These are the Model Defamation Provisions prepared by the Parliamentary Counsel's Committee and approved by the Standing Committee of Attorneys-General on 21 March 2005.

Model Defamation Provisions

Explanatory note

Overview of Bill

In November 2004, the Attorneys General of the States and Territories agreed to support the enactment in their respective jurisdictions of uniform model provisions in relation to the law of defamation (the ***model provisions***).

At the time of the agreement, each State and Territory had different laws governing the tort of defamation. Tasmania and Queensland codified their civil law of defamation. The other jurisdictions retained the common law, but supplemented or altered it to varying degrees by enacting differing statutory provisions. The States and Territories also had different laws governing the offence of criminal defamation. The Summary of Existing Defamation Laws at the end of this Explanatory note summarises the position in each jurisdiction in relation to the tort of defamation and criminal defamation.

The object of this Bill is to enact the model provisions agreed to by the Attorneys General of the States and Territories. The principal features of the model provisions are:

(a) the retention (with some modifications) of the common law of defamation to determine civil liability for defamation, and

(b) the abolition of/the continuation of the abolition of* the distinction at common law between slander and libel, and

(c) the creation of a statutory cap on the amount of damages for non-economic loss that may be awarded in civil proceedings for defamation, and

(d) the enactment of provisions to facilitate the resolution of civil disputes about the publication of defamatory matter without litigation, and

(e) the delineation of the respective roles of juries and judicial officers in the jury trial of civil proceedings for defamation by limiting the role of juries to the determination of whether a person has been defamed and leaving the award of damages to judicial officers, and

(f) the abolition of exemplary and punitive damages in civil proceedings for defamation, and

(g) the establishment of truth alone as a defence to a civil action for defamation, and

(h) the imposition of a limitation period for civil actions for defamation of 1 year, subject to an extension (in limited circumstances) to a period of up to 3 years following publication, and

(i) the enactment of provisions dealing with criminal defamation.*

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides that the proposed Act commences on 1 January 2006.

Clause 3 sets out the objects of the proposed Act.

Clause 4 defines certain terms used in the proposed Act. In particular, the following terms are defined:

The ***general law*** is defined to mean the common law and equity.

The term ***matter*** is defined to include:

(a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical, and

(b) a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication, and

(c) a letter, note or other writing, and

(d) a picture, gesture or oral utterance, and

(e) any other thing by means of which something may be communicated to a person.

Clause 5 provides that the proposed Act binds the Crown in all its capacities.

Part 2 General principles

Division 1 Defamation and the general law

Clause 6 provides that the proposed Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that the proposed Act provides otherwise (whether expressly or by necessary implication). The proposed section also makes it clear that the general law as it is from time to time is to apply for the purposes of the new legislation as if existing defamation legislation had never been enacted or made. This provision removes any doubt about the application of the general law particularly in those Australian jurisdictions in which the general law has previously been displaced by a codified law of defamation.

The proposed Act does not seek to define the circumstances in which a person has a cause of action for defamation. Rather, the proposed Act operates by reference to the elements of the tort of defamation at general law. Accordingly, if a plaintiff does not have a cause of action for defamation at general law in relation to the publication of matter by the defendant, the plaintiff will not (subject to the modification of the general law effected by proposed section 7) have a cause of action for the purposes of the proposed Act.

At general law, a plaintiff has a cause of action for defamation against a defendant if the defendant publishes defamatory accusations or charges (referred to conventionally as ***imputations***) about the plaintiff to at least one other person (other than the defendant or his or her spouse). The courts have formulated the test for determining what is defamatory in various ways. Examples of these formulations include (but are not limited to) the following:

(a) "[Words that] tend to lower the plaintiff in the estimation of right-thinking members of society generally". See *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin.

(b) "Whether the alleged libel is established depends upon the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation". See *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506 per Brennan J.

(c) "In order that one person may establish against another a civil cause of action [for defamation], it is essential that he should prove (1) that a statement or other representation has been made ... of a kind likely to lead ordinary decent folk to think the less of the person about whom it is made; (2) that it was about him that it was made; and (3) that the other has published it to at least one third party (who is not the husband or wife of the other)". See *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86 at 88 per Jordan CJ.

(d) "At common law, in general, an imputation, to be defamatory of the plaintiff, must be disparaging of him ... I say that this is 'in general' the position, as the

common law also recognizes as defamatory an imputation which, although not disparaging, tends to make other persons 'shun or avoid' the plaintiff ... as well as an imputation that displays the plaintiff in a ridiculous light, notwithstanding the absence of any moral blame on his part". See *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 at 452–453 per Hunt J.

Clause 7 abolishes/continues the abolition of* the general law distinction between libel and slander.

At general law, libel is the publication of defamatory matter in a written or other permanent form while slander is the publication of defamatory matter in a form that is temporary and merely audible. If a matter is libellous, the plaintiff does not need to prove that he or she sustained material loss (or ***special damage***) in order for the matter to be actionable. However, if a matter is slanderous, the plaintiff must usually prove special damage in order for the matter to be actionable.

The abolition of this general law distinction means that all publications of defamatory matter are actionable without proof of special damage.

The distinction has already been abolished in most Australian jurisdictions under existing law. The only exceptions are South Australia, Victoria and Western Australia.

Division 2 Causes of action for defamation

Clause 8 provides that a person has a single cause of action for defamation in relation to the publication of defamatory matter even if more than one defamatory imputation about the person is carried by the matter.

The proposed section reflects the position at general law that the publication of defamatory matter is the foundation of a civil action for defamation and reflects the existing law in all of the States and Territories other than New South Wales. Under the existing law of New South Wales, each defamatory imputation carried by a matter founds a separate cause of action.

Clause 9 provides that generally a corporation does not have a cause of action for defamation of the corporation.

However, a corporation will still have a cause of action for defamation if, at the time of the publication of the defamatory matter:

(a) the objects for which the corporation was formed did not include obtaining financial gain for its members or corporators, or

(b) the corporation employed fewer than 10 persons and was not related to another corporation,

and the corporation was not a public body.

The proposed section will not preclude any individual associated with a corporation from suing for defamation in relation to the publication of matter about the individual that also defames the corporation.

New South Wales is currently the only jurisdiction to have precluded most (but not all) corporations from suing for defamation under its existing law.

Clause 10 provides that no civil action for defamation may be asserted, continued or enforced by a person in relation to the publication of defamatory matter about a deceased person (whether or not published before or after the person's death). The proposed section also prevents the assertion, continuation or enforcement of a civil cause of action for defamation against a publisher of defamatory matter who is deceased.

With the exception of Tasmania, the existing laws of the States and Territories preclude a civil action for defamation in relation to a deceased person or against a deceased person. The existing law reflects the position at general law.

Division 3 Choice of law

Clause 11 provides for choice of law rules where a civil cause of action is brought in a court of this [State/Territory]* in relation to the publication of defamatory matter that occurred wholly or partly in an Australian jurisdictional area. An ***Australian jurisdictional area*** is defined to mean:

(a) the geographical area of Australia that lies within the territorial limits of a particular State (including its coastal waters), but not including any territory, place or other area referred to in paragraph (c), or

(b) the geographical area of Australia that lies within the territorial limits of a particular Territory (including its coastal waters), but not including any territory, place or other area referred to in paragraph (c), or

(c) any territory, place or other geographical area of Australia over which the Commonwealth has legislative competence but over which no State or Territory has legislative competence.

Examples of areas over which the Commonwealth, but not a State or Territory, has legislative competence include places in relation to which the Commonwealth has exclusive power to make laws under section 52 (i) of the Commonwealth Constitution and the external Territories of the Commonwealth.

The proposed section creates 2 choice of law rules.

The first choice of law rule applies where a matter is published wholly within a single Australian jurisdictional area. The choice of law rule in that case will require a court of this [State/Territory]* to apply the substantive law applicable in the Australian jurisdictional area in which the matter was published.

The second choice of law rule applies if the same, or substantially the same, matter is published in more than one Australian jurisdictional area by a particular person to 2 or more persons. The choice of law rule in that case will require a court of this [State/Territory]* to apply the substantive law applicable in the Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection. In determining which area has the closest connection with the harm, the court may take into account any matter it considers relevant, including:

(a) the place at the time of publication where the plaintiff was ordinarily resident or, in the case of a corporation that may assert a cause of action for defamation,

the place where the corporation had its principal place of business at that time, and

(b) the extent of publication in each relevant Australian jurisdictional area, and

(c) the extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area.

The second choice of law rule is based on the recommendation made by the Australian Law Reform Commission in its report entitled *Unfair Publication: Defamation and privacy* (1979, Report No 11) at pages 190–191. See also Samuels JA in *ABC v Waterhouse* (1991) 25 NSWLR 519 at 536–537. As indicated in that report, the Australian jurisdictional area with which the tort will have its closest connection will generally be where the plaintiff is resident if the plaintiff is a natural person resident in Australia. In the case of a corporation, it will generally be where the corporation has its principal place of business.

In the event that each State and Territory enacts the model provisions, there is still scope for the application of these choice of law rules if a provision other than the enacted model provisions limits or excludes civil liability for defamation in a particular jurisdiction. For instance, a common statutory provision in State and Territory law is one that protects a public official or public authority of the State or Territory from civil liability for actions taken in a good faith in the exercise of statutory functions. These provisions are of general application and therefore include, but are not limited to, civil liability for defamation.

