THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Jonathan Smithers
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Law Council of Australia
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By email: john.farrell@lawcouncil.asn.au

Dear Mr Smithers,

Review of Model Defamation Provisions

The Law Society of NSW appreciates the opportunity to comment on the Council of Attorneys-General *Review of Model Defamation Provisions Discussion Paper* ("Discussion Paper"). The Law Society's Litigation Law and Practice, Employment Law and Human Rights Committees contributed to this submission.

The Model Defamation Provisions were introduced at a time when significant developments in digital communication were already understood or contemplated. However, what was not obvious at the time was the extent to which digital media would revolutionise the way we communicate. For example, while Facebook in its early manifestations, existed at the time of the 2005 defamation reform, it was not until after the enactment of the Uniform Defamation Law ("UDL") that Facebook became widely used and other new social media platforms such as Twitter, Instagram and Tinder emerged.

The introduction of the Model Defamation Provisions also preceded the UN Human Rights Committee's adoption, in 2011, of General Comment 34, which provides guidance on the interpretation of Article 19 of the *UN International Covenant on Civil and Political Rights* (freedoms of opinion and expression), to which Australia is a party. The General Comment states that:

> Defamation laws must be crafted with care to ensure that they... do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expressions that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognised as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.[1]

[1] UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of opinion and expression* (21 July 2011), adopted at 102nd session, Geneva, 50.

The Law Society welcomes the Review of Model Defamation Provisions and strongly supports reform of the Uniform Defamation Laws ("UDL"). Our responses to the questions in the Discussion Paper are set out below.

1. Policy objectives of the Model Defamation Provisions

Do the policy objectives of the Model Defamation Provisions remain valid?

The Law Society agrees that the core policy objective of the Model Defamation Provisions is "balancing freedom of expression and publication in the public interest with protection of individuals from defamatory publications."[2] We also consider that the Model Defamation Provisions as set out in clause 3 remain valid.

Promotion of uniform laws

The Law Society strongly supports the promotion of uniform laws of defamation in Australia. We are concerned that lack of uniformity of the defamation laws in Australian jurisdictions creates an opportunity for "forum shopping" by plaintiffs. For example, NSW, Queensland, Victoria, Western Australia and Tasmania allow a party to elect trial by jury in defamation proceedings, whereas jury trials are not permitted in the ACT, the Northern Territory and South Australia. It is now established that the Federal Court of Australia will allow a jury trial only in the most exceptional of cases. The problem with the lack of uniformity is that plaintiffs may opt to file their claim in the Federal Court to avoid a jury trial presuming they may obtain a better outcome by a judge sitting alone.

Freedom of expression

The Law Society considers that the drafting of the *Defamation Act 2005* (NSW) ("Act") or its implementation by the courts has not sufficiently met the policy objectives of the Act. For example, there is a tension between ss 3(b) and (c) of the Act, which emphasise the importance of freedom of expression and effective and fair remedies for harm to reputation, respectively. These provisions reflect the balancing exercise which should be at the heart of defamation law. However, the burden placed on each party lacks balance. The elements that a plaintiff must establish as part of his or her onus are relatively simple (i.e. that there is publication "of and concerning" an identified or identifiable plaintiff, which is defamatory). Arguably, the defendant publisher bears a more onerous burden in terms of threshold, cost and inconvenience in having to establish any applicable defence, including justification. In practice, courts do not always undertake a balancing exercise when deciding a defamation claim.

Despite the objectives of the Act, freedom of expression is not a factor to be considered in relation to any of the current defences (notably, s 3(b) contains the sole reference to freedom of expression in the Act).

Remedies

Remedies that comprise compensation alone may be ineffective to repair the damage to and vindicate a plaintiff's reputation (for example, a successful plaintiff will be powerless to have removed false material published as part of a malicious campaign played out on social media), and may lead to unfairness for defendants.

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[2] Council of Attorneys-General, *Review of Model Defamation Provisions Discussion Paper*, 2019 at p.10 <https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf>.

Speedy and non-litigious methods of resolving disputes

In relation to s 3(d) of the Act, the Law Society considers that the uniform laws have singularly failed to achieve speedy and non-litigious methods of resolving disputes about the publication of defamatory matter. That is in part because there is no obligation for a plaintiff to issue a concerns notice in writing prior to commencing proceedings. Further, the technicality of defamation pleadings continues to result in protracted interlocutory skirmishes, prolonging the resolution of claims and increasing costs.

Recommendation

The Law Society recommends consideration of an amendment of the legislation to the effect that it be mandatory for a judge, at the first directions hearing or case management conference, to specifically address the objects in each of ss 3(b), (c) and (d), and how the proceeding fits within the parameters of those objects, before deciding whether, and if so how, a proceeding is to continue further. Alternatively, it should be mandatory for a judge to specifically address each of ss 3(b), (c) and (d) at trial.

2. Broadening the right of corporations to sue for defamation

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

While recognising the arguments in favour of protecting corporate reputations, the Law Society does not support amendment of the Model Defamation Provisions to broaden the right of corporations to sue for defamation.

