The New Defamation Laws: 2021 and Beyond

On 20 August 2020, CAMLA hosted a webinar for its members on the new defamation law reforms, moderated by **Robert Todd,** Partner at Ashurst. The following is a transcript of the event.

Panel

Robert Todd
Partner at Ashurst **(TODD)**

The Hon. Mark Speakman SC MP
Attorney-General and Minister for the Prevention of Domestic Violence, New South Wales **(AG)**

Associate Professor Jason Bosland
Director of the Centre for Media and Communications Law at University of Melbourne Law School **(BOSLAND)**

Marlia Saunders
Senior Litigation Counsel at News Corp Australia **(SAUNDERS)**

Lyndelle Barnett
Leading defamation barrister, Level 22 Chambers, Sydney **(BARNETT)**

TODD: First of all, Mr Attorney has some comments I think he'd like to make and deserves to make after all the effort he's put in so I'll hand straight over to the Attorney.

AG: Thank you Robert.

Thank you also to the Communications and Media Law Association and Ashurst for hosting today's seminar.

I would like to acknowledge the traditional custodians of this land, the Gadigal of the Eora Nation, and I pay my respects to their Elders, past, present and emerging.

The context for reform

These reforms come at a difficult time for media professionals. We have seen often savage changes to newsrooms across the country.

News journalism is more important now than ever. As governments take extraordinary measures to steer communities through the COVID-19 pandemic, we need a legal framework that supports journalists and lawyers holding governments and powerful individuals to account.

Pleasingly late last month the Council of Attorneys-General (**CAG**) agreed to the Stage 1 reforms to Australia's Model Defamation Provisions (**MDPs**).

The new provisions strike a better balance between, on the one hand, providing fair remedies for a person whose reputation is harmed by a publication and, on the other hand, ensuring defamation law does not place unreasonable limits on freedom of expression, particularly about matters of public interest.

Much has changed since the MDPs were introduced in 2005. Social media has democratised defamation.

In 2005, Myspace turned down an offer from Mark Zuckerberg to purchase Facebook for US$75 million.[1] Today, Facebook's market capitalisation is US$744.22 billion[2] - 10,000 times greater.

The 2005 laws came several months before the first ever tweet, before you could defame someone in 140 characters, or 280 characters these days.

Social media has paralleled an increase in defamation suits.

In September 2019, in an address to the National Press Club, Matt Collins QC noted that, on a per capita basis, superior courts in Sydney considered defamation cases more than 10 times as frequently as courts in London.[3]

Kate McClymont of The Sydney Morning Herald said recently that she spent 25 per cent of her working life in 2019 with lawyers about defamation suits.[4] This seems excessive.

The steps so far to reform

In February 2018, the former NSW Department of Justice conducted a statutory review of the state's Defamation Act 2005. The review identified a number of areas in the Act – and by implication, the MDPs – which would benefit from amendment or modernisation.

In June 2018, I asked the CAG to agree to the review's recommendation that the intergovernmental Defamation Law Working Party (**DWP**) be reconvened to review the model laws.

1 Sam Thielman, 'MySpace: site that once could have bought Facebook acquired by Time Inc' The Guardian (online, 12 February 2016) <https://www.theguardian.com/technology/2016/feb/11/myspace-time-inc-facebook-acquisition-ownership>.

2 Bloomberg (web page, 20 August 2020) <https://www.bloomberg.com/quote/FB:US>.

3 Interview with Matt Collins QC (Sabra Lane, National Press Club, 4 September 2019).

4 Zoe Samios, '"You just feel physically ill": Kate McClymont on a career of exposing Sydney's dark secrets' The Sydney Morning Herald (online, 25 January 2020) <https://www.smh.com.au/business/companies/you-just-feel-physically-ill-kate-mcclymont-on-a-career-of-exposing-sydney-s-dark-secrets-20200125-p53upb.html>.

The CAG agreed to target parliament-ready legislation by mid-2020. While it might sound surprising, the CAG considered a two-year uniform law reform process ambitious. This is because there are numerous steps involved in reforming model law.

In February 2019, the DWP released a discussion paper setting out issues affecting the MDPs and asking stakeholders to identify matters requiring reform. 44 submissions were received.

Based on stakeholder feedback, the DWP prepared draft amendments to the MDPs.

In November 2019, these draft amendments were released for public consultation. 36 submissions were received in response.

This work formed the basis of the amendments that each state and territory agreed in late July to introduce.

Within 15 days of the CAG agreeing to the amendments, NSW Parliament passed the reforms, which have since received royal assent.[5]

However, other states and territories have advised they cannot move as quickly, for example because they have elections coming up or because due to COVID-19 they do not have capacity.

