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The NSW Government Discussion Paper on Defamation Law Reform

Judge Judith Gibson[1]

A cyber-age reboot of defamation law

On 26 February 2019, the Attorney-General for New South Wales, the Hon Mark Speakman SC, called on interested participants to "have your say on defamation law"[2] in relation to a series of defamation law proposals set out in the NSW Department of Justice Discussion Paper entitled *Review of Model Defamation Provisions* ('Discussion Paper')[3] issued that same day.

This Discussion Paper is the latest step in a series of steps taken by the New South Wales Government to give defamation legislation a "cyber-age reboot"[4] to bring it up to date with the modern technology.

The Discussion Paper - an overview

The Discussion Paper identifies 17 major areas for inquiry:

- the policy behind the legislation (Question 1);
- the entitlement of corporations currently not permitted to bring defamation actions to have their right to sue restored (Question 2);
- the single publication rule (Question 3);
- offers to make amends (Questions 4–6);
- the role of the jury and the use of juries in the Federal Court (Questions 7 and 8);
- defences: contextual truth, fair report, honest opinion (Questions 9–13);
- serious harm and triviality (Question 14);
- innocent dissemination (Question 15); and
- damages (Questions 16–17).

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1 Judge, District Court of New South Wales, 2001–present. Some of the issues discussed in this paper are referred to in 'Defamation in Australia: Rearranging the Deckchairs', published in the *Gazette of Law and Journalism* (4 March 2019) and in *Inforrm* (7 March 2019) <https://inforrm.org/2019/03/07/defamation-reform-in-australia-rearranging-the-deckchairs-judith-gibson/>. Thanks to Olivia Ronan and to my associate Mr Vincent Mok for editorial assistance.

2 Mark Speakman, 'Have your say on national defamation law' (Media Release, 26 February 2019) <https://www.justice.nsw.gov.au/Documents/Media%20Releases/2019/have-your-say-on-national-defamation-law.pdf>.

3 Council of Attorneys-General, 'Review of Model Defamation Provisions' (Discussion Paper, New South Wales Department of Justice, February 2019) <https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf> ('Discussion Paper'). Details of the entitlement to comment on the Discussion Paper by 30 April 2019 are set out at 'Review of Model Defamation Provisions', *Justice NSW* (Web Page) <https://www.justice.nsw.gov.au/defamationreview>.

4 Mark Speakman, 'Review recommends defamation cyber-age reboot' (Media Release, 7 June 2018) <https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/review-recommends-defamation-cyber-age-reboot.aspx>.

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Editors' Note

Welcome to 2019! If the first few months are anything to go by, it's going to be a big year ahead!

This edition is a special digital platforms edition, following the release by the **ACCC** of the Preliminary Report of the **Digital Platforms Inquiry** at the end of last year. While recognising the significant benefits to consumers and businesses that digital platforms have introduced, the ACCC also identified concerns with the ability and incentive of key digital platforms – for the most part, **Google** and **Facebook** – to favour their own business interests, through their market power and presence across multiple markets. There were concerns regarding the digital platforms' impact on the ability of **content creators** to monetise their content, and the lack of transparency in digital platforms' operations for **advertisers**, **media businesses** and **consumers**. The ACCC also expressed its concerns about consumers' awareness and understanding of the extensive amount of information about them collected by digital platforms, and their concerns regarding the **privacy** of their data. Further the ACCC looked into the role of digital platforms in determining what **news** and information is accessed by Australians, how this information is provided, and its range and reliability.

Following the release of the Preliminary Report, there will be further consultation and discussion, prior to the release of the final report due 30 June 2019. Obviously none of it will be more intelligent, enlightening and authoritative than what follows in these pages. We have the team at Bird & Bird – **Sophie Dawson**, **Joel Parsons** and **Eleanor Grounds** – comment on the Preliminary Report's recommendation in respect of copyright. **Adam Zwi**, former CAMLA Young Lawyer superstar, gives us his thoughts on the proposed algorithm regulator. **Jess Milner** from Minters tackles the Preliminary Report's comments on fake news. **Eva Lu** from Thomson Geer summarises the privacy and data related recommendations from Preliminary Report. And newly appointed CLB co-editor **Ashleigh Fehrenbach** interviews **Rachel Launders**, General Counsel and Company Secretary at **Nine**, about working at a major Australian news organisation and the effect of Preliminary Report on that organisation.

Congratulations go out from the CAMLA community to Joel Parsons and Eva Lu for their respective nominations in the TMT field for Lawyers Weekly's **30 Under 30**. (See what happens, kids, when you regularly contribute articles to CLB.)

Of course, the ACCC's Digital Platforms Inquiry is not the only major inquiry being undertaken in this area relevant to digital platforms. The NSW Department of Justice Discussion Paper, titled **Review of Model Defamation Provisions** was issued at the end of February this year. CAMLA held an event at **JWS** (report within) on the topic, and **Judge Judith Gibson** gives you her thoughts in this edition about the issues that should be considered in the next round of reforms.

CAMLA held another event, at **HWL Ebsworth**, on the subject of integrity in sports, focusing on sports organisations, players, and advertisers (report within). And, on the subject of sports, CAMLA Young Lawyer, **Calli Tsipidis**, profiles **Les Wigan**, COO at **Kayo Sports** following the launch of that multi-sports streaming service at the end of 2018.

It's an action-packed edition, and we hope you enjoy it as much as we have!

Ashleigh and Eli

The tension between defamation law reform and the impact of online technology is clearly the principal issue of concern in relation to all of these issues, and in particular to questions 1, 3, 14 and 15. The *Defamation Act 2013* (UK) is referred to by the Discussion Paper's authors as a useful guide to reform, particularly in relation to proposed reforms such as the single publication rule, qualified privilege issues and the serious harm test.

In broad terms, the proposed reforms in these 17 areas can be summarised as follows:

- The objectives of the policy aims of the legislation remain appropriate, with some minor exceptions, but would benefit from some amendment to clarify the application of terms, reduce ambiguity and better articulate how the legal principles apply.[5]
- The narrowing of the rights of corporation to sue is an important reform which should be preserved.[6]
- The difficulties caused by online technology to the legislation generally should be answered; these answers include consideration of the introduction of a single publication rule and a serious harm test.[7] In particular, the impact of online technology on traditional publication methods means that the defence of innocent dissemination and safe harbour provisions require careful review.[8]
- Early resolution of claims should be encouraged by review of the procedure for offers to make amends.[9]
- Amendments should be made to certain of the main defences, and in particular to the defence of contextual truth (to overcome unwelcome judicial determinations such as *Besser v Kermode*[10]), the "reasonableness test" in s 30 and honest opinion. There should be consideration of limited extensions to absolute privilege for statements made at press conferences and publications in peer-reviewed journals. In addition, the future of the defence of triviality requires consideration.[11]
- As to procedural issues, consideration should be given to appropriate jury case management issues and to consistency of jury provisions for trials conducted in the Federal Court.[12]
- The provisions concerning the role of the cap on damages and its interaction with aggravated damages should be reviewed.[13]

As well as the 17 areas for discussion identified in the Discussion Paper, the final question, question 18, invites consideration of topics not dealt with in earlier questions.

The background to the Discussion Paper

It should first be acknowledged that the problems facing the Discussion Paper's authors in identifying the areas for reform were considerable.

When the uniform defamation legislation[14] was enacted in 2005, a key feature was the five-year review process provided for in s 49[15] of the New South Wales statute. Although due by 26 October 2011, the date the five years expired, the s 49 review report remained uncompleted for over six years.

It is easy to be critical of a delay of this extent, but the long-standing problems of effecting defamation law reform are as well-known as they are widely discussed.[16]

The NSW Attorney-General Mark Speakman SC announced on 31 March 2018 that the next stage of the defamation law reform process would be a consultative process:

> "The timetable is designed to allow the reform process to be as expeditious as possible, while providing opportunity for extensive engagement by

5 Discussion Paper (n 3) 1.14.

6 Ibid 2.9.

7 Ibid 2.10–2.16, 5.46–5.48.

8 Ibid 5.51–5.64.

9 Ibid 3.2–3.21.

10 (2011) 282 ALR 314.

