

## SMALL DEFAMATION CLAIMS IN SMALL CLAIMS JURISDICTIONS: WORTH CONSIDERING FOR THE SAKE OF PROPORTIONALITY?

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*Online communication continues to pose challenges for the law and the administration of justice. One such challenge concerns its propensity to give rise to small defamation claims between ordinary people given the often-enormous costs of litigating defamation claims before the ordinary courts. This article promotes a reform agenda directed to meeting this challenge by (1) demonstrating the need for a proportionate means for resolving small defamation claims, having regard to access to justice considerations and other wider concerns; (2) establishing reasonable grounds for seriously considering deploying the traditional small-claims-proportionate response – small claims jurisdictions – for this purpose notwithstanding contraindications including the infamous complexity of defamation law; and (3) advancing a research pathway for the proportionate treatment of small defamation claims to guide decision-making and innovation. This article also advocates for consideration of this important issue in the ‘national reform process’ launched in 2018 for Australian defamation law.*

### I INTRODUCTION

New online communications technologies have posed a range of challenges for a raft of laws not the least of which is defamation law.<sup>1</sup> While the anticipated

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1 Australian defamation law comprises common law and legislation. The primary legislation is the National Uniform Defamation Legislation (‘NUDL’), which consists of the following nearly uniform state and territory legislation: *Civil Law (Wrongs) Act 2002* (ACT) ch 9; *Defamation Act 2005* (NSW); *Defamation Act 2006* (NT); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA). For convenience, only provisions of the *Defamation Act 2005* (NSW) will be referenced, unless otherwise necessary. The ‘general law’, defined as ‘the common law and equity’, ‘operat[es]’ by virtue of and subject to the NUDL: *Defamation Act 2005* (NSW) ss 4 (definition of ‘general law’), 6.

early deluge of online defamation cases may not have eventuated, there are now reports of an ever increasing stream of such matters coming before the courts in Australia.<sup>2</sup> The initial question of whether online communication would be subject to ordinary defamation law has been answered by the courts with a resounding ‘yes’.<sup>3</sup> The issue confronting law reformers has shifted to whether and, if so, to what extent, existing defamation law and procedure should be revised in order to accommodate or better accommodate particular features of this new communications tsunami.

This article does not attempt a comprehensive answer to this question but concentrates, instead, on responding to a particular aspect of online communication and that is its propensity to give rise to small defamation claims by ordinary people against ordinary people. ‘Small defamation claims’ is not a term of art under Australian defamation law. However, this article uses the term to refer to claims worth \$25 000<sup>4</sup> or less, apart from claims excluded from remedy as ‘trivial’ by legal filters. Currently, the primary filter for this purpose is the statutory triviality defence,<sup>5</sup> but account should also be taken of two recent common law developments.<sup>6</sup> Nevertheless, it will be argued that, as they stand, these legal filters are unlikely to reliably affect more than a small number of claims.<sup>7</sup>

Small defamation claims between ordinary people represent a departure from the iconic defamation suit consisting of a ‘celebrity’<sup>8</sup> suing a mass media organisation for a large quantum of damages.<sup>9</sup> This is not to suggest, however,

2 See, eg, District Court Judge Judith Gibson, ‘Defamation Case Law Analysis and Statistics’ in T K Tobin and M G Sexton, LexisNexis, *Australian Defamation Law & Practice* (at April 2018) [60 560].

3 For recent examples, see *Mickle v Farley* (2013) 18 DCLR(NSW) 51 (Facebook and Twitter); *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 (Twitter); *Smith v Lucht* [2017] 2 Qd R 489 (email); *Fairfax Media Publications Pty Ltd v Pedavoli* (2015) 91 NSWLR 485 (online newspaper article and Twitter); *Piscioneri v Whitaker* [2017] ACTSC 174 (website postings); *Taylor v Hewitt* [2017] WASC 234 (Facebook); *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 (‘Wilson Trial’), damages reduced on appeal in *Bauer Media Pty Ltd v Wilson [No 2]* [2018] VSCA 154 (‘Wilson Appeal’) (magazine websites). For a recent judicial attempt to dispel any ‘lingering misapprehension’ to the contrary, see *Douglas v McLernon [No 4]* [2016] WASC 320, [1] (Kenneth Martin J).

4 The significance of this figure will become apparent in Part III(C) below.

5 *Defamation Act 2005* (NSW) s 33.

6 See *Bleyer v Google Inc* (2014) 88 NSWLR 670 (‘Bleyer’); *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858 (‘Kostov’).

7 This article does not challenge the propriety of weeding out ‘unworthy’ defamation claims, although that is not to say that the legal filters for this purpose are themselves beyond criticism. Nevertheless, it is not necessary to pursue this aspect further in this article because, even if improved, they are not likely to exhaust the class of small defamation claims or otherwise render the issue of their proper treatment otiose.

8 ‘Celebrity’ is used here in the broad sense suggested by Rolph, as extending to entertainers, sports people and politicians: David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate, 2008) 182.

9 For examples, see *ibid* 182–4. More recently, a film actress was awarded an Australian record-high of more than \$4.5 million in damages plus interest against a magazine publisher: *Wilson Trial* [2017] VSC 521, [393]–[395] (Dixon J), although this was reduced on appeal to \$600 000 (general damages only) plus interest: *Wilson Appeal* [2018] VSCA 154, [579] (The Court). For recent Australian research undermining ‘common assumptions’ regarding the comparative incidence of ‘public figures’ and ‘individuals’ as plaintiffs and that of ‘media organisations’ and ‘individuals’ as defendants in defamation

that defamation suits between ordinary people are prohibitive of large damages awards or are exclusive to online communication. Nor are such suits new. But what will be argued is new is the potential scale with which small *online* defamation claims are likely to arise, especially in relation to social media platforms,<sup>10</sup> notwithstanding the presence of certain potentially harm-exacerbating features of online communication.

Concerns about litigating small defamation claims before the ordinary courts in Australia are already mounting.<sup>11</sup> The overall aim of this article is to contribute to the emerging conversation around the proper treatment of such claims with a view to promoting a reform agenda going forward. It proposes to achieve this aim by pursuing three related subsidiary purposes.

The first purpose is to demonstrate the need for a proportionate response for small defamation claims. It will be argued that the propensity of ‘ordinary-small’ suits is such as to warrant the attention of law reformers with a view to developing proper means for their resolution. Given the huge costs of pursuing and defending a defamation claim before the ordinary courts and associated inequities arising, ‘proper’ in this context largely translates to ‘proportionate’. This article proceeds from the position that ordinary people value their reputations and should be able to call upon the ordinary law to protect them; and, further, that ordinary people value speaking freely and should be able to rely upon the ordinary law to enable them to do so.<sup>12</sup> However, both interests are illusory if the ordinary means of exercising them are beyond the financial reach of most ordinary people. This state of affairs has serious ramifications not only for the parties’ access to justice but also affecting the administration of justice, the ‘balance between the right to reputation and freedom of speech’ sought to be struck by defamation law,<sup>13</sup> and the broader community generally.

Accepting the need for a proportionate measure, the question becomes: what form should this measure take? Instead of canvassing a range of possibilities, this article proposes to critically examine the appropriateness of calling in aid an already existing measure in the form of small claims jurisdictions. This measure is designed to enhance access to justice by offering a ‘special’ or ‘modified’ procedure to facilitate parties to a small claim proceeding without legal representation and so reduce the costs usually incurred in ordinary litigation.<sup>14</sup>

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actions, see Centre for Media Transition, ‘Trends in Digital Defamation: Defendants, Plaintiffs, Platforms’ (Report, University of Technology Sydney, 2018) 5, 62–3.

10 ‘Social media’ is a broad umbrella term capable of embracing a wide range of communications technologies. For a brief survey of examples, see District Court Judge Judith Gibson, ‘The Use of Social Media for Investigators’ (Paper presented at the Corruption Prevention Network Annual Forum, Sydney, 6 September 2016) 6–9.

11 See, eg, Michaela Whitbourn, ‘Social Media Transforming Defamation, Says Top Judge’, *The Sydney Morning Herald* (Sydney), 3 July 2017, 4.

12 To adapt and extrapolate an assertion in David Rolph, *Defamation Law* (Lawbook, 2016) 4.

13 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 568 (The Court) (‘*Lange*’).

14 John Baldwin, *Small Claims in the County Courts in England and Wales: The Bargain Basement of Civil Justice?* (Clarendon Press, 1997) 3–4, 14; John Baldwin, ‘Is There a Limit to the Expansion of Small Claims?’ (2003) 56 *Current Legal Problems* 313, 315–19; E Eugene Clark, *Research and Evaluation of Small Claims Courts and Tribunals* (Occasional Paper No 2, University of Tasmania Law School, 1992)

They were conceived or re-conceived (if already existing) in the 1970s in Australia, the United Kingdom, Canada and New Zealand, and more than half a century earlier in the United States.<sup>15</sup>

At first glance, defamation claims and small claims jurisdictions may seem an unlikely pairing. Indeed, there has generally been a reluctance to admit defamation claims to small claims jurisdictions largely, it seems, because of adverse perceptions around their complexity.<sup>16</sup> However, these perceptions should be critically assessed before dismissing this option. Further, it is only logical to start with a consideration of the suitability of the traditional response to small civil claims. This is especially so given that some Australian small claims jurisdictions have already admitted defamation claims,<sup>17</sup> thereby affording examples of this measure in practice to study and, moreover, demonstrating that resistance to taking this step is not absolute. Indeed, it has already started to attract attention as a reform option generally for Australia in the commentary.<sup>18</sup>

It should be clarified, however, that it is not being suggested that small claims jurisdictions present the *only* response to small defamation claims. Clearly alternatives to adjudication have an important role to play in this context as they do in the resolution of civil disputes generally, including (larger) defamation claims.<sup>19</sup> The conventional wisdom that court-based adjudication should be the last resort is not being challenged.<sup>20</sup> Indeed, non-litigious mechanisms are often built into the design of small claims jurisdictions as a precursor to adjudication.<sup>21</sup> The NUDL also provides a non-litigious measure for resolving defamation

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3–9 [2.2]; Christopher J Whelan, ‘Small Claims in England and Wales: Redefining Justice’ in Christopher J Whelan (ed), *Small Claims Courts: A Comparative Study* (Clarendon Press, 1990) 99, 101.

15 Christopher J Whelan, ‘Introduction’ in Christopher J Whelan (ed), *Small Claims Courts: A Comparative Study* (Clarendon Press, 1990) 1, 1–3; Steven Weller, John C Ruhnka and John A Martin, ‘American Small Claims Courts’ in Christopher J Whelan (ed), *Small Claims Courts: A Comparative Study* (Clarendon Press, 1990) 5, 5–7; Iain Ramsay, ‘Small Claims Courts in Canada: A Socio-Legal Appraisal’ in Christopher J Whelan (ed), *Small Claims Courts: A Comparative Study* (Clarendon Press, 1990) 25, 25–7; Chin Nyuk Yin and Ross Cranston, ‘Small Claims Tribunals in Australia’ in Christopher J Whelan (ed), *Small Claims Courts: A Comparative Study* (Clarendon Press, 1990) 49, 49–50, 55–6; Alex Frame, ‘Fundamental Elements of the Small Claims Tribunal System in New Zealand’ in Christopher J Whelan (ed), *Small Claims Courts: A Comparative Study* (Clarendon Press, 1990) 73, 73; Whelan, ‘Small Claims in England and Wales’, above n 14, 99–102; see also James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4<sup>th</sup> ed, 2004) 260, 267.

16 See below nn 156, 226–7 and accompanying text.

17 See below Part III(C). For an overseas example, see the Ontario Small Claims Court in Canada: *Courts of Justice Act*, RSO 1990, c C-43, ss 22–33.1 and note in particular s 23(1). The Court’s financial ceiling is \$25 000: *Small Claims Court Jurisdiction and Appeal Limit*, O Reg 626/00, s 1(1).

18 See David Rolph, ‘A Critique of the *Defamation Act 2013*: Lessons for and from Australian Defamation Law Reform’ (2016) 21(4) *Communications Law* 116, 118.

19 A stated object of the NUDL is ‘to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter’: *Defamation Act 2005* (NSW) s 3(d).

20 For supporting reasons in the defamation context, see *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, [133]–[142] (Applegarth J).

21 See, eg, *Local Courts Act 2007* (NSW) s 36 (conciliation); *Local Court Rules 2009* (NSW) r 2.5(4)(b) (court-ordered mediation). See also below n 144 and accompanying text.

disputes in the form of the ‘offer to make amends’ scheme.<sup>22</sup> This is in addition to providing for apologies to be made without them ‘constitut[ing] an express or implied admission of fault or liability’.<sup>23</sup>

Nor is it intended to determine whether small claims jurisdictions provide the *best* response to the challenge posed by small defamation claims. Indeed, it is not possible to pursue this very ambitious goal at this stage primarily because of the dearth of empirical research to guide informed decision-making. That is not to say, however, that pursuing the present enquiry into the viability of this response is not vexed to some extent, at least, by this limitation. Nevertheless, the key question is not so much what is *best* as what is *necessary* depending on the circumstances. In the event that a small defamation claim reaches the point of last resort then it is contended that there should be a more cost-proportionate means available for its resolution than ordinary litigation.

The second and major purpose is to critically evaluate possible contraindications to the admission of defamation claims to small claims jurisdictions. It will be argued that serious consideration should be given to extending Australian small claims jurisdictions<sup>24</sup> to include defamation claims where this has not already occurred.<sup>25</sup> Possible barriers, including the complexity of defamation law for which it has long been notorious,<sup>26</sup> are not determinative or insurmountable once they have been fully unpacked and their ramifications properly assessed. If any difficulties persist, then consideration should be given to modifying features of small claims jurisdictions and/or providing additional services to support their operation before rejecting this measure outright. It should be emphasised that while the catalyst for considering small claims jurisdictions may be small *online* defamation claims, it is not suggested that this measure should be confined to such claims. Small *offline* defamation claims are equally deserving of a proportionate response. However, the advent of online communications technologies has arguably made the whole question of dealing

22 See *Defamation Act 2005* (NSW) pt 3 div 1. Under this scheme, performance of an accepted ‘offer to make amends’ operates as a bar to the ‘aggrieved person’ pursuing a defamation action against the ‘publisher’: at s 17(1). Also, an unaccepted but ‘reasonable’ and timely ‘offer to make amends’ provides a defence for the ‘publisher’ to a defamation action brought by the ‘aggrieved person’: at s 18(1).

23 *Defamation Act 2005* (NSW) s 20(1)(a). For an exploration of the effect of apologies on the ‘propensity to sue’, see generally Prue Vines, ‘Apologising to Avoid Liability: Cynical Civility or Practical Morality?’ (2005) 27 *Sydney Law Review* 483; Prue Vines, ‘The Value of Apologising within a Moral Community: Making Apologies Work’ (2017) 7 *Oñati Socio-Legal Series* 370

<<http://opo.iisj.net/index.php/osls/article/viewFile/856/998>>. The ‘offer to make amends’ scheme also provides protection for apologies relating to such offers: *Defamation Act 2005* (NSW) ss 13(4), 19. For a consideration of this aspect, see Robyn Carroll and Jeffrey Berryman, ‘Making Amends by Apologising for Defamatory Publications: Developments in the Twenty-First Century’ in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21<sup>st</sup> Century* (Hart Publishing, 2017) 479.

24 In this article, ‘Australian small claims jurisdictions’ refers to Australian state and territory small claims jurisdictions only. It is not proposed to consider the question of an additional layer of defamation-inclusive small claims jurisdictions at the federal level.

25 Where there is more than one small claims jurisdiction in a state or territory, it is not necessarily proposed to admit defamation claims to more than one of these jurisdictions.

26 *National Roads and Motorists’ Association v Whitlam* (2007) 25 ACLC 688, 698 [61] (Campbell JA, with Beazley JA and Handley AJA agreeing). The complexity of defamation law is explored in detail in Part V(A) below.

appropriately with small defamation claims more pressing and may indeed tip the balance in favour of reform.

