

Review of Model Defamation Provisions

VLSB+C submission – *Council of Attorneys-General Review of the Model Defamation Provisions, Stage 2 Discussion Paper*

Summary

- The Victorian Legal Services Board and Commissioner (“VLSB+C”) welcomes the opportunity to contribute to the *Council of Attorneys-General Review of the Model Defamation Provisions—Stage 2 Discussion Paper*. The review represents an important opportunity to understand the effect of Australia’s defamation laws on the reporting of sexual harassment and other unlawful conduct.
- In 2019, we conducted a profession-wide study on sexual harassment in Victoria’s legal sector, which provided us with reliable evidence about its prevalence in the sector, as well as barriers to reporting this conduct. The study did not explore whether respondents avoid reporting their experiences of sexual harassment for fear of being sued for defamation. However, from the reports our Sexual Harassment Complaints Team have received, it appears this is a genuine concern among some lawyers.
- In this context it is relevant to note that our study found perpetrators of sexual harassment in legal workplaces are often senior members of the profession who are successful, well-resourced and experienced in the law and justice system. Conversely, their targets tend to be early career lawyers.
- Our view is that complaints of sexual harassment made to us would attract absolute privilege under the *Defamation Act 2005 (Vic)* (“DAV”) and also at common law. However, we believe legislative amendments are required to ensure that it attaches to:
 - reports or complaints in any form, including incomplete and anonymous reports, to the proper authority (including VLSB+C) about unlawful conduct (including sexual harassment), regardless of whether the form of the report or complaint meets any corresponding statutory threshold (where one exists); and
 - all communications (from a complainant, target or witness) to an appropriate person or authority that are related to the investigation—or possible investigation—of a complaint, irrespective of what the regulator decides to do with the information.
- There is a clear public interest in extending absolute privilege to complaints about sexual harassment to other professional disciplinary bodies, to remove barriers to reporting this conduct, provided appropriate safeguards exist against the making of false or misleading reports.
- Various safeguards within the Legal Profession Uniform Law (“Uniform Law”) regulatory framework serve to prevent deliberately false or misleading reports being made to, or progressed by, VLSB+C.

Introduction

The Victorian Legal Services Board (“the Board”) and the Victorian Legal Services Commissioner (“the Commissioner”) are the independent statutory authorities responsible for the regulation of the legal profession in Victoria under the Uniform Law, both authorities being accountable to the Victorian Parliament. The two authorities effectively operate as one body, the VLSB+C.

The VLSB+C welcomes the opportunity to assist in this consultation, as preventing and addressing sexual harassment in the legal profession is a key regulatory priority for us. Our comments are limited to only those matters within our expertise, specifically:

- the impact of the perceived or actual threat of a defamation suit on complaints about sexual harassment to us, as the professional disciplinary body for Victorian lawyers;
- the application of the defences of absolute and qualified privilege to reports and complaints of sexual harassment made to us;
- proposed changes to Schedule 1 of the DAV; and
- safeguards against false complaints under the Uniform Law regulatory framework.

Regulation of lawyers in Victoria

The Uniform Law commenced on 1 July 2015 in Victoria and New South Wales, establishing a common ‘uniform’ framework for the regulation of lawyers across both states. In Victoria, the Uniform Law forms Schedule 1 to the *Legal Profession Uniform Law Application Act (Vic) 2014* (“Application Act”) and is implemented in Victoria through that Act. The Uniform Law is supplemented by numerous sets of Uniform Rules.

Although VLSB+C operates effectively as one body, the Board and the Commissioner are each allocated separate regulatory functions under the Uniform Law, via the Application Act. Relevantly for this submission, the Commissioner is responsible for the receipt, management and resolution of complaints about the conduct of lawyers by other members of the profession, the general community or by the Commissioner’s own motion, including complaints about a lawyer’s conduct outside of legal practice.

Any investigation the Commissioner undertakes following receipt of a complaint may result in the Commissioner taking a variety of disciplinary actions. Disciplinary actions against lawyers are in addition to any other criminal or civil sanctions imposed and both the Board and Commissioner are obliged to report serious offences to the relevant prosecuting authority.¹

Reports of sexual harassment in the workplace and fear of being sued for defamation

This section includes information in response to question 20(a)—Is fear of being sued for defamation a significant factor deterring individuals from reporting unlawful conduct such as sexual harassment or discrimination to employers or professional disciplinary bodies?

