

DEFAMATION LAW REFORM: WHAT HAVE THE BRITISH EVER DONE FOR US?

11 NOVEMBER 2019

ANGLO-AUSTRALASIAN LAWYERS SOCIETY BREAKFAST

THE HONOURABLE RUTH MCCOLL AO SC

- 1 I acknowledge the Gadigal people of the Eora nation as the traditional owners of the lands and waters where the building in which we gather today is located for they hold the memories, the traditions, the culture and hopes of Indigenous Australia.
- 2 In 1971 the NSW Law Reform Commission charged to inquire into the reform of the law of defamation described its task as “a matter of peculiar difficulty because it must take account of the conflict between the interest of freedom of speech on the one hand and the right to protection from attacks on reputation on the other hand.”¹
- 3 Since the Colony of New South Wales was established this State has seen many defamation statutes come and go. This speech considers the current inquiries into the reform of the 2005 Defamation Act. As will be apparent, the “peculiar difficulty to which the Law Reform Commission referred in 1971 have not gone away. If anything, they have been exacerbated, not least because of the significant changes in the delivery of news by way of the internet.
- 4 This is a large topic. It is not possible in this speech to address each of the proposals for reform. In what follows I have sought to focus on what might be seen as the most substantial changes.

Background

- 5 But first some background.

¹ NSW Law Reform Commission, *Defamation*, (1971) at [7].

- 6 The 2005 Act was a significant advance in the law of defamation in this country. It was devised under the aegis of the then Standing Committee of Attorneys-Genera which approved “Model Defamation Provisions” – to which I will refer as the MDPs – devised by a Defamation Working Party. Those provisions then became the basis of substantially identical defamation legislation in every State and Territory. In this State they became the *Defamation Act 2005 (NSW)* (2005 Act) which repealed in its entirety the previous *Defamation Act 1974 (NSW)* which was the product of the 1971 Law Reform Commission inquiry.
- 7 The objects of the 2005 Act included “ensur[ing] that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance, and provid[ing] effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter”.
- 8 In 2018 the Council of Attorneys-General, whose unfortunate acronym is CAG, acting on a request from this State following a statutory review of the 2005 Act, reconvened the 2005 Defamation Working Party with a view to it considering possible amendments to the Model Defamation Provisions.”²
- 9 As the NSW Review recognised, “since the MDPs were developed, the manner in which information is published and transmitted has changed significantly, particularly with the exponential growth in reliance on digital publications and communications, interactive online forums and blogs” It was those changes which led this State to suggest necessitated “some of the MDP being revisited and potentially amended.”³
- 10 In February 2019, the Defamation Working Party released its Review of the Model Defamation Provisions. It “concluded that the Act’s core policy objective ... remain[ed] valid, but that the Act would benefit from some amendment and

² The Defamation Working Party was that which had developed the MDPs which became the 2005 Act: see NSW Department of Justice, *Statutory Review Defamation Act 2005*, June 2018 (NSW Review) at [1.1].

³ Ibid [1.7].

modernisation.”⁴ Reflecting the NSW Review, the 2019 Review suggested a number of possible amendments and additions to the MDPs, including provisions, or at least approaches, which would replicate provisions of the *Defamation Act 2013 (UK)* (2013 Act).

- 11 According to an agreed timetable, by November this year the CAG was to agree to release the public consultation draft of amended MDPs, followed by public consultation with a view to final revised MDPs to be agreed by the CAG in June 2020 and enacted throughout Australia from June 2020.⁵
- 12 When I checked on the NSW Attorney General’s website and that of the Council of Attorneys-General yesterday, there were no amended MDPs yet. The next CAG meeting will be held on 29 November 2019, so perhaps something will emerge then.
- 13 It is against the background, in particular, of the proposal that the MDPs may replicate provisions of the 2013 Act that I ask the question which is the title of today’s speech “Defamation law reform: what have the British ever done for us?”.
- 14 In that light, it is relevant to consider the history of British influences on Australian defamation law, divergences between the defamation law in the respective jurisdictions, some of the critical UK provisions which it has been suggested might be adopted and whether such reforms are appropriate to an Australian defamation law.
- 15 In the *Life of Brian* (1979), John Cleese, as leader of the Judean People's Front, attempting to justify rebelling against the Romans, questions what the Romans have ever done for the Judeans. His hopes of garnering support are dashed when his followers, rather ingenuously, come up with a long list of entirely

⁴ Council of Attorneys-General Discussion Paper, February 2019 (2019 Review) [1.10].

⁵ Media Statement, Mark Speakman, NSW Attorney General, 31 January 2019, Defamation Working Party Agreed Timetable.

beneficial Roman contributions to Judean life, including for example “the sanitation, the medicine, education” and like advances.

