



31 January 2020

Review of Model Defamation Provisions
c/o Policy, Reform and Legislation
NSW Department of Communities and Justice
GPO Box 31
Sydney NSW 2001

SUBMISSION TO THE REVIEW OF MODEL DEFAMATION PROVISIONS

BACKGROUND

I am the sole administrator of the Lemon Caravans & RVs in Aus Facebook group. The group currently has approximately 52,000 members. It is a victim support group for owners of severely defective 'lemon' recreational vehicles (RVs) such as caravans, camper trailers and motorhomes. Members also join to get information on what RVs brands to avoid, or be careful about when purchasing.

I have also acted as a voluntary consumer advocate, and sometimes a representative, for members litigating in tribunals. I have lobbied legislators for changes to the *Australian Consumer Law* (ACL) and other relevant legislation. As a result, I am highly regarded by my group members, and reviled by much of the RV industry and their supporters. I also have a Graduate Certificate in Applied Law from QUT and am now studying a Master of Applied Law, also at QUT. I am currently specialising in the ACL consumer guarantee regime, but will also be engaging in research on cyberbullying and defamation/injurious falsehood later in the course.

As a result of my ongoing consumer advocacy, I have been subjected to extensive defamation and cyberbullying by numerous Facebook members and group/page administrators, in addition to some RV media. This has been ongoing for over three years without abating, and has caused me significant psychological, physical and financial harm. As a result, I am taking civil action in the Brisbane District Court against two administrators of the Facebook group 'Shonky & Non Shonky Caravan Builders-Dealers-Consumers Around Australia' (the Shonky Caravans group). I am only able to do this because of a special fee agreement with a supportive and understanding law firm.

The Queensland Police Service (QPS) has closed my cyberbullying complaint, after three years of supplying them evidence to support my allegations and making multiple legal arguments that the charges were warranted. The benchmark for proving cyberbullying is clearly too prohibitive and far too onerous, leading to perpetrators not only getting away with their behaviour, but escalating

it to multiple victims. I will be pursuing this complaint further as I believe that the QPS decision to close my complaint is in error, especially where the Queensland government has instigated a 'zero tolerance' policy toward cyberbullying.

Until 1 November 2019 I allowed members to publish their honestly held opinions and negative reviews on their defective RVs, if they had good quality evidence such as photos, videos, emails, repair invoices or expert reports. That all changed when I was found liable for injurious falsehood against Bruder Expedition Pty Ltd in the Brisbane District Court on that date. I was ordered to pay \$357,000 in damages plus costs. I was also ordered not to publish anything to the same effect of the four statements that were the subject of the injurious falsehood claim. This was later clarified by amended orders as I was not found liable for two of the four statements, but not before I was convicted of civil contempt of court and sentenced to 200 hours of community service. I barely escaped going to jail, so I am told by my legal team. I am appealing both the contempt conviction and the jury trial decision.

The injurious falsehood claim stemmed from me allowing a group member to publish a link to a web site about a Bruder Expedition Pty Ltd caravan that the owner was unhappy with. The owner of the caravan was also sued for injurious falsehood. He was subjected to a default judgement that is currently under review by the Supreme Court of Queensland.

Injurious falsehood is a common law tort. It is the legal claim that corporations with 10 or more employees rely upon when they cannot take defamation action under the Model Defamation Provisions (MDPs). It has a much broader and tougher burden of proof; and the burden of proof is on the plaintiff rather than the defendant, as is the case in a defamation claim. There are four liabilities to prove: publication to a third party; falsity; malice; and actual financial loss. The jury found all counts proved against me in two of the four statements I made. I am unable to elaborate at all about the case as it is under appeal. I also have an injunction ordered against me. It has been a devastating experience psychologically, physically and financially, when I know I am innocent.

This was my second visit to court for an injurious falsehood claim. It is sadly the occupational hazard of the consumer advocate, even in a voluntary capacity. The first injurious falsehood claim against me was by the manufacturer of my 'lemon' caravan, Lotus Caravans Pty Ltd. Only a few weeks prior to the trial, they discontinued the claim, after putting me through the financial, physical and psychological stress of multiple interlocutory steps and hearings.

This occurred two days before court ordered disclosure of multiple sensitive documents. However, Lotus Caravans made an alternate claim that they had been 'vindicated' as a result of experts inspecting my caravan. They refused to release the report publicly or to me to prove that vindication. In doing so, they repeatedly defamed me. However, I was not in any financial position to take action against them for doing so. When I finally received the expert report, there was no vindication at all, except for my claims against Lotus Caravans.

