Law Council
OF AUSTRALIA

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Dear Ms Lo

Statutory Review of the *Defamation Act 2005* (NSW)

1 Introduction

1.1 The Law Council of Australia is the peak national representative body of the Australian legal profession. The Media and Communications Committee (**Committee**) forms part of the Business Law Section of the Law Council.

1.2 The Committee welcomes the opportunity to make a submission for the purposes of the Department's statutory review of the *Defamation Act 2005* (NSW) (**Act**). The Committee is grateful to the Department for its agreement to accept this late submission.

1.3 Because the Act forms part of a national scheme of substantially uniform legislation (**national scheme laws**), the Department's review may have national implications. For that reason, the Committee, comprising representatives of media and communications law practitioners and academics across Australia, felt it important to put before the Department a national perspective.

1.4 References in this submission to sections of the national scheme laws are references to the sections as they appear in the Act. Where there are material differences between the laws of different jurisdictions, they have been highlighted in this submission.

2 Executive Summary

2.1 By way of overview, the Committee's submissions can be summarised as follows:

(a) The achievement of national uniformity by the passage of substantially identical legislation in each Australian State and Territory was an historic achievement for which the Standing Committee of Attorneys-General deserves congratulations and thanks.

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(b) The national scheme laws are substantially achieving the objects for which they were enacted.

(c) There are, however, a number of areas in which the Committee believes the national scheme laws require amendment or could be improved.

(d) The unavailability of juries in civil defamation actions in South Australia, the Australian Capital Territory and the Northern Territory encourages forum shopping by defamation plaintiffs. In particular, there appears to be a trend whereby some defamation actions that would ordinarily be brought in NSW (where juries are available) are being brought instead in the ACT (where they are not). This lack of uniformity is inconsistent with the objects of the national scheme laws and undesirable as a matter of policy.

(e) There is division in the legal and broader communities about the merits of the abolition of the rights of most corporations to sue for defamation. There is a consensus among members of the Committee, however, that the corporations provision (section 9) gives rise to anomalies because of the arbitrary definition of 'excluded corporation' in section 9(2). The definition also gives rise to practical uncertainties: it is sometimes impossible for a publisher to know in advance whether or not a corporation is an 'excluded corporation'.

(f) There are a number of ways in which the offer of amends provisions in sections 12–19 of the national scheme laws could be improved. First, section 18(1)(a) should be amended so that it is consistent with section 14(1). Secondly, section 15(1)(d) should be amended so that offers of amends can be made in cases involving the publication of defamatory opinions, as well as cases involving the publication of false statements of fact. Thirdly, defendants should be permitted, having given appropriate notice to the plaintiff, to defer raising and seeking to rely upon a reasonable offer of amends until the end of the trial, to avoid the risk of the jury being prejudiced by statements and admissions made in offers when adjudicating upon other issues.

(g) Section 22 of the Act requires judges to determine the amount of damages to be awarded to a successful plaintiff, even in cases otherwise tried before juries. Because judges are not privy to the reasoning of juries, there is a risk that judges will award disproportionately low awards of damages in respect of publications that juries have considered to be seriously defamatory, or that judges will award disproportionately high awards of damages in respect of defamatory publications that juries have considered to be relatively trivial. Section 22 should accordingly be amended, so that in cases heard before a jury, the jury determines the amount of damages (if any) that should be awarded to a successful plaintiff.

(h) The biggest obstacle to achieving national uniformity was the inability of the States and Territories to reach agreement as to whether truth alone ought to be a defence to defamation law. The impasse was resolved in the national scheme laws in favour of the uniform adoption of the common law

defence of truth alone and a corresponding statutory defence of substantial truth (section 25). In the view of most members of the Committee, it would be a gravely retrograde step to reintroduce a 'public interest' or 'public benefit' component to the defence of truth.

(i) The contextual truth defence in section 26 of the national scheme laws is not achieving its intended objective, partly because of a line of common law authorities that makes it impossible for defendants to plead and justify imputations that have a common sting with, but are broader than, imputations complained of by the plaintiff, and partly because of drafting issues with section 26 itself. The Committee recommends that section 26 be amended so that a defendant has a defence of contextual truth where the defendant proves that, by reason of the substantial truth of any imputations conveyed by a publication, any defamatory imputations of which the plaintiff complains that are not substantially true do not further harm the reputation of the plaintiff.

(j) In order to ensure that the statutory defence of honest opinion meets its intended objective, the Committee recommends that section 31 be amended to clarify that it is not a requirement of the defence that the facts upon which an opinion is based be stated or indicated in the publication, or otherwise known to recipients. The Committee also recommends that a definition of 'opinion' be inserted in section 31 to make it clear that the section 31 defence protects not just opinions, but also the same range of comments protected by the common law defence of fair comment.

(k) The statutory defences of absolute and qualified privilege in sections 27 to 30 appear to be well adapted to the achievement of the objects of the Act and do not appear to require any refinement or clarification.

(l) The statutory defence of innocent dissemination in section 32 of the Act is not well adapted to the achievement of its intent. The defence should be amended as follows:

  (i) section 32(3) should be amended to make it clear that each of the categories of persons referred to in paragraphs 32(3)(a) to (h) are 'subordinate distributors' for the purposes of the section 32 defence; and

  (ii) section 32(1)(b) should be amended so that subordinate distributors have the benefit of the section 32 defence provided that they neither know nor ought reasonably to know both that the matter in question was defamatory, and that its publication could not be justified by a defence available at common law or under the Act, and provided that their lack of knowledge of each of those matters was not due to negligence on their part.

(m) The cap on damages for non-economic loss in defamation proceedings in section 35 of the national schemes law has largely achieved its intended purpose. Two aspects of the operation of the cap, however, require refinement and clarification. First, section 23 ought to be amended to

provide that multiple defamation proceedings by the same plaintiff should be consolidated where the proceedings concern publications of the same or substantially the same matter, irrespective of whether the matter is published by the same or different publishers, and irrespective of whether the matter is published in or via the same or different media of communication. Secondly, section 35 ought to be amended so that the 'maximum damages amount' is defined as the maximum amount of damages that may be awarded to a plaintiff in defamation proceedings.

(n) At present, the only matter courts may take into account when considering applications for extensions to the limitation period for the commencement of defamation actions is whether it was reasonable in all the circumstances for the plaintiff not to have commenced an action within one year from the date of the matter complained of. The present rule can be unfair in its application. Courts should be empowered, when considering whether to extend the limitation period, to take into account a broader range of discretionary factors, including the prejudice the parties would suffer from extending or refusing to extend the limitation period.

(o) A form of single publication rule should be adopted throughout Australia, requiring plaintiffs to commence defamation actions within a reasonable time after allegedly defamatory matter is first published. The adoption of such a rule would remove the spectre of indefinite potential liability that presently attaches to stale material stored in, for example, online archives. Any potential unfairness to plaintiffs from the introduction of such a rule would be mitigated by giving courts the ability to take a broad range of discretionary factors into account when considering applications for extensions to the limitation period.

2.2 The matters which the Committee has identified as areas for potential reform and improvement should not be understood as detracting from the Committee's very firm view that the national scheme laws are a dramatic improvement on the regime of differing State and Territory laws that preceded them.

2.3 The Committee considers it very important that any amendments to the Act only be undertaken as part of uniform amendments to the national scheme laws. It would be a matter of the greatest regret if the achievement of uniformity were to be undone by unilateral changes to the substantive defamation laws of individual Australian jurisdictions.

3 Objectives of the Act

3.1 The enactment of the national scheme laws was an historic achievement for which the Standing Committee of Attorneys-General deserves congratulations and thanks. While, inevitably, there were compromises involved in achieving substantial uniformity, the national scheme laws have, in the Committee's view, very considerably reduced the complexity of Australia's defamation laws, reduced the potential for forum shopping, and desirably rebalanced the tension between freedom of expression and the right to reputation.

3.2 The objects of the national scheme laws are identified in section 3. They are the promotion of national uniformity, the protection of freedom of expression, the provision of effective and fair remedies for defamed persons, and the promotion of speedy and non-litigious methods of resolving defamation disputes. Although the Committee believes there are a number of areas in which the national scheme laws would benefit from refinement and clarification, it considers that they have to a very large extent achieved, and remain well adapted to the achievement of, those objects.

3.3 **Uniformity.** The only significant areas in which Australia's defamation laws have not achieved uniformity concern the role of juries, and the rights of deceased persons.

3.4 Civil juries are not available in defamation cases in South Australia, the Australian Capital Territory and the Northern Territory.[1] Juries are available in each other Australian jurisdiction. The Committee believes this lack of uniformity to be undesirable because it encourages forum shopping: particularly, the commencement of some actions which would ordinarily be brought in NSW (where juries are available) in the ACT (where juries are not available). The Committee has observed, for example, a trend of defamation actions being brought against media defendants in the ACT by legal practitioners acting on a 'no win-no fee' basis. This has a distorting effect and costs implications for the parties to defamation proceedings.

