1. **Background**

1.1 The most recent substantive review of Australia's defamation laws was in 1979. Uniform defamation laws, modelled on 1974 laws, were passed by the States and the ACT in 2005 and came into effect on January 1, 2006.

1.2 Prior to the introduction of the *Defamation Act 2005* (2005 Act), each State and Territory had its own defamation laws, the effect being inconsistencies between the states. These inconsistencies in turn led to policy issues including forum shopping and inefficient management of cases.

1.3 While the introduction of the *Defamation Act 2005* was an important development in media law in Australia, its practical effectiveness was ultimately curtailed by the need to achieve unanimous support amongst the States and Territories. The current law was drafted only to the degree that was capable of compromise between the States and the Commonwealth in 2005.

1.4 Many argue that Australia's defamation laws are slanted strongly in favour of plaintiffs. Melbourne University Associate Professor, Jason Bosland, believes Australia is likely to become the libel capital of the world in the absence of significant changes to the Defamation Act.¹

1.5 72% of journalists say defamation laws make reporting more difficult. What is more difficult to measure is the chilling effect that defamation laws may have on stories that are not pursued by journalists or editors. They represent a pervasive limitation on journalism and are the single greatest threat to press freedom in the country.

1.6 It is for this reason that any reforms to the Defamation Act cannot simply tinker at the edges of the law if they hope to bring about meaningful change. Reforms must be comprehensive and bold. They need to re-shift the balance between freedom of speech and an individual’s reputation by strengthening the available defences to defamation claims.

1.7 International law reform trends and our domestic political discourse demonstrate that Australia’s defamation laws are in urgent need of a major overhaul. For example:

   (a) The UK introduced major defamation law reforms in 2013 to strengthen the defences of truth, honesty and publication on a matter of public interest;

   (b) In November 2017, the Law Commission of Ontario conducted a full review of its defamation laws;

   (c) In February of this year, the Senate Select Committee on the Future of Public Interest Journalism recommended that the Council of Australian Governments (COAG) should

implement legislative measures to reflect the appropriate balance between the public interest in press freedom and the protection of individuals from reputational harm;

(d) In June of this year, the NSW government conducted a substantial review of the 2005 Act and released a paper summarising its findings and recommendations;

(e) Commonwealth government Attorney-General, Christian Porter, has publicly said that a review of Australia’s defamation laws will need to consider national security risks currently faced; and

(f) Liberal MP and parliamentary intelligence committee Chairman Andrew Hastie has warned that investigative journalists writing about foreign interference and influence were at risk of those laws being used by “strategic rivals” of Australia.

1.8 This paper sets out five possible areas for reform that would improve Australia’s press freedom:

(a) amending section 30 of the 2005 Act to lower the existing threshold required to establish the qualified privilege defence and to implement a provision analogous to the UK’s public interest defence;

(b) adopting a single publication rule;

(c) introducing a ‘serious’ harm’ threshold for a defamation claim;

(d) amending section 26 of the 2005 Act to ensure that the defence of contextual truth resembles a provision more similar to its predecessor provision (being section 16 of the Defamation Act 1974); and

(e) implementing a provision that clearly sets out the standard of particulars that are required to be met to substantiate a justification defence in the Federal Court, which standard would be less than that suggested in the recent Chau Chak Wing v Fairfax Media case.

2. Amendment to section 30 qualified privilege defence

The current law and its limitations

2.1 Section 30(1) of the 2005 Act establishes that the defence of qualified privilege will be available where the defendant can show that:

(a) the recipient has an interest or apparent interest in having information on the 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 is reasonable in the circumstances.

2.2 Conduct will be considered reasonable in light of factors set out in section 30(3), including: the extent that the matter was in the public interest, the seriousness of the imputation, whether the publication distinguishes between facts and allegations, the integrity of sources and steps taken to verify the information published. This defence will be defeated by a finding of malice.

2.3 The statutory defence was originally introduced to counter the inaccessibility of common law qualified privilege for media defendants. It was thought that the removal of a reciprocal

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interest-duty requirement and the inclusion of public interest as a relevant consideration – would allow the statutory defence to be utilised by the media. In reality, the media’s ability to rely on s 30 has been extremely (or entirely) limited to judicial interpretation, to the extent that media lawyers have expressed reluctance to plead it as a defence altogether.

