

Submission by  
**The Australian Press Council**

on  
**Discussion Paper (No. 2)**  
on

# **REFORM OF DEFAMATION LAWS**

by the Attorneys General of Queensland,  
New South Wales and Victoria

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- 1.1 In response to the Attorneys General's Discussion Paper No. 2 "Reform of Defamation Laws", the Australian Press Council welcomes the continued interest of the Attorneys General of Queensland, New South Wales and Victoria in defamation law reform. The Council particularly appreciates the opportunity to reply to the matters raised in Discussion Paper No. 2. It notes the determination of the Attorneys to gauge community concern and expectations in this controversial area of law reform, an approach which the Council thoroughly endorses.
- 1.2 The interest of the Council in defamation law reform particularly flows from the *raison d'être* of the Council which is that freedom of speech and freedom of the press are based on the inherent right of the people in a democracy to be informed.
- 1.3 In each of the following paragraphs, the Council comments on the corresponding paragraph in the Discussion Paper.

#### **ROLE OF THE JUDGE AND JURY:**

- 1.8 The Council prefers the position of New South Wales and Queensland, that is that the question of liability be put to the jury and that the quantum of damages be determined by a judge. Noting that Victoria wishes to continue to allow the jury to decide both matters, the Council believes there would be difficulties in maintaining consistency of awards of damages in the trial courts. Should Victoria wish to continue to retain the present position, the Council would respectfully suggest that Victorian judges be empowered to give guidance to the jury as to the quantum of damages in the event that liability is proven to the jury's satisfaction.

#### **CRIMINAL DEFAMATION**

- 2.3 While noting the views of the Attorneys, the Council will still argue, for the reasons noted in the Discussion Paper itself, that the offence be abolished. If however the offence is retained, the Council accepts that the safeguards proposed give some pro-

tection against the possibility of the court being used as a forum to ventilate a private grievance or pursue a personal vendetta as distinct from serving the public interest. It accepts that this result is likely to be achieved through the requirement that the consent of the Director of Public Prosecutions or of the Attorney General be required for any prosecution to proceed.

#### **CONTEMPT**

- 3.2 The Council agrees that it is desirable that any reform of the law of contempt be the subject of a separate reference.
- 3.4 The Council also agrees that the case concerning Senator Tate indicates the real and practical problem for all, including the media, concerning the availability of information regarding pending cases.
- 3.6 Should the Attorneys proceed in this area, the Council sees cost advantages in the option of a non-criminal compensatory award being available at the trial rather than the creation of a separate

action. In the Council's view, it would be unreasonable to impose, automatically, an award equivalent to the cost of the aborted trial. This could be out of all proportion with the breach of the law and could even result in the financial ruin of a newspaper. It would however argue that an innocent contempt, similar to that attributed to the Justice Minister in paragraph 3.4, should not be the subject of any compensatory sanction and should be expressly excluded. In addition, where a person acts on independent legal advice in an innocent contempt, it would seem reasonable that the person be also free from such liability.

## JUSTIFICATION

4.1–4.6 The Council would prefer that the truth alone be a defence to defamation. However the Council does agree that the undue publication of purely private matters, in which there cannot be reasonably said to be any public interest, does not constitute responsible journalism. Noting however the wish of the Attorneys to protect individuals from unjustifiable revelations about their private affairs, except where the publication of such matters is in the public interest, the Council accepts that the solution suggested in the Discussion Paper constitutes a reasonable compromise, subject to the proviso in paragraph 4.8 below. This, in the Council's view, would be better than creating a separate tort of privacy drafted without reference to defamation law, which could lead to a proliferation of separate actions with difficulty in reconciling civil liability.

4.7 The Council endorses the view of The Law Institute of Victoria in this paragraph.

4.8 The success of the solution proposed depends on the drafting of an acceptable provision defining private matters. Given the shortness of time for the making of submissions on the Discussion Paper, the Council suggests that further time be granted before the provision is finalised. The Council wishes to discuss this provision in detail with its constituent organisations and believes that there would be widespread support for this approach in the media and among interested parties.

## PUBLIC FIGURE TEST

5.1 The Council still believes it would not be beyond the competence of the persons drafting legislation to

so define a public figure as to ensure that its impact would not be unnecessarily wide. However, the council notes the determination of the Attorneys not to introduce such a defence.

