Review of the Model Defamation Provisions

Executive Summary

The Model Defamation Provisions (the Model) have their genesis in a desire to reform the laws governing defamation so that relevance is preserved in an environment where the growing and perhaps dominant trend for publication of news and opinion and for the exchange of ideas, is in electronic media.

However, it appears that the proposed Model has not quite achieved that objective for there seems to have been in its drafting a failure to understand that electronic media encourages the exchange of data which does not require nor lend itself to lengthy news or opinion pieces of the type seen in say The Age or The Sydney Morning Herald, but rather short messages or images.

Twitter is a good example of this modern paradigm, but the methods of relaying data are so varied that it is safe to say that data can be presented in an infinite number of forms that are not found in publications of the written word, or speech Data tends to be impersonal, and attempting to draw out of data defamatory imputations can be both unjust, and a cause of embarrassment to judicial officers who do so.The Model has the potential to be the cause of both.

It is understood that the impact of the rules of court, for example the Federal Court Rules 2011, on the conduct of defamation matters is beyond the scope of the terms of reference of the Defamation Working Party. However, this exclusion may mean that any reform to the Model will be little more than cosmetic; the problem of costs,delays and ultimately injustice wrought by tactics justified by the rules will remain.

Introduction

The Model's provisions are intended to reform the laws governing defamation so that Australian defamation laws remain relevant in an environment where the growing, and perhaps dominant trend for publication of news and opinion,and for the exchange of ideas, is via electronic media.

Judicial officers have the power to hear defamation matters on their own and if not direct juries when a jury trial is preferred. Consequently,with a view to efficiency in presentation this submission is made in the context of the mind of the judicial officer only.

Publication in the modern world

Some common methods of on-line or electronic publication are:

a) Social media which includes Facebook and Twitter but also on-line forums such as Hotcopper[1].

b) Electronic publications which can include on-line public scientific and academic journals, but also less

1 HotCopper is Australia's largest free and independent stock market trading forum for ASX investors to discuss share prices, the stock market and more.See https://hotcopper.com.au/

formal but technically oriented sites such as R-Bloggers[2], Submarine Matters[3], The Australian Institute Of International Affairs[4], Bellingcat[5] and Sarawak Report[6] to name but a few.

c) Algorithmic Trading platforms[7], and in particular those that execute short trades[8].

Given the above forms of publication it is then necessary to understand what is conveyed. The forums listed in (a) convey words and letters but the form of presentation is likely to be remote in style and substance to what might be found in The Age, The Times or The Economist. Online fora involve short statements which are then followed by threads where the statements are debated. On forums like Twitter what is read is often the short message of say 300 characters (for that is what Twitter allows); accompanying links are seldom read.

Even where the publication involves a lengthy (say 1000 word) article, it is in the comments which follow that the real discussion takes place. In that regard the decision in *Voller*[9], where the court determined that publishers such as Facebook may be held liable for comments attached to material posted on their platforms, is a recent example of where the courts have failed to comprehend this distinction

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2 R-Bloggers.com is a blog aggregator of content contributed by bloggers who write about R (in English). The site helps R bloggers and users to connect and follow the "R blogosphere" (you can view a 7 minute talk, from useR2011, for more information about the R-blogosphere).See https://www.r-bloggers.com/

3 See http://gentleseas.blogspot.com/

4The Australian Institute of International Affairs (AIIA) is an independent, non-profit organisation promoting interest in and understanding of international affairs in Australia.
It provides a forum for discussion and debate, but does not seek to formulate its own institutional views. See http://www.internationalaffairs.org.au/

5Bellingcat is an independent international collective of researchers, investigators and citizen journalists using open source and social media investigation to probe a variety of subjects: crime, conflicts, corruption, secret operations, mis- and disinformation, extremist groups and many others. See https://www.bellingcat.com/