Context—Prevalence of, and barriers to reporting, sexual harassment in the Victorian legal sector

In 2020 the VLSB+C published a report detailing the findings of a 2019 profession-wide research study into sexual harassment within the Victorian legal sector. A total of 2,324 legal professionals (11% of the Victorian profession) responded to a survey that sought to elicit information about the prevalence and nature of, and responses, to sexual harassment within Victoria’s legal workplaces. The report found that:

- 36% of respondents overall reported having experienced sexual harassment at some point in their career. Women in the profession experience sexual harassment at significantly higher rates (61%) than their male counterparts (12%).
- Targets of sexual harassment tend to be early career lawyers: 59% of respondents who were sexually harassed had five or fewer years’ experience in the legal sector at the time of their most recent incident.
- Those who perpetrate sexual harassment are almost always male (90%), usually in a position of seniority relative to their target (72%) and aged over 40 years (66%). About half the time they are all three of these. Many are senior members of the profession, e.g. partners (22%), barristers (14%) and principals (11%).

¹ See section 465 of the *Uniform Law*.

- Less than one in five respondents (18%) had reported the most recent incident of sexual harassment they had personally experienced. Only 10% of witnesses reported the sexual harassment they had seen or heard about.

Respondents to our survey chose not to report their most recent experience of sexual harassment for a range of reasons, including most commonly that:

- it was easier to keep quiet (80%);
- they wanted to avoid confronting the harasser (70%);
- they were concerned about experiencing negative reactions from colleagues or the harasser(s) (67%);
- they thought others would think they were over-reacting (67%);
- they thought nothing would change a result of complaining or reporting or nothing would be done (66%).

Fear of being sued for defamation

While our survey did not specifically ask respondents whether the potential threat of a defamation suit was a barrier to reporting their most recent incident of sexual harassment, we know it is a live concern for at least some lawyers. A survey respondent volunteered in a free-text comment (abridged to protect confidentiality) that:

“I felt embarrassed and humiliated and had to keep dealing with the harasser ... He belittled me and sexually harassed me and threatened to sue me for defamation ...”

People who contact our specialist Sexual Harassment Complaints Team often fear retaliation for coming forward. Complainants are usually very worried about the impact of reporting sexual harassment on their current employment and future career prospects, and some have mentioned the fear of being sued for defamation.

It is particularly telling that lawyers, who are familiar with the law and the workings of the justice system, can fear being sued after reporting sexual harassment. If fear of being sued for defamation makes those who have an understanding of the law reticent to report unlawful conduct, then it follows that those who are less familiar with the law would also experience a chilling effect based on the fear or threat of a defamation suit.

As discussed further below, the VLSB+C is confident many people who report sexual harassment and other unlawful conduct by a lawyer to us would benefit from the defence of absolute privilege pursuant to both the DAV and the common law. And yet, people can still be threatened with or be actually sued for defamation. In such circumstances, the availability of a defence of absolute privilege is certainly preferable to the alternative, but still requires a defence to be put, and therefore cannot alleviate concerns about making and following through these types of complaints. It should be noted that VLSB+C has only limited options to support complainants or influence defamation proceedings if the subject of a complaint only issues defamation proceeding against the complainant and/or potential witnesses.

Are victims and witnesses of sexual harassment being sued for defamation?

This section includes information in response to question 20(b)—Are victims and witnesses of sexual harassment or discrimination being sued for defamation for reports of alleged unlawful conduct to employers or professional disciplinary bodies?

The VLSB+C is not aware of any targets of sexual harassment (or witnesses to such conduct) being sued for having reported sexual harassment to us. However, we have not yet had cause to notify many lawyers about sexual harassment reports made about them, because many people who report such conduct to us do so on a confidential basis and do not want the harasser notified of their report, as is required where a complaint is made.