3.5 The only Australian jurisdiction in which defamation proceedings may be brought or continued by or against deceased persons is Tasmania.[2] In each other Australian jurisdiction, defamation actions cease upon the death of either the plaintiff or the defendant.[3] While this lack of uniformity is undesirable as a matter of policy, the Committee is unaware of any circumstances in which it has in fact been exploited by litigants in defamation actions.

3.6 **Freedom of expression.** The Committee believes the national scheme laws have significantly liberalised freedom of expression in Australia, particularly through the following reforms:

(a) the abolition of the rights of most corporations to sue for defamation (section 9);[4]

(b) the statutory defence of contextual justification (section 26);[5]

(c) the statutory defence of honest opinion (section 31);[6]

(d) the statutory qualified privilege defences (sections 28–30); and

(e) the cap on general damages for non-economic loss (section 35).[7]

[1] *Juries Act 1927* (SA), s 5; *Supreme Court Act 1933* (ACT), s 22; *Juries Act* (NT), s 6A.
[2] *Administration and Probate Act 1935* (Tas), s 27.
[3] *Defamation Act 2005* (NSW), s 10. There are corresponding provisions in each other jurisdiction, other than Tasmania.
[4] Discussed in more detail in section 4 below.
[5] There is, however, a significant drafting problem with the provision: see section 8 below.
[6] The section would, however, benefit from refinement and clarification: see section 9 below.

3.7 **Protection of reputation.** The Committee believes that the national scheme laws, overall, strike a better balance between the right to freedom of expression and the protection of reputation than the previous regime of differing State and Territory laws. The achievement of substantial uniformity, in particular, has made the law more certain and predictable.

3.8 Generally speaking, the Committee believes that the national scheme laws are more liberal than the previous regime, principally by reason of the reforms referred to in the paragraph 3.6, as a result of which the amount of defamation litigation in Australia has reduced.

3.9 Nonetheless, leaving to one side the rights of corporations, the Committee believes that the national scheme laws provide effective and fair remedies for persons whose reputations have been harmed by the publication of defamatory matter. The laws have not, for example, added to the elements of the cause of action for defamation at common law, and have (desirably, although with some exceptions) focused the cause of action upon the publication of defamatory matter,[8] rather than the publication of imputations, as had previously been the situation in New South Wales, Queensland and Tasmania.

3.10 Most importantly, other than where defamatory matter has been published on an occasion of privilege, the publication of false statements of fact that adversely affect a plaintiff's reputation are actionable against original publishers throughout Australia, other than where defences of contextual truth (section 26) or triviality (section 33) are available.

3.11 **Speedy and non-litigious resolutions.** The national scheme laws have, in the Committee's view, increased the potential for speedy and non-litigious resolutions of defamation actions, by the introduction of the offer to make amends mechanism (sections 12–19),[9] and by the introduction of a presumption in favour of an award of indemnity costs where a party has unreasonably failed to accept (or, in the case of a publisher, make) a settlement offer (section 40).

3.12 The matters which the Committee identifies in the remainder of this submission as areas for potential reform and improvement should not be understood as detracting from the Committee's very firm view that the national scheme laws are a dramatic improvement on the regime of differing State and Territory laws that preceded them.

4 Corporations

4.1 Section 9 of the national scheme laws (**corporations provision**) abolishes the rights of most corporations to sue for defamation. The corporations provision was one of the key reforms introduced with the national scheme laws.

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[7] For the year commencing 1 July 2011, the cap is set at $324,000. It would be desirable, however, to refine and clarify the operation of the cap: see section 12 below.
[8] *Defamation Act 2005* (NSW), s 8. There are corresponding provisions in each other jurisdiction.
[9] The mechanism would benefit from refinement and clarification: see section 5 below.

4.2 The key features of the corporations provision are as follows:

(a) The prohibition has no application to corporations with fewer than 10 full-time or equivalent employees that are not related to other corporations and that are not public bodies.

(b) Not-for-profit corporations retain the right to sue for defamation, irrespective of the number of employees, expect where they are public bodies.

(c) The right of all other corporations to maintain a cause of action for defamation has been abolished.

(d) Any corporation that forms part of a corporate group, even where individually or collectively the corporation or group has fewer than 10 full-time or equivalent employees, falls within the scope of the prohibition.

(e) Public bodies cannot sue for defamation. Public bodies include governmental authorities and other authorities constituted by or under a law of any country that carry on some undertaking of a public nature for the benefit of the community.[10]

(f) The time at which the number of employees is to be assessed for the purposes of ascertaining whether a corporation retains a right to sue for defamation is the time of the publication. Because of the operation of the multiple publication rule (each separate reception of the same publication of defamatory matter gives rise to a separate cause of action), this means that corporations that could not maintain a cause of action at the time defamatory matter is first published may be able to sue in respect of later publications of the same matter, if the size of their workforce falls below the statutory threshold.

(g) The corporations provision does not affect the right of individuals associated with a corporation from suing for defamation, where a publication simultaneously defames both them and the corporation.

(h) Because of the operation of choice of law rules, the corporations provision has no application to defamation actions brought by corporations in Australia to the extent that they seek relief in respect of publications occurring outside Australia.

4.3 The Committee's view is that the corporations provision has had a significant liberalising effect on the ability of the media to report on the activities of corporations. Some members representing media organisations have said that in order to maximise the prospect of being able to rely on the corporations provision, their clients now conduct investigations prior to publication as to the size of corporations, and take care, where defamatory allegations are to be made, not to name or otherwise identify individuals associated with the corporation. They point out that there can, however, be practical difficulties in ascertaining the number of

[10] The term 'public authority' has a well-defined meaning in revenue law: see eg *Renmark Hotel Inc v Federal Commissioner of Taxation* (1949) 79 CLR 10, 18.

full-time or equivalent employees some corporations have at particular points in time, and in ascertaining whether a corporation has objects that do not include obtaining a financial gain for its members or corporators.

4.4 So far as the Committee is aware, no empirical analysis has been undertaken to gauge the effect of the corporations provision. No member of the Committee, however, expressed any doubt about the significant liberalising effect the provision has had on the media landscape in Australia.

4.5 As a consequence of the introduction of the corporations provision, members have noted a degree of inventiveness, on the part of corporations and their advisers, in the formulation of alternative claims against the media. The principal alternative cause of action available to corporations is the ancient tort of injurious falsehood. There are significant disadvantages to that cause of action for plaintiffs, relative to the cause of action for defamation. In particular, injurious falsehood plaintiffs bear the onus of establishing falsity, malice and special damage. Findings of malice are relatively rare. Proof of special damage presents a serious impediment to corporations in many cases, because of the difficulty of proving, for example, that a corporation's share price or goodwill has been affected by a publication.

4.6 In some circumstances, corporations that have lost their right to sue for defamation may have alternative rights under the prohibition on misleading and deceptive conduct in the Australian Consumer Law.[11] In *TCN Channel 9 Pty Ltd v Ilvariy Pty Ltd*,[12] for example, the New South Wales Court of Appeal awarded compensation to a corporation in a case where a reporter had tricked his way into the premises of the corporation to prepare a story. The contents of the story were true – so defamation would not have availed the corporation – but the court awarded damages, effectively, for the loss of reputation sustained by the corporation, in substance because, but for misleading and deceptive conduct by the reporter, the story would have never have gone to air. The media safe harbour provision[13] that shields the media from liability for misleading or deceptive conduct when publishing or broadcasting material in the ordinary course of business was held not to protect the publisher, because the misleading and deceptive conduct of the reporter was antecedent, and insufficiently connected, to the publication.

4.7 In many cases where a non-excluded corporation has been defamed, a range of options will potentially be available despite the abolition of the corporation's right to sue for defamation. Defamation proceedings may be able to be brought by individuals associated with the corporation. Injurious falsehood claims, or claims under competition and consumer legislation, may be available. Alternative solutions, such as complaints to the Press Council of Australia, or rehabilitative advertising or public relations campaigns, might be able to be deployed by aggrieved corporations.

4.8 Some members of the Committee have, however, expressed the view that the corporations provision has the potential to cause injustice in particular cases, for example where a corporation has been the subject of a false and defamatory attack in the guise of serious investigative journalism, where it is unrealistic to think

[11] Section 18 (formerly s 52 of the *Trade Practices Act 1974* (Cth)).
[12] (2008) 71 NSWLR 323.
[13] Section 65A of the *Trade Practices Act 1974* (Cth); see now s 19 of the Australian Consumer Law.

that the corporation could vindicate its reputation without the benefit of a curial finding. The facts of *Australian Broadcasting Corporation v Comalco Ltd* may be an example of such a case.[14]

4.9 There is division both among members of the Committee and in the broader profession and community about the overall merits of the corporations provision.

