

FIRST PRINT

DEFAMATION BILL 1991

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to make provision for the law of defamation. This Bill accommodates an informal agreement between certain jurisdictions to promote uniformity in aspects of defamation law.

This Bill provides that the law relating to defamation (for matter published in the future) is as provided at common law, as modified by the Bill and other legislation. The principal changes which the Bill makes to the law of defamation include the following:

- The defence of justification is created in civil proceedings based on truth alone.
- There is imposed, however, a requirement that when an imputation concerns a person's private affairs (which are defined to include a person's health, private behaviour, home life and personal or family relationships), the defence of truth is available only if the defendant also establishes that the publication of the matter is warranted in the public interest or is subject to qualified privilege. (Clause 22 gives examples of circumstances in which publication of matter concerning a person's private affairs is warranted in the public interest.)
- Similarly, the defence of contextual truth is not available if the matter concerns the plaintiff's private affairs unless the matter concerns the public interest or is subject to qualified privilege.
- A defence of qualified privilege is available for publication of matter if the defendant can establish that the publication related to a matter of public interest, was made in good faith and was made after appropriate inquiries. If the court determines that the matter is false, it may order that the defendant publish an approved reply.
- If defamation proceedings are tried before a jury the judge, and not the jury, will determine the amount of damages to be awarded to a successful plaintiff.
- A system of court-recommended correction statements is established. A party to defamation proceedings which have been threatened or recently commenced may apply to the court for an order recommending that another party publish an approved correction statement.

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- Provision is made for the appointment of mediators to advise on correction statements or replies.
- In assessing damages the court is to take into account whether or not a correction statement was applied for and, if such a statement was published, factors including the contents, timing and prominence of the statement.
- Provision is made to enable defamation proceedings to be struck out if the plaintiff fails to prosecute the proceedings or to comply with any interlocutory order made in relation to the proceedings.
- The prosecution of the offence of criminal defamation is to be subject to the discretion of the Director of Public Prosecutions, rather than the Attorney General.

The Bill amends the Defamation Act 1974 to provide that the Act does not apply to matter published after the date of commencement of the proposed Act. The Bill also provides for the eventual repeal of the Defamation Act 1974 on a day to be appointed by proclamation.

The Bill also amends the Limitation Act 1969 to provide that an action in relation to the publication of defamatory matter must be brought within 6 months of the date on which the plaintiff first learns of the publication. This period may be extended by court order, subject to an absolute limitation period of three years from the date of publication.

PART 1—PRELIMINARY

Clause 1 sets out the short title of the proposed Act and its purposes.

Clause 2 provides that the proposed Act will commence on a day to be proclaimed.

Clause 3 states that the proposed Act applies only to defamatory matter published after the commencement of the Act (with the exception that amendments made by the Act to the Limitation Act will extend to matters published before that commencement).

Clause 4 contains definitions of various expressions used in the proposed Act. "Private affairs" is defined to include the health, private behaviour, home life, personal relationships or family relationships of a person. This definition is used in connection with the exceptions to the defence of truth alone.

Clause 5 provides that the proposed Act binds the Crown.

PART 2—GENERAL PRINCIPLES

Clause 6 provides that the law of defamation is as provided at common law, subject to modifications made by the proposed Act or other relevant legislation.

Clause 7 explains the terms "imputation" and "matter". A defamatory "imputation" is made by means of the publication of "matter".

Clause 8 provides that proceedings may be brought against a person who publishes a defamatory imputation.

Clause 9 provides that the determination of any question relating to public interest is to be determined by the judge and not the jury.

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Clause 10 provides that a jury is to give a single verdict for all causes of action in a proceeding for defamation.

Clause 11 provides that the amount of damages in proceedings for defamation is to be determined by the judge and not the jury.

Clause 12 provides that the leave of the court is required for further proceedings in defamation to be brought against the same person.

Clause 13 provides that the powers of courts regarding vexatious proceedings and abuse of process are not affected.

Clause 14 enables a court to strike out proceedings for defamation, if the plaintiff has not taken steps in the case for 12 months or has failed to comply with an interlocutory order.

Clause 15 continues the present law under which slander (as well as libel) is actionable without having to prove special damage.

PART 3—DEFENCES**Division 1—Preliminary**

Clause 16 provides that the defences under Part 3 are available in civil proceedings (clause 62 deals with the availability of the defences in criminal proceedings).

Clause 17 states that the common law defences in defamation are to continue, except where the proposed Act expressly excludes them.

Clause 18 defines the term "occasion of qualified privilege", so that matter is published on such an occasion only if the matter is published in (and relevant to) circumstances attracting the defence of qualified privilege at common law or under the Act.

Division 2—Truth

Clause 19 provides that the defence of justification (or truth) excludes the common law version of the defence.

Clause 20 provides the defence of justification, so that truth alone is a defence, except where the plaintiff's private affairs are involved, in which case the defendant also has to establish that the publication was in the public interest or was made on an occasion of qualified privilege.

Clause 21 provides a defence of contextual truth, so that truth alone is a defence, except where the plaintiff's private affairs are involved, in which case the defendant has to establish the additional matter as mentioned in clause 20. The defence of contextual truth deals with the case where there are a number of defamatory imputations but the plaintiff has chosen to proceed with one or more but not all of them.

Clause 22 provides some examples of situations in which publication of matter concerning a person's private affairs is warranted.

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Division 3—Absolute privilege

Clause 23 provides that the defence of absolute privilege is as provided in Schedule 1 to the proposed Act.

Division 4—Qualified privilege

The Division deals with defences of qualified privilege, which are defences that can be defeated by proof of malice.

Clause 24 provides that the defence of qualified privilege in the context of a “multiple publication” (for example, through the media) is not defeated for all purposes when it is defeated as regards some recipients of the publication. Furthermore, the defence is available for all recipients of the publication if the extent of the publication is reasonable in the circumstances.

Clause 25 provides a new and additional defence of qualified privilege, if the publication was made in the public interest, in good faith and after appropriate inquiries. The clause also empowers the court to order a reply to be published.

Clause 26 continues the present defence of qualified privilege in circumstances where there was a mistake as to the identity or character of the recipient.

Clause 27 continues the present provisions relating to the defence of qualified privilege in circumstances where the recipient of the defamatory matter has an interest or apparent interest in receiving certain information.

Clause 28 provides that questions as to the availability of a defence of qualified privilege are to be determined by the judge and not the jury.

Division 5—Protected reports and official and public documents

Clause 29 continues the present defence for the publication of a fair protected report of a kind listed in Schedule 2 to the proposed Act.

Clause 30 continues the present defence for the publication of documents or records mentioned in Schedule 3 to the proposed Act.

Clause 31 continues the present provision under which a defence mentioned in this Division is defeated only if the publication was not made in good faith for public information or the advancement of education.

Division 6—Court notices and official notices etc. and reports

Clause 32 continues the present defence for publication of a notice in accordance with a direction of any court.

Clause 33 continues the present defence for publication of a notice or report in accordance with an official request.

Division 7—Fair Comment

Clause 34 provides that the defence of fair comment on a matter of public interest is as provided by this Division.

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Clauses 35–40 continue the provisions of the existing legislation regarding the defence of fair comment.

Division 8—Defence of unlikelihood of harm

Clause 41 continues the present defence that matter was published in circumstances in which it was not likely that the person defamed would suffer harm.

Division 9—Defence of offer of amends

Clause 42 refers to the defence of offer of amends, as found in Division 3 of Part 4.

PART 4—CORRECTIONS

Division 1—Preliminary

Clause 43 provides that this Part does not apply to criminal defamation.

Division 2—Correction statements

Clause 44 provides machinery for the making of correction statements. These statements are made on the recommendation of a court at the request of a party or prospective party to proceedings in defamation. The recommendation does not have to be acted on. The effect of the clause on the amount of damages is dealt with in clause 59.

Division 3—Offers of amends

Clauses 45–54 continue the substance of the present provisions relating to offers of amends.

Division 4—Mediators

Clause 55 provides for the appointment by a court of mediators for the purpose of advising on correction statements under clause 44 or replies under clause 25.

PART 5—DAMAGES

Clauses 56–59 generally continue the provisions of the existing legislation regarding the amount of damages to be awarded in proceedings for defamation. Clause 59 provides that in assessing damages the court is also to take into account matters relating to correction statements.

PART 6—CRIMINAL DEFAMATION

Clauses 60–64 generally continue the provisions of the existing legislation regarding criminal defamation, which is the statutory offence of publishing defamatory matter, without lawful excuse, about a living person, with intent to cause serious harm. Clause 61 (4) provides that proceedings for the offence cannot be commenced without the consent of the Director of Public Prosecutions (or the Attorney General in certain circumstances).