The third purpose of this article is to promote and facilitate setting the issue of small defamation claims on a research track as a necessary prelude to reform. This article calls for up-to-date and comprehensive empirical research regarding small defamation claims generally and in relation to small claims jurisdictions in particular.<sup>27</sup> Without purporting to be exhaustive, key aspects arising in the context of small claims jurisdictions warranting further research are flagged throughout the discussion and several pertinent research questions are posed in closing.

This article is well-timed given the recent (albeit belated) release of the statutory review of the *Defamation Act 2005* (NSW),<sup>28</sup> triggering a second ‘national reform process’<sup>29</sup> for defamation law in Australia. Although the review appears to overlook proportionate mechanisms for the resolution of small defamation claims, this article makes a compelling case for their consideration as part of the reform process.

The following discussion will be divided into five parts. Part II identifies and examines the twin elements of propensity and inequity that speak to the need for a proportionate response for small defamation claims. Part III presents three snapshots depicting small claims jurisdictions in general, Australian small claims jurisdictions in particular and the defamation-inclusive coverage of the Australian jurisdictions. Part IV conducts a comparative profiling analysis of two Australian defamation-inclusive small claims jurisdictions – being those exercised by the South Australian Magistrates Court (‘SAMC’) and the ACT Civil and Administrative Tribunal (‘ACAT’) – with a view to discerning departures from the traditional small claims model and considering their capacity to facilitate the resolution of small defamation claims. To deepen understanding of the interface between defamation claims and small claims jurisdictions, the proceedings arising in one such claim commenced in the ACAT – *Bottrill v Cristian*<sup>30</sup> – are also analysed. With the stage suitably set, Part V critically

27 In doing so, this article adds to other calls for more research regarding the self-represented litigant generally: in the Australian context see, eg, Elizabeth Richardson and Tania Sourdin, ‘Mind the Gap: Making Evidence-Based Decisions about Self-Represented Litigants’ (2013) 22 *Journal of Judicial Administration* 191; Australian Government Productivity Commission, ‘Access to Justice Arrangements’ (Inquiry Report No 72, 5 September 2014) vol 1, 523–4 (‘*Report No 72(1)*’).

28 Provided for by *Defamation Act 2005* (NSW) s 49; NSW Department of Justice, ‘Statutory Review: *Defamation Act 2005*’ (Report, June 2018) (‘*Statutory Review*’).

29 Ibid 2–3. At its June 2018 meeting, the Council of Attorneys-General agreed to reconvene the Defamation Working Party ‘to consider the findings and recommendations of the statutory review ... with a view to developing any required amendments to the Model Defamation Provisions’: Council of Attorneys-General, ‘Communiqué’ (8 June 2018) 3 (‘*Communiqué*’). The ‘Model Defamation Provisions’, as the name implies, supplied the legislative model for the NUDL: see *Statutory Review*, above n 28, 2.

30 There are several proceedings associated with this claim. This article will focus in the main on *Bottrill v Cristian* (Civil Dispute) [2016] ACAT 7 (‘*Bottrill ACAT Hearing*’); *Cristian v Bottrill* (Appeal) [2016] ACAT 104 (‘*Bottrill ACAT Appeal*’); *Cristian v Bottrill* [2016] ACTSC 315 (‘*Bottrill Supreme Court Appeal*’).

evaluates possible contraindications for admitting defamations claims to Australian small claims jurisdictions. Primary attention is devoted to assessing the true challenge posed by defamation-complexity. Part VI offers concluding observations on the issue of small defamation claims in small claims jurisdictions and builds on the preceding discussion to position the issue for further research looking forward to future reform.

## II THE NEED FOR A PROPORTIONATE RESPONSE FOR SMALL DEFAMATION CLAIMS

Two drivers combine to feed the need for a proportionate response for small defamation claims between ordinary people. They are the significant propensity for such claims to arise, especially in social media, and the seriousness of the ramifications of this propensity.

### A Small Online Defamation Claims Propensity

#### 1 *Practical Promoters and Inhibitors*

There are several key factors that give rise to a significant propensity for small online defamation claims between ordinary people.

First is the facility of online platforms to host user-generated content that gives a voice to ordinary people. The cry, '*We are all publishers now!*', rings out loudly in the online communications era. The truth is, however, that we have all always been publishers for the purposes of defamation law. Every time we speak to a friend, or to a work colleague or to a stranger, we are 'publishing' for the purposes of defamation law and our utterances, if defamatory, can expose us to liability for damages.<sup>31</sup> The difference in the online world, however, is that our utterances now have the potential to reach a global audience, and to do so very quickly, very easily and very cheaply. They are also likely to be in permanent form and difficult if not well nigh impossible to completely erase, making suing on them, compared with oral offline expression, a much more attractive proposition on the question of proof.<sup>32</sup> The second factor concerns the nature of certain online platforms, and *social* media in particular, that promotes communication by ordinary people about other ordinary people and the sharing of that communication. The third factor relates to the nature of social media speech and increasing recognition in Australian case law of certain features likely to heighten its defamation-risk profile. These include: 'rather like contributions to a casual conversation ... often uninhibited, casual and ill thought out',<sup>33</sup> 'highly informal',<sup>34</sup> 'colourful and intemperate',<sup>35</sup> 'anonym[ous],

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31 Unless, of course, we are speaking about *that* friend, work colleague or stranger. While publication may be to one person only, it must be someone other than the plaintiff: *Consolidated Trust Co Ltd v Browne* (1949) 49 SR (NSW) 86, 88–9 (Jordan CJ).

32 Mark Pearson, *Blogging & Tweeting without Getting Sued: A Global Guide to the Law for Anyone Writing Online* (Allen & Unwin, 2012) 60.

33 *Rana v Google Australia Pty Ltd* [2013] FCA 60, [71] (Mansfield J), quoting *Smith v ADVFN plc* [2008] EWHC 1797 (QB), [14] (Eady J). See also *Prefumo v Bradley* [2011] WASC 251, [43] (Corboy J).

[instantaneous]’;<sup>36</sup> ‘blunt in its message and attenuated in its form’.<sup>37</sup> That is not to say, however, that they are necessarily exhibited by all forms of social media speech; or, if they are, that they necessarily conduce to defamatory speech of the same degree or even to any degree at all. The fourth factor is the multiplying effect of a huge number of social media and other internet users in Australia and worldwide, compounded by the regularity and duration of social media and other online participation by these users.<sup>38</sup>

However, while the ordinariness of the parties may often speak to a small defamation claim, it does not necessarily preclude a large claim. It will depend on all the circumstances. Three prime circumstances that can significantly magnify the quantum of a defamation claim are the gravity of what was published, its permanency and its audience reach. While these circumstances may be amplified in the online world, this potential does not necessarily preclude the occasion of small online defamation claims or necessarily diminish their population to a trivial number. First, the existence of very grave online defamatory expression does not negate the possibility of online defamation at the other end of the gravity scale. Second, as noted earlier, the permanency of online defamation may also facilitate the pursuit of small (online) defamation claims. Third, the potential of online global reach has to be reconciled with the actual extent of publication in any particular case. An email may only be sent to one or two people. A blog or website may have restricted access and even if open to the public, may only be accessed by a handful of visitors. Even social media postings can be set to be read by only a few select ‘friends’.

## 2 Possible Legal Limitations

Defamation damages and more particularly the non-economic loss component are ‘at large’,<sup>39</sup> meaning that they are not determined ‘by any purely objective computation’,<sup>40</sup> and are, instead, ‘essentially a matter of impression’.<sup>41</sup> This approach has allowed for damages awards that are extremely large as well as awards that are extremely small, including for ‘nominal’ and even ‘contemptuous’ amounts.<sup>42</sup> Although mechanisms have been included in the

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34 *Crespin v Channel Seven Sydney Pty Ltd* (2015) 20 DCLR(NSW) 42, 48 [30] (Gibson DCJ).

35 *Gaynor v Burns [No 2]* (2015) 21 DCLR(NSW) 286, 289 [13] (Gibson DCJ).

36 *Rothe v Scott [No 4]* [2016] NSWDC 160, [142] (Gibson DCJ).

37 *Prefumo v Bradley* [2011] WASC 251, [43] (Corboy J). See also *McEloney v Massey* [2015] WADC 126, [119] (Schoombie DCJ).

38 For recent judicial consideration of ‘[t]he rapidly expanding size of the internet’, see *Google Inc v Trkulja* (2016) 342 ALR 504, 538–9 (The Court).

39 *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 348 [65] (Hayne J) (‘*Rogers*’); *Wilson Appeal* [2018] VSCA 154, [166], [213], [215] (The Court).

40 *Broome v Cassell* [1972] AC 1027, 1071 (Lord Hailsham).

41 *Ibid* 1072 (Lord Hailsham).

42 ‘Contemptuous’ is reserved for ‘the lowest coin in the realm’: see *Allen v Lloyd-Jones [No 6]* [2014] NSWDC 40, [139] (Gibson DCJ) (‘*Allen*’), citing *Kelly v Sherlock* (1866) LR 1 QB 686 (a farthing) and *Dering v Uris* [1964] 2 QB 669 (a halfpenny) as examples.

NUDL to rein in unduly large damages awards,<sup>43</sup> there is no minimum monetary threshold across which a defamation claim must pass in order to succeed. The point being made is that it is open on ordinary principles for small defamation awards to be made, including quite small awards.<sup>44</sup>

However, there are other recognised legal mechanisms that may restrict the potential pool of small online defamation claims by removing ‘unworthy’ claims based on their ‘triviality’. The filter provided by the NUDL is the statutory triviality defence,<sup>45</sup> which requires a defendant to ‘[prove] that *the circumstances of publication* were such that the plaintiff was unlikely to sustain any harm’.<sup>46</sup> However, it has proven to be a ‘very high’<sup>47</sup> mountain for defendants to climb.<sup>48</sup> Two particularly limiting features emanate from judicial interpretation of section 33 ‘harm’. One concerns its *likelihood*, which has been interpreted to mean “the absence of a real chance” or the “absence of a real possibility of harm”.<sup>49</sup> The other concerns its *quantum*, which has been set at “‘harm’ at all”.<sup>50</sup> A third limiting feature of section 33 ‘harm’ will emerge if its *type* is interpreted to include hurt feelings as well as reputational injury, which could push the defence almost to the brink of vanishing.<sup>51</sup> Although there is recent Queensland appellate authority endorsing the contrary view,<sup>52</sup> uncertainty may persist in the absence of

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- 43 These include tying the quantum of damages to ‘the harm sustained’ in ‘an appropriate and rational’ way, the cap on ‘non-economic loss’ and the prohibition on ‘exemplary or punitive damages’: see *Defamation Act 2005* (NSW) ss 34–5, 37 respectively. The 2018–19 statutory cap is \$398 500: at ss 35(3)–(8); Attorney General (NSW), ‘*Defamation Act 2005: Order*’ in New South Wales, *Government Gazette*, No 66, 29 June 2018, 3968, 3970. The statutory cap does not apply, however, without exception: see *Defamation Act 2005* (NSW) s 35(2). In *Wilson Trial* [2017] VSC 521, general damages in the amount of \$650 000 or nearly 1.7 times the relevant statutory cap were awarded at [64], [393] (Dixon J), reduced to \$600 000 or just over 1.5 times that cap on appeal in *Wilson Appeal* [2018] VSCA 154, [158], [260] (The Court).
- 44 See, eg, *Bristow v Adams* [2012] NSWCA 166, [18] (Basten JA) (\$10 000); *Allen* [2014] NSWDC 40, [172] (Gibson DCJ) (\$6000); *Stone v Moore* (2016) 125 SASR 81, 110 (The Court) (\$2000); *Piscioneri v Whitaker* [2017] ACTSC 174, [48] (Elkaim J) (\$9600). The question of a zero-damages award is an interesting one beyond the scope of this article but suffice it to note that it is not without precedent under the NUDL: see *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295; *Tabbaa v Nine Network Pty Ltd [No 10]* [2018] NSWSC 468.
- 45 *Defamation Act 2005* (NSW) s 33.
- 46 *Defamation Act 2005* (NSW) s 33 (emphasis added).
- 47 *Smith v Lucht* [2017] 2 Qd R 489, 494 [16] (Philippides JA).
- 48 Note, however, that the defence recently succeeded in *Barrow v Bolt* (2015) Aust Torts Reports ¶82-248 and *Smith v Lucht* [2017] 2 Qd R 489. Also note that ‘triviality’ in this context may not necessarily sound in nominal amounts. The section 33 defence has succeeded where damages were assessed at \$10 000 at trial: *Smith v Lucht* [2015] QDC 289, [59] (Moynihan DCJ).
- 49 *Jones v Sutton* (2004) 61 NSWLR 614, 624–5 [45]–[49] (Beazley JA, with Santow JA and Stein AJA agreeing) (citations omitted); *Enders v Erbas & Associates Pty Ltd* (2014) Aust Torts Reports ¶82-161, 67 111 (Tobias AJA, with Ward and Leeming JJA agreeing); *Barrow v Bolt* (2015) Aust Torts Reports ¶82-248, 69 698 (Kaye JA, with Ashley and McLeish JJA agreeing); *Smith v Lucht* [2017] 2 Qd R 489, 499 [36] (Flanagan J, with McMurdo P and Philippides JA agreeing).
- 50 *King and Mergen Holdings Pty Ltd v McKenzie* (1991) 24 NSWLR 305, 309 (Mahoney JA); *Papaconstantinos v Holmes à Court* [2009] NSWSC 903, [105] (McCallum J); *Barrow v Bolt* (2015) Aust Torts Reports ¶82-248, 69 698–9 (Kaye JA, with Ashley and McLeish JJA agreeing).
- 51 *Szanto v Melville* [2011] VSC 574, [162] (Kaye J); *Smith v Lucht* [2017] 2 Qd R 489, 514–15 [97] (Flanagan J, with Philippides JA agreeing).
- 52 *Smith v Lucht* [2017] 2 Qd R 489, 505–20 [54]–[116] (Flanagan J, Philippides JA agreeing, McMurdo P not deciding the issue).

a High Court determination of the issue.<sup>53</sup> Another drawback of this filter is that, as a defence, it does not become operational until late in the proceedings and after the likely outlay of considerable time, energy and money, especially given the action's propensity for 'interlocutory skirmishes'.<sup>54</sup> It is conceivable that many small defamation claims may simply not make it to this filter, having been effectively financially exhausted, if not settled,<sup>55</sup> much earlier in the proceedings.

The nascent *Bleyer*-proportionality principle, recognised in 2014 by McCallum J in *Bleyer v Google Inc*,<sup>56</sup> is also unlikely to make much of a dent in the numbers of small defamation claims. Pursuant to this principle, claims may be permanently stayed or dismissed as an abuse of process in circumstances where 'the resources of the court and the parties that will have to be expended to determine the claim are out of all proportion to the interest at stake'.<sup>57</sup> However, the occasion for its operation is 'rare',<sup>58</sup> and, although support is building in NSW,<sup>59</sup> the principle has yet to be imported into another Australian state or territory.<sup>60</sup>

Neither of these mechanisms are self-executing, meaning that they will not work to exclude a claim unless and until the defendant raises them. But even in a clear case, this step may not be taken given the costs involved.

More recently, McCallum J recognised, for the first time in Australia, another filter in the form of 'a threshold of seriousness' in the Australian tests of defamatory meaning comparable to that articulated in *Thornton v Telegraph Media Group Ltd*<sup>61</sup> for the English common law tests.<sup>62</sup> However, it is very early

53 For recent recognition of 'uncertain[ty]' regarding this issue together with acknowledgment of the potential for the extension of the Queensland Court of Appeal's view to other Australian jurisdictions by virtue of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 ('*Farah*'), see *Wilson v Bauer Media* (Ruling No 6) [2017] VSC 356, [31]–[36] (Dixon J). In *Farah*, the High Court of Australia directed that '[i]ntermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of ... uniform national legislation unless they are convinced that the interpretation is plainly wrong': at 151–2 [135] (The Court) (citations omitted).