In our view, the fact that people do not want to make a formal complaint in most cases serves to highlight the multiple barriers to reporting sexual harassment, including the perceived threat of defamation proceedings.

Absolute privilege for reports to professional disciplinary bodies

This section includes information in response to question 21(a)—Should absolute privilege be extended to complaints of unlawful conduct such as sexual harassment or discrimination made to: (ii) professional disciplinary bodies?

Application of absolute and qualified privilege to complaints made to the VLSB+C

Our view is that complaints made to us of unlawful conduct, including sexual harassment, by a lawyer will generally benefit from absolute privilege both under the DAV, and at common law.²

The effect of section 27(2)(c) of the DAV is that matters in Schedule 1 to the *Defamation Act 2005* (NSW) (“DANSW”), (i.e. ‘additional matters’ to which absolute privilege applies), are also matters of absolute privilege when published in Victoria. Matters relating to the Uniform Law, which attract absolute privilege under Schedule 1 to the DANSW, include matters published to the relevant professional regulatory and disciplinary body for the purpose of the making or referral of a complaint, or the investigation, hearing or review of a complaint, under Chapter 5 of the Uniform Law. This covers the making of complaints in relation to sexual harassment and other unlawful conduct by a lawyer, insofar as complaints are made and dealt with in accordance with Chapter 5.

As noted in the Discussion Paper [at p 84] “complaints to professional disciplinary bodies may also attract absolute privilege at common law”, including in relation “to complaints made to the body which are ‘part of an established procedure which must be set in motion if it is to result in disciplinary proceedings even if disciplinary proceedings will not necessarily eventuate’”.³

As further noted in the Discussion Paper [at 96] a common law absolute privilege defence is likely to apply to complaints made to a professional disciplinary body with quasi-judicial functions, as found in *Hercules v Phease*⁴, which considered in detail the public policy considerations in the context of the law of defamation and the legal profession complaints regime. The defendants in that matter made a complaint to the Law Institute of Victoria (“LIV”), which was responsible for receiving complaints about solicitors at the time. The solicitor commenced defamation proceedings. The Court found that absolute privilege did extend to the making of complaints to the LIV as it enlivened the ultimate possibility of the judicial process.

The case of *Hercules v Phease* makes clear that:

- the public interest in encouraging reports about improper conduct by lawyers is critical to the proper administration of justice (at p 423); and
- a complaint against a lawyer is a step which is necessary for powers of investigation to be exercised, which makes it analogous to a writ as a first step leading potentially to a judicial hearing (at pp 423 and 447).

² Individual members of the Board and the Commissioner (along with their delegates) enjoy a personal statutory immunity from defamation claims insofar as the publication of defamatory material by any of those persons falls within the ambit of the immunities conferred by sections 43 and 55 of the *Legal Profession Uniform Law Application Act 2014* (Vic.). Section 389 of the *Uniform Law* also provides an immunity to “protected persons”, which includes investigators appointed for the purposes of Chapter 7, and also extends protection to “permitted disclosures” by a designated local authority.

³ Citing *Mann v O’Neill* (1997) 191 CLR 204 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

⁴ *Hercules v Phease and Anor* [1994] 2 VR 411.

While the members of the Court in *Hercules v Phease* did not reach a unanimous position on whether the *investigation* of a complaint also attracts absolute privilege, in *Lloyd & Anor v Fanning & Ors*⁵, the Supreme Court of Victoria found statements made during the course of investigation into a complaint against a solicitor did attract absolute privilege [at 43]. McDonald J considered it would be “illogical” for a complaint to be the subject of absolute privilege but a subsequent investigation into that complaint to only attract qualified privilege. Notably, item 18 in Schedule 1 of the DANSW makes it clear that matters published for the purpose of an investigation, under Chapter 5 of the Uniform Law, attract absolute privilege (in addition to matters published for the purpose of making a complaint).

Complaints to the VLSB+C about unlawful conduct, including sexual harassment, would also likely, alternatively, attract the statutory and common law defence of qualified privilege. Whether a complaint attracts qualified privilege will turn on the particular facts and circumstances of each case, and as noted in the Discussion Paper [at p 86], these issues will generally be required to be the subject of evidence given at trial.

