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LAWYERS



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Council of Attorneys-General Review of Model Defamation Provisions Submission by Banki Haddock Fiora in response to Supplementary Questions

This submission is made by Banki Haddock Fiora (**BHF**) in response to the supplementary questions for stakeholders dated June 2019 (**supplementary questions**).

At the outset, it should be noted that many of the issues raised in the supplementary questions are addressed in BHF's submission to the Council of Attorneys General Defamation Working Party dated 10 May 2019 (**BHF Submission**).

Question 18a - Formalised pre-litigation processes

BHF considers that a complainant should be required to issue a concerns notice prior to commencing litigation, to ensure that a pre-litigation early resolution process begins. Whether or not the alleged publisher accedes to the demands of the complainant is a question for the alleged publisher. Potential mechanisms for making the issuance of a concerns notice mandatory are outlined at paragraphs 6.2-6.3 of the BHF Submission.

If the new defamation laws are to effect real change and capacity to address the issues raised by advances in technology and communications since the Uniform Defamation Provisions were enacted, they must include a serious threshold requirement. Such a threshold should be that the publication has a genuine tendency to seriously and adversely affect the reputation of the complainant.

BHF otherwise refers to paragraphs 4.1 to 4.11 of the BHF Submission.

Question 18b - Choice of Law Rules

BHF does not believe any change is necessary to section 11.

Question 18c - Jurisdiction of courts and tribunals

BHF supports the use of tribunals and/or divisions of Local (or Magistrates) Courts to deal with small disputes between individuals (to use the vernacular, “backyarders”), particularly those involving posts on social media seen by only a limited number of people. There is a difficulty in the sense that (generally speaking) there is nothing to prevent a would-be plaintiff from commencing proceedings in a District or Supreme Court (it is to be noted that currently the Local Court of NSW does not have jurisdiction to determine defamation disputes in NSW, nor does NCAT).

In terms of the procedural mechanism for sending small matters to more appropriate judicial settings, it may be necessary for the new laws to provide for the Court in which the proceedings are commenced to undertake a value judgement at an early stage by, as to whether the matter ought to be reallocated to a tribunal or division of a Local (or Magistrates) Court. A provision in the reformed laws that provides for the Court in which the proceedings are commenced to, at the first listing, reallocate them to a tribunal or division of the Local Court may be a reasonable mechanism to remove “backyarders” from the higher Courts.

BHF otherwise refers to paragraph 18.15 of the BHF Submission.

Question 18d - Plaintiff to certify falsity

This is a recommendation made at paragraph 18.6 of the BHF Submission.

BHF refers to paragraphs 18.1 to 18.5 of the BHF Submission; that is to say, the onus should be switched to the plaintiff to prove falsity as part of her, his or its case. In the alternative, BHF refers to paragraph 18.6 of the BHF Submission.

Question 18e - Defeasance provisions

This is a recommendation made at paragraph 18.16 of the BHF Submission. BHF submits that serious consideration should be given to completely removing the defeasance provisions, or (if it is considered necessary) instead embodying the defeasance principles as part of the plaintiff’s onus in chief in establishing his or her cause of action.

Question 18f - Defamatory capacity

BHF strongly recommends the law be reformed to provide a procedure for the early dismissal of proceedings when the plaintiff’s imputations are strained, forced or not capable of being

conveyed.

However, it is to be noted that the elements of the cause of action are not set out in the current defamation provisions. Similarly, the current provisions do not set out the applicable tests as to whether the plaintiffs' imputations are capable of arising and of being defamatory. Such questions have traditionally been left to common law, as opposed to legislation.

BHF considers that the introduction of a "serious harm" threshold (which really must be a part of any reform of the defamation laws, if such amendments are to achieve any real, substantial reform) may be the best mechanism to ensure that unmeritorious claims based upon imputations which are strained, forced or unreasonable, can be dismissed at an early stage. To amend the legislation with respect to capacity would effectively involve trespassing into the realm of the plaintiff's cause of action, and may potentially pose difficulties, including as to how the appropriate test is to be articulated and applied.

That is not to say, however, that this issue should not be given serious consideration. The current approach is that the determination of the capacity of a matter complained of to convey imputations is "an exercise in generosity, not parsimony" and that the test to be applied is "whether the challenged imputation could reasonably be found by a jury" (*Corby v Allen & Unwin Pty Ltd* [2014] NSWCA 227).

