

## DEFAMATION BILL 2005

### EXPLANATORY MEMORANDUM

#### OVERVIEW OF BILL

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

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

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

- (a) the retention (with some modifications) of the common law of defamation to determine civil liability for defamation, and
- (b) the abolition of the distinction at common law between slander and libel, and
- (c) the creation of a statutory cap on the amount of damages for non-economic loss that may be awarded in civil proceedings for defamation, and
- (d) the enactment of provisions to facilitate the resolution of civil disputes about the publication of defamatory matter without litigation, and
- (e) the delineation of the respective roles of juries and judicial officers in the jury trial of civil proceedings for defamation by limiting the role of juries to the determination of whether a person has been defamed and leaving the award of damages to judicial officers, and
- (f) the abolition of exemplary and punitive damages in civil proceedings for defamation, and
- (g) the establishment of truth alone as a defence to a civil action for defamation, and
- (h) the imposition of a limitation period for civil actions for defamation of 1 year, subject to an extension (in limited circumstances) to a period of up to 3 years following publication, and
- (i) the enactment of provisions dealing with criminal defamation.

## **OUTLINE OF PROVISIONS**

### **Part 1 Preliminary**

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

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

**Clause 3** sets out the objects of the proposed Act.

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

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

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

- (a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical, and
- (b) a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication, and
- (c) a letter, note or other writing, and
- (d) a picture, gesture or oral utterance, and
- (e) any other thing by means of which something may be communicated to a person.

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

### **Part 2 General principles**

#### **Division 1 Defamation and the general law**

**Clause 6** provides that the proposed Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that the proposed Act provides otherwise (whether expressly or by necessary implication).

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

At general law, a plaintiff has a cause of action for defamation against a defendant if the defendant publishes defamatory accusations or charges (referred to

conventionally as **imputations**) about the plaintiff to at least one other person (other than the defendant or his or her spouse). The courts have formulated the test for determining what is defamatory in various ways. Examples of these formulations include (but are not limited to) the following:

- (a) “[Words that] tend to lower the plaintiff in the estimation of right-thinking members of society generally”. See *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin.
- (b) “Whether the alleged libel is established depends upon the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation”. See *Reader’s Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506 per Brennan J.
- (c) “In order that one person may establish against another a civil cause of action [for defamation], it is essential that he should prove (1) that a statement or other representation has been made ... of a kind likely to lead ordinary decent folk to think the less of the person about whom it is made; (2) that it was about him that it was made; and (3) that the other has published it to at least one third party (who is not the husband or wife of the other)”. See *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86 at 88 per Jordan CJ.
- (d) “At common law, in general, an imputation, to be defamatory of the plaintiff, must be disparaging of him ... I say that this is ‘in general’ the position, as the common law also recognizes as defamatory an imputation which, although not disparaging, tends to make other persons ‘shun or avoid’ the plaintiff ... as well as an imputation that displays the plaintiff in a ridiculous light, notwithstanding the absence of any moral blame on his part”. See *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 at 452–453 per Hunt J.

**Clause 7** abolishes the general law distinction between libel and slander.

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

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

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

## **Division 2 Causes of action for defamation**

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

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

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

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

- (a) the objects for which the corporation was formed did not include obtaining financial gain for its members or corporators, or
- (b) the corporation employed fewer than 10 persons and was not related to another corporation,

and the corporation was not a public body.

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

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

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

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

## **Division 3 Choice of law**

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

- (a) the geographical area of Australia that lies within the territorial limits of a particular State (including its coastal waters), but not including any territory, place or other area referred to in paragraph (c), or
- (b) the geographical area of Australia that lies within the territorial limits of a particular Territory (including its coastal waters), but not including any territory, place or other area referred to in paragraph (c), or
- (c) any territory, place or other geographical area of Australia over which the Commonwealth has legislative competence but over which no State or Territory has legislative competence.

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

The proposed section creates 2 choice of law rules.

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

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

- (a) the place at the time of publication where the plaintiff was ordinarily resident or, in the case of a corporation that may assert a cause of action for defamation, the place where the corporation had its principal place of business at that time, and
- (b) the extent of publication in each relevant Australian jurisdictional area, and
- (c) the extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area.

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

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

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

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

### **Part 3            Resolution of civil disputes without litigation**

#### **Division 1    Offers to make amends**

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

New South Wales and the Australian Capital Territory make similar provision for offers to make amends under their existing laws. The other Australian jurisdictions have provisions in their rules of court and other civil procedure legislation that provide for the making of offers of compromise or payments into court. However, these provisions tend to be available only once litigation has commenced.

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

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

**Clause 14** provides that the offer cannot be made if 28 days have elapsed since the publisher has been given a concerns notice by the aggrieved person that the matter in question is or may be defamatory or if a defence in an action for defamation

brought by the aggrieved person has been served. The proposed section also enables a publisher to seek further particulars from the aggrieved person if the concerns notice does not particularise the defamatory imputations carried by the matter in question of which the aggrieved person complains.