6 Sarawak Report and its sister organisation Radio Free Sarawak were founded by Sarawak born investigative journalist Clare Rewcastle-Brown in 2010. Radio Free Sarawak has gone on to win the IPI International Press Institute's Free Media Pioneers Award 2013 and the Communication for Social Change Award 2014. Sarawak Report has been heralded for its "impact on the political debate" in Malaysia, with the New York Times calling Rewcastle-Brown "one of the most effective voices calling aattention to deforestation in Malaysia". In 2015, Sarawak Report was recognised by the Index on Censorship for being a "champion against censorship". Ms Rewcastle-Brown is acknowledged internationally as the person responsible for breaking the Malaysian 1MDB kleptocracy scandal by the publication of a number of articles on Sarawak Report from early 2015 onward. She has published a book on the matter titled "The Sarawak Report: Theft of the Century" in which she has acknowledged the work of Ganesh Sahathevan in providing her the information which led to her work on 1MDB. Sahathevan's work on 1MDB appears on his blogs and the New South Wales Legal Profession Admission Board has found that Sahathevan's work (and by extension Rewcastle-Brown's work) defamatory of a number of "eminent persons", despite there not being any finding of defamation against Sahathevan **in any action for defamation** in any jurisdiction. For discussion and background see :Butler, Ben *Bizarre blog claims used to deny man right to practise law* The Australian, 17 January 2019 (see https://tinyurl.com/s6fk3rb and link embedded) and Sahathevan G, *When senior Australian judges decide that Najib Razak's blocking of websites reporting the1MDB theft was due to "defamatory" publications ,Australia has a problem: Will Australia do like Malaysia did 20 years ago to address the problem?* Realpolitikasia Blog,19 December 2019*, at link http://realpolitikasia.blogspot.com/2019/12/when-senior-australian-judges-decide.html.* The NSW LPAB's attitude to the works of Sahathevan and Rewcastle-Brown provide a useful insight into judicial attitudes toward internet publishers and the work of investigative journalists . The NSW LPAB's views are considered to be representative of that of judicial officers in the state given that its members include some of NSW's most senior judicial officers. The Chairman of the LPAB, the Chief Justice NSW has, as reported by Butler in The Australian, been made personally aware of these matters and has chosen to make no comment.

7 Turner, Ryan J ."Internet Defamation Law and Publication by Omission: A Multi-jurisdictional Analysis" [2014] UNSWLawJl 2; (2014) 37(1) UNSW Law Journal 34
See n.65 http://www.austlii.edu.au/au/journals/UNSWLJ/2014/2.html#fn66

8 For a discussion on short selling see Carole Comerton-Forde and T□is J. Putni☡◔;Are short sellers manipulating the market? Located at https://www.uts.edu.au/sites/default/files/PaperPutninsTalis.pdf

9Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd [2019] NSWSC 766. Located at https://www.caselaw.nsw.gov.au/decision/5d0c5f4be4b08c5b85d8a60d

between on-line and print media. The Model does not appear in any way to have addressed the problem and herein is an example of how a failure to reform can lead to defamation laws becoming irrelevant. While the law and the rules may be relied on to deem irrelevant comments in the threads so as to put the best case forward for the defamed plaintiff, and while such tactics may well result in a decision in favour of the plaintiff, the decision will make no difference to the opinions formed in the threads about the victorious plaintiff. In fact, in such circumstances it is more likely than not that the judicial officers themselves might become subject of adverse comment, along with the plaintiff.

There is then a problem with the definition of who "publishers" might be. While current defamation laws appear to recognise journalists as publishers and thus accord them in particular the defence of fair comment (or honest opinion) and additionally provide some safe harbours[10], the list above suggests that access to the Internet can make virtually anyone a "publisher". For example, the Internet forum commentator whose primary interest is in the exchange of ideas with like minded individuals in a given forum might suddenly find herself regarded as a "publisher" for the purposes of an action in defamation, by virtue of having posted something that someone has found defamatory. Similarly an algorithmic share trader who has designed a system that will sell or "short" stock in any company subject to some pre-determined criteria might find herself accused of defamatory publication.

However, even as the class of persons who might be considered "publishers" broadens, they may not then be afforded the protection normally afforded journalist as currently defined.
In that regard attention is drawn to the fact that while the decision in *Carlovers Carwash & Ors v Sahathevan*[11] provides at least in NSW a quite broad definition of who might be considered a freelance journalist, there appear to be some attempts to re-define the decision in that case such that the definition is narrowed [12].

