CHIEF JUSTICE'S CHAMBERS
SUPREME COURT

29 April 2019

Review of Model Defamation Provisions
Justice Strategy and Policy Division
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DRAFT SUBMISSION TO THE WORKING PARTY OF THE COUNCIL OF ATTORNEYS-GENERAL ON THE REVIEW OF MODEL DEFAMATION PROVISIONS

The Supreme Court of South Australia has considered the terms of the discussion paper issued by the Council of Attorneys-General into the review of model defamation proceedings dated February 2019.

The Court notes the discussion paper poses 18 questions. Some of those questions contain a number of sub-questions.

The Court notes that questions 2, 3, 4, 6, 8, 9, 10, 11, 12, 13, 14 and 15 pose questions that raise issues as to where the balance in the model defamation law should lie between the interests of plaintiffs and defendants. The Court considers that these are quintessentially policy decisions. The Court considers that it is inappropriate for it to be expressing any view on these matters. These are matters for consideration by the executive and the legislature.

However, while the Court takes the view that the policy objectives of the model defamation provisions remain valid, it opposes the restoration of juries having any role in the adjudication of defamation actions.

The Court considers that the determination of defamation actions by judge-alone trials is more efficient, more just and results in fewer appeals. Judge-alone trials promote transparency and consistency in the application of legal principles in defamation litigating. They produce more predictable and consistent outcomes. This promotes certainty and better enables legal advisers to provide appropriate advice to their clients.

This State abolished juries in civil litigation in 1927. The Court sees no utility in their restoration for one category of civil litigation. While increased harmonisation as a general principle is desirable, the Court opposes the restoration of juries in defamation actions in pursuit of that objective. While uniformity is important, it is more important that there be uniformity in the substantive law of defamation throughout Australia. The difference in procedures for trials that has long existed does not seem to have produced any difficulties. The experience in South Australia does not suggest that the absence of juries in defamation actions in this jurisdiction promotes forum shopping.

Accordingly, the Court opposes the proposition in question 7.

Likewise, the Court opposes the proposition in question 5. The question of whether a jury should be required to return a verdict on all other matters before determining whether an offer to make amends defence is established only serves to evidence one of the inefficiencies that the role of juries in defamation actions produces. The risk of jury prejudice from the offer of amends as a defence is avoided by the trial of a defamation action by judge alone. Indeed, the proposed solution posed by question 5 runs the real risk of protracting court proceedings in defamation actions.

Equally, the difficulties of construction in relation to clause 30 of the model defamation provisions as to the respective roles of judge and jury in relation to the question of reasonableness further highlights the difficulties and inefficiencies of the use of juries in defamation actions.

In relation to the question of remedies, and in particular damages, posed by questions 16 and 17, the Court takes the view that the issue of remedies is substantially a matter of policy which renders it inappropriate for the Court to express any view. However, the Court does consider that there is merit in amending clause 35 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, acknowledging that the Full Court has expressed support for the latter position in *Lesses v Maras (No. 2)*.[1]

The Court also considers that there is merit in clarifying the issues raised in questions 17(a) and (b). In the interest of both justice and Court efficiency, a reduction in litigation is desirable. Statutory clarification of the interaction between clauses 35 and 23 and the circumstances in which the consolidation of separate defamation proceedings will or will not be allowed has the potential to eliminate time consuming and costly arguments.

Yours faithfully

CJKourakis

The Honourable Chris Kourakis
Chief Justice of South Australia

[1] [2017] SASCFC 137 at [31].