The choice of law rules enacted by the proposed section apply only the substantive law of the jurisdiction concerned. In *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 at 544–545, the High Court held that rules which are directed to governing or regulating the mode or conduct of court proceedings are procedural and all other provisions or rules are to be classified as substantive. For instance, a law relating to whether proceedings should be tried by jury would be procedural because the law relates to regulating the mode or conduct of court proceedings.

Under existing law, choice of law for defamation matters is largely determined by the general law. Under the general law, the law of the place in which a defamatory matter is published must be applied to determine liability for that publication. If the matter is published in more than one place, then there is a separate cause of action for each publication. In that circumstance, different laws may need to be applied for each different publication depending on the place of publication.

Part 3 Resolution of civil disputes without litigation

Division 1 Offers to make amends

The Division sets out provisions dealing with offers to make amends for the publication of matter that is, or may be, defamatory. The provisions may be used before, or as an alternative to, litigation.

New South Wales and the Australian Capital Territory make similar provision for offers to make amends under their existing laws. The other Australian jurisdictions

have provisions in their rules of court and other civil procedure legislation that provide for the making of offers of compromise or payments into court. However, these provisions tend to be available only once litigation has commenced.

Clause 12 provides that the Division applies if a person (the ***publisher***) publishes matter (the ***matter in question***) that is, or may be, defamatory of another person (the ***aggrieved person***). The proposed section also makes it clear that the Division may be used instead of the provisions of any rules of court or any other law in relation to payment into court or offers of compromise. The Division will also not prevent the making or acceptance of settlement offers.

Clause 13 enables a publisher to make an offer to make amends to an aggrieved person.

Clause 14 provides that the offer cannot be made if 28 days have elapsed since the publisher has been given a concerns notice by the aggrieved person that the matter in question is or may be defamatory or if a defence in an action for defamation brought by the aggrieved person has been served. The proposed section also enables a publisher to seek further particulars from the aggrieved person if the concerns notice does not particularise the defamatory imputations carried by the matter in question of which the aggrieved person complains.

Clause 15 specifies what an offer to make amends must or may contain. It also confers certain powers on a court in relation to the enforcement of an offer to make amends that is accepted by an aggrieved person.

Clause 16 enables a publisher to withdraw an offer to make amends. It also enables a publisher to make a renewed offer to make amends after the expiry of the periods referred to in proposed section 14 if the renewed offer is a genuine attempt by the publisher to address matters of concern raised by the aggrieved person about an earlier offer and is made within 14 days after the earlier offer is withdrawn (or within an agreed period).

Clause 17 provides that if the publisher carries out the terms of an accepted offer to make amends (including paying any compensation under the offer), the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher in relation to the matter in question even if the offer was limited to any particular defamatory imputations.

Clause 18 provides that it is a defence to an action for defamation against the publisher if the publisher made an offer of amends that was not accepted and the offer was made as soon as practicable after the publisher became aware that the matter in question is or may be defamatory, the publisher was ready and willing to carry out the terms of the offer and the offer was reasonable in the circumstances.

Clause 19 provides that (subject to some exceptions) evidence of any statement or admission made in connection with the making or acceptance of an offer to make amends is not admissible as evidence in any criminal or civil proceedings.

Division 2 Apologies

Clause 20 provides that an apology by or on behalf of a person will not constitute an admission of liability, and will not be relevant to the determination of fault or liability, in connection with any defamatory matter published by the person.

A number of States and Territories make provision along these lines under their existing laws.

Part 4 Litigation of civil disputes

Division 1 General

Clause 21 enables a plaintiff or defendant in defamation proceedings to elect to have the proceedings determined by a jury unless the court orders otherwise. The grounds on which a court may order otherwise include (but are not limited to):

(a) the trial requires a prolonged examination of records, or

(b) the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

There is a miscellany of different provisions under the existing laws of the States and Territories about the use of juries in defamation proceedings. The proposed section, along with proposed section 22, seeks to enact uniform provisions in relation to the use of juries for those States and Territories who will continue to use juries in defamation proceedings.

Clause 22 specifies the respective roles of juries and judicial officers where defamation proceedings are tried by jury.

The proposed section provides that the jury is to determine whether the defendant has published defamatory matter and, if so, whether any defence raised by the defendant has been established. However, the judicial officer and not the jury is to determine the amount of damages (if any) that should be awarded in successful proceedings.

The proposed section alters the position at general law by withdrawing from the jury the determination of damages. Under the existing law of New South Wales, juries cannot determine defences or damages. However, the proposed section makes it clear that it does not require or permit a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer. For example, at general law the judicial officer and not the jury determines whether a matter has been published on an occasion of absolute or qualified privilege for the purposes of a defence. See *Guise v Kouvelis* (1947) 74 CLR 102 at 109, 113 and 117 and *Rajski v Carson* (1988) 15 NSWLR 84 at 100–101.

Clause 23 provides that the leave of the court is required for further proceedings for defamation to be brought against the same person even if the earlier proceedings were brought outside of this [State/Territory]*.

New South Wales makes similar provision under its existing law.

Division 2 Defences

Clause 24 provides that a defence under Division 2 is additional to any other defence or exclusion of liability available to the defendant apart from the proposed Act (including under the general law) and does not of itself vitiate, limit or abrogate any other defence or exclusion or liability. The proposed section also provides that the general law applies to determine whether a publication of defamatory matter was actuated by malice. At general law, a publication of matter is actuated by malice if it is published for a purpose or with a motive that is foreign to the occasion that gives rise to the defence at issue. See *Robert v Bass* (2002) 212 CLR 1 at 30–33.

Clause 25 provides that it is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true. The term ***substantially true*** is defined in proposed section 4 to mean true in substance or not materially different from the truth.

The defence reflects the defence of justification at general law where truth alone is a defence to the publication of defamatory matter.

Under existing law, some States and Territories require a defendant to prove more than truth in order to raise the defence of justification. In New South Wales, the defendant must prove both that the matter was true and that it was in the public interest for it to be published. In Queensland, Tasmania and the Australian Capital Territory, the defendant must prove that the publication of the matter was for the public benefit. However, in Victoria, South Australia, Western Australia and the Northern Territory a defendant needs only to prove that the matter was true.

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

(a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (***contextual imputations***) that are substantially true, and

(b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

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

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

Clause 27 provides that it is a defence to the publication of defamatory matter if the defendant proves that the matter was published on an occasion of absolute privilege. The proposed section lists, on a non-exhaustive basis, certain publications of matter that are published on occasions of absolute privilege. The publications of matter listed include:

(a) the publication of matter in the course of the proceedings of a parliamentary body of any country, and

(b) the publication of matter in the course of the proceedings of an Australian court or Australian tribunal, and

(c) the publication of matter on an occasion that, if published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to the proposed section, and

(d) the publication of matter by persons or bodies in any circumstances specified in Schedule 1 (Additional publications to which absolute privilege applies).

The defence of absolute privilege at general law extends to certain parliamentary and judicial proceedings and certain ministerial communications. The privilege is described as being absolute because it cannot be defeated even if the matter was untrue or was published maliciously.

The proposed section extends the defence of absolute privilege to the publication of matter that would be subject to absolute privilege under the corresponding law of another Australian jurisdiction. This provision ensures that if a State or Territory includes a publication in its equivalent of Schedule 1, then that publication will also have the benefit of absolute privilege in all other States and Territories that enact the model provisions.

Clause 28 provides that it is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in:

(a) a public document or a fair copy of a public document, or

(b) a fair summary of, or a fair extract from, a public document.

The proposed section provides that the defence is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.

The proposed section defines ***public document*** to mean:

(a) any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law, or

(b) any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings and includes:

  (i) any record of the court or tribunal relating to the judgment, order or determination or to its enforcement or satisfaction, and

(ii) any report of the court or tribunal about its judgment, order or determination and the reasons for its judgment, order or determination, or

(c) any report or other document that under the law of any country:

(i) is authorised to be published, or

(ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body, or

(d) any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public, or

(e) any record or document open to inspection by the public that is kept:

(i) by an Australian jurisdiction, or

(ii) by a statutory authority of an Australian jurisdiction, or

(iii) by an Australian court, or

(iv) under legislation of an Australian jurisdiction, or

(f) any other document issued, kept or published by a person, body or organisation of another Australian jurisdiction that is treated in that jurisdiction as a public document under a provision of a law of the jurisdiction corresponding to the proposed section, or

(g) any document of a kind specified in Schedule 2 (Additional kinds of public documents).

The existing laws of a number of States and Territories make provision for a statutory defence along these lines. However, the scope of the statutory defences differs in each jurisdiction.

The proposed section includes a comprehensive list of public documents within its ambit. The provision also ensures that if a State or Territory includes a class of document in its equivalent of Schedule 2, then those documents will also have the benefit of this defence in all other States and Territories that enact the model provisions.

Clause 29 provides that it is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern. The proposed section also provides that it is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter was, or was contained in, an earlier published report of proceedings of public concern, and

(b) the matter was, or was contained in, a fair copy of, a fair summary of, or a fair extract from, the earlier published report, and

(c) the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair.

The proposed section provides that the defence is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.

