BRIEFING
THE NEED TO UPDATE THE UNIFIED DEFAMATION ACT
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This briefing document is being provided by the Joint Media Organisations, members of which are:

- AAP
- ABC
- APN News & Media
- Australian Subscription Television and Radio Association (ASTRA)
- Bauer Media
- Commercial Radio Australia (CRA) – representing Australia's commercial radio broadcasters
- Community Broadcasting Association of Australia (CBAA) – representing community radio and television stations
- Fairfax Media
- Free TV – representing all of Australia's commercial free-to-air television licensees
- Media Entertainment and Arts Alliance (MEAA)
- News Corp Australia
- SBS
- SkyNews
- The Newspaper Works
- The West Australian

BACKGROUND

Uniform defamation laws were introduced across the six states during the latter part of 2005, and came into effect on 1 January 2006. As reported in the 2005-06 Annual Report of the (then) Standing Committee on Attorneys-General, the unified law is subject to an Inter-Governmental Agreement which also provides for amendments to the laws.

As we near the 10th anniversary of the operation of the unified defamation law, we are united in our view that it is time to update the law to:

- Address some aspects of the law which, through 'road testing,' do not operate as intended; and
- Take account of international best practice, including recent amendments adopted in the UK, to ensure consistent application of the law across all platforms (including digital).

The table below details our recommended amendments to update the law.

TABLE OF RECOMMENDATIONS

Note – 'the Act' referred to in this document is the *Defamation Act 2005 (NSW)*

CONCEPT	ISSUE	RECOMMENDATION	PUBLIC POLICY RATIONALE
Who can take a cause of action	The law of defamation rightly protects the reputation of individuals. Currently the law allows individuals and some 'classes' of businesses to sue for defamation.	Amend the law – so that only individuals – namely a natural persons – should have a cause of action in defamation	Consistency
Serious harm test	The law does not adequately deal with spurious claims 'up front'. While the law includes a defence of triviality, and matters can be dismissed as an abuse of process for being a disproportionate drain on the resources of the court, it lacks a threshold 'serious harm' test.	Introduce a 'serious harm' threshold test, similar to section 1 of the *Defamation Act 2013 (UK)*, such that a statement is not defamatory unless it has caused or is likely to cause serious harm to the reputation of the claimant. See also *defence of triviality/defence for operators of digital platforms.*	Align with international best practice (UK); proportionality; ensures efficient allocation of resources including court resources
Single publication rule	Section 14B of the *Limitations Act 1968* provides that an action in defamation is not maintainable if brought after the end of a limitation period of one (1) year from the date of publication of the matter in question. For print publications this date is fixed. However, due to *Dow Jones and Company Inc v Gutnick* as long as a matter in question is available to be downloaded from the internet it potentially continues to be published anew and the limitation period cannot apply.	Introduce a single publication rule in similar terms of section 8 of the *Defamation Act 2013 (UK)* that applies to first publication of the matter regardless of the medium	Align with international best practice (UK); modernisation of the law in the digital age; technological neutrality and ensuring consistent treatment across medium platforms (eg print, broadcast, online); proportionality
URLs in concerns notices	The law did not foresee the practical implications of online publishing, and does not include a requirement for the aggrieved person to list the URL of material published online in the concerns notice.	Introduce a provision to require the URL at which the material is published (if applicable) to be included in concerns notices, and if not included for the publisher to be able to request this information in a further particulars notice.	Modernisation of the law in the digital age

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Correction of any error in fact	The law requires a 'reasonable correction' of the matter in question, or the imputations relating to the offer. It does not require an apology. This deliberate lack of requirement for an apology was addressed in the NSW AG's 2nd Reading Speech to encourage use of the offer of amends. It is often the case that plaintiff lawyers inevitably assert that a correction which does not include an apology is not reasonable when it comes to assessing the offer as a defence pursuant to section 18(1) of the Act.	Amend the law to clarify that the 'correction' required in an offer of amends in section 15(1)(d) of the Act is the correction of any false statement.	Ensure the law works as intended
Offer to make amends – timeframe	A publisher becomes aware of a claim of defamation upon receipt of a concerns notice. The law provides at least 28 days after receipt to investigate and determine whether an offer to make amends should be made. However, a defence pursuant to section 18(1)(a) of the Act requires that the offer be made 'as soon as practicable' – which is inconsistent and has the obtuse outcome of encouraging notices and/or claims requiring an offer of amends to be made the same day.	Amend the law so that an offer for amends made within 28 days, or before filing a defence if no concerns notice is provided, be reasonable for the purpose of an offer of amends defence, rather than requiring the offer be made 'as soon as practicable'.	Consistency; ensures the law works as intended
Proceedings in relation to the same imputations	The 2005 law introduced a cap on damages for non-economic loss. This has resulted in the unintended outcome of plaintiffs bringing multiple proceedings in relation to the same imputations, and ensuing uncertainties. For example, *Buckley v The Herald and Weekly Times Pty Ltd* & Anor and *Dank v Whittaker*.	Amend the law to make it clearer that the plaintiff can only bring one set of proceedings in relation to the same imputations against all defendants.	Ensure the law works as intended
Contextual truth defence	The current contextual truth defence has become unworkable. Specifically, defendants	Amend the law so as to only require that the imputation differ in substance from a plaintiff's	Ensure the law operates as intended;