The need to extend the application of absolute privilege to reports made to VLSB+C that do not constitute a formal complaint

While we are confident about the application of absolute privilege in relation to complaints that fit the definition of a complaint under section 267(2) of the Uniform Law, there is uncertainty about the application of this defence in relation to reports or complaints to the VLSB+C that may not fit the statutory description of a complaint, as follows (emphasis our own):

Section 267

- (2) A complaint must be made or recorded *in writing* and must—
- (a) *identify the complainant;*
 - (b) *identify the lawyer or law practice about whom the complaint is made (or, if it is not possible to identify the lawyer, identify the law practice concerned); and*
 - (c) describe the alleged conduct that is the subject of the complaint.

There is a risk that a report to us that does not meet all of the italicised criteria, including the requirement that a complaint “identify the complainant”, “identify the lawyer” and be “recorded in writing”, will not attract absolute privilege under the DAV on the basis that it is not a complaint within the meaning of Chapter 5 of the Uniform Law. It is possible that people who provide reports of this type to us may be able to be identified at some point by the person they have complained about (given the personal circumstances of the conduct complained of)⁶, and therefore reports of this type also require the protection of absolute privilege.

If an incomplete report is made, there is also a risk that it will not benefit from absolute privilege at common law because the possibility of the investigatory or judicial process may not be enlivened under the Uniform Law if the report does not meet the description of a complaint for the purpose of section 267(2).

The Discussion Paper also notes [at p 96] that “there may be some uncertainty as to whether an absolute privilege defence applies ... to all communications which are related to the investigation of the complaint”, citing the case of *Victoria v Mann*⁷, in which the Supreme Court of Victoria, Court of Appeal found that a letter advising a doctor that the Medical Practitioners Board of Victoria would not further investigate a complaint against him was not subject to absolute privilege.

⁵ (1996) A Def R 52-075 (BC960576).

⁶ For example, potentially as a result of an FOI request.

⁷ [2000] VSCA 89.

People who seek to report unlawful conduct, such as sexual harassment, to us should not have to concern themselves with—or have a detailed understanding about—how the form or indeed the response to their report or complaint might affect whether or not they benefit from absolute privilege.

Complainants to us (and third party witnesses) need to feel confident from the outset that they will benefit from the defence of absolute privilege should a lawyer threaten defamation action against them for the making of (or acting as a witness to) a report or complaint about sexual harassment. Being able to provide this assurance to complainants upfront would, we consider, reduce the chilling effect of the threat of defamation, and also discourage the commencement of defamation proceedings.

Our preference is that the defence of absolute privilege attaches to:

- reports or complaints in any form (including incomplete and anonymous) to us—regardless of whether the form of the report or complaint meets any corresponding statutory threshold (where one exists); and
- all communications (from a complainant target or witness) that are related to the investigation—or possible investigation—of the report or complaint.

The latter point of clarity will help avoid the uncertainty for complainants of a sliding scale of privilege depending on how the report or complaint is addressed by the recipient.

It should be noted that if a complainant does not enjoy the defence of absolute privilege, the defence of qualified privilege still attaches. However, this is not desirable. As noted in the Discussion Paper [at p 86], the defence of qualified privilege generally requires determination at trial, after the accumulation of legal fees and court time, which are incurred even if the defendant is not found liable.

Extension of absolute privilege to sexual harassment complaints made to professional disciplinary bodies more broadly

There is a strong public interest in removing barriers to reporting sexual harassment to the appropriate bodies—which in many cases will be a professional disciplinary body, rather than an employer or the police—regardless of whether such bodies have quasi-judicial functions. The evidence is clear that sexual harassment continues to be a pervasive problem across Australian workplaces, and is largely not being reported or addressed.

Therefore, it is our position that if a professional disciplinary scheme exists, absolute privilege should be extended to complaints about sexual harassment by the professionals covered by the scheme to the appropriate professional disciplinary body, so that such complaints may be investigated and offending behaviour dealt with.

Types of unlawful conduct

This section includes information in response to question 21(b)—What types of unlawful conduct should be included in providing this protection?