The DWP is seeking agreement between members about a feasible common commencement date.

The agreed reforms

The key reforms agreed by the CAG include:

- The introduction of a mandatory complaints notice procedure and serious harm threshold, to reduce the number of matters proceeding to litigation.
- Clarification of the cap on damages for non-economic loss.
- The introduction of a single publication rule.
- The introduction of a new defence for publication of matter on a topic of public interest.

For a start, the reforms will encourage out-of-court settlement.

The reforms make it mandatory for a prospective plaintiff to issue a concerns notice before commencing proceedings.[6] They also clarify the form, content and timing for concerns notices and related offers to make amends.[7] Proceedings cannot be commenced until the applicable period for an offer to make amends has elapsed (generally 28 days). This will assist early dispute resolution.

For those cases that are litigated, plaintiffs will need to show they have suffered, or are likely to suffer, serious harm to their reputation.[8] This will be an element of the cause of action, generally to be determined by the judicial officer as soon as practicable before the trial.

This was one of the key issues raised in stakeholder submissions. The Law Council's submission responding to the discussion paper argued that defamation litigation is often disproportionate to the damages awarded.[9]

The reforms adopt a provision similar to the approach taken in the *UK Defamation Act 2013*. Plaintiffs will be required to prove the publication caused, or is likely to cause, serious harm to their reputation.

A high profile issue affecting defamation law in Australia has been the quantum of damages in recent cases.[10] Two key issues include: whether the cap on damages for non-economic loss operates a scale or as a cut-off, and whether the cap still applies when a court is satisfied that aggravated damages should be awarded.

The reforms clarify that, first, the cap – currently $421,000 – operates as the upper limit of a scale (i.e. the cap should only be awarded in a most serious case); and second, aggravated damages are to be awarded separately from damages for non-economic loss, such that the cap for the latter is preserved.[11]

Although the damages payouts to, for example, Wilson and Rush were comprised largely of damages for economic loss, this reform will at least ensure the cap on damages for non-economic loss is preserved.

The reforms also bring the law in line with the digital age by introducing a single publication rule.[12]

A cause of action in defamation arises when defamatory matter is published by the defendant. In NSW, section 14B of the *Limitation Act 1969* (NSW) provides that a person has one year from the date of publication to commence proceedings. For online material, publication occurs each time a third-party downloads the material. This means that the limitation period effectively does not apply when there are subsequent downloads.

The reforms adopt an approach similar to that in the UK Defamation Act. Under the single publication rule, the date of the first publication will be treated as the start date for the limitation period for all subsequent publications, except if the manner of a subsequent publication is materially different from the first publication.

5 Defamation Amendment Bill 2020 (NSW).
6 Model Defamation Amendment Provisions 2020 cl 12B (**MDAPs**).
7 MDAPS cls 12A, 13-16.
8 MDAPs cl 10A.
9 Law Council of Australia, 'Review of Model Defamation Provisions', submission to the Defamation Working Party, 14 May 2019, 42.
10 *Bauer Media Pty Ltd v Wilson* (No. 2) [2018] VSCA 154; *Rush v Nationwide News Pty Ltd* (No. 7) [2019] FCA 550.
11 MDAPs cl 35.
12 MDAPs sch 4 cl 1A.

While the rule proposed is medium-neutral, for electronic publications the date of first publication is the date the publication was first uploaded for access or sent to a recipient.[13] This differs from the approach taken in the UK. However, the CAG agreed the date of upload is more readily identifiable.

The reform that has attracted probably the most attention is the new public interest defence.[14] The MDPs recognise the right to reasonably publish information to an interested recipient (the defence of qualified privilege). According to the Bar Association of NSW, the defence is rarely effective at trial, particularly in cases involving mass media publications.[15] I am not aware of the defence when in section 30 of the *Defamation Act 2005* having ever been successful.[16] This isn't to say that defendants ought always to succeed. But the rarity of successful news media defences on this ground is a clear signal that defamation law is inhibiting publication and discussion of matters of public interest, contrary to the objects of the 2005 Act.

The new defence is based on UK law, and will require a defendant to prove both that the statement was on a matter of public interest and the defendant reasonably believed that its publication was in the public interest.

There are a number of other reforms introduced, including:

- Clarifying which corporations may have a cause of action.[17]
- Clarifying that a defendant may plead back imputations relied on by the plaintiff to establish the defence of contextual truth.[18]
- Clarifying that plaintiffs are required to seek leave from the court to commence proceedings against associated defendants for claims relating to the same matter.[19]

Further reform

The discussion paper of February 2019 asked stakeholders to comment on whether the MDPs are appropriate for digital platforms. It became clear that this issue could not be resolved satisfactorily by mid-2020. Either the reforms could be delayed to proceed as a whole, or they could be split to avoid holding up the better-understood issues.

