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Uniform Defamation Laws

During 2004 substantial progress was made in achieving uniformity in defamation laws among the States and Territories after more than 20 years of abortive efforts. In July 2004, the Commonwealth Government released its Revised Outline of a Possible National Defamation Law and draft Bill which the Commonwealth Attorney-General warned would be followed by legislation in similar terms if the States and Territories failed to quickly agree on uniform laws. In November 2004, the States and Territories published their own draft Model Bill which it was expected each jurisdiction would adopt by January 2006.

Nicolee Dixon

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|--|----------------|
| Ms Karen Sampford, Director | (07) 3406 7116 |
| Mrs Nicolee Dixon, Senior Parliamentary Research Officer | (07) 3406 7409 |
| Ms Renee Giskes, Parliamentary Research Officer | (07) 3406 7241 |

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Inquiries should be addressed to:

Director, Research Publications & Resources

Queensland Parliamentary Library

Parliament House

George Street, Brisbane QLD 4000

Ms Karen Sampford. (Tel: 07 3406 7116)

Email: Karen.Sampford@parliament.qld.gov.au

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EXECUTIVE SUMMARY

The law of defamation varies between jurisdictions, requiring a plaintiff to make sure that they have a cause of action in each place they wish to sue. For example, the meaning of ‘defamation’ can differ as can the availability of certain defences. The immediacy of the electronic media and widespread use of the Internet will continue to highlight the issue. Indeed, publishers are keen for consistency in defamation laws across all jurisdictions rather than facing the current legal minefield created by the substantive and procedural variations in the laws within Australia (**page 1**).

Publishing defamatory matter is an actionable wrong at common law which operates in many Australian jurisdictions or under statute in Queensland, New South Wales, Tasmania and the Northern Territory. Both the *Defamation Act 1889* (Qld) and the *Defamation Act 1957* (Tas) incorporate a code of defamation law and Queensland and Tasmania are, therefore, referred to as ‘code states’ (**pages 1-2**).

The main features of the Queensland *Defamation Act 1889* are outlined on **pages 2-7**.

The significant variation in the laws of defamation across the country is becoming a greater issue in the 21st Century with the rapid national dissemination of matter, whether by print or electronic means. There is also the problem of ‘forum shopping’, heightened by the ability of the Internet and electronic media to allow defamatory matter to be published in many jurisdictions at rapid speed, enabling action to be brought anywhere the matter is published. In particular, the High Court’s decision in *Dow Jones & Co. v Gutnick*, establishing that a ‘publication’ occurs where something on the Internet is downloaded, means that an action can be brought almost anywhere.

For over 20 years, the State and Territory Governments, through the medium of the Standing Committee of Attorneys-General (SCAG), have attempted to develop a uniform approach to defamation laws. Those attempts have, so far, proved unsuccessful (**pages 7-9**).

In late 2003, the Federal Attorney-General, the Hon Philip Ruddock MP, determined that unless the States and Territories shortly agreed upon uniform laws among themselves, the Commonwealth Government would develop a draft Bill for a codified national defamation law relying on the full extent of its powers under the *Commonwealth Constitution*. Accordingly, the *Outline of a Possible National Defamation Law Discussion Paper* was released for public input in March 2004, followed by a *Revised Outline of a Possible National Defamation Law* and draft model Bill in July 2004 (**pages 9-10**). The main features include enabling corporations as well as representatives of deceased persons to bring an action in defamation; creation of a code of defences (which will include a provision that no longer allows truth alone to be a defence); a 12 month limitation period for bringing an action; and a range of provisions aimed at encouraging non-litigious methods of vindicating plaintiffs’ reputations and less emphasis on damages (**pages 10-14**).

At the July 2004 SCAG meeting the States and Territories indicated that they would embark on their own proposals for uniform laws and presented a paper setting out a number of recommendations that would form the basis of the draft Bill to be developed by November 2004. It was intended that the States would all adopt the laws by 1 January 2006 (**pages 14-15**).

The States' *Proposal for Uniform Defamation Laws* differs in some respects from the Commonwealth's proposed laws. It would not allow corporations or representatives of deceased persons to sue and would allow truth alone to be a defence. Further details of these and other draft provisions are set out at **pages 15-18**.

These points of difference between the two proposals were discussed at the March 2005 SCAG meeting with further discussions to occur at the next meeting in June 2005. Meanwhile, some States, such as South Australia, have already moved to legislate in conformity with the States' model Bill (**pages 18-19**).

1 INTRODUCTION

It has been said that the purpose of the law of defamation ‘*is to strike a balance between the right to reputation and freedom of speech*’.¹

The laws of defamation differ in each Australian jurisdiction, requiring a plaintiff to make sure that they have a cause of action in each place they wish to sue. For example, the meaning of ‘defamation’ can differ as can the availability of certain defences. Even in jurisdictions where a cause of action is based on the common law, there are various statutory modifications. The current situation presents difficulties for plaintiffs and defendants because of the enormous potential for defamatory matter to be published in every jurisdiction across the country. The immediacy of the electronic media and widespread use of the Internet will continue to highlight the issue. Indeed, publishers are keen for consistency in defamation laws across all jurisdictions rather than facing the current legal minefield created by the substantive and procedural variations in those laws within Australia.²

During 2004, substantial progress was made in achieving uniformity in defamation laws across the States and Territories after more than 20 years of abortive efforts. In July 2004, the Commonwealth Government released its *Revised Outline of a Possible National Defamation Law and draft Bill* and the Commonwealth Attorney-General warned that legislation in similar terms would follow if the States and Territories failed to promptly agree on uniform laws. In November 2004, the States and Territories published their own draft Model Bill, which it is expected each jurisdiction will adopt by January 2006.