We are not in a position to comment on whether evidence supports the need to extend absolute privilege to unlawful conduct other than sexual harassment. However, we note that unlawful conduct is unlawful precisely because society has decided, through its elected representatives, that such conduct offends against the public interest and is not acceptable.

Amending the Model Defamation Provisions

This section includes information in response to question 21(c)—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)?

The VLSB+C's suggestion is that each jurisdiction amend Schedule 1 to their respective defamation legislation so the application of absolute privilege can be tailored to the specific regulatory arrangements within their jurisdictions.

We support amendment of the DAV so Schedule 1 specifically references the Uniform Law and Application Act for the purposes of conferring absolute privilege. This would eliminate the need to apply the defamation legislation of another state.

Our strong preference would be for general provisions covering all reports and complaints, complaints handling and investigatory functions under the Uniform Law and Application Act rather than specifically identifying particular functions, to avoid the current issues with Schedule 1 to the DANSW (which includes, for example, a lack of coverage for external examinations of trust money and trust property, which are important tools to address areas of high risk to consumers of legal services).

As articulated above, we think it is imperative that the Model Defamation Provisions, via Schedule 1, provide the broadest level of protection and ensure that where absolute privilege is offered as a defence, it attaches to:

- reports or complaints in any form, including incomplete and anonymous reports, to the proper authority (including VLSB+C) about unlawful conduct (including sexual harassment), regardless of whether the form of the report or complaint meets any corresponding statutory threshold (where one exists); and
- all communications (from a complainant, target or witness) to an appropriate person or authority that are related to the investigation—or possible investigation—of a complaint, irrespective of what the regulator decides to do with the information.

Safeguards to prevent false or misleading reports

This section includes information in response to question 21(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?

There are multiple safeguards within the Uniform Law and Uniform Rules regulatory framework that serve to prevent deliberately false or misleading reports being made to, or progressed by, the VLSB+C.

Rule 32 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 prohibits solicitors from making unfounded allegations against other legal practitioners in the following terms:

Rule 32 Unfounded Allegations

- 32.1 A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.

Solicitors who breach this rule may themselves be liable to a charge of unsatisfactory professional conduct or professional misconduct, and associated disciplinary outcomes.

While the Uniform Law itself does not include specific penalties for making false or malicious complaints, statutory disciplinary bodies like the VLSB+C have safeguards built into their investigative and decision-making processes, which protect against proceeding with false or malicious complaints. For example, under Part 5.7 of the Uniform Law the VLSB+C must:

- act in a fair manner, when exercising or considering whether or how to exercise any applicable discretions when dealing with a complaint (including the conduct of any investigation), having regard to the respective interests of the complainant and the respondent and to the public interest (section 316); and
- deal with complaints (including the conduct of any investigations) as efficiently and expeditiously as is practicable (section 317).

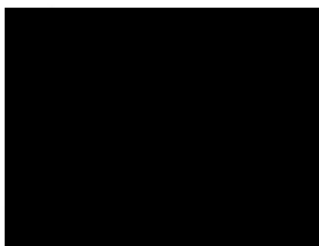
Under section 319 of the Uniform Law the rules of procedural fairness apply in relation to the investigation and determination of complaints, the making of other decisions in respect of complaints and procedures in respect of complaints and any associated matters.

Further, there are also statutory safeguards for maintaining confidentiality contained within section 462 of the Uniform Law, in addition to the broader statutory privacy frameworks.

When weighing the balance of protections for all parties, it is important to keep in mind the nature, prevalence and risks of the problem to be addressed. The risk that legitimate reports and complaints about sexual harassment may not proceed because of fear or threat of being sued for defamation must be weighed against the risk of false complaints causing undue reputational damage to people. As noted in relation to our own regulatory framework, false complaints can be protected against in a range of ways, including through implementation of investigative and decision-making procedures, as part of a confidential process.

Please do not hesitate to contact my office if you would like to discuss this submission in greater detail. The responsible person in my office for this work is Dr Deborah Lawson, Senior Policy Officer. Deborah can be contacted by email on: [REDACTED] or by telephone on [REDACTED].

Yours sincerely



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Board CEO & Commissioner