This apparent desire to limit the definition of "journalist" occurs at a time when the nature of the work of a journalist is changing rapidly. The traditional conception of a journalist as a person who gathers facts from a range of contacts, and then puts what has been learnt to the subject of an intended story before publication is long gone. In her place is the data journalist who can use algorithms to "scrape" websites from across the web, and then tabulate that data and present it graphically in images that can be viewed and digested in a few minutes if not seconds. In that process anyone may get offended, and claim to be defamed, despite data being, by definition, impersonal.

The data journalist is a manifestation of the new and growing area of analytic journalism,which is defined as *"critical thinking and analysis using a variety of intellectual tools and methods to understand multiple phenomena and to communicate the results of those insights to multiple audiences in a variety of ways."*

Analytical journalists, broadly defined are the likely future of publishing where anyone with access to data on the Internet can find, collate, gather and publish data.The pool of data is so great that publication will invariably offend, hurt and cause loss. It is submitted that given this context, finding defamatory imputations is more likely than not to cause injustice, and embarrassment to the judicial officers involved.

It is not evident that the Model has contemplated the work and products of the data journalist, or the impersonality of data. The Model, despite the desire for reform, continues to assume the world of the

10 For a discussion on safe harbours in the context of defamation laws see Rares, Justice Steven "What do Alan Bond, wildly wealthy women and s 52 of the Trade Practices Act 1974 have in common?" (FCA) [2009] FedJSchol 6.Located at http://www.austlii.edu.au/au/journals/FedJSchol/2009/6.html

11 Carlovers Carwash Ltd and Ors [2005] NSWSC 879 (2 September 2005).Located at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2005/879.html

12 See discussion by Sahathevan G published at link http://realpolitikasia.blogspot.com/2019/06/protection-provided-journalistswhistle.html

gentleman or gentlelady who is held by the public to be a paragon of all the virtues. In fact not even the Pope, The Archbishop of Canterbury or the Queen are immune from the sullying effects of the constant stream of data that is projected worldwide via the Internat.

The Model

In light of the above the following comments on some aspects of The Model are offered.

Section 4-Definitions

The term "journalist" should be incorporated into the Model and defined so as to ensure that those who undertake work as journalists in whatever manner are protected by the usual defences of qualified privilege and honest opinion. Incorporation may be accomplished by providing a definition for the term "publisher", which has not been defined.

The definition of "publisher" ought to be as broad as possible and Levine J's decision in *Carlovers & Ors v Sahathevan*[13] may provide some guidance. While that decision concerned the NSW Fair Trading Act 1987's safe harbour for journalists[14] the rationale for the broad definition given the term "journalists" in Levine J's decision is, it is submitted, applicable generally given the democratisation of information gathering and publishing described above.

Alternatively it is submitted that the Model adopt the definition of the term "information provider" contained in the NSW Fair Trading Act,and incorporate that definition into the definition of the term "publisher".

Sections 14 and 15-The Concerns Notice

The Concerns Notice proposed in Sections 14 and 15 does not in substance appear to be any different from a "cease and desist" which is usually accompanied by threats of expensive legal action. It does not in any way address the problem of how the judicial process can be used to stifle free speech, regardless of the truth of what has been published and the public's right to be informed.

It is suggested therefore that the Concerns Notice be preceded by some form of right to reply. This is in fact the reality on social media where participants respond to remarks in a manner where all parties concerned are able to express their views. These exchanges may seem crude and inelegant, but it is not for judicial officers to determine what standards ought to apply to such interactions.

If the right of reply is denied, then the aggrieved party can move to a Concerns Notice and further action. If not, he or she should be prepared, as most people do, to defend their position, or their reputation, independent of the justice system which is after all a social good.

As a corollary the Concerns Notice also provides a means via which journalists may further interrogate the subjects of their stories, and here it should not be for judges to determine how journalists ought to conduct themselves in the course of their work. Where journalists are accused of offences in breach of any legislation, that matter ought to be treated separately and ought not be relevant to any action in defamation. The judicial process must not be used to protect the business and other interests of those who can afford access to the system.