The proposed section defines ***proceedings of public concern*** to mean:

(a) any proceedings in public of a parliamentary body, or

(b) any proceedings in public of an international organisation of any countries or of the governments of any countries, or

(c) any proceedings in public of an international conference at which the governments of any countries are represented, or

(d) any proceedings in public of:

  (i) the International Court of Justice, or any other judicial or arbitral tribunal, for the decision of any matter in dispute between nations, or

  (ii) any other international judicial or arbitral tribunal, or

(e) any proceedings in public of a court or arbitral tribunal of any country, or

(f) any proceedings in public of an inquiry held under the law of any country or under the authority of the government of any country, or

(g) any proceedings in public of a local government body of any Australian jurisdiction, or

(h) certain proceedings of a learned society or of a committee or governing body of such a society, or

(i) certain proceedings of a sport or recreation association or of a committee or governing body of such an association, or

(j) certain proceedings of a trade association or of a committee or governing body of such an association, or

(k) any proceedings of a public meeting (with or without restriction on the people attending) of shareholders of a public company under the *Corporations Act 2001* of the Commonwealth held anywhere in Australia, or

(l) any proceedings of a public meeting (with or without restriction on the people attending) held anywhere in Australia if the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for public office, or

(m) any proceedings of an ombudsman of any country if the proceedings relate to a report of the ombudsman, or

(n) any proceedings in public of a law reform body of any country, or

(o) any other proceedings conducted by, or proceedings of, a person, body or organisation of another Australian jurisdiction that are treated in that jurisdiction as proceedings of public concern under a provision of a law of the jurisdiction corresponding to the proposed section, or

(p) any proceedings of a kind specified in Schedule 3 (Additional proceedings of public concern).

At general law, fair and accurate reports of proceedings of certain persons and bodies are subject to qualified privilege. For example, the general law defence extends to proceedings in parliament and judicial proceedings conducted in open court. As the defence at common law is a defence of qualified privilege, it can be defeated by proof that the publication of the defamatory matter was actuated by malice.

The existing laws of most States and Territories make provision for a statutory defence along the lines of the general law defence. However, the scope of the statutory defences differs in each jurisdiction.

The proposed section extends to a larger class of proceedings than the general law defence. The provision ensures that if a State or Territory includes a class of proceedings in its equivalent of Schedule 3, then those proceedings will also have the benefit of this defence in all other States and Territories that enact the model provisions. Also, the new defence limits the circumstances in which the defence can be defeated to situations where the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.

Clause 30 provides for a defence of qualified privilege that is based on the provisions of section 22 of the *Defamation Act 1974* of New South Wales. The proposed section provides that it is a defence to the publication of defamatory matter to a person (the ***recipient***) if the defendant proves that:

(a) the recipient has an interest or apparent interest in having information on some subject, and

(b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and

(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

The proposed section lists a number of factors that the court may take into account in determining whether the conduct of the defendant was reasonable. These factors largely mirror the factors relevant at general law as stated by the House of Lords in *Reynolds v Times Newspapers Ltd* (2001) 2 AC 127. (In this regard, it should be noted that the New South Wales Court of Appeal in *John Fairfax & Sons Ltd v Vilo* (2001) 52 NSWLR 373 refused to follow the more liberal view of the general law taken by the House of Lords).

As the defence created by the proposed section is a defence of qualified privilege, it can be defeated on the same grounds as the defence of qualified privilege at general law. For example, the proposed section makes it clear that the defence may be defeated if the plaintiff proves that the publication was actuated by malice.

The defence is broader than the defence at general law because the interest that the recipient must have or apparently have is not as limited as at general law. It has been said of the New South Wales provision that "[w]hat the section does is to substitute reasonableness in the circumstances for the duty or interest which the common law

principles of privilege require to be established". See *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 797.

The proposed section, however, alters the factors referred to in the New South Wales provision in 2 important respects. Firstly, it requires the court to take into account whether it was in the public interest in the circumstances for the matter published to be published expeditiously. The New South Wales provision limits the court to a consideration of whether it was necessary in the circumstances for the matter published to be published expeditiously. Secondly, it requires a court to take into account the nature of the business environment in which the defendant operates. The New South Wales provision does not include this factor in its list of factors.

Clause 31 provides for a number of defences relating to the publication of matter that expresses an opinion that is honestly held by its maker rather than a statement of fact.

The proposed section distinguishes between 3 situations.

The first situation is where the opinion was that of the defendant. In that situation, the defence is made out if it is proved that the defendant held the opinion, the opinion related to a matter of public interest and the opinion was based on proper material. ***Proper material***, for the purposes of the proposed section, is material that:

(a) is substantially true, or

(b) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law), or

(c) was published on an occasion that attracted the protection of a defence under the proposed section or proposed section 28 or 29.

This defence will be defeated only if it is proved that the opinion was not honestly held by the defendant at the time the defamatory matter was published.

The second situation is where the opinion was that of the defendant's employee or agent. In that situation, the defence is made out if it is proved that the employee or agent held the opinion, the opinion related to a matter of public interest and the opinion was based on proper material. This defence will be defeated only if it is proved that the defendant did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published.

The third situation is where the opinion was that of a third party. In that situation, the defence is made out if it is proved that the opinion was held by the third party at the time of publication, the opinion related to a matter of public interest and the opinion was based on proper material. This defence will be defeated only if it is proved that the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time the defamatory matter was published.

The defences, at least in relation to opinions personally held by the defendant, largely reflect the defence of fair comment at general law. However, the proposed section clarifies the position at general law in relation to the publication of the opinions of employees, agents and third parties. The existing laws of New South Wales, Queensland, Tasmania, Western Australia and the Northern Territory make statutory provision (whether partly or wholly) in relation to the defence of fair comment. The

proposed section also make it clear that the defence may be defeated if the plaintiff proves that the publication was actuated by malice.

Clause 32 provides that it is a defence to the publication of defamatory matter if the defendant proves that:

(a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and

(b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and

(c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

A person will be a subordinate distributor of matter for the purposes of the proposed section if the person:

(a) was not the first or primary distributor of the matter, and

(b) was not the author or originator of the matter, and

(c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.

The proposed section also lists a number of circumstances in which a person will generally not be treated as being the first or primary publisher of matter.

The defence largely follows the defence of innocent dissemination at general law. See, for example, *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574. However, the provision seeks to make the position of providers of Internet and other electronic and communication services clearer than it is at general law. For example, the provider of an Internet email service will generally not be treated as being the first or primary distributor of defamatory matter contained in an email sent using the service. Accordingly, a service provider of that kind will be treated as being a subordinate distributor for the purposes of the defence unless it can be shown that the service provider was the author or originator of the matter or had the capacity to exercise editorial control over the matter.

Clause 33 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.

The existing laws of the Australian Capital Territory, New South Wales, Queensland, Tasmania and Western Australia already provide for the defence.

Division 3 Remedies

Clause 34 provides that a court, in determining the amount of damages to be awarded in any defamation proceedings, is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

Clause 35 provides for the determination of damages for non-economic loss for defamation. A limit on the amount of damages for non-economic loss is imposed

($250,000). The proposed section also provides for the indexation, by order of the Minister published in the Gazette, of the maximum amount that may be awarded as damages for non-economic loss. A court will not be permitted to order a defendant to pay damages that exceed the maximum damages amount under the proposed section unless it is satisfied that the circumstances of the publication of the matter to which the proceedings relate are such as to warrant an award of aggravated damages.

The existing laws of the States and Territories do not currently impose a cap on damages for non-economic loss that may be awarded in defamation proceedings.

Clause 36 provides that a court, in awarding damages, is generally to disregard the malice or other state of mind of the defendant at the time the matter to which the proceedings relate was published.

Clause 37 provides that a court cannot award exemplary or punitive damages for defamation.

The award of these damages is permitted under the existing laws of all of the States and Territories other than New South Wales.

Clause 38 lists some factors that a court may take into account in mitigation of damages. The list is not intended to be exhaustive.

The existing laws of a number of States and Territories make provision for similar mitigating factors, although there are differences between the jurisdictions as to the factors expressly recognised by legislation.

Clause 39 enables a court in defamation proceedings that finds for a plaintiff on more than one cause of action to assess damages as a single sum.

The existing law of New South Wales already confers this power on its courts.

Division 4 Costs

Clause 40 requires a court (unless the interests of justice require otherwise) to order costs against an unsuccessful party to proceedings for defamation to be assessed on an indemnity basis if the court is satisfied that the party unreasonably failed to make or accept a settlement offer made by the other party to the proceedings. The proposed section also provides that in awarding costs in relation to proceedings for defamation, the court may have regard to:

(a) the way in which the parties to the proceedings conducted their cases, and

(b) any other matters that the court considers relevant.

The proposed section is based on the provisions of section 48A of the *Defamation Act 1974* of New South Wales.

Part 5 Miscellaneous

Clause 41 facilitates the proof in civil proceedings for defamation of publication in the context of mass produced copies of matter and periodicals.

Clause 42 facilitates the proof in civil proceedings for defamation of criminal convictions.

Clause 43 provides that a person in civil proceedings for defamation is not excused from answering a question, or discovering or producing a document thing, on the ground that the answer may tend to incriminate the person of an offence of criminal defamation. However, the answer, document or thing is not admissible in evidence in proceedings for criminal defamation.

Clause 44 provides for how notices may be given under the proposed Act.

Clause 45 confers a power to make regulations for the purposes of the proposed Act.

Clause 46 confers a power to make rules of court for the purposes of the proposed Act.

Clause 47 repeals [*list the relevant statutes of the jurisdiction*]*.

Jurisdictional note. Each jurisdiction is to list the existing legislation relating to defamation it is repealing.