BHF would support any amendments that would involve a more stringent test as to whether or not (as a matter of law) an imputation is capable of arising from the publication. Allowing imputations to pass through the "capacity" gate (on the basis of generosity), only for that imputation to be found at trial not to actually have been conveyed as a matter of fact, needlessly requires a defendant to raise and attempt to establish defences. A defendant may be in effect be required to seek to prove true at trial an imputation which ultimately is not found to even arise from the publication. This situation is immensely expensive to defendants and draws significantly upon the resources of the Court. All this could be avoided if an imputation is struck out at an early stage.

Question 18g - Definition of "matter"

BHF considers that the term "matter" should be amended to refer to the whole of the publication complained of. However, it is important for the sake of certainty, and to remove ambiguity, that consistent terminology is used throughout the new defamation provisions. We note, for example, the inconsistency in the use of terms "matter" and "defamatory matter" in sections 27 to 33 of the Defamation Act 2005 respectively, whereby the former is defined in

the Act, while the latter is not. These defences can be contrasted with sections 25 and 26, which refer to defamatory imputations (as opposed to “matter”). The term “defamatory matter” has proven confusing in terms of how these defences are to operate and be applied.

Question 18h - Election to trial by jury

The decision in *Chel v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWCA 379 involved a case where a jury had been elected by the defendants, but the trial start date was delayed because of illness on the part of the plaintiff’s barrister. As there had only been a set window of time available for the trial (namely three weeks), the delay caused by the barrister’s illness (which lasted a week) meant that the defendants considered that in order to have any chance of having the matter tried within the remaining period (ie two weeks), it would be preferable to have the matter tried by judge. If the trial went over two weeks, the judge could continue to hear the trial at a later date (which would not be possible if it was a jury trial). It was a very unusual case in that respect.

BHF submits that an appropriate measure is for the new laws to specifically provide for a party to apply to seek revocation of its own jury election, which application would be able to be made by a party at any stage of the proceedings.

Question 18i - Summary judgement procedure

There is an inconsistent approach to summary judgment as between the various jurisdictions. In particular, the Federal Court is far more reluctant to entertain strike-out applications than the Supreme and District Courts of New South Wales.

BHF considers that this is a matter that may be best addressed by each jurisdiction as a matter of procedure.

BHF nevertheless supports any legislative mechanism by which defamation claims may be dismissed at an early stage, where they are found to be vexatious, oppressive, an abuse of process or otherwise unmeritorious.

Question 18j - Reversal of onus of proof in terms of establishing truth or falsity of imputations

BHF supports this proposition. The reversal of the onus should not be limited to public figures.

BHF refers to paragraphs 18.1 to 18.6 of the BHF Submission.

Question 18k - Pleading multiple defences

BHF agrees with this proposal. In light of the decision of Meagher JA in *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* [2018] NSWCA 77, (at [38]), this is absolutely essential.

BHF refers to paragraphs 18.1 to 18.10 to 18.11 of the BHF Submission.

Question 18l - Absolute privilege defence

BHF does not believe any such extensions to absolute privilege are required.

BHF responds further by reference to the four categories identified in the supplementary questions:

Court proceedings

Court proceedings are already covered by absolute privilege under section 27(2)(b) of the *Defamation Act 2005*, as well as at common law. Common law absolute privilege goes beyond the courtroom, to covering exchanges between lawyers prior to a trial hearing, and certain actions undertaken by lawyers in proper preparation of a case for trial. It is unclear what expansion is being proposed. If there are certain reasons as to why it is considered absolute privilege needs to be extended, BHF would welcome clarification as to the problems that have been identified.

Complainants as to policy

It is unclear why complainants as a matter of policy ought have absolute privilege in relation to the defamation of an individual made in the course of any such complaint. Presumably, submissions in relation to policy usually do not concern individuals, *per se*, but rather are directed to policy. If a complainant in relation to policy, in the course of such a complaint, viciously defames an individual, it is unclear to BHF why such a complainant should have an automatic right of immunity (which is what absolute privilege provides). Qualified privilege at common law, along with statutory qualified privilege (with legislated improvements as recommended in earlier submissions), is a safeguard to ensure that individuals who make genuine submissions regarding policy, without any malice, are protected under the law.

