BRIEFING PAPER FROM DEFAMATION LAWYERS REGARDING THE PROPOSED CHANGES TO THE UNIFORM DEFAMATION LAW 2005

A. INTRODUCTION

1. Defamation laws should seek to balance the competing rights of members of the public to protect their reputation and privacy, to exercise their freedom of speech and to access accurate and true information. Defamation laws must protect and balance these fundamental individual rights in a liberal democracy. From 1 January 2006, model defamation laws were enacted in all Australian states. Those model provisions were adopted in the ACT on 23 February 2006 and on 26 April 2006 in the Northern Territory. Prior to the model defamation laws, parties to defamation proceedings could face different laws in eight different jurisdictions that could arise in a single proceeding. The model defamation laws to date have brought increased (but not complete) uniformity to defamation law in Australia that has otherwise reduced the legal time and cost to prosecute and defend defamation disputes throughout Australia.

2. The purpose of this paper is to bring attention to the serious consequences of commencing the *Defamation Amendment Act* 2020 (NSW). In summary in relation to the major amendments:

   a. the **serious harm** amendments will not lead to an appreciable reduction in the amount of defamation litigation or disputes and will increase legal time and costs in their present form;

   b. the **concerns notice** amendments will perversely lead to a reduction in the number of defamation disputes settled before proceedings are commenced and increased legal time and costs;

   c. the **public interest defence** amendments are unnecessary, will not lead to an appreciable reduction in the amount of defamation litigation or permissible legitimate public interest journalism, will increase legal time and costs and may in the short-term encourage irresponsible and unreasonable journalism that adversely affect the rights and interests of members of the public; and

   d. the **aggravated damages** amendments are unnecessary, unjustified, may have unintended consequences and will provide no greater clarification as to how to calculate compensatory damages.

3. In February 2019, the Review of the Model Defamation Provisions Discussion Paper was released by the NSW Government on behalf of the Standing Committee of Attorney-Generals and public submissions were accepted for comment until 30 April 2019. On 12 November 2019, draft public consultation legislation was released and public submissions for comment were accepted until 24 January 2020.

4. On 27 July 2020, the Model Defamation Amendment Provisions 2020 (**Proposed Model Amendments**) were released. It was proposed that the Proposed Model Amendments would only commence after they were enacted in all Australian states, the ACT and Northern Territory. On 28 July 2020, the Proposed Model Amendments were introduced into the NSW Parliament as the Defamation Amendment Bill 2020. The Proposed Model Amendments had significant differences from the draft consultation legislation released for public comment in 2019. The Defamation Amendment Act 2020 (NSW) passed both houses on 6 August 2020 and was assented to on 11 August 2020.

5. On 17 November 2020, the Proposed Model Amendments were assented to in Victoria and on 26 November 2020 in South Australia.

6. There was no public consultation in relation to the significant differences in the Proposed Model Amendments Provisions from the earlier consultation draft and at least in New South Wales there was no opportunity for comment on those differences.

7. The Proposed Model Amendments have otherwise have not been enacted and assented to throughout Australia. The NSW Attorney General has recently suggested that due to the delay, the amendments may be commenced in NSW without the remaining states and territories. Different laws between the states will lead to forum shopping and greater legal time and costs due to the different laws to prosecute and defend such claims.

8. The potential for a return to substantially different defamation laws throughout Australia suggests that only Commonwealth legislation, as was proposed for example before the 2005 model laws, will ensure uniform defamations laws throughout Australia in the future. Commonwealth legislation would also ensure that any future amendments could occur more quickly and the proposed changes reflect a national consensus not just the predominate views of NSW.

9. There are many difficulties with the proposed amendments, and many aspects of the law that require change that have not been addressed at all. This paper seeks to highlight, by example, some of those problems. There are other difficulties with the

proposed amendments, but those set out below illustrate why the proposed amendments ought not to be proclaimed or enacted in other jurisdictions.

B. SERIOUS HARM – s10A

10. One of the major amendments in proposals in the consultation draft was to introduce *serious harm* as an element of the cause of action for defamation. The Proposed Model Amendments s10A that introduces the *serious harm* amendment, though well intentioned, is ultimately unworkable and should be abandoned.

11. *Serious harm* is undefined in s10A and there are no proposed statutory guidelines as to what is meant by *serious harm* to reputation (or serious financial harm to excluded corporations). This approach was intentional, and the arguments for and against statutory guidance are evenly balanced. It is however unclear if an applicant/respondent who suffers serious financial harm as a result of defamation would necessarily suffer serious harm to reputation. If a defamed applicant/plaintiff who suffers serious financial harm no longer has a cause of action this would be an absurd and perverse result.