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

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

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

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

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

## **Division 2 Apologies**

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

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

## **Part 4 Litigation of civil disputes**

### **Division 1 General**

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

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

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

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

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

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

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

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

New South Wales makes similar provision under its existing law.

## Division 2 Defences

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

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

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

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

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

- (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (***contextual imputations***) that are substantially true, and
- (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

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

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

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

- (a) the publication of matter in the course of the proceedings of a parliamentary body of any country, and
- (b) the publication of matter in the course of the proceedings of an Australian court or Australian tribunal, and
- (c) the publication of matter on an occasion that, if published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to the proposed section, and

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

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

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

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

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

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

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

- (a) any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law, or
- (b) any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings and includes:
  - (i) any record of the court or tribunal relating to the judgment, order or determination or to its enforcement or satisfaction, and
  - (ii) any report of the court or tribunal about its judgment, order or determination and the reasons for its judgment, order or determination, or
- (c) any report or other document that under the law of any country:
  - (i) is authorised to be published, or
  - (ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body, or
- (d) any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public, or

- (e) any record or document open to inspection by the public that is kept:
  - (i) by an Australian jurisdiction, or
  - (ii) by a statutory authority of an Australian jurisdiction, or
  - (iii) by an Australian court, or
  - (iv) under legislation of an Australian jurisdiction, or
- (f) any other document issued, kept or published by a person, body or organisation of another Australian jurisdiction that is treated in that jurisdiction as a public document under a provision of a law of the jurisdiction corresponding to the proposed section, or
- (g) any document of a kind specified in Schedule 2 (Additional kinds of public documents).

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

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

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

- (a) the matter was, or was contained in, an earlier published report of proceedings of public concern, and
- (b) the matter was, or was contained in, a fair copy of, a fair summary of, or a fair extract from, the earlier published report, and
- (c) the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair.

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

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

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

- (c) any proceedings in public of an international conference at which the governments of any countries are represented, or
- (d) any proceedings in public of:
  - i the International Court of Justice, or any other judicial or arbitral tribunal, for the decision of any matter in dispute between nations, or
  - ii any other international judicial or arbitral tribunal, or
- (e) any proceedings in public of a court or arbitral tribunal of any country, or
- (f) any proceedings in public of an inquiry held under the law of any country or under the authority of the government of any country, or
- (g) any proceedings in public of a local government body of any Australian jurisdiction, or
- (h) certain proceedings of a learned society or of a committee or governing body of such a society, or
- (i) certain proceedings of a sport or recreation association or of a committee or governing body of such an association, or
- (j) certain proceedings of a trade association or of a committee or governing body of such an association, or
- (k) any proceedings of a public meeting (with or without restriction on the people attending) of shareholders of a public company under the *Corporations Act 2001* of the Commonwealth held anywhere in Australia, or
- (l) any proceedings of a public meeting (with or without restriction on the people attending) held anywhere in Australia if the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for public office, or
- (m) any proceedings of an ombudsman of any country if the proceedings relate to a report of the ombudsman, or
- (n) any proceedings in public of a law reform body of any country, or
- (o) any other proceedings conducted by, or proceedings of, a person, body or organisation of another Australian jurisdiction that are treated in that jurisdiction as proceedings of public concern under a provision of a law of the jurisdiction corresponding to the proposed section, or
- (p) any proceedings of a kind specified in Schedule 3 (Additional proceedings of public concern).

At general law, fair and accurate reports of proceedings of certain persons and bodies are subject to qualified privilege. For example, the general law defence extends to proceedings in parliament and judicial proceedings conducted in open

court. As the defence at common law is a defence of qualified privilege, it can be defeated by proof that the publication of the defamatory matter was actuated by malice.

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

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

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

- (a) the recipient has an interest or apparent interest in having information on some subject, and
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
- (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

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

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

The defence is broader than the defence at general law because the interest that the recipient must have or apparently have is not as limited as at general law. It has been said of the New South Wales provision that “[w]hat the section does is to substitute reasonableness in the circumstances for the duty or interest which the common law principles of privilege require to be established”. See *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 797.

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

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

The proposed section distinguishes between 3 situations.

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

- (a) is substantially true, or
- (b) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law), or
- (c) was published on an occasion that attracted the protection of a defence under the proposed section or proposed section 28 or 29.

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

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

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

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

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

- (a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and
- (b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and
- (c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

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

- (a) was not the first or primary distributor of the matter, and
- (b) was not the author or originator of the matter, and
- (c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.

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

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

**Clause 33** provides that it is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.

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

### Division 3 Remedies

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

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

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

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

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

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

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

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

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

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

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

#### **Division 4 Costs**

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

- (a) the way in which the parties to the proceedings conducted their cases, and
- (b) any other matters that the court considers relevant.