4.10 At one end of the spectrum are those who contend that the corporations provision does not go far enough, and that it ought to be extended to all corporations irrespective of their size or objects. At the other end of the spectrum are those who contend that the common law rights of corporations should be restored. The arguments advanced for and against the corporations provision largely mirror those that informed the debate leading to the adoption of the national scheme laws.[15]

4.11 There is, however, a general consensus among members of the Committee that the current corporations provision gives rise to serious anomalies, principally because of the arbitrary nature of the definition of 'excluded corporation'. It makes little sense, for example, that corporations with nine full-time employees but very high profits retain the right to sue for defamation, while struggling corporations with eleven full-time employees do not. It makes little sense that small family businesses operating through related holdings and operations companies cannot sue for defamation, while other family businesses operating through a single company retain their common law rights. More generally, it is undesirable for there to be uncertainty about whether particular corporations fall within or outside the scope of the prohibition.

5 Offer of Amends Provisions

5.1 The national scheme laws provide for a procedure by which the defendant is permitted to make an offer of amends which, if rejected by the plaintiff but ultimately found to be a reasonable offer that the plaintiff ought to have accepted, will afford a complete defence.[16]

5.2 By section 14(1), an offer of amends must be made within 28 days of the receipt of a concerns notice from the aggrieved person, or before the filing of a defence in an action brought by the aggrieved person, whichever is the earlier.

5.3 The offer of amends provisions are prescriptive about what must be included in the offer for it to be valid. Some matters must be included: most importantly, an offer to publish or join in publishing a reasonable correction, and an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and in considering the offer (sections 15(1)(d), (f)). Other matters are optional, such as an offer to publish or join in publishing an apology, and an offer to pay compensation (sections 15(1)(g)(i), (ii)).

[14] (1986) 12 FCR 510.
[15] See eg the second reading speech of the then NSW Attorney-General, Bob Debus, for the Defamation Bill 2005: Legislative Assembly Hansard, 13 September 2005, 17636–7; cf the paper published by the Commonwealth Attorney-General's Department, 'Revised outline of a national defamation law' (July 2004), 38–9.
[16] *Defamation Act 2005* (NSW), ss 12–19.

5.4 By potentially affording a complete defence, rather than just a mechanism for obtaining costs on a higher scale, the offer of amends provisions incentivise defendants to make offers to settle defamation disputes at an early stage. A corollary is that plaintiffs are under pressure to accept reasonable offers of settlement made by defendants at an early stage.

5.5 It is the experience of the Committee that the offer of amends provisions are working as a mechanism that encourages the speedy and cost-effective resolution of defamation disputes. The Committee believes that settlement offers are being made and accepted at an early stage more often than occurred under the previous regime of differing State and Territory laws. As offers are made on a without prejudice basis and, where accepted, generally lead to the settlement of defamation disputes without a great deal of fanfare, it is, however, difficult to quantify with any precision the effectiveness of the mechanism.

5.6 To the best of the Committee's knowledge, there has not been any judicial consideration of the application of the defence in section 18 of the Act. So far as the Committee is aware, no Australian court has yet considered whether a defendant ought to have a defence by reason of having made a reasonable offer to make amends that was rejected by the plaintiff.

5.7 The Committee believes that there are three respects in which the offer of amends provisions could be improved.

5.8 First, there is a disconformity between the time within which an offer of amends must be made under section 14(1) (namely, 28 days from receipt of a concerns notice or before the delivery of a defence, whichever is the earlier) and the time within which an offer of amends must have been made in order to rely upon the section 18 defence (namely, as soon as practicable after the publisher became aware that the matter is or may be defamatory).

5.9 The current time limit in section 18(1)(a) is, in the Committee's view, too restrictive. In order to determine whether to make an offer of amends, and to settle upon the contents of the offer, a defendant needs to consider not just whether the matter is or may be defamatory. The defendant also needs (among other matters) to form a view about the strength or otherwise of potential defences. It is difficult to see why a defendant who has made an offer of amends within the time prescribed by the national scheme laws should be deprived of the ability to rely on the offer as a defence on the grounds that the offer could have been made earlier. The Committee's view is thus that section 18(1)(a) should be amended, so that the offer of amends defence is potentially available in any case where an offer has been made within the time limited by section 14(1).

5.10 Secondly, the requirement that, to be valid, an offer of amends must include an offer to publish or join in publishing a reasonable correction (section 15(1)(d)) is, in the Committee's view, unduly limiting. Not all defamatory publications are susceptible to 'correction'. Defamatory opinions, in particular, will often involve value judgments which may not be either objectively false or capable of reasonable correction. As a result, as presently drafted, the offer of amends provisions have limited application in cases involving the publication of opinions.

5.11 The Committee therefore recommends that section 15(1)(d) be amended by adding the words 'any false statements of fact in' after the words 'a reasonable correction of'.

5.12 Thirdly, there is a tension in the offer of amends provisions between, on the one hand, the obligation on a defendant, when making an offer of amends, to offer to publish a reasonable correction (and the entitlement to include an offer to publish an apology) and, on the other hand, the exclusion of statements and admissions in offers of amends as evidence in any proceedings, including defamation proceedings (section 19(1)).

5.13 The offer of amends provisions encourage defendants to make early offers to resolve proceedings by offering, among other matters, to publish corrections and apologies. The incentive for defendants is the availability of a complete defence where the offer is reasonable but is not accepted by the plaintiff. It is unrealistic, however, to expect a jury, when considering other affirmative defences relied upon by a defendant (such as defences of truth, contextual truth, honest opinion, qualified privilege or triviality) to exclude from their deliberations the fact that the defendant was prepared at an early stage to publish a correction and apology.

5.14 As presently drafted, therefore, the Committee believes that some defendants who have made reasonable offers of amends at an early stage may be discouraged from seeking to rely upon those offers by way of defence, for fear that the contents of the offers will prejudice their ability to rely on other affirmative defences. This is undesirable.

5.15 To overcome this problem, in the Committee's view, it would be useful if defendants were permitted, at least in trials heard by juries, to raise and seek to rely on the section 18 defence after the jury has returned its verdict on all other issues. It would, of course, be important that plaintiffs be on appropriate notice of the defendant's intention to do so.

5.16 The Committee's proposed reform would ensure that juries were not prejudiced by statements or admissions made in offers of amends when considering whether a publication was defamatory of the plaintiff or whether the defendant was entitled to the benefit of any other affirmative defence. In that way it would enhance the practical efficacy of the offer of amends provisions.

6 Role of Judge and Juries

6.1 By section 22 of the national scheme laws in all jurisdictions other than South Australia and the Territories, in defamation actions tried before a jury, the jury determines whether the defendant has published defamatory matter about the plaintiff and whether any defence raised by the defendant has been established, while the judge alone determines questions of damages.

6.2 The rationale behind the division of roles between judges and juries is not entirely clear. It may, perhaps, have been thought that the awarding of damages by judges would lead to more predictable damages awards.

6.3 In practice, the division of responsibilities gives rise to very serious problems. Judges do not have the benefit of knowing the process of reasoning underlying jury verdicts. When it comes to awarding damages, they are therefore entirely in the dark as to whether the jury considered a particular defamatory publication to be serious or relatively trivial. The problem is compounded because juries do not, in some jurisdictions, return verdicts identifying the defamatory meanings they have found to be conveyed by a publication, and more generally by the common law principle that a jury may find for the plaintiff upon a meaning not pleaded by the plaintiff, where that meaning is not substantially different from and is less serious than a pleaded meaning.[17]

6.4 Section 22 thus invariably gives rise to the potential that a judge will award damages upon the basis that a defamatory publication was relatively trivial, when the jury considered it to be very serious, or conversely that a judge will award a high level of damages in a case the jury considered to be relatively trifling.

6.5 The Committee therefore recommends that section 22 be amended, so that in cases heard before a jury, the jury determines the amount of damages (if any) that should be awarded to a successful plaintiff.

6.6 The Committee does not consider that its recommendation would be likely to lead to more unpredictable damages awards in defamation actions. In the first place, the potential for 'rogue' awards is significantly mitigated by the cap on general damages for non-economic loss in section 35 (currently $324,000). Secondly, judges will, as in other areas of the law, and as they did in most jurisdictions before the advent of the national scheme laws, provide detailed directions to juries with a view to ensuring a 'sense of proportion' in the quantum of defamation awards.[18] Thirdly, appellate courts will intervene in appropriate cases where juries return disproportionately high or low damages awards.[19]

7 Truth

7.1 Perhaps the biggest stumbling block to the achievement of national uniformity in Australia's defamation laws prior to 2005 was the division between those jurisdictions where truth alone was a defence (Victoria, South Australia, Western Australia and the Northern Territory), and those jurisdictions where, to succeed in a defence of justification, defendants had to prove not only substantial truth but also that their publication was published for the public benefit (Queensland, Tasmania and the ACT)[20] or that it concerned a matter of public interest or was published on an occasion of qualified privilege (New South Wales).[21]

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[17] *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667; *Nationwide News Pty Ltd v Moodie* (2003) 28 WAR 314; *Advertiser News-Weekend Publishing Co Ltd v Manock* (2005) 91 SASR 206; *John Fairfax Publications Pty Ltd v ACP Publishing Pty Ltd* (2005) 157 ACTR 28; *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227; *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484; *West Australian Newspapers Ltd v Elliott* (2008) 37 WAR 387.

