

SUBMISSION ON THE DRAFT AMENDMENTS TO THE MODEL DEFAMATION PROVISIONS

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1 Introduction

This submission on the draft amendments to the Model Defamation Provisions ('Draft Amendments') is further to my submission to the Defamation Working Party of 30 April 2019 regarding the previous discussion paper of February 2019.¹

2 Summary and general observations

Taken as a whole, the Draft Amendments are unequivocally pro-defendant reforms. Some aspects of them are desirable; others are less so. The Draft Amendments do not advance the interests of anyone other than Australia's media companies and the people who work for them.

The premise which has seemingly motivated the Draft Amendments is that Australian defamation law does not strike the right balance between freedom of speech and protection of reputation. I think that is right, as a matter of just policy and as a matter of popular sentiment. With respect to the latter: I am regularly asked to comment on defamation cases in the news, and a common theme of such stories is that, outside of the clique of journalists, politicians and media lawyers,

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¹ See <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-submission-michael-douglas.pdf>>.

everyone else has little idea how defamation law restricts freedom of speech in Australia. The Draft Amendments neglect people outside of that clique.

2.1 The Draft Amendments do little for regular people affected by defamation

Empirical research published by UTS in 2018 shows that the demographic of defamation litigants has changed in recent years.² From 2013 to 2017, only a quarter of defendant publishers were media companies. Increasingly, and perhaps contrary to perceptions, most defamation defendants are private individuals. ‘Digital defamation’ has become a bit of a faux pas; ‘digital’ is the status quo for mode of publication, and increasingly, ‘digital’ involves social media.

These reforms won’t stop regularly people from litigating over silly things said on social media. The proposed changes to defences will help defendants win trials, but average people will run out of money before they can enjoy them.³ The addition of the serious harm threshold will add some cover, but as fleshed out below, it is likely to increase the costs of litigation. The tweaks to concerns notices will not address the issue in any substantive way.

The reform process ought to have considered low-cost mechanisms for individuals to resolve defamation disputes involving ‘small’ claims.⁴ A defamation claim worth under \$20,000 would be considered small, but for the people involved, the stakes may not be higher.⁵ Many of these claims would easily overcome a serious harm threshold. The costs involved in taking such a claim to trial would often far exceed the sum of any damages and party-party costs awarded to a successful plaintiff. There ought to be a way for these ‘non-commercial’ defamation disputes to be resolved as efficiently as possible.

The flagged second stage of reforms ought to consider how a tribunal or a lower-costs jurisdiction might provide a suitable forum for defamation dispute resolution. Gould writes that there is some precedent for this in South Australia and the ACT.⁶ In an ideal world, a specialised defamation tribunal could work with the intermediaries which were the focus of the *Digital Platforms Inquiry* to resolve defamation disputes and ensure that defamatory content is removed quickly and at low cost. A more achievable alternative may be to imbue existing fora—like the WA Magistrates Court or even the WA State Administrative Tribunal—to resolve disputes with less formality.

Further comments regarding the second stage of reforms are provided below. The remainder of this submission addresses aspects of the Draft Amendments on which I have a strong view.

² Centre for Media Transition, ‘Trends in Digital Defamation: Defendants, Plaintiffs, Platforms’ (Report, University of Technology Sydney, 2018).

³ For a sad case study, see <<https://www.abc.net.au/news/2019-10-11/principal-sues-parents-over-online-comments/11593208>>.

⁴ Gould has considered this issue: Kim Gould, ‘Small Defamation Claims In Small Claims Jurisdictions: Worth Considering For The Sake Of Proportionality?’(2018) 41(4) *UNSW Law Journal* 1222.

⁵ For example, a defamatory allegation of domestic violence was worth just \$12,500: *Dabrowski v Greeuw* [2014] WADC 175.

⁶ Kim Gould, ‘Small Defamation Claims In Small Claims Jurisdictions: Worth Considering For The Sake Of Proportionality?’(2018) 41(4) *UNSW Law Journal* 1222.