The DWP is currently preparing a discussion paper for the 'Stage 2' reforms, which will focus on the liability and responsibility of digital platforms for defamatory material published online. Decisions such as *Voller v Nationwide News Pty Ltd*[20] will be examined. The defence of innocent dissemination, safe harbour provisions and take down procedures will be considered too. This overlaps with the Commonwealth Government's response to the ACCC's Digital Platforms Inquiry.

The Victorian Attorney-General also requested that Stage 2 consider protections for victims of sexual assault who make complaints to police and investigative agencies.

Conclusion

The overall reaction to the Stage 1 reforms has been positive. Criticism has had more to do with courts diverging from parliamentary intent. Many of you – whether in media, law, academia or government – will have a role to play in the interpretation and application of these laws. That's an important position to be in and one that I value highly.

Justice David Ipp said that "Many of the problems [with defamation] are the product of legislation and improvements will be slow until the legislation is changed."[21] His Honour was probably right, but I believe these reforms go a fair way to remedying these issues.

TODD: Thank you Attorney. Now we're going to delve into some of the detail and I'd like to start first of all with the serious harm threshold.

A significant amendment is the introduction of a serious harm threshold.[22] The new test reframes the tort of defamation to make it an element of the cause of action that the publication has caused, or is likely to cause, serious harm to the reputation of the person.

In the case of excluded corporations, the test is whether the publication has caused, or is likely to cause, serious financial loss.

The decision regarding whether the threshold has been reached is a question for the judge, not the jury. The judge is also able to consider this question on their own motion: they need not wait for a party to make an application, although it seems more likely an application will be required.

Given a threshold test naturally lends itself to being heard early in proceedings, many stakeholders questioned at the time of the draft MDAPs how this new threshold would fit with the Federal Court's Defamation Practice Note, under

13 MDAPs sch 4 cl 1B.

14 MDAPs cl 29A.

15 New South Wales Bar Association, 'Council of Attorneys-General Review of Model Defamation Provisions', submission to the Defamation Working Party, 14 May 2019, 35.

16 The defence of qualified privilege in section 22 of the Defamation Act 1974 appears to have been relied on successfully in at least six cases. The defence in section 30 of the Defamation Act 2005 was raised in Feldman v Polaris Media (No. 2) [2018] NSWC 1035 however, because the defences of honest opinion and justification were successful, qualified privilege was dealt with merely in obiter.

17 MDAPs cl 9.

18 MDAPs cl 26.

19 MDAPs cl 23.

20 [2020] NSWCA 102.

21 Justice David Ipp, 'Themes in the Law of Torts' (2007) 87 Australian Law Journal 609.

22 MDAPs cl 10A.

which the Court seeks to limit the number of issues heard at an interlocutory stage, preferring to deal with such issues at trial. Frankly it doesn't fit with the practice note or the Court's disposition on interlocutory matters in defamation, as the final proposed amendments clarify that if a party applies for the serious harm element to be determined before the trial, the judge should determine the issue as soon as is practicable, rather than waiting until the trial.

The final drafting of the serious harm threshold provision invites it to be determined as a preliminary question, especially given it is now an element of the tort. A significant rise in the number of hearings involving preliminary questions can therefore be expected with the attendant costs of calling evidence on the issues.

Parties should also expect that they will be asked at the first directions or case management hearing whether the serious harm element is in issue. Thus early consideration of this element is essential. In cases where the threshold is not in issue (e.g. large circulation of a serious imputation), courts will expect the defendant/respondent to admit the element in their defence. However, in cases where there is a genuine question as to whether or not the serious harm threshold is met, a separate hearing on that issue is likely, and it may be appropriate for a defendant to seek an extension of time for service of the defence until after the separate issue is determined. Separate hearings on the threshold question will require plaintiffs/applicants to prepare and adduce evidence of the actual harm or loss caused or likely to be suffered, and that evidence will be tested by defendants/respondents at the hearing. The UK experience indicates that preliminary hearings in proceedings which involve a serious libel but only limited publication will raise significant evidentiary questions and take up valuable court time.[23]

The inclusion of this threshold is a response to the increase in "backyard fence" litigation: small disputes between individuals amplified into resource intensive court proceedings, which have proliferated in the age of social media. It seems likely that the introduction of this threshold will assist in reducing the amount of such litigation that proceeds to trial, and may also deter the commencement of some matters.