I am a large target for this type of action as a result of being a consumer advocate and allowing group members to publish their honest experiences, with evidence. Having had first-hand experience in both being a plaintiff in a defamation claim (ongoing); being a defendant in a

defamation claim by the person that I am suing for defamation; a successful defendant in a joint defamation and injurious falsehood claim; and an unsuccessful defendant in an injurious falsehood claim; I believe that I can bring insight and experience to the review that will hopefully refine and strengthen the defamation legislation to benefit all parties.

Unfortunately, I was not aware of the initial review and was not given permission to make a late submission. So this document will address my primary concerns with the defamation legislation; the tort of injurious falsehood; and some of the proposed amendments to the MDPs.

I hope that my personal experience will give legislators pause for reflection and thought about the actual intent of the defamation legislation and proposed amendments, and whether they will achieve the aims stated. I would welcome the opportunity to elaborate further on the key criticisms of the amendments to the MDPs.

DEFAMATION ACTION AS A WEAPON OF SILENCE

The right of a consumer or consumer advocate to publish negative reviews is still under threat in spite of the proposed amendments

This is my primary and ongoing concern, and criticism of the amendments.

None of the amendments address the significant problem of wealthy entities, be they individuals or corporations, being able to take improperly motivated defamation or injurious falsehood action against individuals who will not have access to affordable justice. This is also known as Strategic Litigation Against Public Participation (SLAPP). It is rampant in Australia. Anecdotally, there are many more threats made to consumers and advocates than end up before the courts. Consumers invariably capitulate to the demands to protect themselves from litigation. Advocates invariably fight the claims. The US has taken steps to reduce the incidence and effectiveness of SLAPP claims, quite successfully I believe. There needs to be more research into SLAPP claims in Australia and how they have been successfully dealt with in other jurisdictions.

There is little to no access to pro bono representation or legal aid for defendants in these types of proceedings. I know because I spent months exhausting all avenues for representation in the first claim against me. I self-represented in the improper injurious falsehood claim filed against me by Lotus Caravans Pty Ltd, after crowd funding enough money to get my defence professionally written by a specialist defamation barrister. It was improper because Lotus Caravans knew I was telling the truth about my caravan, I had provided evidence, and yet they still took action to silence me and force me to accept their inadequate redress offer.

The judge kept telling me I will need legal representation for the trial. He was right, but I couldn't make him understand that this was not possible given my financial status as a disability support pensioner. This was my very first experience with the legal system and it was terrifying. I felt trapped.

I also had to self-represent at the injunction hearing on 10 July 2019, brought against me by Bruder Expedition Pty Ltd. I was unsuccessful, being up against a highly experienced QC. I had no idea what a 'balance of convenience' was, and only received this in a submission the day before the hearing. At that stage I was overwhelmed trying to get affidavits and evidence completed for filing. I had no time to address anything else. I suffered as a result.

An overarching injunction was granted against me, such that I was unable to comment in any way about Bruder Expedition Pty Ltd, irrespective of what facts I had to hand. If I had representation, I would very likely have been successful in defending against such an injunction. My current barrister advised me of this. This demonstrates that the law is not just about facts, it is about the way they are argued and who is arguing them. Self-represented litigants are at an extreme disadvantage. They may be completely innocent, but due to being unable to cite authorities, have no knowledge of the system and how to play it, or are unable eloquently argue their case, they can be doomed to failure.

I was fortunate enough to find and engage a law firm in Queensland on a special fee arrangement to assist with the Lotus trial, just before the claim was withdrawn. They are now assisting me with other claims against me, including the Bruder Expedition Pty Ltd claims, for which I am extremely grateful. Being a self-represented litigant is frightening and difficult, even for someone with knowledge of the legal system, like I have developed since the Lotus Caravans claim, and through studying law at QUT. Access to affordable justice is a significant issue, especially in extremely expensive litigation such as a defamation or injurious falsehood claim, with legal costs for each party often in excess of \$500,000. Most individuals threatened with defamation action would have no hope of raising those sorts of funds for legal fees even if they are entirely innocent. This then leads to unwarranted compromise and capitulation.

I now want to turn to some of the review documentation. I note the following in the *Review of the Model Defamation Provisions—Background paper* (the Background Paper):

A number of stakeholders noted that the cost of defending a claim can be prohibitive for ordinary members of the public **and that there is potential for defamation claims to be used to coerce a defendant into doing something**. These issues are addressed through proposed changes to the substantive MDPs including: pre-trial procedures (see recommendations 4-6); and the introduction of a new serious harm threshold (see recommendation 14).¹ (emphasis added)

Neither of these proposed changes (pre-trial procedures or the serious harm threshold) will have any effect on the practical reality of the filing of, or defence of, a filed defamation claim. In short, they will not stop a vexatious litigant filing and pursuing a claim.