3 Serious harm threshold

As stated in my previous submission, this reform is probably unnecessary. That a publication causes serious harm necessarily follows from the publication's characterisation as 'defamatory'. Le Miere J cited my submission to that effect in *Armstrong v McIntosh [No 2]*.⁷ Rolph has summarised that case and others on the issue in the latest issue of the *Media and Arts Law Review*.⁸

What the proposed s 7A(1) will do is create a whole new source of fees for defamation lawyers: mini-trials over whether a publication has caused 'serious harm'. Having to prove serious harm at that threshold, interlocutory stage will create forensic difficulties; will courts take oral evidence? Will they be satisfied with an affidavit by a lawyer to the effect that 'oral evidence will be led at trial'? Those difficulties will be pronounced for a company having to prove 'serious financial loss' under s 7A(2)(b).

However those questions are answered, it should not be assumed that the addition of an explicit serious harm threshold will reduce costs or save court resources.⁹ To the contrary: large media companies aside, many defamation defendants may not be able to afford adequate representation for a contest over the application of this section. The uncertainty which has surrounded the application of this section in the United Kingdom means that Australian courts faced with the section will have to take submissions to figure out how it should work, increasing costs for litigants.¹⁰

4 Contextual truth

The addition of s 26(2) is desirable, and would avoid the confusion that was considered by the Court of Appeal in *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal*.¹¹

5 Responsible communication in the public interest

The addition of the *Durie v Gardiner*¹²-style defence in s 29A is also desirable; in some ways, it would be the statutory realisation of what the relatively-toothless *Lange* qualified privilege might have been. However, the new defence could be improved in a few ways.

First, the defence ought to be defeated by malice, and the section ought to make that explicit. The fact that statutory qualified privilege remains defeasible by malice in s 30(4) makes the proposed new defence's approach to the issue incoherent. In its present form, the defence could protect media commentary deliberately designed to inflict political damage, written by persons who want to 'get back' at someone—situations like that considered in *Hockey v Fairfax Media Publications Pty Ltd*.¹³ With media power in Australia more concentrated than ever before, we should not support legislative amendments which embolden those in power to maliciously attack people who do not agree with them. In a perverse way, an unmodified defence could actually undermine free speech in Australia.

Second, the following factor in s 29A(2)(e) ought to be amended: 'the extent of compliance with any applicable professional codes or standards'. Unfortunately, the codes of conduct applicable to some media organisations and journalists are voluntary. Not every person writing spicy content

⁷ [2019] WASC 379, n 25.

⁸ David Rolph, 'Triviality, Proportionality and the Minimum

⁹ Cf Background Paper, 25.

¹⁰ See *Lachaux v Independent Print Ltd* [2019] 3 WLR 18.

¹¹ (2018) 97 NSWLR 547.

¹² [2018] 3 NSWLR 131.

¹³ (2015) 237 FCR 33.

for *The Australian*, for example, is a member of the Media, Entertainment & Arts Alliance (MEAA), and so the MEAA's Journalist Code of Ethics is arguable not 'applicable'. By deleting the word 'applicable', courts can have regard to those industry standards even if a particular defendant elects to not sign up to the relevant organisation. The same point should be made with respect to the deletion of 'applicable' in s 29(2)(g).

Third, by making the application of this defence a matter for the jury via s 29(4) (and the same with respect to qualified privilege in s 30(6)), the defence will create another real incentive for forum shopping. Whether that is desirable is debatable. That issue is addressed further below. For present purposes, it suffices to say that this defence would be perfectly workable if you deleted s 29(4) and either left the issue to the general law, or explicitly provided that the defence is a matter for the judge.

6 Defence of scientific or academic peer review

The proposed s 30A is desirable. However, to support academic freedom and freedom of speech more broadly, it should go even further. The defence should also protect comments made by academics while teaching in a university; with many institutions requiring lectures to be recorded, and those recordings being amenable to easy sharing online, defamation law can have a real chilling effect on what academics are willing to say, and hence on what students will learn.

The defence should also cover comments made in academic publications that are not peer reviewed. Some of the world's leading law journals—the *Harvard Law Review*, for example—are not peer reviewed. Some academic books are not peer reviewed.

