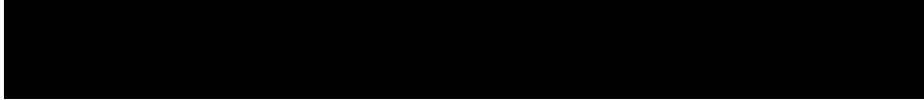


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Council of Attorneys-General Review of Model Defamation Provisions

Submission by Banki Haddock Fiora in response to Discussion Paper of February 2019

This submission is made by Banki Haddock Fiora (**BHF**), a Sydney-based boutique media and intellectual property law firm, in response to the Discussion Paper issued in February 2019 by the Council of Attorneys-General Review of Model Defamation Provisions (the **Discussion Paper**).

BHF considers the review of the Model Defamation Provisions by the Defamation Working Party to be a once-in-a-generation opportunity to remedy what many practitioners in the area consider to be a fairly broken system. The Discussion Paper notes that the “Model Defamation Provisions provide the statutory legal framework for balancing freedom of expression and freedom to publish information in the public interest on the one hand with the right of individuals to have their reputations protected from defamatory publications and the right to remedies for such publications on the other hand.” In our view, the application and development of defamation law in Australia has seen the pendulum balancing these two sets of interests swing far away from the right to freedom of expression.

For the sake of simplicity, this submission will refer to the existing Model Defamation Provisions by reference to the *Defamation Act 2005* (NSW). We acknowledge that existing defamation laws in some jurisdictions are contained in differently named statutes, such as in the ACT and NT. The numbering of the corresponding sections for provisions in the current nationwide defamation laws also differs between the various Acts enacted across Australian jurisdictions. Again, for the sake of simplicity, where section numbers of the current legislation are referred to, this submission will use the section numbers in the *Defamation Act 2005* (NSW).

1. Question 1 – Do the policy objectives of the Model Defamation Provisions remain valid?

1.1. The objectives of the Model Defamation Provisions (as embodied in section 3 of the *Defamation Act 2005* (NSW), and interstate equivalents) are, and continue to remain, worthy. However, experience has proven that the laws are not in fact uniform, and Courts have in many instances not taken heed of the objectives when delivering decisions.

1.2. In relation to section 3(a), which states an objective as being to promote uniform laws of defamation in Australia, the current laws are, regrettably, not uniform. By way of example:

(a) New South Wales, Victoria, Queensland, Western Australia and Tasmania all provide for a party to have the ability to elect trial by jury in defamation cases (as opposed to trial by judge alone). The Australian Capital Territory, Northern Territory and South Australia do not allow trial by jury. In terms of Commonwealth jurisdiction, the Federal Court of Australia (which has in recent years become an increasingly popular forum for the commencement of proceedings, where a publication invokes Commonwealth jurisdiction) it has been made patently clear that trial by jury will occur in that Court only in exceptional circumstances: see *Chau Chak Wing v Fairfax Media Publications Pty Limited* [2017] FCAFC 191; 255 FCR 61;

(b) The Courts of Appeal in Queensland and New South Wales have expressed conflicting views as to whether a party that elects trial by jury may withdraw the election. In *Kencian v Watney* [2015] QCA 212, the Queensland Court of Appeal held that a party could withdraw a jury election (without the need for a formal application to the Court to dispense with the jury), while in *Chel v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWCA 379 the NSW Court of Appeal held a party could not. These conflicting decisions remain unresolved;

(c) Some jurisdictions recognise a form of defence known as a “*Hore-Lacy*” justification plea, whereby a defendant denies that an impugned publication conveyed a particular imputation pleaded by the plaintiff, and does not seek to justify the precise meaning in its exact terms, but instead seeks to prove the truth of a slightly different meaning, which is a permissible variant of the meaning pleaded by the plaintiff upon which the plaintiff might otherwise be able to succeed. A *Hore-Lacy* plea is available to defendants in, for example, Victoria (*Setka v Abbott & Anor* [2014] VSCA 287; 44 VR 352) and Queensland (*Baboolal v Fairfax Digital Australia and New Zealand Pty Ltd & Ors* [2016] QSC 175). However, it is not permissible in New South Wales (*Fairfax Media*

Publications Pty Ltd v Bateman [2015] NSWCA 154; 90 NSWLR 79). Accordingly, a defence of truth may be pleaded to a matter in Victoria and Queensland (at least), which is unavailable in New South Wales in respect of the same matter;

- (d) Victoria and the ACT each have human rights legislation, namely the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT), respectively, while other jurisdictions do not. Both of these pieces of legislation contain provisions dealing with reputation and freedom of expression that potentially impact upon the way defamation disputes may be decided in those jurisdictions. It is to be noted that, in the experience of the United Kingdom, the *Human Rights Act 1998* (UK) and European Convention on Human Rights have been found to be relevant to the determination of defamation disputes (see as but one example *Dow Jones & Co Inc v Jameel* [2005] EWCA Civ 75; [2005] QB 946);
- (e) at least in New South Wales, a trivial defamation claim may be dismissed at an early interlocutory stage as an abuse of process on the basis of proportionality: *Bleyer v Google Inc* (2014) 88 NSWLR 670. See also *Freeburn v The Cake Decorators Association of NSW Inc. (No 2)* [2014] NSWDC 173. However, this concept has been rejected in Queensland: see *Smith v Lucht* [2014] QDC 302;
- (f) the Supreme Court of New South Wales has recognised that the tort of defamation includes an element representing a threshold of seriousness: *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858 (in particular, an imputation should not be held to be defamatory unless it has a tendency to have **adverse effects** upon the claimant). McCallum J held that the definition of “defamatory” adopted in Australia must comprehend a qualification or threshold of seriousness so as to exclude trivial claims. However, no jurisdiction outside New South Wales has to date applied or adopted the threshold of seriousness as an element of the cause of action;
- (g) while most jurisdictions provide that there is no cause of action in defamation for, or against, deceased persons (eg. section 10 of the *Defamation Act 2005* (NSW)), Tasmania did not enact any such provision. This has left open the opportunity for actions for and against deceased persons to be commenced, or continue after death, in Tasmania;
- (h) States and Territories retain the ability to amend their defamation laws so as to make them less uniform nationally. For example, in 2014 and 2015, the Tasmanian government announced it would change Tasmanian defamation laws to allow large corporations (in particular, forestry corporations) to sue for

defamation. Had Tasmania gone it alone in making such a change, it would have provided an avenue for “forum-shopping” by any type of corporation to sue in Tasmania, given the national (and international) reach of internet publications. The plans were eventually shelved in February 2015.¹ Nevertheless, the experience shows that the current laws may be modified should a jurisdiction choose to do so, with a resulting further lessening of uniformity.

- 1.3. The above discrepancies give rise to the potential for plaintiffs to engage in “forum-shopping”, particularly given that so much content is now published nationwide via the internet. For example, if a plaintiff based in NSW wishes to avoid a jury, they may decide to sue in the ACT Supreme Court or the Federal Court of Australia, rather than the Supreme Court of NSW. This is wholly incompatible with the notion of nationwide uniformity.
- 1.4. Section 3(b) emphasises the importance of freedom of expression and in particular the discussion of matters of public interest, whereas section 3(c) recognises the importance of giving effective and fair remedies to persons whose reputations are harmed. Balancing these two often-competing interests is an inevitable challenge in defamation law. However, in practice and our experience, the Courts have often shown a lack of focus upon the importance of freedom of expression and the discussion of matters of public interest, seemingly giving priority to the interests of persons who claim that their reputations have allegedly been harmed in the process of such discussion occurring.
- 1.5. Section 3(d) states that the defamation legislation should promote speedy and non-litigious methods of resolving defamation disputes. The uniform laws have not achieved this object. The pre-litigation Offer to Make Amends procedure is not mandatory, so a plaintiff is not required to issue a concerns notice prior to commencing proceedings. Further, once litigation has been commenced, defamation proceedings (as has been the case for multiple decades) are still susceptible to interlocutory disputes requiring judicial determination.
- 1.6. It is submitted that, rather than the objects in section 3 being aspirational, they should be essential elements to be considered by the Court throughout the proceedings (and a matter on which the parties must address the Court). In particular, the first time a matter comes before the Court, the parties should be required to specifically address the objects of section 3, and how the proceeding fits within their scope, before the Court decides how the proceeding is to continue (if at all). It should also be mandatory for the Court at trial to specifically address each of sections 3(b), (c) and (d).

¹ <https://www.abc.net.au/news/2015-02-05/tasmania-ditches-defamation-law-changes-after-public-backlash/6071438>

2. Question 2 – Should the Model Defamation Provisions be amended to broaden or to narrow the right of corporations to sue for defamation?

2.1. It is submitted that the prohibition on corporations suing for defamation should be extended to all corporations (including not for profit corporations such as charities, religious institutions and unions). This will draw a clear line to ensure that defamation is a tort directed to the rights of individuals to protect their reputations, as opposed to furthering the commercial and other interests of corporations. The simple answer to this vexed issue is to prevent all corporations from suing for defamation, while leaving open the other avenues available to them as outlined above.

2.2. An award of damages is the primary remedy sought in defamation proceedings. Compensatory damages awarded for defamation seek to provide:

- (a) recompense for the personal distress and hurt caused to the plaintiff;
- (b) reparation for any harm that has occurred to the plaintiff's reputation (whether personal or business); and
- (c) vindication of the plaintiff's reputation.²

The first two purposes are frequently considered together, whereas vindication looks to repair the attitude of others towards the plaintiff, with the sum awarded being at least the minimum required to signal to the public at large a vindication of the plaintiff's reputation.

2.3. The concepts of personal distress and hurt have no application to corporations.

2.4. In terms of reparation for alleged harm done to reputation, and vindication, these concepts have a much greater role to play for an individual as opposed to a corporation.

2.5. A corporation is a legal construct. Corporations have the capacity to manage their reputation via public relations, advertising and other means apart from a defamation claim. Reputation is primarily a personal right attached to natural persons. Reputation in a company is reflected in the company's goodwill, which is an intangible asset forming part of the total assets of a company. In other words, it is, ultimately, a commercial commodity. It is far removed from the concept of a reputation of an individual.

2.6. Damage to a company's reputation (and goodwill) is a matter that is more properly addressed through the other avenues open to a corporation to pursue, as noted below. Further, in the modern age, especially with the prevalence of opinions on the internet and social media, people will continue to hold opinions about corporations regardless of any Court finding in a defamation case.

2.7. A prohibition upon any corporation suing for defamation will promote freedom of

² *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; (1993) 178 CLR 44 at 60.

expression and public scrutiny of all corporate bodies.

- 2.8. The concept of “vindication” for a corporation is also questionable. Vindication is a concept that has an intensely personal quality to it. A company as a legal construct does not gain any “personal” satisfaction from vindication. If a company has been wronged, there are many other avenues open to it to pursue, as noted below.
- 2.9. The present provisions for an “excluded corporation” create considerable confusion for publishers. In terms of section 9(2)(b), firstly, a publisher often will have no way of knowing at the proposed time of publication whether or not a corporation employs fewer than 10 persons. Indeed, some corporations may in fact be large operations but have comparatively few employees, instead leaving their workforce to sub-contractors who may not count as “employees” under section 9. Furthermore, on the present state of the law, the kind of “employees” intended to be caught by the section is unclear. The NSW Court of Appeal determined in *Born Brands Pty Ltd v Nine Network Australia Pty Ltd* [2014] NSWCA 369 at [445] that the wording of section 9(2)(b) unambiguously refers to “employees” rather than “persons”. The Court arrived at this conclusion by reference to section 9(3), which refers to counting “employees for the purposes of subsection (2)(b)”. Notwithstanding, the Court (at [446]) did not determine whether the term “employees”, for the purpose of the section, should be limited to “employees at common law” (including executive directors or principals of a business engaged in its ongoing operations), or rather should be extended to individuals engaged in the day-to-day operations of the corporation and subject to its direction and control (which would include persons supplied by labour hire firms). This leaves the publisher in the invidious position of not knowing whether the intended publication may or may not be potentially the subject of a defamation action – both as a question of fact and of law.
- 2.10. In terms of section 9(2)(a), which deals with not-for-profit corporations, many such corporations are in fact large organisations which are quite capable of dealing with reputational issues without resorting to defamation laws. As but an example, earlier this year a religious order associated with the Catholic Church made a defamation complaint to a large media organisation over an opinion piece and threatened action. This is not a new phenomenon (see for instance *Church of Scientology of California Incorporated v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344). It is submitted that churches and other not-for-profits, which like other corporations have no “feelings” to hurt, cannot be “defamed” as such. Other remedies are potentially available to them as noted below.
- 2.11. In the digital era, individuals leave reviews about goods or services online in various forums, including Google reviews, productreview.com.au, Tripadvisor, Facebook and other mediums. It is expected that reviews may be left freely, without fear of a

defamation claim brought by the corporation that provides the goods or services. The expectation is that the particular business may respond to the review, if it so wishes, in the same online space.

- 2.12. Nevertheless, there have been instances of corporations suing private individuals for defamation over simple online reviews. This creates an enormous strain, both in terms of cost and emotion, for the private individual being sued, as well as placing a burden on the Court.
- 2.13. The law should not be changed to permit corporations falling outside the current definition of an “excluded corporation” to be able to sue for defamation. Should large corporations be permitted to use the tort of defamation as a tool against critics, they have a significant advantage (at the very least in terms of financial resources and the ability to engage high-priced lawyers and heavy-handed tactics) against an individual or group of activists who may be simply voicing a view or relaying an experience about a corporation’s activities.
- 2.14. The tort of defamation provides a relatively easy onus on the part of a plaintiff. Generally speaking, a plaintiff need only prove:
 - (a) There was a publication by the defendant to at least one third party;
 - (b) The publication was “about” (or “of and concerning”) the plaintiff;
 - (c) The publication identified the plaintiff;
 - (d) The publication was defamatory; that is, in modern practice, that it conveyed one or more imputations about the plaintiff (as pleaded or particularised by the plaintiff) which were defamatory of the plaintiff (that is, imputations which were disparaging of the plaintiff, or would cause ordinary reasonable persons to think the less of the plaintiff).
- 2.15. Once those elements are established, the plaintiff’s case is complete (save for the question of damages, which arises if defences fail). There is no need as part of the plaintiff’s case to prove damage to reputation, as it is presumed.³
- 2.16. The “heavy lifting” then switches to the defendant, who must then establish any defence, including that of justification (truth). The prospect of having to run a costly defence (particularly for a sole individual) is enough to create a chilling effect on the ability of members of the public (such as critics of a corporation’s practices) to speak freely. If individuals had felt they could not speak out about Australian banks without fear of being sued for defamation, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry may never have occurred.

