



Law Council
OF AUSTRALIA

Review of Model Defamation Provisions

Response to the Supplementary Questions to Stakeholders

**Defamation Working Party established by the Council of Attorneys-General
NSW Department of Justice**

21 June 2019

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Introduction	5
Response to supplementary questions to stakeholders	5
18a. Formalised pre-litigation processes	5
18b. Choice of Law Rules.....	6
18c. Jurisdiction of courts and tribunals.....	6
18d. Plaintiff to certify falsity	7
18e. Defeasance provisions	8
18f. Defamatory capacity.....	8
18g. Definition of ‘matter’	9
18h. Election to trial by jury	9
18i. Summary judgment procedure.....	9
18j. Reversal of onus of proof in terms of establishing truth or falsity of imputations.....	10
18k. Pleading multiple defences	10
18l. Absolute privilege defence	11
18m. Common law defences: Hore-Lacy and consent.....	11
18n. Public figure defence	11
18o. Death of a party	12
18p. Simplifying jury questions	12
18q. Jury determination of damages	12
18r. Alternative remedies	12
18s. Indemnity costs clause	13
18t. Costs consequences for unfounded allegations of malice	13
18u. Scope of jurisdiction	14
18v. Criminal defamation	14

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the contributions of the Law Society of New South Wales and the Queensland Law Society in developing this submission.

Introduction

1. The Law Council appreciates the Council of Attorneys-General Defamation Working Party (**the Working Party**) providing stakeholders with an opportunity to comment on the Supplementary Questions to Stakeholders document (**Supplementary Questions**) which identifies the issues raised by stakeholders in the response to Question 18 of the Model Defamation Provisions Discussion Paper (**Discussion Paper**).
2. The Law Council is grateful for the contributions of the Law Society of New South Wales (**LSNSW**) and Queensland Law Society (**QLS**) in responding to the Supplementary Questions. The Law Council also acknowledges the contributions of the New South Wales Bar Association (**NSW Bar**), the Victorian Bar, the Law Society of South Australia and the Media and Communications Committee of the Law Council's Business Law Section, in the preparation of the Law Council's submission in response to Discussion Paper and notes that several of the issues or proposals identified by those bodies in response to Question 18 have been included in the Supplementary Questions document.
3. Please note that given the limited timeframe in which to respond (approximately two weeks), the Law Council has not been in a position to reach a consensus view in regard to a number of the Supplementary Questions. However, the Law Council sets out the views of the LSNSW and QLS below in the expectation that it will be of assistance to the Working Party. Submissions provided by those constituent bodies below, are the submissions of those bodies and do not necessarily represent the views of the Law Council as a whole. In these instances, the Law Council requests that the submissions be attributed to those bodies should they be relied upon by the Working Party.

Response to supplementary questions to stakeholders

18a. Formalised pre-litigation processes

Law Society of New South Wales

4. The LSNSW strongly supports mechanisms that facilitate the resolution of defamation disputes without litigation. In the view of the LSNSW, the issuance of a concerns notice in writing prior to commencing court proceedings should be mandatory. This is the primary mechanism to ensure a pre-litigation process begins. Without this step, the offer to make amends process may lack potency and, in some instances, may be overlooked.
5. To formalise this process, the LSNSW recommends that the form of statement of claim filed by a plaintiff in a defamation case should require the plaintiff to verify that they have issued a concerns notice (identifying when the concerns notice was issued, to whom it was issued, and any response received). In this way, a process similar to the 'genuine steps' statements in the Federal Court of Australia could be adopted.
6. The LSNSW considers that if reformed defamation provisions are to address the issues raised by technological advancements in communications since 2005 (for example the dominance of social media platforms such as Twitter and Facebook), they should also include a serious threshold requirement – that is,

that the publication in question must have a genuine tendency to seriously and adversely affect the reputation of the complainant/plaintiff.

Queensland Law Society

7. The QLS does not agree that pre-litigation processes should be formalised and made mandatory 'to encourage prompt, prominently displayed withdrawals, corrections and apologies'. In the view of the QLS, this may have the effect of entrenching positions early on in the process and potentially add to costs and reduce flexibility for parties to utilise other less formal resolution processes. The QLS is concerned that linking of pre-litigation processes to damages incentives may also be abused.

