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29 April 2019 Ref: 857652

The Hon Vickie Chapman MP
Attorney-General
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Dear Ms Attorney

Review of Model Defamation Provisions

1. I refer to your letter of 18 March 2019 in relation to the Review of the Model Defamation Provisions currently being undertaken by the Council of Attorneys-General Defamation Working Party ("the Working Party").

2. The Society notes the Council of Attorneys-General Review of Model Defamation Provisions Discussion Paper ("the Discussion Paper") which outlines the main issues for consideration in the review process. The Society's submission addresses a number of questions raised in the Discussion Paper and has been informed by its Members who practise in the area (both plaintiff and defendant).

3. The Society further notes that it has also been referred this matter by the Law Council of Australia and will be providing a copy of this submission to the Law Council for consideration and inclusion in its response. Once the Law Council has finalised its submission, the Society will provide you with a copy for your information. We expect that the Law Council will address additional aspects of the Discussion Paper in its submission.

Question 1: Do the policy objectives of the Model Defamation Provisions ("the Model Provisions") remain valid?

4. The Society considers that the policy objectives of the Model Provisions remain valid. These include to ensure the law of defamation does not place unreasonable limits on freedom of expression and the publication of matters of public interest and importance, and to provide fair and effective remedies for persons whose reputations are harmed by the publication of defamatory matter.

5. The policy objectives are sufficiently broad and reflect the need to strike a balance between freedom of expression and the right to reputation. While the underlying policy goals remain relevant, the Model Provisions require updating to make them more applicable to publications in a digital age.

Question 2: ***Should the Model Defamation Provisions be amended to broaden or to narrow the right of corporations to sue for defamation?***

6. Presently clause 9 provides that a corporation has no cause of action for defamation in relation to the publication of a defamatory matter about the corporation unless it was an "excluded corporation" at the time of the publication. A corporation is an excluded corporation at the time of publication if:

   6.1 The objects for which it is formed do not include obtaining financial gain for its members or corporators; or

   6.2 It employs fewer than 10 persons and is not related to another corporation, and the corporation is not a public body.

7. The Society considers that clause 9 strikes an appropriate balance, in that it prevents strategic litigation by large corporations with significant resources to deter adverse publicity. However, it provides smaller corporations who may be disproportionately affected by harm to their reputation, access to the defamation regime.

8. The Society notes that corporations excluded under the Model Provisions do have available to them a number of legal avenues to protect their reputational interests, which are better suited to address damage than defamation (i.e. misleading and deceptive conduct).

Question 3: Should Model Defamation Provisions be amended to include a 'single publication rule'?

9. The Society notes the limitation period for defamation actions is one year from the date of publication under the Model Provisions. However, in relation to online publications, Courts have determined by applying existing principles that 'publication' occurs each time material is downloaded from the internet by a third party, rather than when the material is uploaded. This is known as the 'multiple publication rule'.[1]

10. The Society understands the multiple publication rule is problematic in the digital age, as there is effectively no limitation date in relation to online materials. A plaintiff may have a cause of action in relation to a single matter that has been subject to multiple 'republications' for many years (i.e. each time an internet user accesses and downloads information from a webpage, this constitutes a 'publication' that may give rise to separate causes of action each with its own limitation period).[2] The Society is aware that the single publication rule has been adopted in a number of jurisdictions including the UK. Section 8 of the *Defamation Act 2013* (UK) has the effect that the 12-month limitation period commences on the date of the first publication by a given publisher.

11. The Society notes concerns raised by plaintiff lawyers that a 12-month time period to bring an action in defamation under the single publication rule may be overly restrictive, given that harmful consequences may arise at a later date (i.e. well after the initial downloading) and not foreseeable at the time of first publication.

12. Under section 37 of the *Limitation of Actions Act 1936* (SA) an action on a cause of action for defamation is not maintainable if brought after the end of a limitation period of 1 year running from the date of the publication of the matter complained of. However, a court must, if satisfied

[1] See *Dow Jones & Co v Gutnick* (2002) 210 CLR 575.

[2] See for example: *Alex v Australian Broadcasting Corporation* (2015) 20 DCLR (NSW) 179; *Gacic v John Fairfax Publications Pty Ltd* (2015) 91 NSWLR 485.

that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of publication, extend the limitation period to up to 3 years running from the date of the publication.

13. It is considered that the exception under the *Limitation of Actions Act 1936* is quite rigid and only applied in very limited circumstances. As such, further consideration may be given to more flexibility in this regard if the single publication rule is introduced. However, this needs to be balanced against the intention of the Model Provisions, which is to encourage people to act swiftly to address reputation harm. The Society notes that the limitation period may be set aside under a discretion allowed to the Court under the UK legislation.[3]

Question 4: Should the Model Defamation Provisions regarding when offer to make amends may be made and the effect of failure to accept reasonable offer to make amends be amended?

14. The Model Provisions prescribe pre-action processes intended to incentivise early resolution of disputes. These processes encourage identification of issues and consideration of the merits of resolution, before parties enter into litigation.

