

28 May 2021

Policy Reform & Legislation
Department of Communities and Justice
GPO Box 6
Sydney NSW 2001

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

Dear Attorneys-General,

Review of Model Defamation Provisions

Thank you for the opportunity to provide feedback on *Discussion Paper: Attorneys-General Review of Model Defamation Provisions – Stage 2* (Discussion Paper).

My role is to advocate for the recognition, inclusion, participation and respect of victims of crime in the justice system and to advise government how to meet the needs of victims in Victoria.

I commend the Attorneys-General for considering victims' experiences within the context of defamation laws.

Due to time constraints, my submission is limited to Part B of the Discussion Paper—extending absolute privilege.

As stated in the Discussion Paper, there are strong public policy grounds to ensure victims and witnesses of crimes can make reports to police freely without the risk or threat of defamation proceedings.

All victims of crime should be encouraged—and feel safe—to report alleged criminal offences without fear of facing defamation proceedings.

While I have not heard directly from victims about this specific issue, no doubt all Attorneys-General are aware of the barriers many victims of crime already face in reporting crime. For example, it is estimated that approximately 80 per cent of Australian women did not report their most recent incident of sexual assault.

Particular cohorts of victims face additional barriers to reporting crime such as Aboriginal and Torres Strait Islander people, people with disability, people from culturally and linguistically diverse backgrounds, older members of our community and people who identify as LGBTIQ+.

In my experience, the law has frequently been used by perpetrators against victims, particularly in relationships where there is an imbalance of power. For example, it is well recognised in the context of family violence that perpetrators commit 'systems abuse'—that is, using a range of legal tactics (threatened or actual) to harass, intimidate, discredit or otherwise control the victim.

Accordingly, I am concerned that the defence of 'absolute privilege' does not currently extend, at a minimum, to reports made to police. In my view, it would be an appropriate extension of the law that any report of alleged unlawful conduct made to police and statutory investigative bodies (such as integrity bodies) attract absolute privilege.

While the Discussion Paper notes that reports to police would likely attract the defence of qualified privilege under current defamation laws, the threat or real possibility of defamation proceedings—given the time, stress and cost involved to litigate—may be enough of a disincentive to dissuade a victim from reporting.

Extending the defence of 'absolute privilege' to reports of alleged unlawful conduct made to police and statutory investigative bodies would ensure victims feel safe and supported to report without fear of defamation proceedings.

As the Discussion Paper notes, there are current offences for making a false and misleading statement. In my view, these provide appropriate safeguards against false or malicious reports.

As a more general observation, I believe the complexity of defamation laws only further serve to highlight victims' lack of access to independent, specialist and government-funded legal advice. While I can only speak in relation to victims' experiences in Victoria, victims frequently raise concerns about their lack of access to specialist legal support.

I am concerned victims do not have the necessary specialist legal advice to navigate complex defamation proceedings that may arise while victims are having to navigate other parallel legal processes, including compensation, state-funded financial assistance, criminal proceedings and family law proceedings.

Accordingly, I will continue to advocate in Victoria for an independent, state-funded legal service for victims of crime that can provide victims with a range of legal advice, covering both civil and criminal issues arising for victims.

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Yours sincerely

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Fidna McCormack
Victims of Crime Commissioner