- 16 If we were to ask, “what have the British ever done for us” in the context of the law of defamation, the answer is short: the British “gave” the Colony of New South Wales the common law of defamation. As established, the Colony was a much larger land mass than it is today, covering what are now New South Wales, Victoria, Queensland, Tasmania and half of South Australia.⁶ As the other states went their separate ways, the law of defamation, particularly in its statutory form, took different paths.

Early divergences from UK defamation law

- 17 In addition, there were early divergences from UK defamation law.
- 18 There has always been an element of give and take between the mother country and the colonies in terms of defamation law. Somewhat ironically perhaps, the colonies at times adopted reforms developed in the UK, but not adopted there.
- 19 For example, the common law defence of justification under which proof of the truth of the alleged defamation was a complete defence operated in New South Wales until the passing of *Windeyer’s Libel Act* in 1847. *Windeyer’s Libel Act* reflected recommendations of an 1843 Select Committee of the House of Lords chaired by Lord Campbell that the British law of defamation law be modified so that truth would only be a defence if the matter sued upon was also published for the public benefit. The House of Commons rejected that provision in respect of civil actions.
- 20 In New South Wales, however, s 4 of *Windeyer’s Libel Act* 1847 made public benefit essential to a defence of truth. This gave a measure of protection of personal privacy. It was thought that New South Wales’ adoption of that qualification reflected the State’s origins as a penal colony. Thus, it was said,

⁶ Patrick George, *Defamation Law in Australia*, LexisNexis, second edition at [3.2].

public benefit was made essential to a defence of truth “to prevent emancipated convicts being taunted as ‘lags’ ”⁷

- 21 Victoria removed the public benefit qualification soon after that colony separated from New South Wales in 1856 - the common law defence of truth alone prevailed in that State thereafter,⁸ and, in due course in South Australia, Western Australia and the Northern Territory. In Queensland, Tasmania and the Australian Capital Territory the statutory defences of truth required the published matter to be true and to be published for the public benefit.
- 22 Until the 2005 Act, New South Wales retained a defence of truth in NSW requiring the defendant to prove that the defamatory imputation to be shown to be of substantial truth and to have been published in the public interest and/or under qualified privilege.
- 23 Windeyer’s 1847 *Libel Act* was re-enacted as the *Defamation Act 1901* (No 22) (NSW), and there was a further consolidation in 1912.⁹
- 24 The 1912 *Defamation Act* was replaced by the *Defamation Act 1958* (NSW). Curiously the 1958 Act was “based ... ultimately on the Indian Penal Code of 1860. Not surprisingly, it did not take into account nearly a hundred years of social change and judicial experience.”¹⁰ The Indian Penal Code indeed had been drafted in 1860 on the recommendations of first law commission of India established in 1834 under the *Charter Act of 1833* under the Chairmanship of Lord Thomas Babington Macaulay.¹¹
- 25 More colourfully, it has been alleged that the 1958 Act was passed because:

“... the government was motivated by [a] desire to provide a civil cause of action for ‘defamation of the dead’ and to allow for criminal prosecutions in the like circumstances in the wake of publication of ‘Wild Men of Sydney’ by

⁷ “*The Truth of a Libel*”, W.J.V. Windeyer, 8 ALJ 319 at 322; see also *Rofe v Smith's Newspapers Ltd* (1924) 25 SR (NSW) 4 at 21 – 22.

⁸ “*The Truth of a Libel*” at 323.

⁹ Paul Mitchell, *The Foundations of Australian Defamation Law*, [2006] SydLawRw 22; (2006) 28(3) Sydney Law Review 477.

¹⁰ *Defamation*, New South Wales Law Reform Commission Report 11 (1971) at [16].

¹¹ https://en.wikipedia.org/wiki/Indian_Penal_Code accessed 10 November 2019.

journalist Cyril Pearl. That book was highly critical of John Norton (who had died in 1916), and whose son Ezra was a prominent newspaper publisher in 1958. New South Wales was due to have an election in March, 1959. It has been contended that the 1958 Act was passed as a quid pro quo for Norton's newspapers supporting the government in that election. John Norton's widow was also alive in 1958."¹²

- 26 Apparently the 1958 Act “was bitterly fought in both Houses of the NSW Legislature, principally on the ground that it allowed causes of action for “defamation of the dead”.¹³ Although the NSW Law Reform Commission’s 1971 Report suggested this was a misconception,¹⁴ notably the words said to support such causes of action (“any imputation concerning any person, or any member of his family, whether living or dead”) were not present in either the *Defamation Act 1974* (NSW) or the 2005 Uniform Defamation Acts.
- 27 The 2005 Act was a significant reform in its own right. As the Explanatory Note to the MDPs noted:

“At the time of the agreement, each State and Territory had different laws governing the tort of defamation. Tasmania and Queensland codified their civil law of defamation. The other jurisdictions retained the common law, but supplemented or altered it to varying degrees by enacting differing statutory provisions. The States and Territories also had different laws governing the offence of criminal defamation.”