[18] *Jones v Pollard* [1997] EMLR 233, 257.

[19] *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 59.

[20] *Defamation Act 1889* (Qld), s 15; *Defamation Act 1957* (Tas), s 15; *Civil Law (Wrongs) Act 2002* (ACT), s 127. It was strongly arguable that the common law defence of truth alone applied in the ACT as an alternative to the statutory defence. There was a statutory defence of truth plus public benefit in Western Australia that operated as an alternative to the common law defence of truth alone: *Criminal Code* (WA), s 356.

[21] *Defamation Act 1974* (NSW), ss 7(2), 15.

7.2 The national scheme laws restored the operation, in New South Wales, Queensland, Tasmania and the ACT, of the common law defence of truth alone, and introduced two statutory truth-related defences: the defence of substantial truth (section 25), and the defence of contextual truth (section 26).

7.3 In his second reading speech for the Defamation Bill 2005, the then NSW Attorney-General, Bob Debus said:[22]

> Perhaps the single greatest obstacle to uniform defamation laws over the past 25 years has been the inability of the States and Territories to reach agreement in relation to the 'truth' defence. At present, 'truth alone' is a defence to defamation actions in South Australia, Victoria, Western Australia and the Northern Territory (as well as England and New Zealand). In Queensland, Tasmania and the Australian Capital Territory it is necessary to prove both truth and public benefit. Only in New South Wales is it necessary to prove both truth and public interest.
>
> It is likely that our convict past had something to do with the abandonment by NSW of the common law defence of truth alone.
>
> The rationale for the common law defence of 'truth alone' was put very succinctly in *Rofe v Smith Newspapers*: The reason upon which this rule rests…is that, as the object of the civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it… (1924) 25 SR (NSW) 4.
>
> The common law position means that a person is not entitled to receive compensation—perhaps hundreds of thousands of dollars—merely because something truthful about them has been published.
>
> It also means that a person cannot be held legally liable and forced to pay damages merely for telling the truth.

7.4 The Committee (with the exception of a minority of members in New South Wales) notes with considerable alarm the position adopted by a majority of the authors of the submission of the NSW Bar to the statutory review that the 'public interest' requirement for the defence of truth ought to be reintroduced.

7.5 The reintroduction of a 'public interest' requirement would, in the view of most members of the Committee, be a gravely retrograde step. In the first place, it would fundamentally and irrevocably undermine national uniformity. The proposal should be rejected on that ground alone. Secondly, the widespread criticisms of the former position that obtained in New South Wales, Queensland, Tasmania and the ACT were well-placed: a 'public interest' or 'public benefit' requirement inherently distorts the law of defamation, is uncertain in its scope and application, and has the effect of making it unlawful in some circumstances to speak the truth – not because what is said undermines the reputation the plaintiff deserves to have, but because it infringes the plaintiff's privacy. In the view of most members of the Committee, privacy and defamation are and ought to be treated by the law as two distinct spheres of discourse. As the Australian Law Reform Commission observed in its 1979 report, *Unfair Publication*:[23]

[22] Legislative Assembly Hansard, 18 October 2005, 18684–5.
[23] ALRC, *Unfair Publication: Defamation and Privacy* (Report No. 11, 1979), page x; see also ibid, [124]–[125].

> The result [of a 'public interest' or 'public benefit' requirement] is to add an uncertain and unpredictable ingredient to the defence, causing suppression of material which could be proved to be true. If true material is to be suppressed by law this should be done, so far as possible, by reference to clearly defined criteria.

7.6 The Committee notes that the Commonwealth government has recently announced its intention to expedite public consultation upon the merits of adopting the Australian Law Reform Commission's 2008 recommendation for the introduction of a statutory cause of action for serious invasion of privacy.[24]

8 Contextual Truth

8.1 Section 26 of the national scheme laws prescribes a statutory defence of contextual truth. The policy underlying the defence, broadly, is that where a false imputation conveyed by a publication has not further damaged the reputation of the plaintiff having regard to the substantial truth of the publication as a whole, the plaintiff ought not to be entitled to recover damages. As the then NSW Attorney-General explained in his second reading speech for the Defamation Bill 2005, 'The purpose of the [section 26] defence is basically to prevent plaintiffs from taking relatively minor imputations out of their context within a substantially true publication'.[25]

8.2 The Committee believes that section 26 of the Act is not achieving its intended objectives and that it requires amendment. The Committee's view is that there are two reasons why section 26 is not working in practice: a common law line of authorities that restricts the ability of defendants to plead and justify imputations that differ from, but have a common sting with, imputations complained of by the plaintiff; and drafting problems with section 26 itself.

8.3 **Common law authorities.** The common law defence of truth alone and the statutory defence of substantial truth (section 25) have two potentially different spheres of operation. The common law affords a defence of truth where the defendant proves the substantial truth of 'the words complained of'.[26] Section 25, on the other hand, affords a defence where the defendant proves that 'the defamatory imputations carried by the matter of which the plaintiff complains' are substantially true. The common law and statutory defences are thus capable, at least in theory, of operating differently with respect to the same publication.

8.4 There has been much debate in the authorities about the extent to which a defendant ought to be permitted to plead and seek to justify an imputation not complained of by the plaintiff. Although the matter has not been authoritatively determined, it seems unlikely that a defendant could plead and seek to justify an imputation of which the plaintiff has not complained under section 25: the section expressly speaks of imputations 'of which the plaintiff complains'.[27]

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[24] ALRC, *For Your Information: Australian Privacy Law and Practice* (Report No. 108, 2008), section 74.
[25] Legislative Assembly Hansard, 18 October 2005, 18685.
[26] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 192.
[27] Defendants were not permitted to plead and seek to justify meanings other than those complained of by the plaintiff where statutory truth defences were relied upon under the previous regime of differing State and Territory laws: see *Robinson v Laws* [2003] 1 Qd R 81; *Jones v John Fairfax Publications Pty Ltd* (2005) 67 NSWLR 434.

8.5 The common law defence is more flexible, although the degree to which defendants may depart from the meanings complained of by the plaintiff has been severely circumscribed in Australia (but not in other common law countries) as a result of the line of authorities commencing with *David Syme & Co Ltd v Hore-Lacy*.[28] Whereas, prior to that line of authorities, a defendant could plead and seek to justify any imputation borne by the publication with a 'common sting' to an imputation complained of by the plaintiff,[29] defendants may now only plead and seek to justify imputations that are not substantially different from, and less serious than, those complained of by the plaintiff.

8.6 The effect of the current common law position in Australia is that plaintiffs are encouraged, tactically, to plead narrow defamatory imputations that are untrue, so as to prevent defendants from pleading and seeking to justify broader meanings with a common sting that are matters of substantial truth.

8.7 The facts of the English decision of *Khashoggi v IPC Magazines Ltd*[30] provide a useful illustration. The plaintiff was the subject of a magazine article that alleged, in substance, that she was 'a lady of considerable sexual enthusiasm'.[31] The article also alleged, however, more specifically, but falsely, that the plaintiff had committed adultery with the president of another nation. The plaintiff sued on a narrow imputation to the effect that she had had an affair with the president of a foreign state. An issue before the court was whether the defendant ought to be allowed to plead and justify a broader imputation, to the effect that the plaintiff was promiscuous. Sir John Donaldson MR held that such a plea ought to be allowed to go to the jury.

8.8 The opposite result would occur in Australia. An imputation of promiscuity is almost certainly substantially different from, and more serious than, an imputation that a person has had a single, specific, extra-marital affair. In Australia, in such a case, the plaintiff would be entitled to a verdict, and damages, even though a jury might well think that the plaintiff could not in reality have suffered any reputational damage by reason of the publication as a whole, having regard to its substantial truth.

8.9 A consequence of the narrowing of the common law principles in Australia is thus that plaintiffs may be entitled to damages in respect of publications which are, taken as a whole, substantially true, even though some narrow aspect of the publication which is unlikely to have further harmed the reputation of the plaintiff is false. This result is at odds with the policy underlying the section 26 defence of contextual truth.