³ *Bristow v Adams* [2012] NSWCA 166.

- 2.17. Corporations have other tools at their disposal to seek to address what they may perceive to be reputational harm, including:
- (a) the resources to undertake public relations actions and/or advertising with a view to seeking to alter public perception;
 - (b) complaints to regulatory bodies such as ACMA and the Press Council;
 - (c) the existing availability of alternative causes of action, including:
 - (i) injurious falsehood;
 - (ii) (where the “information provider” exception does not apply) claims for misleading and deceptive conduct under the Australian Consumer Law and/or the ASIC Act;
 - (iii) breach of confidence;
 - (iv) tort of inducing breach of contract;
 - (v) tort of conspiracy;
 - (vi) tort of intimidation;
 - (vii) tort of causing loss by unlawful means;
 - (viii) tort of passing off;
 - (ix) tort of deceit.
- 2.18. To allow large for-profit corporations to sue for defamation risks the potential for intimidation and/or silencing of activists and/or victims of corporate malfeasance. This is not at all conducive to public debate and civil discourse.
- 2.19. Should an exception remain for “excluded corporations” within section 9, (as opposed to prohibiting all corporations from being able to sue for defamation), it is submitted that section 9 should be amended to provide that any “excluded corporation” which sues for defamation must, as part of its claim, include a claim for measurable, actual financial loss directly attributable to the publication in question, and that such alleged economic loss is properly and fully particularised in the statement of claim itself, along with the alleged elements of causation as to how the publication caused the alleged loss. Such a measure will ensure that excluded corporations which may have taken affront at a particular publication, but have not suffered any economic loss as a result of the publication, cannot institute proceedings for defamation and potentially seek to silence public debate.
- 2.20. In the alternative, if a blanket prohibition were not to be considered acceptable, it is submitted that the current provisions regarding “excluded corporations” should remain as is, subject to some modification. It is submitted that the current provisions should be replaced with a regime that identifies “excluded corporations” by annual turnover rather than the based on the number of employees or whether it is a not-for-profit corporation.

The current requirement of subsection 9(2)(b) presupposes that the number of employees is reflective of the size of a business. This is not always the case; it is conceivable that a business with fewer than 10 employees is in fact quite profitable (and therefore large). A limit, for example of an annual turnover of \$250,000, would more adequately provide a “small business exemption” (as was the legislative intention stated in the Second Reading Speech to the *Defamation Act 2005* (NSW) (NSW Legislative Assembly, Hansard, 13 September 2005).

- 2.21. At the very least, it is submitted that a conservative amendment should be made to section 9 that brings it closer to the position under the *Defamation Amendment Act 2002* (NSW). His Honour Justice Nicholas (referring to the predecessor of section 9(2)(b)) found in *Redeemer Baptist School Ltd v Graeme Francis Glossop & 5 Ors; Redeemer Baptist School Ltd v Fairfax Community Newspapers Pty Ltd* [2006] NSWSC 1201 at [18] – [22] that there was no ambiguity in the language of section 8A of the *Defamation Amendment Act 2002*, which included persons who were employees and those who were not. His Honour noted at [24]:

*This conclusion accords with the underlying purpose of s8A that **only a small corporation is entitled to assert a cause of action for defamation**. As the defendants submitted, if the narrow construction for which the plaintiff contended was correct it would be simple indeed for a corporation to so arrange the conduct of its operations as to avoid its application. This result could be achieved, for example, **by engaging independent contractors or by outsourcing employment requirements by contracting work outside the corporation rather than employ in-house staff**. Because such a construction would negate the statutory purpose it should be rejected...*

(emphasis added)

- 2.22. The current section 9(2)(b) is not necessarily irreconcilable with the findings of Nicholas J at [24] in respect of the predecessor section 8A(3). The Court of Appeal in *Born Brands* stopped short of deciding that issue. However, it remains open, on the present wording of section 9(2)(b) for a court to find that “employee” for the purposes of section 9(2)(b) is restricted to “employees at common law”. It is submitted that section 9(3) should delete the word “employees” and replace it with “persons”.
- 2.23. Furthermore, we submit that section 9 should be amended to include a revised subsection 9(4), extending the criteria for determining whether a corporation is related to another corporation for the purposes of subsection 9(2)(b) beyond the definition provided in section 50 of the *Corporations Act 2001*. Additional criteria could include whether a corporation is in any other way related to another company: for example by common shareholders and directors. As presently drafted, subsection 9(4) suffers from

the same vice identified by Nicholas J at [24] in *Redeemer Baptist*, namely that the provision makes it simple for a corporation to so arrange its operations as to avoid the application of the section. For example, a single incorporated entity which shares identical directors and shareholders as others in a much larger group of companies that work together, may nevertheless be an “excluded corporation” as they are not related bodies corporate within the meaning of section 50 of the *Corporations Act 2001*. This is not a fanciful proposition – it occurs regularly in common practice and is a loophole which section 9 currently does not address.

2.24. We also note that section 9(5) ensures that an individual associated with a corporation continues to have a cause of action for defamation even if the publication of the same matter also defames the corporation. This ensures individuals working for or managing corporations retain their ability to sue, in circumstances such as where they are explicitly named or otherwise identified and targeted in a pointed article about a corporation. However, the Courts have rightly found that just because a corporation is named does not mean that any individual involved in running of the business (who is not named in the publication) will be free to sue, especially where circumstances suggest the individual is making a claim as a surrogate for the company (in effect as a “back door” way for the corporation to make a defamation claim). Any impugned publication must be “about” the individual personally (per section 8), and if it is not, it is not actionable by the individual. This entirely sensible position was highlighted in the decision in *Triguboff v Fairfax Media Publications Pty Ltd* [2018] FCA 845. The reformed laws should keep this distinction very clear.

2.25. It is also submitted that all jurisdictions should enact legislation to avoid strategic lawsuits against public participation (SLAPP suits). The “Gunns 20” case (*Gunns Limited v Marr* [2005] VSC 251, *Gunns Ltd v Marr (No 3)* [2006] VSC 386) is but one example of a case where a large corporation (prior to the 2005 laws) attempted to use defamation laws (amongst other causes of action) against individuals engaged in protest. Measures should be put in place to avoid the sledgehammer approach that SLAPP actions may have against (especially) individuals having their say. In that regard, an appropriate starting point (for replication in each Australian jurisdiction) would be the *Protection of Public Participation Act 2008* (ACT), which provides for civil penalties where a defendant's conduct is public participation and the plaintiff's proceeding is started or maintained against the defendant for an improper purpose.

3. Question 3 – (a) Should the Model Defamation Provisions be amended to include a ‘single publication rule’?

- 3.1. Yes. The multiple publication rule that operates in Australia (as explained by the High Court of Australia in *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; 210 CLR 575) is obsolete in the modern age of the internet. The rule undermines the clear purpose and intent of the limitation periods for defamation actions.
- 3.2. The current limitation period for a defamation action is one year after the date of publication. If a Court is satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the date of the publication, it must extend the limitation period to a period of up to three years from the date of the publication.
- 3.3. In light of the decision in *Dow Jones*, every time an internet article is downloaded and comprehended by a reader, a fresh publication is deemed to have occurred, thereby restarting the limitation period. This means, in an age where historical articles may be located at any time by internet users via the proactive use of search engines and/or through other means, an online article in theory may have a rolling series of “first” publications each time it is viewed, at which time the limitation period will begin all over again. It has even been held that a fresh publication occurs to a reader who has previously read the same material on an earlier occasion: *Dods v McDonald (No 1)* [2016] VSC 200 at [5], [13]-[14], [18]-[20] (not disturbed on appeal: *McDonald v Dods* [2017] VSCA 129).
- 3.4. The multiple publication rule has a chilling effect on publishers of online material, including media organisations which maintain archives of important public interest material (which form part of the public record). It exposes them to a constant threat of a defamation claim which might be made at *any time* after the first date of publication. This renders the prescribed limitation period largely meaningless. Further, the effect of the multiple publication rule may result in significant prejudice for a publisher defending a claim over an article published years earlier. For example, vital evidence may prove difficult or impossible to obtain years later, and there may be difficulties with contacting sources and other potential witnesses after such a long period.
- 3.5. If, for example, an individual does not become aware of an allegedly defamatory online publication within a year of it first being posted (which seems improbable, especially if it is a publication that is *prima facie* defamatory), such a person could seek an extension of the limitation period. However, there is no justification for extending the limitation period beyond the outer limits provided for by the current rules.
- 3.6. It has been repeatedly emphasised that defamation actions (in order to actually achieve their purpose) need to be prosecuted promptly. On the other hand, publishers require

certainty. When laws were passed to introduce one year limitation periods for defamation claims (which occurred in 2002 in NSW, and in 2005 and 2006 in other jurisdictions), second reading speeches pointed to the need for relatively restrictive limitation periods, and emphasised the importance of prompt action in defamation claims:

(a) NSW: “To encourage plaintiffs to seek to vindicate their reputations at the earliest possible opportunity, the bill will insert a new section 14B into the Limitation Act 1969. The new section will shorten the limitation period for bringing a defamation action from six years to one year, with a discretion to extend the period in appropriate cases.”⁴

(b) ACT: “The bill would set a limitation period of one year from commencement of civil defamation actions. Early correction, restoration of reputation and resolution of defamation disputes is in the interests of the parties and the public.”⁵

(c) QLD: “The bill amends Queensland’s Limitation of Actions Act 1974 by reducing the time limit for bringing a defamation action from six years to one year. This is consistent with the objective of promoting speedy resolution of disputes and achieving prompt vindication of reputation.”⁶

3.7. It is clear from these passages that the intent of the relevant legislatures was that defamation claims would be dealt with promptly, or would otherwise be statute-barred. The multiple publication rule, especially insofar as it applies to internet material, undercuts that clear intent.

3.8. As an example of the failure of the multiple publication rule to adequately reflect the rationale behind the one year limitation period, in *Brooks v Fairfax Media Publications Pty Ltd* [2015] NSWSC 986, the plaintiffs were permitted to prosecute defamation proceedings over an online article, first posted online in March 2012, by commencing proceedings well outside the one year limitation period (they commenced proceedings on 23 December 2014). They made no application for an extension of the limitation period. Instead, they sought to sue only upon any downloads of the article that had occurred in the 12 month period prior to the commencement of their proceedings (which per *Dow Jones v Gutnick* were not statute-barred). According to the relevant website data, which was put into evidence during a strike-out application by the defendant, there had been either 48 or 52 pageviews of the online article during that 12 month period

⁴ Hansard, NSW Legislative Assembly, 12 November 2002, Mr Stewart MP, Defamation Amendment Bill (2002).

⁵ Hansard, ACT Legislative Assembly, 15 December 2005, Chief Minister Stanhope.

⁶ Hansard, QLD Legislative Assembly, 25 October 2005, Hon. LD Lavarch (Minister for Justice and Attorney-General).

preceding commencement of the proceedings. This represented 0.44% of all pageviews between March 2012 and the time of the defendant's application to dismiss the proceedings, which occurred in March 2015. In other words, there had been 11,818 total pageviews of the article, only approximately 52 of which were actionable. The remaining 11,766 pageviews were statute-barred. Clearly, the vast majority of any potential damage to reputation (if any such damage in fact occurred) would have occurred in or around the time of initial publication (i.e. in March 2012). The 52 actionable pageviews were a drop in the ocean compared to the 11,766 statute-barred pageviews. While the ship truly had sailed, the plaintiffs were permitted to pursue their claims, at great cost to the defendant, which had to mount a substantial justification defence. The concept of proportionality as a basis for striking out a claim as an abuse of process (*Bleyer v Google Inc* (2014) 88 NSWLR 670) was not considered applicable in that case.

- 3.9. As another example, BHF has recently defended a claim in the Federal Court of Australia in respect of an online article which was first posted online on a major media publisher's website on 14 April 2015. The plaintiff commenced proceedings on 18 April 2018 (that is, outside even the outer limits of the three year period for an extension of time for a claim in defamation). The plaintiff elected to sue on any downloads which occurred within the 12-month period prior to the commencement of her proceedings (that is, in the period from 19 April 2017 onwards), accepting that all pageviews that occurred prior to 19 April 2017 were statute-barred (which comprised well over 99.5% of total pageviews). The plaintiff could only identify two persons by name who were alleged to have read the article during the non-statute barred period, those persons being a friend and a sister.
- 3.10. Notwithstanding continued warnings from some Courts about the risks to a plaintiff in bringing an action for defamation over an online publication "out of time" (or over an online publication where the actionable number of publications involves a comparatively small number of readers),⁷ Courts have allowed plaintiffs to sue for defamation in respect of online publications well outside the one year period after the material was first posted online.
- 3.11. A change from the multiple publication rule to the single publication rule is vital if publishers are able to securely host articles online in "archived" form (that is, only accessible via a search), and thereby maintain the public record, without the risk of being sued years down the track over something that was not the subject of complaint or action at the time of initial publication. In the event of extenuating circumstances, that

⁷ See for instance *Otto (a.k.a. Ashworth) v Gold Coast Publications Pty Ltd* [2017] NSWDC 101 at [57]-[63]; *Garment v Nationwide News Pty Limited* [2018] NSWDC 36 at [24].

plaintiff may always seek an extension up to the three years currently provided for. It is not submitted that the provisions for the extension of the limitation period ought to be changed.