2.4 Where the matter is published to the general public, media defendants have struggled to demonstrate that the recipient has the requisite ‘interest in having information on the subject’. ‘Interest’ in this context ‘is not simply a matter of curiosity, but a matter of substance apart from its mere quality of news’. Subjects that are deemed to be of broad public interest are narrowly confined. In past, pertinent issues like corruption and animal cruelty have been excluded.

2.5 Even where a subset of the public at large are found to have the requisite interest, a partial defence will only be available. The defence will still fail in respect of publication to those persons outside that subset without the requisite interest. This significantly undermines the utility of the defence for media companies.

2.6 Subsection (b) further limits the application of the defence, substantially narrowing the content of an article that may be protected by a statutory qualified privilege defence. In Rogers v Nationwide News, the conduct of the ATO in taxing a damages claim was found to be of interest to the public, however reporting the details of the damages claim itself fell outside the parameters of ss (b). Similarly, whilst in De Pois v Advertiser News, dishonest election practices were found to be of general public interest, this interest did not extend to the conduct of one specific WorkSafe director. In both cases, despite the stories broadly going to public concerns, the media outlets were unable to establish the defence.

2.7 An additional problem is that the considerations in subsection (3) are often treated as a series of independent hurdles to be overcome rather than factors the court may take into account when judging the reasonableness of a defendant’s conduct. The absence of one will often draw the focus of the court and eclipse other positive steps taken in accordance with s 30(3). In John Fairfax Publications v Zunter, prior to the publication, a journalist unsuccessfully attempted to reach the plaintiff by road and telephone. Another employee of the defendant reached the plaintiff by river and impressed upon him to contact the defendant, but to no avail. Notwithstanding these efforts, the court found that the defendant had not acted reasonably in publishing the story.

2.8 Again, during the hearing of in Gayle v Fairfax Media Publications, the defendants were heavily criticised for failing to accurately report the plaintiff’s side of the story. Whilst the journalist had contacted Gayle for a response, she wrote that he had issued a ‘no comment’ statement, when in fact a representative of the plaintiff had said that he had no idea what the allegations against him were. Judgment is currently reserved in that case.

Recommendation

2.9 A provision analogous to the UK’s public interest defence replace the existing qualified privilege defence under s 30. Section 4 of the Defamation Act 2013 (UK) states that it is a defence to an action for defamation if the defendant shows that:

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

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3 Barbaro v Amalgamated Television Services Pty Ltd (1985) 1 NSWLR 30 at 40.
7 (2003) 216 CLR 327.
10 Case number 2016/00013260.
(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

2.10 A belief under subsection (b) will be reasonable ‘only if it is one arrived at after conduct such enquiries and check as is reasonable to expect of the particular defendant’. In approaching this question, guidance is given by the 10 factors articulated in Reynolds v Times Newspapers (these are predominantly reproduced in s 30(3) of the 2005 Act).11

2.11 Section 4 presents the benefit of flexibility. Defendants and courts are not required to strictly adhere to the reasonableness factors set out in 30(3). Instead, these factors are part of a balancing exercise considered in light of the circumstances of the case. A media defendant is unlikely to fail on the same bases seen in Zunter and Gayle.

2.12 This amendment also addresses the confusing wording of 30(a) and (b). Rather than having to determine whether the statement complained of falls within the bounds of the public interest subject, it is necessary only to look at whether the statements themselves are made in the public interest. A far simpler way of framing the test.

2.13 The inclusion of a reasonable belief test recognises the importance of quality reporting as well as according greater weight to the notion of free speech.

2.14 Whilst detractors may argue that the expansion of this defence will significantly hinder the ability of plaintiffs to obtain recompense against media companies – this has not been the case in the UK. In fact, since the incorporation of the provision in 2013, there has only been one instance where a defence under s 4 has been successfully established.

3. Introduction of a 'single publication rule'

The current law and its limitations

3.1 It is a longstanding principle in defamation law that each publication of defamatory material gives rise to a separate cause of action, which is subject to its own limitation period (the ‘multiple publication rule’). Section 5(1AAA) of the Limitations Act 1958 (Vic) provides that an action in defamation is not maintainable if brought one year from the date of publication of the matter in question. For print publications this date is fixed.

3.2 However, in the context of online publication, the multiple publication rule means that each time a defamatory publication is accessed, the limitation period restarts.12 Further, the place in which each cause of action arises is the place of the reader. The application of this rule presents a number of significant problems.