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13 See note 11

14 Applegarth, The Honourable Justice Peter D --- "How deep is the media safe harbour? (2008) March Gazette of Law and Journalism" (QSC) [2008] QldJSchol 23. Located at http://www.austlii.edu.au/au/journals/QldJSchol/2008/23.html

Section 28 Defence for publication of public documents

It is submitted that the defence be limited to public documents that carry the full names of all involved in the preparation of the document, or at least one person who must, in addition to the corporate liability be personally responsible and liable for the contents of the document. In a story published on 17 January 2019 in The Australian,authored by Mr Ben Butler[15] it was demonstrated how even senior judicial officers had either intentionally or negligently created a public document that contained findings of an international conspiracy involving Tony Blair, George Soros and reporters from the ABC 4 Corners program. Mr Butler also disclosed that the persons involved in the creation of the document sought refuge in the anonymity of the civil service.

Section 29A Defence of responsible communication in the public interest

It is submitted that the following subsections of Section 29A be removed .

Section 29A(2)(a) -whether the publication of the matter about a person is responsible

The subsection states:
In determining for the purposes of subsection (1) whether the publication of the matter about a person is responsible, a court must take into account the following factors to the extent the court considers them relevant in the circumstances—
(a) the seriousness of any defamatory imputation carried by the matter published

Presumably the more serious the defamatory publication, the less likely the defence of responsible communication will be upheld. However, matters of public interest are by definition more likely than not to include what a judicial officer may consider serious defamatory imputations. The subsection is likely to have a chilling effect on the reporting of all but the most banal of wrong doings.

29A(2)d) -whether it was in the public interest in the circumstances for the matter to be published expeditiously

When information is relayed and published is often a matter of practicality and of commercial reality. For example information might be contained in a news flash, or in some other form on the Net where it has a limited life. Utilising that data for publication is a matter of practicality ,and does not imply irresponsibility.

To read into these types of practicalities an assessment of whether the publication was responsible is to include in the calculus of what is defamatory or not an irrelevant factor and can again lead to judicial officers interfering in the day to day work of journalists.

29A(2)(e)- the extent of compliance with any applicable professional codes or standards

It suffices to say that in the new world of internet and email publication many who publish are not likely to be members of any professional body. Consequently the subsection has the effect of creating two classes of publishers, where those who are members of some professional body would be regarded as being of a higher class. This can lead to the absurd situation where, for example, an academic with a PhD and record of publications in say politics, publishing his or her personal views via Twitter[16], could be regarded as being somehow less "responsible" than the least experienced member of the Media Entertainment And Arts Alliance simply because the latter is subject to a code of conduct and professional standards.

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15 See note 6 and tiny url at **https://tinyurl.com/s6fk3rb**

16 See for example the personal Twitter account of one of the best known academics in the area of terrorism in South East Asia, Professor Zachary Abuza of the National War College, Washington USA, located at link https://twitter.com/ZachAbuza?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor and https://twitter.com/ZachAbuza

29A(2)(f) the sources of the information in the matter published, including the integrity of the sources

Given the growing number of sources of information, and the growing complexity of the information, it is difficult to see how any judicial officer may be in a position to determine the integrity of the sources of information. Indeed ,as Mr Ben Butler has shown in his article published in The Australian, 17 January 2019, even the most senior judicial officers can demonstrate poor judgement and research skills when considering material found on the Internet[17].

The collection and analysis of information that is found on the Internet is a specialised area that taxes the minds of even the best data scientists and open source intelligence analysts. A judicial officer pretending to have those types of skills is more than likely to embarrass himself, and cause injustice. Worse, he or she will open the judicial system to ridicule, as Mr Butler has demonstrated.

30 Defence of qualified privilege for provision of certain information

The comments above apply to the subsections of Section 30 that are similarly worded.

30A Defence of scientific or academic peer review

It is suggested that subsection 30A (1)(a) be expanded to include financial publications, such that the phrase would be worded "in a financial, scientific or academic journal". With more than a trillion dollars in compulsory superannuation contributions invested in superannuation funds which in turn invest those funds in listed an unlisted companies here and overseas, it is in the interest of every working Australian to have access to any information that might be relevant to their assets. The fact that superannuation is by nature long term adds to that need.