I know this for a fact due to my own experience. I also have first-hand knowledge of the experiences of members of my group who have been threatened with either defamation or injurious falsehood claims and have been forced to make amends, in spite of telling the truth

¹ Council of Attorneys-General, *Review of the Model Defamation Provisions—Background paper* (Background Paper, D19/415348/DJ, December 2019) p 9.

about their 'lemon' RV and their experience. I have seen many solicitor's concerns notices and threats. In many cases, the claims made by the 'lemon' RV owners are in the public interest, as they report significant safety concerns. And this of course must be hidden at any price to protect business reputations. Threats of defamation or injurious falsehood legal action are invariably successful in silencing the consumer, because of the vast ramifications of trying to defend the claim.

Pre-trial procedures

On the assumption that the defendant is innocent and the claim is brought improperly to silence them, a defendant will face the difficult decision of whether to make amends to avoid a stressful and costly trial, or stay true to themselves and face the prospect of a trial as a self-represented litigant, with all the consequential risks of losing to a highly experienced legal team. This is in addition to the financial cost, the time cost and the physical and psychological harm.

In making amends, the accused is most likely to be forced to remove the honest publication, also causing psychological harm in being disappointed in themselves for being forced to capitulate to power. After doing so, many have regrets and wished they were strong enough to fight.

This action by an allegedly vexatious litigant also has a deleterious effect on the proper functioning of the market place, where consumers rely heavily on online reviews to make informed choices. It also has the potential to impact public safety where serious defects are exposed to warn the public, only to be forced into being removed by the threats.

The proposed pre-trial procedures will in no way prevent a vexatious or improperly motivated claim being filed and vigorously pursued, by a party with superior financial resources. In my personal experience, allegedly vexatious claimants also have no qualms in misleading the court or lying under oath. This is not only the case in defamation claims, but in ACL claims. The imperative is protection of reputation at any price, irrespective of whether the publications are in fact true and the plaintiff knows they are true. The ACL imperative is not providing proper redress and never admitting fault, as that is perceived to be damaging to the reputation of the business.

1. Recommendation

Pre-trial procedures need to include an interlocutory hearing in front of a judge, similar to a committal hearing, where a prima facie case must be established before it can proceed to trial. Clear guidelines must be developed to assist litigants in establishing, or defending, a prima facie case, especially if one party is a self-represented litigant. In the case of SLAPP claims, weight needs to be given to the personal experience of the defendant, the type of evidence they have to support their claims, recognising that lay people have a different perspective of what constitutes evidence than the courts, and that they should be able to rely on that evidence for their publication if it is 'proper material'. This would save substantial court time and give pause to litigants making improper or vexatious claims that are likely to be thrown out of court at the initial interlocutory stages.

2. Courts need to provide much better resources and assistance to self-represented litigants, especially in complex defamation and injurious falsehood claims. Governments need to provide resources for community legal services not only to give initial brief advice, but practical support during all stages of a claim, even if they don't fully represent a defendant. There is no other access to justice for those who are accused but innocent, and have no means to defend themselves.

Serious harm

7A Serious harm required for cause of action for defamation

(1) An individual has no cause of action for defamation in relation to the publication of defamatory matter about the individual unless the individual proves that the publication has caused, or is likely to cause, serious harm to the reputation of the individual

The test of 'serious harm' appears to have to be made at trial. This means that a claim can be filed, and interlocutory stages can be completed, in spite of no real 'serious harm' being suffered, or only being suffered on the legitimate grounds of an honest negative review.

'Serious harm' is also not defined. It is also not defined as to what 'serious harm' applies to. Is it reputation, financial losses, mental health or physical health, or a combination of all of these harms? Leaving this to the Courts to define over time will create uncertainty and allow improper 'test claims' to be filed before the law is clarified. Defendants become the 'guinea pigs' of the judicial system to create case law. This was a significant error in the *Australian Consumer Law*, with the definition of a 'major failure' taking many years for the courts to clarify, to the ongoing detriment of thousands of consumers.

A filed claim can be withdrawn at any time prior to the trial if the plaintiff has significant financial resources and is willing to pay costs to cause suffering to the defendant, and later withdraw the claim. This can be done where the plaintiff is seeking solely to scare and harm the defendant by filing a claim. The harm done to the defendant is irrevocable and cannot be compensated under current legislation. This is what happened to me in the Lotus Caravans case. It changed my life for the worse forever. It had serious and devastating consequences on my mental and physical health and my finances. There was and still is no means for me to be compensated for this abuse of the legal system.