If a defendant/respondent applies early in proceedings to have the serious harm element determined and the judicial officer rules in the plaintiff/applicant's favour, a question that arises out of the proposed drafting is whether the defendant is able to raise the issue again later in proceedings if more information about the consequences of the publication becomes available. For example, evidence about the harm suffered as a consequence of the publication (or lack thereof) may be adduced from discovery, subpoenas and cross-examination of key witnesses during the trial. This question is particularly relevant in light of the decision to abolish the defence of triviality, which currently provides defendants with a defence at trial if they can establish that the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm.

There is likely to be a period of transition as courts in Australia interpret the new threshold of serious harm (for example, whether it is an issue that can be raised more than once). With the introduction of the new threshold, it will be necessary for publishers to establish a strategy going forward for the preparation of evidence on seriousness, so that such evidence can be collated and deployed early in a proceeding in order to dispose of claims that don't meet the threshold quickly and cost-effectively. Similarly, prospective plaintiff/applicants will need to be mindful of the evidence required to establish sufficient harm prior to commencing proceedings.

TODD: We'll now move onto the new public interest defence in section 29A. Jason, what is pretty interesting, at least to me, is why there were two different approaches looked at. One was the New Zealand approach and the other was the UK approach. I'd like to get your perspective on the one with settled on. Do you think that's going to work as well in practice?

BOSLAND: Well I think it would certainly work as well as the New Zealand approach. I think it's probably better than the New Zealand approach.

The new section 29A broadly adopts the language of section 4 of the 2013 Act in the UK, in terms of reasonable belief of the defendant that the matter is in the public interest. But I think there are some significant differences that need to be pointed out that might affect its operation and in fact might result in it operating quite differently from the UK equivalent in some ways.

The first is the focus of the UK defence on the defendant's reasonable belief that publishing the "statement" was in the public interest. It is clear from the UK case law that a single publication can include multiple "statements" and that the term is used to delineate particular parts of a publication from which individual defamatory meanings are conveyed.[24] The new section 29A, on the other hand, focuses on the broader concept of "matter", which is defined under section 4 as, in essence, the publication *as a whole*.

This, I think, creates a tension between the focus on imputations in defamation litigation in Australia

23 *Lachaux v Independent Print* ([2015] EWHC 2242 (QB)), where the preliminary hearing before Warby J took two days.

24 See, eg, *Serafin v Makliewicz* [2020] UKSC 23, [27].

and the focus in section 29A on the public interest in the publication *as a whole*. Presumably, if it is found under the new provision that the matter concerns an issue of public interest, it must also be shown that the particular aspect of the matter from which an imputation arises is relevant to such public interest. The more difficult question will be whether – and to what degree – the reasonableness of the defendant's belief will be judged by reference to the precise imputations that have been conveyed or the statements from which they have arisen, rather than the publication as a whole. And, what will happen if a matter which on the whole is on an issue of public interest but is found to give rise to at least one imputation that does not contribute to such public interest – will this result in the defence being defeated in relation to all imputations?

The second key difference is that section 29A, unlike section 4 of the UK Act, contains a list of factors that can be broadly referred to as the "responsible journalism" factors. Some have suggested that the inclusion of the list will lead to a continuation of the practice in Australia developed under the existing reasonable publication defence in s 30 where Courts treat such factors as a checklist. For a number of reasons, I'm not sure that this will necessarily be the case. First, there is a clear legislative intention to move away from that approach. Indeed, section 29A(4) provides that the factors are not to operate as a checklist, nor are they exhaustive. Second, the question of the reasonableness of the defendant's belief that publishing the matter was in public interest will be a question of fact for the jury rather than the judge. I think that this will mitigate the potential risk that there will be an intense focus on the checklist.

However, I think it is important to mention that there is a potential price to be paid for placing this defence in the hands of the jury. The price is that we won't have reliable case law – at least not reasoned judgments – coming through indicating what will satisfy the defence and what will not. In other words, we won't have the "valuable corpus of case law" that Lord Nicholls spoke about in *Reynolds*.

The other possible issue is that the jury will have the task of determining whether the matter concerned an issue of public interest. However, under other defences – namely, fair comment and statutory honest opinion – the question of public interest remains a question for the judge. This gives rise the possibility that there might be conflicting determinations on the question of public interest in the same case and in relation to the same publication.

The final key difference between section 29A and section 4 of the UK Act is the omission in section 29A of a specific provision targeted at neutral reportage. I think this omission is a missed opportunity. The "reportage" defence as recognised under the common law and enshrined in s 4 provides such a strong, predictable and importance defence in the UK, allowing the media to neutrally report allegations being cast back and forth in the context of a dispute of public interest. It is key to addressing the sharp chilling effect of defamation law on responsible publishers and I am surprised it has not been included.

