25 February 2020

Defamation Working Party
Justice Strategy and Policy Division
NSW Department of Justice
GPO Box 31, Sydney, 2001

By email: defamationreview@justice.nsw.gov.au

Dear Colleagues,

Re: Review of Model Defamation Provisions

1. The Bar Association of Queensland (**the Association**) welcomes the draft amendments to the Model Defamation Provisions (**MDPs**) and the background paper accompanying those amendments.

2. There are various matters which the draft amendments have not incorporated, notwithstanding the views expressed by many stakeholders. It is unnecessary to further rehearse those matters; they have been addressed in earlier submissions including from this Association.

3. There is however one matter which arises from the draft amendments which it is necessary to agitate further.

4. While the underlying basis for the introduction of a serious harm threshold is to be commended, the proposed provision, s 7A, is inadequate.

5. If it the case that s 7A is intended to empower courts to filter out trivial defamation claims at an early stage1 - which appears to be the intention – then the provision needs to expressly empower a court to determine this issue on a summary basis and, as part of that, identify some criteria which a court may take into account if asked to exercise the power.

6. As drafted, s 7A wholly fails to do either of these things. These failures mean that the provision is ineffective in providing a "useful and proportionate approach" to addressing the concerns raised in the background paper.

1 A point made by Matthew Collins QC on s 1 of the *Defamation Act 2013* (UK) in his work *Collins on Defamation* 2014 at [7.44].

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7. The failure to empower a court to determine the issue on a summary basis means that a defendant faced with a trivial defamation claim can only defeat that claim by either running the matter to trial or bringing an application for summary judgment. The former of these is obviously undesirable.

8. An application for summary judgment (which would be brought and determined in accordance with procedural rules unique to the jurisdiction in which the claim is filed) requires a defendant to meet a high threshold. Indeed, the accepted, and orthodox, position is that the power to order summary judgment must be exercised with "exceptional caution" and should never be exercised unless it is clear that there is no real question to be tried.2

9. It is difficult to see how the application s 7A, which is modelled upon s 1 of the *Defamation Act 2013* (UK) (**the UK Act**), will meet this threshold.

10. Recently, in the context of the application of s 1 of the UK Act Lord Sumption (with whom Lord Kerr, Lord Wilson, Lord Hodge and Lord Briggs agreed) identified in *Lachaux v Independent Print Ltd* [2019] 3 WLR 18 considered that:

> [12] Although the Act must be construed as a whole, the issue must turn primarily on the language of section 1. This shows, very clearly to my mind, that it not only raises the threshold of seriousness above that envisaged in *Jameel (Yousef)* and *Thornton*, but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words.
>
> …
>
> [14] The reference to a situation where the statement 'has caused' serious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated. The same must be true of the reference to harm which is 'likely' to be caused."

11. With these remarks in mind, s 1 of the UK Act embraces near identical concepts to the proposed s 7A. Specifically, it adopts the concepts of *cause or likely to cause serious harm*. That it does so means that its application will in all cases require an inquiry along the lines identified by Lord Sumption to occur.

12. If that is the position, and assuming a similar interpretation is applied to s 7A as its UK inspiration (and there is no reason to suggest it will not be similarly interpreted), then it is likely that in most cases summary judgment will be extremely difficult to obtain. This is because the considerations identified by Lord Sumption require a factual inquiry, and thus, by their nature, are triable issues.

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2 See, for example, *Wester v Lampard* (1993) 177 CLR 598 at 602-3 (Mason CJ, Deane and Dawson JJ).

13. In substance, the proposed s 7A does little more than recast the existing triviality defence (s 33) as an ingredient of the cause of action for defamation and place the burden of proof on the plaintiff.

14. One of the vices with the existing triviality defence is that it is by nature a defence and only arises for consideration after a plaintiff has established liability. Its application has proved ineffective in deterring trivial defamation claims; indeed, there is no known example of a court dismissing a claim or granting summary judgment to a defendant on the basis that the claim was trivial.3

15. While recasting the burden on a plaintiff to *prove* serious harm goes somewhat to addressing the lack of utility in the s 33 defence, the proposed s 7A fails to adequately grapple with the mischief it is intended to address: providing the means to dismiss trivial defamation claims.