(b) If the single publication rule is supported:

(i) should the time limit that operates in relation to the first publication of the matter be the same as the limitation period for all defamation claims?

(ii) should the rule apply to online publications only?

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

3.12. In answer to (b)(i), yes. There is no reason to discriminate between mediums of publication. The law should adopt a medium-neutral approach.

3.13. In answer to (b)(ii), no. The law should adopt a medium-neutral approach.

3.14. In answer to (b)(iii), yes, however, the single publication rule should also apply to related bodies corporate, and should offer protection for journalists, editors and other individuals involved in the original publication. This would not preclude the establishment of a fresh limitation period running from the date of any subsequent republication of the same material by an unrelated third party (especially any such third party which has engaged in copyright theft). However, the legislation should expressly protect the original publisher and its related entities, servants and agents, to avoid cross-claims by third party publishers, which would effectively undermine the rationale and effectiveness of a single publication rule.

3.15. Exceptions should also be made for the posting of simple hyperlinks to an original article as it appears online, social media posts to the original article, and the like; such online activity should not give rise to a new cause of action with a purported revitalised limitation period.

4. Question 4

(a) Should the Model Defamation Provisions be amended to clarify how clauses 14 (when offer to make amends may be made) and 18 (effect of failure to accept reasonable offer to make amends) interact, and, particularly, how the requirement that an offer be made 'as soon as practicable' under clause 18 should be applied?

4.1. Yes. The interaction between section 14(1)(a), which prescribes a 28 day period within which an offer to make amends may be made, and section 18(1)(a), which requires (in order for the offer to make amends to act as a potential defence) the publisher to have made the offer as soon as practicable after becoming aware that the matter is or may be defamatory, is currently highly ambiguous.

- 4.2. The concept of “as soon as practicable” is somewhat subjective, and derogates from the concrete timeline of 28 days set by section 14(1)(a). Complaints to publishers often deal with complicated issues and can only be addressed after detailed inquiries have been made. The clarity of a 28 day period in order to make any offer to make amends, is undermined by the term of “as soon as practicable”.
- 4.3. Under the current regime, a publisher cannot be sure whether it is sufficient for an offer to make amends to be eligible to operate as a defence (if it ever came to it) if it is made within 28 days of receiving a concerns notice.
- 4.4. Any consideration of a publisher’s actions currently required by section 18(1)(a) could be factored into the assessment under section 18(1)(c) of whether, in all the circumstances, the offer was reasonable.
- 4.5. Sections 14 and 18 are inconsistent and must be reconciled to provide certainty to persons responding to a concerns notice as to what will (and will not) be considered a valid offer to make amends (which may potentially act as a defence in the event it is not accepted).

(b) Should the Model Defamation Provisions be amended to clarify clause 18(1)(b) and how long an offer of amends remains open in order for it to be able to be relied upon as a defence, and if so, how?

- 4.6. This provision was poorly drafted and has caused great confusion amongst the profession. Nevertheless, case law has now established that it is not necessary for an offer to make amends to remain open up until the trial date: see *George Bushara v Nobananbas Pty Ltd & Anor* [2012] NSWSC 63; *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175 at [101]-[104] per Applegarth J; *Zoef v Nationwide News Pty Ltd* [2016] NSWCA 283; 92 NSWLR 570 at [105]-[108]; although cf *Nationwide News Pty Ltd v Vass* [2018] NSWCA 259 at [138] per Basten JA.
- 4.7. Nevertheless, many practitioners have taken the view that the wording of section 18(1)(b), in requiring an offer to make amends to remain open “at any time before” trial, means that it must remain open all the way up until trial. Such a proposition is extremely problematic. If, for example, a reasonable offer to make amends is made at the time of an initial complaint but not accepted by the complainant at that time, and proceedings are instituted, and the defendant has had to incur substantial costs of defending the proceedings all the way to trial, only for the plaintiff to accept the offer to make amends the day before trial, the defendant will have to (in addition to carrying out the terms of the offer) bear its substantial costs of defending the proceedings, with no remedy available to it. This is not a “fair” remedy within the meaning of section 3 of the *Defamation Act 2005* (NSW).

4.8. Section 18(1)(b) should be amended to state that the offer to make amends is to remain open for acceptance for a specified period, namely one that it is reasonable to allow the plaintiff adequate time to consider whether to accept. A set minimum period would assist in providing certainty to all parties.

(c) Should the Model Defamation Provisions be amended to clarify that the withdrawal of an offer to make amends by the offeror is not the only way to terminate an offer to make amends, that it may also be terminated by being rejected by the plaintiff, either expressly or impliedly (for example, by making a counter offer or commencing proceedings), and that this does not deny a defendant a defence under clause 18?

4.9. The NSW Court of Appeal in *Nationwide News Pty Ltd v Vass* [2018] NSWCA 259 emphatically held that a counter-offer will not necessarily amount to a repudiation of an offer to make amends so as to amount to a rejection rendering the offer to make amends no longer open for acceptance.

4.10. The confusion illustrated in the case of *Vass* demonstrates that the offer to make amends provisions should be amended to make crystal clear what will, and what will not, amount to a rejection of the offer.

4.11. Further, where a plaintiff rejects an offer to make amends, whatever the method, this should not impact a defendant's ability to seek to rely upon the offer as a defence pursuant to section 18.

5. Question 5 - Should a jury be required to return a verdict on all other matters before determining whether an offer to make amends defence is established, having regard to issues of fairness and trial efficiency?

5.1. Yes. Pursuant to section 13(4), an offer to make amends is taken to have been made without prejudice, unless the offer provides otherwise. That being so, making the jury aware of the offer before it has determined the other issues would undercut the offer's without prejudice status.

5.2. Further, an offer to make amends will often include an apology. Section 20 of the *Defamation Act 2005* (NSW) provides that an apology does not constitute an express or implied admission of fault or liability by the person in connection with that matter, is not relevant to the determination of fault or liability in connection with that matter, and that evidence of an apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

5.3. The risk in providing an offer to make amends to a jury prior to the determination of liability (including the determination of other defences) is that any apology included in the offer may have a tendency to infect the thinking of the jury in terms of liability. While directions can be given to the jury to ignore the offer of the apology (or the whole of the offer to make amends itself), the fact that a defendant has made an offer to apologise may potentially have the effect of entering the minds of the jury members as a form of “confession”. As such an offer is always made without prejudice, any details of the offer should wait until after the jury determines all other issues of liability.

6. Question 6 - Should amendments be made to the offer to make amends provisions in the Model Defamation Provisions to:

(a) require that a concerns notice specify where the matter in question was published?

6.1. Yes. It is necessary for a publisher to know with precision the precise publication complained of, by way of identification of the forum of publication (including name of any particular newspaper, television station and program, radio station and program, URL of webpage and the like), date of publication, and the headline (if any). In our experience, there have been instances of complainants sending “broad-brush” concerns notices purporting to cover “all articles” in a certain period, where the particular imputations identified in the concerns notice are not directly correlated to specific, identified publications. This places the publisher in the impossible position of attempting to determine the complaint insofar as it applies in respect of separate publication each on its own merits.

6.2. Further, with a view to ensuring the aim of attempting to resolve civil disputes without litigation, it should be **mandatory** for a complainant to issue a concerns notice in writing (that is, via letter or email) prior to commencing Court proceedings. At present, there is no mandatory obligation on the part of a complainant/plaintiff to issue a concerns notice prior to the commencement of proceedings, or at all. This robs the offer to make amends procedure of much of its potency. On many occasions, plaintiffs have completely by-passed the offer to make amends procedure, and simply (without notice) filed a statement of claim. In those circumstances, many defence lawyers have (in the absence of guidance in the legislation) treated the statement of claim itself as a concerns notice, as there is nothing else to work with. However, practitioners inexperienced in the area of defamation, and self-represented litigants, may not appreciate that a statement of claim can in such circumstances constitute a concerns notice, in respect of which an offer to make amends can be made. To allow a plaintiff to completely skip the intended early procedure for resolving complaints before she or he commences proceedings is, at

best, an oversight in the legislation, which must be corrected.

- 6.3. The form for a statement of claim filed by a plaintiff in a defamation case should require the plaintiff to verify that she, he or it has issued a concerns notice (identifying when the concerns notice was issued, to whom it was issued, and any response received). In this way, a process similar to the genuine steps statements in the Federal Court of Australia could be adopted.

(b) clarify that clause 15(1)(d) (an offer to make amends must include an offer to publish a reasonable correction) does not require an apology?

- 6.4. Yes. There appears to be an expectation on the part of many complainants for an apology to form part of an offer to make amends, which in fact finds no grounding in the current legislation.

- 6.5. Further, section 15(1)(d) as it stands is highly problematic because it is based on the assumption that “a reasonable correction of the matter in question” is possible. In many instances, a complaint raises issues that are not truly matters for “correction”. For example, if an opinion piece writer highly criticises a public figure for certain (true) activities, the public figure may take offence and issue a concerns notice. The publisher may decide that the opinion piece went a bit overboard in its criticism, and wish to resolve the matter quickly and make an offer to make amends. However, the writer of the opinion piece may still maintain the strong view expressed in the relevant column. There is no particular matter to “correct”, *per se*. Nevertheless, the publisher may wish to seek to make amends and offer the publication of a form of words acceptable to the public figure in question. At present, in order to make a valid offer to make amends pursuant to the current legislation, publishers are required to “correct” matters where it is not always a simple case of black and white as to whether something is right or wrong, and capable of correction. Every case (and complaint) is different, and a far more nuanced approach to the making of amends ought to be encompassed in the reformed provisions.

- 6.6. Section 15(1)(d), if it is to properly serve its purpose, would be better phrased as requiring the publisher as part of an offer to make amends to offer **the publication of a reasonable correction, apology, clarification, or other form of words as a matter of redress to the complainant**. Whether or not the words offered are reasonable (for the purposes of a defence under section 18) would be a matter for the Court at a later date, if required.

- 6.7. Further, the terms “publish” and “publishing” in section 15(1)(d) are ambiguous. Is an individual who is being sued by a neighbour over a strata dispute expected to publish an advertisement in the local newspaper? Or does a written letter to the complainant

suffice? In the case of the mass media, often complainants will not want corrections or apologies published in the media, out of concern that to do so will raise the matters the subject of complaint yet again and potentially give it a wider audience. Many complainants prefer a private letter. But it is unclear whether a private letter equates with the terms “publish” and “publishing”. This renders a media organisation (who may know the complainant does not want a publicly published apology) in the difficult position of not knowing whether an offer to make amends involving a private letter will in fact be held to comply with section 15(1)(d). This provision is in desperate need of reform, to clarify that an offer to make amends may provide for the publisher’s dissemination of the particular form of words to be made via any medium that is reasonable in the circumstances.

(c) provide for indemnity costs to be awarded in a defendant’s favour where the plaintiff issues proceedings before the expiration of any period of time in which an offer to make amends may be made, in the event the court subsequently finds that an offer of amends made to the plaintiff after proceedings were commenced was reasonable?

6.8. Yes. To ensure the early resolution of complaints, the offer to make amends provisions should be amended to clearly state that the rejection by a complainant of a reasonable offer to make amends will potentially amount to a defence to any proceedings commenced, and may also result in indemnity costs consequences.

7. Question 7 - Should clause 21 (election for defamation proceedings to be tried by jury) be amended to clarify that the court may dispense with a jury on application by the opposing party, or on its own motion, where the court considers that to do so would be in the interests of justice (which may include case management considerations)?

7.1. No. The current provisions (section 21(3) of the *Defamation Act 2005* (NSW)) should not be disturbed, as these provisions already provide clear circumstances in which orders for dispensation of the jury may be made.

7.2. Further, the *Defamation Act 2005* (NSW) provides for a party to elect trial by jury. That is not an election that ought to be overridden by the Court of its own motion: see for instance *Channel Seven Sydney Pty Ltd v Fierravanti-Wells* [2011] NSWCA 246; 81 NSWLR 315.

7.3. An application to dispense with a jury in NSW must be made within 21 days of receipt of a notice of intention to file a notice of election for a jury, pursuant to rule 29.2A(4) of the *Uniform Civil Procedure Act 2005* (NSW). Any amendment to such a specific provision would result in uncertainty between the parties.

- 8. Question 8 - Should the *Federal Court of Australia Act 1976 (Cth)* be amended to provide for jury trials in the Federal Court in defamation actions unless that court dispenses with a jury for the reasons set out in clause 21(3) of the Model Defamation Provisions – depending on the answer to question 7 – on an application by the opposing party or on its own motion?**
- 8.1. Yes. The Federal Court of Australia is a vital part of Australia’s legal system, and is on the same footing as the Supreme Courts of each State and Territory. While SA, ACT and NT do not allow for a party in a defamation matter to elect trial by jury, the remaining, overwhelming, majority of the nation does.
- 8.2. The Full Court of the Federal Court of Australia has taken a very restrictive view as to the availability of trial by jury in the Federal Court: *Wing v Fairfax Media Publications Pty Limited* [2017] FCAFC 191; 255 FCR 61. This decision has effectively curtailed the ability of a litigant in the Federal Court to elect trial by jury, and has potentially opened an avenue for “forum shopping” (i.e. a plaintiff may commence proceedings in the Federal Court, rather than a State Court, if he or she sees an advantage in not having a jury to decide the claim).
- 8.3. While it is necessary to establish Federal jurisdiction in order to prosecute a defamation claim in the Federal Court, this is not difficult in the modern age, particularly in respect of online publications. So long as the pleading alleges that publication occurred in either the ACT or NT, jurisdiction will be invoked. This provides a platform for jurisdiction (to be determined by judge, not jury), in that a plaintiff may simply allege that publication has occurred in the ACT or NT by virtue of its online accessibility.
- 8.4. Many defamation actions are quintessentially more appropriate for resolution by a jury as opposed to a judge alone: *Ra v Nationwide News Pty Ltd* [2009] FCA 1308; 182 FCR 148. See also *Channel Seven Sydney Pty Ltd v Fierravanti-Wells* [2011] NSWCA 246; 81 NSWLR 315.
- 8.5. The Federal Court ought to join with the majority of jurisdictions in Australia, which provide for a party to elect trial by jury. The risk of not doing so will promote “forum-shopping”.
- 8.6. In order to maintain consistency, it is submitted that rules for dispensing with a jury in the Federal Court should adopt those already in place in NSW (including section 21 of the *Defamation Act 2005* and UCPR 29.2A), as explained in *Channel Seven Sydney Pty Ltd v Fierravanti-Wells* [2011] NSWCA 246; 81 NSWLR 315 and *Chel v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWCA 379

9. Question 9 - Should clause 26 (defence of contextual truth) be amended to be closer to section 16 (defence of contextual truth) of the (now repealed) Defamation Act 1974 (NSW), to ensure the clause applies as intended?