11 Discussion Paper (n 3) 5.1–5.46.

12 Ibid 4.1–4.9, 4.10–4.14.

13 Ibid.

14 *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); Defamation Act 2005 (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA); *Civil Law (Wrongs) Amendment Act 2006* (ACT) (amending the *Civil Law (Wrongs) Act 2002* (ACT)); *Defamation Act 2006* (NT) (collectively referred to as 'the uniform legislation').

15 Section 49 provides:

> **49 Review of Act**
> (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
> (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
> (3) **A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.** [Emphasis added]

16 Academic commentary identifying these problems has been extensive. As to problems arising from State/Federal demarcation issues, see David Rolph, *Defamation Law* (Thomson Reuters, 1st ed, 2015) [1.40] and David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16 *Torts Law Journal* 207. As to protection of freedom of speech, see 'Australian Press Council calls for urgent reform of defamation laws', *RN Breakfast* (ABC Radio National, 2 July 2015) <http://www.abc.net.au/radionational/programs/breakfast/australian-press-council-calls-for-urgent-reform-of/6589058'>. As to defects in the drafting of the defences, see Andrew Kenyon, 'Six years of Australian defamation Law' (2012) 31 *UNSW Law Journal* 31. As to the absence of adequate provisions for online technology, see Daniel Joyce, 'Searching for defamation law reform', *Australian Human Rights Centre* (Web Page, 17 August 2017) <http://archive.ahrcentre.org/news/2017/08/22/931>.

community and stakeholder groups to help determine how our new defamation law should function," Mr Speakman said in a statement.

He said the two rounds of public consultation, including stakeholder roundtables, would "allow considered contributions on nationally consistent defamation law".

Reforming the laws would be "complex and demanding" but the timetable provided a framework "to deliver reforms to ensure the right balance between protecting reputations and freedom of speech", Mr Speakman said."[17]

In accordance with that timetable, the New South Wales Government's *Statutory Review: Defamation Act 2005* provided for by s 49 ('the Review')[18] was published on 7 June 2018. It acknowledged that no fresh submissions had been sought since 2011 and that the impact of online publication social media[19] as well as legislative reform in the United Kingdom had resulted in a very different law reform landscape.

Between June and December 2018, discussion in the media and some journal reports[20] considered issues raised in the Review pending the next stage in the process, namely the release of the Discussion Paper on 26 February 2019.[21] Submissions are invited, with a deadline of 30 April 2018.

The 17 areas of defamation law reform selected by the authors of the Discussion Paper all raise interesting and important issues. However, the most interesting of the 18 questions is question 18 itself, namely:

> Are there any other areas of defamation law that should be considered?

This is the question which this seminar paper attempts to answer.

Ten new topics in answer to Question 18

In answer to the Discussion Paper's call for other issues in defamation law that should be considered, I have set out ten potential problem areas for legislators which are not the subject of consideration in the Discussion Paper.

Some of these proposals, such as another s 49 review clause and the inclusion of injurious falsehood provisions in the legislation, may seem obvious, but nevertheless these have not been put forward to date and are worth noting. Other proposals, such as limiting the jurisdiction of certain courts and proposing remedies other than damages, may be more controversial.

1. Another section 49 review provision

The first issue which requires consideration is the inclusion of a fresh provision for statutory review in future legislation. This is necessary for three reasons.

The first of these is the unsatisfactory history of defamation legislative reform in Australia[22] and the six and a half year delay in publication of the s 49 Review, both of which have exacerbated already complex issues of defamation law reform. To give one example, the authors of the Discussion Paper are to be commended for their frank acknowledgement[23] that the contextual justification defence in s 26 had been "intended to mirror former section 16" and that "the current wording of clause 26 appears to have clear unintended consequences". However, this had been a known problem since it was drawn to the Attorney-General's attention by Simpson J in 2010.[24]

This brings me to the second reason, namely that this kind of delay in rectifying a legislative drafting problem should be guarded against in future, particularly given the unwieldiness of the legislative reform process, which requires the meetings of the Attorneys-General for the states and territories of Australia (and, if the Federal Court of Australia is to claim an entitlement to jurisdiction, any involvement of the Commonwealth Government, which will hopefully also be clarified).

The third reason is that the pace of technology grows ever faster.

All of these factors point to the desirability of a review clause in the revised uniform legislation for another five years – and perhaps even on a regular five-year basis.

17 Michaela Whitbourn, 'Ambitious 18-month timetable for defamation law reform', *Sydney Morning Herald* (online, 31 January 2019) <https://www.smh.com.au/national/nsw/ambitious-18-month-timetable-unveiled-for-defamation-law-reform-20190130-p50ukf.html>.

18 New South Wales Department of Justice, *Statutory Review: Defamation Act 2005* (2018) <http://www.justice.nsw.gov.au/justicepolicy/Documents/defamation-act-statutory-review-report.pdf> ('the Review'). The Review was released by the Hon Mark Speakman SC, Attorney-General for New South Wales, on 7 June 2018. The due date of 26 October 2011 arises because Defamation Act 2005 (NSW) provided for the five-year Review to be tabled within one year of the date of assent (that is, 26 October 2005).

19 For statistics on social media, see 'Number of social media users worldwide 2010-17 with forecasts to 2021', *European Commission* (Web Page, 2018) <https://ec.europa.eu/knowledge4policy/visualisation/number-social-media-users-worldwide-2010-17-forecasts-2021_en>; for a discussion on the rise of the number of defamation actions based on social media posts, see Stephen Smiley and Angela Lavoipierre, 'Why dozens of Australians are suing over emails and posts on Facebook or Twitter', *ABC News* (online, 7 November 2018) <https://www.abc.net.au/news/2018-11-07/social-media-defamation-cases-costly-and-time-consuming/10470924>.

20 Media publications included David Rolph, 'Australia's defamation laws are ripe for overhaul', *Sydney Morning Herald* (online, 9 December 2018) <https://www.smh.com.au/national/australia-s-defamation-laws-are-ripe-for-overhaul-20181207-p50kwk.html> and Matt Collins QC, 'Let's end the defamation law horror story', *The Australian* (online, 29 October 2018) (subscription required). Articles published in journals include Michael Douglas, 'Defamatory Capacity in the Digital Age' (2018) 26 *Tort Law Review* 3; J C Gibson, 'Adapting defamation law reform to online publication' (2018) 22 *Media Arts Law Review* 1.

21 Discussion Paper (n 3).

22 This reform process has been described as one of 'piecemeal reform and comparative neglect': Rolph, *Defamation Law* (n 16) [1.40].

23 Discussion Paper (n 3) 5.6, 5.8.

24 *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 85.

2. Jurisdiction issues

The Discussion Paper acknowledges that many defamation cases are now being conducted in the Federal Court and that applications for juries have been refused on procedural grounds.[25] The Federal Court is not a party to the Intergovernmental Agreement. This has led to complaints of forum-shopping, as the Discussion Paper acknowledges.[26] In practical terms, the Federal Court will continue to hear defamation actions and the issue seems to be whether that Court will do so in a manner consistent with other jurisdictions.

However, the question of the interaction between the uniform legislation and Federal Court procedural preferences is only the first of a series of jurisdictional problems in relation to jurisdiction for courts hearing defamation proceedings.

The increase in the number of defamation actions commenced in magistrates courts and administrative tribunals is evident from the judgments emanating from these courts. In many of these cases, litigants are self-represented, and the judgments often report many days of hearing. Where one or both parties are unrepresented, this places a heavy burden on the presiding judicial officer at first instance as well as on appeal, and the potential for injustice is increased.

