

Our reference

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24 January 2020

Review of Model Defamation Provisions
c/o Policy, Reform and Legislation
NSW Department of Justice
GPO Box 31
Sydney NSW 2001

By email: policy@justice.nsw.gov.au

Dear Madam/Sir

Marque Lawyers Submissions on draft amendments to Model Defamation Provisions

1. Scope of this submission

- 1.1 Marque Lawyers is grateful for the opportunity to provide a submission to the Council of Attorneys-General (**COAG**) on the draft amendments to the Model Defamation Provisions (**Draft Amendments**).
- 1.2 We provided a submission on the initial review of the Model Defamation Provisions on 30 April 2019. Our perspective then, and now, on defamation law is influenced by our practice in that area. In particular, we observe a consolidated mass media industry in which independent voices are decreasingly common. Recent cases show that defamation plaintiffs have an unreasonably strong position, and this is placing too great a burden on the freedom of the press.
- 1.3 The submission addresses the following particular topics covered in the Draft Amendments.
 - (a) A right for corporations to sue for defamation: We advocate the abolition of the corporate right to sue altogether rather than the adoption of the s 9 Draft Amendments.
 - (b) The serious harm threshold: We support the introduction of the serious harm threshold (other than the amendments relevant to the corporate right to sue), however we recommend further consideration of its practical application in Australia.
 - (c) The single publication rule: We support the introduction of a single publication rule, and suggest inclusions to the Draft Amendments to clarify its effect.

- (d) The new public interest defence: We support the introduction of a public interest defence and propose revisions to the Draft Amendments to provide greater certainty as to its application.

2. **Context: the importance of free speech and free press**

2.1 Defamation law exists to protect the right of the individual to maintain a good public reputation. Two points flow from this:

- (a) There is no justification of social good for extending the right to corporate entities. Even the existing limited right for small and not-for-profit entities to sue for defamation goes too far.
- (b) There is an inherent conflict between the personal right to reputation and the human right to enjoy freedom of speech. Australia's current defamation law strongly favours reputation over free speech, which is inappropriate. The public good of free speech and a free press should be championed and protected by law. The absence of any right of free speech enshrined in Australian law makes this all the more important.

2.2 Reform to the defamation law should proceed from the starting point that less defamation litigation would be a positive outcome, as that necessarily means that the balance has been shifted in the direction of free speech. For that reason, we argue in favour of reforms that will help to achieve that outcome.

3. **A right for corporations to sue for defamation**

3.1 We submit that the right of corporations to sue for defamation should be removed from the Model Defamation Provisions altogether and rely on the reasons set out in our 30 April 2019 submission. The amendments to s 9 and the definition of "employee" in the Draft Amendments do not address the concerns we have previously raised – that defamation law is not the appropriate forum for corporations to protect their interests.

3.2 First, the most obvious reason for which a corporation should not have a right to sue in defamation is that it has no personal reputation to protect. Reputation is essentially a human experience or right; and connected to concepts of character and dignity. To experience defamation is to be exposed to hatred, ridicule or contempt. Further, the usual remedy for defamation is an award of damages, the purpose of which is to compensate a defamation plaintiff for any personal distress and hurt feelings and to vindicate their reputation. These are matters that are intensely personal.

3.3 A corporation is a legal fiction. It cannot experience hatred, ridicule or contempt or personal distress and hurt feelings. While corporations benefit from many of the rights of natural persons, they are not afforded all of them (for example, the right to privacy). The law of defamation is not an appropriate vehicle for the protection of corporate interests.

