jurisdictional note.** Each jurisdiction that provides for jury trials for defamation proceedings is to enact the above subsection.

## Recommendations:

### Introduction of a United Kingdom style test:

3.13 MinterEllison strongly supports the introduction of a statutory defence of publication on a matter of public interest analogous to s 4 of the *Defamation Act 2013* (UK). This is preferable to a defence with a focus on "responsible communication" similar to the hitherto untested New Zealand defence established in *Durie v Gardiner* [2017] NZHC 337. We consider that a New Zealand style defence will almost certainly lead to difficulties in applying aspects of the responsibility criteria to non-media defendants, including those posting on social media. There are also difficulties in transplanting such a defence to Australia due to our lack of a Bill of Rights Act including the right to freedom of expression.<sup>10</sup> Due to its potential for unintended and arbitrary outcomes, a New Zealand style test should not be implemented instead of a more flexible United Kingdom style test which would not include an express requirement of "responsible journalism", and would not require satisfaction of any or all of the factors in *Reynolds*.

3.14 Our preferred drafting is as follows:

#### **29A Defence of publication on matter of public interest**

(1) It is a defence to an action for defamation for the defendant to show that—

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to:

(a) the interest in freedom of expression and discussion of matters of public interest and importance; and

(b) all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

<sup>10</sup> For clarity, MinterEllison does not advocate for the introduction of a Bill of Rights in Australia. We merely point out the jurisdictional differences which may lead to differential application of a New Zealand style test in Australia.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(emphasis added)

- 3.15 This draft provision mirrors the s 4 of the *Defamation Act 2013* (UK) except for the additional of s 2(a) (see above emphasis), which provides that a court must have regard to '*the interest in freedom of expression and discussion of matters of public interest and importance*'. This aims to entrench a focus on freedom of expression without curtailing matters to which a court may have regard.
- 3.16 MinterEllison does not see it as inevitable that the United Kingdom's *Defamation Act 2013* (UK) would not be received favourably if transplanted into Australia. We note that the lack of support for *Reynolds* arguments in Australian courts to date would present more of an issue if the language of s 4 of the *Defamation Act 2013* (UK) did not depart from the pre-2013 common law. We consider that the fact *Reynolds* arguments in Australia have hitherto been unsuccessful would not preclude *Reynolds* factors from being considered in cases interpreting the new provision. Further, we respectfully reject arguments that the repeated failure of *Reynolds* arguments in Australia should be viewed as a factor militating against reform. On the contrary, we consider that the refusal of Australian courts to accept one of the most important developments in the history of defamation law provides a mandate for legislative intervention and is certainly not a reason to vacate the field.

#### **Amendments to Draft Bill if a United Kingdom style test is rejected:**

- 3.17 If a public interest defence similar to s 4 of the *Defamation Act 2013* (UK) is rejected, MinterEllison makes the following recommendations with respect to s 29A of the Draft Bill.
- 3.18 First, the Draft Bill shifts the focus from 'reasonableness' to 'responsible communication.' Although these are both open textured tests which can be applied strictly or beneficially, we consider that courts may require higher standards of evidence to meet a 'responsible' threshold than a 'reasonable' one. Accordingly, we recommend replacing 'responsible' with 'reasonable' in s 29A(1)(b).
- 3.19 Additionally, we are concerned that the list of considerations in s 29A(2) of the Draft Bill institutes the same kind of unrealistic 'checklist' that presently exists in s 30 of the *2005 Act*. We note that s 29A(2) contains several factors which are irrelevant to its core operative aspect, that of whether the publication of the matter is 'responsible' or 'reasonable'.
- 3.20 The list of considerations in s 29A(2) should therefore be substantially reduced.