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PART 7—MISCELLANEOUS

Clauses 65–72 generally continue various machinery provisions of the existing legislation.

Clause 73 is a machinery provision giving effect to the Schedule of amendments to the Limitation Act 1969.

Clause 74 amends the Defamation Act 1974, to insert a provision that limits the application of that Act to defamatory matter published before the commencement of the proposed Act.

Clause 75 provides for the eventual repeal of the Defamation Act 1974.

SCHEDULES

Schedule 1 lists the matters for which there is a defence of absolute privilege. The defence is extended, in particular, in relation to matters relating to the proceedings of Parliament.

Schedule 2 lists the proceedings in relation to which there is a defence for the publication of reports. The defence is extended, in particular, to reports on the proceedings of local authorities.

Schedule 3 lists the official and public documents and reports for which there is a defence of publication of a copy or fair extract.

Schedule 4 amends the Limitation Act 1969.

Schedule 4 (1) applies to matter published after the commencement of the proposed Act, and provides a primary limitation period of 6 months from discovery of the publication of defamatory matter, subject to a maximum of 3 years from the date of publication.

Schedule 4 (2) provides a secondary limitation period for matter published after that commencement, so that a court can permit proceedings to be commenced in special circumstances after the primary limitation period has expired, but not beyond the period of 3 years from the date of publication.

Schedule 4 (3) applies the above principles to matter published before that commencement, so that the relevant periods are calculated from that commencement.

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DEFAMATION BILL 1991

NEW SOUTH WALES



No. , 1991

A BILL FOR

An Act to make provisions about the law of defamation; to amend and then repeal the Defamation Act 1974 and to amend the Limitation Act 1969; and for other purposes.

The Legislature of New South Wales enacts:

PART 1—PRELIMINARY

Short title and purposes

1. (1) This Act may be cited as the Defamation Act 1991.

(2) The purposes of this Act are to make provisions about the law of defamation, in recognition partly of an informal agreement between States to promote uniformity in certain aspects of the law of defamation, and to make certain changes to the law of defamation as existing before the commencement of this Act.

Commencement

2. This Act commences on a day to be appointed by proclamation.

Application of Act

3. (1) This Act applies only to **matter** published after the commencement of this Act, except as mentioned in subsection (2).

(2) The amendments to the Limitation Act 1969 made by this Act extend to **matter** published before the commencement of this Act, to the extent provided by the amendments.

Interpretation

4. (1) In this Act:

“**Australia**” includes the external Territories;

“**country**” includes a federation, and a state, province or other part of a federation;

“**imputation**” has the meaning given by section 7;

“**matter**” has the meaning given by section 7;

“**multiple publication**” means publication of the same or like **matter** or of copies of any **matter** to 2 or more recipients:

(a) at the same time; or

(b) by means of the publication in the ordinary course of affairs of numerous copies of a newspaper or other writing; or

(c) otherwise in the course of one transaction;

“**occasion of qualified privilege**” has the meaning given by section 18;

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“parliamentary body” means:

- (a) a parliament or legislature of any country; or
- (b) a house of a parliament or legislature of any country; or
- (c) a committee of a parliament or legislature of any country; or
- (d) a committee of a house or houses of a parliament or legislature of any country;

“periodical” includes any newspaper, review, magazine or other printed document of which numbers or parts are published periodically;

“private affairs” of a person includes the health, private behaviour, home life, personal relationships or family relationships of the person;

“reply” means a reasonable statement that is not defamatory and that contradicts or explains a statement made by another person;

“substantially true” means true in substance or not materially different from the truth;

“Territory” includes an external Territory.

(2) The inclusion of a matter in Schedule 1, 2 or 3 does not affect the interpretation of any other matter in the Schedule or another of those Schedules.

Act binds Crown

5. This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

PART 2—GENERAL PRINCIPLES

Common law

6. (1) The law relating to defamation is as provided at common law, as modified by this Act and any other legislation as in force on or after the commencement of this Act.

(2) Furthermore, and without limiting subsection (1), the law relating to defamation is as if the Defamation Act 1958 and the Defamation Act 1974 had not been enacted.

Meaning of “matter” and “imputation”

7. If a person makes an **imputation** defamatory of another person (whether by innuendo or otherwise) by publishing the whole or any part

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of any report, article, letter, note, picture, oral utterance or other thing, then for the purposes of this Act:

- (a) the report, article, letter, note, picture, oral utterance or other thing is a "matter"; and
- (b) the **imputation** is made by way of the publication of the **matter**.

Causes of action

8. (1) If a person publishes any **matter** to any recipient and by way of the publication makes an **imputation** defamatory of another person, the person defamed has, in respect of the **imputation**, a cause of action against the publisher for the publication of that **matter** to the recipient.

(2) The cause of action is:

- (a) in addition to any cause of action that the person defamed may have against the publisher for the publication of the **matter** to the recipient in respect of another defamatory **imputation** made by way of that publication; and
- (b) in addition to any cause of action which the person defamed may have against that publisher for any publication of that **matter** to any other recipient.

(3) Rules of court may prohibit or regulate the reliance by a plaintiff in defamation proceedings on several **imputations** alleged to have been made by means of the same **matter** published by the defendant, where the several **imputations** do not differ in substance.

Public interest a matter for the judge

9. If defamation proceedings are tried before a jury, and on the facts there is a question whether any comment or other **imputation**, or any notice, proceeding or report is or relates to a matter of public interest for the purposes of this Act, the question is to be determined by the judge and not by the jury.

Verdict

10. (1) If defamation proceedings in respect of the publication of any **matter** are tried before a jury, the jury must, unless the judge otherwise directs, give a single verdict in respect of all causes of action on which the plaintiff relies.

(2) This Part does not affect any law or practice relating to special verdicts.

Damages to be assessed by judge

11. (1) If a plaintiff is successful in defamation proceedings, the judge is to determine the amount of damages (if any) to be paid to the plaintiff, whether or not the proceedings are tried before a jury.

(2) If, in defamation proceedings, the judge or jury finds for the plaintiff as to more than one cause of action, the judge may assess damages in a single sum.

Leave required for further proceedings

12. If a person has brought defamation proceedings (whether in New South Wales or elsewhere) against any person in respect of the publication of any **matter**, the person may not bring further defamation proceedings against the same defendant in respect of the same or any other publication of the same or like **matter**, except with the leave of the court in which the further proceedings are to be brought.

Vexatious proceedings

13. This Part does not affect the powers of any court in case of vexatious proceedings or abuse of process.

Want of prosecution

14. The court in which defamation proceedings are pending may strike out the proceedings if it considers that the plaintiff:

- (a) has failed to prosecute the proceedings for a year; or
- (b) has shown disregard for an interlocutory order made in relation to the proceedings or an unwillingness to comply promptly with such an order.

Slander as well as libel actionable without special damage

15. Slander is actionable without proof of special damage, in the same way and to the same extent as libel is actionable without special damage.

PART 3—DEFENCES**Division 1—Preliminary****Application of Part to civil proceedings**

16. (1) This Part deals with defences in civil proceedings for defamation.

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(2) Section 62 deals with the availability of such defences in criminal proceedings for defamation.

Common law defences

17. (1) The provision of a defence by this Part does not of itself diminish or take away any defence or exclusion of liability available apart from this Act.

(2) Subsection (1) has effect subject to any express provision of this Part (for example, section 19 and section 34).

Meaning of “occasion of qualified privilege”

18. In this Part there are references to matters being published on an “occasion of qualified privilege”. For the purposes of this Part, a matter is published on an **occasion of qualified privilege** only if the matter is published in and relevant to circumstances attracting the defence of qualified privilege either at common law or under this Part.

Division 2—Truth**Exclusion of common law defence of justification**

19. There is a defence of justification as to any **imputation** complained of, but only as provided in this Division.

Defence of justification

20. (1) There is a defence of justification as to any **imputation** complained of, if the defendant establishes that the **imputation** is **substantially true**.

(2) However, if the plaintiff establishes that the **matter** carrying the **imputation** concerns the plaintiff’s **private affairs**, the defence is not available unless the defendant also establishes that:

- (a) the publication of the **matter** was warranted in the public interest; or
- (b) the **matter** was published in circumstances that (but for the fact that the publication may have been motivated by malice) would, at common law, attract the defence of qualified privilege and the manner of publication was reasonable in the circumstances.