Defamation proceedings are now brought in nearly every magistrates court and tribunal in Australia:

- **Magistrates courts:** While s 33 *Local Courts Act 2007* (NSW) has prevented the defamation proceedings being commenced in the magistrates courts in New South Wales, there is no cognate provision in other states and territories.[27] While it is unclear whether the apparent increase in defamation actions brought at the magistrate court level is the result of an increase in publication of decisions or for other reasons, the complexity of issues raised and the potential for error are readily apparent.[28] Appeals leading to fresh trials demonstrate these errors, and the fresh trials add to the cost to the litigants as well as to the burdens on the court hearing the appeals.[29]
- **Federal Magistrates Courts**: One of the unlooked-for consequences of the Federal Court's claim of jurisdiction for defamation actions has been that claims could arguably now be brought in the Federal Magistrates Courts. In *Merrett v Marinakos,*[30] the applicant brought a claim for damages on the basis that since 2014 the respondent "did breach my privacy and defame me", as well as sending "a criminally defaming letter". His Honour Judge J D Wilson QC robustly dismissed the defamation claim, in terms which deserve wider circulation than may otherwise be the case[31] However, the fact that such claims may be brought requires consideration of the basis upon which Federal Courts should exercise jurisdiction as well as the desirability of busy court[32] such as the Federal Magistrates Court being burdened with claims of this nature.
- **Administrative tribunals**: In *GP v Mackenzie & Ors (Appeal)*,[33] Presidential Member E Symons describes the "long history" of a defamation case arising from the placing of a table on public land which "has taken up an extraordinary amount of time in the tribunal due to the sheer volume of applications for interim or other orders since the filing of the application commencing this action" (at [3]). This is an unacceptable burden on tribunals designed to provide quick and effective relief in straightforward claims where members of the public are encouraged to act for themselves. These burdens do not stop at claims for defamation; these administrative tribunals have also had to deal with allegations of perjury,[34] requests

25 Discussion Paper (n 3) 4.10–4.14.

26 Ibid.

27 That has not, however, stopped litigants in person from attempting to commence proceedings in New South Wales at the Local Court level; Dr Ghosh commenced her proceedings in the Local Court at Newcastle: *Ghosh v Miller* [2013] NSWDC 194.

28 *Sangare v Northern Territory of Australia* [2018] NTCA 10 was commenced in the Supreme Court by a litigant in person. After the plaintiff's claim was dismissed, it was appealed to the Court of Appeal and the High Court of Australia then dismissed an application for special leave to appeal. Recent judgments in the magistrates courts in Victoria include *Yuanjun Holdings Pty Ltd v Min Luo* [2018] VMC 7 (damages of $3,500 were awarded). Recent decisions in the Queensland Magistrates Court include *Walden v Danieletto* [2018] QMC 10 and *Kelly v Levick* [2016] QMC 11. Recent decisions in the ACT Magistrates Court include the proceedings the subject of an application for transfer in *Small v Small* [2018] ACTSC 231.

29 As well as *Sangare v Northern Territory of Australia* [2018] NTCA 10, see *Berge v Thanarattanabodee* [2018] QDC 121, *Ferguson v South Australia* [2018] SASC 90, *Machado v Underwood (No 2)* [2016] SASCFC 123 (concerning the costs of an appeal from a magistrate) and *Crinis v Commissioner of Queensland Police Service* [2018] QCA 150, [13].

30 [2019] FCCA 541, [5].

31 His Honour stated at [17]–[18]:

> This court has accrued jurisdiction to deal with claims that are associated with claims validly within its jurisdiction. The High Court pronounced on the accrued jurisdiction of the Federal Court in largely similar terms in *Fencott v Muller* and in *Stack v Coastal Securities (No 9) Pty Ltd*. In this case, the Federal Circuit Court of Australia does not have power to determine defamation litigation. Whether or not a defamation claim is part of this court's accrued jurisdiction need not be considered as there is presently no valid claim falling for this court's consideration in this litigation. It follows that there is no valid claim on foot in this case to which anything can be appended or accrued, in particular a defamation proceeding as the applicant wished to agitate.
>
> This litigation is fundamentally flawed. It is wholly misconceived. It smacks of an abuse of the court process. It should be stopped in its tracks immediately. I hereby make such an order. I order the applicant to pay the respondents' costs." [citations omitted]

32 Michael Koziol, 'Overhaul of Family Court system seeks to reduce delays and clear backlogs', *Sydney Morning Herald* (online, 29 May 2018) <https://www.smh.com.au/politics/federal/overhaul-of-family-court-system-seeks-to-reduce-delays-and-clear-backlogs-20180529-p4zi4h.html>.

33 [2018] ACAT 96.

34 *Toogood v Cassowary Coast Regional Council* [2018] QCAT 319; *More atf Cleopatra Skin Discretionary Trust v Ford* [2018] QCAT 19.

for referral to the Director of Public Prosecutions[35] and/or complaints of bias by Tribunal members[36]. The degree to which such courts have jurisdiction at all is uncertain; administrative tribunals in Queensland, Victoria and New South Wales have refused to hear defamation claims.[37]

Amendments to the uniform legislation should exclude the hearing of defamation actions in these courts.

3. Regulation of injurious falsehood and other non-defamation reputation torts

The NSW Attorney-General has publicly announced[38] that the principal anti-abuse of process reform in the uniform legislation, namely the limitations on the rights of corporations to bring actions for defamation, will be retained. This was certainly the position taken by the Review,[39] which noted that:

> [C]orporations have other options to defend their corporate reputations, such as making complaints to the Press Council of Australia, and pursuing other types of legal actions, including under provisions in the Competition and Consumer Act 2010 (Cth) (CCA) and for the tort of injurious falsehood.

Prior to this reform, there was a longstanding debate as to whether corporations could claim aggravated damages as a corporation could not recover damages for increased hurt to feelings caused by the falsity of the claim.[40] The impetus for reform arose following assertions of corporate SLAPP suits[41] and attempts to silence whistleblowers and environmentalists.[42] However, it should be noted that some of the more successful actions of this kind were brought by company directors.[43]

There are four areas for consideration:

- injurious falsehood;
- use of other legislation, such as the so-called "anti-SLAPP" legislation such as the *Protection of Public Participation Act 2008* (ACT);
- the New Zealand defamation legislation's requirements for all corporations to demonstrate pecuniary loss; and
- the question of who is a "prescribed information provider" for claims for misleading and deceptive conduct in the course of trade or commerce.

Injurious falsehood

Should the proposed reforms to defamation law include statutory regulation of injurious falsehood and other actions for slander of title to goods? If amendments to defamation legislation such as the single publication rule make defamation actions less attractive, it is likely that claims for injurious falsehood may become more common.

The six-year limitation period, the absence of a single publication rule and the potential for exemplary damages make claims of this kind very attractive, and not only to corporations. At the very least, the limitation period for slander of title and injurious falsehood claims should be limited in the same way as is the case in the United Kingdom.[44] There are also provisions relating to malicious falsehood claims in the *Defamation Act 1992* (NZ) (described as "An Act to amend the law relating to defamation and other malicious falsehoods"[45]): see ss 5 and 48.

35 *Payne v APN News & Media* [2016] QCATA 140.

36 *Chen v Premier Motor Services Pty Ltd t/as Premier Illawarra* [2018] NSWCATAP 142.

37 An attempt to bring a claim for defamation was dismissed in *Singh v AusHomes Pty Ltd* [2018] QCAT 312, [4]. This was put by way of counter-claim to a claim for damages for defective building which failed on its merits. The same position was taken in *Liang v University of Technology at Sydney* [2018] NSWSC 1740. However, the Administrative Tribunal in the Australian Capital Territory considers that it has jurisdiction and recently awarded $400 damages for defamation: Bottrill v Bailey [2018] ACAT 45.

38 Mark Speakman, 'Corporations should not be allowed to sue for defamation, says Attorney-General', *Australian Financial Review* (online, 9 August 2018) <https://www.afr.com/business/legal/companies-should-not-be-allowed-to-sue-for-defamation-says-attorney-general-20180801-h13fvb>.

39 The Review (n 1) [2.5]. The Review goes on to note that obtaining an injunction may therefore be easier for a corporation as a result: [2.6].

40 *Royal Society for the Prevention of Cruelty to Animals (NSW) v 2KY Broadcasters Pty Ltd* (1988) A Def R 50,030; *Comalco Ltd v Australian Broadcasting Corporation* (1985) 64 ACTR 1; *Australian Medical Association (WA) Inc v McEvoy (No 2)* [2012] WASC 416. See also the discussion of this issue in Law Commission of Ontario, *Defamation in the Internet Age* (Consultation Paper Executive Summary, November 2017) <https://www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/consultation-paper/> V.C.

41 See the examples cited by Bruce Donald, 'Current state of SLAPP litigation in Australia' Walkley Foundation (Paper, Walkley Foundation for Journalism National Public Affairs Convention, Sydney,18–19 May 2009) <https://www.sourcewatch.org/images/2/28/SLAPP_law_fin.pdf> and Greg Ogle, 'Beating a SLAPP suit' (2007) 32 *Alternative Law Journal* 71. SourceWatch maintains a list of asserted SLAPP suits in Australia: 'SLAPPs in Australia', *SourceWatch* (Web Page) <https://www.sourcewatch.org/index.php/SLAPP's_in_Australia>.