#### **Separating the analysis:**

- 3.21 We note that the Draft Bill contains provisions which, in our view, conflate the separate questions of:
- (a) 'reasonableness' or 'responsible communication'; and
  - (b) that the matter is of 'public interest'.
- 3.22 We recommend that all considerations in s 29A(2) of the MDAPs, insofar as they relate to 'public interest' should be removed from the assessment of whether the publication is 'responsible' or 'reasonable'. This would avoid confusing the two enquiries that a Court must engage in.
- 3.23 If such a defence is to be introduced, courts should assess the questions of whether the publication is (a) in the public interest, and (b) responsible / reasonable, as a two-step process, addressing each question separately.



3.24 Further, in s 29A(2), we recommend changing 'must' to 'may' and adding the qualification 'attempts to distinguish' in 29A(2)(b) so as to make the test more flexible and fair to publishers.

3.25 We have reflected the abovementioned suggestions in track changes below.

**29A Defence of responsible communication in the public interest**

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

*(a) the matter is of public interest, and*

*(b) the publication of the matter is ~~responsible~~reasonable.*

(2) *In determining for the purposes of subsection (1) whether the publication of the matter about a person is ~~responsible~~reasonable, a court ~~must~~may take into account the following factors to the extent the court considers them relevant in the circumstances—*

~~*(a) the seriousness of any defamatory imputation carried by the matter published,*~~

*(a) the extent to which the matter ~~published~~ attempts to distinguishes between suspicions, allegations and proven facts,*

~~*(c) the extent to which the matter published relates to the performance of the public functions or activities of the person,*~~

~~*(d) whether it was in the public interest in the circumstances for the matter to be published expeditiously,*~~

*(b) the extent of compliance with any applicable professional codes or standards,*

~~*(f) the sources of the information in the matter published, including the integrity of the sources,*~~

~~*(g) if a source of the information in the matter published is a person whose identity is being kept confidential, whether there is good reason for the person's identity to be kept confidential (including, for example, to comply with an applicable professional code or standard),*~~

*(c) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person,*

*(d) any other steps taken to verify the information in the matter published.*

(3) *Subsection (2) does not limit the matters the court may take into account.*

(4) *Without affecting the application of section 22 to other defences, the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established.*

**Jurisdictional note.** *Each jurisdiction that provides for jury trials for defamation proceedings is to enact the above subsection.*

3.26 In the alternative, MinterEllison submits that more preferable even than the removal of several of these section 29A(2) factors would be the simplification of a responsible communication test to require the defendant to show *'that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances'*. In making these recommendations, we reiterate the shortcomings of any "responsible communication" test and submit that a United Kingdom style "public interest" test is the best option for fair and effective reform.



## 4. Serious harm test

### The current law and consultation draft provision:

- 4.1 There is no explicit ‘threshold of seriousness’ in Australian defamation law and (with the notable exception of the Supreme Court of New South Wales in *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858) Australian courts have tended to reject attempts to recognise one.<sup>11</sup> Instead, s 33 of the 2005 Act provides that ‘it is a defence to a publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain harm’. Harm under this provision is taken to mean ‘harm to reputation’.<sup>12</sup>
- 4.2 The filtering of spurious claims does not occur until trial – by which point significant time has already been wasted and substantial costs incurred. Allowing unworthy claims to proliferate longer than necessary is a hindrance to the court system and the administration of justice.
- 4.3 This is clearly evident in the case of *Smith v Lucht* [2016] QCA 267, where a determination of triviality was only made once the final judgment was given. The court noted the irony that by launching the legal action, Smith had brought more attention to the alleged defamatory comparison and this was the greatest cause of reputational harm. Where a publication initially has a trivial impact on a plaintiff’s reputation, it is counterintuitive to utilise an avenue of recourse that will exacerbate this harm.
- 4.4 This issue is becoming ever more significant in the digital age. Increasing numbers of cases involving social media posts, emails, tweets and text messages show that ordinary people have an elevated platform through which they can communicate to the world at large. Forcing such people, who have limited resources, to contest frivolous claims and pay substantial legal bills runs contrary to good public policy. The lack of a threshold test also encourages costly legal battles over social media posts made to a small number of followers.
- 4.5 Stakeholders including MinterEllison have long called for the introduction of a serious harm test analogous to s 1(1) of the *Defamation Act 2013* (UK). The Draft Bill does this through the insertion of a new s 7A to the MDPs:

#### **7A Serious harm required for cause of action for defamation**

(1) An individual has no cause of action for defamation in relation to the publication of defamatory matter about the individual unless the individual proves that the publication has caused, or is likely to cause, serious harm to the reputation of the individual.

(2) An excluded corporation referred to in section 9 has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless the corporation proves that the publication has caused, or is likely to cause—

(a) serious harm to the reputation of the corporation, and

(b) serious financial loss.

### Recommendations:

#### Support for the introduction of a United Kingdom style serious harm test:

- 4.6 MinterEllison welcomes the introduction of a serious harm threshold which largely mirrors s 1(1) of the *Defamation Act 2013* (UK). However, due consideration should be given to the case law in the United

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<sup>11</sup> See e.g. *Lesses v Maras* (2017) 128 SASR 292, 317-18 (per curiam); [2017] SASCFC 48. Cf. *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858 at [31]-[42] per McCallum J. At time of writing, no jurisdiction outside New South Wales has adopted the serious harm threshold as an element of a defamation action.

<sup>12</sup> *Smith v Lucht* [2016] QCA 267.



Kingdom which has developed over the proper interpretation of s 1(1) in deciding on the precise wording of an Australian equivalent.



#### Amendments to the Draft Bill:

- 4.7 MinterEllison recommends that further drafting be adopted to avoid procedural issues that have emerged in the United Kingdom that were clarified in *Lachaux v Independent Print Ltd* [2019] UKSC 27.
- 4.8 First, the section ought to specify that the threshold question is to be addressed early in proceedings and before the filing of a defence. In making this recommendation, MinterEllison acknowledges but respectfully disagrees with criticism of an early stage test as impractical.
- 4.9 Especially if an early stage serious harm threshold is preferred (and even if it is not), MinterEllison supports the retention of the defence of triviality. This would leave it open to defendants to choose whether to invoke the serious harm threshold and/or rely on the defence of triviality (either together or on separate occasions throughout a trial as appropriate).
- 4.10 MinterEllison supports the recommendations made in the submission of Professor David Rolph to the Working Party in response to the previous Discussion Paper.<sup>13</sup> We reiterate Rolph's suggestions below:
- (a) *the removal of the word, 'any', from cl 33 of the Model Defamation Provisions. In its current form, a defendant bears a very heavy burden if he or she wishes to establish a defence of triviality. A defendant would need to negative any real chance or possibility of harm. The Model Defamation Provisions should be amended so as to make it clear that a defendant does not have to discharge such a heavy burden in order to establish a defence of triviality. The other aspect of the drafting of cl 33 of the Model Defamation Provisions which has been problematic is the reference to 'harm', without specifying what harm. There has been judicial disagreement as to whether this reference is to harm to reputation only or whether it comprehends harm to feelings.*
  - (b) *The position under cl 33 of the Model Defamation Provisions should be clarified by amending it expressly to provide... that the relevant harm is 'harm to reputation'. Reputation is the principal interest protected by the tort of defamation; the principles of defamation law are principally directed towards the protection of reputation; defamation law does not protect mere feelings, only hurt feelings parasitic upon reputational damage. There should be no difficulty in making this change to specify that the relevant harm is harm to reputation.*
- 4.11 Secondly, it is not clear on the face of s 7A of the Draft Bill whether and when a defendant to an application invoking the provision is required to file a defence. We consider that this may be clarified by either:
- (a) the addition of a provision that notes that once an application is brought, there is no requirement for a defendant to file a defence; or
  - (b) the addition of a provision that notes that the requirement of a defendant to file a defence is stayed until such time as an application invoking the provision has been heard.
- 4.12 The practical difference between these two options is negligible, but for clarity we recommend option (a) above.
- 4.13 Thirdly, we recommend the addition of factors which may be taken into account in assessing s 7A to guide the exercise of judicial discretion. We consider that these factors would ensure that the focus remains on serious harm and ensuring that judges do not stray into analysis of hurt feelings or harm outside of the community in which serious harm occurred or is likely to have occurred.
- 4.14 These suggested amendments to the new s 7A proposed in the Draft Bill are reflected in track changes below:

#### **7A Serious harm required for cause of action for defamation**

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<sup>13</sup> David Rolph, 'Review of Model Defamation Provisions' (30 April 2019) <<https://www.justice.nsw.gov.au/defamationreview>>.

(1) An individual has no cause of action for defamation in relation to the publication of defamatory matter about the individual unless the individual proves that the publication has caused, or is likely to cause, serious harm to the reputation of the individual.

(2) An excluded corporation referred to in section 9 has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless the corporation proves that the publication has caused, or is likely to cause—

- (a) serious harm to the reputation of the corporation, and
- (b) serious financial loss.

(3) In determining for the purposes of subsection (1) or (2) whether the publication causes or is likely to cause serious harm to the reputation of the individual, a court may take into account any of the following factors—

- (a) the seriousness of the defamatory imputations of which the plaintiff complains,
- (b) any actual serious harm to reputation which has occurred since the publication,
- (c) any serious harm to reputation which is likely to occur in the future,
- (d) the extent of the publication,
- (e) the location of recipients of the publication,
- (f) the reputation held by the individual in the jurisdiction community in which serious harm was caused or likely to have been caused,
- (g) the extent to which the individual's own conduct has contributed to any harm to reputation, and
- (h) the circumstances of the publication.

(4) Subsection (3) does not –

- (a) require each matter referred to in the submission to be taken into account, or
- (b) limit the matters that the court may take into account.

(5) The matters in subsections (1) and (2) above are to be determined by a court on the application of a party or of its own motion at an early stage in the proceeding.

(6) There is no requirement for a defendant to file a defence once an application under this section is brought or at any other time.

## 5. Damages

### The current law and consultation draft provision:

5.1 Clause 35 of the MDPs provides for a maximum amount of damages for non-economic loss, but several recent cases in which the statutory cap on damages have undermined any cap for non-economic loss.<sup>14</sup>

5.2 The operative subsections of s 35 of the 2005 Act currently provide as follows:

#### **35 Damages for non-economic loss limited**

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<sup>14</sup> See e.g. *Bauer Media Pty Ltd v Wilson* [No 2] [2018] VSCA 154, *Rayney v State of Western Australia* (No 9) [2017] WASC 367, *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201, *Wagner v Nine Network Australia PL & Ors* [2019] QSC 284 and *Rush v Nationwide News Pty Ltd* (No 7) [2019] FCA 496.

(1) Unless the court orders otherwise under subsection (2), the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is \$250,000 or any other amount adjusted in accordance with this section from time to time (the **maximum damages amount**) that is applicable at the time damages are awarded.

(2) A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages.

- 5.3 When the 2005 Act was introduced, it provided for a maximum amount of damages for non-economic loss. The rationale for this maximum amount was explained in the Second Reading Speech for the *Defamation Bill 2005* (NSW) by The Hon Bob Debus, the then New South Wales Attorney-General, as follows:

*Recent changes to New South Wales civil liability law have imposed both thresholds and caps on awards of general damages in personal injury cases. In order to be eligible for the maximum award of damages for non-economic loss, which currently stands at \$400,000, it is likely that a plaintiff would need to show that they have been rendered quadriplegic or severely brain damaged and will be highly dependent on the care of others for the rest of their life. By way of contrast, in the recent case of *Sleeman v Nationwide News Ltd*, 2004 NSWSC 954, a journalist from the *Sydney Morning Herald* was awarded \$400,000 in damages basically because an article in *The Australian* conveyed the impression that he was a dishonest journalist.*

