

Review of Model Defamation Provisions
c/o Policy, Reform and Legislation
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This submission responds to the 2 December 2019 invitation to comment on the draft amendments to the Council of Attorneys-General (CAG) Model Defamation Provisions.

In summary, the development of a uniform defamation regime is commended. Unfortunately the draft amendments are unduly weighted towards the interests of media corporations that – as defamation and other litigation in Australia and overseas has demonstrated – have recurrently and substantively acted with disregard for plaintiffs and third parties.

In addressing calls to modernise the Australian defamation regime by strengthening media freedom the proposed amendments unduly privilege organisations that in placing profit over public interest behave irresponsibly while relying on rhetoric about public interest. The proposed amendments will improperly inhibit legitimate action by individuals whose reputation has been eroded.

The amendments will further foster preliminary litigation regarding the ‘serious harm’ threshold, something that will not reduce the burden on the justice system and will deter individuals from a legitimate defence of their public profile.

On that basis the CAG should reconsider the proposed amendments unless they are introduced alongside meaningful regulation of media organisations such as those proposed in the Finkelstein and Leveson Reviews.

Basis

The submission is made by Asst Professor Dr Bruce Baer Arnold of the Canberra Law School (University of Canberra).

The submission follows input regarding the CAG Discussion Paper in May 2019.

The submission does not represent what would be reasonably construed as a substantive conflict of interest.

Misalignment with community needs

In considering balances of rights it is axiomatic that governments have regard for stakeholder responsibilities – and community benefit – rather than merely rights asserted by vested interests.

The proposed privileging of media organisations is superficially attractive, given the importance of an informed community in the ‘age of the one percent’ and ‘fake news’ alongside judicial recognition of an implied freedom of political communication, highlighted in for example the Australian Law Reform Commission report on *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*. That privileging is however misaligned with

community needs for a fair and accountable media, given evidence – highlighted below – that some organisations have disregarded fairness in items about both celebrities and ordinary individuals.

The privileging proposed in the proposed amendments should accordingly **not** be accepted by the CAG unless there is –

- meaningful self-regulation by traditional Australian media organisations and ‘new media’ (consistent with the recent Australian Competition & Consumer Commission *Digital Platforms* report)
- forward-looking and effective regulation of global entities such as Facebook and Google that are superseding traditional media organisations as the dominant channels for the dissemination of information
- the establishment of a justiciable constitutionally-enshrined national Bill of Rights.

The freedom of a ‘free press’ is not a freedom to act irresponsibly and to be free to cause injury to individuals and associated businesses.

It has become a truism that ‘freedom of the press is guaranteed only to those who own one and have the resources to engage in litigation’, something unavailable to what are often characterised as ‘citizen journalists’. The past decade has seen increasing concentration of print and electronic media organisations, for example consolidation of the Fairfax, Macquarie Media and Nine groups highlighted by both the Australian Competition & Consumer Commission and the Media, Entertainment & Arts Alliance. That concentration has exacerbated a withering of capacity in regional/local media in the private and public sectors, for example offshoring of subediting functions, the departure of leading journalists from *The Age* and other Fairfax titles, and substantial job losses across local Australian Broadcasting Corporation stations and the smaller newspapers of what were the APN and Fairfax groups.

The overall effect has been to foster their emphasis on capturing/retaining audiences through what might be brusquely characterised as sensationalism or ‘gotcha’ journalism, the bias evident in current criticisms by News group employees of that group’s climate denialism, and the abandonment of the careful fact gathering and interpretation that was a marker of the traditional broadsheets. Bias, sensation and lack of care result in egregious misreporting by mainstream media that has been properly condemned by Australian courts.

Examples of that misuse of media freedom through deeply reprehensible and defamatory reporting include –

- *Wagner v Nine Network Australia PL & Ors* [2019] QSC 284
- *Fairfax Media Publications Pty Ltd v Gayle* [2019] NSWCA 172
- *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154
- *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA652

Those instances demonstrate that leading, well-resourced organisations – entities quite different from individuals who assume that access to a keyboard is the same as being a journalist – are at best indifferent to the truth and at worst appear to be engaged in vendettas. (As such they resemble highly partisan shock jocks such as Alan Jones, individuals who have been smacked with a feather by regulators and who are provided by their employers with a national platform for vilification of individuals and communities, a platform that is unavailable to an ordinary citizen.)

The erosion of quality among traditional media is significant given the failure of self-regulation across new offshore-based digital platforms such as Facebook, Twitter and Google that, as noted above, are superseding traditional media while claiming immunity from liability for defamatory or other content on the basis that they are mere conduits – innocent intermediaries – or should be immunised because they are corporate manifestations of a global free speech ‘lex informatica’ regime derived from United States law.

Individuals and the Australian community at large need a legal regime in which media organisations are, as in exemplary recent investigative reporting regarding aged care and the financial system, able to justify their existence by fearlessly critiquing the performance of government and throwing light on the behaviour of prominent individuals and corporations. The value of that activity is evident in for example belated action by watchdogs such as the Australian Prudential Regulation Authority, the Australian Securities & Investments Commission and Aged Care Quality & Safety Commission following parliamentary inquiries and royal commissions that highlighted egregious wrongdoing by leading entities such as Westpac, the Commonwealth Bank and Aveo.