2 BACKGROUND

An action in defamation seeks to redress and protect the reputation of the defamed person. The law, whether under the common law or a statute, allows a person to seek damages as a means of attempting to compensate for the distress and any harm to reputation created by the defamatory publication. As business reputations can be harmed by the publication of such matter, corporations as well as natural persons may bring legal action.³ However, neither common law nor statute enables

¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 568.

² See, for example, ‘Defamation’ *Australian Press Council News*, February 2005.

³ Although the ability of corporations to bring defamation actions in New South Wales is restricted under the *Defamation Act 1974*.

a personal representative or close relative to sue for defamation of a deceased person.

It is not necessary for the plaintiff to show that the alleged defamatory matter is false or that it was maliciously published.⁴

However, even if the plaintiff can show that there has been a publication of matter defamatory of the plaintiff, a defence may be available to the publisher of the defamatory material.⁵ This recognises the public interest in allowing some degree of freedom of speech.

Publishing defamatory matter is an actionable wrong at common law which operates in many Australian jurisdictions or under statute in Queensland, New South Wales, Tasmania and the Northern Territory.⁶ Both the *Defamation Act 1889* (Qld) and the *Defamation Act 1957* (Tas) incorporate a code of defamation law and Queensland and Tasmania are, therefore, referred to as ‘code states’.

2.1 THE QUEENSLAND *DEFAMATION ACT 1889*

The Queensland *Defamation Act 1889* provides for civil and criminal actions for defamation⁷ and has the following features:

- The publication of defamatory matter is unlawful unless such publication is protected, or justified, or excused by law (s 6) (note that only civil procedures will be considered in this Brief). The unlawful publication of defamatory matter is an actionable wrong (s 7).
- ‘**Defamatory matter**’ is defined as an imputation (whether direct, or by insinuation or irony) concerning any person, or any member of the person’s family, whether living or dead, by which –
 - the reputation of that person is likely to be injured, or

⁴ M Gillooly, *The Law of Defamation in Australia and New Zealand*, 1998, Federation Press, p 23.

⁵ See *Halsbury’s Laws of Australia*, Defamation, para 145-1.

⁶ This Brief will consider civil defamation only although there is some overlap with aspects of criminal defamation.

⁷ Note that s 9 makes it an offence for a stranger (i.e. a person who is not a Member of the Parliament) to publish any false or scandalous defamatory matter touching on the conduct of any Member of Parliament.

- the person is likely to be injured in their profession or trade, or
- other persons are likely to be induced to shun, avoid, ridicule or despise the person (s 4).
- **‘Publication’** is –
 - in the case of spoken words or audible sounds – the speaking of such words or making of such sounds in the presence or hearing of any other person than the person defamed; or
 - in the case of signs, signals, or gestures – the making of such signs, signals or gestures so as to be seen or felt by or otherwise come to the knowledge of any person other than the person defamed; or
 - in the case of other defamatory matter – the exhibition of it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with a view to its being read or seen by any other person other than the person defamed (s 5).
- **Part 4** of the Act provides a number of defences, known under the Act as **protections** (absolute protection, protection for certain matter such as a report of certain ‘matters of public interest’, and qualified protection) from liability for the publication of defamatory matter in particular situations –
 - the publication of defamatory matter by a member of Parliament in the course of a speech in Parliament or the presentation of a petition to Parliament by a person containing defamatory matter – the **privilege of Parliament** (absolute protection);
 - the publication of defamatory matter during a court proceeding or Government inquiry, or in an official report by a person resulting from the holding an official inquiry under authority of statute etc. – the **privilege of judges, witnesses and others in courts of justice, reports of official inquiries** (absolute protection);⁸
 - it is lawful to **publish in good faith** (i.e. not actuated by ill-will or other improper motive and done in a manner ordinarily and fairly used in the case of publication of news) for the information of the public, a report of certain **matters of public interest**. Those matters are set out in s 13 and include a fair report of the proceedings of Parliament or a Parliamentary Committee;

⁸ Because quasi-judicial proceedings are not specifically provided for under this Act, other statutes confer a similar absolute privilege e.g. *Commissions of Inquiry Act 1950* (Qld). Absolute privilege is also given to other proceedings and officials where relevant e.g. *Whistleblowers Protection Act 1994* (Qld), s 39.

court proceedings or the result of such (unless prohibited by the court, or it is blasphemous or obscene); proceedings of a Government inquiry; information issued by the police or government departments etc. for the information of the public; matters of public concern reported by local government boards etc.; and proceedings of public meetings about matters of public concern (**protection for matters of public interest**);