Inapplicability of defamation concepts to corporations

The primary remedy sought in any defamation action is an award of damages. The purposes to be served by compensatory damages awarded for defamation are consolation for the personal distress and hurt caused to the plaintiff by the publication, reparation for the harm done to the plaintiff's personal and (if relevant) business reputation, and vindication of the plaintiff's reputation.[3]

The Law Society considers that the concepts of "personal distress" and "hurt" have no application to corporations. The concepts of "reparation for harm done to reputation" and "vindication" have a much greater role to play for an individual than for a corporation. "Vindication" in particular, has an intensely personal quality to it; that is, that the plaintiff was right all along; that the world should know they were right, and that the plaintiff can be personally satisfied that the world knows they were in the right. A company, as a legal construct, does not gain any "personal" satisfaction from vindication.

The present provisions for an "excluded corporation" in the Act create considerable confusion for publishers. In terms of s 9(2)(a), many not-for-profit corporations are in fact large organisations which are quite capable of dealing with reputational issues without resorting to a claim in defamation. For instance, churches and other not-for-profits, which like other corporations, have no "feelings" to hurt, cannot be "defamed" as such. Considering s 9(2)(b), corporations may be large operations but have comparatively few employees, instead engaging sub-contractors who do not count as "employees" under s 9. This leaves the publisher in the invidious position of not knowing whether or not the intended publication gives rise to a potential a defamation complaint or claim.

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[3] *Carson v John Fairfax & Sons Ltd* [1993] HCA 31.

Finally, although corporations have legal personhood in certain circumstances, this does not make corporations factually equivalent to human beings who are the proper bearers of the right to freedom of expression and the right to protection of reputation that defamation law intends to protect. Since corporations do not have human rights, any supposed "rights" of a corporation should not outweigh the actual rights of a human being. The Law Society considers that the balancing act should favour a human's right to freedom of expression over a corporation's interest in protecting its reputation.

Alternative recourse for corporations

The Law Society notes that corporations have other available avenues to address what they may perceive to be reputational harm, including undertaking public relations actions and/or advertising with a view to seeking to alter public perception. Corporations can also make complaints to regulatory bodies such as the Australian Communications and Media Authority and the Press Council, or take advantage of existing causes of action, including injurious falsehood, claims for misleading and deceptive conduct under the Australian Consumer Law[4] (where the "information provider" exception does not apply), breach of confidence, and passing off.

Recommendation

The Law Society recommends consideration of the prohibition on corporations suing for defamation being extended to all corporations, without affecting the other avenues available to corporations as outlined above. This will ensure that defamation is not used to further the commercial and other interests of corporations, and will promote freedom of expression and public scrutiny of all corporate bodies.

Alternatively, the current provisions regarding "excluded corporations" should be amended to provide that any such corporation which sues for defamation must, at the outset, include a claim for measurable, actual financial loss directly attributable to the publication in question, fully particularised in the Statement of Claim itself, along with the alleged elements of causation as to how the publication caused the alleged loss.

3. Single Publication Rule

(a) Should the Model Defamation Provisions be amended to include a 'single publication rule'?

The Law Society strongly supports amending the Model Defamation Provisions to include a "single publication rule".

We consider that the multiple publication rule in operation in Australia is unworkable in the modern digital environment. According to this rule, a fresh publication occurs each time an internet article is downloaded and comprehended by a reader, effectively re-setting the limitation period.[5] It renders the limitation period largely meaningless with respect to online publications. Internet publishers that continue to host material that may be of important public interest forming part of the historical public record are exposed to defamation claims long after an article was first posted online. Further, a publisher facing a claim over an article published years earlier will often be prejudiced in its defence, in that key evidence may no longer be readily available and/or staff and sources may have moved on or become unwilling to assist.

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[4] Sch 2, *Competition and Consumer Act 2010.*
[5] *Dow Jones and Company Inc v Gutnick* [2002] HCA 56.

The clear intent of the various State legislatures in introducing one-year limitation periods was that defamation actions would be pursued and resolved promptly.[6] Despite this, Courts continue to allow plaintiffs to sue for defamation over online publications first posted online more than one year prior to commencement.

The Law Society submits that a change from the multiple publication rule to the single publication rule is vital to enable publishers to continue to maintain the public record by leaving articles online in "archived" form without the risk of being sued perhaps many years later, despite no action having been taken at the time of publication.

3(b)(i) If the single publication rule is supported: should the time limit that operates in relation to the first publication of the matter be the same as the limitation period for all defamation claims?

Yes. There is no reason to discriminate between mediums of publication.

3(b)(ii) Should the rule apply to online publications only?

No. Again, there is no reason to discriminate between mediums of publication.

3(b)(iii) Should the rule operate only in relation to the same publisher, similar to section 8 (single publication rule) of the Defamation Act 2013 (UK)?