TODD: Can I just pick up on one thing, given that the vast bulk of cases are currently being issued in the Federal Court and thus not jury cases, absent some legislative change there, won't we get at least some degree of case law about the operation of 29A and how to approach the list itself?

BOSLAND: Yes, I think that's right. Obviously there will be cases that are tried without a jury, usually in the Federal Court of course. Those cases will be there to provide guidance. However, most cases will continue to be heard before a jury in the State Supreme Courts.

TODD: Thanks Jason.

Marlia, all of this is probably frightening for you as an in-house lawyer having to deal with something entirely new and guess how it will work. But one of the things you probably see a lot of is Concerns Notices and we saw how that had an impact when the 2005 Act came in, and quite a positive impact, I think. What are the main issues you have encountered with the previous Act and how are the new amendments going to change that process upfront, which obviously is a critical one in keeping costs down and keeping matters out of court?

SAUNDERS: Absolutely. I think the biggest frustration has been when plaintiffs don't send Concerns Notices at all prior to commencing proceedings or when they send them very, very late in the limitation period, so the limitation period is almost at its end. Obviously the best time for a plaintiff to raise a complaint is as soon as possible after the publication has occurred, which means that steps can be taken promptly to mitigate any loss or damage, such as taking down an online publication, amending it, publishing an apology or correction or clarification etc. If a Concerns Notice is received proximately to the publication it can really make an impact on mitigating any loss or damage.

It's also the time when a publication is fresh in the minds of a journalist, so evidence is more readily available and it's easier to assess whether a publication is defensible. The closer it gets to the end of the limitation period you start to question whether a plaintiff is truly concerned about damage to their reputation. The whole purpose of the offer to make amends regime is to encourage, as you said, the early resolution of disputes without recourse to expensive litigation. I think that more was needed in the legislation to encourage complainants to send Concerns Notices in a timely manner, and I think that the most significant amendment in this area, which is the new introduction of section 12B, achieves that.

Section 12B will now provide that a plaintiff cannot commence defamation proceedings unless they've first sent a Concerns Notice and the applicable period for making an offer to make amends has elapsed. A Statement of Claim can no longer be treated as a Concerns Notice and, in addition to specifying the defamatory imputations, a Concerns Notice will now have to include additional information which was not previously required, in order for it to be effective as a Concerns Notice, including details of where a matter complained of can be accessed (such as a URL), details of the alleged serious harm to a person's reputation, and in the case of an excluded corporation, the alleged serious financial loss.

If the Concerns Notice does not contain adequate particulars and the complainant does not provide those particulars within 14 days after the receipt of a further particulars notice from a publisher, the Concerns Notice is taken to have not been sent, and therefore proceedings can't be commenced.

I think this will be very helpful for mass media publishers, but also for "backyarder" type complaints, where the complainants are self-represented. It could reduce the incidence of vexatious claims being filed with the Courts, which often occurs without any prior notice at all, or at least it may provide a basis for the strike out of the claim at an early stage due to the lack of a compliant Concerns Notice having been provided.

Another recurring issue that came up a lot after the 2005 Act was introduced was confusion around the wording in section 18, which required that a publisher had to be "ready and willing" to carry out the terms of an offer "at any time before the trial".

Because an offer has to be reasonable in order to obtain the benefit of a section 18 defence, there was uncertainty about whether the offer had to be left open all the way up until the first day of the trial, or whether it could have a more limited duration and still be reasonable. And although this has been resolved to some extent in the case law, with Justice Nicholas in *Bushara v Nobananbas*[25], and the Court of Appeal in *Zoef v Nationwide News*[26], each holding that an offer of amends may be left open for a fixed term of reasonable duration, Justice McCallum did observe in *Vass v Nationwide News* at first instance[27] that it may be difficult to argue that an offer closed well before a trial could be reasonable. On appeal in that case, the Court of Appeal observed that the language in the Act was uncertain.[28]

So, clarifying what is a reasonable duration for an offer to remain open was a pretty important issue and that has been addressed now. Section 15 has been amended to clarify that an offer to make amends needs to be open for at least 28 days, which addresses the confusion around whether it needs to remain open until trial. And I think that change could also provide an indication to the Courts about the duration of offers considered by Parliament to be reasonable.

One other short issue that has been addressed is there was some inconsistency between the language in section 14, which provided for 28 days after the receipt of a Concerns Notice to make an offer to make amends, yet section 18 provided that an offer must be made as soon as possible after becoming aware that the matter may be defamatory. Some plaintiffs have argued that an awareness that something may be defamatory could predate receipt of a Concerns Notice. The language in section 18 has now been amended to clarify that for the purposes of the section 18 defence, the offer is to be made as soon as practicable after receiving a Concerns Notice.

