South Australian Bar Association (SABA) Submissions - Review of Model Defamation Provisions

We refer to your letter of 18 March 2019 requesting that the SABA provide any responses or submissions to the COAG Discussion Paper. We provide some brief responses below and apologise for the delay in doing so.

Question 1

1. In response to question 1, and generally, the SABA considers that the policy objectives of the Model Defamation Provisions remain valid, but that in several respects clarification and alteration to the operation of particular provisions is appropriate.

Codification

2. More generally, the SABA respectfully submits that the time may also have come for consideration to be given to extending the effect of the Model Defamation Provisions so that, to a greater extent than they presently do, they operate as a code.

3. Presently, because the Model Defamation Provisions do not codify the defences available to a defendant, it is routine in defamation matters for defendants to plead statutory and common law defences.

4. The differences between the statutory provisions and the common law principles are subtle. That is not to say that they are not important, and that in any complete codification, there may not be a need to broaden or add to the statutory defences[1].

5. Rather, it is to say that it is inefficient, and contrary to the objectives of keeping costs to a minimum in actions the costs of which are often required to be borne by individuals, to put defendants and plaintiffs to the costs of consulting, pleading and responding to two substantive bodies of law. Plaintiffs and defendants alike ought to be able to look to the legislation to have a complete understanding of the issues that will arise in their litigation.

6. Of course, there will be limits to the extent to which this can be achieved, bearing in mind the Constitutional foundation of the *Lange* defence, but again, there is no reason why it could not be more or less satisfactorily embodied within the Model Defamation Provisions.

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[1] In relation to qualified privilege, the circumstances in which an occasion of privilege may arise at common law may be more narrow than those which will potentially give rise to a consideration of the statutory defence, however, within the common law occasions of privilege, the matters which a defendant is required to establish in order to attract a prima facie defence (defeasible by malice) are less onerous than are generally required in order to make good the statutory defence. It is submitted that for particular well-recognised occasions of privilege, the common law test should still be available to a defendant.

Question 2

7. The SABA sees no reason to broaden or narrow the right of corporations to sue for defamation.

Question 3

8. The SABA respectfully submits that consideration should be given, whether by the adoption of a single publication rule, or alternatively by an amendment to the relevant limitation provisions, to ensuring that the statutory policy which supports short time limits in defamation claims is not circumvented by plaintiffs who have not acted promptly after an initial widespread publication but who later seek to rely on internet or other forms of republication in order to found an action within time.

Questions 4 and 6

9. Whilst the SABA makes no specific submission on these matters, any better clarification of the way in which these provisions operate would be welcome.

Questions 5, 7 and 8

10. These questions concern the role of juries in defamation trials. The SABA considers that the South Australian position should be maintained and that defamation claims should be heard and determined by judges sitting alone without a jury.

Question 9

11. The SABA supports the view expressed in the Discussion Paper that the defence should be expanded and that in its present form it is unworkable. It has led to considerable difficulty as set out in the NSW authorities referred to in the Discussion Paper.

Questions 10, 13 and 15

12. The SABA makes no submission.

Question 11

13. Consistently with the submissions made in relation to question 1, the SABA considers that there are good arguments for codifying the common law defence of qualified privilege. For the reasons indicated above, the statutory test of 'reasonableness', at least as it has come to be applied in practice, might be too stringent if it were to apply to some of the traditional or classical occasions of qualified privilege.

Question 12

14. The SABA agrees that it ought not to be necessary in the context of various digital communication platforms for the contextual material upon which a fair comment defence is to be based to be contained within any narrow conception of the publication in suit. There should be scope to rely on material which an interested reader can readily access or to which the on-line platform facilitates ready cross-referencing.

Question 16

15. The SABA submits that clarification is called for and proposes that consideration be given to stipulating that the limit operates as fixing a top-end. This may tend to create greater consistency and predictability and will assist parties to settle defamation disputes because it will assist in advising on non-economic loss awards. Having said this, in circumstances where, as the Discussion Paper notes, the decisions in some States have treated the limit as a cap, if a different approach is to be taken across the States, it may be appropriate to consider lifting the cap. There may also be merit (in order to permit awards to be compared across different time periods) in adopting a numerical scale of the kind often employed in the field of personal injury.

Question 17

16. The SABA submits that, unless a single publication rule is adopted, it will not be possible to treat the cap as applying to each and every publication of defamatory matter. That said, the SABA also submits that the cap should not apply indiscriminately to an action even where there are substantially different publications (generated by different or unrelated defendants) which are for some good reason being dealt with in a single action.

17. In South Australia, there have been applications for deconsolidation of proceedings in order to circumvent the operation of the cap. Whilst such applications are understandable the resultant procedural cost and (where the application succeeds) duplication of effort is undesirable.

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President

South Australian Bar Association