Yes, although it should be extended to related bodies corporate of the original publisher and ensure that individuals involved in the original publication (such as the journalist and editors) are protected by the single publication rule. If an entirely separate third party subsequently chooses to republish material published at an earlier date (and potentially infringe the copyright in the original material), there is no reason why the limitation period should not recommence upon the date of republication in respect of that republication and that third party. However, we consider that the original publisher should have legal protections legislated to avoid the potential for a cross-claim by the third party.

4. Offers to make amends

4(a) Should the Model Defamation Provisions be amended to clarify how clauses 14 (when offer to make amends may be made) and 18 (effect of failure to accept reasonable offer to make amends) interact, and, particularly, how the requirement that an offer be made 'as soon as practicable' under clause 18 should be applied?

The Law Society supports amending the provisions relating to offers to make amends.

There is considerable confusion and uncertainty created by the interaction between the 28-day period prescribed in s 14(1)(a) and the 'as soon as practicable' timeframe in s 18(1)(a) of the Act. Publishers are often required to make extensive enquiries in order to address complex complaints. While a 28-day period gives the publisher a definite date to work towards in order to make any offer to make amends, the term "as soon as practicable" creates uncertainty as to whether any offer to make amends may potentially operate as a defence.

The Law Society suggests that the provisions be reconciled so as to clarify what will, and what will not, amount to a valid offer to make amends which may potentially act as a defence in the event it is not accepted.

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[6] See for example, the second reading speeches of the NSW, ACT and Queensland parliaments.

4(b) Should the Model Defamation Provisions be amended to clarify clause 18(1)(b) and how long an offer of amends remains open in order for it to be able to be relied upon as a defence, and if so, how?

Yes. The wording of cl 18(1)(b) should be amended to provide that the offer to make amends must remain open for acceptance for, at least, a period that it is reasonable in the circumstances to allow the plaintiff sufficient time to consider whether to accept.

4(c) Should the Model Defamation Provisions be amended to clarify that the withdrawal of an offer to make amends by the offeror is not the only way to terminate an offer to make amends, that it may also be terminated by being rejected by the plaintiff, either expressly or impliedly (for example, by making a counter offer or commencing proceedings), and that this does not deny a defendant a defence under clause 18?

Yes. The offer to make amends provisions should be amended to make clear what will, and what will not, amount to a rejection of the offer. If a plaintiff rejects an offer to make amends (by any method), this should not in any way affect the ability of a defendant to potentially rely upon the offer as a defence pursuant to cl 18.

5. Juries' consideration of offers to make amends.

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

The Law Society agrees that a jury should 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. It would undermine the without prejudice status of the offer for the jury to be made aware of it prior to determining the other issues in terms of liability.

6. Content of offers to make amends and concerns notices

Should amendments be made to the offer to make amends provisions in the Model Defamation Provisions to:

6(a) Require that a concerns notice specify where the matter in question was published?

It is vital that the matter complained of is identified with precision in a concerns notice, including the name of the publication (including any URL), date of publication, and any headline. Where the matter is not properly identified, the publisher cannot assess the merits of the complaint.

6(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?

Many complainants mistakenly believe that an apology is a requirement of an offer to make amends. Clause 15(1)(d) of the Model Defamation Provisions incorrectly assumes that the matter complained of is capable of "a reasonable correction". In many instances the complaint may not relate to a factual inaccuracy but to an omission of contextual information or implication identified by the complainant, which cannot be "corrected" per se. However, the publisher may wish to seek to offer the publication of a mutually acceptable form of words that may involve, for example, a clarification or the inclusion of additional information.

The Law Society suggests that cl 15(1)(d) be amended to require the publisher, as part of an offer to make amends, to offer the publication of a reasonable correction, clarification, apology, or other form of words as a matter of redress to the complainant, the reasonableness of which (per cl 18) would subsequently be a matter for the Court, if necessary.

6(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?

Provision of indemnity costs in these circumstances would help encourage the early resolution of complaints. There is currently no incentive for plaintiffs to engage with the early resolution procedures in the Act. We recommend that the provisions make explicit that not only will the rejection by a complainant of a reasonable offer to make amends potentially amount to a defence to any proceedings, but that there may also be indemnity costs consequences, to encourage early resolution of complaints.

7. Amendments enabling Court to dispense with jury

Should clause 21 (election for defamation proceedings to be tried by jury) be amended to clarify that the court may dispense with a jury on application by the opposing party, or on its own motion, where the court considers that to do so would be in the interests of justice (which may include case management considerations)?

The Law Society does not support amending cl 21 (election for defamation proceedings to be tried by jury) to clarify that the court may dispense with a jury on application by the opposing party, or on its own motion. The current cl 21(3) already provides for dispensation of the jury in certain circumstances and remains appropriate.

In NSW, there are specific provisions for an opposing party to apply to have a jury election dispensed with.[7] Such an application must be made within a prescribed time limit. This provides certainty to the parties as to whether or not the trial is to be by jury or not. To amend these provisions would produce uncertainty between the parties (particularly the party electing trial by jury) as to the approach to the case and trial preparation.