- it is lawful to publish a **fair comment**⁹ about certain matters such as (see s 14 for the full list) the public conduct of a person involved in public affairs, a public officer, or public servant. It is lawful to publish a fair comment about the merits of a court case or conduct of any person as a judge, party, witness, counsel, solicitor or court officer, or respecting the character of any such person if the person's character appears in that conduct. It is lawful to publish a fair comment about a published book or production or the author's character; or respecting a composition, artwork, public performance; or about public entertainment or sports. In each case it is lawful to publish a fair comment respecting the character of a person involved in those things provided that the character of the person appears by such book or production or matter exhibited etc. It is also lawful to publish a fair comment respecting any communication made to the public on any subject (**protection for fair comment**).
- it is lawful, under s 15, to publish defamatory matter if the matter is **true** and if it is for the **public benefit** that the publication complained of should be made (public benefit being an additional requirement to mere truth). It appears that 'public benefit' exists where the publication discusses or raises for discussion or information, matters which are properly of public concern.¹⁰ It would not protect the raking up of a past misdeed of a public figure, albeit true, for the sake of gossip but it may do so if the misdeed was relevant to a public office the person was about to take up (**protection for truth**);
- **qualified protection** is provided by s 16(1) in the following cases, provided that the publication was made in **good faith** –

⁹ Whether the comment is fair or not is a question of fact: s 14(2). The common law requirements that the comment be objectively fair and that its factual basis be true or privileged apply. Also, showing malice on the part of the defendant does not, of itself, defeat the fair comment defence but may be relevant to whether or not the comment is fair: see M Gillooly, p 137 and authorities referred to.

¹⁰ M Gillooly, p 119, citing *Allworth v John Fairfax Group* (1993) 113 FLR 254, 263.

- in the course of a censure for conduct of a person over whom the person making the publication has lawful authority (e.g. employment disciplinary proceedings);
- for the purpose of seeking remedy or redress from a person who has, or whom the person making the publication reasonably believes to have, authority over the person defamed regarding the subject matter of such wrong or grievance (e.g. an employee's complaint of alleged misconduct by another employee made to an employer or disciplinary body);
- for the protection of the interests of the person making the publication or some other person (e.g. a complaint to relevant authorities about suspected child abuse); or made for the public good. The latter phrase, 'for the public good' is quite wide but it might have some constraints (e.g. it may be for the public good to ventilate an expression of views on the political attitudes of politicians but not necessarily for the public good to publish allegations about the private behaviour of public figures).¹¹ The defence would also appear to align with the implied constitutional freedom of communication about political or governmental matters.¹²
- in answer to an inquiry made of the person making the publication regarding a subject about which the inquirer is reasonably believed to have an interest in knowing the truth (this interest being more than mere curiosity but a real and direct personal, business etc. concern)¹³;
- for the purpose of giving information to the person to whom the publication was made about a subject in which that other person has an interest in knowing the truth as to make the conduct in making the publication reasonable in the circumstances;
- on the invitation or challenge of the person defamed;
- in order to answer or refute some other defamatory matter published by the person defamed concerning the person making the publication or some other person;
- in the course of, or for the purposes of (thus protecting a publication merely facilitating the holding of the discussion, such as a leaflet

¹¹ M Gillooly, p 211.

¹² As established by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See M Gillooly, pp 216-218.

¹³ See *Telegraph Newspaper Co v Bedford* (1934) 50 CLR 632, 662.

advertising a meeting), the discussion of some subject of public interest, the public discussion of which is for the public benefit (which is a quite broad concept) and the comment is fair. The comment need only be fair, not necessarily true.¹⁴

For the purposes of the above ‘qualified protections’, a publication will be made in ‘good faith’ if the matter published is relevant to the matters the existence of which may excuse the publication of defamatory matter. It is also made in ‘good faith’ if the matter and extent of publication does not exceed what is reasonably sufficient for the occasion; and if the publisher is not actuated by ill-will or any other improper motive and does not believe the matter to be untrue (s 16(2)). The burden of proof to show absence of good faith lies on the plaintiff (s 17);

- if the defamatory matter is not in writing, it is a good defence to prove that the publication was trivial – i.e. made on an occasion and in such circumstances when the plaintiff was not likely to be injured thereby.

Other matters to note:

- If the defendant has made or offered an **apology** to the plaintiff for the defamation before the start of the action, or as soon afterwards as the opportunity arose if there was no chance to do so before the action commenced, this can be pleaded in evidence in mitigation of damages (s 21).
- If the defamatory matter was contained in a periodical, the defendant may plead that it was published without ill-will or other improper motive, and without gross negligence and that before the action commenced, or at the earliest opportunity thereafter, a full apology was placed in the periodical. However, the defendant must also pay into court a sum of money by way of amends (s 22).
- Actions in respect of the publication of the same defamatory matter brought against several defendants by the same plaintiff can be **consolidated** into one action. However, separate verdicts must be given (s 23).
- The defendant can give, in evidence in **mitigation** of damages, that the plaintiff:
 - has already recovered, or has brought actions for, damages or
 - has agreed to compensation in respect of similar publications of defamatory matter (s 24).

¹⁴ M Gillooly, p 215, referring to *Pervan v North Queensland Newspaper Company* (1993) 178 CLR 309, 324.