8.10 **Drafting implications.** As other submissions to the statutory review have pointed out, there are also implications arising out of the drafting of section 26 of the national scheme laws which are having the effect of preventing the section from achieving its objective. The problems were highlighted by Simpson J in *Kermode v*

[28] (2000) 1 VR 667. The most significant of the other cases in this line of authority are set out above at n 17.
[29] eg *Polly Peck Holdings plc v Trelford* [1986] QB 1000; *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147; *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412.
[30] [1986] 1 WLR 1412.
[31] ibid, 1414.

Fairfax Media Publications Pty Ltd.[32] The New South Wales Court of Appeal recently dismissed an appeal from her Honour's decision.[33]

8.11 Section 26 states that the contextual imputations pleaded by the defendant must be 'in addition to' the defamatory imputations of which the plaintiff complains. This prevents the defendant from 'pleading back' and justifying any of the plaintiff's imputations in support of a contextual truth defence. The section is thus quite different from its predecessor, section 16 of the *Defamation Act 1974* (NSW), which allowed defendants to plead and seek to justify in support of a contextual truth defence 'another imputation', whether or not it had been pleaded by the plaintiff.

8.12 As Simpson J noted, the capacity to 'plead back':[34]

> had the considerable benefit of achieving the objective of the enactment of s 16 … of putting before the jury the ultimate question: of all those imputations conveyed, and defamatory, and having regard to those proven to be true: was the plaintiff's reputation further injured by those imputations of which the defendant had not proven truth? The exercise was a balancing one; all true defamatory imputations were put in one side of the scale, all unproven defamatory imputations in the other…
>
> It would have defeated the purpose of s 16 to exclude from the ultimate balance any imputations pleaded by the plaintiff, and successfully defended as true by the defendant.

8.13 Simpson J held that, as a matter of proper statutory construction, the words 'in addition to' in section 26 simply do not permit the practice of pleading back. She went on, however, to say:[35]

> 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.

8.14 On 30 June 2011 (after all other submissions for the current review had been lodged), the NSW Court of Appeal handed down its decision in *Besser v Kermode*.[36] The Court agreed with Simpson J's construction of section 26 and dismissed the appeal, concluding that on a proper construction of the section, pleading back was not allowed.

[32] [2010] NSWSC 852.
[33] *Besser v Kermode* [2011] NSWCA 174.
[34] [2010] NSWSC 852, [26]–[27].
[35] ibid, [56].
[36] [2011] NSWCA 174.

8.15 However, McColl JA, with whom Beazley and Giles JJA agreed, said:[37]

> I do not discern any legislative intention … that the s 26 defence was to continue the pleading-back practice which prevailed under s 16 of the 1974 Act. Rather, in my view, the structure of the 2005 Act and the language of s 26 belie any such intention. The New South Wales Attorney General said, in the Second Reading Speech to the Bill that became the 2005 Act, in reference to cl 26 that there would be a defence of contextual truth under the 2005 Act, that there had been one under the 1974 Act and that '[t]he purpose of the defence [was] basically to prevent plaintiffs from taking relatively minor imputations out of their context within a substantially true publication'. That position is still open under s 26.

8.16 With respect, the Committee disagrees with this view. None of the sources cited by her Honour indicate a clear view regarding Parliament's intention in respect of the relevant question. Rather, it seems that no attention was paid to the potential implications of the inclusion of the words 'in addition to' in section 26(a).

8.17 More fundamentally, not permitting defendants to plead back and justify a plaintiff's imputations in support of a defence of contextual truth plainly does affect the operation of the section in a way that undermines its purpose. Section 26 is a defence: proof of its elements by a defendant is a complete answer to a defamation claim. Where a plaintiff pleads a true imputation of a serious character, with the effect thereby of depriving the defendant of the ability to rely on a defence of contextual truth founded upon that imputation, the best the defendant can do is to rely upon the truth of the imputation in partial justification of the plaintiff's claim.[38] As McColl JA herself acknowledged, in such a case the defendant 'will be unable to defeat the plaintiff's cause of action entirely'.[39]

8.18 The drafting of section 26 thus encourages plaintiffs to plead true imputations, or to amend their statements of claim after a defence of contextual truth has been pleaded so as to plead back the contextual imputations themselves, in order to prevent defendants from being able to rely on the section 26 defence. By pleading tactically, plaintiffs can thus recover damages for minor imputations that have not further harmed their reputations having regard to the substantial truth of the publication as a whole. Such outcomes are inconsistent with the object stated in section 3(c) of the national scheme laws, namely to provide for effective and fair remedies 'for persons whose reputations are harmed by the publication of defamatory matter'.

8.19 In the Committee's view, it cannot have been the intention of Parliament that plaintiffs should be able to recover damages for defamation only by reason of the fact that they have tactically outflanked the defendant at the pleading stage.

8.20 **Recommendation.** The Committee's view is that plaintiffs ought not to be entitled to recover damages for defamation in respect of a publication where, having regard to the substantial truth of the publication as a whole, their reputation has not suffered further harm by reason of the falsity of a relatively minor imputation that they have selected for complaint.

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[37] ibid, [82].
[38] ibid, [50], [86(c)].
[39] ibid, [89].

8.21 Put another way, the Committee's view is that defendants ought to be allowed to plead and justify any imputations conveyed by a publication (whether complained of by the plaintiff or not, and whether they have a common sting with the imputations complained of by the plaintiff or not), and to succeed in a defence of contextual truth if the substantial truth of those imputations is such that the plaintiff's reputation has not been further harmed by any false imputations of which the plaintiff has complained.

8.22 The Committee considers that this view accords with the intent underlying the section 26 defence, and is consistent with the objects of the national scheme laws, by striking a proper balance between freedom of expression and the provision of 'effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter' (section 3(c)).

8.23 Having regard to all of these matters, the Committee recommends that section 26 be amended so that it provides as follows:

> (1) It is a defence to the publication of defamatory matter if the defendant proves that –
>
> (a) the matter carried one or more defamatory imputations that are substantially true (***contextual imputations***); and
>
> (b) any defamatory imputations of which the plaintiff complains, but which are not substantially true, do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.
>
> (2) For the purposes of subsection (1), a contextual imputation may be:
>
> (a) a defamatory imputation complained of by the plaintiff that is substantially true;
>
> (b) a defamatory imputation that is in addition to the defamatory imputations of which the plaintiff complains that is substantially true; or
>
> (c) a defamatory imputation that has a common sting with a defamatory imputation of which the plaintiff complains that is substantially true.

8.24 Apart from ensuring that section 26 achieves its intended objective, the Committee's recommendation would also reduce the potential for tactical pleading of imputations by all parties in defamation proceedings, be likely to lead to a concomitant reduction in interlocutory disputation, and ensure that neither party could prevent the 'real' meaning of a publication from being put before the trier of fact in defamation proceedings.

9 Honest Opinion

9.1 The statutory defence of honest opinion (section 31) is more liberal than its common law counterpart, the defence of fair comment, in that:

(a) it is not subject to a requirement that the opinion be objectively fair;

(b) the material upon which an opinion can be based includes material

published on occasions of qualified privilege at common law or under statute;

(c) there is no express requirement that the facts upon which an opinion is based be stated or indicated by the publisher, or matters of general knowledge or notoriety; and

(d) there are distinct defences for employers and principals who publish the opinions of their employees and agents, and for the publishers of comments by third party commentators.

9.2 There are two aspects of the honest opinion defence which, in the Committee's view, require clarification.

9.3 First, while it is not an express requirement of the statutory honest opinion defence that the facts upon which the opinion is based be stated or indicated by the publisher, or matters of general knowledge or notoriety,[40] the Victorian Court of Appeal in *The Herald & Weekly Times Pty Ltd v Buckley* held that section 31 is to be interpreted as if there were such a requirement.[41] The Court of Appeal's interpretation restricts the availability of the defence, and is at odds with the intended liberalising approach of the national scheme laws.

9.4 To take a simple example, the statement 'John Smith is the worst player in the national football league' is an expression of an opinion on a matter of public interest that conveys a defamatory meaning. The facts upon which the opinion is based, however, are not stated, indicated or matters of general knowledge or notoriety. As a consequence, opinions of that kind are not protected by the common law defence of fair comment. The intent of the section 31 defence appeared to be to extend protection to expressions of opinion of that kind. The effect of the Court of Appeal's decision in *The Herald & Weekly Times Pty Ltd v Buckley*, however, is that such opinions remain unprotected.