42 Mark Parnell, 'The Hindmarsh Island Bridge Defamation Case', *Environmental Defenders' Office* (Web Page) <https://web.archive.org/web/20120410073855/http://www.ccsa.asn.au/HIB/latest/Hindmarsh_Isld_def_Parnell.htm>; Bruce Donald, 'Hindmarsh Island Defamation', *ABC Radio National* (14 December 2003) <https://www.abc.net.au/radionational/programs/archived/nationalinterest/hindmarsh-island-defamation/3375456#transcript>.

43 There were 14 "defamation fireball" claims (to use the term employed by the solicitor for the plaintiffs) brought against individuals and corporations in relation to the Hindmarsh Island Bridge: see Greg Ogle, 'Defamation Processes and the Hindmarsh Bridge Campaign' (2000) 4(26) *Indigenous Law Bulletin* 7. However, members of the Chapman family later received $850,000 damages for defamation, principally for allegations that they had brought SLAPP suits to silence opponents: *Chapman v Conservation Council (SA)* (2002) 82 SASR 44.

44 In the United Kingdom, the one- year period is extended also to slander of goods and other malicious falsehood claims: see *Limitation Act 1980* (UK) s 4A:

> **Time limit for actions for defamation or malicious falsehood.**
>
> The time limit under section 2 of this Act shall not apply to an action for—
>
> (a)libel or slander, or
>
> (b)slander of title, slander of goods or other malicious falsehood, but no such action shall be brought after the expiration of one year from the date on which the cause of action accrued.

45 *Defamation Act 1992* (UK) Long Title.

SLAPP legislation

It is sometimes claimed that politicians, themselves prone to bring defamation claims,[46] tend to favour corporate lobbyists over truthsaying whistleblowers and investigative journalists. There are defamation proceedings the length and complexity of which, as Bruce Donald[47] pointed out a decade ago, suggest the use of legal action to chill public interest debate (or 'SLAPP suits", namely 'strategic litigation against public participation').[48] The question is whether online technology has made this kind of litigation more likely to occur. If SLAPP suits are a significant issue in Australia, particularly if the rights for companies to sue are restored across the board, should there be special legislation to control litigation asserted to be of a SLAPP nature?

Only the Australian Capital Territory responded to calls for this kind of legislation, by introducing the *Protection of Public Participation Act 2008* (ACT). The Attorney-General for New South Wales at the time, Mr Bob Debus, rejected the legislation as unnecessary because of the reform of defamation law to exclude corporations from suit.[49] The then-Premier, Mr Bob Carr, considered that the restriction on corporations to sue was a sufficient protection for the following reasons:

> Well, big corporations have got enough power as it is in our society. The head of BHP, or an insurance company, can convene a press conference, buy a one page advertisement in The Financial Review. They've got enough clout in our society and the capacity of the media to report corporate shenanigans has got to be just about uninhibited.[50]

The only time this legislation has been invoked as a potential defence to a defamation action occurred in *Batemen v Idomeneo (No 123) Pty Ltd v Fairfax Media Publications Pty Ltd*.[51] Refshauge J noted that the legislation existed in the Australian Capital Territory but that there was no cognate legislation in New South Wales. Nevertheless, his Honour transferred the proceedings to New South Wales, some three years after the proceedings had been commenced in the Australian Capital Territory.

It is an interesting question of law as to whether this statute may be of assistance to defendants in the Federal Court, given the special basis upon which the Federal Court claims original jurisdiction derived from the Australian Capital Territory to hear defamation proceedings. Perhaps this legislation deserves wider recognition by practitioners, regardless of whether it is the subject of consideration by the authors of the discussion paper.

However, Bruce Donald[52] points to some significant defects in its provisions. First, the remedy is a civil penalty which requires government enforcement. Since no private right is expressed and the offence is not a crime, there may be an argument that a private person could not seek an injunction or lay an information against the SLAPP. Second, the main purpose must be against public participation; courts may readily accept a private litigant's argument that they are protecting legitimate rights.

A requirement to prove special damage?

Another potential area for reform in relation to corporations generally, whether they sue for defamation or injurious falsehood, could be a provision along the lines of s 6 of the *Defamation Act 1992* (NZ), which provides:

> **6. Proceedings for defamation brought by body corporate**
>
> Proceedings for defamation brought by a body corporate shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings -
>
> (a) has caused pecuniary loss; or
>
> (b) is likely to cause pecuniary loss to that body corporate.[53]

Whether a provision of this kind is appropriate would largely depend on whether the existing restrictions are preserved.

Prescribed information providers – preventing misuse of misleading and deceptive conduct and other alternatives to defamation

Another alternative to defamation is the commencement of a claim for misleading and deceptive conduct claim pursuant to s 18 of the *Australian Consumer Law* ('ACL'), contained in Sch 2 to the *Competition and Consumer Act 2010* (Cth) (formerly s 52 of the *Trade Practices Act 1974* (Cth)). Section 19 of the ACL (formerly s 65A of the *Trade Practices Act*) significantly limited its application to media organisations but its applicability to social media tweets, blogs or posts is less clear. In addition, the single publication rule would be restricted to claims for defamation.

Continued on page 9 >

46 For a list of politicians who brought defamation proceedings in 2018, see Emily Watkins, 'The politicians who sued for defamation in 2018', *Crikey* (online, 12 December 2018) <https://www.crikey.com.au/2018/12/12/australian-politicians-defamation-2018/>. For an earlier list, see 'Crikey list: politicians who have sued for defamation', *Crikey* (online, 28 January 2015) <https://www.crikey.com.au/2015/01/28/crikey-list-politicians-who-have-sued-media-outlets-for-defamation/>. For academic commentary, see Brendan Edgeworth and Michael Newcity, 'Politicians, Defamation Law and the "Public Figure" Defence' (1992) *10 Law in Context* 39 and Adrienne Stone and George Williams, 'Freedom of Speech and Defamation: Developments in the Common Law World' (2000) 26 *Monash University Law Review* 362.

47 Donald (n 40 and 41).

48 See the definition of 'SLAPP suit' and list of cases in 'Gunning for Change' Greg Ogle, *Gunning for Change: The Need for Public Participation Law Reform* (Wilderness Society, 2005) <http://users.senet.com.au/~gregogle/images/Gunning_for_Change_web.pdf>.

49 Donald (n 40); see also Thalia Anthony, 'Quantum of strategic litigation: quashing public participation' (2009) 14 *Australian Journal of Human Rights* 1.

50 Cited in Donald (n 40).

51 [2013] ACTSC 72.

52 Donald (n 40 and 41).

53 Note that the NSW Bar Association, in its 2011 submission, stated that other common law jurisdictions did not trammel the rights of corporations to sue, but did not refer to this provision: Bar Association of NSW, 'Attorney-General's Review of the *Defamation Act 2005* (NSW)' (Submission to Attorney-General) 1.10. https://www.nswbar.asn.au/circulars/2011/may/defamation.pdf.

CAMLA Integrity in Sports Seminar: Ensuring Fair Play for Our Sports, Our Players and Our Brands

Report by Calli Tsipidis, Junior Legal Counsel at FOX SPORTS Australia

On Thursday 21 March, CAMLA held its Integrity in Sports Seminar at the offices of HWL Ebsworth Lawyers. The event was proudly organised by the CAMLA Board and moderated by Rebecca Lindhout (HWL Ebsworth Lawyers and CAMLA Board Member 2019). The speakers for the Seminar included **Joe Collins** (General Manager Integrity & Senior Legal Counsel, NRL), **Simon Hill** (Football Commentator and Journalist, Fox Sports Australia) and **Melissa Hopkins** (Head of Consumer Marketing, Optus).

In the wake of numerous off-field incidents across sporting codes and the release of the Government's response to the Wood Review, the timely seminar provided attendees with unique insights into the interplay between commerciality, legality, brand and geopolitical influences – particularly, how these factors have shaped, and continue to shape, decision-making within sporting bodies and partner entities.