- 3.1 In contrast, individuals involved in the operation of a corporation have a personal reputation and are capable of experiencing hatred, ridicule and contempt. They deservedly maintain a right to sue on a defamatory statement about a company which identifies or implicitly refers to the individual. Removing the corporate right to sue in defamation will not change this.
- 3.2 Secondly, the exclusion of a corporate right to sue in defamation is consistent with the objectives of the Model Defamation Provisions. A corporate action unreasonably limits freedom of expression. The ability of powerful and well-resourced corporations to silence legitimate criticism by threatening defamation actions (i.e. SLAPP suits) must be the countervailing concern. The COAG articulated this in 2004 when considering the introduction of the Model Defamation Provisions, as the Discussion Paper outlines at paragraph 2.5. The importance of free speech for natural persons outweighs the rights of companies to protect their reputation.
- 3.1 Thirdly, the current narrow permissions small corporations and not-for-profits to sue in defamation remain ill-adapted for their intended purpose.
- 3.2 The addition of a definition of “employee” does little to address the issue that an allowance for a corporation with fewer than 10 employees to sue is arbitrary and makes little practical sense. The problem remains that a publisher is often in a position in which it cannot readily identify the size of a corporation the subject of a story, and therefore cannot assess whether there is a defamation risk. The distinction in the Draft Amendments between those who may be “volunteers” and those who are paid employees or contractors only adds further complication.
- 3.3 The exception for not-for-profits is not well founded, in circumstances where not-for-profits may be large organisations that are entirely capable and resourced to deal with reputational issues without resorting to defamation proceedings (for example, the Minerals Council of Australia or various religious institutions).
- 3.4 For small corporations, there is logically a greater likelihood that a critical publication will at least tacitly identify the individuals involved in running the company, and those individuals will have a personal right to sue if they are defamed. Otherwise, those corporations will retain alternative legal rights which they may pursue if they are the subject of false or malicious statements. Depending on the circumstances, claims of misleading or deceptive conduct, negligent misstatement, malicious falsehood or breach of confidence may be available to them. In that regard, the exclusion of a corporate right to sue does not undermine the objective of the Model Defamation Provisions to provide effective and fair remedies.
- 3.1 Lastly, the burden of a corporate action in defamation is born principally by the press, and secondarily by lobby and activist groups. Other corporations would typically already face liability in misleading or deceptive conduct for false statements published in trade or commerce; providing a wide and effective remedy for inaccurate statements by one company against another; trade rivals for example.
- 3.2 As an alternative, if the right for corporations to sue remains, there should also be an exclusion from liability for the press or for publications made for the dominant purpose of consumer or environmental protection. These could operate in a similar way to the exclusion of liability for

misleading or deceptive conduct for ‘information providers’¹ and the exclusion of liability for boycotts for those conducted for the purpose of environmental or consumer protection².

3.3 These examples from competition and consumer law reflect a recognition of the importance of protecting information providers and activist actions from certain actions by corporations. The Model Defamation Laws should reflect a similar policy position. The best way to do that is to exclude an action for corporations altogether. An alternative is to apply carve outs to protect those most unreasonably burdened by a corporate defamation right.

4. **Serious harm threshold**

4.1 We support the proposal to introduce a serious harm threshold into the Model Defamation Provisions, an amendment that we hope can be adopted to address the increase of frivolous claims in Australian jurisdictions, at an early and cost effective stage in proceedings. However we submit that further consideration and clarification is required regarding the procedural operation of the section. We also submit that s 7A(2) of the Draft Amendments, regarding serious harm to corporations, should be removed for the reasons outlined in part 3 above.

4.2 As Judge Gibson noted in her paper ‘Identifying defamation law reform issues: A snapshot view of defamation judgment data’, there has been a significant increase in the number of disputes brought by individuals in Australia, who are often self-represented, and the “*case management of these proceedings invariably involves a disproportionate amount of judicial time and resources when the likely award of damages and vindication will be small or the meanings contended for are barely, if at all, defamatory.*”

4.3 At present, defamation plaintiffs have an unreasonably strong position in Australia. It is unsatisfactory that the triviality defence currently operates as the only direct mechanism within the Model Defamation Provisions to address frivolous claims, where ordinarily the triviality defence it is not considered until proceedings are ready for trial.

4.4 We submit that the intention of the introduction of the serious harm threshold ought to be to as follows.

- (a) To bar trivial claims from progressing as early as possible in court proceedings in order to reduce unnecessary expenditure of time and resources.
- (b) To ensure greater consistency between Australian jurisdictions in their management of trivial claims at an early stage in proceedings. At present courts have adopted varying civil procedure and case management approaches to manage this issue including, for

¹ See *Australian Consumer Law* s 19.

