

Submission

Introduction

This submission is concerned with Question 21(a) (ii) of Stage 2, Review of the Model Defamation Provisions Discussion Paper.

Question 21: Absolute privilege for reports to employers and professional disciplinary bodies

(a) Should absolute privilege be extended to complaints of unlawful conduct such as sexual harassment or discrimination made to:

- i. employers, or to investigators engaged by employers to investigate the allegation?
- ii. professional disciplinary bodies?

(b) If so, to what types of unlawful conduct should be included providing this protection?

(c) If yes to a), what is the best way of amending the MDPs to achieve this aim (for example, by amending clause 27 and/or by each jurisdiction amending their Schedule 1)?

(d) Are there sufficient safeguards available to prevent deliberately false or misleading reports being made to employers or professional disciplinary bodies? If not, what additional safeguards are needed?

It is concluded in this submission that the defence of absolute privilege should not be extended to professional disciplinary bodies, including bodies that oversee the legal profession, regardless of the subject matter of the publication. Where the defence of absolute privilege is already available,¹ it may be necessary for the Defamation Working Party (DWP) to determine whether the defence should be limited.

¹ The definition of absolute privilege applied in this submission is that which is provided in the Discussion Paper Attorneys-General Review of Model Defamation Provisions – Stage 2

5.35

Professional disciplinary bodies are bodies that can receive complaints and investigate the conduct of an individual in a particular profession through disciplinary proceedings. These bodies are organised by profession, for example, the Council of the Law Society of New South Wales or the Queensland Legal Services Commission investigate complaints about legal professionals in their respective states, and the Medical Board of Australia investigates complaints about medical practitioners. Many professional disciplinary bodies have authorising legislation that provides penalties for providing false or misleading statements or documents.

5.36

Where a complaint is made to a professional disciplinary body with quasi judicial functions, a common law absolute

Case studies from professional and statutory bodies that oversee the legal profession form the basis of this analysis given the material that is in the public domain, some of which in the form of decisions of this country's superior courts. Additionally, the legal profession and in particular the statutory bodies that oversee the profession hold themselves out as having the highest standards of probity. Those standards provide a benchmark against which the conduct of all other professional bodies may be compared.

The reasons for the conclusion above are as follows.

Abuse of process

a) The case of Stewart Allen Levitt

In *Council of the Law Society of New South Wales v Stewart Allen Levitt*², the High Court considered arguments from the applicant in a disciplinary matter against Levitt, a solicitor, for approximately 13 minutes before it denied the application for special leave to appeal, with costs. Mr Brett Walker SC who appeared for Levitt was not required to bestir himself.

The Council was acting on behalf of the Legal Services Commissioner (a statutory body under the purview of the Attorney General NSW). The dismissal of their arguments in a disciplinary matter against a solicitor in such summary fashion by the High Court cannot be said to have enhanced their standing in the eyes of the public, nor justify the protection they already enjoy from claims of defamation.

privilege defence is likely to apply to the complaint. However, there may be some uncertainty as to whether an absolute privilege defence applies to all professional bodies to which a complaint may be made, or to all communications which are related to the investigation of the complaint.¹⁸³ Again, if absolute privilege does not apply, the complainant would need to rely on a qualified privilege defence, or other available defences, if sued for defamation.

5.37

As noted above, some professional disciplinary bodies in NSW are covered by absolute privilege as they are included in Schedule 1 to the Defamation Act 2005 (NSW). However, there is no uniformity between the application of absolute privilege between different professional disciplinary boards and between jurisdictions

² Council of the Law Society of New South Wales v Levitt [2019] HCATrans 78 (12 April 2019). Located at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2019/78.html?context=1;query=Council%20of%20the%20Law%20Society%20of%20New%20South%20Wales%20v%20Levitt%20;mask_path=. Last sighted on 1 May 2021

³ It is important to recall that the findings, such as they may be, against Mr Heydon QC are contained in a report prepared by a person who is not a judicial officer. The person's investigation was not in the form of a duly constituted tribunal where witnesses provided evidence under oath, and could be cross-examined. . See statement by the Chief Justice of The High Court Australia, Mdm Justice Susan Kiefel located at <https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>

Further, counsel for the applicant submitted that there were some 66 other matters on hold, pending the outcome of the Council's application, and appeal. That submission does give the impression that proceedings between the applicant and respondent had come to a point where the respondent's conduct was no longer the real issue of concern to the Council, but rather further embarrassment and costs³.