Complainants about professionals such as medical practitioners

While absolute privilege for complainants about health practitioners and other professionals has a superficial attractiveness, to give absolute privilege to any such complainant would mean that any malicious, false and/or vindictive complaint is absolutely protected, no matter the harm upon the practitioner the subject of complaint. The Courts have rejected the extension of absolute privilege to all such complaints: *Lucire v Parmegiani & Anor* [2012] NSWCA 86.

As said by Nicholas J in *Lucire*, the reluctance of courts to extend the occasion of absolute privilege is well established. See *Lucire* [36]-[37], where Nicholas J noted that in *Gibbons v Duffell* [1932] HCA 26, (1932) 47 CLR 520 (p 528), Gavan Duffy CJ, Rich and Dixon JJ said:

"... The truth is that an indefeasible immunity for defamation is given only where upon clear grounds of public policy a remedy must be denied to private injury because complete freedom from suit appears indispensable to the effective performance of judicial, legislative or official functions. The presumption is against such a privilege and its extension is not favoured (Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson). Its application should end where its necessity ceases to be evident." Evatt J spoke to the same effect (p 534).

In *Rajski v Carson* (1988) 15 NSWLR 84 (p 91, 92) Kirby P and Hope JA said:

"... absolute privilege in defamation can amount to a serious derogation from ordinary civic rights. Whilst the purpose of Parliament must be faithfully upheld by the courts, it is not readily to be assumed that Parliament intended to derogate from the ordinary protection of civil rights, except to the extent that Parliament made such derogation clear. In Gibbons v Duffell (1932) 47 CLR 520, the High Court of Australia held that a report, made in the course of his duty by an inspector of police to a superior officer, which contained defamatory references to a subordinate officer, was not the subject of absolute privilege. Evatt J, in the course of his judgment, said (at 534-535):

'... Absolute immunity from the consequences of the defamation', as Mr E E Williams wrote in 1909, 'is so serious a derogation from the citizen's right to the State's protection of his good name that its existence at all can only be conceded to those few cases where overwhelmingly strong reasons of public policy of another kind cut across this elementary right of civil protection; and any extension of the area of immunity must be viewed with the most jealous suspicion, and resisted,

unless its necessity is demonstrated.' (25 *Law Quarterly Review* p 200).

Extension of the privilege by reason of analogies to recognized cases is not justified. Even if it were, there is no analogy between the Police Force preserving the State from 'internal enemies' and the Army preserving it from 'external enemies.'

*Since those words were written in 1909 and reiterated by Evatt J in 1932, legislatures have expanded the categories of bodies attracting absolute privilege. What began with judicial proceedings, strictly so-called and later extended to Parliamentary proceedings, was expanded to other categories of publication as the list of protected provisions referred to in and about s 17 of the Defamation Act 1974 demonstrates. The reluctance of the courts to extend the number of occasions on which no action at all will lie, although a defendant published words with the full knowledge of their falsity and even with the express intention of injuring the plaintiff, is expressed to the law in England, as well as Australia see e.g. *Law v Llewellyn* [1906] 1 KB 487 and *Beresford v White* (1914) 30 TLR 591 (CA)."*

Instances of persons making complaints to professional bodies about practitioners that are not in good faith, but rather are false and vindictive, are not rare. In fact, there are many defamation cases which deal with such situations: see for instance *Hunter v Hanson* [2017] NSWCA 164.

It is submitted that under the current law, common law qualified privilege would apply to any genuine complainant who makes a complaint made in good faith and without malice. To enlarge the protection of absolute privilege to all complaints about professional practitioners would provide an avenue for vexatious and damaging complaints to be made, which may have serious repercussions for the practitioner (in terms of defending the complaint, and reputational damage), with no recourse against the vexatious complainant.

This is not simply a matter of theory: only recently Dr Charlie Teo discussed the phenomenon of surgeons making malicious complaints against each other: <https://www.smh.com.au/national/they-will-eventually-get-me-surgeon-charlie-teo-threatens-to-quit-20190608-p51vsf.html>. Dr Teo has also admitted in taking adverse action against a fellow practitioner, of a vindictive nature: <https://www.news.com.au/lifestyle/health/surgeon-charlie-teo-guilty-of-prejudice-after-nasty-letter-written-about-him/news-story/764d0be30494322c9b71a824cd8a6f11>

To allow all complaints to professional bodies to attract absolute privilege would give absolute protection to what may be completely false, malicious and vindictive complaints.