(3) Some examples of situations in which publication of **matter** concerning a person’s **private affairs** is warranted in the public interest are set out in section 22.

Defence of contextual truth

21. (1) There is a defence of contextual truth as to any **imputation** complained of, if the defendant establishes that:

- (a) the published **matter** carrying the **imputation** also carried (whether because of ambiguity or otherwise) one or more other **imputations** (“**contextual imputations**”) that are **substantially true**; and
- (b) the **imputation** complained of does not further harm the plaintiff, because of the **substantial truth** of the contextual **imputation** or **imputations**.

(2) However, if the plaintiff establishes that the **matter** carrying the **imputation** concerns the plaintiff’s **private affairs**, the defence is not available unless the defendant also establishes that:

- (a) the publication of the **matter** was warranted in the public interest; or
- (b) the **matter** was published in circumstances that (but for the fact that the publication may have been motivated by malice) would, at common law, attract the defence of qualified privilege and the manner of publication was reasonable in the circumstances.

(3) Some examples of situations in which publication of **matter** concerning a person’s **private affairs** is warranted in the public interest are set out in section 22.

Examples of warranted publications concerning private affairs

22. The following are some examples of situations in which publication of **matter** concerning a person’s **private affairs** is warranted in the public interest:

Example 1

Publication is made reasonably to preserve a person’s safety or to protect a person’s property.

Example 2

The **matter** is relevant to a topic of public interest, examples of such topics being:

- (a) the public, commercial or professional activities of a person; or
- (b) the suitability or candidature of a person for a public, commercial or professional office; or
- (c) a decision taken or ~~likely to be taken~~, in relation to a public, commercial or professional **matter**, by a person who occupies, or is a candidate for election or appointment to, a public, commercial or professional office; or
- (d) any property or service offered to the public; or

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- (e) public administration; or
- (f) the administration of justice,

but only if the **matter** is of legitimate concern to the public or a sufficiently wide section of the public.

Example 3

The **imputation** contradicts a claim made publicly by the plaintiff concerning the plaintiff's **private affairs** and the claim is directly relevant to a public issue in which the plaintiff is involved.

Example 4

Information to the same effect as the published **matter** was recorded in a document that was:

- (a) kept by a statutory authority, or a court, of the Commonwealth or of a State or Territory; or
- (b) kept by a foreign statutory authority or a foreign court; or
- (c) kept pursuant to or in accordance with a law of the Commonwealth or of a State or Territory or a foreign law,

and that was generally available for public inspection (whether or not on payment of a fee) or was required, by a law of the Commonwealth, a law of a State or Territory or a foreign law, to be generally available for public inspection (whether or not on payment of a fee), and there were no relevant limitations on the use to which the document may be put.

Division 3—Absolute privilege**Defence of absolute privilege**

23. There is a defence of absolute privilege as provided by Schedule 1.

Division 4—Qualified privilege**Multiple publication**

24. (1) If:
- (a) a person makes a **multiple publication**; and
 - (b) the **matter** published would if published to one or more, but not all, of the recipients be published on an **occasion of qualified privilege** as regards that recipient or those recipients,

there is a defence of qualified privilege for the publication to that recipient or those recipients, even though the publication is not made on an **occasion of qualified privilege** as regards any other recipient.

(2) However, if the extent of publication is reasonable having regard to the **matter** published and to the **occasion of qualified privilege**, there is a defence of qualified privilege as regards all of the recipients.

Publication in the public interest, in good faith and after appropriate inquiries

25. (1) There is a defence of qualified privilege for publication of **matter** if the defendant establishes that the publication related to a matter of public interest, was made in good faith and was made after appropriate inquiries.

(2) A relevant factor in deciding whether **matter** was published in good faith is whether any of the involved persons, when requested to do so by the person whom it may defame, was willing to publish a reply.

(3) A relevant factor in deciding whether **matter** was published after appropriate inquiries is whether before publication any of the involved persons gave the person it may defame an opportunity to confirm or deny the truth of any statement made in the **matter** or any **imputations** carried by the **matter** (unless such a course would have been inappropriate).

(4) If the court decides that the defendant has made out the defence, and it decides that the statement is false, it may order the defendant to publish a reply approved by the court or by a mediator appointed by the court.

(5) In any proceedings that are tried before a jury, the question of whether the statement is false is to be determined by the judge and not by the jury.

(6) In this section:

“involved persons” means any publisher of the **matter** concerned and the employees and agents of any such publisher who are concerned with the **matter** or its publication;

“statement” includes any type of communication.

Mistaken character of recipient

26. There is a defence of qualified privilege for a publication, if:

(a) the publication is made in the course of a communication by the publisher to any person; and

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- (b) the publication is made in the circumstances in which there would be a defence of qualified privilege for that publication if that person bore some character; and
- (c) the publisher believes, at the time of the communication, on reasonable grounds, that that person bears that character.

Information

27. (1) There is a defence of qualified privilege for a publication, if in respect of the **matter** published:

- (a) the recipient has an interest or apparent interest in having information on some subject; and
- (b) the **matter** is published to the recipient in the course of giving to the recipient information on that subject; and
- (c) the conduct of the publisher in publishing that **matter** is reasonable in the circumstances.

(2) A person has an apparent interest in having information on some subject only if, at the time of the publication in question, the publisher believes on reasonable grounds that the person has that interest.

(3) If **matter** is published for reward in circumstances in which there would be a qualified privilege under subsection (1) for the publication if it were not for reward, there is a defence of qualified privilege for that publication even though it is for reward.

Qualified privilege a question for the judge

28. If defamation proceedings are tried before a jury and, on the facts, there is a question whether there is a defence of qualified privilege under section 27, the question is to be determined by the judge and not by the jury.

Division 5—Protected reports and official and public documents**Protected reports**

29. (1) In this section, “**protected report**” means a report of proceedings of a kind specified in Schedule 2.

(2) There is a defence for the ~~publication~~ of a fair protected report.

(3) If a protected report is published by a person, there is a defence for a later publication by another person of the protected report or a copy of the protected report, or a fair extract or fair abstract from, or fair summary of, the protected report, if the other person does not, at the time

of the later publication, have knowledge that should make him or her aware that the protected report is not fair.

(4) If material purporting to be a protected report is published by a person, there is a defence for a later publication by another person of the material or a copy of the material, or a fair extract or fair abstract from, or fair summary of, the material, if the other person does not, at the time of the later publication, have knowledge that should make him or her aware that the material is not a protected report or is not fair.

Official and public documents

30. There is a defence for the publication of:

- (a) a document of a kind specified in Schedule 3 or a copy of such a document; and
- (b) a fair extract or fair abstract from, or fair summary of, any such document.

Defeat of defence under section 29 or 30

31. If a defence is established under section 29 or 30, the defence is defeated only if it is shown that the publication complained of was not in good faith for public information or the advancement of education.

Division 6—Court notices and official notices and reports

Court notices

32. (1) There is a defence for the publication of a notice in accordance with a direction of a court of any country.

(2) If a defence is established under subsection (1), the defence is defeated only if it is shown that the publication complained of was not in good faith for the purpose of giving effect to the direction.

Official notices and reports

33. (1) There is a defence for the publication of any notice or report in accordance with an official request.

(2) If a defence is established under subsection (1), the defence is defeated only if it is shown that the publication complained of was not made in good faith for the purpose of giving effect to the request.

(3) If there is an official request that a notice or report be published to the public generally or a section of the public, and the notice or report is or relates to a matter of public interest, there is a defence for a publication

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of the notice or report, or a fair extract or fair abstract from, or fair report or summary of, the notice or report.

(4) If a defence is established under subsection (3), the defence is defeated only if it is shown that the publication complained of was not in good faith for public information.

(5) This section does not affect any liability in defamation of a person making an official request.

(6) In this section, “official request” means a request by:

- (a) an officer of the government (including a member of a police service or police force) of the Commonwealth or a State or Territory; or
- (b) a council, board or other authority or person constituted or appointed for public purposes under the legislation of the Commonwealth or a State or Territory.

Division 7—Fair comment

General

34. The defence or exclusion of liability in cases of fair comment on a matter of public interest:

- (a) is modified as appears in this Division; and
- (b) is not available except in accordance with this Division.

Proper material

35. (1) In this section, but subject to subsection (2), “proper material for comment” means material that, if this Division had not been enacted, would (because it consists of statements of fact, or because it is a protected report within the meaning of section 29, or for some other reason) be material on which comment might be based for the purpose of the defence or exclusion of liability in cases of fair comment on a matter of public interest.

