

Defamation Bill 2005

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Western Australia

LEGISLATIVE ASSEMBLY

(As amended in Committee)

Defamation Bill 2005

A Bill for

An Act to —

- **modify the general law relating to the tort of defamation;**
 - **repeal the *Libel Act 1843 (Imp)*, *Newspaper Libel and Registration Act 1884*, *Newspaper Libel and Registration Act 1884 Amendment Act 1888* and *Slander of Women Act 1900*; and**
 - **amend *The Criminal Code*,**
- and for other purposes.**

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Defamation Act 2005*.

2. Commencement

5 This Act comes into operation on 1 January 2006.

3. Objects of Act

The objects of this Act are —

- 10 (a) to enact provisions to promote uniform laws of defamation in Australia;
- (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;
- 15 (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. Terms used in this Act

In this Act —

25 **“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;
- (b) a Territory; or
- (c) the Commonwealth;

5 **“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;

10 **“document”** means any record of information, and includes —

- (a) anything on which there is writing;
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- 15 (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;

20 **“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 —

- 25 (a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical;
- (b) a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication;
- 30 (c) a letter, note or other writing;
- (d) a picture, gesture or oral utterance; and

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(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 Part 3 Division 1;

5 **“parliamentary body”** means —

(a) a parliament or legislature of any country;

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

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

10 (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;

15 **“Territory”** means the Australian Capital Territory or the Northern Territory;

“this jurisdiction” means Western Australia.

5. Act to bind Crown

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

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.
- 5 (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).

7. Distinction between slander and libel abolished

- 10 (1) The distinction at general law between slander and libel is 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

15 **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
20 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
25 unless it was an excluded corporation at the time of the publication.

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Part 2 General principles

Division 2 Causes of action for defamation

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(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

5 (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),
10 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
15 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
20 defames the corporation.

(6) In this section —

25 **“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 causes of action for defamation of, or against, deceased persons

5 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
- 10 (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

- 15 (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.
- 20 (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.
- 25 (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 —
 - 30 (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;
 - (b) the extent of publication in each relevant Australian jurisdictional area;

- (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.

5 (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 —

- 10 (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);
- 15 (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
- 20 (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;

25 **“external Territory”** means a territory, other than the Australian Capital Territory, the Jervis Bay Territory or the Northern Territory, for the government of which as a territory provision is made by a Commonwealth Act;

“geographical area of Australia” includes —

- (a) the territorial sea of Australia; and
- (b) the external Territories of the Commonwealth;

30 **“Jervis Bay Territory”** means the territory mentioned in the *Jervis Bay Territory Acceptance Act 1915* of the Commonwealth;

“multiple publications” 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

- 5 (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.
- 10 (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

- 15 (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
- 20 (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.
- 25 (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
 - 5 (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 —
- 10 (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”**).
- 15 (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.
- 20 (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.
- 25 (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

- 30 (1) An offer to make amends —
- (a) must be in writing;

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Part 3 Resolution of civil disputes without litigation

Division 1 Offers to make amends

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- (b) must be readily identifiable as an offer to make amends under this Division;
 - (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;
 - (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;
 - (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;
 - (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;
 - (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;
 - 5 (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;
 - 10 (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 —
- 15 (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 —
- 20 (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
 - 25 (b) except as provided in paragraph (a), by the Supreme Court.

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

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Division 1 Offers to make amends

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- (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 (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 —
- 10 (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.

15 **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.
- 20
- (2) A court may (but need not) —
- 25 (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.

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- (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.

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;
 - (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

5 (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

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

19. Inadmissibility of evidence of certain statements and admissions

15 (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).

20 (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

25 **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 —

30 (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.

Part 4 — Litigation of civil disputes

Division 1 — General

21. Election for defamation proceedings to be tried by jury

- 5 (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 in accordance with rules of court; and
- 10 (b) accompanied by any relevant fee prescribed by a written
law.
- (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
- 15 (b) the trial involves any technical, scientific or other issue
that cannot be conveniently considered and resolved by
a jury.

22. Roles of judicial officers and juries in defamation proceedings

- 20 (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.
- 25 (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 (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.

10 **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

20 **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.

5 **26. Defence of contextual truth**

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

- 10 (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.

15 **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.

20 (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) —
- 25 (i) the publication of a document by order, or under the authority, of the body;
- (ii) the publication of the debates and proceedings of the body by or under the authority of the body or any law;
- 30 (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;
- (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);
 - (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;
- (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.

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

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Part 4 Litigation of civil disputes

Division 2 Defences

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

5 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.