Council of Attorneys-General – Review of Model Defamation Provisions – Discussion Paper February 2019

- 28 As I have said, the provisions of the 2013 Act have resonated in Australia. The 2019 Review sought submissions on, inter alia:

Question 3

- (a) Should the Model Defamation Provisions be amended to include a ‘single publication rule’?
- (b) If the single publication rule is supported:
- (i) should the time limit that operates in relation to the first publication of the matter be the same as the limitation period for all defamation claims?

¹² An historico-legal study of the Defamation Act, 1958 (NSW), Dr David Galbraith, <https://law.uq.edu.au/event/session/5212>

¹³ Ibid.

¹⁴ At [16].

(ii) should the rule apply to online publications only?

(iii) **should the rule should operate only in relation to the same publisher, similar to section 8 (single publication rule) of the Defamation Act 2013 (UK)?**

Question 11

(a) Should the 'reasonableness test' in clause 30 of the Model Defamation Provisions (defence of qualified privileged for provision of certain information) be amended?

(b) Should the existing threshold to establish the defence be lowered?

(c) **Should the UK approach to the defence be adopted in Australia?**

(d) Should the defence clarify, in proceedings where a jury has been empanelled, what, if any, aspects of the defence of statutory qualified privilege are to be determined by the jury?

Question 14

(a) **Should a 'serious harm' or other threshold test be introduced into the Model Defamation Provisions, similar to the test in section 1 (serious harm) of the Defamation Act 2013 (UK)?**

(b) If a serious harm test is supported:

(i) should proportionality and other case management considerations be incorporated into the serious harm test?

(ii) should the defence of triviality be retained or abolished if a serious harm test is introduced?"

- 29 As some of the proposed reforms in the 2019 Review of the Model Defamation Provisions suggest adopting provisions of UK *Defamation Act 2013*, it is relevant to consider at least certain of those provisions.

A brief segue into what had been happening in the UK

- 30 This requires a brief segue into what had been happening in the United Kingdom.

- 31 In the United Kingdom, in terms of statutory law, as Lord Sumption explained recently in *Lachaux v Independent Print Ltd*, "[s]tatutes to amend the law of defamation were enacted in 1888, 1952, 1996 and 2013, each of which sought to modify existing common law rules piecemeal, without always attending to the

impact of the changes on the rest of the law.” He described the 2013 Act as the latest chapter in this history.”¹⁵

- 32 Three of the provisions of the 2013 Act it has been suggested Australia may adopt are s 1(1) which provides that a “statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.”
- 33 Secondly, the s 4 defence of ‘publication on a matter of public interest’, under which, a defendant must show that, firstly, the statement was on a matter of public interest, and, secondly, that the defendant reasonably believed that publishing the particular statement was in the public interest. In determining ‘reasonable belief’, the court is to have regard to all the circumstances of the case and ‘make such allowance for editorial judgement as it considers appropriate’.
- 34 Thirdly, s 8 which creates a single publication rule.

The serious harm test in action

- 35 It is the serious harm test which so far appears to have provoked most litigation and been most controversial in the United Kingdom.
- 36 The serious harm provision was intended to “raise[s] the bar for bringing a claim so that only cases involving serious harm to the claimant’s reputation can be brought.”¹⁶ It was intended “to build on”, two cases: *Jameel (Yousef) v Dow Jones & Co Inc (Jameel)*¹⁷ and *Thornton v Telegraph Media Group Ltd (Thornton)*.¹⁸
- 37 *Jameel* involved an internet publication to, at best, five subscribers in England and Wales. The Court of Appeal held that it was an abuse of process for the action to proceed “where so little is now seen to be at stake”, and duly struck it

¹⁵ *Lachaux v Independent Print Ltd* [2019] UKSC 27 (*Lachaux*) at [1].

¹⁶ Explanatory Notes to *Defamation Act 2013* (UK) (Explanatory Notes) at [11].

¹⁷ [2005] EWCA Civ 75; [2005] QB 946.

¹⁸ [2010] EWHC 1414; [2010] EWHC 1414 (QB); [2011] 1 WLR 1985.

out. The effect of *Jameel* was to introduce a procedural threshold of seriousness to be applied to the damage to the claimant's reputation."¹⁹

38 In *Thornton*, Tugendhat J held that "there was a substantive threshold of seriousness to be surmounted before a statement could be regarded as meeting the legal definition of 'defamatory'". In his Lordship's view, a statement "may be defamatory of [a person] because it substantially affects in an adverse manner the attitude of other people towards [the person], or has a tendency so to do".²⁰ He derived this formula from dicta of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237."²¹

39 Most recently in June this year, in *Lachaux*, the British Supreme Court considered the proper construction of the "serious harm" requirement in s 1(1).

40 *Lachaux* was an appeal from findings of the Court of Appeal, in turn on appeal from a hearing before Warby J of preliminary issues in libel claims brought by Bruno Lachaux. He was a French aerospace engineer who at the relevant time lived with his British wife Afsana in the United Arab Emirates.²² In the course of divorce proceedings between them, there was a controversy over the custody of their son, Louis. Mrs Lachaux took the son and went into hiding, apparently in the UAE. Mr Lachaux was awarded custody and took possession of his son pursuant to the court order.