15. The Society considers that the suggested amendments in Question 4 would provide greater clarity regarding the operation of concerns notices and offers to make amends. In particular, clarity around the minimum time an offer to make amends can be open for (i.e. 28 days on receipt of the concerns notice). This would provide further incentive for both plaintiffs and defendants to take the pre-action processes seriously.

Question 5: Should a jury be required to return a verdict on all other matters before determining whether an offer to make amends defence is established, having regard to issues of fairness and trial efficiency?

16. The Society notes that South Australia is the only state (along with the territories) which does not retain the option of jury trials for defamation.

Question 6: should amendments be made to the offer to make amends provisions in the Model Provisions?

17. Question 6 suggests the following amendments:

    a) Require that a concerns notice specify where the matter in question was published.

    b) Clarify that clause 15(1)(d) (an offer to make amends must include an offer to publish a reasonable correction) does not require an apology.

    c) Provide for indemnity costs to be awarded in a defendant's favour where the plaintiff issues proceedings before the expiration of any period of time in which an offer to make amends may be made, in the event the court subsequently finds that an offer of amends made to the plaintiff after proceedings were commenced was reasonable.

18. The Society considers that suggestion (a) above is appropriate, however, this should not include a requirement to list the URL of the alleged defamatory material in a concerns notice. The information provided should be sufficient for the publisher to be able to locate and identify that material, where it is in writing or in some other non-ephemeral form.

[3] See section 8(6) of the *Defamation Act 2013* UK.

19. The Society considers that suggestion (b) is not strictly necessary, however, it does not consider the suggested amendment (clarification that an offer to make amends does not require an apology) would do any harm.

20. The Society also considers that suggestion (c) above is appropriate, however the relevant date should be when the plaintiff serves (rather than issues) proceedings.

Question 9: should clause 26 (defence of contextual truth) be amended to be closer to section 16 (defence of contextual truth) of the (now repealed) Defamation Act 1974 (NSW), to ensure the clause applies as intended.

21. It is noted in the Discussion Paper that the current wording of clause 26 appears to have clear unintended consequences. As a result, plaintiffs can tactically deprive defendants of the full benefit of the defence. The Society supports the suggestion posed in the Discussion Paper that clause 26 be amended to reflect/be closer to section 16 of the now repealed *Defamation Act 1974* (NSW).

Question 10: Should the Model Defamation Provisions be amended to provide greater protection to peer reviewed statements published in an academic or scientific journal, and to fair reports of proceedings at a press conference?

22. The Society considers that the Model Provisions could be amended to include peer reviewed statements published in academic or scientific journals, subject to the applicability of clause 28(3) (i.e. the extent the matter published is of public interest; the seriousness of any defamatory imputation carried by the matter published etc.).

23. However, given the defence of innocent dissemination (clause 30), it may be less appropriate to extend the defence to 'fair reports of proceedings at a press conference'. Perhaps, if there were to be such a defence, it should only apply to fair reports of proceedings at a press conference specifically held to discuss matters of public interest and only to the extent that the relevant report relates to those matters of public interest (subject to clause 28(3)).

Question 11: should the 'reasonableness test' in clause 30 of the Model Defamation Provisions (defence of qualified privilege for provision of certain information) be amended?

24. The Society considers that the 'reasonableness test' remains appropriate to achieve a fair balance between competing private and public interests. The defence applies to publications made in the course of giving a recipient information in which he or she has an interest or apparent interest, provided that the publisher acts reasonably. It is frequently relied on by media for publishing investigative reports on matters of genuine public interest, where care has been taken to obtain all sides of the story and distinguish between what is fact and what is allegation, even though the publisher is not able to determine what is true.

25. The Society is aware that there is a view that the Courts tend to apply an overly high standard in considering 'reasonableness', which may contribute to the suggestion that the threshold could be lowered. However, the defence of qualified privilege is an important defence for the protection of freedom of expression and quality journalism on matters of public interest. Therefore, careful consideration of the proposed amendments contained in the Discussion Paper is warranted with respect to clarifying the intended threshold.

Question 12: should the statutory defence of honest opinion be amended in relation to contextual material relating to the proper basis of the opinion, in particular, to better articulate if and how that defence applies to digital publications.

26. In the digital age, opinions are frequently 'published' on blogs, social media sites or in text messages or tweets, without detailed contextualising material. The Society supports proper consideration of how the honest opinion defence can be properly applied in the context of social media and digital publications. Further consideration and articulation of how the defence applies in this context is required.

Question 14: Should a 'serious harm' or other threshold test be introduced into the Model Defamation Provisions, similar to section 1 (serious harm) of the Defamation Act 2013 (UK)?

27. The Society notes that overseas jurisdictions have decided to manage trivial actions by introducing a threshold of harm, placing the onus on the claimant to establish that a defamatory matter materially affected his or her reputation. In the UK, section 1(1) of the *Defamation Act 2013* (UK) provides that 'statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant'. However, with respect to UK provision, the ability to predict the seriousness of the harm which may arise to the reputation of a prospective plaintiff may not always be easy.