² See *Competition and Consumer Act 2010* (Cth) s 45DD.

example in *Bleyer v Google Inc*,³ where proceedings were permanently stayed on the basis of an abuse of process and the principle of proportionality⁴.

4.5 In order to ensure those objectives are met, we believe that further consideration is required regarding the practical operation of s 7A of the Draft Amendments including when and how the serious harm threshold is intended to operate. The following examples of procedural and practical matters ought to be considered.

(a) Whether the Model Defamation Provisions should also list the factors the court may have regard to when assessing the serious harm threshold, adopting the factors from *Lachaux*⁵, and additional factors including:

- (i) the gravity of the statements themselves;
- (ii) the scale of the publication;
- (iii) the audience of the publication;
- (iv) the proportionality of the likely damages assessment in comparison to the likely costs of the proceedings.

(b) Whether a uniform regime could be introduced for the:

- (i) the early assessment of imputations; and
- (ii) the early assessment of the serious harm threshold;

prior to a defence being filed. The early determination of matters in which serious harm is challenged will necessitate some consideration of whether the alleged imputations arise. It would be impracticable to determine the question of serious harm arising from a publication without considering whether it carries defamatory imputations. In *Lachaux*, the court had already assessed that the relevant publications carried defamatory imputations of the plaintiff at an earlier “meaning hearing”. The practical benefit of the serious harm threshold will be seriously diminished unless there is a regime under which it can be addressed, along with the question of imputations, at an early stage.

(c) In the alternative, there could be a uniform regime for the early assessment of the serious harm threshold only (prior to filing a defence) which allows the court to adopt an assumption that the pleaded imputations may be established in favour of the plaintiff. This may be a more effective solution in circumstances where the assessment of defamatory imputations is often a time consuming and costly exercise in itself and may

³ (2014) 88 NSWLR 670.

⁴ Applying *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75.

⁵ *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27.

not necessarily achieve the intended outcome of reducing unnecessary expenditure of time and resources.

4.6 We welcome the proposal to introduce a serious harm threshold into the Model Defamation Provisions following further consideration of the intended practical application of the section.

5. **Single publication rule**

5.1 We welcome the proposal to introduce a single publication rule into the Model Defamation Provisions. We rely on the reasons set out in our 30 April 2019 submission on that front. In particular, the single publication rule is critically important to resolve the current anomaly in which publishers have infinite liability for an online publication.

5.2 We propose one further point to include in the considerations for extending the limitation period, to take account of the High Court's position on jurisdiction in *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

5.3 In *Gutnick*, the High Court found that the defamation occurred where the plaintiff suffered reputational damage, i.e. where the material is read. This produced the opportunity for a plaintiff to forum shop where a publication was read in multiple jurisdictions.

5.4 The single publication rule provides that the action accrues when the communication is published, for the purpose of the limitation period.

5.5 The combined effect of the single publication rule and the jurisdiction considerations in *Gutnick*⁶, would be as follows.

- (a) A cause of action will accrue *when* an article is first published, consistent with the single publication rule.
- (b) A cause of action will accrue *where* an article is downloaded and read, and the plaintiff's reputation is harmed, consistent with *Gutnick*.
- (c) These two occurrences may not align. If an article is first published overseas, and not accessed or read in Australia until more than a year later, then the plaintiff may be time barred from pursuing an action in Australia notwithstanding that the Australian action had not crystallised until more recently.

5.6 Based on our experience working with news publishers, we speculate that the scenario described in 5.5(c) would be quite rare. It need not supplant the overarching benefits of a single publication rule. Nor should it necessitate reframing the rule so that the action accrues when a publication is first read. We support the view that this approach is flawed, in particular creating unnecessary evidentiary burden in establishing when the limitation period commenced.

⁶ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575

5.7 Instead, to respond to this, we suggest that COAG consider amending section 1B in Schedule 4.1 which addresses circumstances when the court can extend the limitation period. Subsection (3), which sets out considerations when deciding whether to extend the limitation period should expressly refer to the situation where the plaintiff has suffered damage in Australia more than a year after first publication. This would give plaintiffs easier access to an extended limitation period in the rare circumstances outlined in 5.5(c). It would not erode the broader benefits flowing from a single publication rule tied to the date of publication.