Joe, Simon and Melissa each brought a unique flavour to the Seminar, drawing on their personal and professional experiences, inciting a flurry of questions from attendees – making for a captivating panel/audience discussion. The seminar ultimately highlighted how the power of the public, media and leadership (both political and within sporting bodies) has a significant impact on how, and whether, standards of integrity in the professional sporting area are upheld and protected...or not.

The CAMLA Board would like to extend its thanks to the speakers for sharing their time, insights and expertise, and to HWL Ebsworth who hosted the event.

Defamation Seminar 28 March 2019

Report by Antonia Rosen, Banki Haddock Fiora

On 28 March 2019, CAMLA presented its defamation reform seminar, hosted by Johnson Winter & Slattery. The focus of the seminar was the February 2019 Review of Model Defamation Provisions Discussion Paper by the Attorneys-General Defamation Working Party. The paper sets out a series of questions which seek to address the continued validity of the policy objectives of the Model Defamation Provisions. The seminar was conducted under Chatham House Rules.

The seminar was lead by a panel of esteemed persons within the field, consisting of Gail Hambly, General Counsel of Fairfax for 20 years, her Honour Judge Judith Gibson of the District Court of New South Wales, Professor David Rolph of the Sydney University Law School, Larina Alick, editorial counsel at Nine, and Matthew Lewis, specialist defamation counsel at Five Wentworth Chambers. The moderator was Kevin Lynch, a partner at Johnson Winter & Slattery, who guided the panel with interesting questions interspersed with comic relief.

The seminar was well attended with many notable figures within the field present. The NSW Department of Justice was also represented and made some brief comments at the outset in respect of the timetable for public consultation and drafting. The current objective is that an agreement be achieved on the new national law by mid-2020. Further information is available on the Department of Justice website.

The panelists were given the opportunity to express their views in respect of the various areas of reform. In this respect, the discussion was largely guided by the 18 questions posed in the Discussion Paper, including the catchall in question 18. The usual suspects were addressed including, the ability of corporations to sue, the impotence of the current contextual truth and statutory qualified privilege provisions, as well as the prospect of a serious harm threshold and a single publication rule. It was suggested that the statutory cap on damages is sufficient and the recent headline cases such as *Wagner & Ors v Harbour Radio, Wilson v Bauer Media* and *Rayney v State of WA* were, on their facts, exceptions rather than the rule.

The catchall question gave rise to some interesting comments. It was noted that notwithstanding the uniform law, inconsistencies between the State jurisdictions remained, for example with respect to the Hore-Lacey defence (there may also have been a joke about dead people in Tasmania). Of course, the current trend of commencing cases in the Federal Court was addressed, including the inconsistencies between the Federal and State jurisdictions with respect to juries, the docket system and the case law. It was suggested that perhaps these issues may be dealt with by Federal legislation. It was also noted that the current legislation in respect of defamation is insufficient (and perhaps not the right vehicle) to address the manner in which the internet is increasingly being used by often unaccountable individuals to harass others.

The seminar provided some excellent insights into the kind of reforms that should be considered. The insights will no doubt be the subject of many submissions to the Working Party.

In conclusion, reforms in relation to defamation should consider the inclusion of actions for injurious falsehood and care should be taken to ensure that similar reputation-based claims based on online publications have similar protections such as the single publication rule.

4. Freedom of speech: *Durie v Gardiner, Lange v ABC*, the implied right of freedom of speech and other constitutional issues

The Discussion Paper contains no reference to *Lange v Australian Broadcasting Corporation,*[54] *Durie v Gardiner*[55] or to any consideration of statutory amendment to render the effectively useless[56] defence of the implied right of freedom of speech more effective.

It has long been recognized that "the comparative lack of legal protections for 'responsible' media stories published in the public interest"[57] must be remedied.

This is a significant oversight, particularly given the clear-sighted judgment of the New Zealand Court of Appeal in *Gardiner v Durie* leading to the description of a neutral reportage defence.

One of the impacts that online publication will have on defamation is that publication is not merely State-based, or even national, but international. Where a country does not have an adequate defence of reportage, that is a matter for concern not only on a national but an international basis.

5. Protection of the complaints process and tribunals by an overhaul of absolute privilege defences

The sole areas of consideration for the extension of protection[58] are peer-reviewed publications (an increasing rarity in today's blog-driven academic world) and press conferences (although even in the United Kingdom statements at a press conference are protected only by qualified privilege).

The entitlement to make a complaint or to draw wrongdoing to the attention of the relevant authorities is capable of misuse, but that does not mean that the complaints process should be unprotected. Examples of problem areas are as follows:

- There has been an extensive consideration in the United Kingdom about whether complaints to the police should benefit from absolute privilege. In an age of concern about public safety, this is an issue which should be considered in Australia.
- The inconsistent and unsatisfactory state of the law concerning complaints about professionals such as medical practitioners (see *Lucire v Parmegiani*[59]) warrants closer consideration.
- The limiting of absolute privilege to court proceedings is based on traditional concepts of courts with the result that publications made to employment tribunals and the like are unprotected.

The facts in *Lucire v Parmegiani* are an example of this problem. A medical practitioner raised the conduct of another medical practitioner with the relevant complaints body and was sued for defamation for the contents of his complaint. Largely because of apparent omissions in the legislation, the complaint was found to be protected by a defence of qualified privilege only. This meant that the question of defamation (as well as the associated claims of injurious falsehood and misleading and deceptive conduct) would have to go all the way to trial. That operates as a chilling effect not only on defamation, but on the complaints process.

There has long been a hodge-podge of statutory attempts at absolute or qualified protection in relation to a number of government and quasi-government complaints bodies[60]. This can be remedied by a "tidying up" process of identifying current legislation (or lack of legislation) where these have been identified in judgments where claims of absolute privilege have been raised.

6. Common law defences: *Hore-Lacy;* common law justification and comment; consent

Some common law defences are the subject of controversy; none of them is included in the legislation.

The Hore-Lacy defence

The inconsistency between New South Wales and Victorian appellate decisions[61] concerning the Hore-Lacy defence[62] has been exacerbated by the Federal Court's apparent unawareness of these views.[63] There is a need for uniformity in relation to the availability of this defence.

54 (1997) 189 CLR 520.

55 [2017] 3 NZLR 72.

56 The Hon Justice Peter Applegarth, 'Distorting the Law of Defamation' (2011) *University of Queensland Law Journal* 99.

57 Law Commission of Ontario (n 40) 4.

58 Discussion Paper (n 3) 5.9–5.16.

59 *Lucire v Parmegiani* [2012] NSWCA 86.

60 For a list of such provisions in legislation prior to 1990, see J C Gibson (ed), *Aspects of the Law of Defamation in New South Wales* (Law Society of NSW, 1990) 125–30. However, many potentially protected occasions are not the subject of express provisions. For example, publications made in the course of employment-related inquiries have long created difficulty; see the discussion of *Bahonko v Sterjov* [2007] FCA 1244 and 1556 at n 62 below and of *Cush v Dillon; Boland v Dillon* (2011) 243 CLR 298 under the heading "Consent" in section 6 of this discussion paper. A claim based on statements made by a witness to the Fair Work Commission was struck out on the basis of absolute privilege in Tull v Wolfe [2016] WASC 65; however, only a defence of qualified privilege was raised in *Gmitrovic v Commonwealth of Australia* [2016] NSWSC 418 for an investigation report in relation to the plaintiff's asserted misconduct at work.

61 *Bateman v Fairfax Media Publications Pty Ltd* (No 2) [2014] NSWSC 1380; *Fairfax Media Publications v Bateman* (2015) 90 NSWLR 79; *Setka v Abbott* [2014] VSCA 287.

62 *David Syme & Co v Hore-Lacy* [2000] 1 VR 667.

63 W*ing v Fairfax Media Publications Pty Ltd* [2018] FCA 1340.

Consent

Although rarely used, the defence of consent may be of assistance as an alternative to extensions of absolute privilege in relation to complaints to complaint review bodies such as the Press Council, employment tribunals[64] and mediators of disputes such as the Finance Industry Ombudsman,[65] as a kind of "eBay-style" method of requiring parties who have a dispute to use the dispute resolution body to resolve it, and not as a gold mine for documents to sue upon if the result is not to their liking.

The defence of consent would relate to the provision and use of the publications for the purposes of that dispute. Wider publication (for example, on social media) could still be actionable.