***While I have no doubt that false and defamatory statements are harmful, the fact is that reputations may be restored and injured feelings may pass after a time. The pain and suffering associated with an affliction like quadriplegia, on the other hand, will last a lifetime. The bill ensures that this glaring discrepancy in the way damages are awarded is addressed.***

(emphasis added)

- 5.4 Thus, the ambition was to bring the size of defamation payments into line with compensation for physical injuries. However, a series of recent authorities suggest that reputational harm deserves more compensation than physical injuries.
- 5.5 In the first instance decision in *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 (**Wilson**), Dixon J of the Supreme Court of Victoria construed section 35 such that the maximum damages amount for non-economic loss had no application in cases where the court found that the circumstances of the publication were such as to warrant an award of aggravated damages. His Honour awarded Ms Wilson \$650,000 for non-economic loss, \$3,917,474 for special damages and \$182,448.61 in interest.
- 5.6 On appeal in *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 (**Wilson No 2**), the Victorian Court of Appeal rejected Bauer Media's argument that the maximum damages amount fixed the upper limit of a range or scale, reflecting the most serious cases. The Court held that the maximum damages amount did not fix the upper limit of a range or scale but rather acted as a cap. At [209], the Court stated:
- In our view, the combination of s 34 and s 35(1) does not create a range or scale with respect to the quantum of damages to be awarded for non-economic loss. In this respect, it is significant, as the plaintiff submitted, that s 35(1) specifies the maximum damages amount for individual defamation 'proceedings' rather than for individual defamatory matter, or for individual imputations, or for separate causes of action. If s 34 and s 35(1) create a range to govern the award of damages for non-economic loss it would be necessary for comparisons to be confidently drawn between defamation proceedings to identify where one proceeding sat relative to another with respect to the seriousness of the imputations and the level of harm suffered. However, the Legislature's choice of 'proceedings' as the reference point rather than imputations or causes of action has the consequence that the ability to draw comparisons is significantly impaired.*
- 5.7 The Court agreed with Dixon J's decision that an award of aggravated damages was warranted but reduced the damages award to \$600,000 for non-economic loss and set aside the award of special damages.