54 Rolph, 'A Critique of the *Defamation Act 2013*', above n 18, 117.

55 Ibid.

56 (2014) 88 NSWLR 670, 676–82.

57 Ibid 681. See also *Feldman v The Daily Beast Co LLC* [2017] NSWSC 831, [18] (McCallum J). Although reminiscent of the proportionality principle emerging in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 ('*Jameel*'), the author has argued elsewhere that the *Bleyer*-proportionality principle may be able to lay claim to independent, local origins having regard to its express location within and reliance upon NSW's legal framework: Kim Gould, 'Locating a "Threshold of Seriousness" in the Australian Tests of Defamation' (2017) 39 *Sydney Law Review* 333, 351–2; see also *Bleyer* (2014) 88 NSWLR 670, 676–82.

58 *Bleyer* (2014) 88 NSWLR 670, 681 [63] (McCallum J); see also *Ghosh v Ninemsn Pty Ltd* (2015) 90 NSWLR 595, 603 [44] (Macfarlan JA, with Adamson J agreeing); *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639, 668 [133] (Ward JA, with Meagher and Payne JJA agreeing); *Watney v Kencian* [2018] 1 Qd R 407, 426–7 [66]–[67] (Applegarth J, with Morrison and McMurdo JJA agreeing). For a recent example of such a 'rar[ity]', however, see *Imielska v Morgan* [2017] NSWDC 329, [35] (Gibson DCJ).

59 See, eg, *Farrow v Nationwide News Pty Ltd* (2017) 95 NSWLR 612, 613–14 [5] (Basten JA).

60 Attempts to do so failed in *Smith v Lucht* [2014] QDC 302 and *Lazarus v Azize* [2015] ACTSC 344, but see *Asmar v Fontana* [2018] VSC 382, [11] (Daly AsJ).

61 [2011] 1 WLR 1985, 2008–9 (Tugendhat J).

days, and even if it becomes an established fixture it appears that the threshold was not contemplated to affect more than ‘trivial claims’.<sup>63</sup>

### 3 *Expectations v Reality*

The extent to which expectations regarding the overall number of small online defamation claims between ordinary people are being realised in Australia is not easy to determine with precision. It is not simply a matter, for example, of counting the number of a particular type of claim appearing in the reported cases. For several reasons, this method is apt to seriously underestimate the true figure, not the least of which is that, like other civil claims, many if not most defamation claims are unlikely to proceed all the way to trial and then judgment.<sup>64</sup> A much more sophisticated research methodology is required in order to discover the real scale of the incidence of small online (plus offline) defamation claims, let alone get a sense of the number of claims that might be brought if there was a more cost-proportionate procedure available. In the meantime, however, it is contended that establishing a significant propensity giving rise to a reasonable expectation of significant numbers of small online defamation claims is sufficient for present purposes.

#### B Undesirable Consequences if Left Unchecked

Significant departure from the archetypal defamation claim may pique an interest for investigation but will not of itself necessitate a response from law reformers. Justification for such intervention may be found, however, in considerations regarding access to justice and repercussions for the administration of justice, the continuing challenge of maintaining an appropriate balance between reputation and free speech and the wider community generally.

The cost of litigating a civil claim is a matter of ongoing concern in Australia.<sup>65</sup> The costs associated with defamation actions have attracted particular attention,<sup>66</sup> no doubt heightened by reports of them swamping the damages ordered.<sup>67</sup>

This state of affairs is largely a product of the complexity that continues to plague Australian defamation law notwithstanding the move to the NUDL more than a decade ago. Most ordinary people lack the financial resources of wealthy celebrities and large media organisations to pursue or defend defamation actions with the assistance of legal representation. Legal aid, even if available, is

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62 *Kostov* [2018] NSWSC 858, [31]–[42].

63 *Ibid* [37] (McCallum J).

64 For such reasons, see Centre for Media Transition, above n 9, 8.

65 *Report No 72(1)*, above n 27, 114–24.

66 *Ramandious v Habashy [No 2]* [2015] NSWDC 146, [15] (Gibson DCJ); *Ghosh v TCN Channel Nine Pty Ltd [No 4]* (2014) 19 DCLR(NSW) 38, 70 (Gibson DCJ); Whitbourn, above n 11.

67 See, eg, Gibson, ‘Defamation Case Law Analysis and Statistics’, above n 2, [60 590]–[60 600]; Graham Hryce, *What Price Reputation?* (11 February 2015) *Gazette of Law and Journalism* <<https://glj.com.au/?s=%22what+price+reputation%22>>. Particular concern has been expressed for defendants given ‘the rarity of defamation insurance’: Gibson, ‘Defamation Case Law Analysis and Statistics’, above n 2, [60 590]–[60 600].

generally restricted to the ‘very poor’,<sup>68</sup> and the plight of ‘the missing middle’ is attracting increasing attention.<sup>69</sup> Other sources of legal assistance for defamation litigants<sup>70</sup> are not without significant limitations and are coming under increasing pressure. Consequently, ordinary plaintiffs and defendants may be faced with an invidious choice: proceed on their own or refrain from proceeding at all and either compromise or forego their rights to an action or a defence.<sup>71</sup>

The inequity of this state of affairs is palpable. On one view, it largely boils down to the importance of the ideal of equal access to the protection of reputation for all to the extent provided by the law. It should not matter whether the reputation is that of an ordinary person or a celebrity. Reputation is important to an ordinary person even if it cannot be monetised in large amounts and its vindication should not depend on the size of the plaintiff’s bank account. As Justice Steven Rares observed, ‘[i]f the common law right of access to justice is to have meaning, it cannot be turned into a privilege, based on financial or other selective criteria’.<sup>72</sup> On another view, however, it can be argued that there should be equal access to the protection of free speech, to the extent provided by the law. And it should not matter whether the speaker is an ordinary person or a mass media organisation. Free speech is important to an ordinary person and its exercise should not depend on the size of the speaker’s bank account.

This inequity has wider repercussions for the administration of justice in two main ways. First, it can undermine public confidence for, as explained by the ACT Law Reform Commission, ‘[where] justice is in practice denied to those wishing to pursue or defend small claims, the whole of the law itself and its administration tends to fall into public disrepute’.<sup>73</sup> It is not immediately apparent why small defamation claims should not be included in this sentiment. Second, there is arguably an additional cost factor (in terms of court resources and delays) for the administration of justice associated with determining small defamation claims in the *ordinary courts* without the assistance of legal representation. This burden may also compromise the access to justice of other litigants in those courts.<sup>74</sup>

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68 Chief Justice Wayne Martin, ‘Access to Justice’ (2014) 16 *University of Notre Dame Australia Law Review* 1, 3. See also Australian Government Productivity Commission, ‘Access to Justice Arrangements’ (Inquiry Report No 72, 5 September 2014) vol 2, 719 (*‘Report No 72(2)’*) and the means test for legal aid applied in the states and territories as surveyed in Australian Government Productivity Commission, ‘Access to Justice Arrangements: Appendices B to K’ (Inquiry Report No 72, 5 September 2014) app H, 1013–17.

69 See, eg, *Report No 72(2)*, above n 68, 640–2; Martin, above n 68, 3.

70 See, eg, court referrals to Pro Bono Panels provided for by *Uniform Civil Procedure Rules 2005* (NSW) pt 7 div 9.

71 *Report No 72(1)*, above n 27, 123–4; Law Reform Commission of the Australian Capital Territory, *Report on the Civil Procedure of the Court of Petty Sessions* (1972) 2.

72 Justice Steven Rares, ‘Is Access to Justice a Right or a Service?’ (2015) 89 *Australian Law Journal* 777, 782.

73 Law Reform Commission of the Australian Capital Territory, above n 71, 2.

74 *Report No 72(1)*, above n 27, 498–502 regarding the general ramifications of self-representation for the administration of justice in Australia.

Further, this inequity may distort the reputation/free-speech balance inherent in defamation law<sup>75</sup> to the extent that the full realisation of the balancing effects of its legal components may be inhibited by practical constraints. Moreover, to the extent that practical considerations exclude ordinary persons from pursuing or defending a defamation claim, this balance may be limited in its reach on what might be perceived as elitist or discriminatory grounds.

This limitation may in turn disrupt the capacity of defamation law to deter defamatory expression. The ‘deterrence’ role of tort law generally,<sup>76</sup> and defamation law in particular,<sup>77</sup> is well-recognised. If a class of defamation claims is not being pursued or not being pursued as effectively as it might be because of extra-legal factors, then the law’s capacity to modify related ‘hurtful and ill-considered defamatory’<sup>78</sup> speech will be compromised to that extent. There may be little else to constrain the proliferation of small-claim-defamatory speech about ordinary people apart from good manners and courtesy. Equally, also, there may be little else to relieve ‘the chilling effect’ on ordinary people speaking freely arising from the prospect of small-claim-defamatory speech being litigated before the ordinary courts,<sup>79</sup> apart from some hoped-for resilience and/or restraint on the part of the targets of such speech. These scenarios pose significant ramifications for the wider community, especially considering the weakness and unreliability of these fallback behaviours.

### III SNAPSHOTS OF SMALL CLAIMS JURISDICTIONS

#### A In General

Small claims jurisdictions have been recently and succinctly described as ‘a participatory based low-cost, less formal, less adversarial and more accessible dispute resolution mechanism’.<sup>80</sup> They developed in response to the limitations of ordinary courts, operating under the traditional adversarial model, to resolve small claims.<sup>81</sup> To call in aid a popular metaphor used in the discourse, ‘Rolls Royce solutions [at Rolls Royce prices] are inappropriate in dealing with everyday disputes involving small sums of money’.<sup>82</sup> A more cost-proportionate procedure in the form of small claims jurisdictions was seen as one way to

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75 *Lange* (1997) 189 CLR 520, 568 (The Court).

76 See, eg, Prue Vines, ‘Introduction’ in Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Thomson Reuters, 10<sup>th</sup> ed, 2011) 3, 10; Lord David Neuberger, ‘Some Thoughts on Principles Governing the Law of Torts’ (2016) 23 *Torts Law Journal* 89, 91.

77 See, eg, *Rogers* (2003) 216 CLR 327, 370 [141] (Callinan J); *The Gleaner Co Ltd v Abrahams* [2004] 1 AC 628, 643, 646 (Lord Hoffmann).

78 *Rogers* (2003) 216 CLR 327, 370 [141] (Callinan J).

79 See generally *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 131 (Mason CJ, Toohey and Gaudron JJ); Eric Barendt et al, *Libel and the Media: The Chilling Effect* (Oxford University Press, 1997) 189–94.

80 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 December 2015, 7618 (John Elferink, Attorney-General and Minister for Justice).

81 Clark, above n 14, 3–9 [2.2].

82 Baldwin, *Small Claims*, above n 14, 4.

overcome this barrier. It has developed into a regular and ‘very popular’ feature of the administration of justice in many places.<sup>83</sup>

However, there is no commonly accepted prescription of small claims jurisdictions. Their contours vary from place to place, reflecting local ‘historical, political, social and economic’ differences.<sup>84</sup> This variation finds expression in the type and range of claims that are allocated to such jurisdictions which, in turn, accounts for the different roles they have been identified with over the years. These include ‘the “People’s Court”’, ‘a debt collection agency’ and, interestingly, ‘a vehicle for social change’.<sup>85</sup> In Australia, local differences also appear to sound in the decision whether to situate such jurisdictions in a court or a tribunal or both.<sup>86</sup>

Notwithstanding their local variation, however, it is useful for present purposes to identify key small-claims-sensitive features and to highlight some of their common settings:<sup>87</sup>

1. *Jurisdictional parameters*: In addition to a low financial ceiling, the subject matter is restricted to certain type(s) that are perceived to be ‘relatively straightforward’ or of an ‘everyday’ nature.
2. *Procedure*: Generally, it is ‘more informal’ and ‘more relaxed’ than that operating in the ordinary courts. With particular regard to:
  - a. *Rules of evidence*: These are dispensed with and the tribunal can decide how it will inform itself about matters.
  - b. *Appeal rights*: These are non-existent or significantly circumscribed.
3. *Role of the decision-maker*: This is more ‘active’, ‘interventionist’ or ‘inquisitorial’ than that traditionally afforded by the adversarial model.
4. *Legal representation*: This is prohibited or limited or disincentivised by restrictions imposed on the recovery of legal costs.
5. *Costs*: Generally, each party is to bear their own costs (known as the “no costs” rule).

The essence of these features may be distilled down to one overarching feature, the goal of which is to enable parties to proceed in person with a view to reducing costs and enhancing their access to justice.<sup>88</sup>

83 Baldwin, ‘Is There a Limit’, above n 14, 317, 319; Crawford and Opeskin, above n 15, 267.

84 Clark, above n 14, 3 [2.2].

85 Shelley McGill, ‘Small Claims Court: A Vehicle for Social Change and the Case for Equitable Relief’ (2017) 26 *Journal of Law and Social Policy* 90, 90–1, with particular reference to the Ontario Small Claims Court.

86 For the pros and cons of using courts or tribunals to deal with small claims, see Clark, above n 14, 24–7 [2.3.7].

87 These aspects have been gleaned from the following works: John Baldwin, ‘Is There a Limit’, above n 14, 315–19; Crawford and Opeskin, above n 15, 260, 262–4, 266–7; McGill, ‘A Vehicle for Social Change’, above n 85, 94, 107.

88 Baldwin, *Small Claims*, above n 14, 3–4; Baldwin, ‘Is There a Limit’, above n 14, 318.

However, a ‘modified’<sup>89</sup> procedure does not mean that modified law will be applied. In the absence of ‘clear words’ to the contrary, small claims jurisdictions can be expected to apply the ordinary law to determine claims, lest they be exposed to an accusation of dispensing ‘palm tree justice’<sup>90</sup> and consequent risk of diminution in the eyes of the community. Adherence to the rule of law also requires the opportunity for parties to be cognisant of the rules governing their relations.<sup>91</sup>

While it is usually the benefits accruing to small claimants that are emphasised, it is important to note that they are not the only beneficiaries of or ‘stakeholders’ relevant to small claims jurisdictions.<sup>92</sup> Defendants in small claims clearly also stand to benefit from a cost-proportionate procedure. Ordinary courts can look forward to some workload relief and resource savings. These may translate into reduced delays and other benefits for litigants in those courts. Finally, the administration of justice may gain generally from the opportunity to enhance public confidence in its operation in two ways. One is by seeming to be responsive to perceived deficiencies and thus avoiding the potentially negative public perception referred to earlier.<sup>93</sup> The second is by facilitating the formation of positive community views through the provision of a measure that affords frequent public interface with the civil justice system.<sup>94</sup>

However, small claims jurisdictions are not without their challenges. The main challenge is to deliver on their promise of providing greater access to justice in practice. Two major concerns permeate the literature. One is their vulnerability to being hijacked by persons or bodies other than their intended beneficiaries, effectively ‘chilling’ out these persons from the jurisdiction.<sup>95</sup> An oft-cited example is businesses pursuing debts against individuals.<sup>96</sup> Another and more problematic concern relates to the capacity of self-represented parties to present or defend a claim according to law.<sup>97</sup> Much ink has been spilt considering their ‘plight’ generally in ordinary litigation,<sup>98</sup> a prospect that ‘is not to be underestimated’.<sup>99</sup> The critical question is how will these concerns play out in the defamation context and, in particular, whether and, if so, to what extent, they

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89 Baldwin, ‘Is There a Limit’, above n 14, 317.

90 *Christ Church Grammar School v Bosnich & Sehr* (2010) 34 VAR 23, 28 [24]–[25] (Sifris J), referring to *R v Small Claims Tribunal & Syme; Ex parte Barwiner Nominees Pty Ltd* [1975] VR 831, 835–6 (Gowans J) and *Walsh v Palladium Car Park Pty Ltd* [1975] VR 949, 955 (Gowans, Menhennitt and Dunn JJ). See also *State Rail Authority of New South Wales v Consumer Claims Tribunal* (1988) 14 NSWLR 473, 477 (Hope JA, with Samuels and Clarke JJA agreeing).