16. As the Association identified in its earlier submissions, at [50], the equivalent English provision, upon which s 7A is based, has simply shifted the focus in litigation. The shift in that focus still presents the risk that the application of the serious harm threshold will simply become be a matter determined at trial: see the recent example in the UK in *Turley v Unite the Union* [2019] EWHC 3547.

17. The only effective means to filter trivial claims is to empower the court to summarily dispose of such claims and to provide guidance as to when it is appropriate to exercise this power.

18. A more effective means by which this can be achieved is to include a list of factors which the court may take into account in considering the application of the serious harm threshold. The provision should also expressly empower the court to dismiss a proceeding, at any point in the litigation, on the application of a defendant.

19. This can be achieved by the following changes (underlined) to the proposed s 7A:

> "**7A Serious harm required for cause of action for defamation**
>
> (1) An individual has no cause of action for defamation in relation to the publication of defamatory matter about the individual unless the individual proves that the publication has caused, or is likely to cause, serious harm to the reputation of the individual.
>
> (2) An excluded corporation referred to in section 9 has no cause of action for defamation in relation to the publication of defamatory matter about the

3 Points may by Professor David Rolph in his work *Defamation Law* 2016 at [14.70]. See also Professor Rolph's recent article titled *Triviality, Proportionality and the Minimum Threshold of Seriousness in Defamation Law* published as a Legal Studies Research Paper No. 20/04 January 2020.

corporation unless the corporation proves that the publication has caused, or is likely to cause—

(a) serious harm to the reputation of the corporation, and

(b) serious financial loss.

(3) At any time after a proceeding has commenced, a defendant may apply to the court under subsection (4) for orders dismissing the proceeding.

(4) If the court is satisfied that the plaintiff has no real prospect of proving that the publication of defamatory matter has caused, or is likely to cause, serious harm to the reputation of the plaintiff the court may dismiss the proceeding and may make any other order the court considers appropriate.

(5) For the purposes of subsection (4) in considering whether a publication has caused or is likely to cause serious harm to reputation the court may take into account any of the following factors:

(a) the seriousness of any defamatory imputations of which the plaintiff complains;

(b) the extent of publication;

(c) the nature of the recipients of the publication and their relationship with the plaintiff;

(d) the objects of this Act; and

(d) any other circumstances that the court considers relevant."

20. Related to this is the issue of proportionality. The background paper adopts the position that proportionality is a matter "best dealt with by jurisdictions through their own procedural rules and not through the MDPs". That position is, with respect, counterproductive.

21. Quite apart from endorsing an approach to defamation which is the antithesis of uniformity (notwithstanding the question of why a defendant in one jurisdiction should benefit from a regime not available in another) leaving proportionality to individual jurisdictions ignores its fundamental utility. Proportionality has proved to be a key consideration in managing defamation litigation and, indeed, the provenance of the jurisprudence which has motivated this aspect of the current reforms. It is sensible that proportionality should be at the forefront of defamation litigation, particularly having regard to the increasing number of claims being filed and the burden they place on courts.

22. The concept of proportionality can easily be included within the existing objects set out in s 3. A proposed clause (with the additions underlined) could be as follows:

> "**3 Objects of Act**
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> The objects of this Act are—
>
> (a) to enact provisions to promote uniform laws of defamation in Australia; and
>
> (b) to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance; and
>
> (c) to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter; ~~and~~
>
> (d) to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter; <u>and</u>
>
> (e) <u>to ensure that proceedings brought under this Act are dealt with justly including, so far as is practicable:</u>
>
> (i) <u>that the issues between the parties are resolved in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute; and</u>
>
> (ii) <u>cases are allotted an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.</u>

23. Any reforms intended to discourage trivial defamation claims and provide a more effective means for courts to manage (and for defendants to be relieved of the burden of) trivial claims must be effective. The problems with the proposed s 7A identified above pose a real risk that the provision if enacted in its current form will be ineffective. The means to address this risk has been identified in the suggested amendments. Those suggestions are, with respect, a more effective means of achieving this purpose.

Yours faithfully

Rebecca Treston QC
President