(2) A statement of fact that is **substantially true** is proper material for comment for the purposes of this section, whether or not the statement relates to a matter of public interest.

(3) The defences under this Division are available as to any comment only if:

- (a) the comment is based on proper material for comment; or

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(b) the material on which the comment is based is to some extent proper material for comment and the comment represents an opinion that might reasonably be based on that material to the extent to which it is proper material for comment.

(4) There is no special rule governing the nature of the material that may be the basis of comment imputing a dishonourable motive or governing the degree of foundation or justification that comment imputing a dishonourable motive must have in the material on which the comment is based.

Public interest

36. The defences under this Division are not available to comment unless the comment relates to a matter of public interest.

Comment of defendant

37. (1) Subject to sections 35 and 36, it is a defence as to comment that the comment is the comment of the defendant.

(2) A defence under subsection (1) as to comment is defeated only if it is shown that, at the time when the comment was made, the comment did not represent the defendant's opinion.

Comment of employee or agent of defendant

38. (1) Subject to sections 35 and 36, it is a defence as to comment that the comment is the comment of an employee or agent of the defendant.

(2) A defence under subsection (1) as to comment is defeated only if it is shown that, at the time when the comment was made, the person whose comment it is did not have the opinion represented by the comment.

Comment of stranger

39. (1) Subject to sections 35 and 36, it is a defence as to comment that the comment is not, and in its context and in the circumstances of the publication complained of did not purport to be, the comment of the defendant or of any employee or agent of the defendant.

(2) A defence under subsection (1) is defeated only if it is shown that the publication complained of was not in good faith either for public information or for the advancement of education.

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Effect of defence

40. If the **matter** complained of includes comment and includes material on which the comment is based, a defence under this Division as to the comment is not a defence as to the material on which the comment is based.

Division 8—Defence of unlikelihood of harm**Defence of unlikelihood of harm**

41. It is a defence that the circumstances of the publication of the **matter** complained of were such that the person defamed was not likely to suffer harm.

Division 9—Defence of offer of amends**Defence of offer of amends**

42. Section 52 provides a defence where an offer of amends is not accepted.

PART 4—CORRECTIONS**Division 1—Preliminary****Application of Part**

43. This Part does not apply to criminal proceedings for defamation.

Division 2—Correction statements**Correction statements**

44. (1) A party or prospective party to defamation proceedings that have been started or threatened may apply to the court for an order recommending that another party or prospective party publish in the way, and at the time or times, specified in the order a correction statement that:

- (a) is in a form approved by the court or by a mediator appointed by the court; and
- (b) relates to one or more of the **imputations** on which the proceedings are or may be based; and
- (c) effects a correction of, or an apology for, the **imputation** or **imputations** to which it relates.

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(2) In the case of threatened proceedings, the court is the Supreme Court.

(3) The parties may agree on the details of the correction statement and ask the court, or a mediator appointed by the court, to approve their agreement.

(4) It is not mandatory on a party or prospective party to publish a correction statement.

(5) No inference of liability is to be drawn from the publication of a correction statement.

(6) In defamation proceedings tried before a jury, evidence is inadmissible, before verdict, of any action taken under this section or of any correction statement published by a party.

(7) This subsection applies whether or not the correction statement is published as recommended by an order under this section.

(8) An application for an order under this section is to be dealt with on an interlocutory basis if defamation proceedings have been commenced.

(9) An application for an order under this section may not be made after 14 days after service on the defendant of the initiating process for the defamation proceedings.

Division 3—Offers of amends

Meaning of “innocent publication”

45. (1) For the purposes of this Part, if **matter** is published by a person, and the **matter** is or may be defamatory of another person, the publication is “**innocent**” as regards the other person if, at and before the time of publication, each of the **involved persons**:

- (a) exercises reasonable care in relation to the **matter** and its publication; and
- (b) does not intend the **matter** to be defamatory of the person; and
- (c) does not know and could not reasonably be expected to know the circumstances because of which the **matter** is or may be defamatory of that person.

(2) The “**involved persons**” are the publisher and the publisher’s employees and agents concerned with the **matter** in question or with its publication.

Offer of amends

46. (1) The publisher of **matter** that is or may be defamatory of another person may make to the person an offer of amends under this Part, if the publisher claims that the publication is innocent as regards the person.

(2) An offer of amends:

- (a) must be expressed to be made under this Part; and
- (b) must include an offer to publish, or join in publishing, such correction (if any) of the **matter** in question as is reasonable; and
- (c) must include an offer to publish, or join in publishing, such apology (if any) to the offeree as is reasonable; and
- (d) if material containing the **matter** in question has been delivered to a person by the publisher or with the publisher's knowledge, must include an offer to take, or join in taking, such action (if any) as is reasonable for the purpose of notifying the recipient that the **matter** in question is or may be defamatory of the offeree.

(3) In determining whether any and, if so, what correction, apology or action is reasonable for the purposes of subsection (2), regard is to be had to any correction or apology published, or action taken, by the publisher or any other person at any time before the occasion for determination arises.

Particulars in support of offer

47. (1) An offer made under this Part must be accompanied by:

- (a) particulars of the facts on which the publisher relies to show that the publication of the **matter** in question is innocent as regards the offeree; and
- (b) particulars of any correction or apology made or action taken, before the date of the offer, on which the publisher relies for the purposes of section 46 (3); and
- (c) a statutory declaration verifying the particulars mentioned in paragraphs (a) and (b).

(2) The statutory declaration must be made:

- (a) by the publisher; or
- (b) where the publisher is a corporation ~~or~~ aggregate, by an officer of the corporation having knowledge of the facts; or
- (c) if, on facts appearing in the statutory declaration, it is impracticable to comply with paragraph (a) or (b), by a person authorised by the publisher and having knowledge of the facts.

Determination of questions

48. (1) If an offer of amends is accepted, the court may, on application made by a party to the offer, determine any question as to the action to be taken in performance of the agreement arising by acceptance of the offer.

(2) An appeal does not lie from a determination under this section.

Effect of acceptance and performance

49. If an offer of amends is accepted and the agreement arising by acceptance of the offer is performed, the offeree must not start or continue any proceedings against the offerer for damages for defamation in respect of the **matter** in question.

Costs and expenses

50. If an offer of amends is accepted, the court may make an order for payment by the offerer to the offeree of:

- (a) the costs of the offeree of and incidental to the acceptance of the offer and the performance of the agreement arising by acceptance of the offer, including costs on an indemnity basis; and
- (b) the expenses of the offeree incurred because of the publication of the **matter** in question.

Courts with powers under sections 48 and 50

51. The powers given by section 48 or 50 to a court are exercisable:

- (a) if the offeree has brought proceedings against the offerer in any court for defamation in respect of the **matter** in question, by the court; and
- (b) in any other case, by the Supreme Court.

Defence when offer not accepted

52. (1) If an offer is made under this Part and the offeree does not accept the offer, it is a defence to proceedings by the offeree against the offerer for damages for defamation in respect of the **matter** in question that:

- (a) the publication by the offerer of the **matter** was innocent as regards the offeree; and
- (b) the offerer made the offer as soon as practicable after becoming aware that the **matter** is or may be defamatory of the offeree; and

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- (c) the offerer is ready and willing to perform an agreement arising by the acceptance of the offer on acceptance by the offeree at any time before the start of the trial on issues in relation to the defence; and
- (d) if the offerer is not the author of the **matter** in question, that the author was not actuated by ill will to the offeree.

(2) For the purposes of a defence under this section, evidence of facts (other than facts of which particulars are given under section 47) is not admissible on behalf of the offerer, except with the leave of the court, to prove that the publication by the offerer of the **matter** in question is innocent in relation to the offeree.

Other publishers

53. (1) If there are 2 or more publishers (whether joint or otherwise) of a **matter**, and one or more but not all of them make an offer under this Part, this Part does not, because of the offer, affect the liability of the other or others of them.

(2) Subsection (1) does not affect the admissibility in mitigation of damages of a correction, apology or other thing.

Limited effect of agreement

54. An agreement arising by the acceptance of an offer made under this Part does not have any effect in law except as specified in this Part and except so far as a contrary intention appears by the agreement.

Division 4—Mediators**Appointment of mediator to advise on correction statements or replies**

55. (1) The court may, of its own motion or at the request of a party to proceedings or prospective party to threatened proceedings in defamation, appoint a mediator to advise on a correction statement under section 44 or a reply under section 25 (4).

(2) The mediator may advise on the following matters:

- (a) the contents of the correction statement or reply;
- (b) the time, form, extent and manner of its publication;
- (c) the inclusion of any finding of fact made by the judge or jury.