3.3 Firstly, it creates uncertain liability for the defendant. Where an online publication is able to be accessed at any time, the limitation period is effectively open-ended. The prospect of having to defend material published years prior does not accord with the reasons originally advanced for a reduced one year limitation period – the speedy resolution of defamation claims and the facilitation of effective remedies.

3.4 Online publishers can be liable under Australian law for defamatory statements in their archives years after they were first posted, simply because they remain accessible. It is practically unworkable to expect such publishers to trawl through past publications in order to ensure that they do not fall foul of defamation law. Further, it fails to recognise the social utility of maintaining news archives.

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3.5 Similarly, the multiple publication rule encourages jurisdictional uncertainty, and the practice of 'forum shopping'. When each 'click' amounts to a new publication, it is technically possible for a plaintiff to bring an action for injury to reputation in several places. This is particularly concerning for Internet publishers, who are necessarily required to consider every article they publish against the defamation laws of each country 'from Afghanistan to Zimbabwe'.

3.6 The multiple publication rule undermines the uniformity of defamation law across different media. This rule stands in stark opposition to accepted objectives of judicial clarity and certainty.

3.7 Ultimately, we strongly agree with the sentiment that the multiple publication rule is 'unsuited in the contemporary world where statements can be uploaded to the internet in an instant, viewed in multiple jurisdictions, endlessly republished and exist indefinitely if not removed.'

**Recommendation**

3.8 A 'single publication rule' should replace the existing multiple publication rule.

3.9 The single publication rule states that a plaintiff's cause of action begins when publication is first made and that any limitation period will run from the date of that first publication. Practically, plaintiffs would be prevented from bringing an action in relation to republication of the same material by the same publisher after one year from the date of first publication.

3.10 The UK introduced a provision to this effect in 2014. Section 8 of the Defamation Act 2013 (UK), prevents an action being brought one year after publication of the material, save for where a subsequent publication is 'materially different' from the first publication. When considering whether a subsequent publication is materially different, the court may have regard to the level of prominence that a statement is given and the extent of the subsequent publication.

3.11 The UK model has proven effective in addressing the concerns outlined above and is able to be easily emulated in Australian legislation. Under this model, courts retain discretion in determining what constitutes a 'material difference', allowing for the time limit to be extended where dissemination of the material goes beyond that in the first publication. This may account for situations where, for example, an old tweet is subject to a news report and receives an influx of 'hits' as a result.

3.12 Notably, the introduction of a single publication rule would not affect the court's discretion under section 23B of the Limitation of Actions Act 1958 (Vic) (the discretion to extend the time limit for actions for defamation). This provision will exist as a safeguard against the single publication rule, where the court deems that a time extension is necessary in the interests of justice.

4. **Introduction of a serious harm threshold**

**The current law and its limitations**

4.1 There is no explicit 'threshold of seriousness' in Australian defamation law. Instead, section 33 of the Act provides that 'it is a defence to a publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain harm'. Harm under this provision is taken to mean 'harm to reputation'.

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13 Ibid.
4.2 The filtering of spurious claims does not occur until trial – at a point where significant time and legal costs have already been expended. Allowing unworthy claims to proliferate longer than necessary is a burden on courts system and the administration of justice in terms of resources, costs and delay.

4.3 This is clearly evident in the case of *Smith v Lucht*, where a determination of triviality was only made once the final judgment was given.\(^\text{16}\) The court noted the irony, that by launching the legal action, Smith had brought more attention to the alleged defamatory comparison and this was the greatest cause of reputational harm. Where a publication initially has a trivial impact on a plaintiff’s reputation, it is counterintuitive to utilise an avenue of recourse that will exacerbate this harm.

4.4 It also suggested that this issue is significantly heightened in the age of technology. Of the 187 defamation cases between 2013-2017, 16 cases involved Facebook posts, 20 involved emails, four involved tweets and two involved text messages\(^\text{17}\). Ordinary people have an elevated platform through which they can communicate to the world. Forcing such people, who have limited resources, to contest frivolous claims and pay substantial legal bills in the process, does not accord with public policy. The lack of a threshold test also encourages costly legal battles over social media posts made to a tiny number of followers.