- Protection from liability is provided for **innocent sellers** of periodicals or books containing defamatory matter if the seller does not know about the defamatory matter contained therein or that defamatory matter is habitually or frequently contained therein (if a periodical) (ss 25-26).
- **Employers** are protected from liability in cases where an employee sells a book etc. containing defamatory matter, unless it is proved that the employer authorised the sale knowing about the defamatory matter or that the book etc. habitually or frequently contained defamatory matter (s 27).
- Either party can elect to have the trial heard by a **jury**;¹⁵
- Part 8 contains provisions applying to **criminal** prosecutions for defamation.

3 BACKGROUND TO UNIFORMITY IN AUSTRALIAN DEFAMATION LAWS

As noted earlier, defamation laws between the States and Territories are not consistent. For instance, in some jurisdictions (e.g. South Australia) there is no room for jury trials whereas in some (e.g. Queensland), either party can elect to have a jury. The defences also vary. For example, truth is a complete defence in SA, Victoria, WA and the NT, but in Queensland, New South Wales, Tasmania and the ACT truth must be accompanied by public interest/benefit for a defence to be established.

The significant variation in the laws of defamation across the country is becoming a greater issue in the 21st Century in view of the rapid national dissemination of matter, whether by print or electronic means. While in past decades, damage to the reputation of a person or business may have been locally confined, it is now likely that the harm can be widespread. There is also the problem of ‘forum shopping’, where a person alleging they have been defamed will attempt to institute proceedings in a jurisdiction with defamation laws most favourable to plaintiffs and/or with the tendency for higher damages awards. For example, it might be easier to succeed in an action in Queensland (where the defendant who has published the allegedly defamatory matter has to show public benefit as well as truth) than it is in Victoria (where truth alone is a complete defence to such an action).

The potential for ‘forum shopping’ in the defamation context is heightened by the ability of the Internet and electronic media to allow defamatory matter to be published in many jurisdictions at rapid speed, enabling action to be brought in

¹⁵ *Uniform Civil Procedure Rules 1999* (Qld), Part 3.

anywhere the matter is published. In particular, the High Court's decision in *Dow Jones & Co. v Gutnick*,¹⁶ establishing that a 'publication' occurs where something is downloaded, means that an action can be brought almost anywhere.

In July 1980, the Standing Committee of Attorneys-General (SCAG) began to consider a uniform defamation law for all Australian jurisdictions based on the Australian Law Reform Commission's (ALRC) Report *Unfair Publication: Defamation and Privacy No. 11*, released in 1979. The ALRC reported that changes were needed because defamation laws were complex and differed across all jurisdictions such that there was a patchwork of statutes and case law. It recommended a codification of the law to be uniform across the country.¹⁷ Despite the publication by SCAG of draft Bills for comment in 1983 and 1984, nothing eventuated. The issue was dropped from the SCAG agenda in May 1985.

In March 1990, the reform of defamation laws around Australia was again taken up by SCAG, followed by a decision of the Attorneys-General of Queensland, Victoria and New South Wales to look at defamation laws in their own states with a view to achieving national uniformity. Those Attorneys-General released two papers during 1990 and 1991 inviting submissions.¹⁸

In March 1992, a Defamation Bill 1992 (Qld) was introduced into the Queensland Parliament – the same time as similar Bills were introduced into the Parliaments of New South Wales and Victoria. The Australian Capital Territory then developed a draft Bill for consideration which was modelled on those Bills. All were based on the NSW *Defamation Act 1974* but also incorporated amendments in areas such as qualified privilege, justification and limitation periods. Unfortunately, the Bills lacked uniformity in various areas.¹⁹

The NSW Bill was eventually referred to the New South Wales Law Reform Commission (NSWLRC) which was followed by a *Defamation Discussion Paper* in 1993 and a subsequent *Defamation Report No. 75* in 1995.²⁰ However, the recommendations in that Report were essentially confined to amending the existing

¹⁶ [2002] HCA 56 (10 December 2002), at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/2002/56.html?query=title+%28+%22gutnick%22+%29>.

¹⁷ Australian Law Reform Commission, *Unfair Publication Defamation and Privacy Report No.11*, 1979.

¹⁸ New South Wales Law Reform Commission (NSWLRC), *Defamation Discussion Paper 32*, 1993, para 1.12, <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/DP32CHP1>.

¹⁹ NSWLRC, *Defamation Discussion Paper 32*, para 1.14.

²⁰ NSWLRC, *Defamation Report No. 75*, 1995, <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R75TOC>.

NSW *Defamation Act 1974* (which has since occurred). Both Victoria and the ACT continued to support the concept of uniformity but no longer sought to actively pursue it in their own jurisdictions for the time being.

In Queensland, the Defamation Bill 1992 lapsed with the prorogation of Parliament leading up to the 1992 State election and it was not reintroduced. However, the Queensland Government remained committed to reform of national defamation laws.