12. The Background Paper to the consultation draft notes that the serious harm amendments were addressed to the so called "*backyard*" non-mass media disputes where there is said to be limited actual effect on the applicant/plaintiff's reputation. The existing defence of triviality has been an entirely ineffective defence except in the rarest of circumstances to address such circumstances. The primary purpose of the amendments appears to be to provide an early or summary basis to dismiss such claims that at trial and after the expense of trial and interlocutory disputes would result in nominal damages or be found to be trivial.

13. The *serious harm* element as drafted will be mostly ineffective as a deterrent to trivial or non-serious disputes or actions. As this element is proposed to be decided by judges, there will be a lag while the provisions are applied to the variety of circumstances in which defamation can arise throughout all the jurisdictions in Australia. This is particularly the case because in all Australian jurisdictions the "backyard" disputes are decided in either the inferior (local/magistrates) courts or intermediate (district/county) courts. Decisions in these courts may not be widely published particularly if dealt with summarily as proposed or have significant, if any, precedential value.

14. Persons who seek advice as to defamation claims invariably perceive a serious actual or likely impact on their reputation because of the content of the matter, the identity of the readers or audience, the extent of publication, their history with the publisher, or actual or potential economic loss. Just one of these factors may be the critical reason for the person providing instructions to issue a concerns notice or commence proceedings. The Proposed Model Amendments provide no additional statutory framework for a legal advisor to dissuade persons from bringing claims that on a proper assessment are likely to be trivial or nominal at trial.

15. There is much to be said for the submission that a matter that is found to be defamatory under the common law test will always cause *serious harm* to an individual's reputation except where the audience is unlikely to believe the defamatory matter.

16. Further, proposing *serious harm* as a threshold issue to be determined early or summarily is misconceived and inconsistent with proof of the cause of action itself. If serious harm is suffered, it is the consequence of those elements that must be proven to constitute the cause of action. Conceptually that means the court needs to make findings about those elements to conclude that they have caused serious harm. That is not in the nature of early or summary determination.

17. The consultation draft provision s7A did not have any mechanism for how early or summary determination of the *serious harm* issue would occur and a mechanism for summary determination s10A(3)-(8) was first included in the Proposed Model Amendments without public comment.

18. The legal time and costs benefit from early or summary determination of the *serious harm* element is illusory. If a respondent/defendant seeks summary determination this will result in an initial argument about the appropriateness of such a hearing under s10A(6) given that harm to reputation will almost always require assessment of defamatory meaning, extent of publication, and other factors that would ordinarily require evidence and be matters for trial.

19. The provision in s10A(7) that judges could summarily determine *serious harm* based on particulars raises real issues of access to justice because only unrepresented litigants will fail to plead sufficient particulars to necessitate the calling of evidence. The summary determination of the *serious harm* element for represented parties would either through a proper application of s10A(6) never occur or result in a substantial mini-trial that would result in the legal time and costs the amendments were intended to save.

20. The provisions in s10A for early or summary determination of the *serious harm* element will be applied differently in each court or jurisdiction based on the applicable jurisdictional and procedural laws and rules that apply for summary dismissal. The differences between jurisdictions may only be apparent over time as summary dismissals based only on particulars under s10A(7) are subject to appeal in each jurisdiction. The procedural amendments have not been subject to any public comment or consultation. Section 10A should be abandoned in its current form.

21. A more effective way to provide a disincentive to small or trivial defamation claims is to cap or eliminate an award of legal costs for the applicant/plaintiff except in exceptional circumstances. Such a proposal, subject to an overarching discretion in exceptional circumstances, could include:

    a. eliminate or cap costs in relation to social media posts that were removed prior to the commencement of proceedings and in relation to which a reasonable apology and retraction was published by the defendant (absent any finding of malice);

    b. eliminate recovery of costs for judgments for $20,000 or less save a scheduled amount similar to that in NSW Local Court Small Claims Division of about $1259.20 plus filing and service fees;

    c. otherwise cap costs save filing and service fees at 25% of judgment for judgments 10% or less than the statutory cap (i.e. presently $421,000) on damages;

    d. exclude s40 of the Act in respect of applicant/plaintiffs for judgments $40,000 or under save an uplift of 25% for any unreasonable rejection of a reasonable offer as occurs in the NSW Local Court Small Claims Division;

    e. in relation to claims against individuals (not including employees of corporations), mandatory payment into Court by the plaintiff of $20,000 in security for costs.