9.5 In order to ensure that the defence meets its intended objective, the Committee therefore recommends that section 31 be amended to state expressly that it is not a requirement of the defence that the facts upon which an opinion is based be stated or indicated in the publication, or otherwise known to recipients. The Committee observes that the approach it recommends is consistent with the draft Defamation Bill currently being considered in England and Wales.[42]

9.6 Secondly, section 31 distinguishes between statements of fact and expressions of opinion. As well as opinions, however, the common law defence of fair comment protects deductions, inferences, conclusions, criticisms, judgments, remarks and observations. Even explicit statements of fact may be treated as comments, for the purposes of the common law defence of fair comment, if they would be understood by recipients as inferences from other facts.[43]

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[40] cf the draft honest opinion defence included in the Commonwealth Attorney-General's Department paper, 'Revised outline of a possible national defamation law', July 2004, in which such a requirement was expressly contemplated.
[41] (2009) 21 VR 661, [84].
[42] Ministry of Justice, 'Draft Defamation Bill', Consultation Paper CP3/11, March 2011, Annex A, clause 4.
[43] See eg *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, [35].

9.7 The Committee recommends that a definition of 'opinion' be inserted in section 31 to make it clear that the section 31 defence protects the same range of comments as the common law defence of fair comment. An appropriate non-exhaustive definition for the word 'opinion' would be the description of a 'comment' given by Lush J in his much-quoted judgment in *Clarke v Norton*, namely anything 'which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark [or] observation'.[44]

9.8 The Committee makes two further observations.

9.9 First, it appears that journalists are being sued more often in a personal capacity under the national scheme laws than they were under the previous regime of differing State and Territory laws. Plaintiffs appear to be adopting the course of suing journalists personally in order to guard against the risk that their employers will have a defence, in respect of the publication of their defamatory opinions, under section 31(2). It will generally be difficult or impossible for a plaintiff to prove, for the purposes of section 31(4)(b), that an employer 'did not believe that the opinion was honestly held by the employee … at the time the defamatory matter was published' in order to defeat the defence under section 31(2). Because media organisations are vicariously liable for the acts of their employees and agents in the course of their employment or agency, this phenomenon significantly reduces the effectiveness of the defence in section 31(2) of the Act.

9.10 Secondly, the Committee believes that, for most practical purposes, the section 31 defence has superseded the common law defence of fair comment. Nonetheless, the Committee does not think the common law defence should be abolished. The common law defence of fair comment has been described as a '*bulwark of free speech*'[45] and '*of vital importance to the rule of law on which we depend for our personal freedom*.'[46] The common law defence continues to evolve.[47] A statutory defence, of course, cannot evolve in the same way as the common law. In addition, as already noted, because of the absence of an expansive definition of 'opinion', the statutory defence as presently drafted may protect a narrower range of publications than the common law defence.

10 Absolute and Qualified Privilege

10.1 The statutory defences of absolute and qualified privilege in sections 27 to 30 of the national scheme laws have, for most practical purposes, replaced their common law equivalents. There have, however, been few cases to consider the operation of the statutory defences since the commencement of the national scheme laws in 2006.

10.2 The Committee's view is that the statutory defences are well adapted to the achievement of the objects of the national scheme laws.

[44] [1910] VLR 494, 499.
[45] *Gatley on Libel and Slander* (10th ed, 2004), [12.1], citing the Faulks Committee Report (1975), para 151.
[46] *Lyon v Daily Telegraph* [1943] 1 KB 746, 753.
[47] See eg *Joseph v Spiller* [2010] 3 WLR 1791.

10.3 Some members of the Committee have expressed concern that the section 30 defence of qualified privilege for the provision of certain information might be interpreted by courts in a manner inconsistent with legislative intent, by treating the factors in section 30(3) as hurdles for defendants to overcome in order to establish that their conduct was reasonable in the circumstances. Other members of the Committee have pointed out that an analogous approach has been emphatically rejected in the United Kingdom by the House of Lords.[48] This matter may be better addressed at a future review of the operation of the national scheme laws after a corpus of relevant authorities has been built up.

11 Innocent Dissemination

11.1 Section 32 of the national scheme laws prescribes a defence of innocent dissemination which is designed to protect subordinate distributors who convey defamatory matter of which they are not the original publisher in circumstances where they might fairly be said to be 'innocent', in that they did not know and had no reason to know that the matter was defamatory and their lack of knowledge was not due to negligence.

11.2 The Committee considers that there are two aspects of the section 32 defence that requirement amendment.

11.3 First, it seems that the intent of section 32 was to provide a defence for, among others, each of the categories of distributors identified in section 32(3), provided that they neither knew nor ought to have known that the matter they distributed was defamatory and provided that their absence of knowledge was not due to negligence. In its terms, however, section 32(3) only qualifies section 32(2)(a), and not sections 32(2)(b) or (c). This gives rise to real uncertainties and potentially unjust outcomes.

11.4 Take, for example, the situation of an ordinary Internet service provider (**ISP**) that makes space available on its servers for the storage of the websites of its subscribers. Such an ISP will almost certainly satisfy the description in sections 32(3)(f)(ii) and (g), and will accordingly not be 'the first or primary distributor' of the content for the purposes of section 32(2)(a). It is difficult to see why, as a matter of policy, such an ISP should be held liable for the content generated by its subscribers, at least in a case where it is not actually aware of the nature of the content. Without the involvement of the ISP, however, the publication of the content stored on its servers would not occur. In that sense, the ISP might be an 'originator' of the content within the meaning of section 32(2)(b). Moreover, most ISPs will, sensibly, have contracts with their subscribers containing terms and conditions which permit them in various circumstances to modify or remove their subscribers' content.[49] By reason of such terms and conditions, ISPs may well have the 'capacity to exercise editorial control' over their subscribers' content within the meaning of section 32(2)(c). As a consequence, despite the apparent legislative intent, ISPs may not in fact be 'subordinate distributors' of the content contained on their servers for the purposes of section 32(1)(a).

[48] *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359.
[49] See eg clauses 11.125 and 13.15–13.16 of Part G of the BigPond service section of Telstra's standard Customer Terms: http://www.telstra.com.au/customer-terms/download/document/bp-part-g.pdf.

11.5 The Committee recommends that this matter be remedied by, in section 32(3), deleting the words 'Without limiting subsection (2)(a), a person is not the first or primary distributor of matter merely because the person was' and substituting the words 'Without limiting subsection (2), a person is a subordinate distributor if the person was merely'.

11.6 Secondly, the section 32 defence is not available where a subordinate distributor knows, or ought reasonably to know, that particular matter is 'defamatory', or where the distributor's absence of knowledge is due to negligence. Matter is 'defamatory' if it conveys a defamatory meaning: in substance, a meaning that tends to lower the plaintiff in the estimation of ordinary members of the community.[50]

11.7 Much – if not most – matter that conveys a defamatory meaning is entirely lawful, because it is susceptible to one or other of the defences that protect the fundamental public interest in freedom of expression. There is nothing unlawful, for example, about the publication of defamatory matter that is substantially true, an honestly held opinion on a matter of public interest, or published on an occasion of absolute or qualified privilege either at common law or under statute.

11.8 The section 32 defence will thus not be available to subordinate distributors in many circumstances where they are merely involved in the distribution of matter that is entirely lawful. The limitations on the defence therefore have the potential to chill to a very considerable extent freedom of expression. Because of the drafting of section 32, it is in the interests of subordinate distributors such as ISPs, for example, to accede to demands for the removal of defamatory matter from servers within their control immediately upon learning of its existence, even where that matter is substantially true, an honestly held opinion on a matter of public interest, or published on an occasion of privilege. The chilling of freedom of expression in this manner is, in the Committee's view, contrary to the public interest.

11.9 The Committee accordingly recommends that section 32(1)(b) be amended as follows, so that the section 32 defence more effectively achieves its intent:

> It is a defence to the publication of defamatory matter if the defendant proves that –
> …
> (b) the defendant neither knew, nor ought reasonably to have known, that:
>
> (i) the matter was defamatory; and
>
> (ii) the publication of the matter could not be justified or excused by a defence available at common law or under this Division (other than the defence in this section); and

[50] eg *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460.

11.10 The proposed amendment would accord with what Lord Denning MR said the position ought to be with respect to subordinate distributors in *Goldsmith v Sperrings Ltd*:[51]

> no subordinate distributor … should be held liable for a libel … unless he knew or ought to have known that a newspaper or periodical contained a libel on the plaintiff himself; that is to say, that it contained a libel which could not be justified or excused…

11.11 The Committee does not believe that its recommendation would effect any injustice upon defamed persons. Persons legitimately seeking to have defamatory matter about them removed from material or equipment within the control of subordinate distributors ought to be able (and indeed ought to be required) to put the subordinate distributor on notice as to the reasons why they assert, for example, that the matter is not substantially true, or not an honestly held opinion on a matter of public interest, or not published on an occasion of absolute or qualified privilege. Where persons have put subordinate distributors on notice of relevant and persuasive facts, the subordinate distributor will continue to allow the distribution of the matter in question at their peril.

12 Cap on Damages for Non-Economic Loss

12.1 Section 35 of the national scheme laws capped the damages for non-economic loss that may be awarded in defamation proceedings at $250,000. With indexation, the cap is currently $324,000.