Bruder Expedition Pty Ltd admitted at trial that their primary motivation for taking action against me for injurious falsehood was for the injunction to silence me. Damages were secondary and unlikely to be recovered, as they acknowledged that I am impecunious. They were successful. However I am now appealing the decisions, but access to justice for appeals has become a very live issue, with security for costs claims to try and defeat my legitimate right to appeal a decision of a lower court. In the current legal system, only those with significant financial resources have any access to justice.

'Serious harm' is also a part of the new threshold test for non-excluded corporations with fewer than 10 employees. Added to this is another test of 'serious financial loss'. This is also not defined.

These two proofs are very close to the proofs for the tort of injurious falsehood, where excluded corporations rely on when they are not able to sue for defamation. The only differences are 'malice' as a motivating factor for the publication, and the burden of proof being on the plaintiff.

Recommendations

1. A prima facie case for serious harm and, where legislated, serious financial loss, needs to be established in an interlocutory hearing. Any negative publication has the potential to cause serious harm (or financial loss), but that harm may be warranted if the publisher is able to defend their publication under the MDP. Serious harm and serious financial loss must be considered in conjunction with the defences for alleged defamation.
2. Compensation provisions need to be developed for defendants who prove that the defamation claim was vexatious and/or improperly motivated. The opportunity to claim and have heard allegations of vexatious and/or improperly motivated litigation should be a 'no risk' hearing, where costs cannot be adversely awarded. I was unable to press my claim of vexatious litigation against Lotus Caravans because of the risk of failing and being liable for tens of thousands in costs. If I am successful in my two appeals against Bruder Expedition Pty Ltd, I am led to believe there is little opportunity for me to obtain redress, especially without taking my own risky, costly, stressful action against them.
3. If vexatious litigation is proven, the outcome should be the automatic right to an award of costs on an indemnity basis, as well as financial compensation for damages including, but not limited to:
 - a. The cost of loss of work or leisure time;
 - b. Psychological and physical harm, but outside of the purview of any personal injury thresholds and legislation;
 - c. Disbursements including: travel; accommodation; photocopying; filing fees; and any other reasonable costs associated with the litigation.
4. There needs to be significant deterrents to wealthy litigants improperly using their superior financial power, and the legal system, as a weapon of silence and punishment.
5. The tort of injurious falsehood should be brought under the statute, similarly to how the tort of defamation has been. It is almost there in the amendments in any case, with the 'serious harm' and 'actual financial loss' provisions, but only for companies with fewer than 10 employees. There will be no impediment to large corporations from filing SLAPP claims, and continuing to intimidate consumers into silence, unless this tort is better managed by statutory provisions to ensure it is used properly, and not vexatiously.

THE 'SINGLE PUBLICATION RULE'

Introducing a single publication rule to provide that the applicable one-year limitation period runs from the date material is uploaded to the internet

I am approaching this discussion and recommendation from the perspective of someone who has been defamed and cyberbullied for over three years on Facebook. When a post is published on Facebook, invariably it 'slides' down the wall quite quickly when comments stop, and over time not many Facebook members will view it. However, it can be deliberately 'bumped' back to the top of the page at any time. This 'republishes' the post and invites a new audience to comment.

An example of this is a post that was made about me on 4 February 2018 by Mr Phil Sanchez. See Appendix 1. I am suing Mr and Mrs Sanchez for extensive defamation over three years. The post was bumped on 10 March 2019, over a year later. The post was viewed and commented on by a new audience. If the one year limitation applied, I would not have been able to include it in a contempt of court application that has been filed against the Sanchezes, which is yet to be heard.

Other recommendations

6. The defamation laws need to address cyberbullying as a civil offence. The current criminal legislative provisions are not working. The benchmark is too high to get a successful criminal prosecution. There needs to be a less onerous means for victims to achieve redress.

I note that there will be a further review of the role and liability of social media platforms in defamation. I have personally experienced this too, with Facebook refusing to remove any of the thousands of defamatory and cyberbullying publications made about me over the past three years. I welcome this further review and propose that the scope be broadened to include a new civil offence of cyberbullying that can be prosecuted by either the victim or the crown, with financial relief to the victim and pecuniary penalties to the perpetrator available to the Courts to apply.

CONCLUSION

The current amendments will not stop vexatious claims being filed. They will not in any way improve the balance between freedom of opinion and expression and the right to reputation. They will still allow wealthy individuals and corporations to file SLAPP claims and use the legal system to persecute and punish consumers and advocates. They will still force innocent publishers to make the difficult choice between capitulation and moving on with their lives, or fighting for their rights.

They will also not assist defamed parties who have no means of filing action against alleged defamers if they have limited means to do so. The defamed will remain powerless and continue to be victims of cyber bullying, if the defamation is online, without any help or support from the State or legal system.

The amendments are fundamentally flawed in achieving their stated intent, and need more thought and revisions.

APPENDIX 1