[7] See rule 29.2A(4) of the *Uniform Civil Procedure Act 2005* (NSW).

8. Jury trials in the Federal Court of Australia

Should the *Federal Court of Australia Act 1976* (Cth) be amended to provide for jury trials in the Federal Court in defamation actions unless that court dispenses with a jury for the reasons set out in clause 21(3) of the Model Defamation Provisions – depending on the answer to question 7 – on an application by the opposing party or on its own motion?

The Law Society considers that the *Federal Court of Australia Act 1976* (Cth) should be amended to provide for jury trials in the Federal Court in defamation actions unless that court dispenses with a jury for the reasons set out in cl 21(3) of the Model Defamation Provisions. As a result of the decision in *Chau Chak Wing v Fairfax Media Publications Pty Limited,*[8] it is virtually impossible for a party to elect trial by jury in the Federal Court. This has now given rise to the opportunity for "forum-shopping" by plaintiffs who are able to invoke Commonwealth jurisdiction (by virtue of a plaintiff alleging that publication has occurred in the ACT or the Northern Territory, as is the case for virtually any internet publication) and who may wish to avoid a jury.

In order to maintain consistency, the Law Society recommends that rules for dispensing with a jury in the Federal Court should adopt those already in place in NSW[9], as explained in *Chel v Fairfax Media Publications Pty Ltd* (No 2) [2015] NSWCA 379.

9. Amendment of clause 26 (defence of contextual truth)

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?

The Law Society supports the amendment of cl 26 (defence of contextual truth) to bring it closer to s 16 (defence of contextual truth) of the (now repealed) *Defamation Act 1974* (NSW). The defence of contextual truth, if it is to remain a separate and distinct defence, must be amended to make clear that the contextual imputations on which the defendant may rely to establish the defence may include imputations of which the plaintiff complains.

In the alternative, we suggest that contextual truth could be incorporated into the defence of justification. To do so may avoid continued potential confusion for litigants, lawyers and judges, and especially juries, as to what is meant by "contextual truth".

10. Protection for statements in peer reviewed journals and reports of press conferences

(a) 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?

(b) If so, what is the preferred approach to amendments to achieve this aim – for example, should provisions similar to those in the Defamation Act 2013 (UK) by adopted?

The Law Society considers that it is vital that academics and scientists are able to express views on matters within their expertise, which have been peer-reviewed, without fear of a defamation claim. We strongly support amending the Model Defamation Provisions to

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[8] [2017] FCAFC 191.

[9] Including s 21 of the *Defamation Act 2005* (NSW) and r 29.2A *Uniform Civil Procedure Rules 2005* (NSW).

provide greater protection to peer reviewed statements published in an academic or scientific journal, and to fair reports of proceedings at a press conference.

We recommend that the protection should also extend to academic books that have gone through a peer-review process, articles published in media (other than journals and books, such as newspapers, magazines and online publications) that have gone through a peer-review process, and to presentations by academics and scientists at conferences specifically held for academic and/or scientific purposes where it is expected that the audience will be comprised of academics and/or scientists.

11. Amendment of "reasonableness test" in clause 30

11(a) Should the "reasonableness test" in clause 30 of the Model Defamation Provisions (defence of qualified privileged for provision of certain information) be amended?

The Law Society considers that cl 30 of the Model Defamation Provisions should be amended.

The Law Society is concerned that statutory qualified privilege provides little protection for media organisations engaging in public interest journalism. The courts have tended to treat the concept of reasonableness as a standard of perfection (albeit with the benefit of hindsight). In practice, despite statements to the contrary,[10] and despite its discretionary element (i.e. factors the court *may* take into account), the reasonableness requirement in cl 30(3) has manifested as a series of hurdles. Mass media defendants traditionally fail in establishing qualified privilege.

Running a defence of statutory qualified privilege requires a great deal of work, including highly voluminous discovery for major investigative stories, extensive answers to interrogatories in the form sanctioned for this defence[11] and preparing witness statements or affidavits of journalists and/or editors. Given the failure of cl 30 to act as a viable defence for media organisations, and the cost and effort involved in running the defence, many such publishers now simply do not bother to rely upon it, knowing that in all likelihood it will be unsuccessful due to the stringent demands of "reasonableness".

Recommendation

The Law Society recommends that, rather than focus on the need by mass media defendants to establish that every recipient had the requisite interest, consideration be given to whether the publication was honestly made to the recipients for the common convenience and welfare of society.

Considering that the list in cl 30(3) is not intended to be exhaustive as indicated by the phrase "any other circumstances that the court considers relevant", we suggest that a further possible area of reform of the statutory form of the defence of qualified privilege is to clarify the list. In particular, it should make clear that reasonableness *may,* not *must,* be assessed by reference to the list.

11(b) Should the existing threshold to establish the defence be lowered?

The Law Society supports amendment of cl 30 to make it clearer that the factors in subclause 30(3) are not mandatory, and that a failure by a defendant to establish any particular factor does not imply a failure of their case.