41 The appeal arose out of two libel actions begun by him in the High Court on 2 December 2014 against the publishers of the Independent and the Evening Standard, and a third begun on 23 January 2015 against the publisher of the *i*.

42 Lord Sumption (with whom Lord Kerr, Lord Wilson, Lord Hodge and Lord Briggs agreed), said that at a "meaning hearing" before Eady J, his Lordship had held

¹⁹ *Lachaux* at [8].

²⁰ *Thornton* at [96].

²¹ *Ibid* at [9].

²² *Lachaux* at [2].

the article in the Independent bore eight defamatory meanings, and the article in the Evening Standard 12.²³

- 43 That is not, with respect to Lord Sumption strictly correct. If you read Eady J's reasons, while his Lordship held the articles to have meant (inter alia) that Mr Lachaux had been violent and abusive towards his wife during their marriage, had hidden Louis' passport to stop her removing him from the UAE, had made use of UAE law and the UAE courts to deprive her of custody and contact with her son, had callously and without justification taken Louis out of her possession, and then falsely accused her of abducting him, he did not rule that those imputations were defamatory.²⁴ This was, no doubt, because as his Lordship noted at the end of his reasons, other preliminary matters may yet arise, including "serious harm' (which the Defendant intend[ed] to raise but had not yet done so)".²⁵
- 44 On the way to the Supreme Court Warby J and the Court of Appeal differed on the construction of s 1(1) as to how to satisfy the serious harm test.
- 45 The controversy in the Supreme Court turned on whether:
- (1) As Mr Lachaux contended, "the Act leaves unaffected the common law presumption of general damage and the associated rule that the cause of action is made out if the statement complained of is inherently injurious or... has a "tendency" to injure the claimant's reputation. The effect of the provision on this view of the matter according to Lord Sumption [was] simply that **the inherent tendency of the words** must be to cause not just some damage to reputation but serious harm to it,
 - (2) Or, as the publishers contended, the provision introduces an additional condition to be satisfied before the statement can be regarded as defamatory, on top of the requirement that the words must be inherently injurious. **It must also be shown to produce serious harm in fact.** The

²³ Ibid at [3].

²⁴ *Lachaux v Independent Print Limited* [2015] EWHC 620.

²⁵ Ibid at [43].

defendant publishers submitted that unless it was self-evident that such a statement must produce serious harm to reputation, this would have to be established by extraneous evidence.²⁶

- 46 Warby J “substantially accepted the publishers’ case on the law. But he found, on the facts, that the relevant newspaper articles did cause serious harm to Mr Lachaux. The Court of Appeal (McFarlane, Davis and Sharp LJJ), preferred Mr Lascaux’s construction of section 1, but they upheld the judge’s finding of serious harm”.²⁷
- 47 In this respect, it might be noted that resolution of the issue of fact had required Mr Lachaux to give evidence, call three other witnesses of fact and also adduce written evidence from his solicitor. Warby J “also received agreed figures, some of them estimates, of the print runs and estimated readership of the publications complained of and the user numbers for online publications. He based his finding of serious harm on (i) the scale of the publications; (ii) the fact that the statements complained of had come to the attention of at least one identifiable person in the United Kingdom who knew Mr Lachaux and (iii) that they were likely to have come to the attention of others who either knew him or would come to know him in future; and (iv) the gravity of the statements themselves, according to the meaning attributed to them by Sir David Eady”²⁸. In addition, Lord Sumption noted that “Mr Lachaux would have been entitled to produce evidence from those who had read the statements about its impact on them.”²⁹
- 48 Lord Sumption held that “that [s 1(1) ... not only raises the threshold of seriousness above that envisaged in *Jameel* ... and *Thornton* ..., but require[d] its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words.”³⁰

²⁶ *Lachaux* at [11].

²⁷ *Ibid.*

²⁸ *Ibid* at [21].

²⁹ *Ibid.*

³⁰ *Ibid* at [12].

49 According to Lord Sumption:

“section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it “has caused or is likely to cause” harm which is “serious”. The reference to a situation where the statement “has caused” serious harm is to the consequences of the publication, and not the publication itself. **It points to some historic harm, which is shown to have actually occurred.**”³¹ (Emphasis added)

50 While his Lordship accepted the common law background to the 2013 Act was relevant, he observed that “It is not disputed that there is a common law presumption of damage to reputation, but no presumption that it is “serious”. So the least that section 1 achieved was to introduce a new threshold of serious harm which did not previously exist.”³²