5.3 The Council endorses the proposition that the introduction of a new workable uniform defence of qualified privilege would be one of the most significant reforms which could be achieved in terms of increasing freedom of speech and expression. The Council would of course emphasise that the proposed uniform qualified privilege would need to be "workable". For the defence to be workable it will be necessary that it be a significant improvement on the present versions. Should it not be possible in future discussions to achieve a workable uniform qualified privilege in the refinement of the proposals in the Discussion Paper, the Council believes that the Attorneys should again reconsider the introduction of a public figure test.

## STATUTORY QUALIFIED PRIVILEGE – SUBMISSIONS

6.7 The Council draws the Attorneys' attention to its comments on paragraph 6.27.

6.8 The Council strongly supports the proposition that the New South Wales and Queensland provisions be retained and that the new uniform defence apply in the three jurisdictions.

6.8 The proposed addition of sub-sections 22(4) and 22 (5) would in the Council's view substantially improve the section.

6.11 The Council prefers the alternative defence based on the standard of reasonable care. This would permit an objective determination of the issue and the court would be able to take note of the appropriate journalistic standards. At the same time, the Council would stress that the provision would need to shield or protect journalists from any obligation, except in limited prescribed circumstances, to reveal a source. The legislation of various US jurisdictions could be considered in this regard.

6.13 The Council believes that in any allegation of malice, the onus of proof as it now is should be on the plaintiff. "Malice" is an allegation of wrongdoing or lack of faith on the part of the publisher, and it would be against established principles of justice to presume wrongdoing on behalf of the defendant;

a citizen should be presumed innocent until proven guilty.

6.18 The Council accepts the Attorneys' view that a requirement to establish a standard of honest belief would be insufficient on its own to achieve an appropriate balance between the conflicting interests sought to be accommodated. In the view of the Council, the addition of the concept of reasonableness would ensure an appropriate objective standard. In other words, there should be a requirement of both honest and reasonable belief in the correctness of a statement to establish the defence.

6.19 The suggestion that the defence of qualified privilege be made conditional upon the publication upon request of a reasonable statement by way of explanation or contradiction would be difficult to apply in practice. It would require that editors would have to make decisions as to what comprises a "reasonable" statement, including quite often decisions as to whether a statement itself is defamatory. Given the difficulties and differences that professional advisers themselves often have on on this point, the Council does not believe it realistic to impose this on editors.

However, should the Attorneys determine that there be such a condition, the Council would suggest that there be provision for alternative dispute resolution including recourse to a third party, for example the Press Council itself. The Council could be empowered on a joint application by the parties to give an authoritative determination as to the reasonableness of a statement including the form of such a statement. Registration of an intention by a media organisation to accept this procedure until further notice could be effected in the manner described in paragraph 7.14 (a). This, we would suggest, should not be reviewable except on jurisdictional questions.

6.21 The Council disagrees with the proposal of the Australian Law Reform Commission for reasons set out in paragraph 6.19 above.

## 2E ATTRIBUTED STATEMENTS

6.25 The Council supports the proposal to introduce a defence of attributed statement. The Council agrees with the comments in 6.24 as to the difficulties of a right of reply.

6.27 The Council prefers the position

of New South Wales and Queensland, and believes that any new defence should be additional to and not a substitute for section 22 (NSW) and section 37 (Queensland). The Council believes there would be advantage in Victoria introducing the new provision.

#### **COURT-RECOMMENDED CORRECTION STATEMENTS**

7.1 The Council agrees with this conclusion.

7.2 The Council also agrees with this conclusion.

7.3 Again, the Council agrees with this proposal. It strongly supports the right of any party to apply, as described, to a Supreme Court judge.

7.4 The Council believes that it should be mandatory in **all** cases for the plaintiff to file an affidavit setting out exactly the allegation of defamation and that the defendant be entitled to justify the publication in the same manner. In relation to the remainder of the paragraph, Council would suggest that this read as follows:

“At this stage, the applicant would be required also to file particulars of and give notice to the respondent of the desired nature, extent, form, manner and time of publication of any proposed Correction Statement. The respondent’s affidavit will also confirm or object to the form etc. of the Correction Statement proposed by the applicant. Such an exchange would ensure that any dispute over contents is detected at an early stage. If the judge were satisfied from the affidavit material that the plaintiff had a reasonable chance of success, a fair and equitable Correction Statement could be recommended.”