22. This proposal to schedule or cap costs should not apply to proceedings where an injunction is ultimately obtained or would have been obtained had publication not stopped after proceedings are commenced. Proceedings in such circumstances might be justified to interrupt or stop an ongoing campaign that would have resulted in significant damage if allowed to continue.

23. Many “backyard” defamation disputes are commenced either on a no-win no-fee basis or apparently without a proper regard to the costs that will need to be incurred to take the case to trial. The applicant/plaintiff may not have assets from which a respondent/defendant can recover their legal costs even if proceedings are dismissed summarily. A cap on fees will provide a real disincentive to potential applicant/ plaintiffs and the lawyers who are advising them from commencing trivial or minor claims. The tighter regulation of legal costs in the “backyard” disputes will also provide a greater incentive and opportunity for applicant/plaintiffs to settle or not commence at the concerns notice stage or earlier.

24. The Proposed Model Amendments do not address at all the significant issue of costs which can be the most traumatic outcome from defamation proceedings involving small publications.

C. CONCERNS NOTICES – ss 12A-B

25. Under the proposed amendments a person subject to an alleged defamation must serve a concerns notice before commencing proceedings. Both the consultation draft and Proposed Model Amendments included a provision that a plaintiff/applicant would be limited to pleading only imputations or substantially similar imputations that have been notified in a concern notice.

26. The Proposed Model Amendments introduce further requirements as to the content and form of a concerns notice: new s12A. The original purpose of the concerns notice provisions in the uniform law were to encourage the just, quick, cheap and non-judicial resolution of defamation disputes. The explanatory note to the Proposed Model Amendments suggests that these changes will improve the early resolution of disputes. To the contrary, the changes are likely to create greater hurdles to settlement and create more disputes if proceedings are commenced. The ss12A-12B concerns notice amendments should be abandoned.

27. The vast majority of defamation disputes involve non-media defendants – alleged written or oral defamation involving individuals often in email or on social media to a limited number of persons (the “backyard” disputes). Where individuals are represented at the concerns notice stage under the existing legislation these disputes are often resolved without proceedings being commenced. Where the applicant/plaintiff only seeks a retraction and apology such disputes are easily resolved irrespective of the merits of the claim. The greatest hurdle to settlement is

where the applicant/plaintiff demands payment of their reasonable legal fees – often in a round figure of about $5,000.

28. The drafting of imputations in a defamation pleading is a task that requires specialised skill and experience. Pleadings are usually settled by a senior junior or senior counsel experienced in defamation. Such senior counsel however are often not engaged at the concerns notice stage and the notices are drafted by experienced solicitors or more junior counsel. The Proposed Model Amendments will mean that even the most experienced defamation solicitor will have a duty of care to have the imputations in a concerns notice settled by such senior counsel who would need to take more care than in drafting a pleading (that is always subject to amendment). This will inevitably increase costs and make it less likely that disputes are settled at the concerns notice stage.

29. The Proposed Model Amendments s12A requirement that the alleged serious harm be identified in the concerns notice means that even more legal time and costs will be required to draft a concerns notice.

30. To the extent that pleaded imputations do not reflect those in the concerns notice there will likely be the need for argument once proceedings are commenced as to whether or not the pleaded imputations are substantially the same as those particularised in the concerns notice.

31. The Proposed Model Amendments to the concerns notice provisions will accordingly make early resolutions less likely and unnecessarily increase time and costs in defamation proceedings and should be abandoned because:

    a. the reasonable legal fees of a plaintiff/applicant will be substantially greater to prepare a concerns notice;

    b. defendants/respondents will have greater scope and be emboldened to ignore or challenge concerns notices that are arguably defective; and

    c. substantial arguments will arise in proceedings, wasting even more legal time and costs, as to whether or not:

        i. a valid concerns notice has been served; and/or

        ii. pleaded imputations are substantially the same as those particularised in the concerns notice

    d. it will re-establish the primacy of the formulation of imputations, through concerns notices, from which the States and Territories expressly agreed to depart under the 2005 Act by enacting that the matter published founded the

cause of action not the imputations as pleaded (see Second Reading Speech, NSW Parliament Defamation Bill, 13 September 2005, Attorney General Bob Debus MLA).

