[redacted]

24 January, 2020

defamationreview@justice.nsw.gov.au

Dear Sirs/Madams,

Re: Review of Model Defamation Provisions

I was a defendant in one of Australia's long running defamation cases occurring in the last few years, namely Moran v Schwartz Publishing and Virginia Peters [WASC2014]. I was the author of a book called 'Have You Seen Simone?' and due to arrangements with my publisher I was responsible for paying for the defence of the proceedings (most publishers have a contractual right to an indemnity from their authors). I think the best contribution I can make to this process is to point out several critical elements in my case, for your consideration, rather than respond to the individual recommendations. At the end of my submission I make a suggestion regarding practice and procedure.

In Moran v Schwartz Publishing and Virginia Peters, my publisher and I were accused of imputing in my book that the plaintiff had committed murder. This was a nonfiction book written for my PhD (conferred by University of London) and written under supervision of two senior professors. The book had also been reviewed by and passed by the London University Ethics Committee – it would not have passed this rigorous process if these experts in ethics believed my book unfair or unfounded, or if I had imputed murder.

In my case, I argued that my book did not impute murder, but imputed the lesser 'suspicion to murder', an indisputable fact. I had attended an inquest, so I believed the allegations made at that inquest would be protected by Absolute Privilege. At an urgent injunction, in which I was successful, Kenneth Martin J pointed to the case against me being arguable, but not strong. This conundrum,

I think, is best summarised by my conclusion at the end of the three-year process that ensued, namely that suspicion *is* smoke. This smoke sustained preparation for five interlocutory hearings – the last hearing was not heard due to the plaintiff offering me a settlement, including to pay some of my costs.

The trial that never eventuated was assessed at costing $780,000 on a 'party party' basis - probably about $1m on a 'solicitor client ' basis. Although I had strong Truth, Qualified Privilege, and Absolute Privilege defences, I was initially advised to settle with the plaintiff in order to avoid the cost of litigation. I was in a bind to admit to, apologise and pay damages to someone who was making a false claim, or alternatively face financial ruin by supporting the legal costs until I could finally have my defences heard (the very last thing in the process to be determined).

Also, making my position even more vulnerable, the plaintiff claimed impecuniosity so that I would never be able to recover my costs should my defences succeed. The exercise in defending myself under the current regime would require a long and expensive court process and was bound to be so punitive as to be pointless. Despite the poor odds, I ran a case for security for costs, and to the surprise of my lawyers I was awarded security for $500,000, to be paid into trust in tranches. The decision extended well beyond accepted principles guiding security for costs and it was coined 'judicial activism' by some commentators.

I thought this victory might end the case. It did not.

The case settled almost three years later, after I prepared to run a fifth interlocutory application, this last one to gain discovery of the plaintiff's personal documents, including his personal summary of the facts of the case - a summary which I had known about, and sought access to unsuccessfully, from the outset of the case. The plaintiff refused access, including on grounds of Criminal Privilege, arguing that his own personal writings may lead to his arrest for murder. As these documents had been in his possession a number of years before he sued me, I felt I had been engaged in an unfair process since the inception of the case. The case appeared to be sustained by technicality utilised by a disingenuous plaintiff rather than principles of expeditious and cost effective justice. At the

close of proceedings I had spent approximately half a million dollars on interlocutory hearings.

Throughout the process I had a reoccurring dream. It involved a bus. It was full of ordinary, reasonable, potential readers travelling along the back roads of Australia - not Clapham. I waved the bus down and offered all the passengers a copy of my book, and of course tea and an Iced Vovo biscuit. A ridiculous dream perhaps, but one based on the simple founding principle of the Defamation Act. In Moran v Peters and Schwartz, Kenneth Martin J opined on several occasions he was not equipped to read like an 'ordinary reader' (how could he be an ordinary reader?), and therefore he could not give a definitive opinion – we would have to wait for a jury.

So how do we 'do away' with Juries, as proposed by some, and streamline the process of justice through courts which many can ill afford?

I believe we require pre-litigation access to a more informal, specialist tribunal (something like NCAT) with a panel of reasonable, 'ordinary readers' as a way of diffusing litigation. In effect, a Wise Crowd of volunteers from the community could perform a service under the supervision of a qualified judicial officer. This could be online and efficient and also act as a guiding (or perhaps binding) finding to superior courts, should they become involved. There would be no shortage of ordinary readers who would like to help. Only the most serious and deserving of cases would have access to the superior courts.

In the context of my experience, the 'serious harm' test still may not have prevented a determined but doomed plaintiff from embarking on a sustained and lengthy legal process. I think the abovementioned solution would have greatly assisted, and still given the plaintiff his opportunity to be heard.

I hope my comments might assist you in your important deliberations and I thank you for the opportunity to be heard.

Yours sincerely,

Virginia Peters