It is therefore submitted that the defence of absolute privilege currently enjoyed by bodies that oversee the legal profession ought to be limited given the real potential for abuse of process. Given the high bar of ethics and probity that the legal profession professes, it follows that the privilege ought not be extended to other professions.

What the limitations ought to be and how they ought to be applied are issues that will be discussed below.

b) The case of Dyson Heydon QC

The very mention of the name Dyson Heydon QC has come to evoke intense emotional responses but it remains the case that Mr Heydon QC has yet to be charged for the offences alleged against him. The allegations, or “findings”⁴ against him were made public in June last year and in July, the Attorney General NSW Mr Mark Speakman SC announced, via mass media, that he had requested the NSW Bar Society to consider if Mr Heydon QC ought to be stripped of his standing as Queen's Counsel⁵.

That the First Law Officer, himself a SC, chose the facade of professional standards and disciplinary process to vilify Mr Heydon QC publicly (for as mentioned above, he has yet to be even charged) should serve as a warning to lawyers and other professionals that even the most highly regarded among them can become subject to public vilification, by peers who are relied on to uphold standards, but who may choose

³ See also discussion by Stephen Warne, a member of the Victorian Bar : Disciplinary prosecution halted because Law Society's reasons for deciding to prosecute were inadequate. Located at link <http://lawyerslawyer.net/2017/07/19/disciplinary-prosecution-halted-law-societys-reasons-deciding-prosecute-inadequate/>. Accessed on 16 May 2021.

⁴ It is important to recall that the findings, such as they may be, against Mr Heydon QC are contained in a report prepared by a person who is not a judicial officer. The person's investigation was not in the form of a duly constituted tribunal where witnesses provided evidence under oath, and could be cross-examined. See statement by the Chief Justice of The High Court Australia, Mdm Justice Susan Kiefel located at <https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>. Accessed on 16 May 2021

⁵ NSW Attorney-General seeks advice on stripping Dyson Heydon of QC title <https://www.abc.net.au/news/2020-07-03/nsw-attorney-general-seeks-to-strip-dyson-heydon-of-qc-title/12419320>. Accessed on 16 May 2021

to disregard professional standards in the pursuit of objectives, for example political considerations, that are not commonly held. The extension of the defence of absolute privilege to all professions is more than likely to encourage that type of conduct.

c) AB v The Law Society of NSW ⁶

The decision in AB v The Law Society Of NSW concerns procedural fairness and the part of the judgement by Davies J that is especially relevant to this section of this submission can be found in paragraph 24 of the decision where Davies J states:

*“In fact, **the Law Society’s statement in that letter was untrue.** Not only did the Law Society have the statutory declaration of CD from which it had quoted, but it had another statutory declaration, made at an earlier time, with answers to questions which had been asked of CD by the Law Society. That only became clear when Mr Walsh⁷ (solicitor acting for CD) saw the report from the Bar Association mentioned earlier. That statutory declaration was not made available until a subpoena and a notice to produce was issued to the Law Society shortly before the present hearing. The other statutory declaration has never been made available to the plaintiff”.*

Suffice to say, for the purposes of this submission: when a judge says the Law Society Of NSW lied, and that the lie was uncovered by the Bar Association NSW, the community at large cannot be expected to believe that officers of the court are a special breed who should be entrusted to not abuse the defence of absolute privilege.