Further, as university researchers are being encouraged to do 'impactful' work, many of us are providing media commentary and writing for more accessible outlets (eg, *The Conversation*). Such commentary ought to be protected, provided that the academic is commenting on an issue within the scope of their expertise.

7 The operation of the cap on general damages

The cap on damages effected by s 35(1) makes sense, but the proposed changes to s 35 are undesirable for several reasons.

First, for the purposes of s 35(2), what is 'a most serious case'? If every case must overcome a threshold of serious harm in the new s 7A, then every case is 'most serious'. There is already a need for a rational relationship between harm suffered and damages awarded in s 34. Thus, proposed s 35(2) ought to be deleted.

Second, with respect to s 35(2A), this subsection is unnecessary. That point is already clear from the case law.

Third, the proposed s 35(2B) is incoherent. Aggravated damages are compensatory in purpose,¹⁴ just like general damages for non-economic loss. It has been observed that the considerations affecting assessment of aggravated damages may be inextricably bound up with those affecting assessment of general damages.¹⁵ So it makes sense that, if aggravated damages are available, the cap ought not apply at all, as several leading cases have held.¹⁶

¹⁴ *Carson v John Fairfax & Sons Ltd* (1993) CLR 44, 66.

¹⁵ *Rayney v State of Western Australia (No 9)* [2017] WASC 367, [855].

¹⁶ Eg, *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 5 VR 674; *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496.

Putting aside those objections of coherence and practicality, the proposed s 35(2B) is also unjust. An award of aggravated damages is not made lightly. It follows terrible, unconscionable, and even life-destroying conduct by a publisher—like saying that a family caused the death of a baby when they obviously didn't.¹⁷ We should not change the law to protect people who engage in such 'aggravating' behaviour. To call it merely 'aggravating' is apt to mislead—this is destructive behaviour which the law ought to condemn. At a system-level, a harsh approach to cases of aggravating conduct may encourage civility and more responsible conduct by media organisations and the people they employ. For these reasons and more, s 35(2B) also ought to be deleted.

8 Single publication rule

If a single publication rule is introduced for the purposes of limitation periods (as per sch 4), then it should also be introduced for choice of law purposes in s 11.

Section 11(2) introduces a single publication rule of sorts for intra-Australian defamation: that the applicable law is that of the Australian jurisdictional area that the harm occasioned by the publication as a whole has its closest connection. The section does not, however, change the choice-of-law rule for transnational (rather than intra-Australian) defamation: that the *lex loci delicti*, the law of the place of the wrong, applies;¹⁸ and that the place of the wrong is the place where the matter is available in comprehensible form, which in the case of online publication is the place of download.¹⁹ This means that, where matter is downloaded or comprehended outside of Australia, foreign law could govern those publications (if pleaded by one of the parties), notwithstanding s 11(2).²⁰

The addition of the *lex loci delicti* rule for transnational publications, combined with the 'closest connection' rule for intranational publications, means that clever plaintiffs—like Joseph Gutnick or Rebel Wilson—simply limit their pleadings to those publications occurring within Australia, even if substantial damage were suffered overseas. If s 11(2) was modified to provide that the 'closest connection' rule applies to all publications, and not just those published within multiple Australian jurisdictional areas, then perhaps Wilson's case would have been subject to foreign law, and she would not have won any damages at all.²¹ The rule would encourage people to sue in the courts of the place where they suffered most damage to their reputation, whether Australian or otherwise: if foreign law applies, then an Australian court may find itself to be a *forum non conveniens*, staying the proceedings. Thus, by modifying the choice-of-law rule for defamation occurring overseas, the statutes could discourage what foreign commentators might call 'libel tourism'.

9 Juries and forum shopping

Recommendation 8 of the Background Paper provides that the Commonwealth Government should consider amendments regarding jury trials in the Federal Court. That recommendation is misconceived and ought to be rejected for several reasons.

First, a supposed rationale of the recommendation is to improve national uniformity. But defamation jury trials are already rare in many Australian jurisdictions. Apart from South

¹⁷ Eg, *Wagner v Nine Network Australia* [2019] QSC 284.