91 Crawford and Opekin, above n 15, 266.

92 Shelley McGill, ‘Small Claims Court Identity Crisis: A Review of Recent Reform Measures’ (2010) 49 *Canadian Business Law Journal* 213, 250.

93 See above n 73 and the passage quoted in the accompanying text.

94 McGill, ‘Small Claims Court Identity Crisis’, above n 92, 221. Of course, this assumes that the small claims jurisdiction is working well.

95 Clark, above n 14, 36 [2.3.12]; Baldwin, ‘Is There a Limit’, above n 14, 335–6.

96 Clark, above n 14, 36 [2.3.12].

97 Baldwin, ‘Is There a Limit’, above n 14, 331–2.

98 For an example of a whole conference devoted to the issue, see ‘Assisting Unrepresented Litigants: A Challenge for Courts and Tribunals’ (Australasian Institute of Judicial Administration, Sydney, 15–17 April 2014); (2014) 24(1) *Journal of Judicial Administration*.

99 *Zoltaszek v Downer EDI Engineering Pty Ltd* [2011] FCA 744, [31] (Flick J).

may be heightened in that context. The difficulty is that at best only a partial answer can be attempted at this stage in the absence of relevant data.

## B In the Australian States and Territories

Small claims jurisdictions operate in the six Australian states and two territories. As might be expected in a federation, however, there is marked variation in their arrangements, starting with nomenclature.<sup>100</sup> The jurisdictions are variously known as ‘small claim(s)’,<sup>101</sup> ‘minor civil actions’,<sup>102</sup> ‘minor civil dispute’,<sup>103</sup> ‘minor civil claim’,<sup>104</sup> ‘minor cases’ and ‘minor proceeding’,<sup>105</sup> and, even more generically, ‘civil dispute applications’<sup>106</sup> and ‘consumer claims’.<sup>107</sup> Further, they could be located in a court,<sup>108</sup> or in a tribunal,<sup>109</sup> and, within a particular state or territory, there could be one,<sup>110</sup> or more than one<sup>111</sup> such jurisdiction. Their monetary ceilings also vary significantly, currently from \$5000<sup>112</sup> to \$40 000,<sup>113</sup> with most set at \$10 000<sup>114</sup> or \$25 000.<sup>115</sup> However, it is difficult to compare these dollar amounts in isolation from other aspects of the respective jurisdictions such as subject matter. While there may be some commonality, the subject matter of these jurisdictions is not uniform. An important difference concerns the admission of defamation claims.

100 For convenience, this article will use ‘small claims’ unless otherwise indicated.

101 In NSW: *Local Court Act 2007* (NSW); in the Northern Territory: *Small Claims Act 2016* (NT); in Victoria: *Magistrates’ Court Act 1989* (Vic), *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 4C (*VCAT Act*) and *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 183.

102 In South Australia: *Magistrates Court Act 1991* (SA) (*SAMC Act*), which includes a ‘small claim’ and ‘a minor statutory proceeding’: at ss 3(2)(a), (c).

103 In Queensland: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (*QCAT Act*).

104 In Tasmania: *Magistrates Court (Civil Division) Act 1992* (Tas).

105 In Western Australia: *Magistrates Court (Civil Proceedings) Act 2004* (WA) and *State Administrative Tribunal Act 2004* (WA) respectively.

106 In the ACT: *ACT Civil and Administrative Tribunal Act 2008* (ACT) (*ACAT Act*).

107 Note, however, that the jurisdiction exercised by the NSW Civil and Administrative Tribunal (*NCAT*) over ‘consumer claims’ is financially capped by the *Fair Trading Act 1987* (NSW) ss 79S(1), (7) at \$40 000 which is significantly higher than other Australian small claims ceilings.

108 For example, NSW Local Court; SAMC (Civil (Minor Claims) Division and Civil (Consumer and Business) Division); Tasmanian Magistrates Court (Civil Division).

109 For example, Northern Territory Civil and Administrative Tribunal (*NTCAT*); Queensland Civil and Administrative Tribunal (*QCAT*); WA State Administrative Tribunal.

110 For example, in ACT: ACAT.

111 For example, in Victoria: Victorian Magistrates’ Court, Victorian Civil and Administrative Tribunal (*VCAT*).

112 *Magistrates Court (Civil Division) Act 1992* (Tas) s 3 (definition of ‘minor civil claim’).

113 *Fair Trading Act 1987* (NSW) ss 79S(1), (7).

114 *Local Court Act 2007* (NSW) s 29(1)(b); *Magistrates’ Court Act 1989* (Vic) s 102(1); *VCAT Act* sch 1 cl 4C; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 183; *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 3(1) (definition of ‘minor cases jurisdictional limit’). The VCAT’s small claims monetary ceiling is set to increase from \$10 000 to \$15 000 by 1 July 2019: *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) ss 2(1)–(3), 3.

115 *ACAT Act* s 18; *Small Claims Act 2016* (NT) s 5; *QCAT Act* sch 3 (definition of ‘prescribed amount’).

### C Of Australian Small Defamation Claims Jurisdiction Coverage

Defamation claims have been admitted to some Australian small claims jurisdictions but mapping the coverage is challenging largely because the legislation conferring these jurisdictions may not make clear and explicit reference to defamation claims, either to include or exclude them. Consequently, their status becomes a matter of statutory interpretation which necessarily carries an element of uncertainty until it is authoritatively determined.

Defamation actions have been specifically excluded from the small claims jurisdictions of the NSW Local Court<sup>116</sup> and the WA Magistrates Court<sup>117</sup> and there does not appear to be a gateway for such actions to the small claims jurisdictions of the NTCAT,<sup>118</sup> QCAT,<sup>119</sup> or VCAT.<sup>120</sup> The prescription of the subject matter qualifying for the small claims jurisdiction of the ACAT, however, includes ‘a damages application’,<sup>121</sup> which is defined as ‘an application for damages for negligence *or for any other tort* except nuisance or trespass’.<sup>122</sup> As the action for defamation is a recognised tort, there seems little doubt that it comes within this definition and an example of a defamation claim before the ACAT is discussed in Part IV(B) below. The subject matter of a ‘small claim’ in the SAMC is defined as ‘a monetary claim’,<sup>123</sup> which also seems broad enough to include defamation claims and there is authority to this effect.<sup>124</sup> Further, it is arguable that defamation actions qualify as ‘a claim or counterclaim *for damages*, or for the payment of money’ in the small claims jurisdiction of the Tasmanian Magistrates Court.<sup>125</sup> It is also arguable that a defamation claim could qualify as a ‘cause of action *for damages*’,<sup>126</sup> that has not been excluded by the regulations,<sup>127</sup> for the purposes of admission into the small claims jurisdiction of the Victorian Magistrates’ Court. However, there are several grounds upon which

116 *Local Court Act 2007* (NSW) s 33(1)(b).

117 *Magistrates Court (Civil Proceedings) Act 2004* (WA) ss 6(5)(c), 26.

118 *Small Claims Act 2016* (NT) s 6; see also Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 December 2015, 7618–19 (John Elferink, Attorney-General and Minister for Justice).

119 *QCAT Act* sch 3 (definition of ‘minor civil dispute’), noting that defamation claims do not constitute ‘a claim to recover a debt or liquidated demand of money’ for the purpose of para (1)(a) of that definition; see also *QCAT Act* s 12(4). See also *More atf Cleopatra Skin Discretionary Trust v Ford* [2018] QCAT 19, [23]–[24] (Adjudicator Alan Walsh).

120 *VCAT Act* sch 1 cl 4C; *Australian Consumer Law and Fair Trading Act 2012* (Vic) ch 7. See also *Vakras v Redleg Museum Services Pty Ltd (Civil Claims)* [2012] VCAT 579, [29] (Bowman J); *Nektaria Pty Ltd v Dimitrijeviski (Civil Claims)* [2018] VCAT 97, [74] (Lulham DP).

121 *ACAT Act* s 16 (definition of ‘civil dispute application’ para (b)).

122 *ACAT Act* s 15 (definition of ‘damages application’) (emphasis added).

123 *SAMC Act* s 3(1) (definition of ‘small claim’).

124 *McDonagh v Cefai* [2014] SADC 83, [4] (Davison J); *Harradine v Commissioner of Police* [2016] SADC 135, [17] (Cuthbertson J).

125 *Magistrates Court (Civil Division) Act 1992* (Tas) s 3 (definition of ‘minor civil claim’ para (a)) (emphasis added), noting, however, that defamation actions have not been prescribed as a ‘minor civil claim’ under the *Magistrates Court (Civil Division) (Minor Civil Claims) Regulations 2013* (Tas) reg 3 pursuant to *Magistrates Court (Civil Division) Act 1992* (Tas) s 3 (definition of ‘minor civil claim’ para (b)).

126 *Magistrates’ Court Act 1989* (Vic) ss 100(1)(a), 102(1) (emphasis added).

127 *Magistrates’ Court Act 1989* (Vic) s 102(2)(a); *Magistrates’ Court (Arbitration) Regulations 2010* (Vic) sch 2.

the Court could order the exclusion of a particular claim including, relevantly, if it ‘involves complex questions of law or fact’,<sup>128</sup> rendering their status uncertain.

To summarise, some Australian small claims jurisdictions have admitted defamation claims but not all, or, it seems, even most. It is also interesting to note that the states and territories appear to divide *roughly* along the familiar big/small state/territory line in terms of population.<sup>129</sup> However, it is not clear what conclusions may be drawn from this observation. While any adverse effects of extending small-claims-jurisdiction coverage to defamation claims are likely to be magnified the greater the population size, presumably so, too, will the benefits of such a move.

#### IV AUSTRALIAN DEFAMATION-INCLUSIVE SMALL CLAIMS JURISDICTIONS IN ACTION

Further insight into the operation of small claims jurisdictions and their amenability to defamation claims may be gleaned from examining two existing defamation-inclusive jurisdictions in action. This will be approached in two ways. First, by profiling the jurisdictions exercised by the SAMC and ACAT and then comparing their profiles across key small-claims-sensitive features. The selection of a state court and a territory tribunal maximises the insights afforded by this exercise. It will be shown that both jurisdictions have departed in significant ways from the traditional small claims model outlined in Part III(A) above. The question is whether these recalibrations are capable of enhancing the defamation-amenability of these jurisdictions. Attention will then turn to an analysis of the proceedings relating to the *Bottrill v Cristian* defamation claim which commenced in the ACAT. The availability of judgments or reasons for decisions given in small claims jurisdictions generally, let alone in relation to small defamation claims specifically, is limited. So, these proceedings provide a valuable opportunity to study the jurisdiction in action. Significantly for present purposes, the claim in question also concerned online publication.

##### A Comparative Profiling of the Small Claims Jurisdictions Exercised by the SAMC and the ACAT

The SAMC exercises jurisdiction over ‘minor civil actions’ pursuant to the *SAMC Act*,<sup>130</sup> which commenced operation in 1992.<sup>131</sup> The Court generally

128 *Magistrates’ Court Act 1989* (Vic) s 102(3)(c). See also ss 102(3)(e)–(f).

129 Based on Australian Bureau of Statistics data: Australian Bureau of Statistics, *3101.0 – Australian Demographic Statistics, Mar 2018* (20 September 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>>.

130 See *SAMC Act* s 8(1)(d).

131 Prior to that and since 1974, the South Australian ‘small claims’ jurisdiction had been exercised by the former South Australian Local Court: *Harradine v District Court of South Australia* [2012] SASC 96, [42]–[43] (Blue J) (*‘Harradine’*), referring to the *Local and District Criminal Courts Act 1926* (SA).

exercises that jurisdiction in its Civil (Minor Claims) Division,<sup>132</sup> although some cases may be heard in its Civil (Consumer and Business) Division.<sup>133</sup> The monetary ceiling of this jurisdiction is \$12 000,<sup>134</sup> which was dropped from \$25 000 in 2016.<sup>135</sup> The subject matter of a ‘minor civil action’ is defined in broad terms,<sup>136</sup> which, for reasons set out in Part III(C), is capable of embracing defamation claims.

The ACAT was established in 2009 by the *ACAT Act* to consolidate ‘most’ ACT tribunals and quasi-tribunals as well as the jurisdiction of the ACT Small Claims Court into a single tribunal,<sup>137</sup> following the establishment of amalgamated tribunals in several other Australian jurisdictions.<sup>138</sup> The consolidation of the small claims jurisdiction in the ACAT<sup>139</sup> was specifically promoted as providing a ‘better fit’ for small claims having regard to their ‘different’ procedure and due priority as well as the opportunity for ‘one-stop shop[ping]’ in certain situations.<sup>140</sup> The monetary ceiling of the ACAT small claims jurisdiction is \$25 000,<sup>141</sup> which was increased from \$10 000 in 2016.<sup>142</sup> The definition of ‘civil dispute application’<sup>143</sup> is also quite wide and, again as explained in Part III(C), offers a gateway for defamation claims.

Both jurisdictions are constructed as last resort measures in that provision is made in their governing legislation for other dispute resolution measures to be pursued before determination in the small claims jurisdiction, although the redirection provided is arguably stronger for claims commenced in the SAMC than in the ACAT.<sup>144</sup>

Although the position is not completely free from doubt, both jurisdictions can be expected to apply the ordinary law when determining small claims. The meaning of the direction to the SAMC, to ‘act according to equity, good conscience and the substantial merits of the case without regard to technicalities

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132 *SAMC Act* pt 5 div 2.

133 *SAMC Act* s 10A.

134 *SAMC Act* s 3(1) (definitions of ‘minor statutory proceeding’, ‘small claim’); see s 3(4).

135 *Magistrates Court (Monetary Limits) Amendment Act 2016* (SA) s 4, amending *SAMC Act* s 3(1) (definitions of ‘minor statutory proceeding’, ‘small claim’), s 3(4) (effective from 1 August 2016).

136 *SAMC Act* ss 3(1) (definitions of ‘minor civil action’, ‘minor statutory proceeding’), 3(2), but see also ss 3(3)–(4).

137 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 8 May 2008, 1575–7 (Simon Corbell, Attorney-General and Minister for Police and Emergency Services). This reform was preceded by the ACT Department of Justice & Community Safety, ‘Options for Reform of the Structure of ACT Tribunals’ (Discussion Paper, September 2007).

138 Justice John Chaney, ‘Australian Super-Tribunals – Similarities and Differences’ (Paper presented at Best Practice in Tribunals: A Model for South Australia, Law Society of South Australia, 14 June 2013) 1.

139 See *ACAT Act* pt 4.

140 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 8 May 2008, 1576 (Simon Corbell, Attorney-General and Minister for Police and Emergency Services). Note that ACAT exercises its small claims jurisdiction exclusively of the ACT Magistrates Court: *Magistrates Court Act 1930* (ACT) s 266A(1) (*‘ACTMC Act’*).

141 *ACAT Act* s 18(2). Provision is made for increasing this ceiling: at ss 20–1.

142 *ACT Civil and Administrative Tribunal Amendment Act 2016* (No 2) (ACT) ss 2(2), 4 (effective from 15 December 2016).

143 See *ACAT Act* s 16.

144 Compare *SAMC Act* s 38(2) with *ACAT Act* s 35.

and legal forms',<sup>145</sup> has long taxed the courts.<sup>146</sup> Nevertheless, it has been held that it depends on the statutory context in which it appears,<sup>147</sup> and there is South Australian authority to the effect that the South Australian provision in question 'relate[s] almost entirely to things procedural and things said and done at trial'.<sup>148</sup> The ACAT is not expressly directed to act in accordance with the above direction or in any other way contrary to the general obligation to apply the ordinary law. Further, there are provisions in its governing legislation that are supportive of this obligation.<sup>149</sup>

Apart from their location in different institutions, another major difference relates to their monetary ceilings. The ACAT's ceiling is much higher than the SAMC's ceiling, although it is interesting to note that until recently their relative positions in this regard were reversed.

