



30 April 2019

Review of Model Defamation Provisions
C/o Justice Strategy and Policy Division
NSW Dept of Justice
Email: policy@justice.nsw.gov.au

Dear Members of the Working Party,

Re: REVIEW OF MODEL DEFAMATION PROVISIONS – Submission of Dr Daniel Joyce in response to Discussion Paper

Thank you for initiating this review into the current Defamation Provisions. It is a timely opportunity to review and reform defamation law and to continue the earlier reforms of 2005. I will target my submissions to those areas I am most concerned with. I make these submissions as an academic who teaches media law and defamation law.

Question 1

Yes, the policy objectives of the Model Defamation Provisions remain valid. In addition to uniform Australian laws, we also need laws which interact with and take account of best practice in foreign jurisdictions given the digital context for publication.

Defamation law is said to balance protection of reputation with freedom of expression. Clearly, as currently practiced this balance is not achieved by defamation laws. There is inadequate protection for freedom of expression, media freedom and for the publication and discussion of matters of public interest and importance.

In part this is because liability is construed so broadly in defamation law. Another factor is the failure of defences such as truth/justification, contextual truth, comment/opinion, qualified privilege and triviality to offer protection for public interest publication. The courts often hold publishers to very high standards and this area of the law is unduly technical, costly and complex.

The absence of a bill of rights in Australia is another key factor. Defamation laws, though they offer an important private law remedy, are probably the key constraint on freedom of expression in Australia. It is time for further reform.

Question 2

The earlier reform to curtail the right of corporations to sue for defamation was the right one. As stated above, defamation law already unduly constrains freedom of expression and can be a tool for the powerful to curtail and silence criticism. Corporations do not need and should not have broader rights in this area.

Question 3

There should be careful consideration given to adoption of a 'single publication rule'. A variety of approaches are possible, and I would recommend a detailed evidence-based analysis of other systems and their strengths and weaknesses. The multiple publication rule needs to be reformed.

Question 9

Yes, further reforms are needed to ensure that the contextual truth defence works as intended.

Question 10

Yes, greater protections should be given for scientists and academics and for critical public discussion more broadly. The UK provisions in this area are sensible and should be adopted.

Question 11

The failure of qualified privilege to protect public interest reportage is well known and a critical area for reform. We should adopt the UK reforms in this area which go further than protecting traditional media. The main reason this defence doesn't work is that the courts hold the media and publishers to very high standards in terms of reasonableness. This is the most important area for reform in terms of media freedom.

Question 12

Perhaps, but I am wary of 'digital publications exceptions' - it is a useful discipline to require an opinion to relate to proper material or to underlying facts. The real issue is whether there is a legitimate context for the opinion.

Question 14

I am strongly of the view that a 'serious harm' threshold test should be introduced as in the UK. I also agree that proportionality and case management considerations should be introduced here too. In general, reform efforts have focused on defences which end up being costly and technical. More robust reform is needed at the front end in terms of the cause of action and its interpretation. *Bleyer v Google Inc* [2014] NSWSC 897 is useful, but more is needed in terms of reform here. The current defence of triviality rarely works. It could be strengthened – currently it is hard to use due to the 'any harm' aspects.

Question 15

This is a very complex area and the review should be wary of self-interest in the making of arguments for 'safe harbour' provisions. While it is true that digital platforms are often placed in a difficult position regarding liability, if properly applied innocent dissemination is a defence which can work well in this area. I would be very cautious about offering a broad 'safe harbour' provision to digital platforms given current global concerns regarding their failure to self-regulate in terms of hate speech, online misogyny, incitement, trolling and so on. It can be very difficult for an individual to have damaging content removed from such platforms, without legal protections, and defamation law is one such avenue. Clearly other forms of public regulation are needed. This is an area where there needs to be greater engagement with and regulation of digital privacy and

data protection. The review should tread carefully here and consider the broader digital media law landscape rather than only focusing on defamation law.¹

Questions 16 and 17

The cap on damages needs to be revisited and further clarified in order to continue to encourage settlement and alternative dispute resolution. There is an upwards trend in recent awards in some high-profile cases. A cap of some kind is useful, but a careful review is needed. There should be a way for plaintiffs to be awarded appropriate damages where the publication is extensive, but also to provide legislative guidance regarding consolidation where needed.

Thank you for the opportunity to provide submissions and for undertaking this much needed review of our defamation laws. I would encourage further consideration of the ways in which defamation laws interact with freedom of speech and privacy. It may also be useful to give consideration to the shaky conceptual foundations of defamation law.

Yours sincerely,



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¹ See further: Daniel Joyce, 2017, 'Data associations and the protection of reputation online in Australia', *BIG DATA & SOCIETY*, vol. 4, <http://dx.doi.org/10.1177/2053951717709829>; Daniel Joyce, 2015, 'Privacy In The Digital Era: Human Rights Online?', *MELBOURNE JOURNAL OF INTERNATIONAL LAW*, vol. 16, <http://classic.austlii.edu.au/au/journals/MelbJIL/2015/9.html>.