Submissions to the Review of Model Defamation Provisions

Serious harm test

51 Most of the submissions to the 2019 Review have supported the adoption of the serious harm test.

52 According to the Law Council, “[t]he context in which adopting the [serious harm] test has become an issue is the contention that ,”[s]ince the Act came into force in 2005, a significant number of trivial defamation claims – related to the internet and the use of social media – have been filed in both the NSW Supreme Court and the NSW District Court.”³³ These are, however, “claims of the kind [which] do not usually involve the mass media. Rather, they concern a dispute between natural persons who are, more often than not, self-represented. The case management of these proceedings invariably involves a disproportionate amount of judicial time and resources when the likely award

³¹ Ibid at [14]; This conclusion was reinforced by subsection (2) which “must refer not to the harm done to the claimant’s reputation, but to the loss which that harm has cause or is likely to cause. The financial loss is the measure of the harm and must exceed the threshold of seriousness. As applied to harm which the defamatory statement “has caused”, this necessarily calls for an investigation of the actual impact of the statement”: Ibid at [15].

³² Ibid at [13].

³³ Review of Model Defamation Provisions, Law Council of Australia, 14 May 2019 at [208]

of damages and vindication will be small or the meanings contended for are barely, if at all, defamatory.”³⁴

53 This is also illustrated by a submission by the Communications Alliance, which describes itself as “the primary telecommunications industry body in Australia”, and contended that such a requirement would “discourage trivial claims from being brought [and] also result in unmeritorious actions being struck out at an early stage, before costs had accumulated on both sides.”³⁵ Many others suggest it will work where the defence of triviality has failed.

54 And it is clear, that is a possibility. Most illustrations of cases in the UK where the serious harm test has led to the plaintiff’s claim being struck out are those where there was a publication to only one or two people.³⁶ That is to say, none was a mass media publication.

Should the serious harm test be adopted in Australia?

55 The 2019 Review recommendation that the serious harm test be adopted reflected submissions to the 2018 Review, that “suggested that the law of defamation would be better served if the concept of triviality were a threshold for successful claims, rather than a defence (that is, if plaintiffs were required to establish that a defamatory statement was not trivial, rather than a defendant having to prove it was trivial).”³⁷

56 The Defamation Working Party suggested that:

“The UK approach [in s 1(1) **arguably** reduces the prospect of spurious claims, deters prospective claimants threatening defamation to discourage people making legitimate publications, and ensures that only matters that have caused a demonstrable harm to claimants can be pursued through the courts. This approach may disadvantage claimants, however, by requiring them to establish

³⁴ Law Council of Australia, Review of Model Defamation Provisions, 14 May 2019 at[209].

³⁵ Communications Alliance submission: Review of Model Defamation Provisions, 30 April 2019 at [6.2].

³⁶ See e.g. *Bexant v Rausing* [2007] EWHC 1118 (QB): a claim based on an email and letter that was only published to the claimant’s accountant and daughter; *Wallis v Meredith* [2011] EWHC 75 (QB): a claim based on a publication only to the claimant’s solicitor: all cited in the DIGI submissions

³⁷ 2019 Review at [5.45].

a demonstrable ‘serious harm’ at the outset, whether or not the publication was indeed defamatory, and whether or not harm was caused.”³⁸ (Emphasis added)

57 Accordingly, the Defamation Working Party queried whether “a threshold test, rather than a defence, would offer a more efficient and effective way to manage trivial claims.”³⁹

Serious harm test consideration

58 The first point which should be noted is that it is not at all apparent that the jurisprudential foundation for the “serious harm” test as devised in the UK (Tugendhat J’s identification in *Thornton* of a “seriousness” or “substantial” element of defamatory in *Sim v Stretch*⁴⁰) finds favour in Australian common law.

59 In *Radio 2UE Sydney Pty Ltd v Chesterton*,^[3]⁴¹ the High Court of Australia observed that ‘(t)he general test [for defamation] ... [i]s whether the published matter is likely to lead an ordinary reasonable person to think the less of the plaintiff’. It based that “general test” on Lord Atkin’s reasons in *Sim v Stretch*.⁴² It did not adopt the *Thornton* approach of identifying in *Sim v Stretch* a “substantive threshold of seriousness to be surmounted before a statement could be regarded as meeting the legal definition of ‘defamatory’”.⁴³

In any event, will adoption of the serious harm test have the desired effect here – that is to say, cutting cases short and reducing costs?

60 Dr Matthew Collins QC has written in his work, *Collins on Defamation*, that the serious harm test “...affords a mechanism for bringing actions to an end at an early stage”.⁴⁴ That may be so, but at what cost?

³⁸ Ibid.

³⁹ Ibid at p5.48]

⁴⁰ [1936] 2 All ER 1237.

⁴¹ [2009] HCA 16; (2009) 238 CLR 460 (‘Radio 2UE Sydney’).

⁴² at 1240.

⁴³ *Thornton* (at [9]).

⁴⁴ Oxford University Press, 2014.