7.5 The Council agrees on the rights of appeal proposed in this paragraph.

7.6 The Council agrees that at that stage, no award for damages should be possible.

7.8–7.9 Council has reservations concerning a Correction Statement being admissible in evidence where the jury is to determine damages. In such a case the Council believes that the effect of the Correction Statement on damages, if any, should be determined subsequently by the judge.

#### **EFFECT ON AWARD OF DAMAGES**

7.10 (a) The Council notes the proposal that if a defendant elects to

publish the court-recommended Correction Statement, such compliance would constitute a component of, and thus be in partial or total substitution for, any final award of damages. The Council suggests that the legislation explicitly state that this is a consequence of an election. As an alternative to the Council’s comments on paragraphs 7.8 and 7.9, consideration could be given in Victoria for a requirement that juries show the gross damages, less the deduction assessed for the Correction Statement, and the nett damages. The Council however prefers the approach suggested above in paragraphs 7.8 and 7.9.

(b) The Council is disappointed that the Attorneys do not favour the suggestion that publication of a Retraction Statement should entitle a plaintiff to claim only proven economic loss. If the Attorneys remain of this view the Council suggests there be a statutory presumption that where a plaintiff claims to have suffered more than economic loss, the plaintiff be required to demonstrate to the satisfaction of the court precise damages which are claimed to have resulted and which have not been sufficiently assuaged by the retraction or correction.

7.11 It would, in the Council’s view, be consistent with the concept of a court-recommended Retraction Statement that evidence of a failure to publish such a statement not be admissible. This would encourage parties to seek the court’s assistance in relation to such recommendations.

7.12 The Council accepts the conclusions on costs.

#### **DETERMINATION OF FORM AND CONTENT OF RETRACTION STATEMENTS**

7.14 The Council agrees with the proposed procedure. The proposed form, nature and content of the Correction Statement should be submitted by the plaintiff at the same time that the affidavit is filed. As was stated in our submission on paragraph 7.4, the Council sees advantage in requiring all plaintiffs to file the affidavit referred to in that paragraph. This would facilitate applications by the defendant. The Council strongly supports the proposal that the determination of the precise contents of a Retraction Statement be decided by some form of mediation

process not formally part of the court structure.

The Council is prepared to play its role in this process. The Council consists of representatives of publishers, journalists, editors and the public. The structure of the Council is such that it is not possible for any one representative group to dominate the Council. The council has a long and unique experience in examining complaints and issuing adjudications, which are made public.

The Council believes that the facilities it offers should be flexible, and not limited to the adjudication process which has hitherto dominated its procedures. A less highly publicised but important role of the Council has been in the mediation of potential disputes which are satisfactorily mediated without being formally adjudicated. Under this procedure, the Executive Secretary acts in the role of a national press ombudsman. The Council is willing to play a new role in the speedy settlement of defamation cases, and where both parties agree, whether in advance or on an ad hoc basis, the Council would be most willing to assist.

The Council envisages that some media organisations might wish to indicate that they would avail themselves of the Council’s processes either for a period of time or until further notice. This could be done by setting up a facility under which media organisations would register such an intention with the Council. Plaintiffs would then know, after inquiry from the Council, that that media organisation concerned was willing to have the Council involved in the development and finalisation of a Correction Statement.

The Council would see its role as being involved in the broad spectrum of the various forms of dispute resolution, ranging from the provision of good offices, through mediation to a form of arbitration through the adjudication process. The precise form of the role of the Council would of course be a matter for the parties concerned.

In the event that the Council’s procedure were used in this way to supplement the court process, the Council of course would obviously need to provide for a derogation from its normal rule contained in paragraph 5 of its complaints procedure. This pro-

vides for the waiving of legal rights where the Executive Secretary considers a complaint could be the basis for a legal action against a publication. The Council sees no difficulty in providing for such a derogation.