TODD: Marlia, you probably realise better than most the issue of publication is now incredibly vexed. The single publication rule will not apply to subsequent publication if the manner of that publication is materially different to the manner of the first publication. Now do you see any issues arising from that in practice?

SAUNDERS: I think there is some potential for confusion as to what is meant by the manner of publication being materially different. The new section provides, as it does in the UK, that in deciding that issue the Court may have regard to the level of prominence given to a matter complained of and the extent of subsequent publication.

The commentary on the UK section says that a possible example of this could be where a story has first appeared in a relatively obscure section of a website which takes multiple clicks to get through to and later it's put on the homepage. So the availability of the article, and the number of eyeballs on it, is materially increased and the suggestion is that the limitation period could be refreshed where the story is promoted in that way.

However, it's also been observed that if there is some change to a website in the background or by external forces unrelated to the publisher which causes a story to be promoted in some way, it should not be interpreted as amounting to it being published in a materially different form.

Another example of where this could arise and be problematic is where a television program is broadcast on television then years later is made

25 *Bushara v Nobananbas Pty Ltd* [2012] NSWSC 63
26 *Zoef v Nationwide News Pty Ltd* (2016) 92 NSWLR 570
27 *Vass v Nationwide News Pty Ltd* [2018] NSWSC 639;
28 *Nationwide News Pty Ltd v Vass* (2018) 98 NSWLR 672

available to download or stream on demand. Would that have the effect of refreshing the limitation period by making it more accessible to modern-day viewers even though there would be evidentiary difficulties if proceedings are commenced long after the material was created? I think we're likely to see some case law about this issue in the early stages after the legislation comes into effect.

TODD: Thanks Marlia. Lyndelle you've bravely agreed to wade into the quagmire that is contextual truth. That is brave indeed! Just as a starting point, do you think the amendments sufficiently clarify that the defendant can plead back the imputations relied on by the plaintiff as well as those it relies on to establish the defence of contextual truth under the Act?

BARNETT: I do. You describe it as brave, but I actually think this is one of the easier questions because section 26 was a section that was really screaming out for amendment. We had not only a number of judgments where Judges had called for this section to be looked at, but it was a case where the construction adopted of section 26 meant that the defence, as previously drafted, really didn't meet not only the legislature's intention, but it didn't meet the objects of what the section was directed towards.

The purpose of the contextual truth defence is to ensure that damage to a plaintiff's reputation is being assessed in the true context of what is said in the publication. And the tortured history we've lived through over the last few years, I think it will be really good to see that come to an end. As we know it started with *Kermode*[29] and I think you can really read in *Kermode* that it was a construction the Court didn't want to adopt, but was forced to because of the language in the previous section. I mean, there was just no way the Court could construe that legislation conformably with the legislature's intention.

And what we've seen since then is plaintiffs adopting really tactical decisions which has rendered the defence useless, really. It started with plaintiffs amending to adopt contextual imputations, and then defendants tried to meet that by saying *"Well alright, but if its proven to be true, we can have it back when we get to the assessment"*. And it was found that this wasn't permitted either.

We really got to a point where this defence was just useless and I would be advising defendants, "Don't plead it because all you're going to do is end up having to meet another plaintiff's imputation". I must say this is one of the amendments I was just so delighted to see that it got through because I think this wording does really make clear and it does fit with legislature's intention to make sure that a plaintiff's damages are assessed in their true context. What it clarifies is that the only two requirements of a contextual imputation are firstly that it is carried by the matter; and secondly that it's true. So there's no longer any requirement that it differ in substance from the plaintiff's imputation and that was with the vice of the previous section.

The other problem that we had with contextual truth that this drafting also fixes is it clarifies which imputations go into the plaintiff's basket and the defendant's basket when you're coming to the subsection (b) analysis. This wasn't so much of a problem in New South Wales as judges were generally declining to follow the Queensland Court of Appeal's decision in *Mizikovsky*[30], where it was found that in the assessment, the imputations that fell on the plaintiff's side included true imputations. But this drafting just clarifies that, so it's great to have a uniform national approach to that assessment task. It's now clear that when you are looking at the assessment you look at, on the one hand for the plaintiff, the imputations that aren't true, and against that to work out if there's any further harm from those, you look at all of the true imputations – plaintiff's or defendant's. It's great to see the insertion of subsection 2 just to ensure that this is adopted and the legislature have put it beyond doubt I think that a defendant is entitled to rely on a plaintiff's imputation as a contextual imputation.