- 5.8 The construction of s 35 in *Wilson (No 2)* has been followed in a series of cases. This line of authorities represents a significant increase in the awards granted in earlier cases and a distortion that requires legislative intervention.
- 5.9 In *Rayney v Western Australia (No 9)* [2017] WASC 367, Chaney J of the West Australian Supreme Court followed Dixon J's first instance judgment in *Wilson*. *Rayney* was decided before the decision of the Victorian Court of Appeal in *Wilson (No 2)*. Chaney J held that the maximum damages amount was inapplicable and awarded the plaintiff \$600,000 for non-economic loss.
- 5.10 *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 is another decision in which the flawed drafting of s 35 led to a significant damages award. Wigney J found that because of the reckless and sensationalist manner in which defamatory articles about Geoffrey Rush were published, Mr Rush was entitled to aggravated damages. His Honour noted at [783] that '*the cap in s 35 of the Defamation Act accordingly does not apply.*' Mr Rush was entitled to an award of damages for non-economic loss (including aggravated damages) in the amount of \$850,000. Mr Rush's total defamation damages payout of \$2.9 million is, at the time of writing, subject to an appeal.
- 5.11 In *Wagner v Harbour Radio Pty Ltd & Ors* [2018] QSC 201, a case in which broadcaster Alan Jones, 2GB and 4BC were held to have defamed the prominent Wagner family in a series of radio broadcasts regarding the Grantham Floods, Flanagan J of the Queensland Supreme Court followed the Victorian Court of Appeal's decision in *Wilson (No 2)* in relation to the construction of s 35. Having found that the conduct of the defendants justified an award of aggravated damages, His Honour awarded each of the four plaintiffs over \$850,000 in damages for non-economic loss, plus interest.
- 5.12 In *Wagner v Nine Network Australia PL & Ors* [2019] QSC 284, the same four plaintiffs were awarded an even larger sum. In this case, which involved a television broadcast on Channel Nine's 60 Minutes, Justice Applegarth of the Queensland Supreme Court concluded that the conduct of the defendants warranted an award of aggravated damages and awarded the plaintiffs \$600,000 plus interest (\$63,000) each against the Nine Network defendants and \$300,000 plus interest (\$31,500) as against journalist Nick Cater. His Honour noted at [412] that if he had accepted the defendants' submissions about the effect of the cap and separately assessed "pure compensatory damages" and "aggravated compensatory damages", then the award against the Nine Network defendants would have been \$400,000 (reflecting the most serious kind of defamation, and to approximate the statutory cap) for "pure compensatory damages", with an additional \$200,000 for aggravated compensatory damages. At the time of writing, this damages award is subject to an appeal by Nine.
- 5.13 Alone, the verdict in *Wagner v Nine Network Australia PL & Ors* [2019] QSC 284 is the largest ever damages award in Australian history, beating the Wagners' previous record for their verdict against 2GB. If a separate \$440,000 settlement against *The Spectator* is included, the Wagners have been awarded more than \$8 million in defamation damages plus costs.
- 5.14 Urgent legislative amendments are required to restore the statutory cap. MinterEllison rejects suggestions that these awards are outliers that are not reflective of a well-documented trend towards larger damages awards for defamation. The particular characteristics of these cases is not so exceptional as to explain the extraordinary awards of damages that have accompanied them. Indeed, these payouts are so large and disproportionate that it is a trite dictum that Australia is the '*defamation capital of the world.*'<sup>15</sup> Addressing concerns that the statutory cap on damages can be set aside in any case involving conduct that warrants an award of aggravated damages is not, as some have claimed, argued merely because it is in the interests of media defendants to do so. The fundamental issue is that, contrary to legislative intention, the gap between ever larger payouts for defamation and capped payouts for personal injuries continues to grow and will not

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<sup>15</sup> See e.g. Dr Matthew Collins QC, 'Nothing to write home about: Australia the defamation capital of the world', National Press Club, Canberra, 4 September 2019. See also Louisa Lim, 'How Australia became the Defamation Capital of the World', *The New York Times* (online, 5 March 2019) <https://www.nytimes.com/2019/03/05/opinion/australia-defamation-laws.html>.

be rectified without intervention. Despite the obvious difficulties in doing so, the intention of the 2005 Act was for courts to compare physical injuries to reputational harm. As Dr Matthew Collins QC has noted:<sup>16</sup>

*The intent seemed to be to try to create a correlation between damage to reputation and personal injuries damage... How do you compare, for example, permanent brain damage, with damage to a reputation from an article published in a newspaper. You can't...*

*It's not a rational comparison but **the legislation requires courts to keep a rational relationship between the damages that are awarded (for physical injuries) and the damages to reputation.***

(emphasis added)

5.15 Responding to concerns from stakeholders, the Draft Bill includes an amended s 35. The proposed s 35(2) aims to clarify that only the most serious cases require awards for non-economic loss at or approaching the cap.

5.16 The relevant subsections of s 35 of the Draft Bill provide as follows:

**35 Damages for non-economic loss limited**

~~(1) Unless the court orders otherwise under subsection (2), the~~ The maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is \$250,000 or any other amount adjusted in accordance with this section from time to time (the **maximum damages amount**) that is applicable at the time damages are awarded.

(2) The maximum damages amount is to be awarded only in a most serious case.

(2A) Subsection (1) does not limit the court's power to award aggravated damages if an award of aggravated damages is warranted in the circumstances.