- 9.1. Contextual truth has been perhaps the most taxing defence for practitioners and judicial officers created by any section of the 2005 laws. Since those laws were enacted, dozens of interlocutory arguments have taken place and gallons of ink have been spilt regarding section 26, over what should be a relatively straightforward defence.
- 9.2. Firstly, the name of the defence is entirely confusing. To the average litigant, and jury member, it is perplexing as to what “contextual” truth is, as compared to simple “truth” (or justification). The terminology should be abolished.
- 9.3. In any event, since the introduction of the Model Defamation Provisions, there has been a huge amount of uncertainty as to how this defence as drafted in section 26 is to work. It is submitted that section 26 was supposed to be based upon the previous provision, section 16 of the *Defamation Act 1974* (NSW) (the **1974 Act**). However, there was a drafting error in the Model Defamation Provisions, which radically changed how the defence has been held to operate. This drafting error involves the use of the phrase “the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations)...”. This wording suggests that a contextual imputation should be something other than a plaintiff’s imputation (that is, a defendant cannot rely on a plaintiff’s imputation as a contextual imputation).
- 9.4. Another problem, which has consumed a considerable amount of judicial time, has been whether a defendant’s pleaded contextual imputation must “differ in kind” from the plaintiff’s imputations⁸, as opposed to “differ in substance”. This has now been resolved (the latter now accepted as being the appropriate test).⁹
- 9.5. However, a greater problem has remained, in terms of what is to happen to a plaintiff’s pleaded imputations which are proven true at trial, in terms of contextual truth. Much of the problem stems from whether or not a defendant is entitled to “plead back” plaintiff’s pleaded imputations as contextual imputations, or otherwise rely upon them at trial (if indeed they are found to be true at trial), for the purposes of a contextual truth defence.
- 9.6. Experience has shown that a contextual truth defence can in practice succeed at trial where a defendant relies upon the plaintiff’s imputations pursuant to the first rationale

⁸ As held in cases including *Jones v TCN Channel Nine Pty Ltd* [2014] NSWSC 1453 at [32]-[36]; *Bateman v Fairfax Media Publications Pty Ltd (No 3)* [2014] NSWSC 1601 at [57]; *King v Fairfax Media Publications Pty Ltd (No 3)* [2015] NSWSC 1450 at [9]-[13].

⁹ *Fairfax Media Publications v Zeccola* [2015] NSWCA 329; 91 NSWLR 341; *Cornwell v Channel Seven Sydney Pty Ltd* [2016] NSWCA 255.

for the defence.¹⁰

9.7. As to the rationale for the defence, by way of background, on 9 February 1971, the NSW Law Reform Commission presented to the NSW government a report on defamation, proposing a new Defamation Bill. The Law Reform Commission, which took the view that the *imputation* rather than the *matter* should become the cause of action, recommended changes so that there would be a defence of truth for any *imputation* found conveyed and defamatory, if it was substantially true and related to a matter of public interest or was published under qualified privilege. However, the Law Reform Commission also decided that further reform was required in relation to the concept of truth as a defence, and recommended a new defence. In that regard, the Law Reform Commission said at 73-74:

*Suppose that the defendant has published an imputation that the plaintiff has been convicted of simple larceny and an imputation that the plaintiff has been convicted of fraudulently converting trust property to his own use. Suppose that the first imputation is false but the second is true. If the plaintiff sues for damages for defamation in respect of both imputations a defence of truth will fail because the truth of both charges cannot be proved. In England the effect of the Defamation Act 1952, section 5, is that in such a case a defence of truth will succeed if the first imputation did not materially injure the plaintiff's reputation having regard to the truth of the second imputation. **We agree with the object of this section, as far as it goes.** But if on facts such as these the plaintiff sues only in respect of the first imputation he will still succeed notwithstanding a provision along the lines of section 5 of the English Act of 1952: *Plato Films Ltd v. Speidel* ([1961] A.C. 1090). A Bill (the Freedom of Publication Protection Bill) was introduced in Parliament at Westminster in 1966 with a view, amongst other things, to substitute a new section for section 5 of the 1952 Act. The new section would have embraced the case where the plaintiff sues on such imputations only as cannot be proved to be true. **We agree also with the object of this proposed substitution.** Section 16 is intended to carry this object into effect. Its expression has to be more elaborate than that of the English proposals because place must be given to questions of public interest and qualified privilege. The Freedom of Publication Protection Bill was not passed: this was, we believe, because of the controversial nature of other provisions of the Bill.*

(emphasis added)

9.8. Accordingly, the Law Reform Commission had two rationales in mind for the

¹⁰ See for instance the result in *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [125]-[130], *Trad v Harbour Radio Pty Ltd (No 2)* [2013] NSWCA 477 at [65]-[72].

contextual truth defence. The first rationale was to provide the additional protection for a truth defence afforded by section 5 of England's *Defamation Act 1952 Act*,¹¹ which enabled a defendant to succeed on the issue of liability even though it did not prove the truth of all of the defamatory material of which complaint was made.¹² Under the English laws, where a defendant in the course of proving such of the imputations that it could true had proven matters of such gravity that there had been no real injury to the plaintiff's reputation notwithstanding some matters were false, the defendant would be the successful party. That position was also adopted in Tasmania under section 18 of the *Defamation Act 1957 (Tas)*, which was in substantially the same terms as section 5 of the English legislation, save for an additional requirement of the publication being for the public benefit. The English and Tasmanian provisions have been referred to as a "narrower form" of contextual truth.¹³

- 9.9. The second rationale of the 1974 NSW contextual truth defence was to expand upon the English and Tasmanian versions of the defence so as allow a defendant to formulate its own imputations to be pleaded as contextual imputations, and thereby prevent a situation whereby a plaintiff would succeed by virtue of himself or herself selectively pleading only the imputations that are false.
- 9.10. As an illustration, in a situation where a publication gives rise to three imputations only, to the effect that a plaintiff is an arsonist, a thief and a bad driver, and it is true that the plaintiff is an arsonist and a thief but false that they are bad driver, a plaintiff (who is at liberty to select which imputations he or she sues upon) might bring a case based upon all or only some of those imputations. Either way, at common law, so long as the plaintiff sues upon at least one false imputation, the defendant would be unable to establish a defence of justification (as it could not establish all imputations to be true). But giving effect to the first rationale for the contextual truth defence, if the plaintiff were to sue on all three imputations, a defendant would be permitted to argue that the truth of the arsonist and thief imputations was such that the falsity of the bad driver imputation caused no harm to the plaintiff's reputation, such that a complete defence is made out. If the plaintiff were to sue only on the bad driver imputation, the second rationale would allow a defendant to plead the arsonist and thief imputations as contextual imputations, and rely upon the truth of them as outweighing the false

¹¹ Section 5 of the *Defamation Act 1952* provided: In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges. It is now largely replicated in section 2 of the *Defamation Act 2013* (UK).

¹² *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 at 120.

¹³ See *Fairfax Media Publications Pty Ltd v Kermode* [2011] NSWCA 174; 81 NSWLR 157 at [61]. Although cf *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262 at [138]-[143].

imputation, as a complete defence. If the plaintiff were to sue on the thief and bad driver imputations, the first rationale would allow the defendant to rely upon the thief imputation, and the second rationale would allow the defendant to rely upon the arsonist imputation, which in combination could be relied upon to defeat the plaintiff's claim.

- 9.11. In 1974, the NSW government broadly adopted the Law Reform Commission's recommendations, and passed the 1974 Act. That Act contained a defence of contextual truth which was substantially in the form of the contextual truth defence proposed in the Law Reform Commission's draft Defamation Bill, as section 16.
- 9.12. During the operation of the 1974 Act, a defendant relying upon the section 16 defence of contextual truth could, in its Defence, "plead back" such of the plaintiff's imputations as it sought to seek to prove true for the purposes of a contextual truth defence to those of the plaintiff's imputations which it could not prove true.¹⁴
- 9.13. As explained by Hunt J in *Hepburn v TCN Channel Nine Pty Ltd* [1984] 1 NSWLR 386 at 396-397, the practice of 'pleading back' was, in relation to section 16, a part of "the whole purpose of the defence of contextual truth":

...the plaintiff argues that the defendant's construction of s 16(2)(c) would produce absurd results in many cases. She gives the example of a plaintiff pleading three imputations, all differing in substance, where the defendant has also pleaded each of those three imputations as contextual imputations and then asks the jury to weigh or measure the combined effect of all three of them against each of the plaintiff's imputations taken singularly. The combined effect of the three imputations must obviously in every case be greater than the effect of each of them individually, she says, so that the plaintiff could never succeed. I do not find this example to be helpful in the construction of s 16. The defendant in that example would be required to establish the truth of each of the three imputations pleaded by the plaintiff in order to establish his defence of contextual truth. But, if he succeeded in doing that, he must necessarily have succeeded in establishing a defence of truth to each of those three imputations in accordance with s 15, and no question of contextual truth would ever arise. If, on the other hand, the defendant failed to establish the truth of one of the plaintiff's imputations, he is quite properly entitled to assert that the combined effect of the substantial truth of the other two imputations was such that the publication of the imputation whose truth had not been established did not further injure the reputation of the plaintiff. That is the whole purpose of the

¹⁴ See, for example, the history of "pleading back" as outlined in *Hall v Hannaford* [1999] NSWSC 1197.

defence of contextual truth.

(emphasis added)

- 9.14. Notwithstanding the long history of the NSW contextual truth defence (and the voluminous jurisprudence dealing with it), the explanatory memorandum to the 2005 legislation provided as follows:

Clause 26 provides for a defence of contextual truth. The defence deals with the case where there are a number of defamatory imputations carried by a matter but the plaintiff has chosen to proceed with one or more but not all of them. In that circumstance, the defendant may have a defence of contextual truth if the defendant proves: [Defence set out]

There is a defence of contextual truth under the existing law of New South Wales.

*At general law, the truth of each defamatory imputation carried by the matter published that is pleaded by the plaintiff must be proved to make out the defence of justification unless it can be established that the imputations were not separate and distinct but, as a whole, carried a "common sting". In that case, the defence of justification is made out if the defendant can show that the "common sting" is true. See *Polly Peck (Holdings) Plc v Trefold* [1986] QB 1000 at 1032. The defence of contextual truth created by the proposed Act, unlike the general law, will apply even if the contextual imputations are separate and distinct from the defamatory imputations of which the plaintiff complains.*

- 9.15. Notably, this explanation for the defence referred to the second originating rationale for contextual truth, but not the first. Yet it also made reference to the existing contextual truth defence in NSW, without giving any indication that the new defence was designed to operate in any dramatically different way to the existing one, let alone that it was designed to do away with the first rationale and the doctrines upon which it was based. Further, the reference to *Polly Peck* and the concept of a “common sting” was curious, given the considerable authority at the point in time of the enactment of the 2005 laws to the effect that a defendant in an Australian jurisdiction was **not** at liberty at common law to plead a defence based upon a *Polly Peck*-style “common sting” (as opposed to a variant or nuance).¹⁵

- 9.16. In the second reading speech for the *Defamation Bill 2005* (NSW), the New South

¹⁵ *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 527-8 and 533-4; *David Syme & Co. Ltd. v Hore-lacy* [2000] 1 VR 667; *Advertiser-News Weekend Publishing Co Ltd v Manock* (2005) 91 SASR 206. See also *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262 at [152]-[154] (NB: this decision was delivered long after the enactment of the 2005 laws).

Wales Attorney General, the Hon. Bob Debus MLA said:

Clause 26 provides for a defence of contextual truth. There is already a defence of contextual truth under the existing New South Wales Act. The purpose of the defence is basically to prevent plaintiffs from taking relatively minor imputations out of their context within a substantially true publication.

9.17. In the Northern Territory, the Minister of Justice and Attorney General, the Hon. Dr Peter Toyne, said in his second reading speech for the *Defamation Bill 2006* (NT):

In addition, the bill provides for a new defence of contextual truth. This provides that where defamatory imputations arise from a publication, it is a defence for the defendant to show in the context where some of the defamatory statements are true or substantially true, and others are not true, that the plaintiff's reputation has not been further harmed by the untrue statements. An example is a publication which states that a person was a convicted murderer which was true and had a drink driving conviction which was false. The defendant could argue that in the context of the whole publication the plaintiff's reputation as a convicted murderer was not further harmed by the untrue statement that he or she was also a drink driver. This differs from the current position in the Territory where the plaintiff can separate statements in the publication and sue on the minor defamatory statement which, if considered in the wider context of the publication, does not actually harm the plaintiff's reputation. This state of affairs potentially operates unfairly. The plaintiff may recover damages for the untrue statement even though no further harm to the plaintiff's reputation occurred in the context of the publication as a whole. The new defence of contextual truth addresses this problem by ensuring courts have reference to wider circumstances and content of the publication.

9.18. Contextual truth was not referred to in the second reading speeches given in the other States and Territories in respect of the 2005 laws. Notably, there was nothing said in Tasmania about abandoning its existing defence, which reflected the English justification defence. Nothing explicit was said in any second reading speech about the first rationale for NSW's 1974 defence.