- 61 New South Wales has trialled what might be called threshold issues in an attempt to reduce costs without that ambition being achieved. Regrettably, the critical amendment which led to that threshold issue being devised was suggested by a judge. In *Radio 2UE Sydney Pty Ltd v Parker*,⁴⁵ Clarke JA and Handley JA each commented about “the desirability (in pre-1995 actions), of the jury determining the issue of whether or not imputations are conveyed at the commencement of the trial”.⁴⁶ This was a 26-day trial in which the matter complained of was a six minute broadcast. In Handley JA’s view, by the end of the trial “it was impossible for the jury to place itself in thought in the position of the ordinary reasonable listener who only heard this broadcast once without being aware of any of [the extensive oral and written evidence].⁴⁷
- 62 Those observations were in part directed to the reality of the task a jury engaged in in determining whether the imputations pleaded were conveyed after hearing all the evidence in the trial. However, there is no doubt that, in part, s 7A was seen as one way of bringing defamation hearings to an early end if the jury determined the imputations were not conveyed, thus avoiding the necessity for evidence going to the defences and damages. Pursuant to s 7A(4)(a), those remaining issues were to be determined by the judge.
- 63 Accordingly, the s 7A procedure led to two trials. This was most usually after there having already been a separate judge only trial on the question of whether the imputations were conveyed and were capable of being defamatory as a matter of law.
- 64 In addition, an appeal lay from the jury’s s 7A determination. Such an appeal could lead to a matter being remitted for yet another s 7A trial. Only after the s 7A procedure had been completed did the rest of the trial proceed. It is not difficult to conclude, even without empirical evidence, that that process

⁴⁵ (1992) 29 NSWLR 448 (*Parker*).

⁴⁶ See *Marsden v Amalgamated Television Services Pty Limited* [1999] NSWSC 87 at [12].

⁴⁷ *Parker* at 474.

considerably increased the costs of defamation actions. Needless to say, s 7A did not find its way into the MDPs.

65 In my opinion, like consequences will flow from the adoption of a serious harm test.

66 That appears to have happened in the UK. In one UK case, *Theedom v Nourish Training T/A Csp Recruitment Colin Sewell*,⁴⁸ Judge Moloney QC, having found the plaintiff had satisfied the serious harm test, observed that:

[31] (a) the trial has demonstrated a further escalation in the conduct of s 1 hearings. **In *Cooke* there was no cross-examination on either side. In *Lachaux* there was cross-examination of the claimant. In this case, both the claimant and the second defendant have been cross-examined, and there was the prospect of calling further oral evidence to rebut the claimant's case on serious harm by reference to specific instances relied on by him. In addition, his general credibility was called into question.**

(b) The parties' costs budgets show that the claimant has spent over £100,000 of costs (inclusive of VAT but not success fees and insurance) and the defendants about £70,000, in respect of this phase of the case alone.

(c) In the result, the hearing of evidence has added little or nothing to the conclusions that an experienced defamation judge would have drawn simply from reading the email and considering the agreed distribution list.” (Emphasis added)

67 Another question is who is to determine the serious harm issue? None of the submissions to the 2019 Review referred to the fact that under s 22(2) of the 2005 Act, where a defamation case is heard by a jury (still the usual case in NSW, Victoria, Tasmania and Queensland⁴⁹), the jury is to determine whether “the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established.” If that provision remains, it would presumably require convening a jury to determine the serious harm issue, just as the jury determined the s 7A(3) issue under the 1974 Act.

⁴⁸ [2015] EWHC 3769.

⁴⁹ Patrick George, *Defamation Law in Australia*, LexisNexis, second edition at 302.

68 Others have recognised that difficulties lie in the broad wording of s 1(1). The Law Council, for example, has suggested an Australia specific provision addressing eg the matters that the court may take into account in considering whether a publication has caused or is likely to cause reputational serious harm. Such matters it suggested, may include the:

- “seriousness of the imputation or imputations alleged to be conveyed by the
- matter;
- extent of the alleged publication;
- alleged audience of the publication; and
- circumstances of the publication.”⁵⁰

69 It is also worth considering whether the serious harm test reduced the number of defamation cases in the UK?

70 Some commentators have suggested that “[s]ince the UK defamation reforms took effect in 2013, there has been a decline in libel actions and only a tiny number of media trials.⁵¹ By the same token, there appears to have been an increase in privacy actions, with such actions said to have “reached a record level.”⁵² There is no tort of invasion of privacy in Australia.⁵³

71 Further, a blog which purported to analyse Judicial Statistics for issued defamation claims in the United Kingdom in 2015 against those going back to 1992 concluded there was a “continuing downward trend [from 1992] which is

⁵⁰ Law Council submission at [218]; see also the NSW Bar Association submissions at [122] - [124].