~~(2B) A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages. An award of aggravated damages is to be made separately to any award of damages for non-economic loss to which subsection (1) applies.~~

**Recommendations:**

5.17 MinterEllison agrees with the objective of the proposed new s 35(2).

5.18 However, we consider that awards well over the cap in line with recent cases may continue to be the norm without a limit on awards for aggravated damages. The Draft Bill does not provide such a limit.

5.19 MinterEllison recommends capping aggravated damages at a percentage of general damages sum awarded. Any more than a 50% uplift for aggravation is, in our submission, punitive and contrary cl 37 of the MDPs. Setting aggravation at 50% would help to ensure that aggravation falls within a reasonable range of assessment.

5.20 MinterEllison also recommends adding to the draft s 35(2B) to clarify that an award for aggravated damages does not affect the maximum damages award for non-economic loss.

5.21 MinterEllison acknowledges that the draft s 35(2B) is contrary to case law such as *Rayney v State of Western Australia (No 9)* [2017] WASC 367 in which it was stated by Chaney J at [855] that:

*It is well-established that aggravated damage is not a separate head of damages in defamation. Rather, it is an aspect of compensatory damages. Although on occasions courts may separately identify the amount by which damages are increased by reason of aggravation, it is not necessary that they do so. In many cases, the aggravated component of a damages award will comprise an*

<sup>16</sup> Chris Merritt, 'Damages payouts that exceed cap 'to be the new normal': Matt Collins QC', *The Australian*, 26 April 2019.

element of the 'inextricable considerations' that make up the total amount awarded. To require the court, as the defendant suggests, not only to assess and separately quantify two components of aggravated damage, being the component attributable to circumstances occurring at any time and the component attributable to aggravating circumstances existing at the time of publication, would be to create a level of artificiality that the legislature cannot have intended, and which the words of the section do not require.

(footnotes omitted)

- 5.22 However, aggravated damages are of contestable nature and *McGregor on Damages* cites a departure from the practice in a case of wrongful arrest, false imprisonment, assault and malicious prosecution, and notes that whether this will, or should, apply to defamation is not clear.<sup>17</sup>
- 5.23 MinterEllison considers that there is no compelling reason why aggravation cannot be separated from pure compensatory damages. Indeed this practice is encouraged in the Supreme Court of Singapore. In *Lim Eng Hock Peter v Lin Jian Wei* [2010] SGCA 26, the Court noted at [40] that:

*One point we wish to make at this juncture would be that whilst a single award can be made for damages in a defamation action, for the purposes of assessing the damages, a judge would necessarily (in his mind) have to come up with a figure for general damages and a figure for aggravated damages (or other types of damages, as the case may be). The sums would then be added together to constitute a single lump sum award for damages. **Therefore, it would be odd if the court does not provide a breakdown of the sums awarded as general damages and as aggravated damages (or other types of damages, as the case may be). Such an approach should be discouraged.** In this connection, it would be apposite to reiterate what was recently stated in *Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] SGCA 15 by this court (at [65]):*

*[W]hile damages for defamation may be given as a single award, we are of the opinion that, **in awarding damages for defamation, a judge ought to demarcate and explain the damages awarded for the defamation itself and the additional damages awarded for the defamer's aggravating conduct in relation to the defamation.** The need for some form of separation is self-evident where financial loss is concerned.*

(emphasis added)