¹⁸ *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491.

¹⁹ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

²⁰ See *Palmer v Turnbull* [2019] 1 Qd R 286.

²¹ See *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [150]–[153].

Australia,²² defamation is by judge-only in the NT,²³ and there may have never been a defamation jury trial in the ACT.²⁴ Defamation jury trials are possible in Western Australia but very rare; there has only been one in many, many years.²⁵ The Background Paper arrogantly implies that national uniformity requires the Federal Court to align to New South Wales and Victoria, but nowhere else.

Second, to rely on the submissions of ‘the majority of stakeholders’²⁶ when the majority of those ‘stakeholders’ are media organisations, or the lawyers who act for media organisations, is a question-begging and unjust way to achieve law reform.

Third, the Federal Court has proved itself to be a highly-desirable forum for the efficient disposal of defamation disputes. Jury trials are costlier, and slower, than judge-only trials. The disposition of Allsop CJ to case management in the Federal Court indicates a big reason why plaintiffs are choosing to sue in that forum:²⁷ they can get a result far quicker than in other courts:

[T]his Court has adopted an approach as to the form of imputations and as to capacity determinations which represents an attempt to apply to defamation cases the same approach to case management that applies in all other civil litigation in the Court (as mandated by Part VB of the Act). The predilection for interlocutory disputation in this area of the law should not be encouraged by the ready grant of leave...²⁸

Fourth, an implicit premise of this proposal (and some media commentary) is that the Federal Court lacks the capability to resolve defamation litigation effectively under current law.²⁹ That sentiment is absurd and offensive. The judges on the Federal Court’s new defamation list are exceptional. If anything, and with respect, recent case law in Australia’s most jury-heavy defamation jurisdiction is more questionable than recent decisions coming out of the Federal Court.³⁰

Fifth, even if this proposal did achieve uniformity, that is not a desirable end in itself. The purpose of defamation law, and all laws, is the attainment of justice. Judge-only defamation trials in the Federal Court have proven themselves to be cost-effective, and the results they produce are just as just as those produced in other Australian courts. As case management principles in every Australian court recognise, the efficient resolution of disputes is essential to the practical attainment of justice.³¹ What this proposed reform will do is provide media companies with another tool with which to encourage impecunious plaintiffs into giving up on legitimate claims before trial—another means by which they can ‘bleed’ their opponents. ‘Forum shopping’ is not an evil if the reason for the shopping is that the product on offer is superior.

Sixth, in some cases, juries may be less equipped to determine certain issues than judges. In recent litigation I was involved with, the jury found that a newspaper carried the imputation that a parliamentarian misused parliamentary letterhead (ie, misused public resources), but that the

²² *Juries Act 1927* (SA) s 5.

²³ *Juries Act 1962* (NT) s 6A.

²⁴ *Bateman v Fairfax Media Publications* (2013) 8 ACTLR 12, 21 [35] (Refshauge J). See also *Nicholl v Federal Capital Press of Australia Pty Ltd* (1990) 101 FLR 356 (application for defamation trial by jury refused).

²⁵ *Jensen v Nationwide News Pty Ltd [No 13]* [2019] WASC 451.

²⁶ Background Paper, 18.

²⁷ See Defamation Practice Note (DEF-1) <<https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/def-1>>.

²⁸ *Nationwide News Pty Limited v Rush* [2018] FCAFC 70, [5].

²⁹ Eg, <<https://twitter.com/RealMarkLatham/status/1116201483232366593>>.

³⁰ Eg, *Voller v Fairfax Media Publications Pty Ltd* [2018] NSWSC 608.

³¹ See *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

imputation was not defamatory.³² At risk of contempt, in my opinion, that was a very curious contrast of findings.

Where issues are particularly difficult, a plaintiff's choice of an effectively judge-only jurisdiction may produce a more just outcome.