There are strong public policy reasons for protection of the complaints process:

First, even those tasked with investigating the complaint may be the subject of suit, as occurred in *Cush v Dillon; Boland v Dillon*,[66] where the only publication sued on was a statement by one of the investigators to the other.

Second, actions based on information provided to investigators may amount to a canvassing of the findings of the tribunal.

Third, parties to an investigation should be as entitled to speak just as frankly as parties to litigation.

Common law comment and justification defences

The rationale for these rarely pleaded defences remaining available seems tenuous. Should consideration be given to a "cover the field" provision?

7. Declarations and other alternatives to damages

One of the significant changes caused to the relationship of plaintiff and defendant by online publication is that everyone can be a publisher to a broad audience, as opposed to the pre-internet media where the cost of publication was a significant barrier to entry. In addition, judgments at first instance, rarely published in the era of authorized law reports, are now available online and around the world.

What is the point of a financially capped remedy for defamation where the real remedy is (as is often the case in claims for misleading and deceptive conduct claims) either the taking down of the publication in question and/or corrective advertising?

The potential for awards other than for financial compensation is not referred to in the Discussion Paper, although this would demonstrate a constructive use of the power of the internet to correct errors in a way that was not really possible in the age of print media.

The concept of alternative remedies to damages has a distinguished pedigree. For decades there has been extensive academic writing about the potential for use of a declaration of falsity or similar alternative to damages[67], culminating in recommendations in 1995 by the NSW Law Reform Commission[68] that such a remedy should be considered. That recommendation was perhaps fortuitous, in that there is no mention at all of the internet,[69] which had begun to encroach on world publishing in the years shortly beforehand.[70] More recently, Dr Matt Collins QC, the President of the Victorian Bar and the author of "Defamation Law and the Internet" (first published in 2001), has publicly raised these issues.[71]

The need for effective remedies for defamation needs to be seen in the larger context of online publication generally.

A postscript on damages: why should judges determine this issue?

It seems ironic that the task of awarding damages was taken away from juries given the concern expressed by the Discussion Paper at the judicial attitude taken to the cap and its interaction with aggravated damages.[72]

Where there is a judge-alone trial the same judge determines liability and damages. The rationale for withholding damages awards from juries arises from the concern that juries award excessive damages and would not be held back from doing

64 The defence of consent is widely used in the United States in relation to employment grievance bodies: see Raymond E Brown (ed), *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States)* (Thomson Reuters, 2nd ed, 1994) Ch 11. A good example of the utility of this defence may be seen in *Bahonko v Sterjov* [2007] FCA 1244 and [2007] FCA 1556, where the applicant was awarded $50 for a report prepared for a report produced at her insistence in the course of conciliation proceedings. The case went all the way to the High Court; special leave was refused in *Bahonko v Sterjov* [2007] HCA Trans 666. Another example is *Zaghloul v Woodside Energy Ltd* [2018] WASC 191, where the plaintiff sued his employer and other employees for the contents of statements they made to an investigator for the purpose of a workplace report. The extensive nature of the subsequent litigation is referred to in *Zaghloul v Woodside Energy Ltd* [2018] WASCA 191; special leave was refused in *Zaghloul v Woodside Energy Ltd* [2019] HCASL 30.

65 There is already a specific procedure in place for the Financial Industry Ombudsman (*see Imielska v Morgan* [2017] NSWDC 329) but many other complaints procedures remain unprotected.

66 (2011) 243 CLR 298.

67 See the list of articles set out in Gibson (ed) (n 60) 141–42. More recent examples over the past three decades include Michael Chesterman, 'The Money or the Truth: Defamation Law Reform in Australia and the USA' (1995) 18 *UNSW Law Journal* 300. For a discussion of the unavailability of such a remedy at common law, see 'Libel, Damages and the "Remedial Gap": a declaration of falsity?', *Inforrm*, 20 July 2013.

68 'NSW Law Reform Commission, *Defamation* (Report No 75, 1995) <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-75.pdf>

69 The Report does, however, refer in one place to the potential of computers in relation to secondary liability for publication, when it notes: 'The NSW Court of Appeal has recently been asked to consider whether developments in computer technology have converted printers into reproducers rather than compositors and thus assigning them a subordinate role which should entitle them to rely on the defence of innocent dissemination", citing *McPhersons Ltd v Hickie* (1995) Aust Torts Reports ¶81-348.

70 The date sometimes given for the birth of the internet is 1989, but a more realistic date is September 1994, when Sir Tim Berners-Lee founded the first World Wide Web consortium: see 'Facts About W3', *World Wide Web Consortium* (Web Page) < https://www.w3.org/Consortium/facts>,

71 See, eg, Matt Collins, 'Frankenstein's Monster: The State of Australian Defamation Law' (Speech, Melbourne Law School, October 2018) <http://static1.1.sqspcdn.com/static/f/556710/28029196/1542690476160/Collins_Frankenstein_Monster.pdf?token=vtISbcjRIxpxiq3iNDxLiWp6DAs>. The Law Commission of Ontario report (n 40) has also recommended consideration of such a reform (at G).

72 Discussion Paper (n 3) 6.2–6.9.

so even by the imposition of a cap. Given the judicial response to the limits of the cap and its interaction with aggravated damages, perhaps damages are better left to the jury. This will save time and money, avoid two trials and reduce the tinkering with damages that so commonly occurs on appeal.

8. An effective summary dismissal procedure

More than any other cause of action, defamation claims are capable of being misused in circumstances amounting to abuse of process. An effective summary dismissal procedure to prevent these claims going to a full hearing is an essential part of defamation law in the United States, Canada[73] and the United Kingdom, and is not restricted to issues such as proportionality or serious harm.

Concern about the disproportionality of legal costs to the damages awarded has long been publicly expressed, but Australian courts, particularly at appellate level, have been reluctant to accept or apply the principles of proportionality.[74] As to the concept of serious harm, although support for these principles may be found in *Kostov v Nationwide News Pty Ltd*,[75] this decision is controversial, in that it runs contrary to appellate authority, as Michael Douglas notes:

> "Previously, in *Lesses v Maras*, the Full Court of the Supreme Court of South Australia assessed *Thornton* as "merely an elucidation of the requirement that, to be defamatory, an imputation must tend to lower the estimation of the plaintiff by the community and an emphasis that an adverse opinion may be expressed about a person without its having such a tendency". With respect, her Honour ought to have followed the Full Court, as required by *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*."[76]

There needs to be a recognized procedure for the early dismissal of claims, first because of the known risk of actions being brought as a form of abuse of process and second of the judicial preference for increasingly outdated case management systems such as the docket (or early trial date) and simple callover case managment systems, both of which require issues to be dealt with at trial: see for example *Herron v HarperCollins Publishers Australia Pty Ltd*[77]. Examples of issues going all the way to trial when they could arguably have been resolved summarily include *Nyoni v Pharmaceutical Board of Australia (No 6)*[78] and *Hockey v Fairfax Media Publications Pty Ltd.*[79] This is despite a perfectly adequate provision permitting the striking out of unmeritorious cases which has in fact been applied in appropriate cases[80], including defamation claims[81].

There is clearly a need for such a provision in the legislation given the very high number of actions which are summarily dismissed. These include:

- where a person is not entitled to bring defamation proceedings (for example, a deceased person (*Defamation Act* s 10), or certain corporations (s 9));
- where a defence of absolute privilege is raised, such as for statements made concerning court proceedings;
- where other proceedings have been brought for the same publication;[82]
- issues of proportionality;[83]
- where proceedings have been commenced out of time;
- claims which are hopeless on their face (perhaps the most common of these applications);[84]
- claims brought by "reluctant gladiators" whose Fabian tactics provoke the suspicion that the action could be an abuse of process;[85] and
- where, on the face of the publication, there is arguably no defamatory meaning.[86]

73 Law Commission of Ontario (n 40) F.

74 See the cases collected in *Khalil v Nationwide News Pty Ltd (No 2)* [2018] NSWDC 126, [40].

75 [2018] NSWSC 858.

76 Douglas (n 7) (citations omitted).

77 [2018] FCA 1495.

78 [2018] FCA 526. This was a 5-day trial which took three years from start to finish. As Mr Nyoni, a litigant in person, is bankrupt, he has been ordered to pay security for costs: *Nyoni v Pharmacy Board of Australia* [2018] FCA 1313.