Clause 48 provides for the amendment of certain Acts.

Jurisdictional note. Each jurisdiction is to amend statutes in accordance with its drafting practice.

Clause 49 provides that, generally, the proposed Act will apply to defamatory matter that is published on or after the commencement of the proposed Act. However, the existing law will continue to apply to:

(a) a cause of action for defamation that accrued before the commencement of the proposed Act, and

(b) a cause of action for defamation that accrued after the commencement of the proposed Act, but only if:

  (i) the action is raised in proceedings that include other causes of action that accrued before that commencement, and

  (ii) the action accrued no later than 12 months after the earliest pre-commencement action accrued, and

  (iii) each action in the proceedings arose out of the publication of the same, or substantially the same, matter on different occasions.

Schedule 1 Additional publications to which absolute privilege applies

Schedule 1 lists publications of certain persons and bodies that are subject to absolute privilege for the purposes of proposed section 27 (Defence of absolute privilege). These publications are in addition to the publications specified in the proposed section.

Schedule 2 Additional kinds of public documents

Schedule 2 lists kinds of documents that are to be treated as public documents for the purposes of the defence under proposed section 28 (Defence for publication of public

documents). These kinds of documents are in addition to the documents specified in the proposed section.

Schedule 3 Additional proceedings of public concern

Schedule 3 lists kinds of proceedings that are to be treated as proceedings of public concern for the purposes of the defences under proposed section 29 (Defences of fair report of proceedings of public concern). These kinds of proceedings are in addition to the proceedings specified in the proposed section.

Schedule 4 Amendment of other Acts

Statute of limitations

Schedule 4.1 amends the [*insert relevant Act of jurisdiction*]* to provide that, generally, a civil action for defamation must be commenced within 1 year following the date of publication of the matter of which the plaintiff complains. However, a court must extend this limitation period to a period of up to 3 years if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced the action within the 1 year period.

Under their existing laws, both New South Wales and the Australian Capital Territory provide for a 1 year limitation period that can be extended for a limited further period. In South Australia and Western Australia actions for slander are subject to a limitation period of 2 years. In other cases and in other jurisdictions, the limitation period is generally 6 years.

Criminal defamation

Schedule 4.2 inserts a new Part in the [*insert relevant Act of jurisdiction*]* dealing with criminal defamation.

Proposed section 1 abolishes/continues the abolition of* the general law misdemeanour of criminal libel.

Proposed section 2 makes it an offence for a person, without lawful excuse, to publish defamatory matter about another living person (the ***victim***):

(a) knowing the matter to be false, and

(b) with intent to cause serious harm to the victim or any other person or being reckless as to whether such harm is caused.

A defendant will have a lawful excuse for the publication of the matter if, and only if, the defendant would, having regard only to the circumstances happening before or at the time of the publication, have had a defence for the publication if the victim had brought civil proceedings for defamation against the defendant.

Proposed section 3 provides that the commencement of criminal proceedings for an offence under proposed section 1 does not preclude the commencement of civil proceedings or the determination of those proceedings.

SUMMARY OF EXISTING DEFAMATION LAWS

Existing civil law of defamation of the States and Territories

Jurisdiction	Applicable civil law
Australian Capital Territory	The general law applies in the Australian Capital Territory subject principally to the provisions of the *Civil Law (Wrongs) Act 2002* of that Territory, particularly Chapter 9 of that Act.
New South Wales	The general law applies in New South Wales subject principally to the provisions of the *Defamation Act 1974* of that State.
Northern Territory	The general law applies in the Northern Territory subject principally to the provisions the *Defamation Act* of that Territory.
Queensland	The civil law of defamation in Queensland has been codified by the *Defamation Act 1889* of that State.
South Australia	The general law applies in South Australia subject principally to the provisions of the *Civil Liability Act 1936* of that State, particularly Part 2 of that Act.
Tasmania	The civil law of defamation in Tasmania has been codified by the *Defamation Act 1957* of that State.
Victoria	The general law applies in Victoria subject principally to the provisions of the *Wrongs Act 1958* of that State, particularly Part I of that Act.
Western Australia	The general law applies in Western Australia subject principally to the provisions of the following Acts: (a) the *Libel Act 1843* of the United Kingdom, (b) the *Newspaper Libel and Registration Act 1884*, (c) the *Newspaper Libel and Registration Act 1884 Amendment Act 1888*, (d) *The Criminal Code* set out in the *Criminal Code Act 1913*, but only to the extent that the Code declares the publication of defamatory matter to be lawful. See section 5 of the *Criminal Code Act 1913*, Chapter XXXV of the Code and *West Australian Newspapers Ltd v Bridge* (1979) 141 CLR 535.

Existing criminal law of defamation of the States and Territories

Jurisdiction	Applicable criminal law
Australian Capital Territory	The law of criminal defamation in the Australian Capital Territory is contained in the *Defamation (Criminal Proceedings) Act 2001* of that Territory.
New South Wales	The law of criminal defamation in New South Wales is contained in the *Defamation Act 1974* of that State, particularly Part 5 of that Act.
Northern Territory	The law of criminal defamation in the Northern Territory is contained in the *Criminal Code* set out in the *Criminal Code Act* of that Territory, particularly Division 7 of Part VI of the Code.
Queensland	The law of criminal defamation in Queensland is contained in the *Defamation Act 1889* of that State, particularly sections 8 and 9 and Part 8 of that Act.
South Australia	The law of criminal defamation in South Australia is contained in section 257 of the *Criminal Law Consolidation Act 1935* of that State.
Tasmania	The law of criminal defamation in Tasmania is contained in the *Criminal Code* set out in the *Criminal Code Act 1924* of that State, particularly Chapter XXIII of the Code.
Victoria	The general law offence of criminal defamation applies in Victoria, subject to the maximum term of imprisonment specified for the offence by section 320 of the *Crimes Act 1958* of that State.
Western Australia	The law of criminal defamation in Western Australia is contained in *The Criminal Code* set out in the *Criminal Code Act 1913*, particularly Chapter XXXV of that Code.

Model Defamation Provisions

Contents

Part 1 Preliminary

1 Citation

This Act may be cited as the *Defamation Act 2005*.

Jurisdictional note. Appropriate local provisions to be inserted. However, a uniform form of citation is suggested, e.g., the *Defamation Act 2005*.

2 Commencement

This Act commences on 1 January 2006.

Jurisdictional note. Appropriate local provisions to be inserted with a view to commencing the model provisions on the same date in each jurisdiction.

3 Objects of Act

The objects of this Act are:

(a) to enact provisions to promote uniform laws of defamation in Australia, and

(b) to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance, and

(c) to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter, and

(d) to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.

4 Definitions

In this Act:

Australian court means any court established by or under a law of an Australian jurisdiction (including a court conducting committal proceedings for an indictable offence).

Australian jurisdiction means:

(a) a State, or

(b) a Territory, or

(c) the Commonwealth.

Australian tribunal means any tribunal (other than a court) established by or under a law of an Australian jurisdiction that has the power to take evidence from witnesses before it on oath or affirmation (including a Royal Commission or other special commission of inquiry).

country includes:

(a) a federation and a state, territory, province or other part of a federation, and

(b) an Australian jurisdiction.

court/Supreme Court.

Jurisdictional note. Appropriate references to the relevant State or Territory court may need to be inserted in the model provisions if only one court in the jurisdiction deals with defamation matters. However, references to "the court" in the model provisions may be retained for those jurisdictions that provide separately for more than one court to have jurisdiction in defamation matters.

document means any record of information, and includes:

(a) anything on which there is writing, and

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, and

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, and

(d) a map, plan, drawing or photograph.

electronic communication includes a communication of information in the form of data, text, images or sound (or any combination of these) by means of guided or unguided electromagnetic energy, or both.

general law means the common law and equity.

matter includes:

(a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical, and

(b) a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication, and

(c) a letter, note or other writing, and

(d) a picture, gesture or oral utterance, and

(e) any other thing by means of which something may be communicated to a person.

offer to make amends means an offer to make amends under Division 1 of Part 3.

parliamentary body means:

(a) a parliament or legislature of any country, or

(b) a house of a parliament or legislature of any country, or

(c) a committee of a parliament or legislature of any country, or

(d) a committee of a house or houses of a parliament or legislature of any country.

substantially true means true in substance or not materially different from the truth.

Territory means the Australian Capital Territory or the Northern Territory.

this jurisdiction means this [State/Territory]*.

Jurisdictional note. The appropriate reference for the jurisdiction is to be inserted by each jurisdiction.

5 Act to bind Crown

This Act binds the Crown in right of this jurisdiction and, in so far as the legislative power of the [Parliament/Legislature]* of this jurisdiction permits, the Crown in all its other capacities.

Jurisdictional note. Each jurisdiction is to enact a provision to ensure that the Crown in right of the jurisdiction and also in all its other capacities is bound by the model provisions.

Part 2 General principles

Division 1 Defamation and the general law

6 Tort of defamation

(1) This Act relates to the tort of defamation at general law.

(2) This Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication).

(3) Without limiting subsection (2), the general law as it is from time to time applies for the purposes of this Act as if the following legislation/or [*insert reference to existing defamation Act if only one Act*]* had never been enacted [or made]*:

(a) [*insert reference to existing defamation legislation if more than one Act*]*,

Jurisdictional note. As some jurisdictions have codified their defamation law in existing legislation, it may be prudent to "revive" the common law as indicated above. This approach was taken in New South Wales when its defamation code, the *Defamation Act 1958*, was repealed by section 4 of the *Defamation Act 1974*. Each jurisdiction should list in proposed subsection (2) any existing laws that are to be repealed by the new law.