Expecting lay persons to have the knowledge and expertise to comprehend academic publications in finance and economics is impractical; it is therefore necessary that "financial journal" be defined and the definition include any publication of a financial or business nature, regardless of whether it has been peer reviewed.

Additionally subsections 30A(1)(c), 30A(2) and 30A(3) should be excluded for,again, it is not for judicial officers to determine how debates on financial, scientific or academic matters ought to be conducted, or who among the relevant communities of persons involved in those types of discussions ought to be regarded as the person best placed to determine what ought to be published.

31 Defences of honest opinion

The use of the term "proper material" in subsections 31 (1)(c), 31(2)(c) and 31(3)(c) carries connotations of class and acceptance which may have been applicable in the days when judicial officers might compare material from say "The Sydney Morning Herald" to "Truth[18]" and determine what was or was not "proper material" . Subsection 31(5)(iii) allows for material "accessible from a reference, link or other access point included in the matter (for example, a hyperlink on a webpage)" to be considered in determining if material is proper but this provision may be rendered of little use to a defendant if a judicial officer determines that the webpage concerned is not what he or she might consider "proper". It may be better to refer to "referenced material" rather than "proper material" and determine "honest opinion" from an assessment of whether the publisher had a basis for asserting what was published.

17 See notes 6 and 15

18 For background see Wikipedia entry at link https://en.wikipedia.org/wiki/Truth_(Sydney_newspaper)

Other Matters

Defamation or Disparagement?

In *Radio 2UE Sydney Pty Ltd v Chesterton*[19] Spigelman CJ provides a quite extensive discussion of the word "disparage" as an element in some defamation matters. His Honour' s exegesis is comprehensive and clear and it illustrates (even if it was not his intention) how the word"disparage" may be used to buttress a relatively weak claim in defamation without fear of a cost order against the instructing solicitors.

The abuse of the word "disparage" could arise when an aggrieved party seeks redress for statements made about him or her that concern some area unrelated to his or her normal field of expertise. The relatively recent tendency of company chief executives, senior civil servants and even judicial officers to enter public debate on popular issues such as say immigration, the plight of asylum seekers and climate change are examples of instances where they will attract adverse comment

In such instances making the case that the statements are defamatory may be problematic for the statements are likely to be directed at the person and his or her comments, rather than their position or work from which their standing in society and their incomes are likely to be derived.

However, couching a claim with sufficiently broad references to "disparagement" could well get the claim over the line, at least with regards the instructing solicitors duty to swear that the claim is not vexatious. As any legal practitioner would know, a statement of claim once filed can set in motion any number of processes that can bankrupt the defendant, regardless of whether the matter is heard.

It is therefore submitted that the word "disparage" be defined and be limited to commercial cases where the disparagement must be shown to have caused some business or commercial loss[20].
It should otherwise excluded be from the statement of claim.

The decision in *Wing v The Australian Broadcasting Corporation [2018] FCA 1340 (31 August 2018) (Wing v ABC)*[21]

In *Wing v ABC* His Honour Mr Justice Steven Rares of the Federal Court made a number of comments which may well require legislative intervention given the adverse impact these are likely to have on the work of journalists.
These comments have been reported in the mass media and in the case report and are reproduced below under separate headings.

a) Media reporting and the rules of court

In his judgement Rares J said, inter alia:

> 106.The particulars do not specify in any way how Dr Wing, whom the particulars also asserted was a billionaire who owned and operated a business conglomerate, even knew that Mr Ashe was to be paid any amount or why he was to be paid. There is no indication in the particulars of whether Dr Wing, or some company he controlled knew about, let alone made

19 Radio 2UE Sydney Pty Ltd v Chesterton [2008] NSWCA 66 (17 April 2008). Located at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2008/66.html?context=1;query=disparage;mask_path=

20 For a discussion on the tpoic see Reinhard, Rawn Howard. "Tort of Disparagement and the Developing First Amendment, The." *Duke LJ* (1987): 727. Located at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2999&context=dlj.