(3) If the parties cannot agree on the details of the correction statement or reply, the mediator may advise on any question as to the details of the correction statement or reply.

(4) If the parties agree on the details of the correction statement or reply, the mediator may approve the form of the statement or reply.

(5) A mediator may be appointed to advise on a correction statement even though an application for an order under section 44 has not been made.

PART 5—DAMAGES

General

56. (1) In this section, “**relevant harm**” means, in relation to damages for defamation:

- (a) harm suffered by the person defamed; or
- (b) if the person defamed dies before damages are assessed, harm suffered by the person defamed by way of injury to property or financial loss.

(2) Damages for defamation are to be the damages recoverable in accordance with the common law, but limited to damages for relevant harm.

(3) In particular, damages for defamation:

- (a) are not to include exemplary damages; and
- (b) are not to be affected by the malice or other state of mind of the publisher at the time of the publication complained of or at another time, except so far as the malice or other state of mind affects the relevant harm.

Truth or falsity of imputation

57. If it is relevant to the amount of damages whether the **imputation** complained of was or was not true or **substantially true**:

- (a) there is no presumption as to whether the **imputation** was or was not true or **substantially true**; and
- (b) evidence as to whether the **imputation** was or was not true or **substantially true** may be adduced by any party (whether or not evidence on the subject is adduced by any other party).

Other recoveries

58. In proceedings for damages for defamation in respect of the publication of any **matter**, evidence is admissible on behalf of the defendant, in mitigation of damages, that the plaintiff:

- (a) has already recovered damages; or
- (b) has brought proceedings for damages; or

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(c) has received or agreed to receive compensation, for defamation in respect of another publication of **matter** to the same purport or effect as the **matter** complained of in the proceedings.

Correction statements

59. In assessing damages or awarding costs:

- (a) the court is to take into account whether or not a statement of a kind for which an order may be applied for under section 44 was published, even if no such order was applied for or made, and whether or not the plaintiff availed himself or herself of an opportunity to reply under section 25; and
- (b) the court is to take into account whether or not such a statement was applied for and, if so, the promptness with which the application was made; and
- (c) if such a statement was published, the court is to take into account the promptness with which the statement was published and the contents, position and prominence of the statement; and
- (d) if publication of such a statement happened after an order was made under section 44, the court is to take into account the reasonableness of adopting the recommendation in the order and the extent to which the recommendation was adopted; and
- (e) if such a statement was not published after an order was made under section 44, the court is to take into account the reasonableness of adopting the recommendation in the order, any unreasonable rejection by the plaintiff of the defendant's willingness to publish such a statement and the terms of such a statement.

PART 6—CRIMINAL DEFAMATION**Common law criminal libel abolished**

60. (1) The common law misdemeanour of criminal libel remains abolished.

(2) The abolition of the misdemeanour does not affect the law relating to blasphemous, seditious or obscene libel.

Offence

61. (1) A person must not, without lawful excuse, publish **matter** defamatory of another living person:

- (a) with intent to cause serious harm to another person (whether the person defamed or not); or

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- (b) if it is probable that the publication of the defamatory **matter** will cause serious harm to another person (whether the person defamed or not) with knowledge of that probability.

Maximum penalty: 200 penalty units or imprisonment for a term of 3 years or both in the case of a natural person; 400 penalty units in any other case.

(2) In subsection (1), “**publish**” has the meaning that it has in the law of tort relating to defamation.

(3) An offence against this section is an indictable misdemeanour.

(4) Proceedings for an offence against this section may be started only with the written consent of the Director of Public Prosecutions.

(5) In proceedings for an offence against this section, a consent purporting to have been signed by the Director of Public Prosecutions is, without proof of signature, evidence of the consent of the Director of Public Prosecutions.

(6) However, if the Director of Public Prosecutions would be a defendant in any proceedings for an offence against this section, the references in subsections (4) and (5) to the Director are to be read as references to the Attorney General.

Defences

62. (1) A person accused of an offence against section 61 in respect of the publication of **matter** defamatory of another person has lawful excuse for the publication only if, had the other person brought proceedings against the accused for damages for defamation in respect of the publication of the **matter**, the accused would be entitled to succeed in those proceedings.

(2) However, regard is to be had only to the events happening before and at the time of publication.

(3) If an information or other statement of a charge of an offence against section 61 alleges that the accused published the **matter** in question without lawful excuse, it is not necessary to negative, in the information or other statement, any thing which would amount to lawful excuse under this section.

(4) At the trial of a person accused of an offence against section 61, it is not necessary for the prosecution to negative anything that would amount to lawful excuse under this section unless an issue respecting the thing is raised by evidence at the trial.

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(5) Once such an issue is raised, the onus of establishing absence of lawful excuse lies on the prosecution.

Correction statements

63. No inference of guilt is to be made from the publication of a correction statement under Division 2 of Part 4 or from anything done under Division 3 of Part 4.

Defamatory meaning: verdict

64. On a trial before a jury of an information for an offence against section 61, if it appears to the judge that the **matter** complained of is capable of bearing a defamatory meaning:

- (a) the question whether the **matter** complained of does bear a defamatory meaning is a question for the jury; and
- (b) the jury may give a general verdict of guilty or not guilty on the issues as a whole in like way as in other cases.

PART 7—MISCELLANEOUS**Evidence of publication etc.**

65. (1) This section applies to civil proceedings for defamation and to proceedings for an offence against section 61.

(2) If a document appears to be printed or otherwise produced by a means adapted for the production of numerous copies, and there is in the document a statement to the effect that the document is printed, produced, published or distributed by or for any person, the statement is evidence that document is so printed, produced, published or distributed.

(3) Evidence that a number or part of a document appearing to be a periodical is printed, produced, published or distributed by or for any person is evidence that a document appearing to be another number or part of the periodical is so printed, produced, published or distributed.

Evidence of criminal offence

66. (1) This section applies to civil proceedings for defamation and to proceedings for an offence against section 61.

(2) If there is a question of the truth of an **imputation** concerning a person, and the commission by the person of a criminal offence is relevant to that question, proof of the conviction by a court of the person for the offence is:

- (a) if the conviction is by a court of the Commonwealth or a State or Territory, conclusive evidence that that person committed the offence; and

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(b) if the conviction is by a court of any other country, evidence that that person committed the offence.

(3) For the purposes of subsection (2):

(a) an issue whether an **imputation** was **substantially true**; or

(b) a question whether an **imputation** was true or **substantially true**, being a question arising in relation to damages for defamation,

is a question of the truth of the **imputation**, but no other question is a question of the truth of an **imputation**.

(4) Subsection (2) does not have effect if it is shown that the conviction has been set aside.

(5) For the purposes of this section, the contents of a document that is evidence of conviction of an offence, and the contents of an information, complaint, indictment, charge sheet or similar document on which a person is convicted of an offence, are admissible in evidence to identify the facts on which the conviction is based.

(6) In this section, "**conviction**" includes a conviction of a court-martial and a finding of guilty by a court-martial.

Incriminating answer etc.

67. (1) If, in civil proceedings for or in respect of the publication of defamatory **matter**, a question is put to a person or a person is ordered to discover or produce a document or thing, the person is not excused from answering the question, or from discovering or producing the document or thing, because to do so may incriminate the person or the person's spouse of an offence against section 61 in respect of the publication of the **matter**.

(2) The answer made by a person to a question, or the discovery or production by a person of a document or thing under an order, in civil proceedings for or in respect of the publication of defamatory **matter**, is not admissible in evidence on a prosecution of the person or the person's spouse for an offence against section 61 in respect of the publication of that **matter**.

(3) In this section, "**spouse**" in relation to an answer, discovery or production by a person, means the person's spouse at the time of the answer, discovery or production.

Damages on failure of a prosecution under section 61

68. Damages in respect of a cause of action arising because of the failure of a prosecution under section 61 are not to include exemplary

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damages, but are otherwise to be the damages recoverable in accordance with the common law.

Representatives

69. If a right or liability of a person in respect of defamation passes to the executor of the person's will, the administrator of the person's estate or another person, a reference in this Act that applies to the first-mentioned person includes, except in so far as the context or subject-matter otherwise indicates or requires, a reference to the executor, administrator or other person.

Power of a court to order decision to be published

70. If a person has obtained a judgment in relation to a defamatory statement and someone later publishes a fair report of the statement, a court may, on the person's application, order the person who published the report to publish with the same prominence a fair report of the action in relation to the statement.