9.19. However, the Courts have repeatedly said that under the *Defamation Act 2005* (NSW), section 26 does not permit "pleading back"; that is, that a defendant cannot rely upon a plaintiff's own pleaded imputation as a contextual imputation. This in fact encourages a plaintiff to plead imputations that he or she knows to be true and/or attempt to "cover the field" by pleading as many imputations as might possibly be wrung out of a publication (so as to prevent the defendant from pleading a contextual imputation). It is submitted that this position is completely at odds with the purpose of the section. So

much was recognised by her Honour Justice Simpson in *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852, where her Honour after considering the proper construction of section 26, said:

53. *The result is that it is not open to the defendants to “plead back” the plaintiff’s imputations. It will be necessary to strike out those paragraphs of the defence that seek to take that course.*

54. I wish to make it perfectly clear – in case I have not already – that I regard this as a most regrettable result. *It does not reflect what I apprehend the legislature to have intended to do. In my opinion the legislature intended to re-enact (with appropriate modifications to reflect alterations in the defence of truth, but not otherwise) the effect of s 16. I am satisfied that s 26 was reworded as it was through inadvertence; that the drafters did not have in mind depriving the defendants of the right they had previously had to bring before the jury all true defamatory imputations (whether initially pleaded by the plaintiff or the defendant) and to measure them against all unproven defamatory imputations. And I am satisfied that the result can work injustice to defendants.*

55. *If it were open to construe the words of s 26 in the way for which the defendants contend, and the way in which Nicholas J did, I would do so. But, in my firm view, the language of the section does not permit that course to be taken.*

56. *So strongly am I of the view:*

(i) that the construction I have adopted is not only correct, it is the only one open;

(ii) that that result does not achieve what the Parliament had in mind; and

(iii) that that result significantly diminishes the value of the s 26 defence;

that I propose, through the avenues available, to draw these reasons to the attention of those charged with the responsibility of statutory reform.

9.20. The remarks of her Honour Justice Simpson have not heeded been by any government. Further, the NSW Court of Appeal subsequently rejected the analysis of Justice Simpson as to the intent of section 26. The NSW Court of Appeal instead divined that it had in fact been the intention of the Model Defamation Provisions to prevent “pleading back”: see *Besser v Kermode* [2011] NSWCA 174; 81 NSWLR 157. In doing so, the Court said (at [75]): “The history of the adoption of uniform laws of defamation in Australia makes it clear that the 2005 Act was a compromise between the common law and statutory jurisdictions”, and that (at [78]) “this markedly different language [between the previous NSW legislation and the 2005 laws] highlights the sea-change the 2005 Act has wrought

to defamation law in this State”.

- 9.21. How this “sea-change” was to adequately address the underlying rationale of the defence of contextual truth was not explained by the Court.
- 9.22. There is no doubt that the wording of the contextual truth defence under the 2005 uniform defamation laws departed in terms from section 16 of the 1974 Act. It had to, given that, under the 2005 legislation, the matter is the cause of action, rather than the imputation (as had been the case in NSW under the 1974 Act). Yet, the second reading speeches that did refer to contextual truth (as noted above) would appear to be consistent with upholding the first rationale. The explanatory memorandum suggests a possible lack of appreciation on the part of its author of the rationales for the contextual truth defence that had operated in New South Wales for over 30 years, and further suggested a potential misunderstanding as to the applicability of the *Polly Peck* “defence” in Australia as at that point in time. There is no evidence of any genuine, conscious intention on the part of the drafters of the 2005 legislation, and the states and territories that passed it, that the 2005 version of contextual truth would abandon the first of the two underpinning rationales for the defence which was derived from the 1974 Act. To the extent that section 26 has pared back an important aspect of the scope of the defences previously available in NSW and Tasmania, it was clearly a drafting error that did not reflect how the defence is intended to operate.
- 9.23. It is further to be noted that in recent years, there has been (at least in NSW) an emerging practice of plaintiffs being permitted by the Courts to “adopt” (or “appropriate”) defendant’s pleaded contextual imputations as their own pleaded imputations. In some instances, agreements have been made between the parties that this adoption or appropriation lasts only up until the point of them being found true at trial (if indeed that occurs) – whereupon they may become contextual imputations again.¹⁶ This has all the hallmarks of technical and tactical manoeuvring (at the expense of the resolution of the real matters in issue in the proceedings) and has added further complexity (and delay in terms of interlocutory skirmishes) to what is already a highly vexed defence, and creates considerable confusion for a jury.
- 9.24. Further, there remains considerable confusion as to what is to happen to a plaintiff’s pleaded imputation found true at trial. In *Chel v Fairfax Media Publications (No 6)* [2017] NSWSC 230, after reviewing the authorities, his Honour Beech-Jones J reached a sensible and elegant solution to fit within the poor drafting of section 26, whereby his Honour held that a plaintiff’s imputation, once found substantially true by the Court, becomes a contextual imputation and may be relied upon by a defendant as part of a

¹⁶ *Pahuja v TCN Channel Nine Pty Ltd* [2015] NSWSC 1664; *Sharp v Harbour Radio Pty Ltd (No 2)* [2016] NSWSC 223. *Eardley v Nine Network Australia Pty Ltd* [2017] NSWSC 1374.

contextual truth defence. His Honour said:

- 40 ... Accepting, as I do, that the analysis in *Kermode* concerned a pleading point, it follows that *Kermode* is binding authority for a construction of s 26(a) that precludes an imputation from simultaneously being both a “defamatory imputation of which the plaintiff complains” and “one or more other imputation ... that [is] substantially true”. However, as *Kermode* was directed to an argument at the pleading stage, it could not, and did not, address Mr Blackburn’s contention that the proper construction of s 26(a) is such that, once an imputation has been found to be substantially true, it can no longer be an imputation of which the plaintiff complains. Accordingly *Kermode* does not preclude an acceptance of Mr Blackburn’s argument.
- 41 ... The text of s 26 does not contemplate the existence of a defamatory imputation found to be substantially true that is neither a “defamatory imputation of which the plaintiff complains” nor “[an]other imputation ... that [is] substantially true”. A defamatory imputation found to be substantially true must be one or the other.
- 42 The construction suggested by Mr Blackburn is consistent with the language of s 26. While the word “complains” is not defined, nothing in the text of s 26 suggests that the imputations of which a plaintiff complains are fixed from the moment they are pleaded.
- 43 Thus, the question of construction reduces to a consideration as to which of Mr Blackburn’s construction or that adopted in *Mizikovsky* better accords with the objects of the Defamation Act 2005. Mr Blackburn’s construction enables the jury to consider whether the truth of the facts, matters and circumstances affecting a plaintiff’s reputation is such that no further harm is done to his or her reputation by the publication of defamatory imputations not shown to be true. This construction accords more with the judgment in *Blake* than the alternative of allowing the effect on reputation of adverse matters shown to be true pleaded by a plaintiff to be considered against adverse matters shown to be true pleaded by a defendant. Mr Blackburn’s construction also respects the balance between freedom of expression and protection of reputation by adopting a discrimen of what has been shown to be true rather than who thought of the imputation first (*Defamation Act 2005, s 3*). The approach in *Mizikovsky* does not further those objects. I cannot conceive of any rational reason for allowing a plaintiff to rely on a set of damning imputations they pleaded that were also found to be true to defeat a defence of contextual truth.

- 9.25. Subsequently, the decision in *Chel v Fairfax Media Publications (No 6)* [2017] NSWSC 230 was disapproved in *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* [2018] NSWCA 77. The NSW Court of Appeal unanimously held that a defendant is not permitted to rely upon a plaintiff's pleaded imputation contingently (that is, if it is ultimately found to be substantially true) as a contextual imputation for the purposes of section 26, nor does a plaintiff's imputation (once found substantially true at trial) become a contextual imputation. However, her Honour Justice McColl held that a finding that a plaintiff's imputation is substantially true must be "given effect", not only for the purposes of mitigation of damages, but also in determining whether the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations within section 26(b) of the *Defamation Act 2005*. The other two judges, Meagher and Gleeson JJA, did not endorse this statement. How an imputation is to be so "given effect", especially when the defendant is unable to plead and rely upon a section 26 defence at all, and how this all is to be explained to a jury, was not expanded upon.
- 9.26. The upshot is that it is presently entirely unclear what is to be done at trial in circumstances where a one or more of the plaintiff's pleaded imputations are found to be true (but one or more not found to be true), and where the gravity of the truth of the true imputations may well outweigh the harm caused by any false imputations. This produces considerable confusion not only for litigants, but any Court asked to determine a contextual truth defence.
- 9.27. Further, to add to the confusion over the operation of section 26, in *O'Brien v Australian Broadcasting Corporation* [2017] NSWCA 338; 97 NSWLR 1, a majority (Macfarlan JA, Leeming JA agreeing) held that two imputations, each dealing with a journalist's conduct (one being true – dealing with competence in the sense of the journalist publishing a false, alarmist article - and one being false, dealing with dishonesty and trickery as a journalist) could not (in effect) be properly weighed against each other for the purposes of section 26. His Honour Justice Macfarlan said at [222]-[225]:
223. *It is clear that contextual imputation A was very serious indeed, that it would have harmed the appellant's reputation substantially and that it arose out of the central claims in the appellant's article. However the imputation did not include that the appellant had acted dishonestly or with an intent to mislead, whereas the plaintiff's imputation (a) (the trickery imputation) did.*
224. *In my view this distinction between the imputations is significant. It leads me to differ from the primary judge's conclusion concerning the s 26 defence. Whilst the appellant's reputation would have been substantially damaged by contextual imputation A, her honesty would not have been impugned by it. As*

the plaintiff's imputation (a) did impugn her honesty, I consider that that imputation further harmed her reputation beyond that caused by the substantially true contextual imputation.

225. *The distinction to which I have referred is one between different "sectors" of the appellant's reputation, a distinction well-recognised in other aspects of defamation law (see Australian Broadcasting Corporation v McBride (2001) 53 NSWLR 43; [2001] NSWCA 322 at [16]-[23]; Channel Seven Sydney Pty Ltd v Mahommed [2010] NSWCA 335; (2010) 278 ALR 232 at [162]-[186]; Holt v TCN Channel Nine Pty Ltd [2014] NSWCA 90 at [29]). Whilst the level of generality at which sectors of reputation should be identified will in some cases be in doubt (see Mahommed at [182]), it is sufficient to say in the present case that the appellant's honesty and competence constitute different sectors of her reputation. Even a severe blow to the latter will not necessarily, and in my view in this case did not, affect the former. The trickery imputation did however affect the former.*

(emphasis added)

9.28. The references to "sectors" of a person's reputation find no grounding in section 26. To say that a true imputation of incompetence as a journalist cannot "swamp" (to use the common vernacular in defamation practice) a false imputation of dishonesty as a journalist for the purposes of a contextual truth defence appears to miss the central crux of section 26; namely, whether "the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations." That is particularly so given that in deciding whether defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations, the trier of fact must focus on the facts, matters and circumstances establishing the truth of the contextual imputations, rather than on the terms of the contextual imputations themselves.¹⁷ Section 26 does not divide people's reputations into sectors. While the question of sectors may be relevant for other purposes in defamation, it has no statutory foundation in terms of the defence of contextual truth per section 26. To take the position stated in *O'Brien* to its logical endpoint, for an article to make a false statement that person has misappropriated petty cash from an office (that being a plaintiff's pleaded imputation), while also making a true statement that the person is a murderer (that being an available contextual imputation to be pleaded by a defendant, and capable of being proven true), would

¹⁷ *John Fairfax Publications Pty Ltd v Blake* [2001] NSWCA 434; 53 NSWLR 541 at [5]; *McMahon v John Fairfax Publications Pty Limited (No 3)* [2012] NSWSC 196 at [20]; *Mizikovsky v Queensland Television Limited & Ors* [2013] QCA 68; [2014] 1 Qd R 197 at [25] ("*Mizikovsky*"); *Nationwide News Pty Ltd v Weatherup* [2017] QCA 70 at [46] ("*Weatherup*").

involve different “sectors” of that person’s reputation, and per the analysis in *O’Brien* would appear to mean that a contextual truth defence would fail. This cannot be the intended purpose of this defence.

- 9.29. To remain as a separate and viable defence, the defence of contextual truth must be amended to clarify that the imputations of which the plaintiff complains can be relied upon by the defendant as contextual imputations to mount a contextual truth defence. Further, the concept of “sectors” of reputation introduced by *O’Brien* should be expressly abolished.
- 9.30. It is also submitted that in the interests of simplicity, the defence of contextual truth could be incorporated into the statutory defence of justification. A combined defence could remove much of the confusion for parties to the litigation, legal representatives, judges, and especially juries, as to what is meant by “contextual truth”. It is submitted that section 25 (justification) could be amended to read:

25 Defence of justification

- (1) It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter are substantially true.
- (2) If one or more of the defamatory imputations carried by the matter is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously further harm the plaintiff’s reputation.
- (3) For the purposes of this section:
 - (i) a defendant may seek to prove that the matter carried one or more imputations not complained of by the plaintiff and that those imputations are substantially true, which may be relied upon for the purposes of establishing a defence under this section; and
 - (ii) in addition to the imputations referred to at (i) above, a defendant as part of a justification defence under this section, may rely upon any or all of imputations of which the plaintiff complains.

10. Question 10

- (a) Should the Model Defamation Provisions be amended to provide greater protection to peer reviewed statements published in an academic or scientific journal, and to fair reports of proceedings at a press conference?**

- 10.1. Yes. It is essential that academics and scientists can freely publish their works that have been peer-reviewed, particularly with the assurance that their right to do so is protected.
- 10.2. It is noted that in Australia at least one recent case has involved a claim concerning a publication in a scientific journal, namely the case of *Noble v Phillips (No 2)* [2018] NSWSC 25, in which a defamation claim had been made in respect of (amongst other publications) a paper entitled “*Aversive behaviour by koalas (Phascolarctos cinereus) during the course of a music festival in Northern New South Wales, Australia*”, published online in the CSIRO journal “Australian Mammalogy” on 15 January 2016.
- 10.3. However, the protection should not be limited to academic journals, but rather should extend to all academic and scientific publications that have been subjected to peer-review, notwithstanding the medium in which they are published. Similarly, presentations made by scientists and/or academics at conferences held for scientific and/or academic purposes should benefit from strong protections.

