SUBMISSION BY A WORKING GROUP OF THE VICTORIAN BAR TO THE DEFAMATION WORKING PARTY ESTABLISHED BY THE COUNCIL OF ATTORNEYS-GENERAL REGARDING THE MODEL DEFAMATION AMENDMENT PROVISIONS 2020

A working group of members of the Victorian Bar with expertise in media law and practice welcomes the opportunity to make a submission to the Defamation Working Party established by the Council of Attorneys-General regarding the Model Defamation Amendment Provisions 2020.

This paper has been prepared by a working group consisting of Dr Matt Collins AM QC, Georgina Schoff QC, David Gilbertson QC, Justin Castelan, Elle Nikou-Madalin and Sally Whiteman (**the working group**).

The working group considers that many of the Model Defamation Amendment Provisions 2020 represent welcome changes to the uniform defamation laws. In particular, it agrees with the amendments proposed in relation to the following:

- contextual truth;
- honest opinion;
- clarification of the offer to make amends defence (subject to submissions set out below in relation to the concerns notice provisions);
- the introduction of the single publication rule; and
- amendment of ss 39 and 40 of the *Federal Court of Australia Act 1976* (Cth) to permit jury trials in defamation proceedings.

A majority of the working group also supports the introduction of a serious harm threshold. A plaintiff should not be compensated where the publication has not caused, or is not likely to cause, serious harm to his or her reputation. The current defence of triviality in the

uniform laws is ineffective. It requires the defendant to establish that the "*circumstances of the publication* were such that the plaintiff was unlikely to suffer any harm."

A minority of the working group, however, considers that a serious harm threshold could cause expensive interlocutory disputes.

The working group wishes to make submissions in relation to a number of the other proposed amendments, which it considers are problematic.

Using the same section numbers as those in the Model Defamation Amendment Provisions 2020:

1. Section 12A – Defamation proceedings cannot be commenced without concerns notice

1.1 The working group's view is that this provision could cause significant problems.

1.2 Firstly, it is unclear why an aggrieved person should not be permitted to bring defamation proceedings without first giving each proposed defendant a concerns notice. The concerns notice provisions were never intended to create a hurdle before an aggrieved person could issue proceedings. In practice, defendants have rarely relied successfully on the offer to make amends provisions. In some cases, for example *Rush v Nationwide News Pty Ltd (No. 7)*[1], proceedings were issued without a concerns notice having been served. It is unlikely that if a concerns notice had been served, it would have led to a settlement of that proceeding, or proceedings like it, before proceedings were issued.

1.3 The requirement to serve a concerns notice could cause a number of unnecessary complications for an aggrieved person, in particular:

(a) The concerns notice must be served on "*each proposed defendant*". Difficulties can arise where the identity of further publishers is revealed in the course of the proceedings[2]. It is also problematic if one or more defendants were not served with such a notice;

[1] [2019] FCA 496
[2] For example, *Johnston v Holland* [2017] VSC 597; *Donohue v Round & Ors* [2017] VCC 1711

(b) Section 12A(1)(b) provides that an aggrieved person cannot commence defamation proceedings unless -

> The imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice;

In many instances, concerns notices are drawn in urgent circumstances, by practitioners with little or no experience in defamation law. Drawing imputations in defamation pleadings is a complicated matter, often undertaken by experienced Counsel. It is very common for the formulation of the imputations set out in a statement of claim to differ from those in a concerns notice.

As a result, this requirement is likely to lead to expensive interlocutory pleading disputes and delays.

(c) Section 12A(1)(c) contains a further limitation that proceedings cannot be issued until fourteen days have elapsed:

> since the concerns notice was given in relation to each proposed defendant

However, under section 14(1)(a), a defendant has twenty-eight days to serve an offer of amends. The time limit in section 12A(1)(c) should be twenty-eight days, if it is to be included at all.

