THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
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By email: natasha.molt@lawcouncil.asn.au

Dear Mr Smithers,

Supplementary questions – Review of Australia's Model Defamation Provisions

Thank you for the opportunity to contribute to a submission on the supplementary questions for stakeholders from the Council of Attorneys-General (CAG) Defamation Working Party in its *Review of Australia's Model Defamation Provisions*. The Law Society's Litigation Law and Practice Committee has contributed to this submission.

We note the Defamation Working Party has raised many of the recommendations we made in our original submission to the review as matters for further consideration. Our responses to specific questions raised in the supplementary questions table are provided below.

18a: Formalised pre-litigation processes

The Law Society strongly supports mechanisms that facilitate the resolution of defamation disputes without litigation. In our view, the issuance of a concerns notice in writing prior to commencing Court proceedings should be mandatory. This is the primary mechanism to ensure a pre-litigation process begins. Without this step, the offer to make amends process may lack potency and in some instances, may be overlooked.

To formalise this process, we recommend the form of statement of claim filed by a plaintiff in a defamation case should require the plaintiff to verify they have issued a concerns notice (identifying when the concerns notice was issued, to whom it was issued, and any response received). In this way, a process similar to the genuine steps statements in the Federal Court of Australia could be adopted.

The Law Society considers that if they are to address the issues raised by technological advancements in communications since 2005 (for example the dominance of social media platforms such as Twitter and Facebook), reformed defamation provisions should also include a serious threshold requirement – that the publication in question must have a genuine tendency to seriously and adversely affect the reputation of the complainant / plaintiff.

18b: Choice of Law Rules

The Law Society does not consider clause 11 of the Model Defamation Provisions requires amendment.

18c: Jurisdiction of courts and tribunals

As noted in our previous submission, in relation to relatively minor disputes between individuals (particularly on social media), the Law Society considers that claims could be required to be commenced either in a new division of state tribunals such as the *NSW Civil and Administrative Tribunal* or a division of a Local Court. Alternatively, they could be commenced in a national tribunal dealing solely with small defamation disputes. As noted previously, we recommend this tribunal could require mediation as the first step, with strong encouragement for online takedown and the publication of an apology / correction as mechanisms for resolving the matter at the earliest opportunity.

We recommend that remedies in such a tribunal be restricted (in particular, damages), and there should be a *prima facie* presumption of no orders as to costs.

In terms of mechanisms for small matters to be sent to a more appropriate judicial authority, we recommend consideration be given to ensuring the reformed model provisions enable the Court in which the proceedings are commenced to reallocate them at the first listing to one of the bodies outlined above.

18d: Plaintiff to certify falsity

As noted in our previous submission, there is currently a heavier burden placed on the defendant publisher than on the plaintiff in proving falsity of imputations. Effectively, however, defamation law requires that any plaintiff who sues for defamation does so on the basis that the imputations in dispute are, in the view of the plaintiff, false. We therefore consider it appropriate for the plaintiff to prove the falsity of the imputations, rather than the onus being left to the defendant. The plaintiff will always be in a better position to know whether an imputation is true or not. A plaintiff should not be permitted to sue over imputations they know to be true.

As stated previously, we recommend the reformed model defamation provisions include an additional element in the cause of action, that the plaintiff must establish that the imputations they rely upon are false. In many cases, this may simply require the plaintiff to give evidence in the witness box that each imputation is false. We consider that switching the onus of establishing truth would act as a deterrent to frivolous or vexatious claims and claims brought for the purpose of silencing public debate, and would therefore reduce the burden on the Courts.

In the alternative, if falsity of the imputations is not made an element of the tort of defamation to be proven by the plaintiff, a plaintiff should still be required in his or her statement of claim to swear or affirm an affidavit that each of the imputations pleaded or particularised is false, on penalty of perjury.

18e: Defeasance provisions

As outlined in our previous submission, the Law Society considers the defeasance provisions make little sense in a world where people are in constant digital communication via social media and the internet, often to limited groups of people (as opposed to "the public" at large).

We would support removal of the defeasance provisions entirely.

18f: Defamatory capacity

The Law Society recommends the reformed model defamation provisions provide avenues for publishers to have proceedings dismissed at an early stage when the imputations pleaded and relied on by a plaintiff are strained, forced or unreasonable.

We note the current defamation legislation does not articulate the elements of the cause of action, including the tests to apply to whether an imputation relied upon by a plaintiff is capable of arising and being defamatory of the plaintiff. Questions such as the threshold of capacity have traditionally been left to the common law.

We recommend the reformed model defamation provisions include a legislative requirement that an imputation be capable of arising from the publication, for example, through the introduction of a "serious harm" threshold. We consider a legislative approach to addressing the low capacity threshold would be the best way to ensure unmeritorious claims based on imputations which are strained, forced or unreasonable, may be dismissed at an early stage.

18g: Definition of "matter"

We consider the term "matter" should be amended to refer to the whole of the publication complained of.

However, in doing so, we recommend consistent terms be used throughout the reformed model defamation provisions to ensure certainty. For example, the defences contained in sections 27 to 33 of the *Defamation Act 2005* (NSW) are directed to "the publication of defamatory matter". While there is a definition of "matter" in the Defamation Act, there is no definition of "defamatory matter". Unlike sections 25 and 26, these defences do not make any reference to defamatory imputations. We consider the use of "defamatory matter" creates confusion in relation to how these defences are to operate and be applied. We recommend that any amendment to terms such as "matter" should avoid repeating these ambiguities.