So the section is, I think, well drafted and I don't really think there's any room for any interpretation contrary to the legislature's intention, although I very much hope I'm not proven wrong on that.

One of the benefits of having this section drafted this way is hopefully it will cut down interlocutory disputes. We did see a lot of interlocutory disputes arising from this defence. The one area where I can maybe see some dispute coming up, and I hope not, is that there's no requirement in the section for contextual imputations to differ from each other. I think it is possible that some defendants might plead nuance type imputations and a lot of them and that could be the kind of area where we might see objections taken, so I'd like to think that this defence is not used in that way and the defendants do plead the real imputations and don't plead multiple imputations where there's really no difference in substance.

TODD: Lyndelle, do you think that the amendments in section 35 bringing it back to where it is setting a scale and a range are going to work, particularly in light of the fact that aggravated damages are not capped, and must be awarded separately? Do you think we will still see what have been, at least in my view, large awards of aggravated damages going forward?

BARNETT: I don't think so; but I also don't think we'll see damages being awarded well within the range like we were prior to the

29 *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852; *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157.

30 *Mizikovsky v Queensland Television Ltd* [2014] Qd R 197.

Wilson decision.[31] This amendment is an important amendment for defendants. I mean, the *Wilson* decision and the verdicts that we've seen since that decision I think really did send a bit of a shockwave through the industry. It's always difficult to predict what damages might be awarded. But previously when the approach to section 35 was that section 35 set a scale - that's pre-*Wilson* when Courts generally applied Justice Bell's decision in *Attrill v Christie*[32] - you could have a fair go at guessing or estimating what the assessment would be and defendants could opt whether to take a risk and defend a story or not. Whereas post-*Wilson* it was almost impossible to estimate damages.

The intention of these amendments is to try and stop these large damages by separating out the assessment of general damages and aggravated damages. Certainly with general damages I think we will see those assessments come back to the pre-*Wilson* type assessments because section has clarified that this is intended to be a scale, so the cap really is for the worst case defamation and the others fit within that. I think for that component of damages we will see these awards coming down.

But aggravated damages, whilst they are to be awarded separately, they can exceed the cap. So it would be open for a Court to award a large award of aggravated damages and we might still see some of these large awards. I think that will be really interesting to see. Judgments where I've seen separate awards of aggravated damages, they're usually in the order of $10,000 or $20,000, not awards of several hundred-thousand dollars for aggravated damages. The benefit of that separate award for defendants will be that the reasoning in relation to the award will be exposed. If an award is so large that it appears to be punitive or manifestly excessive it will make it a bit easier for a defendant to appeal that. I mean, it's always difficult to appeal damages because they're an evaluative judgment, but if we start seeing judgments with that level of damages, I think that would be something that should be tested in the Court of Appeal.

SAUNDERS: Yes, large awards of aggravated damages could possibly be contrary to section 37, which provides that punitive or exemplary damages are not to be awarded. I'm bracing myself for an appeal on that point.

TODD: Mr Attorney, I assume it is the intention to do everything possible to discourage matters going before the Courts and that was the kind of reasoning behind resetting damages?

AG: Well everything reasonably possible. At the end of the day we still want to have legitimate protection of reputation. Although I note that in some of the celebrity cases that we've seen in recent years, most of the damages have been for economic loss, so this won't curtail that, but certainly the intention is to put downward pressure on damages awards where possible.

TODD: Would any of the other panellists like to comment on any of the other reforms?

BARNETT: One important aspect of the reforms that hasn't received much attention is the change to the defence of honest opinion. It has long been a bugbear of mine that the current statutory defence has been interpreted in a way that is quite burdensome in terms of the amount of factual material that needs to be included in the publication itself. In interpreting section 31, the courts have insisted that it incorporates the requirement under the common law defence of fair comment[33] that enough underlying facts – unless they are notorious – must be included to enable to the recipient of the publication to judge the comment for themselves.[34] This sets the standard so high that the defence is of extremely limited application, except in very clear 'review' cases (such as book reviews). The reform to section 31 will make the defence available where the underlying facts are set out in general terms, or accessible via a reference or hyperlink.

This is potentially a very significant change to section 31, not only when it comes publications conventionally classified as honest opinion, such as book reviews, but other publications as well, including investigative journalism. This is because 'opinion' can include factual allegations where such allegations are presented as conclusions, inferences, deductions, etc, from other facts. What has held this defence back in defending such 'factual' conclusions is the stringent requirement for the underlying facts to be stated to such a high degree of specificity. Therefore what appears to be a relatively insignificant tweak to section 31 could be quite an important reform.

TODD: Lyndelle, can I just ask you, when Jason was talking previously about the list of criteria in relation to the new public interest defence, do you have a particular view yourself about how the courts will approach that?