79 (2015) 237 FCR 33; (2015) 332 ALR 257. There was no separate ruling on capacity and at the trial the applicant failed in 8 of the 11 claims, resulting in significant costs set-offs.

80 Although not a defamation case, *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290 and [2005] FCA 1307 possessed many of the features of a 'SLAPP' suit, such as the proposed joinder of another 103 applicants and multiple respondents. The proceedings were struck out but a second pleading was allowed where a claim for misleading and deceptive conduct was added. According to Donald (n 41), a director of AWI was reported to have said to *The Age:* ...suggests his group will seek to wear PETA down financially. '"If we have a massive bill, so have they got a massive bill, this industry is extremely well financed and these sorts of crises are catered for.' Other cases where misleading and deceptive conduct were successfully relied upon to silence criticism include *Schwabe Pharma (Aust) Pty Ltd v AusPharm.Net.Au Pty Ltd* [2006] FCA 868 and complaints about regulators (*Merman Pty Ltd v Cockburn Cement Pty Ltd* (1989) ATPR 40-920). For an examination of SLAPP suits in Canada, see Law Commission of Ontario (n 40) G.

81 *Thomson v Luxford* [2014] FCA 342.

82 *Bracks v Smyth-Kirk* (2009) 263 ALR 522.

83 *Bleyer v Google Inc* (2014) 88 NSWLR 670).

84 *McGrane v Channel Seven Brisbane Pty Ltd* [2012] QSC 133; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd (No 3)* [2013] NSWSC 1850, [28]; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288, [101]–[103]; *Trkilja v Dobrijevic (No 2)* [2014] VSC 594.

85 *Kang v Australian Broadcasting Corporation* [2015] NSWSC 893 is one of many of these cases.

86 *Korolak v Bauer Media Pty Ltd* [2016] NSWDC 98; *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65; cf *Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652, where the issue was reserved to the trial which caused significant costs problems for all parties.

The successful use of summary procedures in the United Kingdom and the United States warrants consideration of specific legislative provisions for such a process. This has the added advantage of warning parties bringing unmeritorious proceedings (or conducting them in a dilatory or oppressive way) that the consequences of such action may be swift, as opposed to a lengthy process of going all the way to trial in the hope of bankrupting the opponent.

9. Costs

This brings me to perhaps the single greatest problem in defamation proceedings, namely the extremely high legal costs generated by such actions, especially where there is a docket system. As the most significant impact online technology has had on defamation law is to render ordinary members of the public putting material online (or being the target of material online) vulnerable to suit, these costs no longer fall upon publishers with deep pockets but upon ordinary working families who may find themselves having to sell their homes and/or go bankrupt, whether plaintiff or defendant, even if they are successful in the litigation.

The United Kingdom has conducted a series of inquiries into the costs of defamation litigation, the most recent of which, "Controlling the costs of defamation actions", [87] was set up on 29 November 2018, the same day that the UK Government published its response to the 2013 consultation, "Costs protection in defamation and privacy claims: the Government's proposals".[88]

These inquiries are only the latest in a series of governmental[89] and private[90] studies in the United Kingdom demonstrating that the cost of defamation actions has grown out of proportion to the value of the action to the extent that actions may amount to an abuse of process.

In Australia, concern about legal costs in defamation proceedings has led to attempts at law reform going back even before Federation. On 30 April 1886, Mr George Reid MLA moved a second reading of a bill to limit costs in defamation actions to verdicts of more than 40 shillings.[91] His Bill was passed, and remained a costs provision applicable to defamation proceedings until the *Defamation Act 1957* (NSW), when this portion was omitted.[92] From that time onwards, defamation costs (and the number of actions) began to increase dramatically. For example, in one trial where there were two limited publications (one to one person and the other in the Serbian language)[93], the costs certificate for the trial totalled $941,444.77.[94] Part of the problem was that a wealthy litigant could force on litigation by simply refusing to settle even when offered a very reasonable amount, as occurred in *Antoniadis v TCN Channel Nine Pty Ltd*,[95] where Levine J awarded indemnity costs at the third trial of these proceedings to the plaintiff following rejection of her offer of compromise of $5,000, noting the two earlier trials had been discharged because of "the fault of the defendant"[96].

It was to overcome problems such as these that Mr David Barr, the Member for Manly, introduced the *Defamation Amendment (Costs) Bill 2002*[97], which sought to restrict costs orders to the quantum of damages awarded. The amendment was unsuccessful, but following the defeat of this bill s 40A(1)(b) (which was the precursor to s 40 in the uniform legislation) was introduced into the *Defamation Act 1974* (NSW).[98]

A further Bill was brought by Mr David Barr MLA to prevent the amendment to Pt 52A r 33 of the *Supreme Court Rules 1970* (NSW) ('Supreme Court Rules') and was defeated.[99] The rule (now *Uniform*

87 David Gauke, 'Controlling the costs of defamation cases' (Ministerial Statement, 29 November 2018) <https://www.gov.uk/government/speeches/controlling-the-costs-of-defamation-cases>.

88 United Kingdom Ministry of Justice, 'Costs protection in defamation and privacy claims: The government's proposals' (Consultation Outcome, 13 September 2013) <https://www.gov.uk/government/consultations/costs-protection-in-defamation-and-privacy-claims-the-governments-proposals>.

89 See the list of prior inquiries set out in the government reports above (n 87), (n 88).

90 The high cost of defamation actions in the common law system was demonstrated in a 2008 study which found that the cost of defamation actions in the United Kingdom was 140 times greater than civil law systems in Europe: Norma Patterson, *A comparative Study of Defamation Costs Across Europe* (University of Oxford, Centre for Socio-Legal Studies, 2008) <http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf>. The main contributing factor to these costs is the conditional fee agreement: Ben Dowell, 'High cost of libel studies shackling newspapers, says study', *The Guardian* (online, 19 February 2009) <https://www.theguardian.com/media/2009/feb/19/no-win-no-fee-lawyers-shackling-newspapers>.

91 New South Wales, *Parliamentary Debates,* Legislative Assembly, 30 April 1886, 1609. Mr Reid stated: 'I do not think that I need apologise to the House for introducing a measure with reference to the law relating to libel and slander, because I think that it is generally admitted, and there have been striking instances of the fact, that the law is not at all in a satisfactory condition at the present time.'

92 The full story of Mr Reid's defamation costs law reform is set out by David Barr MLA in his second reading speech of the *Defamation Amendment (Costs) Bill* (2002): New South Wales, *Parliamentary Debates,* Legislative Assembly, 16 October 2003, 4027–31.

93 In *Skalkos v Assaf* [2002] NSWCA 14, the Court of Appeal dismissed an appeal which included grounds that the defence of unlikelihood of harm should not have been withheld from the jury. An application for special leave to the High Court was refused.

94 *Skalkos v T S Recoveries Pty Ltd* [2004] NSWCA 281.

95 (Supreme Court of New South Wales, Levine J, 24 April 1997).

96 Ibid 11.

97 New South Wales, *Parliamentary Debates,* Legislative Assembly, 16 October 2003, 4027–31 (David Barr MLA). The impetus for this proposed reform was the proceedings brought by one councillor against another for two slanders to a handful of other councillors. Judgment for the defendant on the basis of unlikelihood of harm was set aside on appeal but the court made special costs orders on the basis that the action was clearly politically motivated: *Jones v Sutto*n (2004) 61 NSWLR 614; (No 2) [2005] NSWCA 203. As was the case in the Skalkos v Assaf application for leave, special leave was refused by the High Court.

98 Phillipa Alexander, 'Costs issues in defamation proceedings' (2009) 92 *Precedent* 38.

99 New South Wales, *Parliamentary Debates,* Legislative Assembly, 30 October 2003, 7134.

Civil Procedure Rules Pt 42 r 34[100]) was amended in 2003 to remove defamation from the list of actions which required an application for recovery of costs for proceedings where the damages were less than $225,000 (this sum has now increased to $500,000). This provision was introduced after a costs application was made in *West v Nationwide News Pty Ltd*[101] where a plaintiff was awarded $50,000 and the defendant argued that the litigation could have been conducted more appropriately in the District Court. Simpson J made a reduction in the costs but warned that this might lead to more defamation cases being commenced in the District Court. Part 52A r 33 of the Supreme Court Rules was then amended to exempt defamation actions from this requirement. The result has been that the higher scale of costs has been applied to defamation actions in the Supreme Court no matter what the size of the judgment, which has been a significant factor in making defamation cases more expensive.