21 Wing v The Australian Broadcasting Corporation [2018] FCA 1340 (31 August 2018). Located at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2018/1340.html

> or agreed to, that payment, what the payment or its source was, when it was made or how, or even if, one of his companies was involved in it far less, that Dr Wing knew all of the essential matters to establish that the payment was to be made and what its purpose was.
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> 107.The striking feature of the particulars is the absence of any allegation about what Dr Wing did, when he did it or how he knew anything about any of the matters alleged. Moreover, the particulars of Dr Wing's alleged state of mind in par 80 do not comply with r 16.43. Perhaps this is why par 80 then asserted, without any basis, that Dr Wing "must have known that [Ms] Yan was corrupt" and that he somehow "knowingly participated" in the payment of the USD200,000 bribe.

The words are problematic for they appear to require that journalists and editors craft their stories in accordance with not just the laws of defamation, but also the rules of court. This can lead to a situation where it would be impossible to publish any story unless the story is set-out like a statement of claim. Even then a defamation action may not be avoided for as any lawyer would appreciate, there is seldom agreement even among lawyers about what the laws and the rules mean in practise.

In that regard the Model does not appear to have addressed problems arising front the application of the rules of court despite this well publicised warning from Her Honour Mdm Justice Judith Gibson[22],which were reported by the ABC in November 2018:

Judge Gibson described defamation proceedings as a "trial by ambush" that may actually prevent the truth from coming out.

"And that should be the aim of the court — the truth."

While it is understood that reform of the rules is beyond the scope of reference of the Working Party the above illustrates how without reform of the rules, reform of the Model may be at best cosmetic.

b) Interpretation of words of common usage

It should also be noted that in coming to his conclusions Rares J is reported to have said[23]:
"If you (the ABC) had said foreign interference you'd not have a problem ... you've said he's a spy".

His Honour's analysis of the word "spy" is reported in the case report and it shows reliance on a particular dictionary meaning of that word. This however is not how intelligence analysts and practitioners[25], and quite likely the public (ie the ordinary reasonable person) understand that word. In fact, most would consider the distinction he has drawn between "foreign interference" and "spying" to be less than artificial.

The exact wording of the amendments to the Model that would be required to deal with the problems arising out of Rares J's analysis are beyond the scope of this submission but however it is submitted that it probably requires that the amendments provide explicitly that in determining the ordinary meaning of words the ordinary meaning as it is likely to be understood by the public (ie the ordinary reasonable person) be the determinant of what the words are meant to mean. While it is understood that this is already the law, Rares J's opinion suggests that codification of the common law is necessary.

c) Words in support of the plaintiff

Rares J is also reported to have said of the plaintiff

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22 Hagar Cohen, Defamation is back big time', says senior judge, but warns victories may be Pyrrhic,Updated .Located at https://www.abc.net.au/news/2018-11-16/defamation-is-back-big-time,-senior-judge-says/10501256

23 Lucy Hugh Jones,**ABC 'abused' privilege in Chau lawsuit, 27 June 2018.Located at** https://www.murrayvalleystandard.com.au/story/5493070/abc-abused-privilege-in-chau-lawsuit/

"He's got billions ... I bet he does nothing about organising conferences,"

Rares J's comment, ‘‘he has billions’’ does not appear to have been supported by the evidence before the court. While the defendants described the plaintiff as a billionaire, the finding that the plaintiff has billions requires an assessment of all his assets and liabilities. There is nothing in the case report and in media reporting that show that any of this had been provided. The issue is of particular concern to financial journalists and analysts whose job it is to determine if say an Alan Bond or a Christopher Skase is in fact as wealthy as claimed to be. The issue is also of concern to writers and researchers in the area of national security and terrorism, where sources of apparent wealth cannot be assumed and are often analysed to determine origin and actual ownership[24].

It is therefore submitted that the Model include provisions which would require that in coming to any conclusion that is in favour of the plaintiff the court explicitly state the basis for that conclusion. There is a danger here of the judicial officer ‘‘filling in the blanks’’ for a plaintiff who has made an incomplete disclosure of his or standing or reputation in the community.

d) Rejection of statements made under parliamentary privilege

The defendant had tried to premise a defence of justification by, among other things, statements made under Parliamentary Privilege by the Right Honourable Andrew Hastie, Member for Canning. That defence was dismissed by Rares J as ‘‘an abuse of privilege’’ and ‘‘embarrassing’’. Importantly Rares J is reported to have said[25]:

"The fact that Mr Hastie wants to say something doesn't prove anything,"

In his reasons for decision Rares J did not explain why he considered Mr Hastie's statements in Parliament made under privilege to be irrelevant.
As he put it:
"The fact that Mr Hastie wants to say something doesn't prove anything,"
Indeed, Rares J seemed to imply that Mr Hastie's words were of no substance.