That freedom to ‘speak truth to power’ in the public interest does not, however, require Australian law to further privilege the media, whether old or new. Calls for amendment of the draft proposals to further entrench the media have not been substantiated through a clear demonstration that the initial proposals provide inadequate protection for media organisations and are according contrary to the public interest. Instead they conflate public curiosity (and thence corporate benefit) with the public interest, while ignoring instances such as those noted above where large media organisations both made defamatory statements and refused to acknowledge corporate error.

In considering proposed amendments that will privilege media organisations the Council might usefully recall the 2015 *Melbourne University Law Review* analysis by Finkelstein and Tiffen. They commented that –

newspapers are businesses. They exist to make money. At the same time newspapers also report the news, ‘act as watchdogs’ and ‘unearth scandals’. But newspapers do these things to succeed in business.

Along the way they publish inaccurate, misleading and distorted information which is rarely corrected and, when it is, even more rarely with due prominence. Not only this, the press, while free to be partisan, ought to distinguish clearly between comment, conjecture and fact. This ‘obligation’ is routinely treated with contempt.

The proposal in the Finkelstein Inquiry report aimed to establish a forum independent of both government and industry that would provide redress to those injured by the press. It did so in ways that enlarged – and did not restrict – the flow of information, and through procedures with no financially punitive sanctions on either side beyond public exposure. The successful hostility of the press to having a statutory basis for such procedures means that for the foreseeable future, beyond the rule of statutes and torts, such as defamation and contempt of court, the main means of accountability will continue to be voluntary self-regulation.

There are some who believe in press self-regulation. The Swedish Press Ombudsman Ola Sigvardsson declared that ‘[a]mong the Swedish publishers there is a desire to behave decently, to behave in an ethical way. I think many publishers just think it’s a good thing to do’. A journalist thought the German Press Council sits within a vibrant array of wider media accountability instruments, including ‘ombudsmen, codes of newsroom ethics, reader advisory councils, correction corners, online portals that specialise in media criticism and self-criticism, media literacy campaigns to encourage reader interaction, and so on.

Experience tells us that the thought that such rosy scenarios represent the future of press self-regulation in Australia is foolish. Still, it is not surprising that action by

government, even though not directed to fettering or gagging the press, is never likely to occur.

That analysis is as applicable to broadcast and ‘new media’ as it is to print. If the Australian legislatures are to grant the media, old and new, stronger privileges through amendments to the proposed Model Defamation regime we should hold those organisations to a higher standard than has been the case. The Australian Press Council has been and remains a paper tiger. Self-regulation by the commercial broadcasters, endorsed by the Australian Communications & Media Authority under the national electronic media co-regulatory regime, has been similarly ineffective.

Privilege, if granted, *must* be accompanied by responsibility. Calls for ‘media freedom’ should not result in rewards for the institutional failures evident in the above defamation judgments and in the systemic problems with corporate culture that were identified by Lord Leveson in his report on an ongoing blind eye to illegality in the UK arm of the News global publishing, broadcasting and film group.

The public interest defence

Australia, in contrast to almost all liberal democratic states, does not have a recognised cause of action for serious breach of privacy. The statutory watchdogs, such as the Office of the Australian Information Commissioner, are significantly under-resourced and manifestations of regulatory capture, construing their role and priorities through the eyes of the entities they are meant to regulate.

In considering the defence of ‘responsible communication in the public interest’ in the absence of meaningful self-regulation by media organisations the Council should be conscious of the difference between public curiosity and public interest, with an expectation that

- entities relying on the defence will indeed behave responsibly (something clearly not the case in the *Wagner* and *Wilson* judgments),
- restraint will be exercised in reporting on the private lives of people ‘in the news’, a category that encompasses ordinary citizens rather than merely those who are able to stifle observation through wealth or through celebrity are able to use ‘new media’ such as Twitter to present a contrary account to what appears in the tabloids,
- entities in responding to defamation actions will not, as in the recent litigation regarding Geoffrey Rush (discussed by Dr Sarah Ailwood, University of Wollongong), punish third parties as collateral damage.

Capping Non-economic loss

It is clear from judgments and insider accounts in Australia and overseas that some media organisations (for example News in the United Kingdom) regard damages payments as a routine cost of business. Circulation increases through recurrent attacks on figures such as Elton John are perceived as more than offsetting litigation costs and damages.

Meaningful damages – sufficient to attract the attention of shareholders and signal to the community that media misbehaviour is properly condemned by courts – are one mechanism for inducing responsible behaviour on the part of corporate executives and other decisionmakers within media organisations. If the prospect of hanging traditionally ‘concentrated the mind wonderfully’, so does the likelihood of substantial damages in response to journalism that is egregiously negligent or malicious (evident in for example the *Wilson*, *Hockey* and *Wagner* judgments cited above).

The proposed amendments disincentivise good journalism by clarifying that the cap on damages for non-economic loss will apply even when aggravated damages are justified.

Extension of the cap sends the wrong message to media organisations and is not justified by declining circulation/advertising spend among 'old media'.

The serious harm threshold

The proposed introduction of a threshold of serious harm should be treated warily. It may deter some disadvantaged injured parties from initiating litigation, particularly given the willingness – as we have seen in recent proceedings – for media organisations to double up after wrongdoing.

Just as importantly, it is unlikely to fundamentally reduce the volume of litigation, instead fostering interlocutory action over whether the harm caused by a publication is sufficiently serious to take further. That is a matter of displacement rather than overall reduction in the burden on the court system.

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