28. While it is important to deter trivial claims, the term 'serious harm' is generally undefined, with little guidance as to how 'serious' the harm needs to be before it constitutes 'serious harm'. This is problematic in the defamation context. Given the potentially significant consequences that flow in a defamation context, if such a threshold was to be introduced, the Society considers that there would need to be further guidance and information provided as to its interpretation.

Question 15: Does the innocent dissemination defence require amendment to better reflect the operation of Internet Service Providers (ISPs), Internet Content Hosts, social media, search engines and other digital content aggregators as publishers?

29. The Society notes the matter of *Google Inc. v Duffy* [2017] SAFC in which the Full Court of the Supreme Court of South Australia upheld the decision of Blue J, that Google was liable as a secondary publisher of defamatory information for hyperlinks and snippets that came up in response to search queries. The Full Court found that once Google was on notice that the material was defamatory and refused to remove it, it could not be found to have innocently circulated the information.

30. As such, the Court has found that is fair and reasonable for secondary publishers to be liable for defamatory material, following proper notification and a reasonable time to take down the defamatory material.

31. While this position appears to be reasonable, the Society is aware of concerns with respect to the degree of vigilance necessary in an environment involving publication of vast quantities of information from differing sources, which creates a risk of aggregators adopting an overly conservative approach which may have ultimately impact upon freedom of expression. For example, where the comments sections are removed on digital content on social media, to avoid the risk of becoming a secondary publisher. Furthermore, there are concerns that the existing position has the potential to be burdensome, especially to individuals and smaller/non-for-profit entities.

32. In the Society's view, it may be desirable to provide greater clarity around the provision of notice of defamatory content and the 'reasonable' period of time to remove that content once on notice (i.e. clear and prescriptive 'take down provisions'). The Society would support the development of a framework around when ISPs, search engines etc. will be deemed to have been given sufficient notice of defamatory content, and the period of time that is 'reasonable' to remove that content. The Society notes the view of Justice Blue in *Google v Duffy* which suggested a time period of around one month.

33. Some jurisdictions, including the UK and EU, have taken the approach of implementing 'safe harbour provisions' which provide more complete protection for digital content aggregators. In an international marketplace, this also gives rise to issues relating to viability of local content aggregators competing against those operating from such jurisdictions.

34. However, there are also arguments in favour of permitting civil liability against, and an incentive for responsible conduct by, digital content aggregators, particularly in circumstances where it may be impossible or very difficult to identify, pursue or enforce relief against the primary publisher of defamatory content.

35. In the alternative, safe harbour provisions could be adopted which apply where the digital content provider can demonstrate that the identity and a means of contacting the party who originally posted the content was readily ascertainable (which is a reversal of onus when compared with the UK provision).

36. The Society considers this is a difficult balancing act and notes that the matter is also being considered as part of the Australian Competition and Consumer Commission's Digital Platforms Inquiry into competition in the media and advertising services market.

Question 16: Should clause 35 be amended to clarify whether it fixes the top end of a range of damages that may be awarded, or whether it operates as a cut off?

37. The Society notes that clause 35 of the Model Provisions provides that unless the situation warrants an award of aggravated damages, the maximum amount of damages for non-economic loss (i.e. to compensate for general harm to reputation, distress, and provide vindication of a plaintiff's reputation) is $250,000, adjusted annually in accordance with the percentage change in average weekly earnings of full time adults – currently $398,500. However, the amount of damages payable for economic loss is uncapped and can still result in large damages awards. The Discussion Paper refers to the case of *Rayney v The State of Western Australia* [No. 9] [2017] WASC 367, where a Perth barrister was awarded $2.62 million for defamation arising from a series of media conferences relating to the murder of his wife.

38. Until 2017, the cap had been perceived to significantly reduce the number of claims pursued by impacting the likely commerciality of pursuing a claim which does not involve any economic loss component. However, several recent decisions where circumstances have permitted the cap being significantly exceeded may reverse that trend. Further, several recent decisions have also suggested that the cap should be treated as a mere 'cut-off' point for the awarding of damages, and not as a relevant criterion for determining the amount of damages that are appropriate.

39. The Society supports the amendments proposed to clause 35 to reflect that it is intended to represent the top end of a range of sums awardable (that is, the cap is the maximum awarded for the worst damage). The cap otherwise seems unhelpful as a tool for predicting the likely range of damages and encouraging commercial settlements, and does not reflect its policy intent.

40. Question 16 of the Discussion Paper also considers whether clause 35(2) should be amended to clarify whether or not the cap for non-economic damages is applicable once the court is satisfied that aggravated damages are appropriate. The Society considers that clarification would be sensible with respect to clause 35(2) to ensure consistency between jurisdictions, given the varying applications of clause 35(2).

41. A possible solution would be to retain the cap for non-economic damages, resulting in any award of aggravated damages to be awarded as an additional component (in addition to the cap).

Yours sincerely

Amy Nikolovski
PRESIDENT
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