It is therefore submitted that the Model include provision which would require the judicial officer concerned to provide explicitly detailed reasons for rejecting statements made parliamentary privilege.

The decisions in Carlovers v Sahathevan and Bond v Barry

Levine J's decision in Carlovers[26] was followed by the court in Bond v Barry[27] and both decisions are important in particular to freelance journalists and indeed anyone who chooses to publish, including whistleblowers[28] They were also important for establishing that in the process of publishing journalists tend to talk to one another and to others (apart from sources) in the process of building their stories,

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24 For a discussion on the issues raised in paragraphs (a) and (b) see Sahathevan, G Not spying, only foreign interference : How are Australian journalists meant to report something like the story of Amos Dawe and Moscow Narodny given the Federal Court Australia's guidance on who might not be called "spy" ; located at https://ganeshsahathevan.blogspot.com/2020/01/not-spying-only-foreign-interference.html

25 Meredith Griffiths
ABC, Fairfax criticised by judge in Chau Chak Wing defamation case for using MP's comments,27 June 2018. Located at https://www.abc.net.au/news/2018-06-27/chau-chak-wing-andrew-hastie-comments/9915628

26 Note 11. See also discussion by Mr Justice Steven Rares ,Note 10.

27 [2007] FCA 1484; 73 IPR 490

28 For a discussion on the importance of these decisions see Sahathevan G,Protection provided journalists,whistle blowers and sources by Carlovers v Sahathevan ,Bond v Barry undermined by NSW judicial body overseen by Chief Justice NSW, and AG Speakman,11 June 2019, located at link http://realpolitikasia.blogspot.com/2019/06/protection-provided-journalistswhistle.html

and building a market for their stories, and that those communications too need safe harbour protection[29].
Additionally, Levine J's decision in Carlovers established that a journalist does not cease to be a journalist even if he or she is personally involved in the subject matter of the story. As mentioned above there does seem to be a tendency to disregard if not dilute Levine J's decision in Carlovers[30] such that, for example, queries from journalists may be construed to be a form of harassment, threat and intimidation[31]. It does also appear that these are then meant to provide an additional basis to justify if not buttress a finding of defamation.
It is therefore submitted that Levine J's decision on the matters described above be codified and included as an amendment to the Model, such that:

a) communications among journalists and among journalists and publishers (broadly defined,as discussed above) be regarded as privileged communications (regardless of whether the communications have been marked as privileged).

b) claims of harassment, threat and intimidation may never form any part of a claim for defamation.

Conclusion

The Model does not seem to have addressed the issue of how the Internet has transformed us into a world that is data driven in which style of speech and writing mean little. Additionally the proposed amendments mean little if the rules of court are not also amended to reflect the reality of modern communications. The fact that few if any outside the legal profession are even aware of the existence of the rules makes reform of the rules as well all the more necessary. Meanwhile it does seem as if there is within the judicial system a concerted effort to dilute defamation laws[32].Why this is so is perhaps the question that ought to have been raised at the outset of this latest proposal to reform the Model.

29 See Note 10

30 See Note12

31 NSW LPAB Reasons for Decision Against Sahathevan, 3 August 2018, 4 February 2019; See also Note also Notes 6 and 15. NSW LPAB Reasons have been placed in the public domain by Sahathevan,and the NSW LPAB has been provided written authorisation to provide Mr Butler all and any material concerning him, regardless of source.

32 Richard Ackland, editor of the *Gazette of Law and Journalism* has written of a "tribal hostility to journalists". See link at https://medium.com/the-walkley-magazine/legal-frictions-96ee2b03b983 . That hostility seems to have led to at least one instance where judicial officers have been quite casual about misrepresenting the underlying facts of a decision in order to achieve a desired outcome. See Sahathevan, Note 28.