10 (4) In this section —

“public document” means —

- 15 (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;
- (b) any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings and including —
- 20 (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
- 25 determination;
- (c) any report or other document that under the law of any country —
- (i) is authorised to be published; or
- 30 (ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body;

- (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;
- 5 (e) any record or other document open to inspection by the public that is kept —
- (i) by an Australian jurisdiction;
 - (ii) by a statutory authority of an Australian jurisdiction;
 - 10 (iii) by an Australian court; or
 - (iv) under legislation of an Australian jurisdiction;
- (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
- 15 (g) any document of a kind specified in Schedule 2.

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.
- 20 (2) It is a defence to the publication of defamatory matter if the defendant proves that —
- 25 (a) the matter was, or was contained in, an earlier published report of proceedings of public concern;
 - (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
 - 30 (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.

5 (4) In this section —

“proceedings of public concern” means —

- (a) any proceedings in public of a parliamentary body;
- (b) any proceedings in public of an international organisation of any countries or of the governments of any countries;
- 10 (c) any proceedings in public of an international conference at which the governments of any countries are represented;
- (d) any proceedings in public of —
 - 15 (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;
- 20 (e) any proceedings in public of a court or arbitral tribunal of any country;
- (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;
- 25 (g) any proceedings in public of a local government body of any Australian jurisdiction;
- (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 —
 - 30 (i) a member or members of the society; or

- (ii) a person subject by contract or otherwise by law to control by the society;
- (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;
- (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;
- (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;
- (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;
- (m) any proceedings of an ombudsman of any country if the proceedings relate to a report of the ombudsman;
- (n) any proceedings in public of a law reform body of any country;

- 5 (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.

(5) In this section —

10 **“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 —

- 15 (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
- 20 (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;

25

“relevant objects” of a learned society, sport or recreation association or trade association means —

- 30 (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;

(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

5 (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 —

10 (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
15 pastime; and

(b) authorised by its constitution —

(i) to exercise control over, or adjudicate on,
matters connected with the game, sport, or
pastime; and
20 (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
25

(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
30 (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

- 5 (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;
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
- 10 (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
- 15 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 —
- 20 (a) the extent to which the matter published is of public interest;
- (b) the extent to which the matter published relates to the performance of the public functions or activities of the person;
- 25 (c) the seriousness of any defamatory imputation carried by the matter published;
- (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts;
- (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously;
- 30 (f) the nature of the business environment in which the defendant operates;

- (g) the sources of the information in the matter published and the integrity of those sources;
 - (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;
 - (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;
 - (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;
 - (b) the opinion related to a matter of public interest; and
 - (c) the opinion is based on proper material.

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Division 2 Defences

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- (3) It is a defence to the publication of defamatory matter if the defendant proves that —
- 5 (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;
- (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 —
- 10 (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;
- (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
- 15 (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.
- 20 (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;
- 25 (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.
- 30 (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 —
- 5 (a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor;
 - (b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and
 - 10 (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 —
- 15 (a) was not the first or primary distributor of the matter;
 - (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
- 20 involved in the publication of the matter in the capacity of —
- (a) a bookseller, newsagent or news-vendor;
 - (b) a librarian;
 - (c) a wholesaler or retailer of the matter;
 - 25 (d) a provider of postal or similar services by means of which the matter is published;
 - (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
 - 30 comprise the matter;

- (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
 - 5 (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;
- (g) an operator of, or a provider of access to, a
- 10 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
- 15 another person, prints or produces, reprints or reproduces or distributes the matter for or on behalf of that other person.

33. Defence of triviality

20 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

25 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

30 (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.

- 5 (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.
- 10 (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).
- 15 (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.
- 20 (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.
- 25 (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.
- 30 (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

5 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

10 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 —
- 15 (a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter;
- (b) the defendant has published a correction of the defamatory matter;
- 20 (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;
- (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
- 25 (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.
- 30 (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

5 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 —
- 10 (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.
- 15 (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
- 20 (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.
- 25 (3) In this section —
- 30 **“settlement offer”** means any offer to settle the proceedings made before the proceedings are determined, and includes

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Part 4 Litigation of civil disputes

Division 4 Costs

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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

41. Proof of publication

- 5 (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.
- 10 (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.
- 15 (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

- 20 (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
- 25 (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
30 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

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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.

5 (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

10 (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
15 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.

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 —

(i) by delivering it to the person personally;

30 (ii) by 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) by sending it by facsimile transmission to the facsimile number of the person;

5

or

- (b) in the case of a body corporate —

- (i) by 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

10

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

15

- (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.