1.4 In any event, the working group contends that section 12A should be removed.

2. Section 23 – Leave required for further proceedings in relation to publication of same defamatory matter

2.1 The working group has concerns about the inclusion of the words "an associate of a previous defendant" in section 23(2). Those words may produce significant adverse consequences. If an aggrieved person were defamed, for example, by a Channel Nine entity on 60 Minutes and also previously in a Fairfax newspaper (an associated entity within the meaning of the *Corporations Act 2001* (Cth) – see s 23(c)), that person would require leave. It is not clear why that should be necessary.

2.2 The working group submits that the words "an associate of a previous defendant" should not be included in section 23(2).

3. Section 29A – defence of responsible communication in the public interest

3.1 The working group urges reconsideration of the proposed responsible communication defence. For the reasons set out below, it submits that the proposed new defence would not add anything significant to the existing section 30 statutory qualified privilege defence. The working group recommends the adoption of a provision similar to section 4 of the *Defamation Act 2013* (UK).

3.2 Further, a majority of the working group considers that the proposed new defence does not address a major flaw in the current section 30 statutory defence – that historically, publishers have faced difficulties establishing reasonableness for the purposes of such a defence unless they prove that they believed in the truth of each imputation that is made out by the plaintiff, or that its conduct was nevertheless reasonable in the circumstances in relation to each imputation which it did not intend to convey but which was in fact conveyed[3]. In circumstances where an imputation relied on by the plaintiff is made out, but it was not intended by the defendant, the statutory qualified privilege defence would almost certainly fail. A minority view was expressed that publishers should be astute to the likely meanings conveyed and that s 30 of the uniform laws strikes the right balance.

3.3 In order to successfully invoke the defence under s 29A, a defendant must establish that the publication was responsible. Section 29A of the Model Defamation Amendment Provisions 2020 provides factors to be considered in determining this question.

3.4 Those factors are identical to those in s 30 of the current uniform laws, save for the following. Paragraphs 29A(2)(e) (compliance with applicable codes or standards) and (g) (confidential sources) are not included *expressly* in the current provisions; paragraphs 30(3)(a) (extent to which the matter published is of public

[3] *Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652 at [220] – [248]; *Obeid v John Fairfax Publications Pty Ltd* (2006) 68 NSWLR 150 at [68]-[69].

interest) and (f) (nature of the business environment in which the defendant operates) of the uniform laws are not included *expressly* in s 29A.

3.5 In both s 29A and the current provisions, however, there is a provision which does not limit the matters that may be taken into account (s 29A(3) and s 30(3)(j)).

3.6 The end result is that *any* factor can be taken into account, including those which are not expressed.

3.7 Accordingly, it seems improbable that the proposed defence, as presently formulated, will make any significant change or will achieve its underlying policy objective of providing greater protection for public interest and investigative journalism.

3.8 The working group recommends that serious consideration be given to adopting a provision similar to section 4 of the *Defamation Act 2013* (UK). There are two limbs to the defence in section 4:

(a) the matter published must be in the public interest; and

(b) the defendant must reasonably believe that publication of the particular statement was in the public interest.

3.9 Such a defence would be more likely to result in a better balance between publication of matters of public interest and protection of reputation, as has occurred in the United Kingdom and other countries which have adopted corresponding defences, such as Canada. Adoption of the UK defence would also lead to Australian courts considering, and likely applying, the jurisprudence that has developed in those jurisdictions; and encourage greater uniformity of defamation laws in common law countries.

Statutory Qualified Privilege

3.10 For the reasons given above, the working group's view is that s 30 should be replaced with a provision similar to s 4 of the *Defamation Act 2013* (UK).

4. Section 35 Damages for non-economic loss limited

4.1 The working group takes the view that the current drafting of the proposed amended s 35 does not make it clear, beyond argument that aggravated damages may be awarded over and above the maximum damages amount.

4.2 The working group suggests that the proposed s 35(1) should have the following underlined words added:

> "The maximum amount of damages for non-economic loss (not including aggravated damages) that may be awarded in defamation proceedings is $250,000 or any other amount adjusted in accordance with this section from time to time (the **maximum damages amount**) that is applicable at the time the damages are awarded."