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24 January 2020

Response to Model Defamation Amendment Provisions 2020 (Consultation Draft)

My comments are limited in scope to areas of my expertise. I have published two papers on the offer to make amends provisions because of my research on the role of apologies in the law and a paper on apologies as a remedy for serious invasion of privacy (all of which I submitted – albeit late – to the Review of Model Defamation provisions on 31 May 2019.) I do not practice, teach or research defamation law more generally. My interest in this important area of law concerns how remedies (in particular apologies and other vindicatory remedies) can most fairly and effectively achieve the objects of the legislation.

I have previously submitted and continue to maintain that the prescribed terms of an offer to make amends should require that it include a 'suitable correction' and a 'sufficient apology' (the language used in the UK Defamation Act 1996 s2). This recognises that in law an apology need not always include an acknowledgement of wrongdoing – particularly in the context of the defence of truth in the Model Defamation Act. The purpose of requiring a 'sufficient' apology is that a correction does not acknowledge and make amends for the injury to feelings that publication of an incorrect statement may cause whereas an apology does have that purpose. The reasonableness of a correction and sufficiency of an apology would remain relevant to the s18 inquiry whether the offer was 'reasonable'.

I note also that purpose and operation of section 20 of the Model Defamation Act supports my submission that a 'sufficient' apology be required as a term of the offer to make amends. That section renders an apology inadmissible in proceedings for purposes of determining liability.

I am aware that my proposed changes to section 15 have not been taken up in the Consultation Draft or the proposed amended provisions. In view of that I offer the following comments:

Recommendation 5:

I support this recommendation.

Recommendation 6(b): I support the proposed amendment to clause 15(1)(d) to require publication of a reasonable 'correction, clarification or inclusion of information'. This expressly expands the remedial actions that can be taken.

Recommendation 6(c): I agree that this is unnecessary because the current legislation makes this clear. The confusion stems from the fact many people do not necessarily understand the difference between a correction and an apology. The proposed change to clause 15(1)(d) may go some way to assist and if my primary submission is rejected than I support this change to the drafting in section 15. I submit however, that the fact that people usually expect an apology in an offer of amends supports my earlier submission and it would balance the interests of both parties to require a 'sufficient' apology that takes account of differing circumstances. Research shows that partial as well as full apologies can be beneficial to the parties and to the resolution of dispute. See published chapters attached to this submission.¹ Apologies are already significant to

¹ Carroll, 'Apologies and Corrections as Remedies for Breach of Privacy' in Moreham and Varahus (eds) *Remedies for Breach of Privacy*, (Hart Publishing 2018); Carroll and Graville, 'Meeting the Potential of

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the assessment of damages and need to be considered in the settlement negotiation process for this reason. Publishers will still need to offer apologies in many cases to meet the 'reasonableness' requirement in s18 so this does not introduce any greater uncertainty. In any case section 18 is a more holistic evaluation and requires the parties to litigate over the terms of the offer – something that the legislation aims to avoid.

Recommendation 14(b):

The Consultation Draft proposes that the Australian legislation follow the development in the UK of introducing a 'serious harm' threshold. This is consistent with the recommendation to repeal the defence of triviality (Recommendation 14(b)). If this threshold is introduced I support the latter recommendation.

Recommendation 16:

This recommendation seeks to maintain a cap on non-economic damages separate from an award of aggravated damages. What is needed is clarity about the purpose of imposing a cap and the reasons for assessing general and aggravated damages separately. Any proposed changes raise for consideration the purpose and function of general damages and aggravated damages and whether there is really a distinction in their purpose (they are both to compensate for non-economic loss). Aggravated are damages for one type of loss - general damages for injury to feelings. This amendment reinforces the strained distinction between general and aggravated compensatory damages.

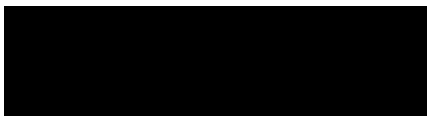
This point is made by Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) in Chapter 12 at 232 in support of its recommendation that aggravated damages not be available for the tort they recommend be introduced but that aggravating (and mitigating) circumstances be considered in the assessment of general non-economic damages. The ALRC considers that awards of exemplary damages in 'exceptional cases' to mark the disapproval of the court are appropriate, rather than large awards of aggravated damages.

The ALRC's proposals make sense from a functional point of view of damages and I refer you to the reasoning behind recommendations 12-2, 12-3 and 12.4 in the Privacy Report. I recognise however that the abolition of aggravated damages in the Defamation Act with no exemplary damages available does not sit well with the imposing a cap on general damages and based on the current cap would seriously undercompensate some plaintiffs.

Additional comments:

I also recommend consideration by given to including two other provisions of the UK Defamation Act 2013. The first is section 12 which provides a means of vindication for the parties by conferring power on a court to order a summary of its judgement to be published. The second is the summary disposal of claims provision in clause 8(3).

Yours sincerely,



Robyn Carroll

Alternative Remedies in Australian Defamation Law' Ch 28, *New Directions for Law in Australia: Essays in Contemporary Law Reform*, edited by Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton, (ANU Press 2017, 311-319); Carroll and Berryman, 'Making Amends by Apologising for Defamatory Publications: Developments in the 21st Century', Barker, Fairweather and Grantham (eds), *Private Law in the 21st Century* (2017, Hart Publishing, Oxford) 479-499.