(b) If so, what is the preferred approach to amendments to achieve this aim – for example, should provisions similar to those in the Defamation Act 2013 (UK) be adopted?

- 10.4. Section 6 of the *Defamation Act 2013* (UK) is a starting point. However, as noted above, the protection should be extended beyond scientific or academic journals to peer-reviewed articles appearing in books and other media, and to presentations at conferences. It is to be noted that a section 6 defence may be defeated by malice per section 6(6). This is a reasonable backstop to prevent any consequence-free publication of deliberately malicious material.

11. Question 11

(a) Should the ‘reasonableness test’ in clause 30 of the Model Defamation Provisions (defence of qualified privilege for provision of certain information) be amended?

- 11.1. Yes. Statutory qualified privilege provides virtually no remedy for media organisations even where such organisations publish matters of public concern. The Courts often seem to treat the concept of truth as a proxy for reasonableness (often from a point of retrospection, once other issues, such as the truth of the imputations, has been decided). The practical and realistic outcome is such that a defence of statutory qualified privilege (as it is currently formulated) will only succeed for a media defendant when another substantive defence (such as truth) has been established.
- 11.2. In *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652; 237 FCR 33, his Honour Justice White said at [228] that “The matters listed in s 30(3) are not to be regarded as ‘a series of hurdles to be negotiated by a publisher before [it can]

successfully rely on qualified privilege” and “reasonableness should not be interpreted as requiring a counsel of perfection, given that the predicate on which it operates is that the imputations in question are not true and that the conduct of the defendant is accordingly not beyond criticism”.

- 11.3. While these statements are to be welcomed, in practice it is the experience of publishers that the onus of “reasonableness” is fraught with a series of “trip-wires” or hurdles laid out at section 30(3).
- 11.4. BHF is unable to name a single case since the enactment of the *Defamation Act 2005* where a media publisher, in the absence of justification defence, has successfully defended a proceeding solely on the basis of statutory qualified privilege.
- 11.5. Judges appear to proceed on the basis that if a media publisher is not running a justification defence, and therefore cannot (or does not attempt to) prove the plaintiff’s pleaded imputations to be true, then the publication cannot be reasonable for that very reason; ie it has published falsehoods, and it cannot be reasonable to publish false statements. This overlooks the very premise of the defence, which assumes that the defendant is not pleading truth and will not be seeking to establish the imputations to be true. It is an entirely separate defence, designed for an entirely different purpose.
- 11.6. There may be very good reasons why a media publisher chooses not to run a justification defence. For example, the publisher may disagree that the plaintiff’s pleaded imputations were actually conveyed, and cannot otherwise prove true the pleaded imputations in the precise terms in which they have been formulated. A publisher may also have relied upon one or more confidential sources for a story, who may refuse to give up their confidential status and give evidence at trial so as to establish truth. A media defendant may also consider that the matter complained of was a serious piece of reporting published in the public interest (involving matters that should be brought to the attention of the Australian public), which should be protected by section 30. Similar factors may present themselves to non-media defendants, who may wish to rely upon statutory qualified privilege.
- 11.7. A media organisation that pleads a defence of statutory qualified privilege will inevitably need to spend a great deal of time and resources preparing the defence. The interlocutory steps necessary to establish such a defence are particularly onerous. A defendant who pleads this defence must give discovery of all documents, prepare answers to interrogatories (which in the form required¹⁸ are extremely demanding upon journalists and editors), and prepare journalists and/or editors’ witness statements or

¹⁸ See *Palmer v John Fairfax & Sons Ltd* (1986) 5 NSWLR 727; *Clout v Jones* [2011] NSWSC 1430; *Mooney v Nationwide News Pty Limited (No 2)* [2014] NSWSC 1933

affidavits for them to appear at trial. In light of the dire success rate of the defence for the media, and the expense and effort required to mount the defence, it is quite common for publishers to forego the defence from the outset. The Courts have continued to treat the question of “reasonableness” as a standard of perfection.

- 11.8. Radical change is required to the wording of section 30 if it is to constitute a defence for media publishers. Otherwise, it is a dead letter.
- 11.9. The phrase “the conduct of the defendant in publishing that matter is reasonable in the circumstances” should be removed from section 30. It should be replaced with “the defendant acted with care and diligence so as to avoid knowingly and deliberately publishing falsehoods”.
- 11.10. Further, section 30 should be amended to make abundantly clear that the factors in subsection 30(3) are not “trip-wires” or mandatory hurdles, and that a failure by a defendant to establish any particular factor or factors listed in that sub-section does not mean that the defence will fail.
- 11.11. Additionally, section 30 as currently framed may be defeated as a matter of defeasance by way of the plaintiff establishing malice. However, if the defendant has acted maliciously, the defendant will fail to have established its own onus in terms of the necessary element of reasonableness (or care and diligence). The defeasance provision essentially achieves no aim, but adds to the cost to the parties and the burden to the Court.

(b) Should the existing threshold to establish the defence be lowered?

- 11.12. Yes, as outlined above.

(c) Should the UK approach to the defence be adopted in Australia?

- 11.13. Yes, but it should be a separate defence. Section 30 does not require “public interest”. It requires that the recipient have an interest or apparent interest in having information on some subject. This means it can be relied upon by individuals who may make statements to other persons about topics which may not be truly said to be in the public interest, yet the recipient still has an interest in the matter.
- 11.14. Section 4 of the *Defamation Act 2013* (UK) is a defence for publication of a matter of public interest. That is a different concept to the purpose of section 30. Notably, section 4 aims to provide protection for responsible journalism by media organisations.
- 11.15. In practice, section 4 has been a much more effective defence for media engaging in responsible journalism. Australia is in dire need of similar protections.
- 11.16. It is submitted that a defence that operates in the same manner as section 4 of the

Defamation Act 2013 (UK) should be added to the reformed Australian defamation laws, as a new and separate defence in addition to section 30 of the *Defamation Act 2005* (NSW). The new equivalent section 4 defence would be a defence primarily relied upon by journalists and media organisations publishing matters of public interest, in circumstances where they reasonably believed that publishing the statement complained of was in the public interest. Section 30 (subject to the above proposed changes) could continue to be relied upon by all individuals and entities, as well as the media, in publishing matters which may not necessarily be deemed to be in the “public interest”, but remain of interest to the recipients.

(d) Should the defence clarify, in proceedings where a jury has been empanelled, what, if any, aspects of the defence of statutory qualified privilege are to be determined by the jury?

11.17. The jury should decide all aspects of the section 30 statutory qualified privilege defence.

11.18. There is no justification for hiving off parts of the defence to the judge. In *Daniels v State of New South Wales (No 6)* [2015] NSWSC 1074 and *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, it was held that it was for the jury to determine the element of reasonableness in section 30 of the *Defamation Act 2005* (although not the other two elements of the section 30 defence).

11.19. McCallum J subsequently decided in *Gayle v Fairfax Media Publications Pty Ltd (No 2)* *Gayle v The Age Company Pty Ltd (No 2)*; *Gayle v The Federal Capital Press of Australia Pty Ltd (No 2)* [2018] NSWSC 1838 that it is for the judge, not the jury, to determine whether all three elements listed in section 30 are proved so as to establish a defence of qualified privilege. Her Honour noted that the element of reasonableness may, depending upon the circumstances of the case, require the jury to determine any dispute as to the primary facts. The rationale for this was that section 22(5)(b), which (in dealing with the roles of judicial officers and juries in defamation proceedings) says that nothing in that section requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer. “General law” is defined to mean the common law and equity. It is true that at common law, there is established case law that common law qualified privilege is a matter to be determined by the judge.

11.20. But statutory qualified privilege is not part of the common law, or equity, and is an entirely different and separate defence to common law qualified privilege. It is entirely a creature of statute. It is unclear why the role of a judge in determining a common law qualified privilege claim has any bearing whatsoever upon how section 30 is to be determined. Section 22(2) provides that the jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence

raised by the defendant has been established (emphasis added). This provision requires the jury to determine the defences under the statute. Just because common law qualified privilege is to be determined by a judge, does not mean that a defence pursuant to section 30 is also to be determined by judge, even though it may share a similar name.

12. Question 12 - Should the statutory defence of honest opinion be amended in relation to contextual material relating to the proper basis of the opinion, in particular, to better articulate if and how that defence applies to digital publications?

12.1. Australians are used to people expressing opinions. It is part of a free society, where people are entitled to speak their minds. Recipients of opinions are not so fragile as to expect that the maker of an opinion must face numerous technical hurdles in making the statement of opinion in order to avoid a defamation claim.

12.2. The current defence of statutory honest opinion is beset with numerous problems.

12.3. Firstly, it is directed to “the publication of defamatory matter”. This differentiates it from defences such as justification (section 25) and contextual truth (section 26), which refer to imputations. Section 31 makes no reference to imputations, but rather refers to the “matter”. The term “matter” is defined in section 4 so as to mean the entirety of a particular publication, whether it be an article, television program, broadcast or other form of medium. The wording of section 31(1)(a) (i.e. “the matter was an expression of opinion of the defendant rather than a statement of fact”) indicates that the whole of the matter complained of must be an expression of opinion of the defendant rather than a statement of fact. However, in the case of, for example, an opinion piece published in a newspaper, the article will inevitably contain both expressions of opinion and statements of fact. Indeed, it is (under the current law) expected that the piece will set out the facts upon which the opinion is based. It is therefore virtually impossible for the entirety of the matter to constitute opinion. Case law has interpreted the section as referring to “the matter complained of in its defamatory sense”.¹⁹ The term “defamatory sense” appears to be a separate concept to that of imputations, yet finds no grounding in the legislation. The wording of this section has created considerable confusion as to how the statutory defence is in practice supposed to operate: see for instance *Tabbaa v Nine Network Pty Ltd (No.10)* [2018] NSWSC 468, *Tabbaa v Nine Network Australia Pty Ltd* [2019] NSWCA 69 at [55]-[70].

12.4. Secondly, section 31(1)(b) requires that the opinion relate to a matter of public interest. It is unclear why this is a requirement of the defence. Why is it necessary for a person,

¹⁹ *Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091 at [100]; *Zaia v Eshow* [2017] NSWSC 1540 at [73].

in order to express an opinion on a particular topic, to confine the topic to one which is deemed to be in the public interest? There is no public interest requirement for a defence of justification under section 25, and it therefore does not follow that there should be a public interest requirement to publish an opinion. So long as an opinion is expressed honestly, and is understood to be an expression of a person's opinion, the question of public interest becomes largely irrelevant. To confine a defensible expression of opinion to only those expressions which relate to a matter deemed by a Court to be of "public interest" muzzles persons from expressing opinions which might fall outside what a Court says is in the public interest. In an era where people are increasingly engaging by way of social networks, and expressing opinions constantly over various mediums, it is simply unworkable to require every opinion to be in the public interest in order to enliven a valid defence. The public interest requirement is overly restrictive and fails to reflect the fact that individuals express opinions about all manner of things, some of which may be considered in the public interest, some of which may be of a more private nature. The public interest element of the defence is a curtailment on free speech. The element should be removed from statutory honest opinion.

- 12.5. Thirdly, there is the question of "proper material" (per section 31(1)(c)); that is, the material upon which the opinion is based. Section 31 defines proper material to be material that (a) is substantially true, (b) was published on an occasion of absolute or qualified privilege (whether under the Act or at general law), or (c) was published on an occasion that attracted the protection of a defence under this section or sections 28 or 29.
- 12.6. Nowhere in section 31 is it stated that the proper material must be set out in the matter complained of. It simply is not an element of the defence. Nevertheless, the Courts have imported a requirement (not appearing in the statute) that the proper material must be facts that appear or be referenced in the matter complained of, or be notorious: see for instance *Hanks v Johnston* [2015] VSC 570. If this was indeed a requirement of statutory honest opinion, one would expect it would have been legislated as part of section 31. It was not. Instead, concepts from common law fair comment have been imported by the Courts into a statutory defence which, plainly on its face, does not require "facts truly stated" to be set out in the matter complained of.
- 12.7. In contemporary discourse, which takes place on all manner of platforms, it is often not possible to satisfy a requirement for setting out facts "truly stated", particularly when one considers the particular restraints of a platform – for example Twitter.
- 12.8. In the UK Supreme Court decision of *Spiller v Joseph and others* [2010] UKSC 53, Counsel for the defendant submitted that the Court should develop the common law of fair comment so that it is "simplified and liberalised". Counsel submitted that the Court

should:

- (a) sweep away the requirement that the comment should relate to matter of public interest;
- (b) hold that the subjective state of mind of the defendant is wholly irrelevant;
- (c) restrict the requirements of the defence to (a) a requirement that the words complained of should be comment and (b) a requirement that there should be shown to exist one or more facts (or privileged statement) on which an honest person could have founded the relevant comment;
- (d) those facts could even come into existence after the date of the publication.