The main reason for increasing the ACAT's ceiling was couched in terms of 'increas[ing] access to justice for the ACT community',<sup>150</sup> given that the \$10 000 ceiling was effectively some two decades old (if account is taken of its life in the time of the ACAT's predecessor, the ACT Small Claims Court).<sup>151</sup> It was observed during the parliamentary debates that, '[m]erely applying CPI to this figure would increase the figure to \$20 000 in 2016'.<sup>152</sup> The ACT Government Discussion Paper that preceded this change cited further reasons including alignment with other Australian small claims jurisdictions and alleviating the workload of the ACT Magistrates Court.<sup>153</sup>

The purpose of decreasing the SAMC ceiling was 'to reduce court delays by decreasing the number and complexity of small claim lodgements'.<sup>154</sup> The change was precipitated by the statutory review of the increase of the ceiling

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145 *SAMC Act* s 38(1)(f).

146 *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26, 29 (Gleeson CJ and Handley JA); *Seers v Exhibition Centre Pty Ltd* (2009) 232 FLR 415, 434–6 (Refshauge J).

147 *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26, 30 (Gleeson CJ and Handley JA).

148 *Ghassemi-Far v Geo Kennedy Pty Ltd* [1999] SADC 94, [28] (Burnett J). It has also been held that the employment of this formula did not disoblige the ACT Magistrates Court of having to apply ordinary law when arbitrating matters pursuant to the *Workers Compensation Act 1951* (ACT): *Seers v Exhibition Centre Pty Ltd* (2009) 232 FLR 415, 435–9 (Refshauge J), referring to the *Workers Compensation Regulation 2002* (ACT) reg 56(5).

149 See, eg, the provisions for appeals on questions of law as well as referrals of law: *ACAT Act* ss 77(3), 79(3), 84(1), 86(1). See also the direction that the ACAT enjoys 'the same jurisdiction and powers as the Magistrates Court [in its civil jurisdiction]': at s 22(1) referring to *ACTMC Act* pt 4.2; but also note s 22(2).

150 Explanatory Statement, ACT Civil and Administrative Tribunal Amendment Bill 2016 (No 2) (ACT) 1.

151 South Australia, *Parliamentary Debates*, Legislative Assembly, 7 June 2016, 1726 (Shane Rattenbury).

152 Ibid.

153 ACT Justice and Community Safety Directorate, 'Reform to the Jurisdiction and Structure of the ACT Civil and Administrative Tribunal' (Discussion Paper, January 2016) 8–9.

154 South Australia, *Parliamentary Debates*, House of Assembly, 13 April 2016, 5136 (John Rau, Attorney-General and Minister for Justice Reform). Again, alignment with other Australian small claims jurisdictions was seen as desirable, although the snapshot taken preceded some changes to other ceilings and notably that of the ACAT.

from \$6000 to \$25 000 in 2013.<sup>155</sup> One of the recommendations emanating from the report that informed that review was '[to consider] excluding certain claim types that would benefit from legal representation in court' and defamation was specifically mentioned as an example.<sup>156</sup> However, this recommendation was not implemented.

The monetary ceiling is pivotal to the operation of small claims jurisdictions. The level at which it is set regulates the number of small claims entering the jurisdiction. The higher this level is pitched, the greater the number of claims that might be expected. However, this number will be moderated and to that extent the monetary ceiling will be informed by the size of the population the jurisdiction serves. The same ceiling may allow different numbers of claims to enter jurisdictions depending on their population size. Conversely, different ceilings could allow for roughly equal numbers of claims to enter jurisdictions depending on their population size. It might be noted here that the population of South Australia is more than four times larger than that of the ACT.<sup>157</sup> It is conceivable that the marked variance between the ACAT's and SAMC's ceilings may not necessarily translate to such a marked variance between their numbers of small claims. However, financial ceilings are not simply a function of population size but more likely a complex matrix of factors of which population size is an important but only one factor. Other factors are likely to include economic factors as well as nebulous political factors such as commitment to the underlying philosophy of access to justice.

The 'modified',<sup>158</sup> procedures applied by each jurisdiction are similar in many respects. Importantly, both jurisdictions operate along inquisitorial lines,<sup>159</sup> can dispense with the usual rules of evidence,<sup>160</sup> constitute 'no-costs jurisdiction[s]',<sup>161</sup> subject to some exceptions,<sup>162</sup> and make provision for appeals.<sup>163</sup>

But there are some notable differences which may speak, to a greater or lesser degree, to inherent differences between a court and a tribunal. First, the arrangements for appealing SAMC decisions are different to and overall appear to be more limited than those for appealing ACAT decisions. ACAT decisions

155 Ibid 5135–6. See *Statutes Amendment (Courts Efficiency Reforms) Act 2012* (SA) ss 23(2)–(3); see also s 28(1); Attorney-General John Rau, 'Report Required under Section 28 of the *Statutes Amendment (Courts Efficiency Reforms) Act 2012*' (Report, South Australian House of Assembly, 3 December 2015).

156 As reported in Rau, above n 155, 7.

157 Based on Australian Bureau of Statistics data: Australian Bureau of Statistics, above n 129.

158 Baldwin, 'Is There a Limit', above n 14, 317.

159 This is arguably made more explicit for the SAMC, by the *SAMC Act* s 38(1)(a) ('inquiry by the Court') as supported by ss 38(1)(b)–(e) and see *Harradine* [2012] SASC 96, [46]–[49] (Blue J), than for the ACAT, by the *ACAT Act* ss 23, 26 as supported by ss 6(b)–(c), 7(a). For a brief description of the workings of the 'inquisitorial model' compared with the 'adversarial model', see *Harradine* [2012] SASC 96, [47] (Blue J).

160 *SAMC Act* s 38(e); *ACAT Act* s 8.

161 See, eg, Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 7 June 2016, 1725 (Jeremy Hanson).

162 *SAMC Act* s 38(5); *ACAT Act* s 48.

163 *SAMC Act* ss 38(6)–(9); *ACAT Act* ss 79–82, 85–6.

may be appealed on questions of law and fact ‘within tribunal’,<sup>164</sup> where they may be dealt with ‘(a) as a new application; or (b) as a review of all or part of the original decision’.<sup>165</sup> A further appeal is provided to the ACT Supreme Court with leave of that court.<sup>166</sup> By contrast, provision is made for ‘review’ of SAMC decisions by the District Court of South Australia,<sup>167</sup> which differs from an appeal in the strict sense.<sup>168</sup> Also the SA District Court is directed to apply a ‘modified’<sup>169</sup> procedure when conducting ‘a review’, which has elements in common with the original SAMC procedure,<sup>170</sup> except that it is to be conducted ‘in an *adversarial* context’.<sup>171</sup> Further, the SA District Court’s decision has been made ‘final and not subject to appeal’,<sup>172</sup> although it may still be subject to judicial review by the SA Supreme Court.<sup>173</sup> These differences reflect the variation in the appeal arrangements that exists across the Australian small claims jurisdictions, especially as between the two different types of hosting institutions.<sup>174</sup> A necessary concomitant of this variation is lack of uniformity regarding the role played by higher courts in the small claims appeal process in Australia. Second, whereas the ACAT may refer a question of law to the ACT Supreme Court that ‘raises an issue of public importance’,<sup>175</sup> the SAMC has been expressly denied a reservation power regarding most ‘minor civil action[s]’.<sup>176</sup> Third, unlike the SAMC,<sup>177</sup> the ACAT has been given the power to order private hearings where ‘the right to a public hearing is outweighed by competing interests’.<sup>178</sup> The prescribed ‘competing interests’ could be enlivened by a defamation action, especially where it touches on privacy.<sup>179</sup>

The position regarding legal representation constitutes another potential point of difference, in that the default position for the ACAT is to allow such representation,<sup>180</sup> whereas the opposite obtains for the SAMC.<sup>181</sup> However, this

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164 *ACAT Act* ss 79, 80(3).

165 *ACAT Act* s 82.

166 *ACAT Act* ss 86(1)(a)(i), (3). Provision is also made for certain ACAT ‘original decision[s]’ to be appealed direct to the ACT Supreme Court (ie, bypassing the ACAT Appeal Tribunal) with leave: see, eg, ss 86(1)(a)(ii)–(iii), (3).

167 *SAMC Act* s 38(6).

168 *Harradine* [2012] SASC 96, [53] (Blue J), setting out the relevant principles of this ‘review’.

169 Baldwin, ‘Is There a Limit’, above n 14, 317.

170 See *SAMC Act* s 38(7). ‘Clearly the same concern and intention to ensure efficient and practical justice informs the approach to the District Court review process’: *Wilczynski v District Court of South Australia* [2016] SASC 51, [48] (Doyle J) (citations omitted) (‘*Wilczynski*’).

171 *Hadeler v Antoniou and Antoniou* [2009] SADC 113, [16] (Tilmouth J) (emphasis added).

172 *SAMC Act* s 38(8).

173 *Harradine* [2012] SASC 96, [33]–[35] (Blue J); *Wilczynski* [2016] SASC 51, [49] (Doyle J). This is not a merits review, being limited instead to a consideration of procedural fairness: *Harradine* [2012] SASC 96, [35] (Blue J); *Wilczynski* [2016] SASC 51, [50]–[51] (Doyle J).

174 Crawford and Opeskin, above n 15, 266–7.

175 *ACAT Act* s 84(1).

176 *SAMC Act* s 41(1a).

177 *SAMC Act* s 18.

178 *ACAT Act* ss 38–9.

179 *ACAT Act* s 39(5)(b).

180 *ACAT Act* s 30. Cf *Civil and Administrative Tribunal Act 2013* (NSW) s 45(1)(b).

181 *SAMC Act* s 38(4)(a).

difference may not be as pronounced in practice, given the disincentivising effect of the ACAT's restriction on costs awards<sup>182</sup> and the provision of exceptions to the SAMC's bar on legal representation.<sup>183</sup> Nevertheless, in both instances these moderating effects are themselves not free of the possibility of moderation.<sup>184</sup> Another potential difference concerning enforcement has been largely foreclosed by making provision for the ACAT's orders to be enforced by an 'appropriate court' without the need for separate proceedings to be taken in that court.<sup>185</sup>

From the above analysis, three key departures from the small claims model may be discerned regarding both jurisdictions. These relate to the provision for legal representation, appeals and referrals of questions of law. Significantly for present purposes, all three features have the capacity to assist with ameliorating the adverse effects of legal and factual complexity. So, too, would having legally trained decision-makers. But, while this would ordinarily be the case for both jurisdictions, it is not necessarily a foregone conclusion.<sup>186</sup> The question, however, is whether these features come at a cost for small claims jurisdictions. The suggestion that they may emerges from an examination of the proceedings in *Bottrill v Cristian*.

## B The *Bottrill v Cristian* Proceedings

The defamation claim concerned comments, authored by various persons, about the applicant personally and in connection with a particular organisation, and posted on and hyperlinked to the respondent's website.<sup>187</sup> Over the course of a decade prior, much of this commentary had been the subject of successful claims, including for defamation, brought by the applicant or on his behalf by the organisation, against its authors, in the ACT and Victoria.<sup>188</sup> The applicant requested removal of the material from the website and a few days later lodged a 'Civil Dispute Application' against the respondent and her partner with the ACAT.<sup>189</sup> The proceedings that followed may be conveniently grouped into two sets, which are worth setting out in detail including the relevant time frames.

The first set<sup>190</sup> commenced with the lodgement of the application in May 2014. The ACAT gave judgment *ex parte* for the applicant in August 2014 and in December 2014 awarded him the maximum damages then allowable of \$10 000 plus \$130 in costs. The Tribunal also made orders regarding the removal from

182 *ACAT Act* s 48.

183 *SAMC Act* ss 38(4)(a)–(ab).

184 The ACAT's 'no-cost' rule is not without exceptions which are set out in *ACAT Act* s 48. Doubt has also been expressed regarding the frequency with which these exceptions have been triggered: John Doyle, 'Are Lawyers Part of the Solution or Part of the Problem?' (2013) 35(10) *Bulletin (Law Society of South Australia)* 18, 19.

185 *ACAT Act* ss 69A, 71.

186 *SAMC Act* ss 7A(1), (2)(c); *Acts Interpretation Act 1915* (SA) s 4(1) (definition of 'special justice'); *Justices of the Peace Act 2005* (SA) s 7(3); *Justices of the Peace Regulations 2006* (SA) regs 4–5; *ACAT Act* ss 89(2), 90(a)–(b), 94, 96; *ACT Civil and Administrative Tribunal Regulation 2009* (ACT) reg 6 (table 6, items 6–8); *ACTMC Act* s 7A.

187 *Bottrill ACAT Hearing* [2016] ACAT 7, [7]–[19], [49] (Symons P).

188 *Ibid* [9]–[16], [81]–[82] detailing proceedings before the ACAT, VCAT and ACT Small Claims Court.

189 *Ibid* [17]–[19] (Symons P).

190 The following outline is drawn from *ibid* [19]–[33] (Symons P).

the website by the respondent and her partner and restraining their publication on the respondent's<sup>191</sup> website(s) of matter defamatory of the applicant. Only the respondent appealed to the ACAT Appeal Tribunal in early 2015 but was unsuccessful because she had not complied with the ACAT's removal and restraint orders. The respondent then appealed to the ACT Supreme Court where she succeeded in July 2015 in having the Appeal Tribunal decision as well as the ACAT's orders against her set aside. The matter was sent back to the ACAT.

The second ACAT hearing occurred in October 2015 and marks the beginning of the second set of proceedings. In February 2016, the ACAT decided the claim in favour of the applicant, finding that the respondent was responsible for comments defamatory of the applicant,<sup>192</sup> and that her defences of 'honest opinion' and 'freedom of speech' were to no avail.<sup>193</sup> The Tribunal also 'found ... that there was no truth in the comments' in question.<sup>194</sup> The Tribunal ordered damages in the maximum amount then allowable of \$10 000 plus costs of \$130,<sup>195</sup> and the removal of matter defamatory of the applicant from the respondent's website(s).<sup>196</sup> The respondent then appealed to the ACAT Appeal Tribunal. The appeal was dealt with 'as a review of the original decision',<sup>197</sup> having regard to 'the lengthy history of this matter and the broad ranging and general nature of [the grounds of appeal]'.<sup>198</sup> However, in the absence of a 'relevant error' in the ACAT decision, the appeal was dismissed.<sup>199</sup> The respondent sought leave to appeal to the ACT Supreme Court, but this was refused in the absence of 'any arguable error' in the ACAT Appeal Tribunal decision.<sup>200</sup>

While it is not possible to draw firm conclusions about defamation claims in small claims jurisdictions from just one claim in one such jurisdiction, there are five main take-outs from these proceedings relevant for present purposes.

### 1 *Defamation Claims Can Succeed in Small Claims Jurisdictions*

In case of doubt, this outcome should be expressly acknowledged, as should the fact that the success of the claim under review is not an isolated occurrence.<sup>201</sup> Of course, the key questions are, *how likely* is this outcome to

191 The fourth order reported in *ibid* [26] refers to 'respondent' in the singular in this regard.

192 *Ibid* [49]–[105]. The imputations were described as 'serious': at [155].

193 *Ibid* [106]–[121].

194 *Ibid* [118]; see also [83], [94], [96].

195 *Ibid* [156], [160], [162]. The award included aggravated damages relating inter alia to the republication of defamatory matter on the respondent's website: at [148]–[151], [156].

196 *Ibid* [158], [161].

197 *Bottrill ACAT Appeal* [2016] ACAT 104, [17] (Crebbin P, Senior Member Meagher), referring to *ACAT Act* s 82 at [16]. It was designated as 'a rehearing': at [17].

198 *Ibid*.

199 *Ibid* [53]–[54].

200 *Bottrill Supreme Court Appeal* [2016] ACTSC 315, [28], [36] (Refshauge ACJ). Accordingly, the respondent's injunction application was also dismissed: at [27], [37].