7 Distinction between slander and libel abolished

(1) The distinction at general law between slander and libel is/remains* abolished.

Jurisdiction note. If the distinction has previously been abolished in a jurisdiction, the jurisdiction may choose to enact a provision that states that the distinction "remains" abolished.

(2) Accordingly, the publication of defamatory matter of any kind is actionable without proof of special damage.

Division 2 Causes of action for defamation

8 Single cause of action for multiple defamatory imputations in same matter

A person has a single cause of action for defamation in relation to the publication of defamatory matter about the person even if more than one defamatory imputation about the person is carried by the matter.

9 Certain corporations do not have cause of action for defamation

(1) A corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication.

(2) A corporation is an excluded corporation if:

(a) the objects for which it is formed do not include obtaining financial gain for its members or corporators, or

(b) it employs fewer than 10 persons and is not related to another corporation,

and the corporation is not a public body.

(3) In counting employees for the purposes of subsection (2) (b), part-time employees are to be taken into account as an appropriate fraction of a full-time equivalent.

(4) In determining whether a corporation is related to another corporation for the purposes of subsection (2) (b), section 50 of the *Corporations Act 2001* of the Commonwealth applies as if references to bodies corporate in that section were references to corporations within the meaning of this section.

(5) Subsection (1) does not affect any cause of action for defamation that an individual associated with a corporation has in relation to the publication of defamatory matter about the individual even if the publication of the same matter also defames the corporation.

(6) In this section:

corporation includes any body corporate or corporation constituted by or under a law of any country (including by exercise of a prerogative right), whether or not a public body.

public body means a local government body or other governmental or public authority constituted by or under a law of any country.

10 No cause of action for defamation of, or against, deceased persons

A person (including a personal representative of a deceased person) cannot assert, continue or enforce a cause of action for defamation in relation to:

(a) the publication of defamatory matter about a deceased person (whether published before or after his or her death), or

(b) the publication of defamatory matter by a person who has died since publishing the matter.

Division 3 Choice of law

11 Choice of law for defamation proceedings

(1) If a matter is published wholly within a particular Australian jurisdictional area, the substantive law that is applicable in that area must be applied in this jurisdiction to determine any cause of action for defamation based on the publication.

(2) If there is a multiple publication of matter in more than one Australian jurisdictional area, the substantive law applicable in the Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection must be applied in this jurisdiction to determine each cause of action for defamation based on the publication.

(3) In determining the Australian jurisdictional area with which the harm occasioned by a publication of matter has its closest connection, a court may take into account:

(a) the place at the time of publication where the plaintiff was ordinarily resident or, in the case of a corporation that may assert a cause of action for defamation, the place where the corporation had its principal place of business at that time, and

(b) the extent of publication in each relevant Australian jurisdictional area, and

(c) the extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area, and

(d) any other matter that the court considers relevant.

(4) For the purposes of this section, the ***substantive law*** applicable in an Australian jurisdictional area does not include any law prescribing rules for choice of law that differ from the rules prescribed by this section.

(5) In this section:

Australian jurisdictional area means:

(a) the geographical area of Australia that lies within the territorial limits of a particular State (including its coastal waters), but not including any territory, place or other area referred to in paragraph (c), or

(b) the geographical area of Australia that lies within the territorial limits of a particular Territory (including its coastal waters), but not including any territory, place or other area referred to in paragraph (c), or

(c) any territory, place or other geographical area of Australia over which the Commonwealth has legislative competence but over which no State or Territory has legislative competence.

geographical area of Australia includes:

(a) the territorial sea of Australia, and

(b) the external Territories of the Commonwealth.

Jurisdictional note. In the Interpretation Acts of a number of jurisdictions, "Australia" is defined to exclude the external Territories of the Commonwealth. It has been assumed for the purposes of the above definition that each jurisdiction defines the term "external Territory" in its Interpretation Act.

However, if this is not the case in a particular jurisdiction, the term "external territory" will need to be defined as well.

multiple publication means publication by a particular person of the same, or substantially the same, matter in substantially the same form to 2 or more persons.

Part 3 Resolution of civil disputes without litigation

Division 1 Offers to make amends

12 Application of Division

(1) This Division applies if a person (the ***publisher***) publishes matter (the ***matter in question***) that is, or may be, defamatory of another person (the ***aggrieved person***).

(2) The provisions of this Division may be used instead of the provisions of any rules of court or any other law in relation to payment into court or offers of compromise.

(3) Nothing in this Division prevents a publisher or aggrieved person from making or accepting a settlement offer in relation to the publication of the matter in question otherwise than in accordance with the provisions of this Division.

13 Publisher may make offer to make amends

(1) The publisher may make an offer to make amends to the aggrieved person.

(2) The offer may be:

(a) in relation to the matter in question generally, or

(b) limited to any particular defamatory imputations that the publisher accepts that the matter in question carries.

(3) If 2 or more persons published the matter in question, an offer to make amends by one or more of them does not affect the liability of the other or others.

(4) An offer to make amends is taken to have been made without prejudice, unless the offer provides otherwise.

14 When offer to make amends may be made

(1) An offer to make amends cannot be made if:

(a) 28 days have elapsed since the publisher was given a concerns notice by the aggrieved person, or

(b) a defence has been served in an action brought by the aggrieved person against the publisher in relation to the matter in question.

(2) A notice is a ***concerns notice*** for the purposes of this section if the notice:

(a) is in writing, and

(b) informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question (the ***imputations of concern***).

(3) If an aggrieved person gives the publisher a concerns notice, but fails to particularise the imputations of concern adequately, the publisher may give the aggrieved person a written notice (a ***further particulars notice***) requesting the aggrieved person to provide reasonable further particulars about the imputations of concern as specified in the further particulars notice.

(4) An aggrieved person to whom a further particulars notice is given must provide the reasonable further particulars specified in the notice within 14 days (or any further period agreed by the publisher and aggrieved person) after being given the notice.

(5) An aggrieved person who fails to provide the reasonable further particulars specified in a further particulars notice within the applicable period is taken not to have given the publisher a concerns notice for the purposes of this section.

15 Content of offer to make amends

(1) An offer to make amends:

(a) must be in writing, and

(b) must be readily identifiable as an offer to make amends under this Division, and

(c) if the offer is limited to any particular defamatory imputations—must state that the offer is so limited and particularise the imputations to which the offer is limited, and

(d) must include an offer to publish, or join in publishing, a reasonable correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited, and

(e) if material containing the matter has been given to someone else by the publisher or with the publisher's knowledge—must include an offer to take, or join in taking, reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person, and

(f) must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer, and

(g) may include any other kind of offer, or particulars of any other action taken by the publisher, to redress the harm sustained by the aggrieved person because of the matter in question, including (but not limited to):

(i) an offer to publish, or join in publishing, an apology in relation to the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited, or

(ii) an offer to pay compensation for any economic or non-economic loss of the aggrieved person, or

(iii) the particulars of any correction or apology made, or action taken, before the date of the offer.

(2) Without limiting subsection (1) (g) (ii), an offer to pay compensation may comprise or include any one or more of the following:

(a) an offer to pay a stated amount,

(b) an offer to pay an amount to be agreed between the publisher and the aggrieved person,

(c) an offer to pay an amount determined by an arbitrator appointed, or agreed on, by the publisher and the aggrieved person,

(d) an offer to pay an amount determined by a court.

(3) If an offer to make amends is accepted, a court may, on the application of the aggrieved person or publisher, determine:

(a) if the offer provides for a court to determine the amount of compensation payable under the offer—the amount of compensation to be paid under the offer, and

(b) any other question that arises about what must be done to carry out the terms of the offer.

(4) The powers conferred on a court by subsection (3) are exercisable:

(a) if the aggrieved person has brought proceedings against the publisher in any court for defamation in relation to the matter in question, by that court in those proceedings, and

(b) except as provided in paragraph (a), by the Supreme Court.

Jurisdictional note. This subsection may need refinement in those jurisdictions in which only one court has jurisdiction to determine defamation matters.

16 Withdrawal of offer to make amends

(1) An offer to make amends may be withdrawn before it is accepted by notice in writing given to the aggrieved person.

(2) A publisher who has withdrawn an offer to make amends may make a renewed offer.

(3) A renewed offer may (but need not) be in the same terms as the withdrawn offer.

(4) A renewed offer is to be treated as a new offer (including for the purposes of section 14).

(5) However, the time limit specified in section 14 for the making of offers to make amends does not prevent the making of a renewed offer that is not in the same terms as the withdrawn offer if:

(a) the renewed offer represents a genuine attempt by the publisher to address matters of concern raised by the aggrieved person about the withdrawn offer, and

(b) the renewed offer is made within 14 days after the withdrawal of the withdrawn offer or any other period agreed by the publisher and the aggrieved person.

17 Effect of acceptance of offer to make amends

(1) If the publisher carries out the terms of an offer to make amends (including payment of any compensation under the offer) that is accepted, the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher in relation to the matter in question even if the offer was limited to any particular defamatory imputations.

(2) A court may (but need not):

(a) order the publisher to pay the aggrieved person the expenses reasonably incurred by the aggrieved person as a result of accepting the offer, and

(b) order any costs incurred by the aggrieved person that form part of those expenses to be assessed on an indemnity basis.