18h: Election to trial by jury

We recommend the reformed model provisions include a specific provision for a party to apply to the Court to seek revocation of its own jury election. Such application should be able to be made by a party at any stage.

18i: Summary judgement procedure

The practical exercise of summary judgment procedures is inconsistent between the various jurisdictions. For example, the Federal Court has shown reluctance to entertain early strike-out applications, a position at odds with the Supreme and District Courts of New South Wales.

We consider this may be a matter of practice and procedure for each jurisdiction. However, in the interests of achieving true uniformity across the jurisdictions (and to avoid issues with forum-shopping), the Law Society would support any legislative mechanism by which unmeritorious defamation claims may be dismissed at an early stage.

18j: Reversal of onus of proof in terms of establishing truth or falsity of imputations

As noted above in relation to question 18d, the Law Society supports the reversal of the onus of proof in relation to establishing truth or falsity of imputations.

We consider, however, the reversal should not be limited to public figures (that being a concept derived from law in the United States and relevant to malice, as opposed to proof of falsity as part of the cause of action).

18k: Pleading multiple defences

We noted in our previous submission to the review that matters may contain a variety of material, some parts of which might be subject to, for example, a justification defence, other parts to an honest opinion defence, and other parts to a fair report defence. We support an amendment to the reformed model laws to clarify that a defendant may rely on a combination of defences in response to any particular matter complained of, and that different defences may be directed towards different imputations.

18l: Absolute privilege defence

The Law Society is not persuaded that any such extensions to absolute privilege (as opposed to qualified privilege, or other available defences) are required.

18m: Common law defences: Hore-Lacy and consent

The Law Society supports mechanisms to ensure uniformity across the jurisdictions.

We recommend the statutory justification defence contain an additional provision so that a defendant can rely on a meaning that the plaintiff has not pleaded, if not substantially different from, and no more injurious than, the plaintiff's pleaded meaning.

We note ambiguity exists in relation to what will and what will not amount to consent, how far "consent" extends (particularly in the age of social media) and who can rely on such a defence.[1] We support the model defamation provisions clarifying that when a person makes a statement voluntarily, any publisher may rely upon a defence of consent in repeating the sense and/or substance of the statement in question and attributing it to the would-be plaintiff.

18n: Public figure defence

We note this proposal would mirror the law in the United States. We support this proposed amendment.

18p: Simplifying jury questions

As outlined in our previous submission, the Law Society supports an amendment that would enable juries to be asked to give a simple general verdict as to which party should win, as opposed to answering a series of questions where the set of questions does not ultimately identify to the jury who succeeds in the case.[2] In criminal cases, elements of the criminal offence are explained to the jury, as are each of the defences

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[1] The common law defence of consent was recently examined by Gibson DCJ in *Arman v Nationwide News Pty Limited* [2017] NSWDC 151.

[2] Note the questions put to the jury in *Tabbaa v Nine Network Pty Ltd (No.10)* [2018] NSWSC 468.

that may be relied upon, but the jury delivers a simple verdict of guilty or not guilty. In many defamation cases, we consider that after closing addresses and directions from the judge, it would be simpler and easier for the jury to be asked which side should win. We support an amendment to clarify this. In our view, however, provision should also be made for exceptional circumstances where jury questions are more appropriate.

We also recommend that any amendment to the model defamation provisions should require that any jury given a series of questions to answer (as opposed to being asked to give a simple, general verdict) be informed about which side will win based on their responses to questions. This would remedy the present position where juries, who may be asked numerous questions, may not know the consequences of their answers and which side will win as result of those answers.

18r: Alternative remedies

The Law Society does not support the concept of a "declaration of falsity" remedy. The cause of action of defamation is about whether a statement (or imputation) is defamatory, not whether it is false. We are concerned the introduction of a "declaration of falsity" remedy would radically transform the cause of action of defamation. Further, it would require a plaintiff to establish, to the Court's satisfaction, that the imputations are false (we do not support the alternative, in which a defendant would be required to disprove falsity).

While we endorse falsity being an element of the plaintiff's cause of action, in the event it is not introduced as part of the reformed model laws, we consider a "declaration of falsity" provision will potentially act as a surrogate, placing an expectation on the plaintiff to prove falsity. The interaction of a "declaration of falsity" remedy with the justification defences would also require careful consideration.

18s: Indemnity costs clause

The Law Society supports the proposal that equivalent indemnity costs provisions apply to both defendant and plaintiff.

18t: Costs consequences for unfounded allegations of malice

As noted in our previous submission, the Law Society agrees there should be costs consequences for a plaintiff who alleges malice against a defendant, which is ultimately found to be unsubstantiated. For example, we recommend if a plaintiff makes an allegation of malice that is ultimately found to be baseless, the court may deprive the plaintiff of a costs order in their favour in respect of the proceedings.

18u: Scope of jurisdiction

The Law Society considers that careful consideration be given to any proposal to amend what would otherwise be the jurisdictional scope of the relevant court, noting possible issues under international and Constitutional law.

18v: Criminal defamation

The Law Society supports the repeal of criminal defamation offences.

Thank you again for seeking our feedback on these supplementary questions. Should you have any questions in relation to this submission, please contact Adi Prigan, Policy Lawyer, on 9926 0285 or email adi.prigan@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President