201 As already noted, the applicant had succeeded in earlier defamation claims in such jurisdictions: see above n 188 and accompanying text. Subsequently, the applicant succeeded in another such claim before the ACAT, *Bottrill v Bailey (Civil Dispute)* [2018] ACAT 45, concerning 'substantially the same

occur and *how significant* is its occurrence? Answering these questions with confidence requires comprehensive data concerning the success rates of defamation claims in defamation-inclusive small claims jurisdictions and, for comparison, the success rates of small claims in small claims jurisdictions generally as well as those of defamation claims before the ordinary courts. Nevertheless, a low success rate should not of itself block the extension of the Australian small defamation claims jurisdiction coverage. Rather, it should provoke investigation into the reasons for this rate and, where necessary, consideration of ways and means to address these reasons.

## 2 *Small Claims Jurisdictions Are Not Always Synonymous with Speed and Simplicity*

This is apparent from the timeline outlined above. The time from the filing of the ‘civil dispute application’ to the second decision of the ACT Supreme Court is nearly two and a half years. Hardly a quick resolution. A significant contributing factor to the delay was the provision made for appeals, noting that there were *two sets* of appeals each involving *two levels* of appeal. Hardly a simple process. These proceedings serve as a practical reminder of ‘the tension’, identified by Crawford and Opeskin, ‘between minimising formality, expense, and delay, on the one hand, and treating small claims as a regular part of the state’s machinery of justice, on the other’.<sup>202</sup>

Looking at the time taken to resolve the matter at first instance, nearly seven months<sup>203</sup> is, again, not all that quick.<sup>204</sup> Whether it is representative of timeliness in the ACAT or indeed other Australian small claims jurisdictions, for defamation or claims generally, cannot be determined without comprehensive data regarding claims in these jurisdictions. Nevertheless, it does bring to the fore the critical question of how quick should quick be for the purpose of dealing with defamation claims in small claims jurisdictions? Further, what criteria should inform the formulation of a viable benchmark?

## 3 *Small Claims Jurisdictions May Attract ‘Large(r)’ Claims*

Although damages were not actually calculated in full, it seems that they would ‘probabl[y]’ have exceeded the ACAT’s jurisdictional limit.<sup>205</sup> This is not surprising given the ‘serious imputations’ involved, the potentially wide publication due to the popularity of the website and the presence of aggravating

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defamatory material’: at [253]–[254] (Senior Member Donohoe). In that case, damages of \$18 750 (including aggravated damages and interest) plus costs of \$130 were awarded and orders made for the removal of the Facebook matter in question and an apology: at [268]–[270]. The maximum damages then allowable were reduced by 25 per cent on account of the applicant’s previous damages awards: at [260]–[265].

202 Crawford and Opeskin, above n 15, 267.

203 This was the time from the filing of the ‘civil dispute application’ to the first ACAT decision. It was also the time from the remittal by the ACT Supreme Court to the second ACAT decision.

204 The time taken in *Martin v Trinh (Civil Dispute)* [2016] ACAT 47 (application dismissed) and *Bottrill v Bailey (Civil Dispute)* [2018] ACAT 45 (application succeeded) was roughly six months.

205 *Bottrill ACAT Appeal* [2016] ACAT 104, [15], [48] (Crebbin P, Senior Member Meagher); *Bottrill ACAT Hearing* [2016] ACAT 7, [160] (Symons P).

factors.<sup>206</sup> The possibility of applicants pursuing claims worth more than the financial ceiling appears to have been contemplated by the governing legislation in its provision for ‘abandon[ing] the excess’.<sup>207</sup>

There are good reasons why an applicant may be prepared to effectively downsize his or her claim so as to proceed in a small claims jurisdiction. The prospect of an informal, quick and cheap process resulting in not insignificant damages is attractive, and there is still the vindication that attends ‘a favourable judgment’.<sup>208</sup> Further, the nature of online defamation may prioritise its timely removal and restraint and, understandably, opportunities for realising these outcomes quickly and cheaply compared with litigating the matter before the ordinary courts.<sup>209</sup>

However, the question is whether small claims jurisdictions can work quickly enough to issue orders for the timely removal of online defamatory material. The seven months taken in *Bottrill* to a first instance decision, much less the two and a half years taken to final resolution, is an extremely long time for material to be available in the online world. Nevertheless, failure to deliver a timely process for this specific purpose, even if shown to be representative beyond this particular instance, is not a reason for denying defamation claims admission to small claims jurisdictions. Rather, it underscores the need to either streamline the small claims procedure or develop other processes better suited to this purpose that may operate alongside and complement this measure.

More problematic, perhaps, are the adverse consequences that may flow from notionally lifting the financial ceiling. In addition to the resource implications of allowing more claims into the jurisdiction, the admission of larger claims may compromise certain policy considerations underpinning this measure that are based on the low monetary value of claims. Nevertheless, there should be some offset for the potential to avoid deploying practical accommodations supporting the strict imposition of a financial ceiling that may be counterproductive to seeking relief in a small claims jurisdiction.<sup>210</sup>

#### 4 Claims Heard in Small Claims Jurisdictions Can Raise ‘Big’ Issues

The claim under review illustrates the multidimensional nature of the complexity that may attend defamation claims. One issue concerned the

206 See *Bottrill ACAT Hearing* [2016] ACAT 7, [151]–[156] (Symons P).

207 *ACAT Act* s 20(2).

208 *Farrow v Nationwide News Pty Ltd* (2017) 95 NSWLR 612, 613 [5] (Basten JA).

209 The potential ‘futility’ of such orders concerning online material generally, however, has not escaped judicial attention. In *Jones v Toben* (2002) 71 ALD 629, Branson J highlighted the capacity to ‘prompt others, for whatever motive, to publish that material on the world wide web or elsewhere’: at 655 [110]. Nevertheless, the grant of ‘worldwide’ injunctions against a social media platform is not without precedent in Australia: see *X v Twitter, Inc* (2017) 95 NSWLR 301; see especially Pembroke J’s reasoning at 310–11 [38]–[43] (regarding Twitter).

210 For example, requiring a court or tribunal to conduct a preliminary assessment of the monetary value of a claim to determine whether it fell below the monetary ceiling would add to the costs of pursuing small claims for the administration of justice as well as the parties.

operation of the ‘honest opinion’ defence,<sup>211</sup> which, in both its common law and statutory forms,<sup>212</sup> is renowned for posing difficulty as regards the proper interpretation of its elements as well as their application.<sup>213</sup> Another issue concerned publication on the internet for the purposes of defamation law,<sup>214</sup> and specifically: (a) whether the owner of a website publishes material posted and authored by other people; and (b) whether the publisher of a hyperlink is also the publisher of the linked material.<sup>215</sup> The difficulty posed by online publication for defamation law is multifaceted in that it is not only a function of *new* technology (in the sense of being *different*) but, moreover, a function of challenging features of that technology. For lower courts and tribunals, however, *novelty* spells yet another difficulty while the application of defamation law to these challenging features awaits authoritative direction and guidance from appellate courts.

To the extent that defamation-complexity is a problem for particular claims, the question is whether and, if so, to what extent, particular features of the small claims jurisdiction can ameliorate its adverse consequences. One feature offering much potential in this regard is the interventionist role of the judge. But as this claim demonstrates, it is not a panacea for all difficulties.

### 5 *Interventionist Adjudication Is Not a Cure-All for Challenges Facing Self-Represented Parties*

The proceedings highlight that small claims jurisdictions are not without challenges for self-represented parties and provide insight into some of those challenges, notably around articulating claims including defences<sup>216</sup> and marshalling appropriate supporting evidence.<sup>217</sup> Further, challenges for the self-represented party are likely to intensify as the matter moves through appeal phases, especially around articulating grounds of appeal and identifying relevant errors in the appealed decision.<sup>218</sup>

Moreover, the proceedings highlight that while interventionist adjudication can assist with overcoming these challenges, there is a limit as to what this and, indeed, other small claims modifications can achieve for self-represented parties. Whereas, for example, the ACAT was able to ‘glean’<sup>219</sup> or ‘[interpret]’<sup>220</sup> a

211 *Bottrill ACAT Hearing* [2016] ACAT 7, [48], [113]–[118] (Symons P).

212 See, eg, *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 (‘*Manock*’) and *Defamation Act 2005* (NSW) s 31 respectively. As Kirby J observed in *Manock*, ‘[t]he defence of fair comment is extremely important to the exercise of free expression in Australia ... In effect, it allows everyone to express opinions, so long as the necessary legal preconditions are met’: at 297 [115].

213 Rolph, *Defamation Law*, above n 12, 272–3.

214 To succeed in an action for defamation, the plaintiff must show ‘publication of the defamatory matter of and concerning the plaintiff’: *Lee v Wilson* (1934) 51 CLR 276, 288 (Dixon J) (emphasis added).

215 *Bottrill ACAT Hearing* [2016] ACAT 7, [48], [52]–[57], [78]–[80], [103]–[105] (Symons P).

216 *Ibid* [106] (Symons P).

217 See, eg, *ibid* [83] (Symons P); *Bottrill ACAT Appeal* [2016] ACAT 104, [39] (Crebbin P, Senior Member Meagher).

218 *Bottrill ACAT Appeal* [2016] ACAT 104, [18]–[20] (Crebbin P, Senior Member Meagher); *Bottrill Supreme Court Appeal* [2016] ACTSC 315, [5]–[7] (Refshauge ACJ).

219 *Bottrill ACAT Appeal* [2016] ACAT 104, [51] (Crebbin P, Senior Member Meagher).

220 *Ibid* [10] (Crebbin P, Senior Member Meagher).

recognisable defamation defence where it had not been specifically asserted,<sup>221</sup> make findings regarding the non-availability of other unasserted defences,<sup>222</sup> and work with the asserted defence of ‘freedom of speech’;<sup>223</sup> it was not able to make up for lack of evidence to support assertions. The ACAT Appeal Tribunal also emphasised that dispensing with the *rules* of evidence does not mean dispensing with the *need* for evidence in the form of ““probative” or persuasive material that establishes the factual finding relied on’.<sup>224</sup>

Nevertheless, acknowledging limitations of key features of small claims jurisdictions is not to defeat the utility of this measure for defamation claims. Rather it speaks to the need to develop additional strategies to support its operation. The burgeoning work regarding the self-represented litigant generally may offer rich grounds to mine for this purpose.<sup>225</sup>

## V CONTRAINDICATIONS FOR EXTENDING THE AUSTRALIAN SMALL DEFAMATION CLAIMS JURISDICTION COVERAGE

There are several possible contraindications for extending the Australian small defamation claims jurisdiction coverage to the other states and territory. While some are stronger than others, none is necessarily preclusive of taking this step, especially allowing for the provision for additional support for this measure.

### A Defamation Law Is Too Complex

The main contraindication for allowing defamation claims into small claims jurisdictions appears to be the complexity of defamation law. It was the reason given, for example, by the English Court of Appeal in *Jameel* to explain why these claims had not gained access to equivalent procedures in the United Kingdom.<sup>226</sup> It also appears to underpin the recommendation directed to removing defamation claims from the SAMC’s small claims jurisdiction referred to earlier.<sup>227</sup> It is predicated on the assumption that small claims jurisdictions apply the ordinary law which, as discussed in Part III(A), is generally the case.

221 *Bottrill ACAT Hearing* [2016] ACAT 7, [106], [113]–[118] (Symons P) (ie, the defence of honest opinion).

222 *Ibid* [120] (Symons P) (eg, the statutory triviality defence).

223 *Ibid* [106]–[112].

224 *Bottrill ACAT Appeal* [2016] ACAT 104, [39] (Crebbin P, Senior Member Meagher). See also *Martin v Trinh (Civil Dispute)* [2016] ACAT 47 (small defamation claim dismissed for want of evidence).

225 See, eg, Margaret Castles, ‘Barriers to Unbundled Legal Services in Australia: Canvassing Reforms to Better Manage Self-Represented Litigants in Courts and in Practice’ (2016) 25 *Journal of Judicial Administration* 237.

226 *Jameel* [2005] QB 946, 970 [70] (Lord Phillips).

227 See above n 156 and accompanying text.

It is easy to find acknowledgement of, if not complaints about, the complexity of Australian defamation law and procedure.<sup>228</sup> It springs from different sources and operates at different levels. At a very general level, the root cause has been attributed to ‘seeking to balance competing [private and public] interests’ and, specifically, reputation and free speech respectively.<sup>229</sup> This task is not helped by competing views and/or uncertainty regarding what qualifies for protection on both sides of the balance.<sup>230</sup> The state of the resulting law is further exacerbated by ‘historical accident, piecemeal reform and comparative neglect’.<sup>231</sup> The effects of these elements continue to plague the law notwithstanding the introduction of the NUDL scheme. While this step mostly addressed complexity arising from different laws operating within the one country, securing uniformity in the law was prioritised over remediating other sources of complexity.<sup>232</sup> The delay in launching the second ‘national reform process’<sup>233</sup> has unduly prolonged the much needed remediation.

A cumulative effect of many of these general sources is to allow a clutter of archaic rules and principles to persist, especially in the recesses left to the common law under the NUDL,<sup>234</sup> which can lead to further complications when the law is confronted with novel situations. A prime example is the disruptive impact of the old multiple publication rule in the online world. According to this rule, each publication gives rise to a new cause of action which means that limitation periods are restarted each time material is accessed.<sup>235</sup> This event can be expected to occur with very high frequency in relation to many online materials given their continuing availability and ease of access.

Complexity also sounds in the undesirable consequences of several drafting problems in the NUDL. One example that was highlighted in Part II(A)(2)

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- 228 See, eg, *Channel Seven Sydney Pty Ltd v Mahommed* [No 2] (2011) 80 NSWLR 210, 224 [74] (McClellan CJ at CL); *Bateman v Fairfax Media Publications Pty Ltd* (2013) 8 ACTLR 13, 17 [11] (Refshauge J); *Ghosh v NBN Ltd* [2014] QCA 53, [12] (Muir JA, with Holmes JA and Douglas J agreeing); *Rothe v Scott* [2015] NSWDC 105, [10] (Gibson DCJ); *Adeang v Australian Broadcasting Corporation* [No 2] [2016] FCA 1599, [17] (Rares J) (‘Adeang’); *Taylor v Hewitt* [2017] WASC 234, [1] (Le Miere J); *Bauer Media Pty Ltd v Wilson* [No 3] [2018] VSCA 164, [12] (The Court); Rolph, *Defamation Law*, above n 12, 1, 4.
- 229 *National Roads and Motorists’ Association v Whitlam* (2007) 25 ACLC 688, 698 [61] (Campbell JA, with Beazley JA and Handley AJA agreeing). See also *Adeang* [2016] FCA 1599, [17] (Rares J).
- 230 See, eg, Rolph, *Defamation Law*, above n 12, 12–13. Protection under the Australian Constitution is limited to the implied guarantee of political communication: see *Lange* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; *McCloy v State of New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328. So far, statutory bills of rights containing express free speech guarantees have only been enacted in the ACT (*Human Rights Act 2004* (ACT) s 16) and Victoria (*Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15).
- 231 Rolph, *Defamation Law*, above n 12, 4.
- 232 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 September 2005, 17 641 (Bob Debus, Attorney-General and Minister for the Environment and Minister for the Arts).
- 233 *Statutory Review*, above n 28, 2.
- 234 See above n 1.
- 235 *Duke of Brunswick v Harmer* (1849) 14 QB 185; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600–1 (Gleeson CJ, McHugh, Gummow and Hayne JJ). ‘Accessed’ in the online context requires the matter to be downloaded, ‘read and understood’: *David v Abdishou* [2012] NSWCA 109, [285] (McColl JA, with Beazley JA and Sackville AJA agreeing), clarifying *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

concerns the ambiguity of ‘harm’ for the purpose of the section 33 triviality defence and specifically whether it extends beyond reputational injury to include hurt feelings. An additional layer of complexity inheres this defence while uncertainty regarding its true scope persists. Another example that has attracted much notoriety relates to the statutory prescription of the contextual truth defence in section 26 and, in particular, the meaning and effect of ‘in addition to’ in paragraph (a).<sup>236</sup> The provision has been judicially interpreted as precluding the practice of defendants ‘pleading-back’ the plaintiff’s imputations as contextual imputations.<sup>237</sup> This outcome has been branded ‘most regrettable’ because it was ‘not ... intended’ by parliament and ‘[could] work injustice to defendants’.<sup>238</sup> Complexity inheres the defence in the aftermath of accommodation and readjustment,<sup>239</sup> amidst calls for legislative intervention.<sup>240</sup>

In the *Bottrill v Cristian* analysis in Part IV(B)(4), the common law defence of ‘fair comment’ and the section 31 ‘honest opinion’ defences were flagged as particular sources of defamation-complexity. Complexity also attends the continuation of common law defences with the statutory defences generally under the NUDL<sup>241</sup> by compounding any problems inherent in both forms.<sup>242</sup> In addition, complexity is likely to meet attempts to discern differences (if any) between companion forms of a defence and to determine the significance (if any) of any such differences.