Rules of court

71. Rules of court may be made for the purposes of this Act, but this section does not limit any other power to make rules of court.

Criminal informations excluded

72. Section 6 of the Imperial Act called The Australian Courts Act 1828 does not apply to an offence under section 61.

Amendment of Limitation Act 1969 No. 31

73. The Limitation Act 1969 is amended as set out in Schedule 4.

Amendment of Defamation Act 1974 No. 18

74. The Defamation Act 1974 is amended by inserting after section 4 the following section:

Act not to apply to new publications

4A. This Act does not apply to matter published after the commencement of the Defamation Act 1991.

Repeal of Defamation Act 1974 No. 18

75. The Defamation Act 1974 is repealed on a day to be appointed by proclamation as the day on which the repeal is to take effect.

SCHEDULE 1—ABSOLUTE PRIVILEGE

(Sec. 23)

PART 1—GENERAL DEFENCES**Parliamentary papers**

1. (1) There is a defence of absolute privilege for the publication of a document by order or under the authority of a parliamentary body.

(2) There is a defence of absolute privilege for the publication of a document previously published as mentioned in subclause (1) or a copy of a document so published.

Other parliamentary papers of this State

2. (1) There is a defence of absolute privilege for the publication by the Government Printer or under the authority of the Presiding Officer of either House of Parliament of:

- (a) reports of the debates and proceedings of the House or any committee of that House; and
- (b) a report of an individual complete speech of a Member of the House, provided the report is printed with a certificate by a person authorised by the Presiding Officer, stating the date and context of the speech and stating that the speech is published under authority; and
- (c) proofs of such reports and copies of proofs of such reports, provided they are not known by the publisher to contain substantial printing or typographical errors or omissions and only while the official version of the reports has not become available; and
- (d) audio recordings, or transcripts of audio recordings, of the debates and proceedings of the House or any committee of that House (being recordings or transcripts made in connection with the preparation of such reports), but only while the official version of those reports has not become available.

(2) There is a defence of absolute privilege for the publication by the Government Printer or under the authority of the Presiding Officers jointly of:

- (a) reports of debates and proceedings of a joint sitting or of a joint committee; and
- (b) a report of an individual complete speech of a Member at a joint sitting, provided the report is printed with a certificate by a person authorised by the Presiding Officers, stating the date and context of the speech and stating that the speech is published under authority; and
- (c) proofs of such reports and copies of proofs of such reports, provided they are not known by the publisher to contain substantial printing or typographical errors or omissions; and
- (d) audio recordings, or transcripts of audio recordings, of the debates and proceedings of a joint sitting or of a joint committee (being recordings or transcripts made in connection with the preparation of such reports), but only while the official version of those reports has not become available.

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(3) There is a defence of absolute privilege for the publication of reports and proofs, previously published as mentioned in subclause (1) or (2), or a copy of reports and proofs so published.

(4) In this clause:

“joint committee” means a joint committee of both Houses of Parliament;

“joint sitting” means a joint sitting of the Members of the Legislative Council and the Members of the Legislative Assembly;

“Presiding Officer” means the President of the Legislative Council or the Speaker of the Legislative Assembly.

Proceedings of inquiry

3. There is a defence of absolute privilege for a publication in the course of an inquiry made under the authority of an Act or Imperial Act or under the authority of Her Majesty, of the Governor, or of either House or both Houses of Parliament.

Report of inquiry

4. If a person is appointed under the authority of an Act or Imperial Act or under the authority of Her Majesty, of the Governor or of either House or both Houses of Parliament to hold an inquiry, there is a defence of absolute privilege for a publication by the person in an official report of the result of the inquiry.

PART 2—SPECIFIC DEFENCES

Anti-Discrimination Act 1977

5. (1) There is a defence of absolute privilege:

(a) for a publication to or by:

- a member of the Equal Opportunity Tribunal; or
- a member of the Anti-Discrimination Board; or
- the President of that Board; or
- any officer of the President of that Board; and

(b) for a publication to any officer of the Public Service employed to assist in the administration or execution of that Act; and

(c) for a publication to or by the Director of Equal Opportunity in Public Employment,

if the publication is made for the purpose of the administration or execution of that Act.

(2) There is a defence of absolute privilege for the publication of a report:

(a) referred to in section 91 (2) or 94 (1) of the Anti-Discrimination Act 1977 of the President of the Anti-Discrimination Board made to the Equal Opportunity Tribunal; or

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SCHEDULE 1—ABSOLUTE PRIVILEGE—*continued*

- (b) referred to in section 120 (2), 121, 122 (2) or 122R (b) of that Act to the Minister administering that Act.

Children (Care and Protection) Act 1987

6. There is a defence of absolute privilege for the publication of a report made under section 100 (6) of the Children (Care and Protection) Act 1987 by a Board of Review established under that Act.

Coal Mines Regulation Act 1982

7. There is a defence of absolute privilege for the publication of a report referred to in section 94 of the Coal Mines Regulation Act 1982 of an inspector appointed under that Act to or by the Minister administering that Act.

Farm Produce Act 1983

8. There is a defence of absolute privilege for the publication of a notice under section 47 or 48 of the Farm Produce Act 1983.

Harness Racing Authority Act 1977

9. There is a defence of absolute privilege:

- (a) for a publication in the course of an appeal under Part 5 of the Harness Racing Authority Act 1977; and
- (b) for a publication by the Harness Racing Authority of New South Wales or the Harness Racing Appeals Tribunal in an official report of its decision in respect of any such appeal of the reasons for that decision.

Independent Commission Against Corruption Act 1988

10. (1) There is a defence of absolute privilege for a publication to or by the Independent Commission Against Corruption or the Commissioner for the Commission as Commissioner, or to any officer of the Commission (within the meaning of the Independent Commission Against Corruption Act 1988) as such an officer.

(2) This clause applies in relation to any hearing before the Independent Commission Against Corruption or any other matter relating to the powers, authorities, duties or functions of the Commission.

Law Reform Commission Act 1967

11. (1) A report published pursuant to section 13 (6) of the Law Reform Commission Act 1967 is, for the purposes of this Act, taken to have been published under the authority of either House of Parliament.

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SCHEDULE 1—ABSOLUTE PRIVILEGE—*continued*

- (2) There is a defence of absolute privilege:
- (a) for a publication in the course of the proceedings of, or in the course of an inquiry held by, the Law Reform Commission under the Law Reform Commission Act 1967; and
 - (b) for any other publication by the Law Reform Commission in connection with a reference to it under that Act.
- (3) Subclause (2) does not apply to a report referred to in section 13 of the Law Reform Commission Act 1967.

Legal Aid Commission Act 1979

12. There is a defence of absolute privilege for a publication to or by the Legal Aid Commission, an officer of that Commission or a committee established under the Legal Aid Commission Act 1979, if the publication is made for the purpose of the administration or execution of that Act.

Legal Profession Act 1987

13. (1) There is a defence of absolute privilege:
- (a) for a publication to or by:
 - the Bar Council; or
 - the Law Society Council; or
 - the Professional Conduct Review Panel; or
 - the Professional Standards Board; or
 - the Disciplinary Tribunal; or
 - a member of any of those bodies as such a member, for the purpose of the making or referral of a complaint, or the investigation, hearing or review of a complaint, under Part 10 of the Legal Profession Act 1987; and
 - (b) for the publication by a body referred to in paragraph (a) of a report of its decision or determination in respect of a complaint, and of the reasons for that decision or determination, under Part 10 of the Legal Profession Act 1987.
- (2) In this clause:
- (a) a reference to the Bar Council or the Law Society Council includes a reference to a committee of either of those Councils; and
 - (b) a reference to a member of the Bar Council or the Law Society Council includes a reference to a member of any such committee.

Medical Practitioners Act 1938

14. (1) There is a defence of absolute privilege:
- (a) for a publication to or by:

*Defamation 1991*SCHEDULE 1—ABSOLUTE PRIVILEGE—*continued*

- the New South Wales Medical Board; or
 - a Professional Standards Committee; or
 - the Medical Tribunal; or
 - a member of any of those bodies as such a member, for the purpose of the assessment or referral of a complaint or the holding of any inquiry or any appeal under the Medical Practitioners Act 1938; and
- (b) for a publication by a body or person referred to in paragraph (a) of a report of a decision or determination in respect of a complaint or an inquiry or appeal, and of the reasons for the decision or determination.
- (2) In this clause:
- (a) a reference to the New South Wales Medical Board includes a reference to a committee of the Board; and
 - (b) a reference to a member of the Board includes a reference to a member of any such committee.