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[10] *Hockey v Fairfax Media Publications Pty Limited* [2015] 237 FCR 33 at [228].
[11] See *Mooney v Nationwide News Pty Limited (No 2)* [2014] NSWSC 1933.

Recommendation

The Law Society recommends that consideration be given to removing the phrase "the conduct of the defendant in publishing that matter is reasonable in the circumstances" and replacing it with "the defendant acted with care and diligence so as to avoid knowingly and deliberately publishing falsehoods". This proposal offers greater clarity of the threshold required for the defence to be established.

11(c) Should the UK approach to the defence be adopted in Australia?

Section 4 of the *Defamation Act 2013* (UK) is a defence for publication on a matter of public interest. It is aimed at providing protection for responsible journalism by media organisations. However, cl 30 of the Model Defamation Provisions can also be relied on by individuals who make statements about topics which are not necessarily in the public interest, but in relation to which the recipient still has an interest. Comparatively, s 4 of the UK Act has given far greater protection to journalists and media organisations engaging in responsible journalism, particularly investigative journalism, than cl 30.

Recommendation

Australian defamation law should be amended to include a provision equivalent to s 4 of the *Defamation Act 2013* (UK) in addition to the defence in cl 30 of the Model Defamation Provisions (which should remain available to both individuals and media defendants, subject to the modification recommended above).

11(d) Should the defence clarify, in proceedings where a jury has been empanelled, what, if any, aspects of the defence of statutory qualified privilege are to be determined by the jury?

The Law Society considers there to be a lack of consistency in the approach taken by the courts as to whether it is for the judge to determine whether all three elements of cl 30 are proved, or whether determining the element of reasonableness is for the jury.

Recommendation

The jury should be required to determine all elements of cl 30 statutory qualified privilege.

12. Amendment of the statutory defence of honest opinion

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?

The Law Society supports amendment of the statutory defence of honest opinion.

Clause 31(1)(a) requires that "the matter was an expression of opinion of the defendant rather than a statement of fact". This suggests that the entirety of the "matter" (for example, the whole of an article) was an expression of opinion. However, opinion pieces will generally contain a mixture of opinion and fact. The section has been interpreted as referring to "the matter complained of in its defamatory sense"[12] and there is considerable confusion as to how the statutory defence is supposed to operate in practice.[13]

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[12] *Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091 at [100]; *Zaia v Eshow* [2017] NSWSC 1540 at [73].

[13] See for instance *Tabbaa v Nine Network Pty Ltd (No.10)* [2018] NSWSC 468.

It is simply not possible for people who wish to express an opinion to identify, in every case, the facts upon which their opinion is based, let alone set them out in full. Where tweets are limited to 280 characters and Facebook posts are often short (frequently as part of a longer conversation), a post will generally not be able to set out the proper material. Provided the matter complained of reads as opinion and can reasonably be understood by an ordinary reasonable reader as opinion, and the opinion is held and expressed honestly by the publisher, it should be defensible as honest opinion.

Recommendation

The Law Society recommends that consideration be given to addressing the confusion outlined above in cl 31(1)(a).

Additionally, we recommend that the element of public interest be removed from statutory honest opinion (cl 31(1)(b)). As there is no public interest requirement for a defence of justification under cl 25 it is questionable why it should remain permissible to publish a true fact, which is not in the public interest, but not permissible to publish an opinion on a matter that is not in the public interest. In the social media age, where opinions are expressed quickly and succinctly on wide variety of issues, the requirement that each opinion (in order to be defensible) is in the public interest is overly restrictive and anachronistic. To prohibit the expression of an opinion on a private matter significantly restrains free speech.

The approach proposed by Counsel for the defendant in the UK case of *Spiller v Joseph and others* [2010] UKSC 53 ought to be adopted in the reformed law to simplify and liberalise the honest opinion defence. That approach comprises:

(a) removing the requirement that the comment relates to a matter of public interest;
(b) providing that the subjective state of mind of the defendant is wholly irrelevant; and

restricting the defence to requirements that (a) the words complained of are comment and (b) proof that one or more facts (or privileged statements) on which an honest person could have founded the relevant comment exist (even if those facts come into existence after publication).

Alternatively, we recommend that the honest opinion defence be amended to reflect s 3 of the *Defamation Act 2013* (UK).

13. Amendment of clause 31(4)(b) of the Model Defamation Provisions

Should clause 31(4)(b) of the Model Defamation Provisions (employer's defence of honest opinion in context of publication by employee or agent is defeated if defendant did not believe opinion was honestly held by the employee or agent at time of publication) be amended to reduce potential for journalists to be sued personally or jointly with their employers?

The Law Society supports the amendment of cl 31(4)(b). To the extent that the provision has been understood as requiring the journalist or author of the matter complained of to be sued, in addition to the corporate publisher, the provision ought to be amended so that such individuals are not unnecessarily forced into litigation.