⁵¹ *Free press backwater: how to change the defamation laws that stifle Australian journalism*, Richard Ackland, The Guardian, 1 December 2018: <https://www.theguardian.com/law/2018/dec/01/free-press-backwater-how-to-change-the-defamation-laws-that-stifle-australian-journalism>

⁵² *Privacy claims reach record level as defamation cases fall away*, Roy Greenslade, The Guardian, 13 June 2016: <https://www.theguardian.com/media/greenslade/2016/jun/13/privacy-claims-reach-record-level-as-defamation-cases-fall-away>

⁵³ See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63.

probably explained by other factors such as the general increase in the costs of litigation and the ‘cap’ on libel damages.”⁵⁴.

- 72 The author commented that “[i]t is difficult to discern any substantial contribution by the Defamation Act 2013 to this continuing downward trend which is probably explained by other factors such as the general increase in the costs of litigation and the ‘cap’ on libel damages.”⁵⁵

The defence of “[p]ublication on [a] matter of public interest”.

- 73 Secondly, s 4 of the 2013 Act creates a defence of “[p]ublication on [a] matter of public interest”. It was based on “the existing common law defence established in *Reynolds v Times Newspapers*⁵⁶ and [was] intended to reflect the principles established in that case and in subsequent case law.”⁵⁷ In particular, according to the Explanatory Notes to the 2013 Act, “Subsection (4) requires the court, in considering whether the defendant’s belief was reasonable, to make such allowance for editorial judgement as it considers appropriate. This expressly recognises the discretion given to editors in judgments such as that of *Flood v Times Newspapers*,⁵⁸ but is not limited to editors in the media context.”⁵⁹

- 74 Submissions to the 2019 Review were divided on the adoption of the s 4 defence.

- 75 According to the 2019 Review, “Australia’s Right to Know” alliance embraced the proposed reform. It submitted that “the high threshold demanded by the reasonableness test [in s 30 of the 2005 Act] renders the qualified privilege defence of little use”.⁶⁰ It also argued that the defence has ‘put Australian media and members of the public who publish material about matters of public concern

⁵⁴ “Judicial Statistics, 2015: Issued defamation claims down by 40%, the second lowest number since 1992”, Inform’s Blog, The International Forum for Responsible Media Blog.

⁵⁵ Ibid.

⁵⁶ [2001] 2 AC 127.

⁵⁷ Explanatory Notes at [29].

⁵⁸ [2012] UKSC 11.

⁵⁹ At [33].

⁶⁰ 2018 Review at [5.22].

at much greater risk than their US and UK counterparts, and [this] has made Australia less attractive as a home for content businesses.⁶¹

76 However, both “[t]he NSW Bar Association and the Law Council of Australia considered that the statutory qualified privilege defence [in s 30] is well adapted to achieving the objects of the MDP.”⁶²

77 In this context, it is worth recalling that while the law of defamation inhibits freedom of speech, it does so in what is intended to strike a balance between freedom of speech and the right to a reputation. It proceeds necessarily on the basis that at least insofar as the media is concerned, it will engage in responsible journalism as expounded in the Court of Appeal judgment in *Loutchansky v Times Newspapers Ltd (Nos 2-5)*⁶³:

“The interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed. The vital importance of this interest has been identified and emphasised time and again in recent cases and needs no restatement here. The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist. He can have no duty to publish unless he is acting responsibly any more than the public has an interest in reading whatever may be published irresponsibly. That is why in this class of case the question whether the publisher has behaved responsibly is necessarily and intimately bound up with the question whether the defence of qualified privilege arises. Unless the publisher is acting responsibly privilege cannot arise.”

The single publication rule

78 Thirdly, s 8 of the 2013 Act creates a single publication rule “to prevent an action being brought in relation to publication of the same material by the same publisher after a one year limitation period from the date of the first publication of that material to the public or a section of the public. This replaces the longstanding principle that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (the

⁶¹ Ibid.

⁶² Ibid at [5.24]

⁶³ [2001] EWCA Civ 1805, [2002] QB 783 at [36].

“multiple publication rule”).⁶⁴ It is largely intended to limit actions in respect of internet publications,⁶⁵ each of which is “published” in the sense relevant to creating a cause of action in defamation, when the publication is downloaded.⁶⁶

79 Adoption of a single publication rule also has strong support. According to the Law Council, “[t]he ‘multiple publication rule’ does not adequately accommodate digital publication, particularly given the prevalence of online archives. [It] therefore, strongly recommends that the Model Defamation Provisions be amended to include a ‘single publication rule’ in a form similar to section 8 of the Defamation Act 2013 (UK) (the UK Act)”.⁶⁷

80 Once again, a single publication rule is at odds with a comparatively recent decision of the High Court which rejected adoption of such a rule in *Dow Jones and Company Inc v Gutnick*. There is much to be said for the plurality’s view that:

“38 In the course of argument much emphasis was given to the fact that the advent of the World Wide Web is a considerable technological advance. So it is. But the problem of widely disseminated communications is much older than the Internet and the World Wide Web. The law has had to grapple with such cases ever since newspapers and magazines came to be distributed to large numbers of people over wide geographic areas. Radio and television presented the same kind of problem as was presented by widespread dissemination of printed material, although international transmission of material was made easier by the advent of electronic means of communication.