12.9. Counsel for the defendant submitted that the defence should be renamed simply “comment” or “opinion”.

12.10. However, the UK Supreme Court rejected defence Counsel’s proposed new formulation of an opinion defence and noted at [90] that “no authority to which this court has been referred put in doubt the fact that the defence of fair comment required the facts upon which the comment was made to be stated or identified in or from the comment itself” and that (at [95]) the case law did not “support the proposition that a defendant can rely in support of the defence of fair comment on a fact that does not form part of the subject matter identified generically by the comment”. The Court went on to say:

99. *What of a case where the subject matter of the comment is not within the public domain, but is known only to the commentator or to a small circle of which he is one? Today the internet has made it possible for the man in the street to make public comment about others in a manner that did not exist when the principles of the law of fair comment were developed, and millions take advantage of that opportunity. Where the comments that they make are derogatory it will often be impossible for other readers to evaluate them without detailed information about the facts that have given rise to the comments. Frequently these will not be set out. If Lord Nicholls’ fourth proposition is to apply the defence of fair comment will be robbed of much of its efficacy.*

100. *The cases have none the less emphasised repeatedly the requirement that the comment should identify the subject matter on which it is based, as is demonstrated by the passages in the judgments that I have emphasised by placing them in italics. If the requirement that the comment should identify the subject matter on which it is based is not imposed in order to enable the reader of the comment to form his own view of its validity, what is the object of the requirement? Bingham LJ in Brent Walker [1991] 2 QB 33, 44 said that the true facts must be “stated or sufficiently indicated” – sufficiently for what?*

101. *There are a number of reasons why the subject matter of the comment must be identified by the comment, at least in general terms. The underlying justification for the creation of the fair comment exception was the desirability that a person should be entitled to express his view freely about a matter of public interest. That remains a justification for the defence, albeit that the concept of public interest has been greatly widened. If the subject matter of the comment is not apparent from the comment this justification for the defence will be lacking. The defamatory comment will be wholly unfocussed.*
102. *It is a requirement of the defence that it should be based on facts that are true. This requirement is better enforced if the comment has to identify, at least in general terms, the matters on which it is based. The same is true of the requirement that the defendant's comment should be honestly founded on facts that are true.*
103. *More fundamentally, even if it is not practicable to require that those reading criticism should be able to evaluate the criticism, it may be thought desirable that the commentator should be required to identify at least the general nature of the facts that have led him to make the criticism....*

12.11. The above sentiments (expressed in 2010) may have had particular relevance prior to the rise of the prominence of social media platforms such as Twitter. However, in the modern age, it is simply not possible for persons using social media (or other forums), who wish to express opinions, to, in every case, identify (let alone set out in full) the entirety of the facts upon which their opinion is based. This is not necessarily a bad thing. An ordinary reasonable reader will ordinarily be able to discern an expression of opinion from a statement of fact. If that ordinary reasonable reader wishes to discover more about the particular topic the subject of the opinion, the internet provides a vast platform for doing so, in an instant.

12.12. It is submitted that as long as the matter complained of reads as opinion, and can reasonably be understood by an ordinary reasonable reader as opinion, and the opinion is held and expressed honestly by the publisher, it should be defensible as honest opinion. The approach proposed by Counsel for the defendant in *Spiller v Joseph and others* [2010] UKSC 53 should be adopted in any revised version of section 31. To do otherwise leaves any person who expresses an opinion in any medium, including Twitter and other social media platforms, who may not set out or relevantly identify the facts upon which the opinion is based, wide open to a defamation claim. This is not conducive to public discourse in Australia in the modern digital age.

12.13. Alternatively, the honest opinion defence should be amended to adopt the approach taken in section 3 of the *Defamation Act 2013* (UK).

13. Question 13 - Should clause 31(4)(b) of the Model Defamation Provisions (employer's defence of honest opinion in context of publication by employee or agent is defeated if defendant did not believe opinion was honestly held by the employee or agent at time of publication) be amended to reduce potential for journalists to be sued personally or jointly with their employers?

13.1. Yes. Where section 31(4)(b) has been interpreted as necessitating that both the author of the matter the subject of the defamation proceedings and the corporate publisher must be sued, this should be reformed. Individuals should not be needlessly joined in proceedings.

14. Question 14

(a) Should a 'serious harm' or other threshold test be introduced into the Model Defamation Provisions, similar to the test in section 1 (serious harm) of the Defamation Act 2013 (UK)?

14.1. Yes. Australia has taken small steps towards a threshold of requiring serious harm before permitting a defamation claim to proceed. The first step in recent times was to declare a trivial claim an abuse of process, on the basis of proportionality: *Bleyer v Google Inc* (2014) 88 NSWLR 670. See also *Freeburn v The Cake Decorators Association of NSW Inc (No 2)* [2014] NSWDC 173.

14.2. However, the concept of proportionality as a basis for dismissing a proceeding as an abuse of process was rejected in Queensland in *Smith v Lucht* [2014] QDC 302, where McGill DCJ declined to follow the decision in *Bleyer v Google Inc* (2014) 88 NSWLR 670. In that case, an application was made for early dismissal of the proceedings (which involved statements referring to the plaintiff as "Dennis Denuto", a central character in the Australian film *The Castle*). As a result of the refusal of the dismissal application, the matter went to trial, and the defendant succeeded on the basis of the defence of triviality (per section 33 of the *Defamation Act 2005*). This decision was upheld on appeal: *Smith v Lucht* [2016] QCA 267; [2017] 2 Qd R 489. Clearly, this case involved enormous burden to the Court, and expense to the parties, which would have been avoided had the matter been dismissed at an early stage pursuant to the principle in *Bleyer*. The expense undertaken in taking the matter to trial (let alone stress and angst to the defendant), and the ensuing appeal, could all have been avoided had the principles in *Bleyer* been followed and the proceedings been dismissed at an early stage.

14.3. Since then, the NSW Court of Appeal has made statements endorsing the *Bleyer* approach of dismissing proceedings on the basis of proportionality: see for instance *Farrow v Nationwide News Pty Ltd* [2017] NSWCA 246; 95 NSWLR 612 at [5] per

Basten JA.

- 14.4. Subsequently, the Supreme Court of New South Wales has held that defamation actions in Australia involve an element comprising of a threshold of seriousness: see *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858 at [31]-[45]. In that decision, her Honour McCallum J accepted and applied the statement by Justice Tugendhat in the English case of *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB); [2011] 1 WLR 1985 that: “an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant”.
- 14.5. The *Kostov* decision has not as yet been applied widely and is yet to gain approval from any intermediate appellate Court. Nevertheless, it is a clearly step in the right direction, so as to reduce the number of ultimately trivial defamation actions clogging up Court resources.
- 14.6. It is submitted that the *Kostov* decision, confirming that the tort of defamation in Australia does require a threshold of seriousness, should be recognised in the reformed defamation laws.

(b) If a serious harm test is supported:

(i) should proportionality and other case management considerations be incorporated into the serious harm test?

(ii) should the defence of triviality be retained or abolished if a serious harm test is introduced?

- 14.7. Yes, for the reasons outlined above. The experience of the litigants in *Smith v Lucht* (and the cost that will have been borne by the parties to that piece of litigation) show that proportionality must be taken seriously as part of any early, preliminary determination of serious harm.
- 14.8. The defence of triviality should be retained. If, for whatever reason, a judge is reluctant to dismiss proceedings at an early stage on the basis of serious harm and/or proportionality, a defendant should still be able to argue at trial that the publication is defensible by way of proving that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm. The defence of triviality focuses on the circumstances of publication whereas the seriousness threshold and the proportionality concept respectively focus on the tendency of the matters complained of to adversely affect the claimant and on the use of the Court’s resources. Moreover, it is to be noted that “harm” for the purposes of section 33 is harm to reputation, and does not encompass hurt to feelings: *Smith v Lucht* [2016] QCA 267; [2017] 2 Qd R 489. In the

event a judge may wish to leave these questions to trial rather than take the step of an early dismissal, a defendant should still have available to it the defence of triviality.

15. Question 15

(a) Does the innocent dissemination defence require amendment to better reflect the operation of Internet Service Providers, Internet Content Hosts, social media, search engines, and other digital content aggregators as publishers?

15.1. Yes. The application of the innocent dissemination defence in the *Defamation Act 2005* (NSW) is complicated by clauses 90 and 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth). Clause 91 provides (amongst other things):

91 Liability of internet content hosts and internet service providers under State and Territory laws etc.

(1) A law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it:

(a) subjects, or would have the effect (whether direct or indirect) of subjecting, an internet content host to liability (whether criminal or civil) in respect of hosting particular internet content in a case where the host was not aware of the nature of the internet content; or

(b) requires, or would have the effect (whether direct or indirect) of requiring, an internet content host to monitor, make inquiries about, or keep records of, internet content hosted by the host; or

(c) subjects, or would have the effect (whether direct or indirect) of subjecting, an internet service provider to liability (whether criminal or civil) in respect of carrying particular internet content in a case where the service provider was not aware of the nature of the internet content; or

(d) requires, or would have the effect (whether direct or indirect) of requiring, an internet service provider to monitor, make inquiries about, or keep records of, internet content carried by the provider.

15.2. The most comprehensive examination of this provision can be found in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125; 263 FCR 211; 83 NSWLR 52. In that decision, the Court held that clause 91 excludes the operation of a State law which either subjects the relevant party to a liability in respect of content, of the nature of which it was not aware, or requires the party to monitor or make inquiries about that content. The Court held that a State law which imposes liability on a content host in respect of content of which it is aware continues to operate. However, the prohibition in respect of a content host would prevent a State law imposing an obligation on the content host to monitor, and thereby make itself aware of, the content

which it is hosting.

- 15.3. The net effect of the above is that internet hosts are in a better position (at least in terms of legal liability) if they do not take steps to monitor content that they host. The current legislative framework may result in liability for those publishers who act responsibly and pro-actively moderate their content, but not for those who don't. The statutory innocent dissemination defence should be revised so that, when considered in conjunction with clause 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth), it does not penalise responsible publishers, at the very least in respect of third party comments posted by members of the public on the many websites which allow a platform to post such a comment (and in respect of which a publisher may not become aware of until notified).
- 15.4. Courts have repeatedly found that an online website operator is not liable as a publisher for material of which it is not aware prior to being put on notice of the alleged defamatory material by the complainant. Reformed defamation laws (whether in an Act, or by regulation) should stipulate a "takedown procedure", compliance with which would preclude a complainant from commencing defamation proceedings in respect of the material in question. A prescriptive takedown procedure could in this way form the basis for a 'safe harbour' provision, which in turn would allow internet content hosts to manage their risk and assess their potential liability with greater certainty.
- 15.5. An appropriate timeline for takedown, in our view, is 48 hours. The new legislation could provide for flexibility to abridge or extend that timeline if a party can show that a different timeline would have been reasonable in the circumstances. In other words, the takedown is to occur within 48 hours of notice by the complainant, unless it is shown that an earlier or later period is warranted in the specific circumstances of the case in question.

(b) Are existing protections for digital publishers sufficient?

- 15.6. No. The existing protections for digital publishers are insufficient. Courts have yet to coalesce with a dominant view as to what constitutes publication by an internet content host. There is also a divergence of opinion in Australian courts on the question of whether an internet service provider can be a publisher for the purpose of defamation law: *Rana v Google Australia Pty Ltd* [2013] FCA 60 at [50] per Mansfield J. Digital publishers would also benefit from unambiguous rules about how prospective complainants are to put publishers on notice about allegedly defamatory material and how publishers should go about taking down any allegedly defamatory content. Digital publishers should be able to know with a measure of certainty when there is a legitimate complaint on foot in respect of matter of which they otherwise have no actual

knowledge, and the steps they will need to take (presuming the material is defamatory) to address the complaint and not be liable in respect of any given piece of published content.

(c) Would a specific ‘safe harbour’ provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions?

15.7. Yes, for the reasons outlined above. The revised legislation (and if necessary, regulations), should set out a step-by-step procedure.

(d) Are clear ‘takedown’ procedures for digital publishers necessary, and, if so, how should any such provisions be expressed?

15.8. Yes, for the reasons outlined above.

16. Question 16

(a) Should clause 35 be amended to clarify whether it fixes the top end of a range of damages that may be awarded, or whether it operates as a cut-off?

16.1. Yes. As a preliminary issue it needs to be recognised that Parliaments in 2005 agreed on a cap of \$250,000 to attempt to retain some relativity with damages awarded in personal injuries cases. Due to gradual increases, the cap has already grown to almost \$400,000 and is due to increase again shortly.

16.2. A further issue is that the cap was originally considered to be a reflection of the maximum amount permissible without special or aggravated damages coming in to play. Although it may be argued that large awards of damages are the exception, it appears to be an increasing trend. The cap acts to inform the Court as to what award of general, compensatory damages would be consistent with a “most extreme case” of harm to reputation. If the cap is simply treated as a “cut-off”, it would be near impossible to compare the harm to reputation in one case to the harm done in another, depriving the Court of the assistance it would otherwise derive from the cap, or from monetary sums awarded in previous decisions.

(b) Should clause 35(2) be amended to clarify whether or not the cap for non-economic damages is applicable once the court is satisfied that aggravated damages are appropriate?

16.3. Yes. The cap should apply to general, compensatory damages. The intention of having a “cap” is that it is truly a “cap”, and a measure by which defamation damages awards can

be measured. If, as has been held in recent cases,²⁰ the cap simply does not apply if the Court is to find there to be some aggravating feature which warrants aggravated damages, the cap simply ceases to have any purpose. The cap, upon that point, loses all relevancy. This cannot have been the intention of the legislature in 2005. A true “cap” which applies to regulate the maximum amount a Court can award for general, compensatory damages provides far greater certainty to all litigants. It is submitted that if the Court is satisfied that an award of aggravated damages is appropriate, the cap should remain in place, subject to whatever sum the Court considers should be awarded in terms of aggravated damages, to be explicitly (and articulated in a fixed sum) added on top of the general damages sum (which may, by combination of the general and aggravated damages awards, exceed the cap).

17. Question 17

(a) Should the interaction between Model Defamation Provisions clauses 35 (damages for non-economic loss limited) and 23 (leave required for further proceedings in relation to publication of same defamatory matter) be clarified?

17.1. No. We consider that the interaction between clauses 35 and 23 is sufficiently clear.

(b) Is further legislative guidance required on the circumstances in which the consolidation of separate defamation proceedings will or will not be appropriate?

17.2. Yes. The legislation, as currently drafted, does not account for corporate groups which publish the same content in different media/platforms/periodicals via separate corporate subsidiaries, or, indeed, the position of journalists or editors whose work resulted in the item in question per *Webb v Bloch* (1928) 41 CLR 331. See for example *Fairfax Media Publications Pty Limited & Ors v Cummings; Fairfax Digital Australia and New Zealand Pty Limited & Anor v Cummings & Anor* [2013] ACTCA 37 (where two sets of proceedings were brought over essentially the same article published on different platforms operated by the Fairfax Media group). See also *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652, where there were three separate sets of proceedings (one against the Sydney Morning Herald entities, one against The Age entities, and one against The Canberra Times entities, all in respect of essentially the same article).