Investigators acting in good faith

The rationale for the extension of absolute privilege to investigators has not been fleshed out in the supplementary questions. However, it may perhaps be derived from the result in *Rayney v The State of Western Australia (No 9)* [2017] WASC 367.

It is submitted that investigators acting in good faith will already be protected by qualified privilege.

Question 18m - Common law defences: Hore-Lacy and consent

BHF submits that the statutory justification defence could and should contain an additional provision so that a defendant can rely on a meaning that the plaintiff has not pleaded, if not substantially different from, and no more injurious than, the plaintiff's pleaded meaning. The inconsistency between the states on this question must be remedied.

The common law defence of consent was recently examined in great detail by Gibson DCJ in *Arman v Nationwide News Pty Limited* [2017] NSWDC 151. That decision tends to suggest there to be some ambiguity as to precisely what will amount to consent, and the extent to which a defendant can rely on "consent" as a defence. The decision also tends to suggest that there is ambiguity as to who can rely upon such a defence. Specific provisions in the new legislation could remedy this, and BHF would support the introduction of a defence of consent where a statement is made voluntarily, and where the publisher repeats the sense and/or substance of the statement in question and attributes it to the complainant.

Question 18n - Public figure defence

BHF would support the introduction of a public figure defence, substantially in line with USA law.

Question 18o – Death of a party

BHF does not take any position in relation to this proposal.

Question 18p - Simplifying jury questions

BHF supports a position whereby a jury may give a simple verdict as to which party has been successful. Indeed, general verdicts appear to have been the intention of the existing laws. For example, section 22(4) of the Defamation Act 2005 provides that “if the proceedings relate to more than one cause of action for defamation, the jury must give a single verdict in relation to all causes of action on which the plaintiff relies unless the judicial officer orders otherwise”.

However, in practice, juries are not asked to give single, general verdicts, but are instead given a series of questions to answer.

BHF supports a position whereby the law is that there is a presumption that the jury will deliver a simple verdict as to which side wins, but subject to a carve-out for exceptional circumstances where jury questions are more appropriate. Further, any such new legislative provision should enact a requirement that any jury given a series of questions to answer must be informed as to the outcome of their responses to questions, with respect to which side will win as a consequence of their answer. In many instances, juries do not currently know the consequences of their answers to the questions they have been asked to answer.

Question 18q – Jury determination of damages

BHF does not take any position in relation to this proposal.

Question 18r - Alternative remedies

BHF rejects the concept of a declaration of falsity remedy. The concept of a declaration of falsity is fraught with difficulties. Firstly, the cause of action of defamation is about whether a statement (or imputation) is defamatory, not whether it is false. A false statement may not be defamatory. To falsely say that a person is wearing a blue coat, when that person is wearing a red coat, is not defamatory, notwithstanding it is false. The question of what is defamatory is the subject of an enormous amount of case law, perhaps best articulated (in recent times) in *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16; 238 CLR 460.

The introduction of a discrete declaration of falsity remedy would fundamentally transform the cause of action of defamation. Further, it would be a two-edged sword for any plaintiff. Any declaration of falsity would require a plaintiff to establish, to the Court’s satisfaction, that the imputations are false. A defendant should not be required to disprove falsity (and it does not appear to have been suggested that this would be the case). Introducing a declaration of falsity measure may act as a surrogate so as to effectively add an additional element to the plaintiff’s

cause of action, namely that the plaintiff must prove falsity. Any plaintiff who does not seek this remedy might fairly be asked why they did not. BHF supports falsity being an introduced as an element of the plaintiff's cause of action.

As to minor claims, BHF repeats the response to question 18c above.

Question 18s - Indemnity costs clause

Yes. This proposal is entirely logical, and BHF supports it.

Question 18t - Costs consequences for unfounded allegations of malice

Yes. BHF refers to paragraph 18.12 of the BHF Submission.

Question 18u - Scope of jurisdiction

BHF considers that the reformed defamation laws ought not attempt to amend what would otherwise be the jurisdictional scope of the relevant Court. To do otherwise is fraught with difficulties and raise issues of international law and conflict of laws, and potentially constitutional law.

Question 18v - Criminal defamation

Yes. Criminal defamation is an anachronism, seldom ever successfully prosecuted, and should simply be repealed. BHF supports this proposal.

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