14. Introduction of a serious harm test

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

14(b) If a serious harm test is supported:

> **(i) should proportionality and other case management considerations be incorporated into the serious harm test?**
>
> **(ii) should the defence of triviality be retained or abolished if a serious harm test is introduced?**

The Law Society supports the introduction of a serious harm test similar to the test in s 1 (serious harm) of the *Defamation Act 2013* (UK).

Recommendation

A threshold of seriousness for defamation actions should be legislated in the reformed defamation laws. The decision in *Kostov v Nationwide News Pty Ltd*[14] provides guidance as to the wording for an appropriate section.

Factors which may be taken into account when determining whether the "serious harm" threshold is met may include traditional elements relevant to the quantification of damages to which a successful plaintiff might be entitled, including the extent of publication and the seriousness of the defamatory matter.

Proportionality and other case management considerations should be incorporated into the serious harm test and the defence of triviality retained. If a judge is reluctant to dismiss proceedings at an early stage on the basis of serious harm and/or proportionality (for example, they may wish to leave such questions to trial), we consider that a defendant should still be able to argue at trial that the publication is defensible because the circumstances of publication were such that the plaintiff was unlikely to sustain any serious harm.

15. Innocent dissemination defence

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

The Law Society supports amending the innocent dissemination defence.

Currently, the innocent dissemination defence is available where defamatory material was published by a party only in their capacity as a subordinate distributor; they neither knew, nor ought reasonably to have known, that the matter was defamatory; and the lack of knowledge was not due to the distributor's own negligence. The term "subordinate distributor" captures certain parties who could not be expected to have known that the content of the material they published was defamatory: broadcasters of live programs, postal services, operators or providers of any equipment, system or service, by means of which matter is retrieved, copied, distributed or made available in electronic form; and operators of, or providers of access to, communications systems by which the matter is transmitted by a person over

[14] *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858 at [31]-[45].

whom the operator or provider has no effective control.

On the face of the legislation, it is not clear that Internet Service Providers ("ISPs") and search engines are "subordinate distributors", which involves questions of mixed fact and law.[15] The act of uploading material to a server may constitute publication, and usage agreements frequently allow ISPs to delete or modify content stored on their servers, arguably enabling them to exercise *control* over the content they publish. The burden that would be faced by ISPs and search engines, if the innocent dissemination defence is not available to them in these circumstances, is significant. It would be operationally overwhelming to manually review the massive volume of third-party content hosted for any objectionable material, let alone analyse it to identify whether content is defamatory. The speed at which new content is created adds to this burden, with the Review finding that search engines "automatically process more than a billion searches each day, often making it unfeasible to respond promptly to all requests that material not appear in search results."[16]

Even where an ISP or search engine is a subordinate distributor, it risks losing the defence where it is put on notice of defamatory matter and does not take steps to remove it within a reasonable time.

Further, we note that the innocent dissemination defence cannot be divorced or considered in isolation from Commonwealth provisions which deal with internet publication, such as ss 90 and 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth). The practical effect of these provisions is that it is in an internet host's legal interests *not* to monitor things such as reader comments because s 91 only applies to laws relating to internet hosts and service providers where they are aware of the relevant content. If reader comments on news websites or Facebook pages (which may be defamatory) are not monitored, and the Internet host is not aware of them, s 91 will operate to effectively override state or territory defamation laws. This places media publishers in an extremely difficult position, because s 91 requires them not to monitor reader comments to avail themselves of its protection, which is in direct opposition to their duty as a news publisher to ensure that their platforms are not used for the publication of readers' hate speech or defamatory material.

Recommendation

The Law Society recommends that if the UDL is amended to expressly extend the defence to ISPs and search engines, including where they are given notice of defamatory matter, care needs to be taken to ensure the balance struck between freedom of expression and the protection of personal reputation is considered. In this regard, it is important to recognise that it is also an object of the UDL to "provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter."[17]

The Law Society suggests that any amendment to the innocent dissemination defence should reconcile s 32 of the Act with s 91 of the *Broadcasting Services Act 1992* (Cth), so that media publishers who act responsibly in monitoring reader comments are not held liable in defamation for comments that they do not endorse or adopt in any way.

15(b) Are existing protections for digital publishers sufficient?

No. We consider there is a considerable amount of uncertainty as to what will and what will not be actionable, in terms of online publication (including search results, search "snippets", blogs, reader comments, Facebook posts and the like), and what timelines (if any) apply as

[15] *Defteros v Google Inc LLC* [2018] FSCA 176.
[16] NSW Justice, *Statutory Review – Defamation Act 2005*, June 2018, 5.56.
[17] *Defamation Act 2005* (NSW), s3(d) and corresponding provisions in the other States and Territories.

to what amounts to a publication by the Internet content host.[18]

Recommendation

To achieve certainty, the Law Society recommends that a clear set of rules for notice by a complainant and a takedown procedure be set out in plain terms in legislation.

15(c) Would a specific 'safe harbour' provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions?

Yes. We accept, however, that in certain circumstances an obviously defamatory publication ought to be removed by an internet content host, if it is to avoid the prospect of a defamation claim. A specific, step-by-step takedown procedure (as described below) would facilitate this.

