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Defamation Working Party
C/O Policy, Reform and Legislation
NSW Department of Communities and Justice
GPO Box 31
SYDNEY NSW 2001

By email only: defamationreview@justice.nsw.gov.au

Dear Defamation Working Party

Submissions on the draft Model Defamation Amendment Provisions

We value the opportunity to make a submission to the Defamation Working Party in response to the draft Model Defamation Amendment Provisions (**draft MDAPs**).

LawRight has previously contributed to the Review of the Model Defamation Provisions by:

- providing a submission in response to the Review of Model Defamation Provisions Discussion Paper on 30 April 2019 (**Previous Submission**); and
- participating in a Stakeholder Workshop on 12 June 2019.

LawRight is generally supportive of the draft MDAPs. We consider that the proposed amendments encourage the early resolution of defamation disputes, and provide more clarification on matters which have been causing confusion for our client base.

This submission will focus on the particular issues we raised in the Previous Submission, as they relate to the draft MDAPs, as follows::

1. Single publication rule;
2. Pre-trial procedures;
3. Defence of honest opinion; and
4. Serious harm threshold test.

Single publication rule

In our Previous Submission, we noted that, unless additional consideration is given to the limitation period for actions in defamation and the associated discretionary power of the courts to extend those limitation periods, a single publication rule may not provide sufficient protections and remedies for persons whose reputations are harmed by the publication of defamatory material.

[redacted]

The draft MDAPs introduce a single publication rule (cl 1A to Schedule 4.1) and include a mechanism for a plaintiff to apply to the court for an order extending the limitation period (cl 1B to Schedule 4.1). Where an application is made in circumstances where the facts relevant to the cause of action only became known to the plaintiff after the limitation period expired, then clause 1B(3)(b) to Schedule 4.1 requires the court to have regard to the day on which the facts became known to the plaintiff, and the extent to which the plaintiff acted promptly and reasonably after the facts became known.

LawRight is supportive of the proposed amendments regarding the single publication rule, particularly in respect of the changes to the limitation period. We consider that the proposed amendments appropriately balance the protection of a plaintiff's reputation with the need to reduce the risk of 'endless' limitation periods caused by digital publication and online archiving.

Pre-trial procedures

In our Previous Submission, we recommended that pre-trial procedures should be made mandatory and clarification should be given regarding the specific content and timing of concerns notices and offers to make amends.

The draft MDAPs make a number of amendments to the provisions regarding pre-trial procedures, including:

- making it mandatory that an aggrieved person issue a concerns notice in writing to the publisher prior to commencing court proceedings (new cl 12A);
- requiring a concerns notice to specify the location where the matter in question can be accessed (cl 14(2)(a1));
- clarifying the content for an offer to make amends (cl 15(1)); and
- clarifying the timing for making an offer to make amends (cl 18(1)(a)).

LawRight is generally supportive of the proposed amendments regarding pre-trial procedures, particularly regarding mandatory concerns notices and the content of offers to make amends. We observe that, on the whole, the amendments address the concerns we raised in our Previous Submission about the existing provisions regarding pre-trial procedures.

However, we note that even with the amendments proposed by the draft MDAPs, there may still be some confusion regarding the timing for making offers to make amends in the context of requests for particulars of concerns notices, and the consequences if proceedings are started without the giving of a concerns notice.

<u>Requests for particulars of concerns notices</u>

Assuming the Model Defamation Provisions are amended in accordance with the draft MDAPs, a "concerns notice" is defined to mean "a concerns notice for the purposes of section 14". An aggrieved person will be required to give a publisher a concerns notice

prior to commencing proceedings (cl 12A(1)(a)). The publisher can then give the aggrieved person a further particulars notice (cl 14(3)). The aggrieved person then must provide the reasonable particulars within 14 days after being given the further particulars notice (cl 14(4)). If the aggrieved person fails to do so, they will be taken not to have given the publisher a concerns notice for the purposes of clause 14 (cl 14(5)).

In our Previous Submission, we observed that clauses 14(3) to 14(5) of the Model Defamation Provisions do not clearly set out how the timing for requesting particulars of a concerns notice aligns with the requirements of clause 14(1). The amendments in the draft MDAPs do not provide further clarification about this issue. It is still unclear whether a request for particulars of a concerns notice has any other effect on the time allowed to make an offer to make amends.