18b. Choice of Law Rules

Law Society of New South Wales

8. The LSNSW does not consider clause 11 of the Model Defamation Provisions requires amendment.

Queensland Law Society

9. Clause 11 of the Model Defamation Provisions is uniform, therefore in the QLS's view, the relevance of choice of law rules is unclear.
10. The Discussion Paper referred to research which indicates that 'NSW was the preferred forum for defamation actions and more matters reached a substantive decision'.¹ However, the QLS notes that this may be due to the way in which defamation proceedings are conducted. That is, with experienced and specialist Defamation Lists in the New South Wales District and Supreme Courts. The award of traditionally higher damages may also be a factor.

18c. Jurisdiction of courts and tribunals

11. The Law Council notes that no matter which courts or tribunals have jurisdiction to hear defamation matters, it is fundamentally important that they are properly and adequately resourced to do so, and that there is sufficient expertise among the judicial or tribunal members to hear such matters.

Law Society of New South Wales

12. As noted in the LSNSW's response to Question 18 of the Discussion Paper (included in the Law Council's submission),² in relation to relatively minor disputes between individuals (particularly on social media), the LSNSW considers that claims could be required to be commenced either in a new division of state tribunals, such as the NSW Civil and Administrative Tribunal, or a division of a Local Court. Alternatively, they could be commenced in a national tribunal dealing solely with small defamation disputes. As noted in the previous response, the LSNSW suggests that this tribunal could require mediation as the first step, with strong encouragement for online takedown and the publication of an

¹ Council of Attorneys-General, *Review of Model Defamation Provisions Discussion Paper* (February 2019) 10.

² Law Council of Australia, Submission to the Council of Attorneys-General Defamation Working Party, *Review of Model Defamation Provisions* (14 May 2019) 58 [289].

apology/correction as mechanisms for resolving the matter at the earliest opportunity.

13. The LSNSW recommends that remedies in such a tribunal be restricted (in particular, damages) and that there should be a prima facie presumption of no orders as to costs.
14. In terms of mechanisms for small matters to be sent to a more appropriate judicial authority, the LSNSW recommends that consideration be given to ensuring the reformed model provisions enable the court in which the proceedings are commenced to reallocate them at the first listing to one of the bodies outlined above.

Queensland Law Society

15. The QLS suggests that there appears to be no evidentiary basis for any changes to the jurisdiction of courts and tribunals.
16. In the view of the QLS, the Magistrates Court in Queensland should continue to have jurisdiction to hear claims. Further, differences in remedies already exist given jurisdictional limitations in the Magistrates, District and Supreme Courts.

18d. Plaintiff to certify falsity

Law Society of New South Wales

17. As noted in the LSNSW's response to Question 18 of the Discussion Paper,³ there is currently a heavier burden placed on the defendant publisher than on the plaintiff in proving falsity of imputations. Effectively, however, defamation law requires that any plaintiff who sues for defamation does so on the basis that the imputations in dispute are, in the view of the plaintiff, false. The LSNSW therefore considers it appropriate for the plaintiff to prove the falsity of the imputations, rather than the onus being left to the defendant. The plaintiff will always be in a better position to know whether an imputation is true or not. A plaintiff should not be permitted to sue over imputations they know to be true.
18. As stated previously, the LSNSW recommend the reformed Model Defamation Provisions include an additional element in the cause of action, that the plaintiff must establish that the imputations they rely upon are false.⁴ In many cases, this may simply require the plaintiff to give evidence in the witness box that each imputation is false. The LSNSW considers that switching the onus of establishing truth would act as a deterrent to frivolous or vexatious claims and claims brought for the purpose of silencing public debate, and would therefore reduce the burden on the courts.
19. In the alternative, if falsity of the imputations is not made an element of the tort of defamation to be proven by the plaintiff, the NSWLS states that a plaintiff should still be required in his or her statement of claim to swear or affirm an affidavit that each of the imputations pleaded or particularised is false, on penalty of perjury.

³ Ibid 57 [281].

⁴ Ibid [282].

Queensland Law Society

20. The QLS notes that this would be a fundamental change to the current laws surrounding defamation. In the view of the QLS, implementation of such a requirement may curtail claims and give rise to the cost of satellite litigation.