4 RECENT DEVELOPMENTS

The issue of national uniformity has always been on the ‘backburner’ of SCAG’s agenda even though there has not been significant progress towards achieving this aim since the early 1990s. In late 2003, the Federal Attorney-General, the Hon Philip Ruddock MP, determined that unless the States and Territories shortly agreed upon uniform laws, the Commonwealth Government would develop a draft Bill for a codified national defamation law.²¹ However, Mr Ruddock’s preference was reported to be for a cooperative approach to get a model code into place.²²

In order to enact a Defamation Bill forming a national code, the Commonwealth Government would rely on its powers under the *Commonwealth Constitution* (particularly its telecommunications power and its power over activities of corporations contained in s 51). In this way, it would be able to cover a vast array of defamatory publications throughout the country, essentially leaving the States and Territories with the ability to legislate only for publication of defamatory matter between individuals (such as where defamatory matter is placed on a noticeboard or is published in a leaflet) within their own jurisdictions. Section 109 of the *Commonwealth Constitution* prevents the States from legislating about the same matters covered by Commonwealth laws. However, the States could refer power to deal with the latter type publications to the Commonwealth under the reference provision (s 51(xxxvii)) of the *Commonwealth Constitution*.²³

In March 2004, the Commonwealth Attorney-General’s Department released the *Outline of a Possible National Defamation Law Discussion Paper* which set out an

²¹ Hon Philip Ruddock MP, Commonwealth Attorney-General, ‘Australian Government pushes for uniform defamation laws’, *Media Statement*, 14 November 2003.

²² Fergus Shiel, ‘Time for unity on defamation, says Ruddock’, *Age Online*, 15 November 2003.

²³ ‘National Defamation Law’, News Headlines, *CCH Australia Limited*, 18 March 2004.

overview of the proposed code of defamation law.²⁴ The *Discussion Paper* elicited an enormous response from a number of legal practitioners, media representatives and other parties in most capital cities. Major newspaper publishers and television stations appeared opposed to the proposed measures, with the company secretary for John Fairfax reportedly stating that there was no value in uniformly bad law. There was a concern that the resulting defamation laws would impose greater restrictions on what was published.²⁵

The comments received and other submissions (some by relevant experts) were taken into consideration when the Commonwealth Attorney-General's Department published the *Revised Outline of a Possible National Defamation Law* in July 2004 and draft Bill. The revised proposals responded to concerns raised during consultation, made some changes, and clarified certain matters.²⁶ Comments were invited in response to draft provisions of the Bill proposed to form part of a national code to be enacted by the Commonwealth Parliament.

4.1 REVISED OUTLINE OF A POSSIBLE NATIONAL DEFAMATION LAW (JULY 2004)

The major proposals outlined in the Attorney-General's Department's *Revised Outline of a Possible National Defamation Law* are –

- The cause of action will not be made to depend on the publication of a defamatory imputation. There will be a **single cause of action** for the publication of defamatory matter regardless of the number of imputations contained in it.
- The meaning of '**defamatory matter**' will, as in Queensland, allow plaintiffs to sue for the publication of defamatory matter which affects them in their occupation or their financial standing even if it does not also damage their reputation or lead to their social exclusion. Some media bodies have argued that this proposal was too broad and would inhibit the reporting of business news for fear it could injure a person in their occupation or trade etc.²⁷

²⁴ Commonwealth Attorney-General's Department, *Outline of possible defamation law, Discussion Paper*, March 2004.

²⁵ Chris Merritt, 'Publishers split on defamation laws', *Australian Financial Review*, 20 March 2004, p 7.

²⁶ Hon Philip Ruddock MP, Commonwealth Attorney-General, 'Government moves one step closer to uniform defamation law', *Media Statement*, 29 July 2004.

²⁷ See, for example, 'One step forward, many steps back,' *Age Online*, 22 March 2004.

- A plaintiff will be prevented, apart from in limited circumstances, from bringing more than **one action** in respect of the same matter.
- A person who publishes matter alleged to be defamatory matter concerning a **group or class of persons** will be liable to a member thereof if the group or class is sufficiently small that the matter can reasonably be understood to refer to such a member or the circumstances of publication reasonably give rise to that conclusion.
- A representative of a **deceased person** or a surviving close relative will be able to bring an action for publication of defamatory matter, provided it is brought within three years of death (to avoid difficulties in gathering evidence for a trial). However, remedies would be limited to a correction order, declaration or injunction rather than damages. This would be new to all Australian jurisdictions and has been a controversial proposal.²⁸ It is at odds with the States' and Territories' proposals (see below).
- The new laws would also provide for **survival of actions** but with limited remedies.
- A **corporation** will be able to sue for defamation but can only be awarded damages for actual or financial loss. The ability of corporations to bring proceedings has been wound back under amendments to the NSW *Defamation Act 1974* (allowing only small businesses with less than 10 persons to sue) in 2002 but remains in other jurisdictions. This proposal has also been controversial, with opposition from media organisations²⁹ and is contrary to the States' and Territories' proposal that corporations should be generally prohibited from suing in defamation (see below).
- **Defences** –
 - there will be a defence if the publication of the matter is **true and** relates to a subject of **public interest**. The concept of 'public interest' will be broader than the current Queensland defence of truth and 'public benefit' as the matter will be seen as relating to a public interest unless it involves an 'unwarranted disclosure of private affairs' as specified under the proposed

²⁸ See, for example, submission of the Media and Communications Committee of the Business Law Section of the Law Council of Australia to the Commonwealth Attorney-General's Department, April 2004, p 7.