17.3. Where a publication is in substance the same, but published across various platforms operated by the same ultimate holding company or media group (and authored and/or

²⁰ *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 267; *Rayney v The State of Western Australia [No 9]* [2017] WASC 367; *Wilson v Bauer Media Pty Ltd* [2017] VSC 521; *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154; 361 ALR 642.

edited by the same journalists), a plaintiff should not be entitled to commence multiple sets of proceedings against (for example) different subsidiary companies operating different newspapers and websites, and different journalists or editors. To allow this to occur creates additional cost and burden for the parties and in particular for the Court, with no discernible gain.

(c) Should the statutory cap on damages contained in Model Defamation Provisions clause 35 apply to each cause of action rather than each ‘defamation proceedings’?

17.4. No. Per *Davis v Nationwide News Pty Ltd* [2008] NSWSC 693, a defamation proceeding attracts a single cap for compensatory damages. If the statutory cap were to be applied to each pleaded cause of action, this would encourage claimants to sue (as separate causes of action) on various versions of a particular publication that may appear on the internet, in print, or which has been broadcast, which in essence all constitute the same publication (disseminated to audiences via multiple mediums). An amendment to allow the cap to apply to each “cause of action” will likely encourage amendments by plaintiffs to broaden claims so as to “catch” all mediums in which the relevant matter has been disseminated (each as a separate cause of action), which in turn would result in the proliferation of interlocutory disputes as well as lengthy and overly complex pleadings. If the publication of multiple, distinct and separate articles or items is deemed to constitute aggravating conduct (that is, conduct which is improper, unjustifiable or lacking in *bona fides*), then the cap may be exceeded to reflect any alleged aggravated damage, and that would provide a sufficient remedy to the plaintiff, rather than multiple separated damages caps applying.

18. Question 18 Are there any other issues relating to defamation law that should be considered?

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

18.1. As noted above, the elements that a plaintiff must establish as part of his or her onus are relatively simple. The “heavy lifting” is generally left to the defendant publisher.

18.2. Defamation is, at its heart, about a plaintiff seeking to vindicate him or herself by “nailing a lie”. That is to say, a claim for defamation should be brought on the basis that the plaintiff believes the imputations sued upon to be false.

18.3. That being so, it is appropriate for the plaintiff to prove falsity of the imputations, rather than the onus being left to the defendant. The plaintiff will always be in the best position to know whether an imputation is true or not. A plaintiff should not be permitted to sue

over imputations which he or she knows are true.

- 18.4. The cause of action in defamation should include an additional element, requiring the plaintiff to establish that the imputations he or she relies upon are false.
- 18.5. In many cases, this will be quite a simple proposition for a plaintiff. For example, he or she could simply give evidence under oath that the imputations are false. But this reversal of the onus of establishing the truth of the imputations would have a profound effect on the approach adopted by potential claimants, and would discourage frivolous and vexatious claims. There have been many cases where plaintiffs have sued on imputations which have ultimately been found to be substantially true at trial, or which have settled close to trial when evidence of the truth of imputations has come to light. Placing the onus upon the plaintiff to establish falsity as part of his or her claim will focus the mind of the plaintiff and help to avoid frivolous or vexatious claims, or claims made for an ulterior motive to the protection of reputation and ultimate vindication (i.e. claims made with a view to silencing a critic).
- 18.6. Alternatively, it should be a requirement under the reformed laws that a plaintiff must swear or affirm an affidavit embodied in the Statement of Claim that each of the imputations pleaded are false.

Level of specificity required of a justification plea

- 18.7. Numerous recent decisions have supported the proposition that a plea of justification must be particularised with the precision of an indictment. In *Rush v Nationwide News Pty Ltd* [2018] FCA 357 at [52], it was said in terms of the requirement of specificity or precision of a justification defence, that the common law rule is that a defendant must specify the particulars of truth relied on with the same precision as in an indictment: *Hickinbotham v Leach* [1842] EngR 799; (1842) 152 ER 510 at 510; *Zierenberg v Labouchere* [1893] 2 QB 183 at 186-187; *Wootton v Sievier* [1913] 3 KB 499 at 503; *Crosby v Kelly* [2013] FCA 1343 at [33]; *Brooks v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWSC 1331 at [9]- [12].
- 18.8. In *Brooks v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWSC 1331, the following submission was accepted:

18. Secondly, Ms Chrysanthou submitted that a defendant to a defamation action is in that position by reason of being (or having been alleged to be) a publisher of defamatory material. She said "it behoves a publisher of such material, at least one who asserts what has been published is true, to be armed with the information to back up the allegations and to inform the plaintiff accordingly", again referring to *J'Anson* [*J'Anson v Stewart* [1787] EngR 116; (1787) 1 TR 748] in the following quote:

“Now here if the defendant can support his charge that the defendant has defrauded diverse persons, it must be known to him whom he has defrauded and he must call them as witnesses to prove the particular acts of fraud. If he cannot substantiate his charge, he ought not have to have made it.”

(emphasis added)

18.9. It is simply unrealistic, and represents a serious misunderstanding of the nature of journalism, to expect that a journalist preparing a major piece of investigative journalism to be in the same position, at the time of publication, as a prosecutor with a detailed brief of evidence to take a criminal matter to trial. Journalists rely upon confidential sources, many of whom do not and will not go on the record. They may also, in the course of preparing an article, view documents which cannot be copied and retained. They may be provided with information which they know to be true, but have no tangible, concrete and admissible evidence *in their possession* at the time of publication. The analogy drawn between police charges (and an indictment) and that of a justification plea is inapt. It has long been held that a party may avail itself of interlocutory processes (including discovery, interrogatories and the issue of subpoenas) in order to complete the particularisation of a pleading. There is no reason why this ought not be the case in defamation proceedings. The proposition applied by the Courts that a journalist must be in possession, at the time of publication, of (effectively) a brief of evidence proving all elements of a story true, should be expressly rejected in the reformed defamation laws. Further, the laws should prohibit truth defences from being struck out at an early stage prior to them having had the opportunity to pursue the usual interlocutory steps.

Clarification that multiple defences can be relied upon in combination by a defendant

18.10. The reformed laws should clarify that a defendant can rely on a combination of defences to defend a claim in relation to a single matter complained of. Many publications contain a variety of material, some parts of which might be defensible by way of a justification defence, other parts may be defensible as an honest opinion, and others capable of supporting a fair report defence. Traditionally, defendants have been able to mount multiple defences to address different aspects of a particular publication. For example, in *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295, McCallum J said at [22]:

The defence of justification under s 25 of the Defamation Act requires proof that “the defamatory imputations” carried by the matter complained of are substantially true. It has not, however, been understood that the defence may

only be pleaded in a case where the defendant seeks to prove all of the plaintiff's imputations to be substantially true. Rather, it is generally accepted that a defendant may plead the defence to only some of the plaintiff's imputations, presumably on the premise that, if other imputations are defeated by other defences, there will be a complete defence to the action so as to entitle the defendant to judgment in its favour.

18.11. However, in *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* [2018] NSWCA 77, Meagher JA stated at [38] that defamation defences each work on an “an all-or-nothing basis”. That was certainly not the position taken by Fairfax in that matter (notwithstanding what is said at paragraph [38]), and is completely contrary to the traditional approach taken by media defendants to the defence of matters which involve a mixture of fact, opinion, fair report and the like. The reformed laws should make clear that a combination of defences can be relied on by a defendant in response to any particular matter complained of, and that different defences may be directed towards different imputations.

Costs consequences for unfounded allegations of malice

18.12. Consideration should be given to the consequences that should be faced by a plaintiff who makes unsubstantiated allegations of malice against a defendant. For example, costs consequences could flow for such a plaintiff (possibly at the discretion of the Court) if an allegation of malice is ultimately found to be baseless, such as depriving the plaintiff of the benefit of any costs order in his or her favour;

Jury questions and how the jury is to deliver verdict

18.13. There is a question as to whether the function of juries should be simplified, such that juries would simply give a general verdict in favour of one party or the other. Juries currently face the arduous task of answering a series of questions, the answers to which may not ultimately make it clear to them who is successful in the case (see for instance the extraordinary number of questions put to the jury in the matter of *Tabbaa v Nine Network Pty Ltd (No.10)* [2018] NSWSC 468). In criminal matters, the elements of the relevant criminal offence are explained to the jury, along with any defences relied upon by the defendant, with the jury then delivering a simple verdict of guilty or not guilty. A reform of the function of juries in terms of determining the outcome of a case would enable the jury to better understand its role. The question to be put to the jury could be as simple as:

- (i) *who has succeeded in this claim for defamation (circle one answer): the plaintiff, or the defendant?;*

or, alternatively:

(ii) (circle one answer):

(A) has the **plaintiff** succeeded in establishing that he/she has been unlawfully defamed and that the defendants' defences have failed - **YES**; OR

(B) has the **defendant** succeeded in defending the plaintiff's claim for defamation - **YES**.

Drafting of the new legislation

18.14. It is vital that the drafting of the new legislation should be overseen by a panel of experienced, specialist defamation practitioners, so as to avoid a repeat of the drafting errors of the 2005 legislation. Input to the wording of legislation could be given by a panel of true specialists, actively practising in this area of law, including senior and highly experienced defamation Counsel, senior solicitors specialising in defamation, and in-house Counsel working in major news organisations, to ensure that there is no repeat of the 2005 glitches. BHF is happy to put forward names of suitable persons to comprise such a panel.

Small disputes to (at least initially) be dealt with by a tribunal or Local Court

18.15. In light of the proliferation of relatively minor disputes between individuals (often played out on social media, as well as other forums, which are known, in the vernacular, as “backyarders”), there should be a requirement to commence claims either in a new specialist division of state tribunals such as NCAT or a specialist division of a Local Court. Alternatively, given the increasingly cross-jurisdictional nature of social media and online defamation matters, a national tribunal could be established to deal solely with small defamation disputes (particularly those based upon exchanges on social media). Such specialist tribunals could require mediation as a first step, with the parties strongly encouraged to take down online publications and publish an apology to attempt to resolve the matter as quickly and cheaply as possible. Further, (subject to enabling legislation) remedies in such a tribunal setting could allow for the tribunal to (for example) make orders of declaration as to truth or falsity, for injunction / take-down, and/or the publication of an apology, but otherwise be highly restricted in terms of remedies, including a restriction on the amount of damages that may be awarded by the tribunal (if any), and a *prima facie* position that such matters will be heard and determined on the basis that there will be no order as to costs as between the parties. Such measures may reduce the number of minor defamation claims being made in the Courts, which simply do not warrant the expenditure of judicial time and resources.

Removing defeasance provisions

18.16. We urge that the effectiveness and relevance of the current defeasance provisions in the defamation laws be examined. For example, a defence of fair report of proceedings of public concern may currently be defeated if the plaintiff can demonstrate that the defamatory matter was not published honestly for the information of the public or the advancement of education. If a person posts a tweet about an ongoing Court case, which otherwise accurately reports what has happened in the Court case, is it truly necessary for that tweet to be published honestly for the information of the public or the advancement of education? What if it is simply published for the information of friends and family of the person who tweeted it? Why should a person be prohibited from publishing a fair report without fear of a defamation claim in circumstances where they have no intention of making the publication “for the information of the public or the advancement of education”? The current defeasance provisions have largely become meaningless anachronisms in light of the near-constant digital communication that occurs via social media and the internet, often within small groups of people, as distinct from mass media publication. The defeasance provisions are leading to the imposition of an additional burden on both defendants and the Courts in dealing with applications to strike out deficient Replies (see for example *Arman v Nationwide News Pty Limited* [2017] NSWDC 151; *Mosslmani by his tutor Karout v Australian Radio Network Pty Ltd* (ACN 065 986 987) [2018] NSWDC 114). Serious consideration should be given to completely removing the defeasance provisions, or (if it is considered necessary) instead embodying the defeasance principles as part of the plaintiff’s onus in chief in establishing his or her cause of action.

Potential radical reform

18.17. It is submitted that the Discussion Paper and the proposed reform process creates an opportunity for radical reform as to how defamation matters are conducted in Australia, potentially going well beyond the questions currently posed. For example, the role of imputations (and the interlocutory skirmishes occasioned by them) could be revisited, so to examine whether or not they are in fact necessary for the determination of a civil claim. A defendant dealing with an imputation that it considers is not capable of being conveyed (but a Court refuses to strike out), may have to mount a substantial justification defence (involving a great deal of work and cost), which in the event the imputation is not found at trial to have been conveyed results in a considerable waste of money and resources for that defendant. Further, potential specific laws dealing with online publication (in particular social media) ought to be addressed as part of the

review. Serious consideration should be given to the possibility of truly radical reform as part of a once-in-a-generation opportunity to address the shortcomings and anachronisms in the current law.

Limitation period for injurious falsehood

18.18. Injurious falsehood is an analogous tort to defamation, and can be (and has been) used as a surrogate for defamation by persons or entities otherwise unable to sue for defamation (including persons or entities who have otherwise missed the limitation period for defamation actions). Presently the limitation period for injurious falsehood is **6 years**. Legislation for the reform should bring the limitation period for injurious falsehood into line with the limitation period for defamation, namely **1 year** from the date of publication.

Review provisions

18.19. Any new legislation should enact a similar provision to section 49 of the *Defamation Act 2005* (NSW), so that the legislation must be reviewed within five years. Such a review ought to be carried out promptly (unlike the situation which developed in relation to section 49, where the review process dragged out for years). The advances of technology and methods of communication continue at an ever-growing rate. A prompt and efficient review which takes place (and is completed) within five years after the enactment of new laws will ensure that such new laws remain in keeping with the technology and cultural expectations that will exist in five years' time.

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