12.2 By reason of the definition of 'maximum damages amount' in section 35(1), the cap is the maximum amount of damages for non-economic loss that may be awarded 'in defamation proceedings', not the maximum amount per cause of action or publication.

12.3 The intention of the national scheme laws was to reduce and render more predictable the amount of damages awarded in defamation cases, following manifestly excessive awards in cases such as *Ettingshausen v Australian Consolidated Press Ltd*[52] and *Carson v John Fairfax & Sons Ltd*.[53] It is the Committee's view that the statutory cap has achieved this aim.

12.4 The statutory cap may have had a deterrent effect on the bringing of defamation claims in Australia, particularly in the period immediately following the commencement of the national scheme laws. More recently, however, in some cases, plaintiffs have sought to circumvent the statutory cap by issuing multiple proceedings in respect of separate publications giving rise to the same, similar or related imputations. For example, last year Sydney-based liquidator, Andrew Wily, issued seven separate defamation proceedings in relation to a number of articles published in *The Sydney Morning Herald*, *The Age* and on associated websites. The defendants were, at the time these submissions were prepared, seeking an order that the proceedings be consolidated.

[51] [1977] 1 WLR 478, 487; cf *Metropolitan International Schools Ltd v Designtechinca Corporation* [2009] EMLR 27, [67]–[69].
[52] See (1995) 38 NSWLR 404.
[53] See (1993) 178 CLR 44.

12.5 While there are competing arguments as to the desirability of a statutory cap on damages and as to whether the 'per proceedings' limitation is appropriate, it is the Committee's view that the current position under the national scheme laws is ambiguous in two respects, and requires amendment to achieve certainty and clarity.

12.6 First, the circumstances in which multiple proceedings in respect of the same, similar or related matters are to be consolidated ought to be clarified.

12.7 Under section 23 of the national scheme laws, to commence further defamation proceedings for damages against the same defendant in relation to the same or any other publication of the same or like matter, a plaintiff must first obtain the leave of the court. If leave is not granted, it is clear that the 'per proceedings' cap will apply and the plaintiff is restricted to the statutory cap in respect of all claims made in the proceedings.

12.8 The interaction between sections 23 and 35 was considered by the Victorian Court of Appeal in *Buckley v The Herald & Weekly Times Pty Ltd*.[54] In December 2007, the plaintiff sued a newspaper and a journalist for damages arising out of the publication of four allegedly defamatory articles. In September 2008, the plaintiff issued separate defamation proceedings against the same defendants claiming damages in respect of a further article published in 2008.

12.9 The defendants sought a stay of proceedings on the basis that the plaintiff had not obtained leave under section 23 or, in the alternative, an order that the new proceedings be consolidated with the previous proceedings.

12.10 Kaye J refused the stay application, stating that he did not consider the 2008 article was 'like' any of the four articles the subject of the first proceedings. Kaye J held that section 23 did not apply to the new proceedings, and that accordingly the plaintiff was not required to obtain the leave of the court.[55]

12.11 However, Kaye J made an order consolidating the two sets of proceedings. Consequently, the maximum amount of damages that the plaintiff could have recovered fell from $561,000 (two times the cap at the relevant time) to $280,500 (the cap at the relevant time). Kaye J held that the reduction in the maximum damages did not constitute prejudice of the kind which should inhibit making an order consolidating the two proceedings, as the question of prejudice 'cuts both ways' in the sense that, whichever decision he made, one party's potential detriment would be the other party's potential advantage.[56]

12.12 The plaintiff appealed the consolidation order. The Court of Appeal reversed Kaye J's decision. Nettle, Ashley and Weinberg JJA held that, generally speaking, applications for the consolidation of proceedings were governed by two principles. First, their Honours said that consolidating orders should very rarely be made, and that it was better to confine them to cases where several actions had been brought

[54] [2009] VSCA 118. This decision reversed the decision of Kaye J in *Buckley v The Herald & Weekly Times Pty Ltd* [2009] VSC 59.
[55] *Buckley v The Herald & Weekly Times & Anor (No 2)* [2008] VSC 475.
[56] *Buckley v The Herald & Weekly Times Ltd and Anor (No 3)* [2009] VSC 59.

which might have been joined in the one writ.[57] Secondly, their Honours said that where a consolidation order is likely to expose a plaintiff to a substantial risk of real prejudice, the order should not be made.[58]

12.13 The Court of Appeal held further that the consolidation order made by Kaye J appeared to expose the plaintiff to a substantial risk of real prejudice due to section 35. Nettle JA noted that section 35 has been construed in New South Wales to mean that the limit of $250,000 (as indexed) applies to 'proceedings', regardless of the number of causes of action that are pleaded or upheld in the proceedings.[59]

12.14 His Honour also held that to make a mere procedural consolidation order which halved the potential value of the plaintiff's substantive rights and halved the defendants' correlative substantive contingent liabilities worked a radical re-ordering of the parties' substantive rights and obligations, with the risk of substantial prejudice to the plaintiff.

12.15 Uncertainty as to when the consolidation of multiple proceedings will be appropriate undermines the certainty that the statutory cap was intended to provide to both plaintiffs and defendants. Accordingly, it is the Committee's view that it is desirable that there be legislative clarification of this issue.

12.16 The Committee's view is that where a plaintiff has, in substance, a single complaint in respect of publications of the same or substantially the same allegedly defamatory matter, that complaint ought ordinarily to be heard and determined in its entirety in the same proceedings, even if it involves multiple defendants, and even if it involves publications of the same or substantially the same matter in multiple media of communication (such as in print and on a website or via a smartphone or electronic tablet application; or on radio and by a podcast; or by television and by an online video-on-demand service).

12.17 In the Committee's view, an appropriate solution would therefore be to amend section 23 to provide that multiple defamation proceedings by the same plaintiff should be consolidated where the proceedings concern publications of the same or substantially the same matter, irrespective of whether the matter is published by the same or different publishers, and irrespective of whether the matter is published in or via the same or different media of communication.

12.18 Secondly, the law is currently unsettled in relation to whether the statutory cap applies separately to each plaintiff suing in the same proceedings.[60]

12.19 Leaving to one side the question of consolidation of proceedings, where different plaintiffs bring different proceedings against the same defendant in respect of the same publication, they will each be entitled to damages up to the amount of the statutory cap. However, as section 35 states that the statutory cap is the maximum amount of damages for non-economic loss that may be awarded 'in defamation

[57] See *Bolwell Fibreglass Pty Ltd v Foley* [1984] VR 97.
[58] See *Cameron v McBain* [1948] VLR 245.
[59] See *Davis v Nationwide News Pty Ltd* [2008] NSWSC 693.
[60] In *Restifa v Pallotta* [2009] NSWSC 958, [64], McCallum J assumed that the cap applied separately to each plaintiff in the same proceedings.

proceedings', it may be that where multiple plaintiffs sue the same defendant in the same proceedings (whether in respect of the same or different publications), they are only entitled, collectively, to damages up to the statutory cap.

12.20 It is obviously undesirable for claims by multiple plaintiffs that are closely related, such as individual claims arising from the same publication, to be fragmented into separate proceedings. However, this seems an inevitable outcome if the issuing of separate proceedings is the only means by which each plaintiff becomes entitled to damages up to the maximum amount of the statutory cap. It therefore follows, in the Committee's view, that section 35 ought to be amended so that the 'maximum damages amount' is defined as the maximum amount of damages that may be awarded to any plaintiff in defamation proceedings.

13 Limitation Period

13.1 Another of the important reforms in the national scheme laws was the unification of the limitation period for defamation actions across Australia.

13.2 Under the previous regime of differing State and Territory laws, the limitation period for defamation actions varied from jurisdiction to jurisdiction. In New South Wales, the limitation period was one year from the date on which the defamatory material was published.[61] The limitation period was six years from the date on which the cause of action accrued in Queensland, Tasmania and Victoria.[62] A three year limitation period applied in the Northern Territory. In South Australia, the limitation period was six years for libel, but two years for slander.[63] In Western Australia, the limitation period was 12 months for libels published in newspapers, two years for most forms of slander, and six years for other causes of action.[64] In the Australian Capital Territory, the limitation period was one year from the date on which the allegedly defamatory material was first published.[65] The circumstances in which limitation periods could be extended varied from jurisdiction to jurisdiction.