A situation could potentially arise where a publisher receives a concerns notice and the next day requests particulars of the concerns notice in accordance with clause 14(3). The aggrieved person may not provide those particulars until 14 days later. By this time, 15 days have already elapsed since the publisher was first given the concerns notice. Under clause 14(1), the publisher will only have a further 13 days to consider and make an offer to make amends, despite only having just received full particulars of the matter.

We suggest that clause 14 should be further amended to include a new subsection (6), which clarifies that, where reasonable further particulars are provided in accordance with clause 14(4), the date of the provision of the particulars is taken to be the date on which the publisher was given the concerns notice for the purposes of clause 14.

Recommendation 1: consider amending clause 14 to insert new subsection (6): *Where an aggrieved person provides the reasonable further particulars specified in a further particulars notice in accordance with subsection 14(4), the date that the reasonable further particulars are provided is taken to be the date on which the publisher was given a concerns notice for the purposes of this section.*

Consequences of starting proceedings without a concerns notice

LawRight considers that the amendments in the draft MDAPs regarding mandatory concerns notices will promote swift resolution of disputes without recourse to litigation. Most of the relevant amendments in the draft MDAPs indicate that concerns notices and offers to make amends are now part of a separate process that the parties must undertake before commencing litigation. The giving of a concerns notice is mandatory (clause 12A(1)). The court may grant leave for proceedings to be commenced less than 14 days after the giving of a concerns notice, but there is no specific provision for the court to grant leave for proceedings to be commenced where no concerns notice has been given at all (clause 12A(3)). The failure to accept a reasonable offer to make amends provides a publisher with a complete defence; however, the availability of the defence is specifically tied to the timing of the receipt of the concerns notice (clause 18(1)(a)). It is already recognised that the offer to make amends provisions are separate

to the parties' entitlement to make or accept other types of settlement offers at any point in the dispute (see clause 12(3)). These provisions together suggest that the mandatory concerns notice and offer to make amends provisions constitute a separate and specific mechanism to resolve disputes that exists alongside litigation.

However, while all of these amendments will go a long way to encourage parties to resolve their disputes promptly without resorting to the courts, the reality is that some aggrieved persons will still attempt to commence proceedings without first giving a concerns notice. This is particularly likely to occur where the aggrieved person is unaware of the law and unable or unwilling to obtain legal assistance before taking action.

In such a circumstance, it is unclear how a defendant should respond or how the court should treat the proceeding. We observe that clause 12A(2)(3) allows the court to grant leave to excuse non-compliance with the time limitations in clause 12(1)(c), but the draft MDAPs do not give the court an explicit power to excuse non-compliance with the actual giving of the concerns notice. In addition, it is unclear how a defendant can access the defence in clause 18(1) if no concerns notice has been issued, as the defence as amended by the draft MDAPs is specifically tied to the publisher's receipt of a concerns notice.

On the assumption that the court has power to make these orders under its inherent power or pursuant to the relevant court rules, we anticipate that in such a situation, one of the following are likely to occur:

1. The court excuses the plaintiff's non-compliance with clause 12A(1) and allows the proceedings to continue; or
2. The court orders the plaintiff to give a concerns notice in compliance with clause 12A(1) and stays the proceedings until 14 days after the date the concerns notice is given.

We note the court may also be able to dismiss the entire proceeding due to the noncompliance; however, this seems unlikely in circumstances where the plaintiff has a valid claim.

There are benefits and disadvantages of both of the above approaches. In the case of the first scenario, while the plaintiff is able to continue with an otherwise valid proceeding, it is still unclear how the defendant can make an offer to make amends and access the defence in clause 18(1), as no concerns notice has been or will be given. In the case of the second scenario, while it is clear that the defendant will be able to access the defence in clause 18(1), this adds further delay to the resolution of the dispute in circumstances where the defendant has now technically had full notice of the plaintiff's concerns since the date of service of the statement of claim.