**Recommendation**

4.5 A 'serious harm' threshold test, analogous to that implemented in the UK, be introduced into the 2005 Act.

4.6 Section 1 of the Defamation Act 2013 (UK) says a "statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant". Whether serious harm exists is to be determined as a threshold question by preliminary hearing, prior to the commencement of a full trial. This avoids the waste of party and court resources that the current system encourages.

4.7 UK courts have determined that it will not be necessary to provide evidence of actual series harm if it can be inferred. In considering whether such an inference arises, courts will look at a number of factors including the seriousness of the imputations, the audience they were made to, the vulnerability of the claimant and the influence of the author. This suggests that, whilst the court’s analysis is comprehensive, evidentiary requirements placed on plaintiffs are not necessarily onerous.

4.8 The case of *Lachaux v AOL (UK)* sets out that where a question of serious harm requires the need for substantial evidence, courts ‘should be slow to hear it as a preliminary issue’ and instead deem it as a matter for trial.\(^\text{18}\) This interpretation of the serious harm principle allows for flexibility in its application and avoids situations where duplicate evidence would require presentation at a preliminary hearing and then at trial.

5. **Contextual truth defence**

**The current law and its limitations**

5.1 Section 26 of the Defamation Act states that ‘it is a defence to the publication of defamatory matter if the defendant proves that:

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

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\(^\text{16}\) [2016] QCA 267.  
\(^\text{17}\) Centre for Media Transition, ‘Trends in digital defamation: defendants, plaintiffs, platforms’ *University of Technology Sydney* 2018.  
\(^\text{18}\) [2017] EWCA Civ 1334.
(b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.'

5.2 The policy underlying this defence is that where a false imputation conveyed by a publication has not further damaged the reputation of a plaintiff having regard to the substantial truth of the publication as a whole, the plaintiff ought not to be entitled to recover damages. The defence is intended to prevent plaintiffs from 'taking relatively minor imputations out of their context within a substantially true publication'.

5.3 The effectiveness of this defence is currently hindered on two bases – firstly, the drafting of s 26 itself and secondly, a line of case authorities that restricts the ability of defendants to plead and justify imputations that differ from, but have a common sting with, imputations complained of by the plaintiff.

Drafting of section 26

5.4 This defence is similar to that previously found in s 16 of the Defamation Act 1974 (NSW), with one key difference – the inclusion of the phrase 'in addition to'. Under the 1974 Act, defendants were empowered to use the plaintiff's imputations as part of its own defence of contextual truth (a practice known as 'pleading back'). For example, if a plaintiff pleads that the publication imputes that he is both a murderer and a thief, proving the truth of the murder imputation will ensure that the thief imputation would do no further harm to the reputation of the plaintiff. In such circumstances, the defendant could rely on a contextual truth defence. This approach allowed the court to balance the effect of true and false imputation in a publication.

5.5 Under section 26, a defendant can only plead the substantial truth of an imputation that is in addition to the defamatory imputations that are specifically complained of by a plaintiff – preventing defendants from 'pleading back'.

5.6 This drafting encourages plaintiffs to plead all defamatory imputations in a publication so that there will be no substantially true imputations left for a defendant to rely on in their defence. In addition, if a defendant seeks to rely on substantially true imputations that have not been pleaded by a plaintiff, a plaintiff can amend their statement of claim to also adopt those imputations, 'pulling the contextual truth rug from under the defendant's feet' and depriving them of the full effect of the defence. If this were to occur, the defendant will be unable to defeat the plaintiff's claim in its entirety, and would only be able to partially justify the imputations pleaded.

5.7 Confusion has also arisen in determining what constitutes a permissible imputation that is 'in addition to' already pleaded imputations. Courts have made a number of nuanced determinations with difficult practical application, including that:

(a) A contextual imputation that merely reformulated a plaintiff's imputation at a higher level of generality was impermissible;

(b) Where the plaintiff's imputations are more than one it will be necessary to consider all of them, separately and in combination, to determine whether a contextual imputation is carried in addition to them;

(c) If the condition contained in a contextual imputation is necessarily implicit in the act identified in the plaintiff's imputations then the contextual imputation will not arise in addition.

19 Legislative Assembly Hansard, 18 October 2005, 18685.
20 Hall v TCN Channel Nine Pty Ltd [2014] NSWSC 1604.
Development of the common law

5.8 Under David Syme & Co Ltd v Hore-Lacy, defendants may only plead and seek to justify imputations that are not substantially different from and not more serious than, those complained of by the plaintiff.21 Prior to this case, a defendant could plead and seek to justify any imputation arising from the publication with a 'common sting' to an imputation complained of by the plaintiff.22 It is now impossible to plead and justify imputations that have a common sting with, but are broader than, imputations complained of by the plaintiff.