(3) The powers conferred on a court by subsection (2) are exercisable:

(a) if the aggrieved person has brought proceedings against the publisher in any court for defamation in relation to the matter in question, by that court in those proceedings, and

(b) except as provided in paragraph (a), by the Supreme Court.

Jurisdictional note. This subsection may need refinement in those jurisdictions in which only one court has jurisdiction to determine defamation matters.

18 Effect of failure to accept reasonable offer to make amends

(1) If an offer to make amends is made in relation to the matter in question but is not accepted, it is a defence to an action for defamation against the publisher in relation to the matter if:

(a) the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory, and

(b) at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer, and

(c) in all the circumstances the offer was reasonable.

(2) In determining whether an offer to make amends is reasonable, a court:

(a) must have regard to any correction or apology published before any trial arising out of the matter in question, including the extent to which the correction or apology is brought to the attention of the audience of the matter in question taking into account:

(i) the prominence given to the correction or apology as published in comparison to the prominence given to the matter in question as published, and

(ii) the period that elapses between publication of the matter in question and publication of the correction or apology, and

(b) may have regard to:

(i) whether the aggrieved person refused to accept an offer that was limited to any particular defamatory imputations because the aggrieved person did not agree with the publisher about the imputations that the matter in question carried, and

(ii) any other matter that the court considers relevant.

19 Inadmissibility of evidence of certain statements and admissions

(1) Evidence of any statement or admission made in connection with the making or acceptance of an offer to make amends is not admissible as evidence in any legal proceedings (whether criminal or civil).

(2) Subsection (1) does not prevent the admission of evidence in any legal proceedings in order to determine:

(a) any issue arising under, or relating to the application of, a provision of this Division, or

(b) costs in defamation proceedings.

Division 2 Apologies

20 Effect of apology on liability for defamation

(1) An apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published by the person:

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and

(b) is not relevant to the determination of fault or liability in connection with that matter.

(2) Evidence of an apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

(3) Nothing in this section limits the operation of section 38.

Jurisdictional note. Each jurisdiction is to enact this provision in its version of the model provisions. It may be necessary for some jurisdictions to make consequential amendments to any provision along these lines that is currently in their law.

Part 4 Litigation of civil disputes

Division 1 General

21 Election for defamation proceedings to be tried by jury

(1) Unless the court orders otherwise, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury.

(2) An election must be:

(a) made at the time and in the manner prescribed by the rules of court for the court in which the proceedings are to be tried, and

(b) accompanied by the fee (if any) prescribed by the regulations for jury trials in that court.

(3) Without limiting subsection (1), a court may order that defamation proceedings are not to be tried by jury if:

(a) the trial requires a prolonged examination of records, or

(b) the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

Jurisdictional note. Each jurisdiction that wishes to have jury trials for defamation proceedings is to provide for a right of election in the above terms. Subsection (2) may need refinement in certain jurisdictions to fit in with the civil procedure legislation of the jurisdiction.

Jurisdictions that permit a magistrate's court to deal with defamation proceedings may need to make provision to ensure that juries are not required in proceedings before such courts.

22 Roles of judicial officers and juries in defamation proceedings

(1) This section applies to defamation proceedings that are tried by jury.

(2) The jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established.

(3) If the jury finds that the defendant has published defamatory matter about the plaintiff and that no defence has been established, the judicial officer and not the jury is to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.

(4) If the proceedings relate to more than one cause of action for defamation, the jury must give a single verdict in relation to all causes of action on which the plaintiff relies unless the judicial officer orders otherwise.

(5) Nothing in this section:

(a) affects any law or practice relating to special verdicts, or

(b) requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer.

Jurisdictional note. Each jurisdiction that provides for jury trials for defamation proceedings is to enact the above provision dealing with the role of juries.

23 Leave required for further proceedings in relation to publication of same defamatory matter

If a person has brought defamation proceedings for damages (whether in this jurisdiction or elsewhere) against any person in relation to the publication of any matter, the person cannot bring further defamation proceedings for damages against the same defendant in relation to the same or any other publication of the same or like matter, except with the leave of the court in which the further proceedings are to be brought.

Division 2 Defences

24 Scope of defences under general law and other law not limited

(1) A defence under this Division is additional to any other defence or exclusion of liability available to the defendant apart from this Act (including under the general law) and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability.

(2) If a defence under this Division to the publication of defamatory matter may be defeated by proof that the publication was actuated by malice, the general law applies in defamation proceedings in which the defence is raised to determine whether a particular publication of matter was actuated by malice.

25 Defence of justification

It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

26 Defence of contextual truth

It is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (***contextual imputations***) that are substantially true, and

(b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

27 Defence of absolute privilege

(1) It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.

(2) Without limiting subsection (1), matter is published on an occasion of absolute privilege if:

(a) the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to):

(i) the publication of a document by order, or under the authority, of the body, and

(ii) the publication of the debates and proceedings of the body by or under the authority of the body or any law, and

(iii) the publication of matter while giving evidence before the body, and

(iv) the publication of matter while presenting or submitting a document to the body, or

(b) the matter is published in the course of the proceedings of an Australian court or Australian tribunal, including (but not limited to):

(i) the publication of matter in any document filed or lodged with, or otherwise submitted to, the court or tribunal (including any originating process), and

(ii) the publication of matter while giving evidence before the court or tribunal, and

(iii) the publication of matter in any judgment, order or other determination of the court or tribunal, or

(c) the matter is published on an occasion that, if published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to this section, or

(d) the matter is published by a person or body in any circumstances specified in Schedule 1.

Jurisdictional note. Each jurisdiction is to specify in Schedule 1 any other publications within its jurisdiction that should have the benefit of absolute privilege, but which do not fall within the general terms of this section.

28 Defence for publication of public documents

(1) It is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in:

(a) a public document or a fair copy of a public document, or

(b) a fair summary of, or a fair extract from, a public document.

(2) For the purposes of subsection (1), if a report or other document under the law of a country would be a public document except for non-compliance with a provision of that law about:

(a) the formal requirements for the content or layout of the report or document, or

(b) the time within which the report or document is prepared, or presented, submitted, tabled or laid to or before a person or body,

the report or document is a public document despite that non-compliance.

(3) A defence established under subsection (1) is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.

(4) In this section, ***public document*** means:

(a) any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law, or

(b) any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings and including:

(i) any record of the court or tribunal relating to the judgment, order or determination or to its enforcement or satisfaction, and

(ii) any report of the court or tribunal about its judgment, order or determination and the reasons for its judgment, order or determination, or

(c) any report or other document that under the law of any country:

(i) is authorised to be published, or

(ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body, or

(d) any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public, or

(e) any record or other document open to inspection by the public that is kept:

(i) by an Australian jurisdiction, or

(ii) by a statutory authority of an Australian jurisdiction, or

(iii) by an Australian court, or

(iv) under legislation of an Australian jurisdiction, or

(f) any other document issued, kept or published by a person, body or organisation of another Australian jurisdiction that is treated in that jurisdiction as a public document under a provision of a law of the jurisdiction corresponding to this section, or

(g) any document of a kind specified in Schedule 2.

Jurisdictional note. Each jurisdiction is to specify in Schedule 2 any other document produced in its jurisdiction that should be treated as a public document, but which does not fall within the general terms of this section.

29 Defences of fair report of proceedings of public concern

(1) It is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern.

(2) It is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter was, or was contained in, an earlier published report of proceedings of public concern, and

(b) the matter was, or was contained in, a fair copy of, a fair summary of, or a fair extract from, the earlier published report, and

(c) the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair.

(3) A defence established under subsection (1) or (2) is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.

(4) In this section, ***proceedings of public concern*** means:

(a) any proceedings in public of a parliamentary body, or

(b) any proceedings in public of an international organisation of any countries or of the governments of any countries, or

(c) any proceedings in public of an international conference at which the governments of any countries are represented, or

(d) any proceedings in public of:

(i) the International Court of Justice, or any other judicial or arbitral tribunal, for the decision of any matter in dispute between nations, or

(ii) any other international judicial or arbitral tribunal, or

(e) any proceedings in public of a court or arbitral tribunal of any country, or

(f) any proceedings in public of an inquiry held under the law of any country or under the authority of the government of any country, or

(g) any proceedings in public of a local government body of any Australian jurisdiction, or

(h) proceedings of a learned society, or of a committee or governing body of the society, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about:

(i) a member or members of the society, or

(ii) a person subject by contract or otherwise by law to control by the society, or

(i) proceedings of a sport or recreation association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about:

(i) a member or members of the association, or

(ii) a person subject by contract or otherwise by law to control by the association, or

(j) proceedings of a trade association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about:

(i) a member or members of the association, or

(ii) a person subject by contract or otherwise by law to control by the association, or

(k) any proceedings of a public meeting (with or without restriction on the people attending) of shareholders of a public company under the *Corporations Act 2001* of the Commonwealth held anywhere in Australia, or

(l) any proceedings of a public meeting (with or without restriction on the people attending) held anywhere in Australia if the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for public office, or

(m) any proceedings of an ombudsman of any country if the proceedings relate to a report of the ombudsman, or

(n) any proceedings in public of a law reform body of any country, or

(o) any other proceedings conducted by, or proceedings of, a person, body or organisation of another Australian jurisdiction that are treated in that jurisdiction as proceedings of public concern under

a provision of a law of the jurisdiction corresponding to this section, or

(p) any proceedings of a kind specified in Schedule 3.