D. PUBLIC INTEREST DEFENCE - s29A

32. The Proposed Model Amendments introduce a new defence s29A to overcome alleged shortcomings in the defence in s30 of the Act. The Attorney General for New South Wales in his second reading speech for the Defamation Amendment Bill 2020 erroneously claimed that mass-media defendants have never successfully argued a s30 defence.

33. This claim was incorrect when it was made: see, for example, *Feldman v The Australian Jewish News* [2018] NSWSC 1201 (23 July 2018, per McCallum J); *Feldman v The Australian Jewish News* [2020] NSWCA 56 (1 April 2020, per White JA, Emmett and Simpson AJJA); *Bailey v WIN Television NSW Pty Ltd* [2020] NSWSC 232 (24 March 2020, per Fagan J). This claim has been further undermined since due to the continued success of mass media respondents/defendants arguing s30 defences: *Bailey v WIN Television NSW Pty Ltd* [2020] NSWCA 352 (22 December 2020, Meagher and White JJA, Simpson AJA); *Herron v HarperCollins Publishers Australia Pty Ltd* (No 3) [2020] FCA 1687 (per Jagot J).

34. Both the existing s30 and proposed s29A are based on a notion of reasonableness and provide statutory guidance as to the circumstances that might be relevant to that assessment. Unlike s30, the new s29A defence would be applied over the coming years without the benefit of 16 years of case law under the uniform laws (and 47 years of case law including under s22 of the *Defamation Act* 1974 (NSW) and the common law based on *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520). Significant disputes, arguments and appeals as to the proper interpretation of s29A will be inevitable.

35. The proposed s29A is unlikely to discourage applicants/plaintiffs from commencing actions where it will be difficult based on the matter complained of for a respondent/defendant to establish an existing s30 defence in respect of the reasonableness of conduct.

36. There is a real danger however that the introduction of the s29A defence might encourage journalists (or pseudo-journalists who contribute to news and other websites) to *unreasonably* publish untrue stories about individuals that would not be published under traditional journalistic standards. The social media Internet age has

contributed to a reduction in the quality of journalism and a blurring between what is private and public. It is difficult to imagine a legitimate justification for greater protections to journalism that is not substantially true or otherwise not reasonable to publish. Such protections can only act to restrict the fundamental rights, freedom and expectations of individuals in a liberal democracy.

37. Notwithstanding the views of the NSW Attorney General or the mass media organisations, it is doubtful that a new defence based on a notion of "reasonably believed", once properly interpreted, will provide any greater protection than s30 to journalists. It would be unlikely for a jury to find that a journalist has a reasonable belief the publication of the matter was in the public interest where that jury would not find that their conduct in publishing the matter was reasonable.

38. It would also be unlikely for there to be a finding of reasonable belief that the matter was published in the public interest where it is found that the journalist did not have an honest belief in the truth of the matter published - because there can be and should be no public interest in the publication of matter that the journalist did not honestly believe was true.

39. The new defence in s29A does not have the equivalent of s30(4) of the defeasance of malice. It follows that the subjective intent or state of mind of the journalist would be relevant to the reasonableness of the belief that the matter was published in the public interest.

40. The new defence will accordingly just create further and unnecessary legal time and costs due to:

    a. media and other respondents/defendants pleading and arguing both ss29A and 30 defences;

    b. Courts interpreting and applying and directing juries about the new statutory language over the coming years; and

    c. Confusion arising from the overlap of the defences under ss29A and 30 and the defence of common law of qualified privilege.

41. The s29A public interest and related s30 amendments should be abandoned.

E. STATUTORY DAMAGES CAP – s35

42. The Proposed Model Amendments overrule the well-reasoned comprehensive judgment of the Victorian Court of Appeal in *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674 as to s35 of the Act that has been followed in nearly every jurisdiction throughout Australia. The amendments seek to replace the cap with a scale of general damages and to ensure that only aggravated damages may be awarded over the scale.

43. Neither the Background Paper nor the NSW Attorney General's second reading speech provided any compelling reason why s35 needs to be amended.

44. Aggravated damages are a form of compensatory damages. Aggravated damages are only awarded where the respondent/defendant's conduct lacks bona fides or is improper or unjustifiable and aggravated the damage the applicant/plaintiff has suffered. The proposed s35 amendments proceeds on an unsound basis that aggravated damages are somehow different to other compensatory general damages and (contrary to the common law) can be properly calculated separately. Proposed s35(2B) should be abandoned for that reason alone.