Motor Accidents Act 1988

15. There is a defence of absolute privilege:
- (a) for a publication to or by a licensed insurer (within the meaning of the Motor Accidents Act 1988) or the Nominal Defendant, for the purpose of any claim or any proceedings arising from any claim under the Motor Accidents Act 1988; and
 - (b) for a publication by any such licensed insurer or the Nominal Defendant of a report of a decision or determination in respect of any such claim and of the reason for that decision or determination; and
 - (c) for a publication by the Motor Accidents Authority of the whole or any part of a register maintained by the Authority under section 67 of the Motor Accidents Act 1988.

New South Wales Crime Commission Act 1985

16. (1) There is a defence of absolute privilege for a publication to or by the New South Wales Crime Commission or to any member of the Commission or member of the staff of the Commission in his or her capacity as such a member.

(2) This clause applies in relation to any hearing before the New South Wales Crime Commission or any other matter relating to the powers, authorities, duties or functions of the Commission.

Ombudsman Act 1974 and Police Regulation (Allegations of Misconduct) Act 1978

17. (1) There is a defence of absolute privilege for a publication to or by the Ombudsman, or to any officer of the Ombudsman, as such an officer. This subclause

*Defamation 1991*SCHEDULE 1—ABSOLUTE PRIVILEGE—*continued*

applies to an acting Ombudsman, the Deputy Ombudsman, an Assistant Ombudsman and a special officer of the Ombudsman in the same way as it applies to the Ombudsman.

(2) There is a defence of absolute privilege for a publication to a member of Parliament for the purposes of section 12 (2) of the Ombudsman Act 1974 or section 6 (2) of the Police Regulation (Allegations of Misconduct) Act 1978.

(3) There is a defence of absolute privilege for the publication under section 31 (3) of the Ombudsman Act 1974 or under section 32 (3) or 45 (5) of the Police Regulation (Allegations of Misconduct) Act 1978 of a report.

(4) There is a defence of absolute privilege for the publication, under the authority of the Minister for the time being administering the Ombudsman Act 1974, of a copy of a report previously made public under section 31 (3) of that Act.

(5) There is a defence of absolute privilege for the publication, under the authority of the Minister for the time being administering the Police Regulation (Allegations of Misconduct) Act 1978, of a copy of a report previously made public under section 32 (3) or 45 (5) of that Act.

Privacy Committee Act 1975

18. (1) There is a defence of absolute privilege for a publication to a member of the Privacy Committee constituted under the Privacy Committee Act 1975, a member of a subcommittee of that Committee or an officer of that Committee for the purpose of the administration or execution of that Act or, for that purpose, by that Committee, by a subcommittee of that Committee to that Committee or by such a member or officer.

(2) There is a defence of absolute privilege for the publication under section 18 (3) of the Privacy Committee Act 1975 of a report under that Act.

(3) There is a defence of absolute privilege for the publication under the authority of the Minister for the time being administering the Privacy Committee Act 1975 of a copy of a report previously made public under section 18 (3) of that Act.

Public Hospitals Act 1929

19. There is a defence of absolute privilege for the publication under section 33H of the Public Hospitals Act 1929 of a decision and the reasons for that decision of a board referred to in that section.

Racing Appeals Tribunal Act 1983

20. There is a defence of absolute privilege:

- (a) for a publication in the course of an appeal under the Racing Appeals Tribunal Act 1983; and
- (b) for a publication by the Racing Appeals Tribunal in an official report of its decision in respect of any such appeal and of the reasons for that decision.

*Defamation 1991*SCHEDULE 1—ABSOLUTE PRIVILEGE—*continued***Sentencing Act 1989 and Prisons Act 1952**

21. There is a defence of absolute privilege:
- (a) for a publication of a report or other document under Part 3 of the Sentencing Act 1989 or Part 10 of the Prisons Act 1952; and
 - (b) for a publication in the course of any proceedings of:
 - the Offenders Review Board (or a Division or committee of that Board); or
 - the Serious Offenders Review Board (or a committee of that Board); and
 - (c) for a publication by a body referred to in paragraph (b) of a report of any proceedings referred to in that paragraph.

Workers Compensation Act 1987

22. (1) There is a defence of absolute privilege:
- (a) for a publication to or by a conciliation officer for the purpose of any proceedings under the Workers Compensation Act 1987; and
 - (b) for the publication by a conciliation officer of a report of a decision or determination in respect of any such proceedings and of the reasons for that decision or determination; and
 - (c) for a publication to or by an insurer for the purpose of any claim or any proceedings arising from any claim under that Act; and
 - (d) for a publication by an insurer of a report of a decision or determination in respect of any such claim and of the reasons for that decision or determination; and
 - (e) for a publication of information under section 93D of that Act by the Authority referred to in that section; and
 - (f) for a publication to or by an insurer pursuant to an exchange of information authorised by section 93D (2) of that Act.
- (2) In this clause, "insurer" and "claim" have the same meanings as in Division 1A of Part 4 of the Workers Compensation Act 1987 and, in subsection (1) (f), "insurer" has the extended meaning it has in section 93D of that Act.

SCHEDULE 2—PROTECTED REPORTS OF PROCEEDINGS

(Sec. 29)

PART 1—GENERAL REPORTS

Public proceedings of parliamentary bodies

1. Proceedings in public of a parliamentary body.

Defamation 1991

SCHEDULE 2—PROTECTED REPORTS OF PROCEEDINGS—*continued***Public proceedings of international organisations**

2. Proceedings in public of an international organisation of any countries or of governments of any countries.

Public proceedings of international governmental conferences

3. Proceedings in public of an international conference at which governments of any countries are represented.

Public proceedings of international judicial or arbitral tribunals

4. Proceedings in public of the International Court of Justice or of any other judicial or arbitral tribunal for the decision of any matter in dispute between nations or of any other international judicial or arbitral tribunal.

Public proceedings of a court

5. Proceedings in public of a court of any country.

Public proceedings of inquiries

6. Proceedings in public of an inquiry held under:

- (a) the legislation of the Commonwealth, another State, a Territory or a foreign country; or
- (b) the authority of the government of the Commonwealth, another State, a Territory or a foreign country.

Public proceedings of local authority etc.

7. Proceedings in public of a local council, board or other authority constituted for public purposes under the legislation of the Commonwealth, a State or a Territory, so far as the proceedings relate to a matter of public interest.

Proceedings of certain associations etc.

8. (1) So much of the proceedings in public of an association to which this clause applies or of a committee or governing body of an association to which this clause applies (being proceedings in furtherance of the objects referred to in subclause (2)) as comprises a finding or decision that:

- (a) relates to a member of the association or a person subject by contract or otherwise by law to control by the association; and
- (b) was made in Australia or has effect, by law or custom or otherwise, in any part of Australia.

*Defamation 1991*SCHEDULE 2—PROTECTED REPORTS OF PROCEEDINGS—*continued*

(2) This clause applies to an association, whether incorporated or not and wherever formed, that is:

(a) an association:

- having among its objects the advancement of any art, science or religion or the advancement of learning in any field; and
- empowered by its constitution to control or adjudicate on matters connected with those objects; or

(b) an association:

- having among its objects the promotion of any calling (i.e. any trade, business, industry or profession) or the promotion or protection of the interests of persons engaged in any calling; and
- empowered by its constitution to control or adjudicate on matters connected with the calling or on matters connected with the conduct of persons engaged in the calling; or

(c) an association:

- having among its objects the promotion of any game, sport or pastime to the playing or exercise of which the public is admitted as spectators or otherwise or the promotion or protection of the interests of persons connected with the game, sport or pastime; and
- empowered by its constitution to control or adjudicate on matters connected with the game, sport or pastime.

Proceedings at general meeting of company

9. (1) Proceedings at a general meeting held in Australia of a company, wherever its place of incorporation or of origin.

(2) Proceedings at a general meeting wherever held of a company having its place of incorporation or of origin in Australia.

(3) Proceedings at a general meeting wherever held of a company wherever its place of incorporation or of origin, if:

- (a) the company carries on any part of its business or affairs in Australia; or
- (b) the company is listed on a stock exchange in Australia.

(4) In this clause, "company" means:

- (a) a corporation aggregate; or
- (b) an unincorporated society, association or other body that under the law of its place of origin may sue or be sued or hold property in the name of its secretary or other officer appointed for the purpose.

(5) This clause does not apply to:

- (a) an exempt proprietary company within the meaning of the Corporations Law; or
- (b) a foreign company within the meaning of the Corporations Law; or

Defamation 1991

SCHEDULE 2—PROTECTED REPORTS OF PROCEEDINGS—*continued*

- (c) a company not formed for the purpose of carrying on any business which has for its object the acquisition of gain by the company or its members.