- 5.24 In Singapore, courts have been loath to allow grossly exorbitant awards for general damages and been generally consistent in the quantum of general damages (including aggravated damages). The approach in Singapore shows that critics of s 35 of the Draft Bill who would maintain that it is unprecedented in the common law world are misguided. Further, arguments that Australia would be entrenching 'artificiality' by amending the MDPs to require separation of aggravated damages paradoxically ignore the artificiality of the current approach. This too is evident from the above extract from *Lim Eng Hock Peter v Lin Jian Wei* [2010] SGCA 26. If a court necessarily calculates aggravation, it would aid transparency and guard against the perpetuation of an inbuilt punitive element in aggravated damages for this calculation to be separately demarcated and, moreover, explained in written reasons.
- 5.25 Recent Australian case law arguably supports an argument that aggravated damages have in fact become punitive despite this being prohibited by the Act. This can and should be rectified. Amendments which mandate specified amounts and reasons for aggravation would help to clarify the true 'cost' that may otherwise be unknown. Lawmakers should not be afraid to force a departure from the practice of not breaking down an award into a component for ordinary compensatory damages and a component for aggravated compensatory damage. Such a departure is both demonstrably possible and urgently needed.
- 5.26 Our proposed additions to s 35(2) of the Draft Bill appear below in track changes.

### **35 Damages for non-economic loss limited**

<sup>17</sup> Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th ed, 2014) at [44-041].

(1) The maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is \$250,000 or any other amount adjusted in accordance with this section from time to time (the **maximum damages amount**) that is applicable at the time damages are awarded.

(2) The maximum damages amount is to be awarded only in a most serious case.

(2A) Subsection (1) does not limit the court's power to award aggravated damages if an award of aggravated damages is warranted in the circumstances.

(2B) An award of aggravated damages is to be made separately to any award of damages for non-economic loss to which subsection (1) applies. An award for aggravated damages does not affect an award for damages for non-economic loss to which subsection (1) applies.

(3) An award for aggravated damages must not be for an amount greater than 50% of an award for damages for non-economic loss in any case.

(4) A judicial officer making any award of damages for non-economic loss or any award for aggravated damages must give actual written reasons.

(5) Subject to this act, written reasons to which subsection (4) applies must separately set out for any non-economic loss award and any aggravated damages award:

(a) the reasons for that award; and

(b) the findings on material questions of fact that led to that award, referring to the evidence or other material on which the award was based.

...

## 6. Introduction of a 'single publication rule'

### The current law and consultation draft provision:

- 6.1 The "multiple publication rule", a long held principle of defamation law, provides that each publication of defamatory material gives rise to a separate cause of action, which is subject to its own limitation period.
- 6.2 Section 5(1AAA) of the *Limitations Act 1958* (Vic) provides that an action in defamation is not maintainable if brought one year from the date of publication of the matter in question. This date is fixed for print publications.
- 6.3 The multiple publication rule has led to many well documented issues in the context of online publications. Effectively, the limitation period for an online publication is open-ended, contrary to the prompt and effective resolution of claims and hostile to media organisations who maintain news archives which benefit society.
- 6.4 Defamatory statements in their archives can render an online publisher liable for defamation years after they were first posted and it is practically unworkable and hugely expensive for these publishers to constantly trawl through past publications.
- 6.5 The multiple publication rules also encourages forum shopping and undermines the uniformity of defamation law across different media.



- 6.6 MinterEllison agrees that it is thoroughly '*unsuited in the contemporary world where statements can be uploaded to the internet in an instant, viewed in multiple jurisdictions, endlessly republished and exist indefinitely if not removed*'.<sup>18</sup>

**Recommendations:**

- 6.7 MinterEllison strongly supports amending the MDPs to include a single publication rule in similar terms to s 8 of the *Defamation Act 2013* (UK) that applies to first publication of the material irrespective of the medium.
- 6.8 MinterEllison echoes the concern raised by other stakeholders around the wording of "manner" in subsections 1A(3) and (4) of the Draft Bill. We recommend the removal of subsections (3) and (4) as section 1(b) already establishes that the rule applies only to matter that is "substantially the same".

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<sup>18</sup> Ursula Connolly, 'Multiple Publication and Online Defamation – Recent Reforms in Ireland and the United Kingdom' (2012) 6 *Masaryk University Journal of Law and Technology* 35, 37.