The efficacy of s 40 appears uncertain, as its role has effectively been reduced to being merely a factor in costs cases. For example, the lengthy series of offers of compromise and Calderbank offers in *Hyndes v Nationwide News Pty Ltd*[102] showed a seriousness of purpose in terms of settlement offers in circumstances where the plaintiff failed entirely in the claim, as opposed to receiving a lower amount. Instead of operating as an incentive to settle, s 40 has become (perhaps as a result of judicial interpretation rather than bad drafting) a positive handicap in that it is neutering offers that may well have succeeded under the offer of compromise or Calderbank system.

All of the above costs issues arise from judicial approaches to the legislation and it is difficult to see how this can be overcome. However, one way around the problem would be for the setting up of an inquiry into defamation costs, as has occurred in the United Kingdom, so that costs experts can contribute appropriate submissions. Costs assessors and specialists in costs litigation may find answers that elude academics and legislators.

10. Effective remedies for online publication

Although the internet celebrates its 30th birthday this year, courts and legislators alike remain uncertain about the principles upon which online intermediaries may be held liable for publication across a range of areas and not merely to defamation, notably vilification, copyright[103], content regulation and misleading and deceptive conduct.[104] In particular, and of relevance to the Discussion Paper, there is the problem, common to all these areas of law, of the litigant called the "recalcitrant defamer"[105] who, in breach of any number of civil and criminal laws and regulations, maintains attacks on the reputation or property rights of others. These recalcitrant defamers may also be anonymous, a problem of increasing difficulty thanks to the internet.[106]

While defamation has to date been dealt with as a State-based tort, it seems evident, from the eagerness with which the Federal Court has determined it has jurisdiction and its preference for its own case management systems, that there will be significant Federal input into the new legislation. If so, the Commonwealth should step up to the plate and accept responsibility for research into effective remedies for plaintiffs the victim of internet abuse, privacy breaches and vilification, including but not limited to defamation, in the same way as has occurred in Canada.[107] This could be achieved by an ongoing inquiry set up by the Australian Law Reform Commission.

If the Intergovernmental Agreement includes the Commonwealth, the States could consider requiring, as part of the defamation reform package, that the Commonwealth Government not merely leave its role to being the continued participation of Federal Court judges in defamation trials – a role any State judge could perform – but that the real issues concerning internet use and abuse could finally be addressed

100 This Rule provides:

42.34 Costs order not to be made in proceedings in Supreme Court unless Court satisfied proceedings in appropriate court

(1) This rule applies if:

(a) in proceedings in the Supreme Court, other than defamation proceedings, a plaintiff has obtained a judgment against the defendant or, if more than one defendant, against all the defendants, in an amount of less than $500,000, and

(b) the plaintiff would, apart from this rule, be entitled to an order for costs against the defendant or defendants.

(2) An order for costs may be made, but will not ordinarily be made, unless the Supreme Court is satisfied that:

(a) for proceedings that could have been commenced in the District Court--the commencement and continuation of the proceedings in the Supreme Court, rather than the District Court, was warranted, or

(b) for proceedings under Part 2 of Chapter 7 of the *Industrial Relations Act 1996* --the commencement and continuation of the proceedings in the Supreme Court, rather than the Local Court, was warranted.

101 [2003] NSWSC 767.

102 [2011] NSWSC 1443; [2012] NSWCA 349.

103 The unwelcome results of *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42 has led to a series of attempts at legislative change: see the discussion in Kylie Pappadarlo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40 *Sydney L Rev* 470.

104 See the explanation of the result in *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 in *Trkulja v Google Inc* (2018) 92 ALJR 619 at [57]–[60].

105 Law Commission of Ontario (n 40) identifies the problem of 'recalcitrant defamers maintaining a stubborn online campaign against a plaintiff regardless of court proceedings, injunctions, bankruptcy or even contempt proceedings': [2].

106 Law Commission of Ontario (n 40) at 'Identifying Anonymous Defendants'.

107 Law Commission of Ontario (n 40) [2].

in a coherent, Australia-wide fashion as opposed to differing positions (or inaction) by successive governments either unable or unwilling to confront the complexities of online legislation.

This will be the most intractable area for reform and there are no easy answers. To give one example, replacing the law of criminal libel by some form of digital equivalent does not appear to be the answer. In New Zealand, criminal libel (*Crimes Act 1961* (NZ) s 216) was repealed in 1993, before the internet had begun to make its presence known. An attempt to restore the balance *Harmful Digital Communications Act 2015* (NZ) has had little effect.[108] Legislation in France and Germany in relation to fake news and attempts in the United States to criminalise lies told during election campaigns[109] are complex issues too large for the scope of this paper.

Conclusion

The biggest impact that online publication has had on the law may be in terms of the sociological issues underpinning law reform. This is relevant not only to legislative drafting issues, such as the single publication rule and the revision of defences such as qualified privilege, but to the changes in the way people communicate which have resulted from internet use.

Defamation law reform in Australia, in the context of an international communications system containing hate sites, internet rage-based publications and calls to commit violent crime, may seem to some to be inconsequential as an effective cause of action and, in the case of abuse of process, as a chill on the voice of the responsible media, especially where the claim is brought by the rich and famous (or perhaps infamous). However, these issues require consideration because one of the most devastating results of online publication is that liability for defamation is increasingly hitting what could be called 'the small end of town', namely ordinary members of the community who have used social media or a blog site to make a comment, or who are themselves the subject of such comments, sometimes with devastating personal or professional results.

Another relevant factor, in sociological terms, is that there is what could be called a 'widespread public concern' that defamation proceedings may be brought to stop political criticism. This is not a new concern. In *Theophanous v Herald & Weekly Times Ltd,*[110] Deane J foresaw what he called 'widespread public concern' at 'the extraordinary development and increased utilisation of the means of mass communication', warning:

> … the use of defamation proceedings in relation to political communication and discussion has expanded to the stage where there is a widespread public perception that such proceedings represent a valued source of tax-free profit for the holder of high public office who is defamed and an effective way to 'stop' political criticism, particularly at election times.

In addition to these concerns, the rapid way in which societal values are changing on issues such as gay marriage and sexual harassment (where such topics are often discussed in online publications) has also become an issue. When drafting reform legislation, it must be borne in mind that publications and especially social media are not only available on an international scale, but are being used to discuss issues that have not been discussed on a wide public scale before, such as the sometimes intensely personal publications arising in the course of discussion in the #MeToo movement and sex abuse in institutions or by Church officials.

Then there is the method of internet communication, in that "internet rage", hate speech, trolling and other forms of misuse of online publication coexist and may intersect with defamatory publications. Demarcations of the tort of defamation in the future will not be easy. In particular, as to the #MeToo movement, allegations of sexual harassment and/or sexual assault have long caused difficulties in relation to other areas of the law such as workplace disputes[111] and health and safety work guidelines[112] and there seems every likelihood that these difficulties will arise in relation to defamation proceedings as well.

The rapidity of technological and societal change is a challenge to legislative drafters in many areas, but perhaps none so evidently as defamation law reform. The authors of the Discussion Paper have a difficult task before them, and it is one which has been embarked upon much later in the day than should have been the case. It is to be hoped that members of the profession as well as academics, courts and governmental organisations around Australia come forward to provide the submissions sought and that the law reform debate can proceed in an efficient way to the next level of appropriate and uniform legislation.

108 Its website is currently down for maintenance: see <https://www.consumerprotection.govt.nz/general-help/laws-policies/online-safety/harmful-digital-communications-act/>.

109 Joshua Sellers, 'Legislating against lying in campaigns and elections' (2018) 71 *Oklahoma Law Review* 141.

110 (1994) 124 ALR 1, 52.

111 For a review of relevant cases, see Brook Hely, 'Open all hours: The reach of vicarious liability in "off-duty" sexual harassment complaints' (2008) 36(2) F*ederal Law Review* 173.

112 Lisa Heap, 'Sexual harassment isn't a women's issue: it's a workplace health and safety problem', *ABC News* (online, 29 December 2017) <https://www.abc.net.au/news/2017-12-29/treat-sexual-harassment-as-a-workplace-health-and-safety-issue/9222614>.