A corollary : The example of the abuse of the public document defence

6 [2018] NSWSC 1975. See also discussion by Stephen Warne on his blog post located at <http://lawyerslawyer.net/2019/02/03/the-disciplinary-investigators-duty-of-disclosure-more-on-inadequate-reasons-following-a-disciplinary-investigation/>. Accessed on 16 May 2021.

7 Mr Greg Walsh has set-out the facts of his client AB's case in a post that can be located at link <https://www.gregwalsh.com.au/ab-v-law-society-of-nsw-2018-nswsc1975-davies-j/>. Accessed on 16 May 2021/

In Sahathevan's submission to the first stage of consultations with regards reforms to the MDPs , it was noted with regards **the** Section 28 Defence for publication of public documents⁸:

It is submitted that the defence be limited to public documents that carry the full names of all involved in the preparation of the document, or at least one person who must, in addition to the corporate liability be personally responsible and liable for the contents of the document. In a story published on 17 January 2019 in The Australian, authored by Mr Ben Butler⁶⁹ it was demonstrated how even senior judicial officers had either intentionally or negligently created a public document that contained findings of an international conspiracy involving Tony Blair, George Soros and reporters from the ABC 4 Corners program. Mr Butler also disclosed that the persons involved in the creation of the document sought refuge in the anonymity of the civil service.

Mr Butler's article in The Australian named the NSW Legal Profession Admission Board (NSW LPAB) and its chairman The Chief Justice Of NSW, Mr Tom Bathurst QC. The NSW LPAB is overseen by the Attorney General NSW. Mr Butler's story also referred to the fact that the Board at the time of writing included three sitting judges.

The public document defence is justified in part by the utility to society of ensuring that the civil service's ability to serve without fear or favour is protected from claims of defamation. Similarly the absolute privilege defence., with regards professional bodies and the bodies that regulate them.

However, Mr Butler's story suggests that even very senior judicial officers and their subordinates at apex regulatory bodies such as the NSW LPAB cannot be relied on to act in a manner consistent with the standards society would expect of persons afforded the public document defence. As argued above, given the high bar of ethics

⁸ <https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions-amendments/ganesh-sahathevan-mdap-submission.pdf>. Accessed on 16 May 2021

⁹ Located at <https://tinyurl.com/s6fk3rb> Accessed on 16 May 2021

and probity that the legal profession says it is bound by, it follows that other professions cannot be expected to conduct themselves in any better manner. For these reasons too the defence of absolute privilege ought to be limited.

Failure of civil service checks and balances

It is submitted that the privileges afforded professional disciplinary bodies, particularly those that are part of the civil service, ought to be considered in the context of the scrutiny that civil service entities are ordinarily subjected to, by for example the audit divisions of the civil service, and of parliament itself. The NSW LCS and NSW LPAB are for example required to prepare annual reports of their activities, which are subject to audit by the NSW Audit Office, and that are then tabled in parliament by the NSW Attorney General. However, despite all these different levels of scrutiny one would not find in any of their annual reports Mr Butler's story mentioned above, despite The Australian's nationwide readership, and the story placing on the public record very serious issues that go to the credibility of NSW's legal oversight bodies. The judgement and research skills of the state's most senior judges was also called into question.

Niether is there any explanation as to why the LCS exposed itself to financial and reputation risks by pursuing Mr Levitt. These are in essence operational issues which one would expect to see detailed in any annual report.

Additionally, despite the public flagellation of Mr Heydon QC the LCS Annual Reports seems to have omitted, by accident or design, complaints against Mr Heydon QC by a female employee of the NSW Supreme Court, made to a judge of that court for whom the complainant worked¹⁰. Public service annual reports are meant to disclose how complaints made were resolved, for they are matters of operational risk, but this was not the case here.