18e. Defeasance provisions

Law Society of New South Wales

21. The Law Society considers that the defeasance provisions make little sense in a world where people are in constant digital communication via social media and the internet, often to limited groups of people (as opposed to ‘the public’ at large).⁵ The LSNSW would support removal of the defeasance provisions entirely.

Queensland Law Society

22. The QLS suggests that the defeasance provisions should not be amended as suggested in the Supplementary Questions on the basis that you cannot pre-empt a defence.

18f. Defamatory capacity

Law Society of New South Wales

23. The LSNSW recommends that the reformed Model Defamation Provisions should provide avenues for publishers to have proceedings dismissed at an early stage when the imputations pleaded and relied on by a plaintiff are strained, forced or unreasonable.
24. The LSNSW notes that the current defamation legislation does not articulate the elements of the cause of action, including the tests to apply to whether an imputation relied upon by a plaintiff is capable of arising and being defamatory of the plaintiff. Questions such as the threshold of capacity have traditionally been left to the common law.
25. The LSNSW recommends the reformed Model Defamation Provisions include a legislative requirement that an imputation be capable of arising from the publication, for example, through the introduction of a ‘serious harm’ threshold. A legislative approach to addressing the low capacity threshold would be the best way to ensure unmeritorious claims based on imputations which are strained, forced or unreasonable, may be dismissed at an early stage.

Queensland Law Society

26. This would be a fundamental change to the current laws surrounding defamation and the QLS does not believe that such a change would limit disputes with respect to ‘defamatory capacity’. It may simply change the focus.

⁵ Ibid 59 [292].

18g. Definition of ‘matter’

27. The Law Council notes that the suggestion outlined in Supplementary Question 18g was proposed by the NSW Bar and draws the Working Group’s attention to the Bar’s comments.⁶

Law Society of New South Wales

28. The LSNSW agrees that the term ‘matter’ should be amended to refer to the whole of the publication complained of.
29. However, in doing so, the LSNSW recommends that consistent terms should be used throughout the reformed Model Defamation Provisions to ensure certainty. For example, the defences contained in clauses 27 to 33 of the Model Defamation Provisions are directed to ‘the publication of defamatory matter’. While there is a definition of ‘matter’, there is no definition of ‘defamatory matter’. Unlike clauses 25 and 26, these defences do not make any reference to defamatory imputations. The LSNSW considers the use of ‘defamatory matter’ creates confusion in relation to how these defences are to operate and be applied. Therefore, the LSNSW recommends that any amendment to terms such as ‘matter’ should avoid repeating these ambiguities.

Queensland Law Society

30. The QLS notes that term ‘matter’ is used throughout the Model Defamation Provisions and any change could give rise to unintended consequences. As such, any change would require careful consideration of its intent and the likely effect.

18h. Election to trial by jury

Law Society of New South Wales

31. The LSNSW recommends that the reformed Model Defamation Provisions include a specific provision for a party to apply to the court to seek revocation of its own jury election. Such application should be able to be made by a party at any stage.

18i. Summary judgment procedure

Law Society of New South Wales

32. The practical exercise of summary judgment procedures is inconsistent between the various jurisdictions. For example, the Federal Court has shown reluctance to entertain early strike-out applications, a position at odds with the Supreme and District Courts of New South Wales.
33. The LSNSW considers this may be a matter of practice and procedure for each jurisdiction. However, in the interests of achieving true uniformity across the jurisdictions (and to avoid issues with forum-shopping), the LSNSW would support any legislative mechanism by which unmeritorious defamation claims may be dismissed at an early stage.

⁶ Ibid 61-2 [306]-[311].

Queensland Law Society

34. The QLS agrees that there may be scope for a defamation-specific summary dismissal process.
35. However, should a defamation-specific summary dismissal process be introduced into the Model Defamation Provisions be considered, the QLS respectfully requests further consultation in regard to the possible bases on which a matter be capable of being summarily dismissed.

18j. Reversal of onus of proof in terms of establishing truth or falsity of imputations

Law Society of New South Wales

36. As noted above in relation to Supplementary Question 18d, the LSNSW supports the reversal of the onus of proof in relation to establishing truth or falsity of imputations.
37. However, the LSNSW considers the reversal should not be limited to public figures (that being a concept derived from law in the United States and relevant to malice, as opposed to proof of falsity as part of the cause of action).