²⁹ See, for example, the Combined Media Defamation Reform Group's *Submission in Response to 'Outline of Possible National Defamation Law'*, May 2004, p 20.

laws. There will also be a defence of contextual truth.³⁰ This proposal has caused a difference of opinion among stakeholders³¹ and the States and Territories have proposed that truth alone be the minimum standard (see below);

- there will be a defence of **'honest opinion'** if the defendant can show that the matter related to a subject of public interest; it expressed the defendant's honestly held opinion which was based on facts referred to in the matter, or generally known at the time of publication; and the facts were substantially true or were covered by absolute or qualified privilege or fair report. There will also be 'related opinion' defences to protect non-authors such as an employer or a person who publishes an opinion of a stranger (e.g. a newspaper publishing a letter to the editor);
- there will be a defence of **absolute privilege** to the publication of defamatory matter in the course of proceedings in Commonwealth, State and Territory **Parliaments, courts, quasi-judicial** and **administrative bodies** and a defence for some communications involving Ministers;
- there will be a defence of **qualified privilege** covering publication, without an improper purpose, in any one or more of a set of **specified circumstances** (which will be similar to portions in s 16(1) of the Queensland *Defamation Act 1889*). However, an additional defence will be provided where the publication is made in the course of conveying information about the suitability of a candidate to electors during an election campaign. In addition, the onus will now be on the defendant to show that the publication was not made for an improper purpose;
- there will be also be a defence of **qualified privilege** if the publication of the defamatory matter is otherwise **reasonable in all the circumstances** if the defendant can show they believed on reasonable grounds that the recipient had an interest in receiving certain information; the publication was made in the course of giving the information; and the publication was reasonable in all the circumstances (taking into account a number of enumerated matters);

³⁰ This arises in a situation where the plaintiff does not proceed with all of the defamatory imputations and the defendant can prove that the matter carried other imputations, besides that about which the plaintiff complains, which are substantially true and the imputations about which the plaintiff complains do not further harm the plaintiff because of the substantial truth of the other imputations.

³¹ See, for example, the Combined Media Defamation Reform Group, p 36 (truth alone); Law Council of Australia, p 12 noting opinion was divided in the legal profession.

- there will be a defence of **qualified privilege** for **fair and accurate reports** of certain public proceedings or a copy or summary of a public document;
- there will be a limited defence for **trivial defamation** i.e. where the recipients of the publication are well acquainted with the plaintiff;
- at common law, all persons who participate in a publication are all liable (e.g. the printer, retailer, library), but a defence of **'innocent dissemination'** is available. Under the proposed laws there will be a defence for Internet Service Providers and Internet Content Hosts that reflects Schedule 5 of the *Broadcasting Services Act 1992* (Cth), which requires the removal of certain content once told to do so by the Australian Broadcasting Authority but does not require that ISPs and ICHs engage in active monitoring of content. 'Other distributors' will have a defence if they can show they had no knowledge of the defamatory material being contained in the publication and that it was reasonable for them, having regard to the nature of the publication and other facts, not to check the contents. The defence would not assist authors, editors or commercial publishers and others concerned in the determination of the relevant matter;
- the proposed laws will provide for the defences of release (where the plaintiff releases the defendant from liability by way of compensation etc.); consent to the publication by the plaintiff in certain circumstances; and illegality which exist in some jurisdictions.
- **Remedies** –
 - the new laws will contain new remedies aimed at encouraging parties to take steps to vindicate the plaintiff's reputation where possible rather than to rely on damages (e.g. incentives for publishers to give an adequate **right of reply** by a person potentially defamed; full and complete **apologies** offered as soon as possible; **correction orders** where a plaintiff is successful so the defendant must set right a defamatory statement in a way calculated to reach the same audience).
 - **damages** will still be able to be awarded pursuant to an enumerated set of assessment factors and there will be two factors which will reduce damages (evidence of specific misconduct by the plaintiff to establish bad reputation; and the terms of any declaration or correction order).
- **Procedures** –
 - there will be provision for a **12 month** limitation period within which to bring an action from the date of publication (subject to the court's discretion to extend the period for up to three years if just and reasonable to do so);

- Supreme Courts of each State and Territory and the Federal Court of Australia will be given **concurrent jurisdiction** to hear actions under the new laws with appeals to the Federal Court;
- under the new laws, it is proposed that **juries** will be restricted to those jurisdictions whose legislation already allows for their use and to proceedings in the Federal Court. The juries' function will be limited to deciding if a publication is defamatory and whether a defence is available but the judge will determine the level of damages. Juries currently have the role of determining damages in Queensland. However, in an effort to stop 'forum shopping', further consideration is needed regarding whether the laws should provide a common criteria for judges to decide whether or not to order a jury trial;
- various powers for speedy resolution of proceedings will be provided (e.g. striking out of proceedings for want of prosecution), including alternative dispute resolution processes (e.g. mediation).