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	are having their contextual imputations struck out because of the strict interpretation of the phrase 'in addition to' – that is, not only is there a requirement that a defendant's contextual imputation differ in substance from a plaintiff's imputation, but that it must be 'in addition' to that of a plaintiff's imputations. For example, *Jones v TCN Channel Nine Pty Ltd.* Additionally, in *Fairfax Media Publications Pty Limited v Bateman* the NSW Court of Appeal found that NSW – unlike Victoria – does not permit a Hore-Lacey pleading, creating a disparity between jurisdictions where there should not be such.	imputation. Specifically, adopt alternative wording of section 26 drafted by Dr Matthew Collins QC and included in the Law Council submission to the NSW review.	consistency across jurisdictions
Defence of public documents/proceedings	The law currently includes defences for fair report of public documents and proceeds. However it does not include documents issued or published by, and presentations at, a scientific or academic conference and press conferences held to discuss matters of public interest.	Amend the law to add include documents issued or published by, and presentations at, a scientific or academic conference and press conferences held to discuss matters of public interest to the defences of fair report or public documents and proceedings of public concern.	Align with international best practice (UK)
Defence of qualified privilege	The factors that a court may take into account when determining reasonableness in subsection 30(3) where introduced into the Defamation Act 1974 in 2002 and remain largely unchanged in the current Act. They were drawn from *Reynolds v Times Newspaper Ltd*. The courts have approached the matters to be taken into account as a series of hurdles to be overcome rather than matters to be taken into account.	Replace section 30 of the Act with the public interest defence in section 4 of the *Defamation Act 2013 (UK)*. The section in the UK Act is intended to better reflect the intentions of *Reynolds v Times Newspaper* and remains based on that case; and is simpler and more likely to result in a publisher being able to rely on statutory qualified privilege as a defence. The amendment should also include a public figure defence.	Ensure the law operates as intended; align with international best practice; promote the efficient allocation of resources, including court resources
Defence of honest	The defence of honest opinion does not afford	Amend the law to expressly state the defence	Ensure the law operates as intended

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opinion	a defence as it was intended. Specifically, it does not clarify that it is not necessary that the proper material upon which the opinion is based be stated or referred to in the matter in question.	does not require the facts upon which an opinion is based to be stated or indicated in the publication of notorious, and a definition of opinion be inserted to clarify that the defence protects the same range of comments as the common law defence.	
Defence of triviality/defence for operators of digital platforms	The law currently provides that it is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm. This links with (i) the recommended serious harm test (above); and (ii) the development of digital platforms. Regarding a defence of operators of digital platforms – The defence does not reflect the manner in which internet users express their opinions.	(i) Regarding the link with the *serious harm test* – If the *serious harm test* is introduced (as proposed), then the defence for triviality can be repealed. (ii) Regarding a defence of operators of digital platforms – replace the triviality defence with a defence for digital platform operators who host third-party comments based on section 5 of the *Defamation Act 2013 (UK)* and the *Defamation (Operators of Websites) Regulation 2013 (UK)*.	Introduction of a serious harm test makes the triviality defence unnecessary. Align with international best practice (UK); modernisation of the law in the digital age
Issuing proceedings before the expiration of the period allowed for an offer to make amends	The law currently provides for 28 days for the defendant to assess a claim and determine an offer to make amends. However, plaintiff lawyers often issue proceedings before the time period elapses.	Amend the law to require that indemnity costs be awarded in the defendant's favour if a plaintiff issuing proceedings before the expiration of any period of time in which an offer to make amends may be made, in the event that the court subsequently finds an offer of amends subsequently made to the plaintiff was reasonable.	Ensure the law operates as intended; promote the efficient allocation of resources, including court resources
Criminal defamation	In many states, including NSW, defamation is a criminal offence, attracting criminal penalties of up to 3 years in jail. For example, section 529 of the *Crimes Act 1900 (NSW)*	Repeal all laws that that provide criminal penalties for defamation, eg section 529 of the *Crimes Act 1900 (NSW)*	Criminalising defamation infringes disproportionately on freedom of speech; align with international best practice