Jurisdictional note. Each jurisdiction is to specify in Schedule 3 any other proceedings within its jurisdiction that should be treated as proceedings of public concern, but which do not fall within the general terms of this section.

(5) In this section:

law reform body of a country means a body (however described and whether or not permanent or full-time) established by law to conduct inquiries into, and to make recommendations on, reforming the laws of that country.

learned society means a body, wherever formed:

(a) the objects of which include the advancement of any art, science or religion or the advancement of learning in any field, and

(b) authorised by its constitution:

(i) to exercise control over, or adjudicate on, matters connected with those objects, and

(ii) to make findings or decisions having effect, by law or custom, in any part of Australia.

ombudsman of a country means a person (however described and whether or not permanent or full-time) authorised by law to investigate complaints about the actions or other conduct of any public officials or public bodies of that country.

Jurisdictional note. Some jurisdictions may wish to also wish to include such bodies in Schedule 1 in order to confer absolute privilege on their proceedings as well.

relevant objects of a learned society, sport or recreation association or trade association means:

(a) in relation to a learned society—objects of the kind referred to in paragraph (a) of the definition of ***learned society*** in this subsection, or

(b) in relation to a sport or recreation association—objects of the kind referred to in paragraph (a) of the definition of ***sport or recreation association*** in this subsection, or

(c) in relation to a trade association—objects of the kind referred to in paragraph (a) of the definition of ***trade association*** in this subsection.

sport or recreation association means a body, wherever formed:

(a) the objects of which include the promotion of any game, sport, or pastime to the playing of which or exercise of which the public is admitted as spectators or otherwise and the promotion or

protection of the interests of people connected with the game, sport, or pastime, and

(b) authorised by its constitution:

(i) to exercise control over, or adjudicate on, matters connected with the game, sport, or pastime, and

(ii) to make findings or decisions having effect, by law or custom, in any part of Australia.

trade association means a body, wherever formed:

(a) the objects of which include the promotion of any calling, that is to say, a trade, business, industry or profession and the promotion or protection of the interests of people engaged in any calling, and

(b) authorised by its constitution:

(i) to exercise control over, or adjudicate on, matters connected with a calling or the conduct of people engaged in the calling, and

(ii) to make findings or decisions having effect, by law or custom, in any part of Australia.

30 Defence of qualified privilege for provision of certain information

(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the ***recipient***) if the defendant proves that:

(a) the recipient has an interest or apparent interest in having information on some subject, and

(b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and

(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

(2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.

(3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:

(a) the extent to which the matter published is of public interest, and

(b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and

(c) the seriousness of any defamatory imputation carried by the matter published, and

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and

(f) the nature of the business environment in which the defendant operates, and

(g) the sources of the information in the matter published and the integrity of those sources, and

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

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

(j) any other circumstances that the court considers relevant.

(4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.

(5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

31 Defences of honest opinion

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

(a) the matter was an expression of opinion of the defendant rather than a statement of fact, and

(b) the opinion related to a matter of public interest, and

(c) the opinion is based on proper material.

(2) It is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter was an expression of opinion of an employee or agent of the defendant rather than a statement of fact, and

(b) the opinion related to a matter of public interest, and

(c) the opinion is based on proper material.

(3) It is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter was an expression of opinion of a person (the ***commentator***), other than the defendant or an employee or agent of the defendant, rather than a statement of fact, and

(b) the opinion related to a matter of public interest, and

(c) the opinion is based on proper material.

(4) A defence established under this section is defeated if, and only if, the plaintiff proves that:

(a) in the case of a defence under subsection (1)—the opinion was not honestly held by the defendant at the time the defamatory matter was published, or

(b) in the case of a defence under subsection (2)—the defendant did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published, or

(c) in the case of a defence under subsection (3)—the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time the defamatory matter was published.

(5) For the purposes of this section, an opinion is based on ***proper material*** if it is based on material that:

(a) is substantially true, or

(b) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law), or

(c) was published on an occasion that attracted the protection of a defence under this section or section 28 or 29.

(6) An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material if the opinion might reasonably be based on such of the material as is proper material.

32 Defence of innocent dissemination

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

(a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and

(b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and

(c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

(2) For the purposes of subsection (1), a person is a ***subordinate distributor*** of defamatory matter if the person:

(a) was not the first or primary distributor of the matter, and

(b) was not the author or originator of the matter, and

(c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.

(3) Without limiting subsection (2) (a), a person is not the first or primary distributor of matter merely because the person was involved in the publication of the matter in the capacity of:

(a) a bookseller, newsagent or news-vendor, or

(b) a librarian, or

(c) a wholesaler or retailer of the matter, or

(d) a provider of postal or similar services by means of which the matter is published, or

(e) a broadcaster of a live programme (whether on television, radio or otherwise) containing the matter in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter, or

(f) a provider of services consisting of:

(i) the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded, or

(ii) the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form, or

(g) an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control, or

(h) a person who, on the instructions or at the direction of another person, prints or produces, reprints or reproduces or distributes the matter for or on behalf of that other person.

33 Defence of triviality

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.

Division 3 Remedies

34 Damages to bear rational relationship to harm

In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

35 Damages for non-economic loss limited

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

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

(3) The Minister is, on or before 1 July 2006 and on or before 1 July in each succeeding year, to declare, by order published in the Gazette, the amount that is to apply, as from the date specified in the order, for the purposes of subsection (1).

Jurisdictional note. A date of 1 July 2006 has been selected to provide an ample lead-in time for each jurisdiction to enact the model provisions. The above subsection will need to be modified for those jurisdictions, such as the Australian Capital Territory, who no longer publish a Gazette.

(4) The amount declared is to be the amount applicable under subsection (1) (or that amount as last adjusted under this section) adjusted by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in Australia over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.

(5) An amount declared for the time being under this section applies to the exclusion of the amount of $250,000 or an amount previously adjusted under this section.

(6) If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (4), the amount declared is to be determined in accordance with the regulations.

(7) In adjusting an amount to be declared for the purposes of subsection (1), the amount determined in accordance with subsection (4) is to be rounded to the nearest $500.

(8) A declaration made or published in the Gazette after 1 July in a year and specifying a date that is before the date it is made or published as the date from which the amount declared by the order is to apply has effect as from that specified date.

36 State of mind of defendant generally not relevant to awarding damages

In awarding damages for defamation, the court is to disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff.

37 Exemplary or punitive damages cannot be awarded

A plaintiff cannot be awarded exemplary or punitive damages for defamation.

38 Factors in mitigation of damages

(1) Evidence is admissible on behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that:

(a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter, or

(b) the defendant has published a correction of the defamatory matter, or

(c) the plaintiff has already recovered damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter, or

(d) the plaintiff has brought proceedings for damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter, or

(e) the plaintiff has received or agreed to receive compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter.

(2) Nothing in subsection (1) operates to limit the matters that can be taken into account by a court in mitigation of damages.

39 Damages for multiple causes of action may be assessed as single sum

If the court in defamation proceedings finds for the plaintiff as to more than one cause of action, the judicial officer may assess damages in a single sum.

Division 4 Costs

40 Costs in defamation proceedings

(1) In awarding costs in defamation proceedings, the court may have regard to:

(a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings), and

(b) any other matters that the court considers relevant.

(2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise):

(a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff, or

(b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

(3) In this section:

settlement offer means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made.

Part 5 Miscellaneous

Jurisdictional note. Each jurisdiction may insert such local procedural provisions as it requires in this Part. For instance, provision might be made in this Part for matters such as regulation-making and rule-making powers.

41 Proof of publication

(1) If a document appears to be printed or otherwise produced by means adapted for the production of numerous copies and there is in the document a statement to the effect that the document is printed, produced, published or distributed by or for a particular person, the statement is evidence in defamation proceedings that the document was so printed, produced, published or distributed.

(2) Evidence that a number or part of a document appearing to be a periodical is printed, produced, published or distributed by or for a particular person is evidence in defamation proceedings that a document appearing to be another number or part of the periodical was so printed, produced, published or distributed.

(3) In this section:

periodical includes any newspaper, review, magazine or other printed document of which numbers or parts are published periodically.

42 Proof of convictions for offences

(1) If the question whether or not a person committed an offence is in question in defamation proceedings:

(a) proof that the person was convicted of the offence by an Australian court is conclusive evidence that the person committed the offence, and

(b) proof that the person was convicted of the offence by a court of any country (other than an Australian court) or a court martial of any country is evidence that the person committed the offence.

(2) For the purposes of this section, the contents of a document that is evidence of conviction of an offence, and the contents of an information, complaint, indictment, charge sheet or similar document on which a person is convicted of an offence, are admissible in evidence to identify the facts on which the conviction is based.

(3) Subsection (2) does not affect the admissibility of other evidence to identify the facts on which the conviction is based.

(4) In this section, ***conviction*** for an offence includes a finding of guilt but does not include:

(a) a conviction that has been set aside or quashed, or

(b) a conviction for an offence for which a person has received a pardon.

43 Incriminating answers, documents or things

(1) A person who is required to answer a question, or to discover or produce a document or thing, in defamation proceedings is not excused from answering the question or discovering or producing the document or thing on the ground that the answer to the question or the discovery or production of the document or thing might tend to incriminate the person of an offence of criminal defamation.