In releasing the *Discussion Paper*, the Commonwealth Attorney-General reaffirmed his commitment to uniformity in the law of defamation, stating that anything less was not acceptable. Mr Ruddock said that defamation reform was about striking a balance between the public interest in receiving information and the need to protect reputations.³²

4.2 STATES' AND TERRITORIES' DRAFT MODEL BILL

The Commonwealth's proposals were put to the State and Territory Attorneys-General at the July 2004 SCAG meeting. At the same time, the States and Territories³³ indicated that they would embark on their own proposals for uniform laws and would release a draft model defamation law in time for the next SGAG meeting in November 2004. Accordingly, the States presented SCAG with a paper setting out a number of recommendations that would form the basis of the draft Bill.³⁴ It was intended that the States would all adopt the laws by 1 January 2006.³⁵

³² 'Government moves one step closer to uniform defamation law'.

³³ 'States and Territories' will be referred to as 'States' for reasons of brevity.

³⁴ SCAG Working Group of State and Territory Officers, 'Proposal for Uniform Defamation Laws', NSW Attorney-General's Department, July 2004, http://www.lawpress.com.au/States_Defamation_July04.pdf.

The States' *Proposal for Uniform Defamation Laws* stated that each State and Territory are committed to enacting textually uniform 'core' provisions to complement the common law but that each jurisdiction would be able, without compromising uniformity, to accommodate local procedures and institutions. The State and Territory Ministers did not support the Commonwealth model arguing it would add a ninth lawyer to defamation laws in Australia as it would not be possible for the Commonwealth to completely cover the field in the area.³⁶

The Commonwealth Attorney-General said that the *Proposal for Uniform Defamation Laws* presented by the States failed to address significant issues and showed that the States were not committed to achieving a genuine uniform law.³⁷

A **draft model Defamation Bill** was released in November 2004. The main features are –

- A definition of '**defamatory material**' as 'matter (whether written, oral or otherwise) that conveys a defamatory imputation about a person' and provisions for a single cause of action for the publication of defamatory matter even if there is more than one defamatory imputation.
- **Corporations** cannot sue for defamation, apart from non-profit corporations that are not a local council, or governmental body, or public authority.
- **Deceased persons'** legal representatives or any other person cannot bring or continue a cause of action in respect of the publication of defamatory matter about a deceased.
- Proceedings must generally be commenced within **12 months** of the publication of the defamatory matter, although the court has discretion to extend the limitation period to three years.
- Provisions for resolution without litigation including an '**offer of amends**' process. The 'offer of amends' must include an offer to publish a reasonable correction and an offer to pay reasonably incurred expenses of the aggrieved person, and may include an offer to pay compensation.

³⁵ States and Territories Model Provisions – Model Defamation Provisions, [http://www.lawlink.nsw.gov.au/lap.nsf/files/Model%20Defamation%20Provisions.pdf/\\$FILE/Model%20Defamation%20Provisions.pdf](http://www.lawlink.nsw.gov.au/lap.nsf/files/Model%20Defamation%20Provisions.pdf/$FILE/Model%20Defamation%20Provisions.pdf).

³⁶ 'Proposal for Uniform Defamation Laws', p 7.

³⁷ Hon Philip Ruddock MP, Commonwealth Attorney-General, 'State defamation paper falls short of mark', *Media Statement*, 30 July 2004.

- Unless the court orders otherwise, either party may elect to have a trial by **jury** – with the jury having the function of determining whether the matter is defamatory and whether the defendant can establish a defence. Juries will not determine damages.
- **Defences** will include –
 - ‘**substantial truth**’ of the matter;
 - **contextual truth** (see explanation provided above) of the matter;
 - **absolute privilege** for the publication of matter in the course of Parliamentary proceedings or of a court or tribunal and other specified bodies (including reciprocal recognition for those bodies in other jurisdictions);
 - publication of a **public document** as defined (e.g. reports by a Parliamentary body or a court judgement);
 - **fair report** of specified proceedings of public concern (e.g. public proceedings of law reform bodies or a public meeting about matters of public interest);
 - **qualified privilege** for providing certain information in which the recipient has an interest, if the conduct of the defendant in publishing such is reasonable in the circumstances;
 - expressions of **honest opinion** on a matter of public interest based on substantially true or privileged material;
 - **innocent dissemination** (to protect subordinate distributors such as booksellers, newsagents, librarians); and
 - where the plaintiff was **unlikely to suffer harm**.
- **Damages** for non-economic loss would be limited to a specified amount but a court can award aggravated damages. However, no exemplary/punitive damages may be awarded. Provision is made for mitigation of damages.

When the draft Bill was released, Mr Ruddock said that the proposal fell short of achieving uniformity but was a ‘step in the right direction.’ The areas of concern were in relation to the differences from the Commonwealth proposed laws. The differences were listed by Mr Ruddock as follows³⁸ –

³⁸ Hon Philip Ruddock MP, Commonwealth Attorney-General, ‘States move forward on defamation but still not uniform’, *Media Statement*, 5 November 2004.