Queensland Law Society

38. Again, the QLS notes that this would be a fundamental change to the current laws surrounding defamation. Implementation of such a requirement may curtail claims and give rise to the cost of satellite litigation.

18k. Pleading multiple defences

Law Society of New South Wales

39. The LSNSW noted in its response to Question 18 of the Discussion Paper,⁷ that matters may contain a variety of material, some parts of which might be subject to, for example, a justification defence, other parts to an honest opinion defence, and other parts to a fair report defence. The LSNSW supports an amendment to the reformed Model Defamation Provisions to clarify that a defendant may rely on a combination of defences in response to any particular matter complained of, and that different defences may be directed towards different imputations.

Queensland Law Society

40. It would seem appropriate that a combination of defences could be relied on by a defendant in response to any particular matter complained of.
41. However, the QLS would again respectfully request further consultation on what this change might look like.

⁷ Ibid 58 [287]-[288].

18l. Absolute privilege defence

42. The Law Council, LSNSW and QLS are not persuaded that there is any need for change to the absolute privilege defence.

18m. Common law defences: Hore-Lacy and consent

Law Society of New South Wales

43. The LSNSW supports mechanisms to ensure uniformity across the jurisdictions.
44. The LSNSW recommends the statutory justification defence contain an additional provision so that a defendant can rely on a meaning that the plaintiff has not pleaded, if not substantially different from, and no more injurious than, the plaintiff's pleaded meaning.
45. Ambiguity exists in relation to what will and what will not amount to consent, how far 'consent' extends (particularly in the age of social media) and who can rely on such a defence.⁸ The LSNSW supports the amendment to the Model Defamation Provisions to clarify that when a person makes a statement voluntarily, any publisher may rely upon a defence of consent in repeating the sense and/or substance of the statement in question and attributing it to the would-be plaintiff.

Queensland Law Society

46. The QLS considers that this is a matter which ultimately requires consideration by the legislature. However, there would appear to be some merit in enacting the Hore-Lacy defence in the Model Defamation Provisions.
47. Conversely, there does not appear to be a need to enact the defence of consent which the QLS understands would be uncommon.

18n. Public figure defence

Law Society of New South Wales

48. The LSNSW notes that this proposal would mirror the law in the United States and supports this proposed amendment.

Queensland Law Society

49. The QLS does not agree that there is a need for such a defence. In the QLS's view it is important to bear in mind that the purpose of defamation laws is to protect individuals from reputational damage, irrespective of whether publications were made with malice.

⁸ The common law defence of consent was recently examined by his Honour Gibson DO in *Arman v Nationwide News Pty Limited* [2017] NSWDC 151.

18o. Death of a party

50. The Law Council notes that the suggestion outlined in Supplementary Question 18o was proposed by the NSW Bar and draws the Working Group attention to the Bar's previous comments.⁹

Queensland Law Society

51. The QLS agrees that this may be a matter which requires further consideration.

18p. Simplifying jury questions

Law Society of New South Wales

52. As the LSNSW noted in its response to Question 18 of the Discussion Paper,¹⁰ it supports an amendment that would enable juries to be asked to give a simple general verdict as to which party should win, as opposed to answering a series of questions where the set of questions does not ultimately identify to the jury who succeeds in the case.¹¹ In criminal cases, elements of the criminal offence are explained to the jury, as are each of the defences that may be relied upon, but the jury delivers a simple verdict of guilty or not guilty. In many defamation cases, the LSNSW considers that after closing addresses and directions from the judge, it would be simpler and easier for the jury to be asked which side should win. The LSNSW supports an amendment to clarify this. However, provision should also be made for exceptional circumstances where jury questions are more appropriate.

53. The LSNSW also recommends that any amendment to the Model Defamation Provisions should require that any jury given a series of questions to answer (as opposed to being asked to give a simple, general verdict) be informed about which side will win based on their responses to questions. This would remedy the present position where juries, who may be asked numerous questions, may not know the consequences of their answers and which side will win as result of those answers.