BARNETT: I think it's going to be really interesting to see how that is applied. The real benefit of this defence is that it tries to put the focus on the public interest and the importance of those public interest stories being written, as opposed to the previous section 30 defence where the focus was really on reasonableness as between the publisher and the plaintiff.

31 *Bauer Media Pty Ltd v Wilson* (No 2) (2018) 56 VR 674; (2018) 361 ALR 642.

32 *Attrill v Christie* [2007] NSWSC 1386.

33 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.

34 See, eg, *Herald & Weekly Times Pty Ltd v Buckley* (2009) 21 VR 661.

In terms of the list of factors in subsection 3, I can see an argument that they may put the focus a little bit back onto reasonableness as between the publisher and the plaintiff. For example, providing a reasonable opportunity to obtain a person's side of the story. I think time will tell. But the argument I think a defendant will put is: well you have to consider that in light of the importance in the public interest for this to be published. So the assessment whether those steps are adequate needs to take into account that it's accepted that there is a public interest in this story being published. I think it's very beneficial that it tries to put the focus back on that. I think there will be a tendency, particularly for plaintiffs, to argue that the previous case law under section 30, dealing with these factors, is applicable. And we may see a bit more of that level of perfection being required, that some argue section 30 is requiring. So I think it's going to be very interesting to see how those factors are construed in light of the elements of the defence in subsection 1.

SAUNDERS: I think it is good that there's been an additional factor included for the court to consider the importance of freedom of expression in the discussion of issues in the public interest as well. It does focus the court's attention on that issue in the list of factors that may be taken into account. One aspect of the UK provision which was not transported across into the section is that in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest, the Court must make such allowance for editorial judgment as it considers appropriate. Even though it's not explicitly stated in our version of the defence, I would hope that in practice that is taken into account in applying the defence as well.

BOSLAND: There was one further thought I had about the operation of s 29A. Given that the question of whether the defendant *reasonably* believed that the publication was a matter of public interest is one for the jury and may be judged by reference to accepted standards of journalistic conduct, it may be that attempts will be made to rely upon expert evidence as to what would be expected of a journalist in the circumstances. I presume there'll be pushback against the use of this type of evidence. But I just wonder whether or not that might be something that we see come through the courts. I know it has been attempted in Canada where it is a question for the jury to determine whether a publication was responsible under the defence established in *Grant v Torstar Corp.*[35]

TODD: It was interesting to see in those cases how that evidence has been sought to be deployed in trials and it'll be just as interesting to see how the evidence is deployed in relation to section 10A.

We have a question: *"Are there any observations on whether the Concerns Notice will limit the imputations that can be pleaded in the Statement of Claim"*. He notes that Matt Collins has written an article suggesting pleadings will be restricted by the drafting of the Concerns Notice.

Maybe throw that, at least to you in the first instance, Marlia, if you have a view on that?

SAUNDERS: Section 12B requires that imputations be particularised in a Concerns Notice, then in any proceedings, a plaintiff can rely on some but not all of the imputations particularised, or imputations that are substantially the same as those particularised. So, yes, that does suggest that if an imputation has not been particularised in the Concerns Notice and it's materially different to the imputations specified in the Concerns Notice, it cannot form part of the pleading. That means the plaintiff has to try to nail the imputations upfront, which I think is a good thing from my perspective!

TODD: I have another question which is, *"Will the new provisions cover past publications"?* And I take that to mean this is a question about the effect of a single publication. Again Marlia, I think maybe you might like to say something about that.

SAUNDERS: It's intended that the amendments will apply to publications made after the amendments come into effect. However, in the case of the single publication rule there's a provision that says that if the original publication predated the amendment, then the single publication rule will apply such that the limitation period will be taken to have commenced from the date of that original publication.

TODD: And I think we have time for probably one last question: *"How, if at all, will the public interest offence change publisher's appetite to publish riskier stories and how will it or could it change the pre-publication advice provided to journalists"?*

And I'm afraid Marlia that's clearly a question for you.

SAUNDERS: That's me! [*Laughs*]. Well I think obviously the fact that publishers must have a reasonable belief that something is in the public interest means publishers aren't going to be publishing things without that in mind. In providing pre-publication advice, we will need to test that this is the case, and to consider the factors in the defence and make sure that the publishers have done what they need to do so that they have a really good shot of making out a section 29A defence. Particularly in the early stages before the defence has been tested in the courts, I think we will be going through that process carefully with our publishers and trying to give the defence the best shot at being argued successfully, so that it proves to be more useful to media publishers than the section 30 qualified privilege defence.

35 [2009] 3 SCR 640.