23 January 2020

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Review of Model Defamation Provisions

c/o Justice Strategy and Policy Division
NSW Department of Justice
GPO Box 31
Sydney NSW 2001

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

Dear Madam/Sir

Scope of this submission

This submission only address question 14(a) in the review of the Model Defamation Provisions about whether a 'serious harm' threshold should be introduced.

Context

Many people of limited means value their reputation and introducing a serious harm threshold may restrict their ability to right a perceived wrong.

All Australians deserve the right to address wrongs that have committed against them without overcoming significant barriers put in place by the Government and the justice system.

Alienation from justice breeds discontent and a foundation of good policy is to ensure changes to the law retains the faith and goodwill of the public and not be skewed towards the interests of the powerful traditional and newer online media organisations.

Serious harm threshold

No, Australia's defamation laws should not have a serious harm threshold test.

A serious harm threshold is too high a barrier. People have no automatic right to tarnish a reputation without good cause, and adherents to the proposition 'freedom of speech' need to acknowledge that having unlimited rights to free speech can cause harm.

As it is the defendant publishing comments, the defendant should have the onus of proving there was a proper basis for publishing the comments. The plaintiff, who may well be an innocent party, should not have to prove comments were false and exceed a serious harm threshold.

Barriers to plaintiff are already high for the average person on wages, yet their employment prospects may well be hindered by callous and vindictive employers, or ex-business partners. Serious harm must not be implemented. People's livelihoods are at real risk. Introducing a serious harm threshold test risk removing defamation from the reach of the people who work hard to gain a good reputation, and who are on low wages. These people often value their standing in the local community and may not be readily be able to demonstrate 'serious harm' to the satisfaction of a judge. Proving a person is being shunned can be insurmountable as it is often seen in small behavioural changes by those around them. It is next to impossible for someone to prove they missed on being elected President of their favourite association, or not being invited onto a committee of management, all due to the lowering of their reputation in the eyes of those around them.

Another consequence of needing to prove 'serious harm' is where employers conduct online searches for prospective employees. It is common practice for employers to conduct online searches of prospective employees and base their hiring decisions on what they find out about through these searches. Employers do not communicate the results of online searches to prospective employees and future job opportunities or financial security is at risk if a prospective employee has had information posted about them that falsely tarnishes their reputation. It is possible, indeed likely, the prospective employee will never determine the reason for missing out on job opportunities. Employers are careful to ensure they provide no information to prospective employees that gives the prospective employee an opportunity to claim discrimination against the employer.

Employees may not be able to demonstrate 'serious harm' at the time of posting, however in 2, or 5 or 10 years or more time the offending material may still be online when the employee is seeking alternative job opportunities.

Technology allows defamatory material to be stored online indefinitely and people are aware of this and often concerned about the effects of offending material about them being online indefinitely. They deserve the right to seek the removal of material adversely and unfairly affecting their reputations without needing to demonstrate they have or may suffer serious harm. It is readily foreseeable a judge faced with a question about serious harm may well ask how long an employee has been employed. If the judge thinks the employer is a long term employee, the judge may say there is no foreseeable serious harm. An employee should not be faced with this problem through changes to the defamation laws.

It easy to publish content online and technology is making it easier and easier for not just media organisations and journalists to publish content but now anyone with a smartphone and a data plan can publish content online. The propensity for relationship breakdowns resulting in social media outbursts increases with the ease of posting content online. Whether it be acrimonious family relationships, student teacher, client doctor, or online trolling, people deserve protection that no other law can provide.

Posts, comments and email trails can exist for years online, some held in jurisdictions beyond Australia. Publishers of content need to be held accountable for their actions when they are reckless, indifferent, negligent or wilful in their attacks on others in our community. Publishers are using online anonymity to harm reputations people strive to build. A good reputation is often difficult to achieve, and easy to tarnish.

Excuses by publishers that trials are expensive, generally results from the behaviour of the larger publishers. They have the option of complying with reasonable demands in a concern's notice while

a plaintiff who sets unrealistic demands in a concern's notice or statement of claim can and should be held to account through the appropriate apportionment of cost orders.

Defamation actions should be available for everyone in our society and there is a risk that serious harm becomes associated with high profile mass media cases. Judicial interpretation of 'serious harm' may not always correlate to the general public, and statutory interpretations do not readily adapt to changes in society.

Arguments about the wastage of court resources on trivial matters are missing alternative solutions.

Implementing a serious harm threshold to eliminate trivial cases is not a proper or reasonable solution. Better solutions involve awarding/not awarding costs or giving jurisdiction to state based tribunals to hear matters below a certain threshold, say claims less than $20,000 (indexed).

The law must protect the innocent, and not provide a safe haven through a serious harm threshold for publishers to tarnish reputations, often just because they can.

I welcome the opportunity to expand on my views or explain any part of my submission.

Regards,

Rod Veith

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