Then no evidence has been found of any disclosure of Davies J's finding that the Law Society NSW lied to the court. The silence suggests that the bodies entrusted with

¹⁰ Dyson Heydon sexual harassment revelations are also matters for the NSW Auditor General Margaret Crawford: reports suggest NSW LPAB, NSW Legal Services Council did not disclose complaints in their Annual Reports; NSW LPAB has a history of interfering with the paper trail. Located at link <https://justicepaosgavel.blogspot.com/2020/06/legal-establishment-sexual-harassment.html>. Accessed on 12 May 2021.

oversight of the legal profession have failed to provide oversight, or have otherwise participated in the concealment of a very serious issue.

There has then been a failure of the usual checks and balances, and that failure can be expected to further manifest if these bodies are afforded an unfettered reliance on the defence of absolute privilege. This failure has an economic cost that is ultimately borne by the taxpayer.

Economic costs

As Sahathevan has noted ¹¹with reference to Council of the Law Society of New South Wales v Levitt⁸ ¹²The Council and the Legal Services Commissioner (LCS) comprise some of the most senior lawyers in this country. It is therefore hard to comprehend that they could not have known that their case was so weak that the High Court was likely to reject their application. The facts of the case suggest that the LCS was prepared to take on a degree of risk of financial (and reputation) loss that it would not have but for its government funding. Unfettered access to the defence of absolute privilege is likely to encourage in the LCS and other bodies like it a tendency towards risk appetites beyond the boundaries of their professional responsibilities, at taxpayer's expense.

As mentioned above, in Levitt's case the Council and the LCS admitted that their application was motivated in part by their concern for some 66 other matters, which had nothing to do with the respondent's conduct. The admission suggests that the reckless behaviour seen in Levitt's case was not an isolated incident.

While it is true that where the supervisory or disciplinary body concerned is not taxpayer funded members bear the burden of cost, it is submitted that the private rather than public source of funding ought not be a consideration.

Proposal

¹¹ Located at <https://ganeshsahathevan.blogspot.com/2021/05/nsw-budget-2020-contingent-liabilities.html>. Accessed on 1 May 2021

¹² Note 2

In light of the above it is proposed that the defence of absolute immunity, in the circumstances referred to in question 21(a) (ii) of Stage 2, Review of the Model Defamation Provisions Discussion Paper, be allowed only in instances where the identity of the natural person who published and the natural person who is the recipient of the publication are clearly identified. This is probably the only method available to ensure that the defence, and the evidentiary rules that accompany it, is not abused as a means of communicating and placing on the record allegations that are defamatory and cannot be justified.

Evidence of fraudulent intent is not the easiest to adduce, but the available evidence detailed above suggests that the standards observed in the preparation of these records are not what the community would expect. As Sahathevan noted in his submission to the first stage of consultations with regards reforms to the MDPs¹³ even decisions of the NSW Supreme Court are not safe from what might be charitably described as “re-imagination” of the facts of those decisions, by some of this state's most senior judicial officers¹⁴. There is also evidence of paper trails being concocted for reasons best known to the judicial officers concerned¹⁵.

The existence of such records can be kept secret even to those whom it concerns¹⁶, causing loss of reputation and income. Therefore it is also proposed that the authors of such records provide a clearly identifiable paper trail of all documents related to the publication of concern. The paper trail ought to be transparent.

It should be added here that bodies such as the NSW LPAB, and the Law Council Of Australia may already be subject to greater scrutiny in foreign jurisdictions, even if not here. Consequently the belief if not argument that bodies such as these ought to be shielded from scrutiny in order to preserve public confidence in their functions and by extension the justice system is no longer tenable. Action taken outside Australia can be easily monitored in Australia; given the extent of the internet.