Further, complexity begets technicality which in turn begets more complexity. Such is the story of defamation pleadings, where technicality manifests in the precision required and fuels the multitude of costly ‘interlocutory skirmishes’<sup>243</sup> that continue to afflict defamation litigation in the ordinary courts. Ipp’s oft-repeated observation more than a decade ago that

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236 *Defamation Act 2005* (NSW) s 26 provides:

It is a defence to the publication of defamatory matter if the defendant proves that:

- (a) the matter carried, *in addition to* the defamatory imputations of which the plaintiff complains, one or more other imputations (*contextual imputations*) that are substantially true, and
- (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations. (emphasis altered)

According to the Minister’s Second Reading Speech, ‘[t]he purpose of the defence is basically to prevent plaintiffs from taking relatively minor imputations out of their context within a substantially true publication’: New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 September 2005, 17 638 (Bob Debus, Attorney-General and Minister for the Environment and Minister for the Arts).

237 *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157, 177–9 (McColl JA, with Beazley and Giles JJA agreeing), affirming *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852, [28]–[56] (Simpson J).

238 *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852, [54] (Simpson J).

239 For a brief outline, see *Boikov v Network Ten Pty Ltd* [2017] NSWDC 88, [23]–[28] (Gibson DCJ).

240 See, eg, *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852, [56] (Simpson J).

241 *Defamation Act 2005* (NSW) s 24(1).

242 Rolph, *Defamation Law*, above n 12, 273 specifically referring to the common law defence of ‘fair comment’ and the s 31 ‘honest opinion’ defences.

243 *Drummoynne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135, 149 (Kirby P); *Manock* (2007) 232 CLR 245, 294–5 [105] (Kirby J).

‘[defamation pleadings] are as complex, as pedantic and as technical as anything known to Dickens’<sup>244</sup> still applies.

Finally, complexity permeates the environment of uncertainty prevailing while the operation of defamation law in the online environment continues to be authoritatively worked out by the courts. Two aspects of online publication arising in *Bottrill v Cristian* were highlighted in Part IV(B)(4). Two other aspects recently raised before Australian courts concern internet search engines and, specifically, their publisher-status vis-à-vis search results, such as ‘autocomplete predictions’, and the defamatory-meaning capacity of such results.<sup>245</sup> Although reaching the High Court of Australia,<sup>246</sup> uncertainty still largely persists around these aspects owing to the limited deliberative context afforded by the type of application framing the appeal in that case.<sup>247</sup> Indeed, features of the NUDL itself continue to come before the courts for determination.<sup>248</sup> While this type of uncertainty may not last forever, its duration is unlikely to be short-lived given its multidimensional nature, exacerbated by the time taken for judicial and/or legislative clarification.

The above list does not purport to be exhaustive of all sources of defamation-complexity but will suffice to give a sense of its nature and scale. Complexity poses a challenge for small claims jurisdictions in several ways not the least of which is the difficulty created for parties to participate effectively in the proceedings without the assistance of legal representation. Non-lawyers likely find it hard enough to navigate things legal on their own, much less the intricacies of complex law and procedure, the nature of which in the defamation context has been recognised as challenging even for lawyers and judges.<sup>249</sup> While the provision of a ‘modified’<sup>250</sup> procedure might be expected to go some way to relieving defamation-complexity, there is only so far even an ‘interventionist’

244 David Ipp, ‘Themes in the Law of Torts’ (2007) 81 *Australian Law Journal* 609, 615 (citations omitted).

245 See, eg, *Google Inc v Trkulja* (2016) 342 ALR 504, 568–93 [285]–[372], 596–9 [384]–[405] (The Court); and on appeal *Trkulja v Google LLC* (2018) 356 ALR 178, 187–96 [36]–[67] (The Court).

246 *Trkulja v Google LLC* (2018) 356 ALR 178.

247 Namely, an application for the dismissal of defamation proceedings. See especially *ibid* 628–9 [37] (The Court).

248 A recent example is the proper interpretation of the provision made in section 35(2) of the *Defamation Act 2005* (NSW) for ‘exceed[ing]’ the statutory cap on ‘non-economic loss’ imposed by s 35(1) of that Act. Section 35(2) provides:

A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages.

Its Victorian equivalent (*Defamation Act 2005* (Vic) s 35(2)) has recently been interpreted as enabling the exceedence of the statutory cap ‘when an award of aggravated damages is warranted’: *Wilson Appeal* [2018] VSCA 154, [248]–[250] (The Court), affirming *Wilson Trial* [2017] VSC 521, [72]–[83] (Dixon J).

249 *Renouf v Federal Capital Press of Australia Pty Ltd* (1977) 17 ACTR 35, 58 (Blackburn J); *Ghosh v NBN Ltd* [2014] QCA 53, [12] (Muir JA, with Holmes JA and Douglas J agreeing) (including ‘practitioners experienced in the area’); Steven Rares, ‘Can I Say That?’ (2004) 25 *Australian Bar Review* 45, 45.

250 Baldwin, ‘Is There a Limit’, above n 14, 317.

judge can go in this direction.<sup>251</sup> Complex defamation law may also pose a challenge for the decision-maker depending on their training and experience.

However, as problematic as defamation-complexity can be, it needs to be unpacked a little further and with particular regard to its ramifications for small claims jurisdictions.

First, defamation law cannot lay exclusive claim to complexity in private law, and there is also judicial acknowledgement that ‘not all aspects of defamation law are complex’.<sup>252</sup>

Second, it is not as if areas already committed to small claims jurisdictions are inherently free of legal let alone factual complexity.<sup>253</sup> There is no necessary correlation between the monetary value of a claim and its complexity.<sup>254</sup>

Third, complexity is relative depending on a person’s training and experience. What is complex to a lay person may not be complex to a lawyer let alone someone who specialises in the area of law in question. So, whose perspective is relevant for the purpose of judging complexity: the decision-maker, a legal practitioner, a specialist lawyer in the field, or the parties? If it is the parties’ perspective then given that many (if not most) ordinary people would likely find much law (including, it is contended, areas traditionally allocated to small claims jurisdictions) to be complex and mystifying, does that effectively strip complexity largely of its capacity to gate-keep the types of claims appropriate for small claims jurisdictions? If it does not, then, at the very least, it begs the question of how complex is too complex before areas become unsuitable for small claims jurisdictions? And why single out defamation law?

Fourth, conferring jurisdiction upon tribunals to resolve complex issues without the assistance of legal representation is not without precedent. A notable example is the jurisdiction of the NCAT<sup>255</sup> to determine vilification complaints in accordance with laws<sup>256</sup> that have been influenced by defamation law.<sup>257</sup>

Fifth, the problem of defamation-complexity for self-represented parties is not unique to small claims jurisdictions. It also attends defamation litigation in the ordinary courts.<sup>258</sup> Legal representation is not mandated and self-representation may be expected to obtain for many ordinary litigants largely for

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251 Ibid 342–3.

252 *Elliott v Tomkins [No 2]* [2014] NSWDC 56, [1] (Gibson DCJ). See also *Nationwide News Pty Ltd v Weatherup* [2018] 1 Qd R 19, 47 [92] (Applegarth J, with Fraser JA and Douglas J agreeing).

253 Margaret Castles, ‘Adelaide Magistrates Court Legal Advice Clinic – Part A: The Introduction of a Clinically Based Legal Advice Clinic in the Minor Civil Claims Jurisdiction of the Adelaide Magistrates Court’ (2002) 6(2) *Newcastle Law Review* 1, 3.

254 Ibid 6; McGill, ‘Small Claims Court Identity Crisis’, above n 92, 228. Complexity will, however, sound in the costs of actioning the claim.

255 *Civil and Administrative Tribunal Act 2013* (NSW) ss 29, 45(1)(a), although note that the Tribunal may grant leave for a party to have legal representation: at s 45(1)(b).

256 See, eg, *Anti-Discrimination Act 1977* (NSW) div 3A (‘racial vilification’).

257 See *Western Aboriginal Legal Service Ltd v Jones* [2000] NSWADT 102, [78] (Members Rees, Silva and Luger).

258 See, eg, *Ghosh v NBN Ltd* [2014] QCA 53, [12] (Muir JA, with Holmes JA and Douglas J agreeing); *Prefumo v Bradley [No 4]* [2014] WASC 94, [4] (Martin CJ); *Graham v Powell [No 3]* [2014] NSWSC 185, [6] (Beech-Jones J).

financial reasons,<sup>259</sup> although not necessarily exclusively.<sup>260</sup> The view that self-representation in defamation litigation is substantial and growing finds support in District Court Judge Gibson's 'Defamation Case Law Analysis and Statistics'.<sup>261</sup> In addition, this problem arguably presents in ordinary courts in a more acute form. Not only do self-represented parties have to contend with complexity in the substantive law, they also have to battle complex defamation procedure and do all of this without the assistance of the modifications and accommodations afforded by a small claims procedure. So, as much as defamation-complexity may be cited as a contraindication for admitting defamation claims to small claims jurisdictions, it may also be relied upon as a positive indication for doing so.

Sixth, the prospect of relief from defamation-complexity resulting from the current 'national reform process'<sup>262</sup> should also be taken into account. But it needs to be offset by the difficulty in quantifying any such likely relief at this early stage as well as the difficulty and time required to secure the agreement of all eight states and territories for amendments to the Model Defamation Provisions pursuant to an intergovernmental agreement.<sup>263</sup>

But even putting defamation-complexity into perspective in these ways still leaves a significant challenge for small claims jurisdictions. The possibility of reducing complexity by dispensing with the application of ordinary defamation law is not a viable option at this stage given the prevailing authority and the force of the rule-of-law-type considerations discussed in Part III(A). So, the question becomes whether there are any ways or means of further ameliorating the *impact* of complex law and procedure.

There are several possible options that might be considered. These include having legally trained decision-makers and possibly some specialising in defamation law, allowing parties to be legally represented, conferring powers of referral of questions of law to a court (or higher court, as the case may be) and making provision for an appeal ultimately to a court (or higher court, as the case may be). For the larger states, establishing a specialised defamation list, akin to that established for the Supreme and District Courts in NSW, may be useful and sustainable.<sup>264</sup> These options may already be found, to a greater or lesser extent, in existing small claims jurisdictions, as shown in Part IV(A). However, they all come at a cost, especially in the form of '[i]ncreased formality',<sup>265</sup> to the efficacy of these jurisdictions in performing their core function of enhancing access to

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259 Gibson, 'Defamation Case Law Analysis and Statistics', above n 2, [60 590].

260 For non-financial reasons why litigants may elect self-representation, see *Jeray v Blue Mountains City Council* [No 2] (2010) 180 LGERA 1, 4 [8] (Allsop P); *Report No 72(1)*, above n 27, 491–4.

261 Gibson, 'Defamation Case Law Analysis and Statistics', above n 2, [60 590]. Note, however, that 'self-representation' is susceptible to different meanings and so its reported rate is liable to vary depending on the definition employed: see, eg, *Report No 72(1)*, above n 27, 488.

262 *Statutory Review*, above n 28, 2.

263 The process is explained in *ibid*.

264 See generally Supreme Court of New South Wales, *Practice Note No SC CL 4 – Supreme Court Common Law Division – Defamation List*, 5 September 2014; District Court of New South Wales (civil jurisdiction), *Practice Note No 6 – District Court Defamation List*, 3 June 2015.

265 See, eg, ACT Justice and Community Safety Directorate, above n 153, 13.

justice. Further, to the extent that they rely upon an interventionist decision-maker, *Bottrill v Cristian* serves as a reminder that this feature is not without its limitations, as discussed in Part IV(B)(5). So, the challenge for future consideration will be to develop modifications that will assist small claims jurisdictions to strike a better balance between these benefits and costs.<sup>266</sup>

Finally, there is also the argument that if defamation law is too complex then this should be grounds for simplifying defamation law and not for disqualifying defamation claims from measures that may improve access to justice for many people. At the heart of this reasoning lies the fundamental question of whether defamation law *needs* to be so complex. The view that it *does not* is not without judicial and academic support.<sup>267</sup> The view that Australian defamation law is in need of reform commands considerable and widespread support.<sup>268</sup> Whether and, if so, to what extent, this view translates into tangible outcomes by virtue of the current reform process remains to be seen.

To summarise, while the forces at work giving rise to and perpetuating complexity in Australian defamation law are themselves a complex mix of legal and extra-legal factors, that is not to say that defamation-complexity is as formidable a contraindication for admitting defamation claims into small claims jurisdictions as may appear to be the case at first sight.

## B Large Numbers of Small Defamation Claims

It is almost trite to observe that the adverse effects of defamation-complexity increase as the numbers of small defamation claims increase. This consideration may explain, at least in part, the rough big/small state/territory division in terms of preparedness to admit defamation claims into Australian small claims jurisdictions highlighted earlier in Part II(C). Whereas the complexity complications of a small number of small defamation claims may be tolerable, there likely comes a point, as numbers increase, that that tolerance breaks down. The difficulty, however, lies in working out exactly where that point arises. It is unlikely to be represented by a fixed number of claims applicable to all small claims jurisdictions but, rather, by a variable figure derived from a complex matrix of factors pertaining to a particular jurisdiction and not just its population

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266 Another possibility is excluding 'test case(s)' as was recommended by Lord Woolf for the 'fast track' of the United Kingdom civil justice system: Lord Woolf, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (July 1996) 23.

267 See, eg, *Aktas v Westpac Banking Corporation Ltd* [2009] NSWCA 9, [36] (McClellan CJ at CL, with Ipp and Basten JJA agreeing); *National Road and Motorists' Association Ltd v Nine Network Australia Pty Ltd* [2002] ACTSC 9, [22] (Miles CJ); NSW Chief Justice T F Bathurst quoted (extra-judicially) in Whitbourn, above n 11, 4; Rolph, *Defamation Law*, above n 12, 4, 92.

268 See, eg, NSW Chief Justice T F Bathurst reported in Whitbourn, above n 11, 4; District Court Judge J C Gibson, 'Adapting Defamation Law Reform to Online Publication' (2018) 22 *Media and Arts Law Review* 119; Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2018, 7 (Andrew Hastie); Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, *Report* (2018) 137 [7.94]–[7.97]; David Weisbrot, 'Australian Press Council Chair Calls for Urgent Action on Defamation Law Reform' (Media Release, 1 July 2015); Rolph, *Defamation Law*, above n 12, 4–5.

size. This particular factor can also pull in two directions. Whereas the large states may be expected to experience a greater number of complex claims than small states/territories by virtue of their larger populations,<sup>269</sup> they may also be better positioned than small states/territories for this reason to resource larger small claims jurisdictions.

This is another area where comprehensive data would enhance a deeper understanding of the issues, and especially data around the reasons for the decision, already taken in relation to some Australian small claims jurisdictions, to admit or not to admit defamation claims.