5.9 The consequence of this narrowing of the common law position is that plaintiffs are encouraged to strategically plead narrow defamatory imputations, so as to prevent defendants from pleading these broader meanings that are matters of substantial truth. Accordingly, plaintiffs may be entitled to damages in respect of a publication that taken as a whole is substantially true, even though some narrow aspect of the publication that is unlikely to further harm the plaintiff, is false.

5.10 This appears to be at odds with the policy underlying the defence of contextual truth.

Recommendation

5.11 Defendants should be able to plead and justify any imputations that are reasonably conveyed by a publication and succeed in a defence of contextual truth if the substantial truth of those is such that the plaintiff's reputation has not been further harmed by any false imputations of which the plaintiff has complained.

5.12 This might be achieved by amending the drafting of section 26 proposed by the Law Council of Australia in its submission to the NSW Department of Justice's Review of the Defamation Act (2005), that provides as follows:23

(1) It is a defence to the publication of a defamatory matter if the defendant proves that –
   (a) the matter carried one or more defamatory imputations that are substantially true (contextual imputations); and
   (b) any defamatory imputations of which the plaintiff complains, but which are not substantially true, do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

(2) For the purposes of subsection (1), a contextual imputation may be:
   (a) a defamatory imputation complained of by the plaintiff that is substantially true;
   (b) a defamatory imputation that is in addition to the defamatory imputations of which the plaintiff complains that is substantially true; or
   (c) a defamatory imputation that has a common sting with a defamatory imputation of which the plaintiff complains that is substantially true.

5.13 The Law Council sets out that this drafting would 'reduce the potential for tactical pleading of imputations… be likely to lead to a concomitant reduction in interlocutory disputation and ensure that neither party could prevent the 'real' meaning of a publication from being put before the trier of fact in defamation proceedings'.

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6. **Standard of particulars in a justification defence**

**The current law and its limitations**

6.1 It is accepted that particulars provided in support of a defence of justification must generally satisfy two requirements:

(a) they must be shown to be capable of proving the truth of the defamatory meaning sought to be justified; and

(b) they must be sufficiently specific and precise to enable a claimant to know the case they are required to meet.

6.2 It is also accepted law that a defendant must specify the particulars of truth to support a plea of justification with the same precision as an indictment. Particulars do not themselves indicate the outer limits of what may be proved, they indicate, in effect, topic on which evidence may be led. Evidence adduced in support of a justification defence may be greater than the bare content of the topics outlined in the particulars.

6.3 Whilst these principles are uncontroversial, recent Federal Court interpretation of these principles has been problematic for defendants.

6.4 In *Rush v Nationwide News*, the plaintiff contended that the particulars of the justification defence were inadequate for their failure to comply with the above requirements. The court found that a pleaded particulars that the 'applicant touched the complainant in a manner that made the complainant feel uncomfortable' and 'the conduct referred to in the preceding paragraphs was inappropriate' lack the specificity and precision required in order for the applicant to know the case he had to meet. The particulars were accordingly struck out. The Defendants have since re-pleaded their defence.

6.5 In *Wing v ABC & Ors [2018] FCA 1340*, the Defendants' truth defences were struck out because, amongst other issues, they did not fulfil the Defendants' obligations to specify which matters and circumstances are alleged against Dr Wing. An example of this purported failure was the judge's finding that '…the particulars asserted in pars 32 and 34 that Dr Wing was a member of the standing Committee of the Guangdong Tianhe District CPPCC and the National Committee of the CPPCC without identifying any facts, matters or circumstances to support that allegation'. Analysis of this kind, respectfully, and to some degree, conflates the requirements of particulars with the requirements of evidence in support of particulars that is to be led at atrial.

6.6 Further, in response to the particular that "the applicant served as the honorary chairman" of the ACPPRC, Rares J stated that the particulars "do not give a meaningful indication of the facts and circumstances with any particularity so as to enable Dr Wing to have a fair or any real opportunity to meet it". We submit that the pleaded fact that the applicant was an honorary chairman is clear and precise – Dr Wing knows the case he is required to meet.