39 It was suggested that the World Wide Web was different from radio and television because the radio or television broadcaster could decide how far the signal was to be broadcast. It must be recognised, however, that satellite broadcasting now permits very wide dissemination of radio and television and it may, therefore, be doubted that it is right to say that the World Wide Web has a uniquely broad reach. It is no more or less ubiquitous than some television services. In the end, pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact. *However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so*

⁶⁴ Explanatory Notes to 2013 Act at [60].

⁶⁵ Ibid at [61].

⁶⁶ *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; 210 CLR 575 at [44] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

⁶⁷ LC submissions at [5], [53].

knowing that the information they make available is available to all and sundry without any geographic restriction.” (Emphasis added)

81 In addition, as Tom Molomby SC pointed out in his submissions to the 2019 Review, the consequences of a single publication rule in the context of the internet is “radical and utterly unjust”. He emphasises that “electronic technology” in substance made defamation easier. As he dramatically describes it, now a “message can be delivered to millions of people in multiple countries almost instantaneously at the flip of a button.”⁶⁸

82 In his view the “continuing publication that is an inherent part of the internet “ should involve “continuing liability for continuing publication” in circumstances where technology could equally be devised to enable the “person” or vehicle by which material is placed on the internet to take it down.⁶⁹

Conclusion

83 Lord Sumption was clearly critical of what he described as the piecemeal approach to the statutory reform of defamation law in Great Britain.

84 We should be mindful not to go down the same route. As I have explained, we have not always adopted British law. We should not lightly assume all British law will operate beneficially in the Australian environment.

85 In addition, even wholesale changes such as those implemented in the 2005 Act are not free of drafting issues. The issue whether the contextual truth defence, which the 2019 Review appears to accept has not worked to the extent intended, is well known in the defamation community. And there may be questions about whether the construction given to the cap on damages and the aggravated damages provisions are what the legislature intended.

86 In summary, I contend that:

⁶⁸ Tom Molomby, submissions to the review of Model Defamation Provisions, 16 April 2019 at 3.
⁶⁹ Ibid at 6.

- (1) Australia should avoid an ad hoc approach to defamation law reform. What started out as a review of the MDPs may not be the appropriate vehicle for wholesale change.
- (2) Australia should be careful of introducing “reforms”:
 - (a) which have the real potential to increase costs;
 - (b) which lead to piecemeal amendments to the MDPs and with the concomitant risk that they fail, or fail adequately, to consider the text, structure or purpose of the 2005 Act.⁷⁰

87 As the Hon Paul Finn has observed, in 1942 “Sir Owen Dixon could state uncontroversially that ... [Australia is] studious to avoid establishing [common law] doctrine which English courts would disavow. For we believe that no good can come of divergences be-tween the common law as administered in one jurisdiction of the British Commonwealth and as administered in another.”⁷¹

88 Forty-five years later, as Professor Finn also commented, “in a changed Australia, Sir Anthony Mason gave his imprimatur to a process which was then well in train:

There is ... every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances. ... The value of English judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning.”⁷²

89 Australia has moved long past the era of which Sir Owen Dixon spoke in 1942 when our law moved in lockstep with that devised by English courts. And Sir

⁷⁰ Cf *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 ; (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41

⁷¹ The Hon Paul Finn, *Common Law Divergences*, [2013] MelbULawRw 20; (2013) 37 (2) Melbourne University Law Review 509 at 510, referring to Sir Owen Dixon, ‘Two Constitutions Compared’ in Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (Law Book, 1965) 104, an address originally presented on 26th August 1942.

⁷² *Common Law Divergences* at 510, referring to Sir Anthony Mason, ‘Future Directions in Australian Law’ (1987) 13 *Monash University Law Review* 149, 154.

Anthony Mason's words about "fashion[ing] a common law for Australia that is best suited to our conditions and circumstances" applies equally to legislation.

- 90 I am not saying that Australia should not take heed of the reforms the United Kingdom adopted in 2013. We cannot forget the common jurisprudential basis of our defamation law. However, as one author has observed, in considering the "persuasiveness" of the decisions which formed the foundation of the serious harm provision, "[t]wo potentially relevant differences between Australia and the UK are the absence of an equivalent to the *Human Rights Act 1998* (UK) ('HRA') in all of the Australian jurisdictions and the absence of a dedicated statutory triviality defence to a defamation action in the UK."⁷³
- 91 I am saying, however, that in drafting new MDPs, we should not forget the history of Australia's defamation law, both common law and statutory. We should not adopt provisions from the 2013 Act unless we are confident that they will work positively to advance the objects of the 2005 Act, and are consistent textually and purposively with those objects, and are best suited to our conditions and circumstances.

⁷³ Gould, Kim --- "Locating a 'Threshold of Seriousness' in the Australian Tests of Defamation" [2017] SydLawRw 15; (2017) 39(3) Sydney Law Review 333 at