Proceedings of public meetings

10. Proceedings of a meeting open to the public, whether with or without restriction, held in Australia, so far as the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for a public office.

PART 2—SPECIFIC REPORTS**Proceedings of Anti-Discrimination Board**

11. Proceedings at an investigation, inquiry or examination conducted by or on behalf of the Anti-Discrimination Board constituted under the Anti-Discrimination Act 1977.

Proceedings of Committee of Australian Jockey Club

12. Proceedings on an appeal to the Committee of the Australian Jockey Club under section 32 of the Australian Jockey Club Act 1873.

Proceedings of Crime Commission

13. Proceedings held in public by the New South Wales Crime Commission.

Proceedings of Equal Opportunity Tribunal

14. Proceedings at an inquiry conducted by the Equal Opportunity Tribunal constituted under the Anti-Discrimination Act 1977.

Proceedings of Harness Racing Authority and Appeals Tribunal

15. Proceedings on an appeal to the Harness Racing Authority or to the Harness Racing Appeals Tribunal under Part 5 of the Harness Racing Authority Act 1977.

Proceedings of Independent Commission Against Corruption

16. Proceedings at a hearing held in public by the Independent Commission Against Corruption.

Proceedings of Law Reform Commission

17. Proceedings in public of, or proceedings in public at an inquiry held by, the Law Reform Commission under the Law Reform Commission Act 1967.

*Defamation 1991***SCHEDULE 2—PROTECTED REPORTS OF PROCEEDINGS—*continued*****Proceedings of Medical Board etc.**

18. Proceedings of the New South Wales Medical Board, a Professional Standards Committee or the Medical Tribunal under the Medical Practitioners Act 1938.

Proceedings of Ombudsman

19. Proceedings of the Ombudsman, so far as those proceedings are included in a report previously made public under section 31 (3) of the Ombudsman Act 1974 or under section 32 (3) or 45 (5) of the Police Regulation (Allegations of Misconduct) Act 1978.

Proceedings of Privacy Committee

20. Proceedings of the Privacy Committee, so far as those proceedings are included in a report previously made public under section 18 (3) of the Privacy Committee Act 1975.

Proceedings of Racing Appeals Tribunal

21. Proceedings on an appeal to the Racing Appeals Tribunal under the Racing Appeals Tribunal Act 1983.

Proceedings of Workers Compensation conciliation officer

22. Proceedings of a conciliation officer under the Workers Compensation Act 1987.

SCHEDULE 3—OFFICIAL AND PUBLIC DOCUMENTS

(Sec. 30)

Parliamentary documents

1. Any report, papers, votes or proceedings published in any country by order or under the authority of a parliamentary body of that country.

Parliamentary debates and proceedings

2. The debates and proceedings of either House of Parliament published by the Government Printer or under the authority of the President or Speaker of the House.

*Defamation 1991***SCHEDULE 3—OFFICIAL AND PUBLIC DOCUMENTS—*continued*****Court judgments and records**

3. A document that is:
- (a) a judgment, being a judgment, decree or order in civil proceedings, of a court of any country; or
 - (b) a record of the court relating to:
 - such a judgment; or
 - the enforcement or satisfaction of such a judgment.

Documents open to public inspection

4. A record or document kept by a government or statutory authority or court of the Commonwealth, a State or a Territory or kept in pursuance of the legislation of the Commonwealth, a State or a Territory, being a record or document that is open to inspection by the public.

Report of Bar Council, Law Society Council etc.

5. A document that consists of a report made by:
- (a) the Bar Council; or
 - (b) the Law Society Council; or
 - (c) the Professional Conduct Review Panel; or
 - (d) the Disciplinary Tribunal,

of its decision or determination in respect of a complaint, and of the reasons for the decision or determination, under Part 10 of the Legal Profession Act 1987.

Report of Workers Compensation conciliation officer

6. A document that consists of a report made by a conciliation officer of his or her decision or determination, and of the reasons for the decision or determination, in respect of any proceedings under the Workers Compensation Act 1987.

SCHEDULE 4—AMENDMENT OF LIMITATION ACT 1969

(Sec. 73)

- (1) Section 14B:

After section 14A, insert:

Defamation

14B. (1) This section applies to a cause of action based on the publication of defamatory matter, but does not apply to a cause of action that accrued before the commencement of the Defamation Act 1991.

*Defamation 1991*SCHEDULE 4—AMENDMENT OF LIMITATION ACT 1969—*continued*

(2) An action on a cause of action to which this section applies is not maintainable if brought after the expiration of a limitation period of 6 months running from the date on which the plaintiff, or a person through whom the plaintiff claims, first learns of the publication.

(3) However, the action is not maintainable if brought after the expiration of 3 years running from the date of the publication.

(4) Clause 6 of Schedule 5 contains provisions applying to causes of action that accrued before the commencement of the Defamation Act 1991.

(2) Part 3, Division 4:

After section 62, insert:

Division 4—Defamation

Secondary limitation period

62A. (1) This section applies to a cause of action based on the publication of defamatory matter.

(2) A person claiming to have a cause of action to which this section applies may apply to a court for an order extending the limitation period for the cause of action.

(3) After hearing such of the persons likely to be affected by the application as it sees fit, the court may, if it decides that it is just and reasonable to do so, order that the limitation period for the cause of action be extended for such period as it determines.

(4) However, the limitation period may not be extended past the expiration of 3 years running from the date of the publication.

Matters to be considered by the court

62B. In exercising the powers conferred on it by section 62A, a court is to have regard to all the circumstances of the case, and (without affecting the generality of the foregoing) the court is, to the extent to which they are relevant to the circumstances of the case, to have regard to the following:

- (a) the length of and reasons for the delay;
- (b) the extent to which, having regard to the delay, there is or may be prejudice to the defendant because evidence that would have been available if the proceedings had been commenced within the limitation period is no longer available;
- (c) the time at which the publication became known to the plaintiff;
- (d) any conduct of the defendant which induced the plaintiff to delay bringing the action.

*Defamation 1991*SCHEDULE 4—AMENDMENT OF LIMITATION ACT 1969—*continued***Effect of order**

62C. If a court orders the extension of a limitation period for a cause of action under section 62A, the limitation period is accordingly extended for the purposes of:

- (a) an action brought by the applicant in that court on the cause of action that the applicant claims to have; and
- (b) section 26 (1) (b) in relation to any associated contribution action brought by the person against whom that cause of action lies.

Costs

62D. Without affecting any discretion that a court has in relation to costs, a court hearing an action brought as a result of an order under section 62A may reduce the costs otherwise payable to a successful plaintiff, on account of the expense to which the defendant has been put because the action was commenced outside the original limitation period.

Prior expiry of limitation period

62E. An order for the extension of a limitation period, and an application for such an order, may be made under this Division even though the limitation period has already expired, but may not be made, or made to have effect, after the expiration of 3 years after the date of the publication of the defamatory matter concerned.

(3) Schedule 5 (Further Transitional Provisions):

After clause 5, insert:

Defamation Act 1991**Existing causes of action in defamation: ordinary limitation period**

6. (1) This clause applies to a cause of action based on the publication of defamatory matter, if the cause of action accrued within 6 years before the commencement of the Defamation Act 1991.

(2) An action on a cause of action to which this clause applies is not maintainable if brought after:

- (a) the expiration of a limitation period of 6 years running from the date of the publication; or
- (b) the expiration of a limitation period of 3 years running from the date of commencement of the Defamation Act 1991; or
- (c) where the plaintiff, or a person through whom the plaintiff claims, first learned of the publication before the commencement of the Defamation Act 1991, the expiration of a limitation period of 6 months running from the date of commencement of that Act; or

Defamation 1991

SCHEDULE 4—AMENDMENT OF LIMITATION ACT 1969—*continued*

- (d) where the plaintiff, or a person through whom the plaintiff claims, first learns of the publication on or after the commencement of the Defamation Act 1991, the expiration of a limitation period of 6 months running from the date on which the plaintiff, or a person through whom the plaintiff claims, first learns of the publication,

whichever first occurs.

Existing causes of action in defamation: secondary limitation period

7. (1) Division 4 of Part 3, as inserted by the Defamation Act 1991, does not apply to causes of action that accrued before the commencement of the Defamation Act 1991.

(2) However, that Division does extend to a cause of action to which clause 6 applies if the cause of action accrued within 3 years before the commencement of the Defamation Act 1991.