13 Note 5

14 Protection provided journalists, whistle blowers and sources by *Carlovers v Sahathevan*, *Bond v Barry* undermined by NSW judicial body overseen by Chief Justice NSW, and AG Speakman <http://realpolitikasia.blogspot.com/2019/06/protection-provided-journalistswhistle.html>. Accessed on 16 May 2021

15 <https://ganeshsahathevan.blogspot.com/2020/02/how-process-not-truth-is-used-in-anti.html>

16 See for example the discussion by Stephen Warne (Note 3) on the decision in *AB v Law Society of NSW* [2018] NSWSC 1975. Warne's post is located at <http://lawyerslawyer.net/2019/02/03/the-disciplinary-investigators-duty-of-disclosure-more-on-inadequate-reasons-following-a-disciplinary-investigation/>. Particular attention is drawn to this part of Mr Warne's discussion : “In July 2017, the solicitor’s lawyer requested a copy of the stat dec, to no avail. The Law Society said the lawyer had been provided with everything relevant and they would not provide irrelevant material. That was not true.....”.

The matter of the recently deceased Professor Zhu Minshen and his Top Education Group Ltd¹⁷ is a case in point. Zhu's Top Group sought an Initial Public Offering (IPO) in Hong Kong in 2018, and their prospectus made numerous references to approvals from the NSW LPAB. Upon listing on the Hong Kong Stock Exchange Top's share price rose to HK 90 Cents, and then crashed to roughly HK 30 Cents. It has never recovered, and has traded closer to HK 20 Cents in the past year. The listing has all the hallmarks of what in sharemarket parlance is referred to as a "pump and dump". The documents are all available on the Hong Kong Stock Exchange website, and financial websites such as Bloomberg, Yahoo Finance and Simply Wall St.

Zhu and Top Group received renewal of their NSW LPAB approvals even after the share price collapsed¹⁸, and in other promotion Zhu referred to approval from the Law Council Australia¹⁹. Given the collapse in market capitalisation it is highly probable that the NSW LPAB and the LCA's backing for Zhu would be subject to shareholder and overseas regulatory scrutiny.

Similarly the College Of Law Ltd has been the subject of adverse media reports in Malaysia, even as its regulators, the NSW LPAB and the Law Society NSW, ignore the issues raised in the Malaysian report²⁰.

Conclusion

The defence of absolute privilege as it applies to professional bodies is unlikely to have survived but for the fact that often publication is to persons in whom society has invested high status and authority, and in confidential documents safe from public view.

17 <https://www.smh.com.au/politics/federal/minshen-zhu-is-this-australias-most-connected-chinese-political-donor-20160901-gr6a1f.html> and <http://realpolitikasia.blogspot.com/2019/09/zhu-minshen-announces-that-nsw-lpab.html>. Accessed on 16 May 2021

18 See summary of events at <https://ganeshsahathevan.blogspot.com/2020/04/zhu-minshens-top-group-share-prices.html>. Accessed on 16 May 2021

19 See material at <https://gsahathevan.blogspot.com/2020/08/law-council-australia-officially.html?view=flipcard>. Accessed on 16 May 2021

20 See <https://newmalaysiatimes.com/2019/07/19/bar-council-education-jv-must-be-clarified/> and <https://realpolitikasia.blogspot.com/2019/07/malaysia-will-investigate-nsw-ag-and.html> Accessed on 16 May 2021.

However, that trust is being abused, and it would appear, not in the defence of the high standards of probity and ethics professed but of parochial interests. This type of self-interested behaviour may have been gotten away with in the past but the advent of the internet and easy access to news and other information from any part of the world has the capacity to shine light on conduct that falls well below what the community would expect of officers of the court. For example, Mr Butler's story in *The Australian* appears readily in Internet searches, and is available to readers in this country and overseas; similarly adverse publications about Top Group and Professor Zhu Minshen, and the College Of Law Ltd.

Consequently expecting that the community would allow the privilege to continue without constraints, let alone be expanded in its application, would be arrogant, and ignorant of the already poor perception that the community has of lawyers, and by extension, legal methods²¹.

21 Coade M, Why don't people trust lawyers? *Law Society Journal*, 1 December 2018. Located at link <https://lsj.com.au/articles/a-matter-of-trust/>. Accessed on 16 May 2021.