



Law Council
OF AUSTRALIA

Review of Model Defamation Provisions – Draft Amendments

Defamation Working Party of the Council of Attorneys-General

31 January 2020



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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful contributions of the Law Society of South Australia and the South Australian Bar Association in the preparation of this submission.

Introductory Note

1. The Law Council welcomes the opportunity to make a submission to the Defamation Working Party of the Council of Attorneys-General (**Working Party**) regarding the Draft Amendments to the Model Defamation Provisions (**Draft Amendments**).
2. However, due to the timing of the Consultation, the Law Council has been unable to sufficiently canvass the views of the profession in relation to the Draft Amendments. As such the Law Council does not wish to comment on the Draft Amendments and instead provides the submissions of the Law Society of South Australia (**LSSA**) and South Australian Bar Association (**SABA**) for consideration by the Working Party. These views should be attributed to those organisations and not the Law Council as a whole.
3. The Law Council looks forward to further engaging with the Working Party regarding the Review of the Model Defamation Provisions in 2020. In particular, by responding to the next stage of proposed reforms intended to address digital platform issues.

Submission of the Law Society of South Australia

4. The LSSA notes the Review of the Model Defamation Provisions Discussion Paper which was released for consultation on 14 May 2019, and is pleased to see that the Draft Amendments adopt a number of concerns raised during that consultation.
5. Overall, the LSSA considers the Draft Amendments to be appropriate and supports them in principle. Set out below are comments concerning some of the key amendments, including suggestions for improvement and identification of areas where further clarification and guidance may be required.

Serious harm required for cause of action for defamation

6. The Draft Amendments would introduce section 7A which provides:
 - (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 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.*
7. The LSSA supports the introduction of a 'serious harm' threshold. However, it has some concerns about the lack of guidance in the legislation itself about how that threshold is to be approached and understood.
8. The Model Defamation Amendment Provisions 2020 (Consultation Draft) Background Paper (**Background Paper**), notes that it was a deliberate decision not to include legislative guidance as to the factors to be considered in deciding what constitutes

serious harm, on the basis of an expectation that the courts would take those factors into consideration in any event.

9. The LSSA is concerned there is a real risk that simple statutory interpretation may result in the courts taking a different view. While there is some United Kingdom (**UK**) jurisprudence on the term, it won't necessarily be binding in Australian courts. Furthermore, given that 'serious harm' could be interpreted quite subjectively, this may in practice lower the threshold and defeat the purpose of the amendments. The LSSA notes the defence of contextual truth and cap on damages in this regard, where the intention behind the provision isn't sufficiently clear and subsequent statutory interpretation doesn't reflect the initial intention.
10. The LSSA notes that the Law Council in its submission of 14 May 2019, stated that it may be preferable for the legislature to be explicit in relation to the matters that the court may take into account in considering whether a publication has caused or is likely to cause reputational serious harm. The LSSA supports this approach.
11. The LSSA suggests that the inclusion in the legislation of some guiding commentary, capturing some of what appears in the Background Paper, or a list of non-exhaustive factors for the Court to consider in relation to 'serious harm', similar to the approach taken in relation to qualified privilege at section 30(3) and (3A) of the Draft Amendments, would be beneficial to avoid confusion.
12. Guiding commentary or a list of non-exhaustive factors is also likely to assist practitioners to properly interpret the term in order to more confidently give advice, where appropriate, that a potential claim isn't likely to meet the threshold, and in particular, for self-represented litigants to better understand the limits of any potential claim. Such measures would also align with the approach taken in relation to some of the other proposed amendments, for example, the amendments to the requirement for a 'reasonable correction' in an offer to make amends.
13. Furthermore, the LSSA notes that the Draft Amendments fail to provide guidance as to what 'serious financial loss' means for the purposes of an excluded corporation establishing a cause of action. The LSSA questions whether this means serious loss in an objective or subjective sense. For example, if a two-person company earning \$100,000 a year suffers a \$10,000 loss as a result of a defamatory publication – which would be significant in the context of that business, but doesn't meet the minor civil jurisdictional limit in terms of actual quantum – is that sufficient? Such an approach may defeat the purpose of ensuring that claims that are pursued are significant and proportionate to the costs of litigation, to make that claim worthwhile from a public policy perspective.

Contextual truth

14. The LSSA supports the 'plead-back' amendments to the contextual truth defence contained in the Draft Amendments. The LSSA considers the amendments will ensure the defence of contextual truth has a greater chance of operating as originally intended.
15. However, the LSSA seeks clarification as to whether the amendments will permit a defendant to plead back a modified version of an imputation pleaded by a plaintiff, or if the defendant will be limited to either the express imputations pleaded by the plaintiff, or something altogether different. For example, it is unclear whether a defendant could, in response to a pleaded imputation that the plaintiff is 'a liar and a

phony', deny that the double-barrelled imputation arises but plead back that the plaintiff 'is a liar' as a contextual truth.