LawRight does not have a specific recommendation for a solution to this issue; however, we note that the following options could be considered:

- Consider making further amendments to clause 18 (and any relevant amendments to clause 14(1) that are required for consistency) to account for circumstances where a defendant was not afforded the opportunity of responding to a concerns notice before proceedings were started; or
- Consider inserting an additional subsection in clause 12A clarifying that the court can excuse non-compliance with the giving of a concerns notice, and allow the court to make relevant conditions to minimise the prejudice to the defendant. We observe that a similar provision is contained in the *Personal Injuries Proceedings Act 2002* (Qld) (***PIPA***), which allows a court to authorise a claimant to proceed with their claim despite the claimant's failure to give the respondent a mandatory pre-trial notice (s 18(1)(c)(ii)). The court's order excusing the non-compliance may be made on whatever conditions the court considers appropriate to minimise prejudice to the respondent from the claimant's failure to comply with the requirement (s 18(2) of *PIPA*). If a similar provision was included in the Model Defamation Provisions, we anticipate that such conditions may include an order that the plaintiff's statement of claim is taken to be a concerns notice for the purposes of clauses 14 and 18; allowing the defendant to make an offer to make amends and access the relevant defence under Division 1, Part 3.

Recommendation 2: consider whether further amendments should be made to clause 18, 14 and/or clause 12A to clarify what the consequences are where proceedings have been started without giving a concerns notice in compliance with clause 12A(1).

Defence of honest opinion

In our Previous Submission, we recommended that the defence of honest opinion be amended to clarify whether the proper material on which an opinion is based must be stated or included in the publication, particularly in the context of digital publication.

The draft MDAPs include amendments to clarify what it means for an opinion to be "based on proper material" (cl 31(5)).

LawRight is supportive of the proposed amendments to the defence of honest opinion. In particular, we consider that the clarification provided in clause 31(5)(a) appropriately recognises the ways in which contextual information is made available or accessible in digital publications.

Serious harm threshold

In our Previous Submission, we supported the implementation of a threshold 'harm' test, noting that such a test would encourage the prompt resolution of defamation disputes. We further observed that the introduction of a threshold 'harm' test would require consideration of whether the triviality defence should be retained.

The draft MDAPs introduce a serious harm threshold, with the onus on the plaintiff to establish serious harm (new cl 7A(1)), and abolish the defence of triviality (deletion of cl 33).

LawRight is generally supportive of the introduction of a serious harm threshold and the corresponding removal of the defence of triviality. As noted in the Previous Submission, a requirement for the plaintiff to prove serious harm is likely to discourage spurious or trivial claims, at least in circumstances where a potential plaintiff is able to obtain legal advice before commencing proceedings.

We observe that some procedural questions may arise in circumstances where a plaintiff commences proceedings which do not appear to meet the serious harm threshold, as may occur where a plaintiff is self-representing and unable or unwilling to obtain legal advice before commencing. In that case, it is not clear from the draft MDAPs what the appropriate procedure would be to have the serious harm question heard and determined at an early stage in the court proceedings, before the matter progresses further and the parties and the court are put to further delay and cost.

We assume that these procedural questions are intended to be dealt with by the courts, and expect that, in practice, the situation will be similar to other circumstances where specific matters must be pleaded – e.g. the defendant should apply for strike-out or summary judgment.

Conclusion

In summary, LawRight's position on the draft MDAPs is as follows:

- **Support**
  We are supportive of the draft MDAPs as a whole. The proposed amendments generally address the concerns raised in our Previous Submission, and we consider that the amendments encourage the early resolution of defamation disputes, and provide more clarification on matters which have been causing confusion for our client base.

- **Pre-trial procedures**
  While we are generally supportive of the framework and specific requirements for pre-trial procedures created by the draft MDAPs, we make the following recommendations for additional clarification:

    - Recommendation 1: consider amending clause 14 to insert new subsection (6): *Where an aggrieved person provides the reasonable further particulars specified in a further particulars notice in accordance with subsection 14(4), the date that the reasonable further particulars are provided is taken to be the date on which the publisher was given a concerns notice for the purposes of this section.*

- Recommendation 2: consider whether further amendments should be made to clauses 18, 14 and/or clause 12A to clarify what the consequences are where proceedings have been started without giving a concerns notice in compliance with clause 12A(1).

We appreciate the opportunity to provide feedback on this important draft legislation.

If you have any questions about this submission or require further information, please do not hesitate to contact me at ben.tuckett@lawright.org.au.

Yours faithfully

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