Queensland Law Society

54. The QLS suggests that the basis for the proposed change is unclear.

18q. Jury determination of damages

Queensland Law Society

55. The QLS does not agree with the proposed change.

18r. Alternative remedies

56. The Law Council notes that in the Victorian Bar has advocated for the introduction of a new remedy by of a 'declaration of falsity' as recommended by

⁹ Law Council of Australia, Submission to the Council of Attorneys-General Defamation Working Party, *Review of Model Defamation Provisions* (14 May 2019) 62-3 [312]-[315].

¹⁰ *Ibid* 59 [291].

¹¹ Note the questions put to the jury in *Tabbaa v Nine Network Pty Ltd (No. 10)* [2018] NSWSC 468.

the NSW Law Reform Commission's 1995 Report and draws the Working Group's attention to the Bar's previous comments.¹²

Law Society of New South Wales

57. The LSNSW does not support the concept of a 'declaration of falsity' remedy. The cause of action of defamation is about whether a statement (or imputation) is defamatory, not whether it is false. The LSNSW is concerned that the introduction of a 'declaration of falsity' remedy would radically transform the cause of action of defamation. Further, it would require a plaintiff to establish, to the court's satisfaction, that the imputations are false (the LSNSW does not support the alternative, in which a defendant would be required to disprove falsity).
58. While the LSNSW does endorse falsity being an element of the plaintiff's cause of action, in the event it is not introduced as part of the reformed model laws, a 'declaration of falsity' provision will potentially act as a surrogate, placing an expectation on the plaintiff to prove falsity. The interaction of a 'declaration of falsity' remedy with the justification defences would also require careful consideration.

Queensland Law Society

59. In the QLS's view, the need for a 'declaration of falsity' is unclear as a judgment can effectively provide this remedy.
60. The QLS agrees that there may be a role for self-regulatory forums to resolve disputes involving digital platforms with low-level reputational accusations.
61. However, the QLS has concerns about the proposed 'takedown procedure, regulated by a government authority' which may have the effect of impeding freedom of speech.

18s. Indemnity costs clause

Law Society of New South Wales

62. The LSNSW supports the proposal that equivalent indemnity costs provisions apply to both defendant and plaintiff.

Queensland Law Society

63. The QLS does not think there is a need for this change. However, the QLS does query the need for the reference to 'unreasonably' in the defendant failing to make an offer under clause 40(2)(a).

18t. Costs consequences for unfounded allegations of malice

Law Society of New South Wales

64. As previously noted in response to Question 18 of the Discussion Paper,¹³ the LSNSW suggests that there should be costs consequences for a plaintiff who alleges malice against a defendant, which is ultimately found to be

¹² Law Council of Australia, Submission to the Council of Attorneys-General Defamation Working Party, *Review of Model Defamation Provisions* (14 May 2019) 60-1 [298]-[305].

¹³ *Ibid* 59 [290].

unsubstantiated. For example, the LSNSW recommends that if a plaintiff makes an allegation of malice that is ultimately found to be baseless, the court may deprive the plaintiff of a costs order in their favour in respect of the proceedings.

65. However, the Law Council notes that this suggestion, whereby an otherwise successful plaintiff would be deprived their costs of the entirety of the proceedings, does not accord with the well-established principle that costs orders are made to compensate the person in whose favour it is made for having to defend or assert their rights rather than to punish the person against whom the order is made.¹⁴ In the Law Council's view, this change may have a chilling effect on cases. The usual position in the case suggested would be for the plaintiff either to not to receive their costs for that part of the proceedings that dealt with the unsuccessful malice allegation, pay the other side's costs on that issue on a party/party basis, or indemnity costs.

18u. Scope of jurisdiction

Law Society of New South Wales

66. The LSNSW considers that careful consideration should be given to any proposal to amend what would otherwise be the jurisdictional scope of the relevant court, noting possible issues under international and Constitutional law.

18v. Criminal defamation

Law Society of New South Wales

67. The LSNSW supports the repeal of criminal defamation offences.

¹⁴ See, eg, Federal Court of Australia, General Practice Note: Costs, 25 October 2016, [3.13]; Judicial Commission of New South Wales, Civil Trials Bench Book: Costs, last updated May 2019, [8-0020]; *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33, [34].