Defence of responsible communication in the public interest

16. The concept of responsible journalism recognises that the greater the seriousness of the defamatory allegation(s) and the potential harm they may cause, the greater the responsibility of the publisher/journalist to ensure that all reasonable and practicable steps are taken to verify the allegations and provide the person in question with a reasonable opportunity (prior to publication) to provide a response. In this respect, the LSSA considers that a reasonable opportunity includes reasonable time for the person's views to be sought, obtained and included in (or at the time of) the defamatory publication.
17. The LSSA would expect that in order for the defence to be upheld, the publisher must reasonably believe the truth of the defamatory allegation(s) and have taken such reasonable and practicable steps.

Defence of scientific or academic peer review

18. Section 30A of the Draft Amendments provides a defence of scientific or academic peer review. Section 30A(1) provides it is a defence to the publication of defamatory matter if the defendant proves that:
 - (a) *the matter was published in a scientific or academic journal, and*
 - (b) *the matter relates to a scientific or academic issue, and*
 - (c) *an independent review of the matter's scientific or academic merit was carried out before the matter was published in the journal by –*
 - i. *the editor of the journal, and*
 - ii. *one or more persons with expertise in the scientific or academic issue concerned.*
19. The LSSA supports proposed section 30A in principle. However, it considers that section 30A(1)(c) may be problematic. In particular, that an editor of a relevant scientific or academic journal may not have the necessary expertise in the scientific or academic issue concerned (which is the subject of the proposed publication), such as to be in a position himself or herself to carry out 'an independent review of the matter's scientific or academic merit'.
20. It is apparent that the 'and' between section 30A(1)(c)(i) and (ii) is conjunctive. It is considered the requirement in 30A(1)(c)(ii) is appropriate, but perhaps as an alternative to 30A(1)(c)(i). Where the editor does not have the relevant expertise, it would be appropriate for him or her to choose a person who has such expertise (and on whose expertise he or she reasonably relies) to carry out such independent review (on which he or she relies).

Single publication rule

21. The LSSA welcomes the inclusion of the single publication rule in the Draft Amendments. The LSSA notes the provision amends the current common law

position on publication, in that publication occurs on the upload of the material, rather than the download.

22. It will be interesting to assess whether or not the definition of publication will have any impact on questions of jurisdiction. For example, where a matter is uploaded in the United States (as opposed to being downloaded in Australia) and how that will affect the applicable jurisdiction in which the claim should be brought.
23. In this regard, the LSSA considers that the introduction of the serious harm threshold may have an impact, in that the relevant jurisdiction becomes where the harm is suffered as opposed to where the downloading/publication of the material occurs. This could raise some potential issues, for example, if the alleged defamatory material is uploaded in the United States, read or seen by people in New South Wales, but the plaintiff resides in South Australia, where does the harm actually occur and what then is the appropriate jurisdiction?
24. Notwithstanding, the LSSA considers that the upload approach gives greater certainty with respect to the limitation of actions and is more easily identifiable (such as by the date of an article, or the date a website was edited, or the timestamp on a social media post). The LSSA refers to the Background Paper in this respect, which explains why the UK approach to the definition of publication should be avoided.

Submission of the South Australian Bar Association

25. In SABA's previous submission to the Attorney-General for the State of South Australia, it supported the following:
 - the single publication rule (or some other means of ensuring time limits were not circumvented);
 - the expansion and clarification of the contextual truth defence;
 - an expansion and clarification of the 'basis' rule for the defence of comment/opinion; and
 - clarification of how the cap on non-economic loss is intended to operate.
26. SABA is pleased to see that the Draft Amendments reflect and address those matters. In respect of the other provisions proposed, SABA:
 - supports the proposed relaxation of the test for an extension of time; and
 - on balance, having regard to the considerations set out below, supports the proposed threshold requirement of 'serious harm'.
27. However, SABA notes that the test of 'serious harm' is likely to involve a difficult assessment which it seems would not be made until the end of a trial by which time a plaintiff will have incurred significant expense.
28. On the other hand, SABA sees merit in deterring small claims in defamation. This is not on the basis that media or other likely defendants should enjoy some special or additional protection, but rather on the footing that the costs associated with the pursuit of small claims in defamation do seem to be out of all proportion to the likely award.

29. Further, given the complexity of defamation matters generally, SABA considers that in many if not most cases, plaintiffs who have suffered some harm which is very modest but not so insignificant as to attract the 'triviality' defence are too often ultimately ill-served by instituting proceedings which can then become out-of-control and difficult to resolve.
30. Finally, having regard to the various on-line platforms in respect of which individuals may become liable for comments of others, SABA notes that there is likely to be a proliferation of these small defamation claims. There is also a tendency for individuals met with small defamation claims to launch knee-jerk cross-claims. Experience suggests that where successful, the awards are modest, and the actual vindication provided by such claims is of limited benefit having regard to the transitory and transient effect of on-line commentary. A successful judgment will rarely be published or known in the same forum in which the original defamation was made.