15(d) Are clear 'takedown' procedures for digital publishers necessary, and, if so, how should any such provisions be expressed?

Yes. The amendment (whether in an Act, or by regulation) should provide for a simple, step-by-step "takedown procedure" for any complaint about online material. A timeline should be mandated for takedown of alleged defamatory material. Such a timeline could be, for example, 48 hours, unless either party is able to demonstrate that an earlier or later period was reasonable in the circumstances. If a publisher does not comply with the mandated take down process, but rather elects to keep the impugned material online, the complainant ought then be able to institute a defamation claim. If, however, the material is taken offline in accordance with the prescribed takedown procedure, the complainant should be barred from commencing any proceedings in relation to the matter.

16. Cap on damages

16(a) 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?

The Law Society supports a cap being placed on the amount of damages that may be awarded in defamation proceedings.

The Law Society considers that the cap represents the top end of a range, the purpose of which is to give the Court guidance as to the appropriate sum of damages for a particular gravity of defamatory content. A simple "cut-off" provides no such guidance, and arguably is at odds with cl 34, which requires there to be "an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded".

Recommendation

That cl 35 be amended to clarify that it fixes the top end of a range of damages.

16(b) Should clause 35(2) be amended to clarify whether or not the cap for noneconomic damages is applicable once the court is satisfied that aggravated damages are appropriate?

The Law Society supports amending cl 35(2). The cap should be for general, compensatory damages. It should only be exceeded to the extent that aggravated (or special) damages are added on top of what would otherwise be the cap.

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[18] See for instance the divergence of views of the judges in *Google Inc v Duffy* [2017] SASCFC 130.

17. Miscellaneous

17(a) Should the interaction between Model Defamation Provisions clauses 35 (damages for non-economic loss limited) and 23 (leave required for further proceedings in relation to publication of same defamatory matter) be clarified?

No. We do not consider that this is a matter that requires clarification.

17(b) Is further legislative guidance required on the circumstances in which the consolidation of separate defamation proceedings will or will not be appropriate?

The Law Society supports further legislative guidance. At present, it is possible for a plaintiff to sue separate legal entities, which may form part of the one corporate group, over the same article as published across different mastheads.

17(c) Should the statutory cap on damages contained in Model Defamation Provisions clause 35 apply to each cause of action rather than each 'defamation proceedings'?

The Law Society does not support placing a statutory cap as described above.

Our view is that a single set of proceedings should be subject to a single cap for compensatory damages (which may, if required, be exceeded in the event of an award of aggravated and/or special damages). If the publication of multiple articles is deemed to constitute aggravating conduct (that is, conduct which is improper, unjustifiable or lacking in bona fides, such as where there may be what might be considered to be an unfair campaign against a plaintiff), then the cap may be exceeded to reflect aggravated damage.

18. Other issues relating to defamation law that should be considered

Are there any other issues relating to defamation law that should be considered?

The Law Society raises the following issues for further consideration:

Reversal of onus of proof in terms of establishing truth or falsity of imputations

As noted above, in response to Question 1, a heavier burden to establish their case is placed on the defendant publisher than on the plaintiff. Effectively, the requirement of defamation law is that any plaintiff who sues for defamation should do so on the basis that the imputations sued upon are, in the view of the plaintiff, false. It is therefore appropriate for the plaintiff to prove falsity of the imputations, rather than the onus being left to the defendant. The plaintiff will always be in the best position to know whether an imputation is true or not. A plaintiff should not be permitted to sue over imputations which he or she knows are true.

The reformed Model Defamation Provisions could include an additional element in the cause of action, namely that the plaintiff must establish that the imputations he or she relies upon are false. In many cases, this may simply require the plaintiff to give evidence in the witness box that each imputation is false. But the switching of 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 to be 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 are false, on penalty of perjury.

Level of specificity required of a justification plea

Recent decisions have stated that if a defendant is to plead justification, it is necessary for the particulars of the defence to be articulated with the precision of an indictment.[19] The Law Society is concerned at the tendency inherent in this approach to expect that a journalist who has undertaken a major piece of investigative journalism should, at the time of publication be in the same position as a prosecutor with a brief of evidence ready to take a matter to trial. This misunderstands the nature of investigative journalism, where it is often the case that journalists, may, in preparing an article, view documents which they may not be able copy.

The Law Society considers that, particularly in the context of public interest investigative journalism, it is unrealistic to expect a publisher to refrain publishing an important piece of investigative journalism until they have a "brief of evidence" sufficient to particularise a justification defence, and it is contrary to the objective of encouraging freedom of expression.

The reformed defamation laws could disavow any suggestion that a journalist must effectively have a brief of evidence ready to prove all elements of a story true as at the time of publication. Such reform will prevent publishers from having their defences struck out at an early stage prior to them having had the opportunity to pursue the usual interlocutory steps that a party to a civil proceeding can take advantage of in order to complete the particularisation of a pleading.

Clarification as to whether a defendant may rely upon a combination of defences in order to defend a single matter complained of.