6. The new public interest defence

6.1 We support the introduction of a public interest defence for the reasons outlined in our earlier submission. There is currently a gap in the defences available to news publishers for legitimate, responsible reporting which may not attract the truth defence. A free press requires some latitude to make errors in order to perform its function in a democratic society. The public interest defence recognises that and will assist in supporting legitimate journalism and robust public debate. We offer our views on specific aspects of the proposed legislation below.

6.2 Responsibility factors

- (a) The new public interest defence is likely to supplant use of the qualified privilege by news publishers. Submissions about news publishers' access to the qualified privilege defence in the first round of submissions are also relevant to the new public interest defence. It is appropriate to take that feedback into account and apply it to section 29A in the Draft Amendments.
- (b) The Background Paper explains amendments to the introductory language in section 30, the qualified privilege defence. It refers to submissions that the reasonableness factors were perceived as a mandatory checklist for access to the defence, and that it should be amended to make clear that all of the factors do not have to be met. The Draft Amendments reflect this in section 30.
- (c) The current drafting in section 29A states that "*... a court must take into account the following factors to the extent that the court considers them relevant in the circumstances...*".
- (d) We suggest that this language be amended to adopt the same language in the amended section 30, i.e. "*... a court may take into account any of the following factors...*".

6.3 'Responsible' vs 'Reasonable'

- (a) The Background Paper explains that the genesis of the defence is the New Zealand decision in *Durie v Gardiner*⁷. That case established the two elements reflected in the

⁷ [2018] NZCA 278.

Draft Amendments; that the matter is of public interest, and that the publication of the matter is 'responsible'.

- (b) We suggest that the second element, responsibility, be replaced with the same language as section 30(1)(c) which reflects the 'reasonableness' element of the qualified privilege defence. I.e. Section 29A(1)(b) in the Draft Amendments should be amended to provide "*the conduct of the defendant in publishing that matter is reasonable in the circumstances*".
- (c) This will give media defendants the benefit of existing Australian jurisprudence on the question of reasonableness in the context of the qualified privilege defence. It will also avoid the potential for future judgments to create diverging meanings for 'responsible' and 'reasonable' publications, which we do not understand to be intended in the Draft Amendments.
- (d) We submit that using the term 'reasonable' would be of greater benefit and offer greater certainty to publishers than adopting the term 'responsible' from *Durie*. Most of the considerations for whether a publication is 'responsible' in the public interest defence in section 29A(2) mirror those for whether a publication is 'reasonable' in the qualified privilege defence in section 30(3). Logically, this implies that the considerations are similar, and so the terms of the defences should also be similar and both consider 'reasonableness'.
- (e) Further, the considerations for whether a publication is 'responsible' diverge from those proposed by the New Zealand Court of Appeal in *Durie*⁸. For example, *Durie* includes 'tone of the publication' and 'the inclusion of defamatory statements which were not necessary to communicate on the matter of public interest' as considerations which do not appear in section 29A(2). And section 29A(2) offers other considerations than those expressed in *Durie*, such the extent to which the publication distinguishes between suspicions, allegations and proven facts. This further implies that the intended meaning of section 29A is more aligned to 'reasonableness' than 'responsibility'.

6.4 Overall, we consider that the introduction of a public interest defence reflects an important progression of defamation law in Australia, correcting an imbalance which weighed against freedom of expression and a free press.

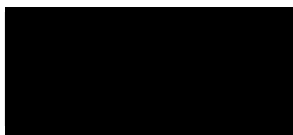
7. Conclusion

7.1 In our view and subject to our comments above, the Draft Amendments reflect a series of positive changes which will improve the balance between individual rights and freedom of expression. Our particular interest is press freedom. If enacted, the Draft Amendments will reflect one step towards preserving press freedom in an otherwise increasingly challenging legal environment.

⁸ at [67],

We would be very happy to expand or explain any part of this submission. Please contact Hannah Marshall or Michael Bradley if you have any queries.

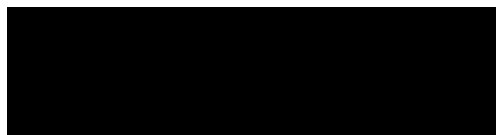
Yours sincerely



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