13.3 Upon the introduction of the national scheme laws, the limitation period for defamation became one year from the date of publication of the matter complained of.[66] In all Australian jurisdictions, however, courts must extend the limitation period to a period up to three years from the date of the publication if they are 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 publication.[67]

13.4 The Committee makes two submissions in relation to the limitation period.

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[61] *Limitation Act 1969* (NSW), s 14B(3).
[62] *Limitation of Actions Act 1974* (Qld), s 10(1)(a); *Limitation Act 1974* (Tas), s 4(1)(a); *Limitation of Actions Act 1958* (Vic), s 5(1)(a).
[63] *Limitation of Actions Act 1936* (SA), ss 35(c), 37.
[64] *Limitation Act 1935* (WA), s 38(1)(a)(ii); *Newspaper Libel and Registration Act 1884 Amendment Act 1888* (WA), s 5.
[65] *Limitation Act 1985* (ACT), s 21B(1).
[66] *Limitation Act 1969* (NSW), s 14B; *Limitation of Actions Act 1974* (Qld), s 10AA; *Limitation of Actions Act 1936* (SA), s 37(1); *Defamation Act 2005* (Tas), s 20A(1); *Limitation of Actions Act 1958* (Vic), s 5(1AAA); *Limitation Act 2005* (WA), s 15 *Limitation Act 1985* (ACT), s 21B(1); *Limitation Act 1981* (NT), s 12(1A).
[67] *Limitation Act 1969* (NSW), s 56A; *Limitation of Actions Act 1974* (Qld), s 32A; *Limitation of Actions Act 1936* (SA), s 37(2); *Defamation Act 2005* (Tas), s 20A(2); *Limitation of Actions Act 1958* (Vic), s 23B; *Limitation Act 2005* (WA), s 40 *Limitation Act 1985* (ACT), s 21B; *Limitation Act 1981* (NT), s 44A.

13.5 First, there is a drafting issue with the standard provision governing the extension of the limitation period (**extension provision**). In determining whether or not to grant an extension of time for the commencement of a defamation action, the extension provision empowers the court to look *only* at the reasonableness of the plaintiff's conduct in the one year period from the date of publication.

13.6 The problem with the current drafting can be illustrated by example. Suppose a plaintiff, reasonably, fails to commence defamation proceedings within a year from the date of a defamatory publication because he or she, for example, has been trekking in Nepal and only learns of the publication 366 days after it was published. Suppose further, however, that the plaintiff then fails to commence a defamation action in respect of the publication until two years and 364 days after the date of publication. In such a case, it seems that a court would be required to extend the limitation period to a date three years from the date of publication, even if the plaintiff has no good explanation for his or her delay in commencing proceedings upon learning of the defamatory publication, and even if the extension of the limitation period causes irreparable prejudice to the defendant. This is because the extension provision empowers a court to consider *only* whether it was reasonable for the plaintiff not to have commenced proceedings within a year from the date of publication. The court has no discretion to refuse to extend the limitation period for other reasons.

13.7 This is, in the Committee's view, an undesirable situation. The Committee recommends that the extension provision be amended to enable courts to have regard to other relevant discretionary factors when considering whether or not to extend the limitation period for the commencement of defamation actions in particular cases.

13.8 Secondly, Australia has retained the common law 'multiple publication' rule, the effect of which is that each separate publication of the same defamatory matter gives rise to a fresh cause of action.[68] The multiple publication rule has implications for the running of time in defamation actions, particularly in relation to material published via the Internet. Where, for example, defamatory material was first published long ago, but remains accessible in an online archive, the limitation period is refreshed each time the material is accessed from the archive, exposing the publisher to indefinite potential liability. This can be severely prejudicial where, for example, witnesses who could have proved the substantial truth of material at the time it was originally published have died or become unavailable by the time the material is downloaded and read, perhaps many years later.

13.9 The multiple publication rule has been replaced by a 'single publication' rule in most American States.[69] The effect of the American single publication rule is that only one cause of action arises out of 'any single publication or exhibition or utterance, such as any one edition or issue of a newspaper or book or magazine

[68] The rule derives from *Duke of Brunswick v Harmer* (1849) 14 QB 185; 117 ER 75. See also *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2002] QB 783, 817–18; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

[69] See eg *Holloway v Butler*, 662 SW 2d 288 (CA Tx, 1983); *Crook v Peacor*, 579 F Supp (ED Mi, 1984); *Churchill v State of New Jersey*, 876 A 2d 311 (SC NJ, 2005); *Firth v State of New York*, 747 NYS 2d 69 (CA NY, 2002).

or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture'.[70] The single publication rule eliminates the spectre of indefinite exposure to liability in respect of multiple publications of the same defamatory matter.

13.10 It seems very likely that a form of single publication rule will be adopted in the United Kingdom. The adoption of such a rule has been twice recommended in recent times by the Ministry of Justice of that country and has garnered wide support.[71]

13.11 Prior to the adoption of the national scheme laws, a form of single publication rule operated briefly in the Australian Capital Territory. The limitation period there was one year from the date on which the offending material was first published.[72]

13.12 Ireland adopted a similar form of single publication rule with effect from 1 January 2010.[73] In that country, subject to a judicial discretion, plaintiffs must commence defamation proceedings within a year of the first publication of the allegedly defamatory matter. In the case of Internet publications, time begins to run from the date on which the publication was first capable of being viewed or listened to.[74]

13.13 Single publication rules of analogous kinds also operate in the Canadian provinces of Ontario, Saskatchewan and Québec.[75] In those jurisdictions, time begins to run from the date on which the plaintiff discovered or learned of the allegedly defamatory matter.

13.14 The Committee sees considerable merit in the adoption of a form of single publication rule in Australia. It is undesirable for defendants to be exposed to the risk of liability for the publication of defamatory matter years after the matter was first published. There is, in such cases, a very real risk of prejudice because of the incidence of the burden of proof with respect to affirmative defences. Conversely, there is, in the Committee's view, no unfairness in requiring plaintiffs to commence defamation proceedings within a reasonable time after the first publication of allegedly defamatory matter: indeed, that was the rationale underlying the adoption of a uniform one-year limitation period across Australia. Any potential unfairness in particular cases could be dealt with by a judicial discretion of the kind that applies in Ireland, where judges may give a direction extending the limitation period by up to two years where they are satisfied that an extension is in 'the interests of justice' and that 'the prejudice the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice the defendant would suffer if the direction were given'.[76]

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[70] See the American Law Institute's Uniform Single Publication Act.
[71] Ministry of Justice, *Defamation and the internet: the multiple publication rule*, Consultation Paper CP20/09 (September 2009); Ministry of Justice, *Draft Defamation Bill*, Consultation Paper CP3/11 (March 2011), [72]: 'the majority of those responding to a consultation on the issue by the previous Government in 2009 indicated that a single publication rule should be introduced, and this was also recommended by the Culture Media and Sport Committee and the Ministry of Justice Libel Working Group in their reports published in early 2010.'
[72] *Limitation Act 1985* (ACT), s 21B(1).
[73] *Defamation Act 2009* (Ireland) s 38, amending the *Statute of Limitations 1957* (Ireland), s 11.
[74] ibid, s 11(3B).
[75] *Limitation Act*, SO 2002 (Ontario), ss 4, 5, 15; *Limitation Act*, SS 2004 (Saskatchewan), ss 5–7; *Civil Code of Québec*, SQ 1991, art 2929.
[76] *Statute of Limitations 1957* (Ireland), s 11(3A).

13.15 Taking all of these matters into account, the Committee recommends that:

(a) the limitation period for defamation actions be changed so that it is one year from the date of first publication of the matter complained of; and

(b) the extension provision be amended so that it provides as follows:

(1) A person claiming to have a cause of action for defamation may apply to a court for an order extending the limitation period for the cause of action.

(2) A court, on an application under subsection (1), must extend the limitation period to a period of up to three years from the date of first publication of the matter complained of, if satisfied that:

(a) 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 first publication of the matter complained of;

(b) the application has been brought by the plaintiff within a reasonable time in all the circumstances; and

(c) the extension is in the interests of justice taking into account the prejudice the plaintiff would suffer if the extension were not granted and any prejudice the defendant would suffer if the extension were granted.

(3) A court may not order the extension of the limitation period for a cause of action for defamation other than in the circumstances specified in subsection (2).

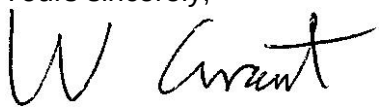
14 Conclusion

14.1 As observed at the outset, the Committee considers the national scheme laws, overall, to be a major achievement and a substantial success. There are, however, as we have endeavoured to explain, a number of areas in which the laws would benefit from refinement and clarification in order better to achieve their objectives.

14.2 The Committee considers it vital that any amendments to the Act only be undertaken as part of uniform amendments to the national scheme laws. Plainly, unilateral changes to the substantive defamation laws of individual Australian jurisdictions would fundamentally undermine the first object of the national scheme laws, namely the promotion of uniform laws of defamation in Australia.

14.3 The Committee would be pleased to elaborate upon or clarify any aspects of this submission. Enquiries may be directed to the Chair of the Committee, Dr Matthew Collins, by telephone (03 9225 7780) or via email (matt.collins@vicbar.com.au).

Yours sincerely,



Bill Grant
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