- the States' proposed measures did not enable courts to make or recommend corrections as a remedy which the Commonwealth proposals provided for;
- the States' proposals restricted the right of corporations to bring defamation actions which would also prevent sole traders, family businesses etc. from seeking protection. The Commonwealth laws would allow corporations to sue;
- the States' model allows truth alone to be a defence whereas the Commonwealth model requires truth *and* public interest (albeit with the latter merely requiring that there is no unwarranted disclosure of specified private affairs);
- the States' proposals would leave it to each jurisdiction to decide whether a jury should be involved in an action for defamation. However, both the States and the Commonwealth agree that juries should only decide whether a publication is defamatory but not assess damages;
- the States' proposed laws would include a defence of an 'offer of amends' which would enable a defendant to escape liability if able to show a reasonable offer was made to make amends;
- the States' model would entrench the common law's treatment of defamation against the deceased by not allowing a legal representative to bring a cause of action for defamation of the dead person. The Commonwealth proposals would allow representatives to sue on behalf of the dead;

Mr Ruddock warned that each State and Territory may not enact legislation that strictly conformed to the above model provisions. He noted that introducing such laws would require quite radical departure from existing defamation legislation. The Attorney-General cited the codes in Queensland and Tasmania as needing to be 'ripped up' under the States' proposals and the common law resurrected.³⁹

On a different note, the Australian Press Council expressed its support for the States' model law. In particular, the Council's chairman was in favour of the proposal for an 'offer of amends' as one that would lead to a greater number of settlements without resort to lengthy trials. The Council also considered that the inclusion of recommendations for a defence of truth without an additional need for public interest/public benefit, a cap on damages for non-economic loss, and a shortened limitation of actions period as positive.⁴⁰

³⁹ 'States move forward on defamation but still not uniform'.

⁴⁰ 'Defamation' *Australian Press Council News*, February 2005.

The States' proposals also have union support with Media, Entertainment and Arts Alliance secretary, Chris Warren, being reported as being pleased that there is an alternative to the Commonwealth proposals. He reportedly welcomed the idea of truth alone providing a defence and of not permitting dead people to bring actions through their representatives.⁴¹

4.3 SUBSEQUENT PROGRESS

In the lead up to the March 2005 meeting of SCAG, the States and Territories indicated their objection particularly to the Commonwealth's proposal that would allow corporations to sue for defamation, arguing that the vast resources available to companies would make them the stronger party in any proceedings.⁴²

At the same time, the Commonwealth Attorney-General is reported to have warned the States and Territories that they have until 2006 to agree on a uniform code or the Commonwealth would legislate along the lines of its proposed laws.⁴³ It has been reported that, while Mr Ruddock has attempted to compromise on a number of issues, he will not give in to some of the States' demands such as removing the ability of corporations to sue for defamation.⁴⁴

It has been reported that Queensland Attorney-General, Hon Rod Welford MP, was prepared to forgo elements of Queensland's *Defamation Act 1889* in the effort to achieve national uniformity which would provide clarity and certainty. However, it is believed that Mr Welford lobbied his State and Territory counterparts at the March SCAG meeting to include in the final national model the requirement that a publication be both true and in the public interest before a defence is available. At present, the States' draft proposal would allow truth alone to be a complete defence.⁴⁵

⁴¹ 'A-G to unveil uniform defamation laws', *ABC News Online*, <http://www.abc.net.au/news>, 5 November 2004.

⁴² 'Federal Government pushes again for uniform defamation laws', *CCH Australia Limited*, 21 March 2005.

⁴³ 'Government after uniform defamation laws', *Sydney Morning Herald Online*, 21 March 2005.

⁴⁴ David Marr, 'A law unto themselves, or so they hope', *Sydney Morning Herald Online*, 14 April 2005.

⁴⁵ Malcolm Cole, 'State compromises on defamation law', *Courier Mail*, 13 April 2005, p 4.

It is reported that the State Attorneys-General have agreed to take their model Bill to their respective Cabinets with a view to the introduction of defamation legislation by January 2006.⁴⁶

In April 2005, in an address to the Law Council of Australia, the Commonwealth Attorney-General said that the differences between the State and Commonwealth draft measures did not mean that there was an impasse and the Commonwealth was prepared to compromise on important issues. Mr Ruddock indicated that he could give ground on the defence of truth alone, defamation of the dead and survival of actions, and caps on damages. The major areas of difference were regarding removing the right of corporations to sue, remedies to correct the record, and the role of juries. Mr Ruddock said that the States now needed to act on their commitment to introduce uniform laws by 2006 and if there is no true uniformity, the Commonwealth would again look at legislating. The Attorney-General said that he had told the States and Territories that the Commonwealth would not require their proposals to reflect every detail of the Commonwealth's model and that the States and Territories had indicated their preparedness to do some more work on the 'sticking points' with a view to putting some options to Ministers prior to the June SCAG meeting.⁴⁷

4.4 SOUTH AUSTRALIA INTRODUCES A DEFAMATION BILL

The Defamation Bill 2005 (SA) was introduced into the South Australian Legislative Assembly on 2 March 2005. It seeks to reform defamation law in SA in conformity with the model Defamation Bill agreed to by the States in November 2004. South Australia has not had juries for civil matters for many years.

⁴⁶ Ian Munro, 'Uniform defamation laws close, say States', *Age Online*, 5 November 2004.

⁴⁷ Hon Philip Ruddock MP, *Law Council of Australia Seminar on Defamation Law Reform*, Sydney, 13 April 2005, at http://www.lawpress.com.au/LCA_Ruddock_130405.html. Downloaded 17 May 2005.

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