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

## **Part 5            Miscellaneous**

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

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

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

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

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

**Clause 46** repeals the:

*Libel Act 1843.*

*Newspaper Libel and Registration Act 1884*

*Newspaper Libel Registration Act 1884 Amendment Act 1888*

*Slander of Women Act 1900*

**Clause 47** provides for the amendment of the Criminal Code.

**Clause 48** provides that, generally, the proposed Act will apply to defamatory matter that is published after the commencement of the proposed Act. However, the existing law will continue to apply to:

- (a) a cause of action for defamation that accrued before the commencement of the proposed Act, and
- (b) a cause of action for defamation that accrued after the commencement of the proposed Act, but only if:
  - i the action is raised in proceedings that include other causes of action that accrued before that commencement, and
  - ii the action accrued no later than 12 months after the earliest pre-commencement action accrued, and
  - iii each action in the proceedings arose out of the publication of the same, or substantially the same, matter on different occasions.

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

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

This Schedule is available to list publications of certain persons and bodies that are subject to absolute privilege for the purposes of proposed section 27 (Defence of absolute privilege). These publications would be in addition to the publications specified in the proposed section.

## **Schedule 2 Additional kinds of public documents**

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

This Schedule is available to list kinds of documents that are to be treated as public documents for the purposes of the defence under proposed section 28 (Defence for publication of public documents). These kinds of documents would be in addition to the documents specified in the proposed section.

## **Schedule 3 Additional proceedings of public concern**

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

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

## **Schedule 4 Amendments to the Criminal Code**

**Clause 1** repeals section 53 of the Criminal Code which creates the offence of defaming foreign princes.

**Clause 2** repeals chapter 35 of the Criminal Code. This chapter contains 25 sections concerning criminal defamation. These include s350 which provides that it is unlawful to publish defamatory matter unless such publication is protected or justified or excused by law. Chapter 35 also includes special defences such as s364 which indicates that it is a defence to criminal defamation if a publisher or editor of a periodical proves that the defamatory matter was placed in the periodical without their knowledge and without their negligence.

Clause 2 also inserts a new chapter 35 containing s345 which is based on recommendations of the WA Law Reform Commission Report on Defamation (project no. 8) (pages 122-125) and creates a new Criminal Defamation offence for a person, without lawful excuse, to publish defamatory matter about another living person (the *victim*):

(a) knowing the matter to be false, and

(b) with intent to cause serious harm to the victim or any other person or without regard to whether such harm is caused.

This offence incorporates two elements of criminal behaviour which are not in the current chapter 35; namely knowledge of or disregard of the falsity of the defamatory publication and intention to cause serious harm or disregarding whether serious harm is caused.

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

A prosecution under s345 can only be commenced with the consent of the Director of Public Prosecutions.

## SUMMARY OF EXISTING DEFAMATION LAWS

### Existing civil law of defamation of the States and Territories

Jurisdiction	Applicable civil law
Australian Capital Territory	The general law applies in the Australian Capital Territory subject principally to the provisions of the <i>Civil Law (Wrongs) Act 2002</i> of that Territory, particularly Chapter 9 of that Act.
New South Wales	The general law applies in New South Wales subject principally to the provisions of the <i>Defamation Act 1974</i> of that State.
Northern Territory	The general law applies in the Northern Territory subject principally to the provisions the <i>Defamation Act</i> of that Territory.
Queensland	The civil law of defamation in Queensland has been codified by the <i>Defamation Act 1889</i> of that State.
South Australia	The general law applies in South Australia subject principally to the provisions of the <i>Civil Liability Act 1936</i> of that State, particularly Part 2 of that Act.
Tasmania	The civil law of defamation in Tasmania has been codified by the <i>Defamation Act 1957</i> of that State.
Victoria	The general law applies in Victoria subject principally to the provisions of the <i>Wrongs Act 1958</i> of that State, particularly Part I of that Act.
Western Australia	The general law applies in Western Australia subject principally to the provisions of the following Acts: <ul style="list-style-type: none"><li>(a) the <i>Libel Act 1843</i> of the United Kingdom,</li><li>(b) the <i>Newspaper Libel and Registration Act 1884</i>,</li><li>(c) the <i>Newspaper Libel and Registration Act 1884 Amendment Act 1888</i>,</li><li>(d) the <i>Slander of Women Act 1900</i></li><li>(e) <i>The Criminal Code</i> set out in the <i>Criminal Code Act 1913</i>, but only to the extent that the Code declares the publication of defamatory matter to be lawful. See section 5 of the <i>Criminal Code Act 1913</i>, Chapter XXXV of the Code and <i>West Australian Newspapers Ltd v Bridge</i> (1979) 141 CLR 535.</li></ul>

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## Existing criminal law of defamation of the States and Territories

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