### C Vulnerability to Hijacking

The vulnerability for small claims jurisdictions to be hijacked by persons or entities other than ordinary people, alluded to earlier,<sup>270</sup> is alive in relation to small defamation claims. However, this vulnerability is considerably attenuated in Australia because of the general ban on corporations suing for defamation.<sup>271</sup> Nevertheless, while there is the possibility of wealthy individuals and ‘excluded corporation[s]’<sup>272</sup> suing for defamation in small claims jurisdictions with the assistance of legal representation, this vulnerability cannot be said to have reached vanishing point. However, rather than operating to preclude the admission of defamation claims to small claims jurisdictions, this vulnerability could be controlled through adaptations to certain features of small claims jurisdictions. These include the level of the financial ceiling, circumstances in which legal representation might be allowed and eligibility requirements for parties. Further, the adverse consequences of this vulnerability for ordinary people as prospective claimants also needs to be balanced against those for ordinary people who may be forced to defend a defamation action in the ordinary courts. All things considered, this contraindication is not strong.

### D Relegation to a Lesser System of Justice

Given that small claims jurisdictions involve a trade-off of certain ‘rules and protections’ for wider accessibility,<sup>273</sup> they are open to be branded ‘second best’,<sup>274</sup> or ‘second-class’.<sup>275</sup> While Whelan has highlighted the ‘paradox’ of procedural demands being relied upon to achieve justice for ordinary litigants and at the same time being used to shut out ‘small claimants’ from justice,<sup>276</sup> the possibility of relegating claims to a lesser system requires a response.

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269 Depending, however, on the level at which the monetary ceiling is pitched as discussed in Part IV(A).

270 See above nn 95–6 and accompanying text.

271 *Defamation Act 2005* (NSW) s 9.

272 The statutory ban does not extend to ‘an excluded corporation’, which essentially is a not-for-profit corporation or a small corporation (in the sense of having less than 10 employees) that is not in either case a ‘public body’: *Defamation Act 2005* (NSW) s 9.

273 South Australia, *Parliamentary Debates*, House of Assembly, 12 September 1974, 922 (L J King, Attorney-General), quoted with apparent approval in *Harradine* [2012] SASC 96, [44] (Blue J).

274 *Ibid*.

275 Baldwin, *Small Claims*, above n 14, 155.

276 Christopher J Whelan, ‘Small Claims Courts: Heritage and Adjustment’ in Christopher J Whelan (ed), *Small Claims Courts: A Comparative Study* (Clarendon Press, 1990) 207, 230.

At a general level, it is usually argued that lesser procedural safeguards can be tolerated where small amounts of money are at stake.<sup>277</sup> However, this may be met with the reply that those amounts, although small by comparison with other civil awards, are not of themselves to be sneered at and probably will not be in the eyes of most ordinary people.<sup>278</sup> Further, it is not clear how the traditional argument plays out in relation to large claims, and especially substantially large claims, admitted to small claims jurisdictions through mechanisms such as the ACAT's 'abandon[ing] the excess' provision<sup>279</sup> flagged earlier. Is the argument premised solely on the amount actually awarded or the true value of the claim? Alternatively, reliance may be placed on particular aspects of the 'modified'<sup>280</sup> procedure as offsetting procedural compromises. Key here is the shift in the role of the decision-maker to being more 'interventionist' but, to reiterate, there is a limit to how far s/he may act in this regard,<sup>281</sup> as was illustrated in *Bottrill v Cristian*. Moreover, there is an inherent assumption in the basic objection and that is that the full procedural trappings of ordinary court litigation are necessary to the pursuit of and are necessarily productive of 'justice according to law'. This assumption is not only debatable generally but seriously so in the defamation context given the procedural technicality and complexity identified earlier.<sup>282</sup>

So, the possibility of relegation to a 'second-class' system is arguably no more so for defamation claims than for small claims generally and if a response is wanting in some way then it is wanting not only for small defamation claims. Further, it is arguable that the relegation of defamation claims specifically may in some respects be to a *better*, rather than *lesser*, place given that any simplification of ordinary defamation procedure would be a welcome relief for all concerned. Moreover, it might be argued that a system that effectively shuts out ordinary citizens from bringing a claim to protect a valid interest or forces them to proceed at exorbitant expense or not at all is itself fundamentally of lesser quality.

## E Diversion of Important Issues Away from Authoritative Determination

Small claims are capable of raising important legal issues as exemplified by the *Bottrill v Cristian* claim. It could be argued that diverting such claims away from the purview of the ordinary courts and the strict operation of the doctrine of precedent<sup>283</sup> could compromise the coherent development of the law.<sup>284</sup>

277 Baldwin, *Small Claims*, above n 14, 158; Baldwin, 'Is There a Limit', above n 14, 331.

278 Castles, 'Adelaide Magistrates Court', above n 253, 6.

279 *ACAT Act* s 20.

280 Baldwin, 'Is There a Limit', above n 14, 317.

281 *Ibid* 342–3.

282 See above nn 243–4 and accompanying text.

283 Decisions of lower courts are not generally binding on other courts: *Valentine v Eid* (1992) 27 NSWLR 615, 621–2 (Grove J). Tribunals are not strictly bound by tribunal decisions: *Director of Liquor Licensing v Kordister* (2011) 34 VAR 293, 317–18 [107] (Bell J).

284 A similar criticism has been levelled against alternate dispute resolution in general: see, eg, Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Australian Government Publishing

However, the force of this argument is weakened because it is not being suggested that the whole defamation subject-area be given over to small claims jurisdictions, nor even that the bulk of defamation claims be relocated there. Further, scrutiny by ordinary courts can be afforded by making provision for appeals and/or the referral of questions of law and possibly even the reservation of ‘test case(s)’<sup>285</sup> although, as highlighted by the analysis of *Bottrill v Cristian* in Part IV(B)(2), such recalibrations may entail certain trade-offs. In addition, there is authority recognising the advantages of ‘consistency and predictability of decision-making and maintaining public confidence in the legal process’ in relation to adjudicative bodies other than the ordinary courts.<sup>286</sup>

### F Potential Misalignment with the Goal of Suing for Defamation

It is well accepted that ‘vindication of reputation’<sup>287</sup> is the main objective of suing for defamation.<sup>288</sup> In *Bleyer*, however, McCallum J observed that this goal ‘is not wholly measured or achieved in financial terms, even though the remedy must be given in the form of monetary compensation’.<sup>289</sup> That observation could be construed as a contraindication for implementing a measure for resolving defamation claims that turns on the monetary value of the claim. However, it is also open to be construed as generally supportive of finding ways of managing small defamation claims with a view to facilitating the action for defamation to better achieve its goal.

### G Threats to the NUDL Scheme

The option of admitting defamations claims to small claims jurisdictions in Australia must also be viewed within the context of uniform law operating in a federation.<sup>290</sup> It has the potential to undermine uniformity by creating two sources of disparity. One is between the various Australian small claims jurisdictions and the other is between the ordinary courts and small claims jurisdiction(s).

Disparity already exists between the states and territories in their arrangements for handling defamation claims given that some have admitted defamation claims to their small claims jurisdictions while others have not. While extending the small defamation claims jurisdictions coverage Australia-wide will remove this dimension of inter-state/territory disparity, others remain. Differences concerning important aspects of these jurisdictions might be expected having regard to the differences already existing between established

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Service, 1994) 279; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 414.

285 See Woolf, above n 266, 23.

286 *Director of Liquor Licensing v Kordister* (2011) 34 VAR 293, 318 [107] (Bell J).

287 *Bleyer* (2014) 88 NSWLR 670, 682 [63] (McCallum J).

288 *Spautz v Williams* [1983] 2 NSWLR 506, 540 (Hunt J); *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639, 652 [48], 661 [99] (Ward JA, with Meagher and Payne JJA agreeing).

289 *Bleyer* (2014) 88 NSWLR 670, 682, quoted with approval in *Nationwide News Pty Ltd v Weatherup* [2018] 1 Qd R 19, 47 [93] (Applegarth J, with Fraser JA and Douglas J agreeing).

290 See above n 1.

small claims jurisdictions concerning monetary ceilings and certain procedures. Given the enormous challenge of obtaining uniform laws generally in Australia, especially considering the degree of state/territory cooperation required, it is unlikely that a uniform national small claims procedure will eventuate in the near future. However, it is arguable that the case for uniformity is not so compelling across all or even most aspects of this measure and that there is a place for some local differentiation based on, for example, population size.

As for disparity between the operation of ordinary courts and small claims jurisdictions, this is a given by definition. An additional point of difference in the defamation context concerns the availability of a jury. However, the potential disruption to defamation uniformity from the absence of a jury in small claims jurisdictions is considerably diminished because ordinary defamation litigation is already starting from a baseline of disunity on jury-availability between the states and territories.<sup>291</sup> Otherwise, the potential for other disruptions of defamation uniformity occasioned by general differences between ordinary litigation and the small claims procedure is outweighed by the greater access to justice afforded by the 'modified'<sup>292</sup> procedure. In other words, greater defamation uniformity may be achieved overall when access to dispute resolution is made more uniformly available.

## VI LOOKING FORWARD TO REFORM

This article has established compelling grounds for Australian law-reformers to give serious consideration to extending the defamation-coverage of Australian small claims jurisdictions to all states and territories as a means of addressing the need to provide a proportionate response to small defamation claims. Although there are challenges and limitations, they are not necessarily intractable, insurmountable or irremediable. In particular, apprehension around defamation-complexity may be exaggerated when it is duly unpacked and its ramifications for small claims jurisdictions critically assessed. There is also the prospect of some relief emanating from the 'national reform process'.<sup>293</sup> Be that as it may, however, proper consideration should be given to ways of alleviating the adverse effects of defamation-complexity before dismissing this measure outright. Some possibilities have been suggested in this article. In addition, angst around trading-off procedural safeguards may also pale once due consideration is given to the reality of litigants proceeding in person in defamation actions before the ordinary courts and, as best as can be surmised, in increasing numbers.<sup>294</sup> So, there is

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291 Provision for a jury is only made in five out of the eight Australian jurisdictions and is not mandatory in the jury jurisdictions as it is a matter for election by one or other of the parties: *Defamation Act 2005* (NSW) s 21(1); *Defamation Act 2005* (Qld) s 21(1); *Defamation Act 2005* (Tas) s 21(1); *Defamation Act 2005* (Vic) s 21(1); *Defamation Act 2005* (WA) s 21(1).

292 Baldwin, 'Is There a Limit', above n 14, 317.

293 *Statutory Review*, above n 28, 2.

294 See above n 261.

already a growing class of litigant who is probably not only missing out on the supposed benefits of such safeguards but is also labouring under their weight. Access to and navigation around the safeguards is largely dependent upon access to legal knowledge and training.

However, to fully assess the viability of this measure, much less determine whether it offers the best response to small defamation claims, calls for comprehensive and up-to-date empirical research, both qualitative and quantitative, across a range of issues, many of which have been highlighted in this article. At a foundational level, more extensive data is required concerning the numbers and key features of Australian small defamation claims to bring into sharper focus and facilitate a better understanding of the current contours of this domain.<sup>295</sup> To consolidate and build on work in this article, but without intending to be exhaustive, the following additional research questions are proposed.

1. What constitutes acceptable and unacceptable complexity for the purposes of small claims jurisdictions?
2. To what extent can the adverse effects of defamation-complexity be ameliorated by measures that are compatible with the goals of small claims jurisdictions?
3. Should there be a uniform monetary ceiling for defamation claims in Australian small claims jurisdictions? If not, should the small claim defamation ceiling for a particular state or territory be tied to the ceiling set for other small claims in that state or territory?
4. What are the ramifications for ordinary courts and litigants of failing to provide proportionate measures for small defamation claims?
5. How successful are defamation-inclusive small claims jurisdictions?
6. Do any of the answers to the above questions vary depending on whose perspective is considered – the claimant, the respondent, the decision-maker – and does this matter?

The answers to these and other relevant questions, supported by quality empirical research, will facilitate evidence-based decision-making concerning the amenability of small claims jurisdictions to defamation claims. If the traditional measure is to be rejected for a particular type of claim then this should be for evidence-based reasons and not on the basis of untested assumptions or limited anecdotal experience. Nor should such a decision be made in relation to an unimproved version of this measure. Research will facilitate the development of proposals to improve the amenability of small claims jurisdictions to defamation claims, where necessary, while maximising the return not only to the parties but also to the administration of justice and the wider community in general. Nor

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295 This audit would extend the research in Gibson, 'Defamation Case Law Analysis and Statistics', above n 2 and Centre for Media Transition, above n 9, by broadening the catchment area of small defamation claims and investigating additional key features explicitly and comprehensively such as the dispute resolution method, the type of forum (including whether or not a small claims jurisdiction and its jurisdictional limit), duration of claim resolution, party representation (legal or self), costs as well as a more nuanced party classification.

should rejection of the traditional measure foreclose consideration and development of other responses to small defamation claims and the research proposed can also usefully inform this process.

The reform agenda framed by the 16 recommendations of the *Statutory Review*<sup>296</sup> does not *explicitly* refer to proportionate measures for small defamation claims. This should not of itself preclude its consideration in the current ‘national reform process’.<sup>297</sup> Nevertheless, it does expressly include consideration of the introduction of ‘a “serious harm”<sup>298</sup> or other threshold test’ and the concomitant role of the statutory triviality defence.<sup>299</sup> Although this mechanism has the potential to reduce the numbers of small defamation claims, its consideration should not of itself preclude the consideration of proportionate small claims measures as part of the ‘national reform process’.<sup>300</sup> Without a clear indication of the level at which a threshold would operate, it is not possible to gauge the degree of any such reduction. Further, consideration of the efficacy of proportionate small claims measures provides valuable context for determining the optimal level, if not the need, for such a threshold. Indeed, that context is arguably mandated for any state or territory already providing defamation-inclusive small claims jurisdictions. Moreover, the possibility of the two measures working in tandem and complementing each other is worthy of consideration in the interests of striking a better ‘balance between the right to reputation and freedom of speech’.<sup>301</sup> The prospect that legislation other than the NUDL may require amendment should also not act as a deterrent,<sup>302</sup> given that arguably it has already been enlivened by at least one element of the current reform agenda. The NUDL does not operate in a vacuum and a reform process that overlooks this circumstance risks being compromised.<sup>303</sup>

The question of a proportionate response for small defamation claims sits in the intersection between two balancing exercises, both of which pose a perennial challenge for law reformers. One is between protecting reputation and promoting free speech,<sup>304</sup> and the other is between facilitating access to justice and respecting legal ‘rules and protections’.<sup>305</sup> At the heart of this intersection is the fundamental question of how far should the law go in protecting the reputations

296 *Statutory Review*, above n 28, iv–vii.

297 *Ibid* 2. The language of the *Statutory Review* and the *Communiqué* appear wide enough to comprehend reform of aspects other than those specifically raised in the review’s recommendations: *Statutory Review*, above n 28, 4; *Communiqué*, above n 29, 3.

298 Referring to the ‘serious harm’ test embodied in *Defamation Act 2013* (UK) s 1.

299 *Statutory Review*, above n 28, 29–31.

300 *Ibid* 2.

301 *Lange* (1997) 189 CLR 520, 568 (The Court).

302 Note that the ‘national reform process’ is framed in terms of ‘developing ... amendments to the Model Defamation Provisions’: *Statutory Review*, above n 28, 2; *Communiqué*, above n 29, 3. See also *Statutory Review*, above n 28, 2–4.

303 See Gibson, ‘Adapting Defamation Law Reform’, above n 268 regarding the relevance of other legislation outside of the NUDL and notably ‘internet-related legislation’: at 133–4, 144–7.

304 *Lange* (1997) 189 CLR 520, 568 (The Court).

305 South Australia, *Parliamentary Debates*, House of Assembly, 12 September 1974, 922 (L J King, Attorney-General), quoted with apparent approval in *Harradine* [2012] SASC 96, [44] (Blue J).

and free speech of ordinary people, which translates in practical terms to how far should the law go in providing reputation and free speech-protection mechanisms sensitive to the needs of ordinary people? These questions are becoming more acute amidst the massive take-up of online technologies by ordinary people worldwide. The earliest opportunity to *fully* consider and address them for Australia should not be missed.