



THE LAW SOCIETY
OF NEW SOUTH WALES

16 May 2011

Director
NSW Department of Attorney General and Justice
Legislation and Policy Division
GPO Box 6
Sydney NSW 2000

Dear Sir/Madam,

Review of Defamation Act 2005

The Law Society's Litigation Law and Practice Committee (the Committee) thanks the NSW Department of Attorney General and Justice for the opportunity to provide a submission in response to the review of the *Defamation Act 2005* (the Act). The Committee also thanks the Department for the extension of time granted.

The Committee submits that the policy objectives of the Act remain valid and that its terms remain appropriate for securing its objectives. In view of the relatively short period of time that the Act has been in effect it may be premature to address the performance of the Act's provisions at this stage. For example *Aktas v Westpac Banking Corporation Limited [2010] HCA 25* was decided by the High Court in 2010 based on the former *Defamation Act 1974* (the 1974 Act) which was in force at the time of the events complained of. Despite the Act repealing the 1974 Act, the Court proceeded with the legislation as it "continued to govern the litigation against Westpac instituted in the Supreme Court of New South Wales in 2002."

Assessment of the Defamation Act

The Act has effectively been operating in the courts for approximately 4 years and so far the objectives remain valid. The matters dealt with by the courts show that the law of defamation does not place unreasonable limits on freedom of expression. The publication and discussion of matters of public interest and importance continue without significant interference. Remedies for persons whose reputations are harmed by the publication of defamatory matter are effective and fair. The case law demonstrates that uniform laws have been promoted in Australia.

By allowing the general law to operate, the Act provides greater flexibility for matters involving defamation. In time the full effect of section 6(3) (applying the general law under the Act as if the *Defamation Act 1958* and 1974 Act had never been enacted) will enhance the general law precepts in matters of defamation. The Committee considers that it is presently too early to make a proper assessment of the provision and the application of the general law since the Act came into force.

The processes contained in the Act are being used to promote speedy and non-litigious resolution of matters involving defamation. It will take time for these provisions to be used exclusively, without any use of the 1974 Act, and to fully assess the impact of the Act. Additionally, the increased use of social media in the future may cause defamation laws to be used more frequently.

The offer of settlement provisions in relation to costs under section 40 provides a strong incentive for the parties involved in litigation to resolve their dispute by making a reasonable offer to make amends before or after the proceedings have commenced. The impact of these provisions cannot be fully assessed as matters before the courts have been based on the 1974 Act. If matters under the current Act resort to these provisions there may be difficulty in properly assessing the operation of section 40 as parties to a dispute involving defamation would tend to pursue the course provided under Part 3 of the Act before litigating the matter. The Committee considers that in time Part 3 will be used more frequently thus enhancing the objectives of the Act.

The limitation of actions by corporations under section 9 cannot be assessed as the operation of the Act has been too short for matters to come to the courts to provide considered views that can assist a proper analysis.

Matters arising under the provisions contained in the Schedules to the Act do not appear to raise any concerns as these have been limited.

Possible issues for consideration

The operation of Part 3 of the Act should be monitored to assess its future use and the nature of the matters dealt with under this Part. While most matters would be dealt with by legal practitioners under this Part there may be matters requiring the assistance of adjudication without resorting to Part 4 of the Act.

A lower level of adjudication might be made available in the NSW Administrative Decisions Tribunal with a specialist division or another form of adjudication specialising in defamation. This function could be performed without the rules of evidence to provide a speedy resolution by the parties with the aid of adjudication. However, a new Part would need to be inserted with amendment to existing provisions to provide for this adjudication process.

Should you have any queries please feel free to contact the policy lawyer with responsibility for this matter, Patrick McCarthy, who can be contacted on (02) 9926 0323 or by email at patrick.mccarthy@lawsociety.com.au.

Yours sincerely,



Michael Tidball
Chief Executive Officer