10 Social media companies

Finally, I note the proposal for a further review to consider the responsibilities of 'internet intermediaries' like Facebook, Twitter and Google (Background Paper, Recommendation 15). We can already see the direction that review is heading from the following statement by the Attorney-General for the Commonwealth in his 20 November 2019 address to the National Press Club:

My own view is that these online platforms should be held to essentially the same standards as other publishers but that how this should occur requires a sensible measured approach to reform taking into account the differences in the volume of material hosted between twitter or Facebook and a traditional newspaper for instance.³³

The AG also referred to *Voller*,³⁴ where it was held that Australian publishers of newspapers are responsible as 'publishers' for comments made by third-party users commenting on content posted via those newspapers' social media accounts.³⁵ He said that 'it is clear that to have a level playing field between online publishers such as Facebook and twitter [*sic*] and traditional media publishers reform in this area is very necessary'.

That this is even being considered in the course of a reform that has otherwise flown the free speech-flag is ridiculous. In December 2019, I wrote the following on this proposal in the *Gazette of Law & Journalism*:³⁶

The proposal has its strengths. It would be great for plaintiffs and the defamation lawyers they engage. Access to the deeper pockets of the companies behind social media platforms would be an incentive to sue.

At a systematic level, the change may encourage social media platforms to tighten their self-regulation to further prevent the dissemination of harmful content.

Making social media companies liable may also be comforting to the traditional media companies whose advertising revenue is being whittled away by social media and other intermediaries. If reforms allow Aussie media to compete in a disrupted industry, it may indirectly support Australian journalism, and thus Australian democracy.

Against that, several factors support the view that this is a terrible, terrible idea.

Libertarians and pseudo-libertarians have been swift to call out the impact this will have on freedom of expression on the internet. The proposal seems to go against the grain of the "pro-freedom" vibe of the other proposed reforms. A cynic might argue that this proposal is more about political expediency, and a desire to appease government critics in the news media, than it is about ideology.

For me, the biggest challenge for this proposal is the "cross-border" factor.

³² *Jensen v Nationwide News Pty Ltd [No 13]* [2019] WASC 451.

³³ <<https://www.attorneygeneral.gov.au/media/speeches/address-national-press-club-canberra-20-november-2019>>.

³⁴ *Voller v Fairfax Media Publications Pty Ltd* [2018] NSWSC 608.

³⁵ A quick review of the comments section of your typical article posted by *The Australian* may give an indication as to why this decision made everyone (read: News Corp) so upset.

³⁶ Republished at <<https://www.linkedin.com/pulse/facebook-newspaper-liability-social-media-platforms-under-douglas/>>.

Social media platforms are underpinned by transnational corporate groups which are usually centred in the United States. To pursue a “platform” for defamation liability may require service of several foreign companies outside of the jurisdiction. As *X v Twitter Inc* (2017) 95 NSWLR 301 illustrated, there is reason to suggest these companies will simply ignore Australian process, even if the court has jurisdiction in personam under Australian private international law.

If a plaintiff follows through with an action against a foreign company based in the United States, then s 230 of the *Communications Decency Act* comes into play. It states: “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”.

Relying on this provision, US-based social media companies may ignore Australian defamation judgments, or worse, seek an order from a US court to the effect that an Aussie judgment may not be enforced. After the Supreme Court of Canada found that Google Inc was liable for breach of confidence for linking to dodgy content in search results, Google did exactly that.

At least Google has a subsidiary in Australia and does participate in local defamation litigation. Will Facebook and Twitter be as willing to submit to the long-arm authority of Aussie courts? Doubtful.

What can an Australian court do when its authority ignored? It can hold people in contempt. But compare what happened when a Victorian court purported to suppress reporting on the Pell trials. Global media companies without a presence in Australia reported anyway.

If social media companies are made liable as publishers of defamation authored by third-party users, the prospect of Australian judgments being ignored by foreign judgment debtors is real. If we are that keen to pierce the “jurisdictional veil” with Australian law, I would prefer that governments focus on base erosion and profit shifting before ruining the internet.

If Australian governments follow through with this proposal, Australia will end up looking silly on the global stage; judges will feel silly when they are ignored; and plaintiffs will feel silly for spending so much money on solicitor-client costs.

Recommendation 15 ought to be abandoned before we embarrass ourselves.