The Discussion Paper suggests that various different sections of the media express varying degrees of support for the Council. In this regard, it is pertinent to note that the Council now has representation from all the main line newspaper publishers in Australia, either through direct representation, or through the appropriate associations. In addition, Council has representation through an editorial member. In the absence of the affiliation of a constituent organisation which is an association of journalists, (obviously the Australian Journalists' Association), the Council has made provision for representation on the Council by journalists eminent in their profession. In fact, the original such representatives were those elected by the AJA. The Council was of course disappointed when the AJA withdrew as a constituent organisation. The Council is always concerned when a constituent organisation withdraws and is delighted when others rejoin or join on the first occasion. With a voluntary organisation, the full and direct representation of all spectra of the industry on Council is sometimes difficult. It can be achieved in different degrees. For example, although John Fairfax Ltd was not always a member it always responded to complaints, and observed the Council's recommendations in relation to the publication of adverse rulings. The same can be equally said of News Ltd during the years when it had withdrawn from the Council. Over these years, both media organisations played a significant role in relation to complaints about their publications. In many ways, they were informal members of the Council. The same can be said of many smaller newspapers which, although not formally represented either directly or indirectly through a constituent association of the Council, observe the Council's procedures.

The Council maintains good relations with the AJA, which it respects as the significant professional representative body of the profession. Indeed, its present

journalistic representation comes from journalists who are members of the AJA.

Prior to the withdrawal of the AJA, the Council was ready to discuss differences which had developed since the original concept of the Council, in whose foundation the AJA had played such a significant and important role. The Council remains ready and willing to discuss not only with the Australian Journalists' Association but with all other sectors of the media, the constitution, role and structure of the Australian Press Council. At the same time it is relevant to point out that the Council has strong public representation and has attempted to provide a reasonable mix of its public membership, taking into account the need to balance representation of city and country readers, different States and Territories, Aboriginal and ethnic interests, male and female representation and different socio-economic levels. This is in striking contrast to the public membership of the new British Press Complaints Commission, which contains one former editor and consists essentially of members from the more prominent and already influential strata of British society.

With its wide experience and broad representation, the Council continues to have a significant role to play in the provision of a complaints facility for the hearing of complaints against the press, lobbying in relation to freedom of the press and freedom of speech matters, and in relation to liaison between the press and other media organisations and with government. This is assured by the Council consisting, as we have indicated above, not only of the peers of the media organisations the subject of complaint, but also of representatives of a cross-section of the public.

The Council does not see itself as the exclusive forum for complaints, and encourages direct complaints to newspapers and the use of readers' representatives, ombudsmen and the like. It also has no objection to and encourages, in appropriate cases, references to the Judiciary Committee of the AJA, the Advertising Standards Council and similar bodies. The Council therefore sees itself as playing a new and expanded role in the mediation process – where both parties would wish it.

## **PARLIAMENTARY PRIVILEGE AND PROTECTED REPORTS**

8.9 The Council sees advantage in a statutory definition of "proceedings in parliament". It believes that this should be reasonably liberal.

8.11 The council agrees with this proposal.

8.12 The Council believes that the Bill should incorporate and generalise the provisions of existing legislation.

## **FORUM SHOPPING**

9.1 The Council supports this proposal.

9.2 The Council believes that the law applicable should be that of the principal place of publication.

## **DAMAGES**

10.1, 10.2 See paragraph 1.8 above.

## **OTHER MATTERS**

11.1, 11.2 The Council sees advantage in the New South Wales provision being included in the Bill.

## **INNOCENT PUBLICATION**

11.3 The council sees advantage in Division 8 of the New South Wales legislation being used as a model provision concerning innocent publication.

11.4 The Council supports the view that defamation law should not intrude in the area of fiction. It notes the Attorneys' concern and supports any proposals encouraging mediation and dispute resolution outside of litigation.

11.6 The Council is concerned that non-negligent innocent dissemination be excluded from liability. Given the Attorneys' reservation, the Council believes that further discussion of this issue be encouraged before a final decision is taken.

11.12 The Council notes, with approval, the Attorney's position on defunct writs.

11.15 The Council supports the Law Society of New South Wales Young Lawyers Section's submission.

11.17 Again the Council supports the proposal – the Council believes that facilities and incentives for mediation and dispute resolution should be strongly encouraged.

## **CONCLUSION**

12 In conclusion, the Council welcomes this opportunity to comment on Discussion Paper No. 2 and is encouraged by the role the Attorneys are taking in their constructive efforts for reform in this difficult area of the law. ●