Many 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. Defendants have traditionally understood that multiple defences could be mounted to address different aspects of a particular publication. However, the NSW Court of Appeal has stated that defamation defences each work on an "an all-or-nothing basis."[20] This is contrary to how media defendants have traditionally approached defences to matters which involve a mixture of fact, opinion, fair report and the like.

The reformed laws could make clear that a defendant may cumulatively rely upon a combination of defences in response to any particular matter complained of.

Minor disputes

In relation to relatively minor disputes between individuals (particularly on social media), 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, or alternatively in a national tribunal dealing solely with small defamation disputes. This tribunal could require mediation as the first step, with strong encouragement for online takedown and the publication of an apology/correction to seek to resolve the matter at the earliest opportunity. Further, remedies in such a tribunal should be restricted, in particular damages, and there should be a *prima facie* presumption of no orders as to costs.

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[19] *Rush v Nationwide News Pty Ltd* [2018] FCA 357 at [52].
[20] *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* [2018] NSWCA 77, per Meagher JA at [38].

Allegations of malice

The Law Society recommends that consideration be given to whether there should be consequences for a plaintiff who alleges malice against a defendant, which is ultimately found to be unsubstantiated. For example, if an allegation of malice has been made by a plaintiff, which ultimately has been found to be baseless, the plaintiff could be deprived of any costs order in his or her favour in respect of the proceedings.

Jury Verdicts

The Law Society recommends that consideration be given to whether juries should be asked to give a simple general verdict as to which party should win, as opposed to being put through the arduous task of answering a series of questions where the set of questions does not ultimately identify to the jury who succeeds in the case.[21] We note that, in criminal cases, elements of the criminal offence are explained to the jury, as are each of the defences that may be relied upon, but the jury delivers a simple verdict of guilty or not guilty. In many defamation cases, after closing addresses and directions from the judge, it would be simpler, and easier, for the jury to simply be asked which side should win.

Defeasance provisions

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). Further, with respect to cl 30 (defence of qualified privilege for provision of certain information), if the defendant has acted maliciously, the defendant will not have established the element of reasonableness. Malice therefore becomes irrelevant. Finally, the defeasance provisions are increasingly creating work for defendants and the courts in applications to strike out deficient replies.[22]

Recommendation

Consideration ought to be given to the need and relevance of the current defeasance provisions in the defamation laws. We recommend that the defeasance provisions be removed altogether, and instead (if necessary) incorporating the concepts embodied in the defeasance provisions as part of the plaintiff's onus in chief in establishing his or her cause of action.

Threshold on the question of capacity

Consideration ought to be given to whether courts have adopted an overly cautious approach to the determination of the preliminary legal question of whether a matter complained of is capable of conveying the imputations contended for by the plaintiff. In particular, consideration should be given to raising the very low threshold to the question of capacity.[23]

Avoiding SLAPP Suits

The Law Society suggests consideration of uniform legislation to avoid strategic lawsuits against public participation ("SLAPP suits"), such as the "Gunns 20" case.[24] This is all the more pressing in the digital age, where individuals have an expectation of being able to

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[21] Note the questions put to the jury in *Tabbaa v Nine Network Pty Ltd (No.10)* [2018] NSWSC 468.
[22] See for example *Arman v Nationwide News Pty Limited* [2017] NSWDC 151; *Mosslmani by his tutor Karout v Australian Radio Network Pty Ltd* (ACN 065 986 987) [2018] NSWDC 114.
[23] See *Favell v Queensland Newspapers Pty Ltd* [2005] HCA 52.
[24] *Gunns Limited v Marr* [2005] VSC 251, *Gunns Ltd v Marr (No 3)* [2006] VSC 386.

express opinions and protest via social media and other internet forums. In that regard, in furtherance of the principle of freedom of expression, the *Protection of Public Participation Act 2008* (ACT) should be replicated across all Australian jurisdictions, providing for civil penalties where a defendant's conduct is public participation, and the plaintiff's proceeding is started or maintained against the defendant for an improper purpose.

Radical reform and drafting of the reformed legislation

The Discussion Paper presents an opportunity for radical reform to how defamation matters are conducted in Australia. For example, can the law be amended to remove the concept of imputations altogether, and simply ask the jury whether a particular publication is defamatory and false, and if so, are the parts of which the jury determines to be defamatory and false defensible by virtue of one or more defences relied upon by the defendant? While there is much to be said in having imputations so as to define the real matters that will be in issue at trial, the courts are straining under the workload of voluminous interlocutory disputes. The idea of truly radical reform (rather than "tinkering around the edges" of the existing laws) should be given serious consideration as part of the reform process.

Recommendation

The Law Society recommends that a panel of highly experienced practitioners in the defamation field be assembled to consider in detail the reformed defamation legislation.

The Law Society thanks you for the opportunity to comment. If you have any questions, please feel free to contact Adi Prigan, policy lawyer on Adi.Prigan@lawsociety.com.au or 9926 0285.

Yours sincerely,

Elizabeth Espinosa
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