(2) However, any answer given to a question, or document or thing discovered or produced, by a natural person in compliance with the requirement is not admissible in evidence against the person in proceedings for criminal defamation.

Jurisdictional note. Each jurisdiction is to consider whether it is necessary to extend this provision so that it applies to the incrimination of a person's spouse if the law of the jurisdiction provides for a person's spouse to be exposed to criminal liability.

44 Giving of notices and other documents

(1) For the purposes of this Act, a notice or other document may be given to a person (or a notice or other document may be served on a person):

(a) in the case of a natural person—by:

(i) delivering it to the person personally, or

(ii) sending it by post to the address specified by the person for the giving or service of documents or, if no such address is specified, the residential or business address of the person last known to the person giving or serving the document, or

(iii) sending it by facsimile transmission to the facsimile number of the person, or

(b) in the case of a body corporate—by:

(i) leaving it with a person apparently of or above the age of 16 years at, or by sending it by post to, the head office, a registered office or a principal office of the body corporate or to an address specified by the body corporate for the giving or service of documents, or

(ii) sending it by facsimile transmission to the facsimile number of the body corporate.

(2) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on a person in any other manner.

Jurisdictional note. Some jurisdictions may need to include a provision along the lines of the above provision to facilitate the giving of concerns notices and further particulars notices under Part 3.

45 Regulations

Jurisdictional note. Each jurisdiction is to insert a provision enabling the making of regulations for the purposes of the new Act.

46 Rules of court

Jurisdictional note. Some jurisdictions may need to insert a provision enabling the making of rules of court for the purposes of the new Act.

47 Repeal of existing legislation

Jurisdictional note. Each jurisdiction is to insert a provision repealing its existing legislation relating to defamation.

48 Amendment of other Acts

Schedule 4 has effect.

Jurisdictional note. Each jurisdiction is to make provision for the amendment of existing legislation as a consequence of the enactment of the new legislation, including (in particular) provisions in relation to the limitation period for defamation.

49 Savings, transitional and other provisions

(1) This Act applies to the publication of defamatory matter after the commencement of this Act, unless subsection (2) provides otherwise.

(2) The provisions of this Act (other than this section) do not apply to a cause of action for the publication of defamatory matter that accrues after the commencement of this Act (the ***post-commencement action***) if:

(a) the post-commencement action is one of 2 or more causes of action in proceedings commenced by a plaintiff, and

(b) each cause of action in the proceedings accrues because of the publication of the same, or substantially the same, matter on separate occasions (whether by the same defendant or another defendant), and

(c) one or more of the other causes of action in the proceedings accrued before the commencement of this Act (a ***pre-commencement action***), and

(d) the post-commencement action accrued no later than 12 months after the date on which the earliest pre-commencement action in the proceedings accrued.

(3) The existing law of defamation continues to apply to the following causes of action in the same way as it would have applied to those causes of action had this Act not been enacted:

(a) any cause of action that accrued before the commencement of this Act,

(b) any post-commencement action to which the other provisions of this Act do not apply because of subsection (2).

(4) In this section, the ***existing law of defamation*** means the law (including all relevant statutory provisions and principles and rules of the general law) that applied in this jurisdiction to the determination of civil liability for the publication of defamatory matter immediately before the commencement of this Act.

Jurisdictional note. Each jurisdiction is to enact this transitional provision, whether in the body of the model provisions or in a savings and transitional Schedule. Additional transitional provisions may be needed, for instance, provisions updating references to any repealed law.

Schedule 1 Additional publications to which absolute privilege applies

(Section 27 (2) (d))

Jurisdictional note. Each jurisdiction is to add publications by its authorities that should have the benefit of absolute privilege, but which are not caught by the terms of section 27. The following provision, drawn from NSW, is included as an example of how a provision to be included in this Schedule might be framed:

1 Law Reform Commission

Matter that is published:

(a) by the Law Reform Commission in a report published under section 13 (6) of the *Law Reform Commission Act 1967*, or

(b) in the course of the proceedings of, or in the course of an inquiry held by, the Law Reform Commission under that Act, or

(c) by the Law Reform Commission in connection with a reference to it under that Act.

Schedule 2 Additional kinds of public documents

(Section 28 (4) (g))

Jurisdictional note. Each jurisdiction is to add public documents issued within its territory that are not caught by the terms of section 28. The following provision, drawn from NSW, is included as an example of how a provision to be included in this Schedule might be framed:

1 Decisions of Aboriginal Land Councils Pecuniary Interest Tribunal

A document that consists of a decision (including reasons given for the decision) made by the Aboriginal Land Councils Pecuniary Interest Tribunal under the *Aboriginal Land Rights Act 1983*.

Schedule 3 Additional proceedings of public concern

(Section 29 (4) (p))

Jurisdictional note. Each jurisdiction is to add proceedings of public concern conducted within its territory that are not caught by the terms of section 29. The following provision, drawn from NSW, is included as an example of how a provision to be included in this Schedule might be framed:

1 Proceedings of Law Reform Commission

Proceedings in public of, or proceedings in public at an inquiry held by, the Law Reform Commission under the *Law Reform Commission Act 1967*.

Schedule 4 Amendment of other Acts

(Section 48)

4.1 Statute of limitations

Jurisdictional note. Provisions along the following lines should be inserted in the statute of limitations of each jurisdiction:

1 Proceedings generally to be commenced within 1 year

(1) An action on a cause of action for defamation is not maintainable if brought after the end of a limitation period of 1 year running from the date of the publication of the matter complained of.

(2) However, a court must, if 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 1 year from the date of the publication, extend the limitation period mentioned in subsection (1) to a period of up to 3 years running from the date of the publication.

2 Application of amendments

(1) Section 1 applies to the publication of defamatory matter after the commencement of that section, unless subsection (2) provides otherwise.

(2) The provisions of section 1 do not apply to a cause of action for the publication of defamatory matter that accrues after the commencement of that section (the ***post-commencement action***) if:

(a) the post-commencement action is one of 2 or more causes of action in proceedings commenced by a plaintiff, and

(b) each cause of action in the proceedings accrues because of the publication of the same, or substantially the same, matter on separate occasions (whether by the same defendant or another defendant), and

(c) one or more of the other causes of action in the proceedings accrued before the commencement of section 1 (a ***pre-commencement action***), and

(d) the post-commencement action accrued no later than 12 months after the date on which the earliest pre-commencement action in the proceedings accrued.

(3) The existing limitation law continues to apply to the following causes of action in the same way as it would have applied to those causes of action had section 1 not been enacted:

(a) any cause of action that accrued before the commencement of section 1,

(b) any post-commencement action to which section 1 does not apply because of subsection (2).

(4) In this section, the ***existing limitation law*** means the provisions of this Act that applied in relation to the limitation period for defamation actions immediately before the commencement of section 1.

4.2 Criminal defamation

Jurisdictional note. Provisions along the following lines may be inserted in the statute book of those jurisdictions who choose to re-enact their criminal defamation laws:

Part 1 Criminal defamation

1 Common law misdemeanour of criminal libel abolished

The common law misdemeanour of criminal libel is/remains* abolished.

Jurisdiction note. If the common law offence has previously been abolished in a jurisdiction, the jurisdiction may choose to enact a provision that states that the offence "remains" abolished.

2 Offence of criminal defamation

(1) A person must not, without lawful excuse, publish matter defamatory of another living person (the ***victim***):

(a) knowing the matter to be false, and

(b) with intent to cause serious harm to the victim or any other person or being reckless as to whether such harm is caused.

Maximum penalty:

Jurisdictional note. Each jurisdiction is to specify a maximum penalty for the offence.

(2) A defendant in proceedings for an offence under this section has a lawful excuse for the publication of defamatory matter about the victim if, and only if, the defendant would, having regard only to the circumstances happening before or at the time of the publication, have had a defence for the publication if the victim

had brought civil proceedings for defamation against the defendant.

(3) The prosecution bears the onus of negativing the existence of a lawful excuse if, and only if, evidence directed to establishing the excuse is first adduced by or on behalf of the defendant.

(4) On a trial before a jury for an offence under this section:

(a) the question of whether the matter complained of is capable of bearing a defamatory meaning is a question for determination by the judicial officer presiding, and

(b) the question of whether the matter complained of does bear a defamatory meaning is a question for the jury, and

(c) the jury may give a general verdict of guilty or not guilty on the issues as a whole.

Jurisdictional note. Some jurisdictions may need to either omit or modify this provision if the offence may only be tried summarily in the jurisdiction. Also, some jurisdictions may need to say expressly whether the offence is triable summarily or on indictment.

(5) Proceedings in a court for an offence under this section cannot be instituted without the written consent of the [Director of Public Prosecutions/Attorney General]*.

Jurisdictional note. The Attorney General should be substituted for those jurisdictions that do not have a Director of Public Prosecutions.

(6) In those proceedings, a consent purporting to have been signed by the [Director of Public Prosecutions/Attorney General]* is, without proof of the signature, evidence of that consent.

(7) In this section, ***publish*** and ***defamatory*** have the meanings that they have in the law of tort (as modified by the *Defamation Act 2005*) relating to defamation.

3 Proceedings for an offence do not bar civil proceedings

The commencement of criminal proceedings for an offence under section 2 (1) does not prevent:

(a) the commencement of civil proceedings for defamation against the defendant in the criminal proceedings, or

(b) the determination of the civil proceedings pending the determination of the criminal proceedings.