45. Regulations

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The Governor may make regulations for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

46. Repeal of existing legislation

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- (1) The following Imperial enactment is repealed in so far as it is part of the law of Western Australia —

6 & 7 Victoria, chapter 96 (1843)

An Act to amend the Law respecting defamatory Words and Libel.

[Known as the *Libel Act 1843*.]

30

[Adopted by *Imperial Acts Adopting Ordinance 1847*.]

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(2) The following Acts are repealed —

- (a) *Newspaper Libel and Registration Act 1884*;
- (b) *Newspaper Libel and Registration Act 1884 Amendment Act 1888*;
- (c) *Slander of Women Act 1900*.

5

47. *The Criminal Code* amended

*The Criminal Code** is amended as set out in Schedule 4.

[* *Reprint 12 as at 1 June 2005 (see the Schedule to the Criminal Code Act 1913 appearing as Appendix B to the Criminal Code Compilation Act 1913).*]

10

48. 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.

15

(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;
- (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);
- (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.

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(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 —

- 5 (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).

10 (4) In this section —

“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
15 defamatory matter immediately before the commencement of this Act.

**Schedule 1 — Additional publications to which absolute
privilege applies**

[s. 27(2)(d)]

- 5 Currently there are no provisions in this Schedule but it has been included for consistency with national model legislation.

Schedule 2 — Additional kinds of public documents

[s. 28(4)(g)]

5

Currently there are no provisions in this Schedule but it has been included for consistency with national model legislation.

Schedule 3 — Additional proceedings of public concern

[s. 29(4)(p)]

5

Currently there are no provisions in this Schedule but it has been included for consistency with national model legislation.

Schedule 4 — Amendments to *The Criminal Code*

[s. 47]

1. Section 53 repealed

Section 53 is repealed.

5 2. Chapter XXXV replaced

Chapter XXXV is repealed and the following Chapter is inserted instead —

“

Chapter XXXV — Criminal defamation

10 345. Criminal defamation

(1) A person who, without lawful excuse, publishes matter defamatory of another living person (the “**victim**”) —

15 (a) knowing the matter to be false or without having regard to whether the matter is true or false; and

 (b) intending to cause serious harm to the victim or any other person or without having regard to whether such harm is caused,

20 is guilty of a crime and is liable to imprisonment for 3 years.

 Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.

25 (2) In proceedings for an offence under this section the accused person has a lawful excuse for the publication of defamatory matter about the victim if, and only if, subsection (3) applies.

30 (3) This subsection applies if the accused person 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

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civil proceedings for defamation against the accused person.

- 5
- (4) The prosecutor bears the onus of negating 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 accused person.
- (5) On a trial before a jury for an offence under this section —
- 10
- (a) the question of whether the matter complained of is capable of bearing a defamatory meaning is a question for determination by the judge;
- (b) the question of whether the matter complained of does bear a defamatory meaning is a question for the jury; and
- 15
- (c) the jury may give a general verdict of guilty or not guilty on the issues as a whole.
- (6) A prosecution under this section must not be commenced without the consent of the Director of Public Prosecutions.
- 20
- (7) In this section —
- “publish”** and **“defamatory”** have the meanings that those terms have in the law of tort (as modified by the *Defamation Act 2005*) relating to defamation.

”.

25



Defined Terms

*[This is a list of terms defined and the provisions where they are defined.
The list is not part of the law.]*

Defined Term	Provision(s)
aggrieved person	12(1)
Australian court.....	4
Australian jurisdiction	4
Australian jurisdictional area	11(5)
Australian tribunal.....	4
commentator	31(3)
concerns notice.....	14(2)
contextual imputations.....	26
conviction	42(4)
corporation.....	9(6)
country.....	4
document	4
electronic communication.....	4
existing law of defamation.....	48(4)
external Territory	11(5)
further particulars notice.....	14(3)
general law.....	4
geographical area of Australia.....	11(5)
imputations of concern	14(2)
Jervis Bay Territory.....	11(5)
law reform body	29(5)
learned society	29(5)
matter.....	4
matter in question	12(1)
maximum damages amount	35(1)
multiple publications	11(5)
offer to make amends	4
ombudsman.....	29(5)
parliamentary body.....	4
periodical	41(3)
post-commencement action.....	48(2)
pre-commencement action	48(2)
proceedings of public concern.....	29(4)
public body	9(6)
public document.....	28(4)
publisher	12(1)
recipient.....	30(1)
relevant objects	29(5)
settlement offer	40(3)

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Schedule 4 Amendments to The Criminal Code

Defined Terms

sport or recreation association.....	29(5)
substantially true	4
Territory.....	4
this jurisdiction.....	4
trade association	29(5)