45. Although some judges both before and after *Bauer Media* have made separate awards for aggravated damages, that is not a uniform approach or the approach at common law. The proposed s35(2B) will provide no greater clarity how judges should calculate aggravated damages given they are part of compensatory damages and how that should occur given proposed s35(2). In contrast, the existing s35 and the ruling in *Bauer Media* permits an approach that is consistent with the common law.

46. The change or clarification that the cap is a scale may have unintended consequences on future awards. This is particularly the case if it is wrongly suggested that the previous awards that approached or exceeded the cap did not involve most serious cases within the meaning of proposed s35(2). There is no empirical justification for this change given the past 16 years of experience.

47. Further the statutory cap was not initially set in 2005 by an evaluation of the worst category of defamation within which a range could be measured but was a financially based limit imposed as a result of increasingly higher awards. It 'cut off' that upward trend by providing certainty to the maximum amount that might be awarded, except where the circumstances of s35(2) applied.

48. In the past 16 years, damages have only on rare occasion exceeded the statutory cap. Each of those occasions was exceptional and involved significant conduct that

lacked bona fides or was improper or unjustifiable. Damages have only on occasion approached the statutory cap and each of those occasions involved seriously defamatory matters, extensive publication, proof of significant actual damage to reputation or hurt to feelings, and/or significant circumstances of aggravation.

49. There is no empirical evidence that s35 has failed since 2005 to keep defamation awards within community expectations, that the present law under *Bauer Media* has resulted in disproportionate or unfair awards, or that the larger awards in recent years for exceptional cases have caused an increase in unmeritorious defamation claims. The proposed changes to s35 should be abandoned.

50. There is a community expectation that persons seriously defamed will be able to protect their reputation through appropriate action in the Courts. Any discussion of damages must be seen in the context of the disproportionate cost to commence and maintain an action in defamation – particularly against media defendants who can deduct their defamation expenses as a cost of doing business.

51. The reform process that led to the Proposed Model Amendments did not address at all the important issue of costs of defamation proceedings. Section 40 provides some incentive for parties to take a reasonable approach to settlement. There are however limits to that incentive because it only applies after trial and judgment and even an award of indemnity costs may not cover all legal expenses. The high costs of defamation proceedings against mass media defendants are almost entirely attributable to interlocutory applications, subpoenas and complex defences (often including multiple amendments) which the respondents/defendants have the resources to raise irrespective of their prospects of successful defending the matter. Any assessment of damages should also look at the question of costs to ensure persons seriously and unjustifiably defamed will not be left out of pocket to vindicate their reputation. The reform process the NSW government undertook failed to address the issue of costs except in a tangential manner.

F. BEST PRACTICE

52. Part of the rationale for the amendments was to implement ‘international best practice’. This best practice by and large was proposed by adopting provisions from the Defamation Act 2013 (UK). One serious omission was not to adopt the UK provision to restrict the use of juries in defamation cases, unless the court determines that it is in the interests of justice to do so in any particular case.

53. The continued use of juries in some jurisdictions in Australia and not others has been a major obstacle to uniformity. There has been criticism of the Federal Court in particular as a court which does not use juries, allowing 'forum shopping' and providing a safe haven for 'jury shy' public figures.

54. This ignores the fact that in addition to the Federal Court, half the remaining jurisdictions in Australia do not now use juries for defamation cases regularly or at all (South Australia, Western Australia, the Australian Capital Territory and the Northern Territory).

55. In the UK, the restriction on the use of juries has allowed a 'best practice' of early determination of meaning and other relevant issues. This has profound benefits for the speed and cost of defamation cases. It enables the parties to obtain a ruling on meaning at an early stage of the proceedings and provides a better platform for the pleading of defences or if appropriate settlement, than the current practice of leaving these issues to be determined at the end of a jury trial.

56. The statutory right of the use of juries should be removed in favour of 'the interests of justice', or unless the court otherwise orders as provided in s 11 of the Defamation Act 2013 (UK).

G. CONCLUSION

57. The Proposed Model Amendments are fundamentally flawed and should be abandoned. The NSW government driven review process did not work and any future process should be done on a national basis only through the Commonwealth government.

58. The flawed outcome and review process suggests that Commonwealth legislation is necessary in the future to ensure uniform and appropriate defamations laws throughout Australia, that can be amended to keep up to date with the changing landscape, in particular regarding publications on the internet.

59. The fact that the law as it applies to digital publishers was not addressed by the Proposed Model Amendments was in itself a major omission in the proposed changes. This is a most important and complex issue as a result of the emergence and dominance of social media. It is by its nature a federal issue and should be addressed by the Commonwealth.

60. [redacted]

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