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The Reviewer
Policy, Reform and Legislation
NSW Department of Communities and Justice
GPO Box 31
Sydney NSW 2001

Dear Reviewer

Re: Stage 2 of the Review of the Model Defamation Laws

Thank you for the kind invitation to make a submission to the review.

I read through the Discussion Paper and the links you sent. My submission will cover both Part A and Part B of the Discussion Paper, although I prefer a narrative submission rather than answer specific questions. It may be inferred from the Terms of Reference that you are concerned about the exorbitant cost of defamation proceedings—the primary focus of this submission.

<u>The High Court has work to do on the political communications defence</u>

Attorney General for NSW, Mark Speakman, published an opinion piece in the August 2020 edition of the *Law Society Journal* to coincide with his proposed amendments to the uniform defamation laws, amendments that went through the NSW Parliament in the blink of an eye—with little or no serious debate. At the time of writing, the amendments are yet to be proclaimed. As a former member of the Legislative Council of the NSW Parliament, I am always suspicious of legislation that you miss if you blink.

The attorney began his opinion piece with the observation that a defence of free speech in defamation law was recognised by the High Court in *Lange v ABC* (1997) 189 CLR 520)—the implied freedom of political communication. In a recent case before the Court of Appeal involving a political spat, an appeal judge wanted to know why *Lange* failed to get a guernsey in the primary court. His Honour was informed that the *Lange* decision was picked up by the qualified privilege defences in the 2005 uniform law amendments.

What the appeal judge might have been told is that far from assisting a defendant seeking the protection of the political communication defence, the uniform law and a string of cases since *Lange* was decided have failed to live up to the expectations of the defence. Perhaps the most expensive case for a politician to defend was the case of *Bennette v Cohen* (2009) NSWCA 60 in which my then parliamentary colleague, Ian Cohen, was sued in defamation for describing a north coast property developer, Jerry Bennette, as a thug and a bully. Cohen won in the primary court and lost in the Court of Appeal where the prospective damages verdict of $15,000 was upheld.

Cohen then failed in an application to secure leave to appeal to the High Court. The verdict, adverse costs orders, plus interest, required Cohen to pay more than a million dollars to the plaintiff. Three years later, Bennette's counsel, Bruce McClintock SC, convinced the High Court in *Papaconstuntinos v Holmes a Court* [2012] 293 ALR 215 that *Cohen* was wrongly decided. The uniform defamation law has not adequately accommodated the free speech defence, and while the High Court laid the foundations for the defence in *Lange*, nobody seems willing to build upon the foundations.

More recently, I sought leave to appeal to the High Court against a verdict of $10,000 in the NSW Supreme Court (*Loder v Bolton* [2020] HCA S132). At issue for the appellant, Narrabri Councillor, Ann Loder, was whether a political comment on another person's Facebook page amounted to secondary publication for the purposes of the defamation law. Leave to appeal was refused. A similar issue (third party publication on the internet) involving mass media organisations in Australia was given leave to appeal in *Australian News Channel Pty Ltd v Voller* [2020] HCA S107. The *Voller case* is being heard today by a Full Court of the High Court in Canberra.

Another recent case where the political communication defence flag has failed to fly thus far is *Hanson-Young v Leyonhjelm* [2019] FCA 1981, a case involving comments across the floor of the Senate parliamentary chamber. While the defendant was punished for repeating the comments outside the chamber, it would be fair to say the comments retained their political flavour—the defendant quoted his own words in the chamber. Even so, the defendant was ordered to pay the plaintiff $125,000 including aggravated damages. An application for leave to appeal to the High Court has been filed by the defendant on the basis of the dissenting judgement of Rares J in *Leyonhjelm v Hanson-Young* [2021] FCAFC 22. To my mind, the costs in this and the other political cases referred to would choke a horse and are out of all proportion to the issues involved.

In the absence to date of action in the High Court to build on the principles enunciated in *Lange*, it falls to the legislature to reform the defamation law to provide cheap and accessible justice for people injured in their reputation and standing in the community. Section 30 of the uniform law has not done the job for which it was intended, in my opinion, and at least two simple legislative solutions come to mind, providing some relief to defendants. First, introduce anti-SLAPP laws that require public figures to prove actual malice by clear and convincing evidence before commencing proceedings (see for example *Palin v The New York Times* [2020] 17-cv-4853 (JSR) (SDNY).

And secondly, amend state and federal parliamentary privileges legislation to confirm that words spoken or written under privilege retain the privilege when repeated outside the chamber by the senator or member responsible for the words. In other words, treat the words as if they were reports of proceedings thereby allowing the ongoing privilege protection. After all, the stated intention of section 16 (2) of the *Parliamentary Privileges Act* 1987 (Cth) is to safeguard Article 9 of the Bill of Rights 1688.

<u>Some questions around publication including intention</u>

As I mentioned, the High Court is today considering in *Voller* some fundamental questions around publication in defamation law, including the question of intention. In the benchmark case of *Webb v Bloch* (1928) 41 CLR 331 [at 363-364], Isaacs J said that if a person had ***intentionally lent his assistance*** to the existence of the defamatory publication, ***his instrumentality is evidence to show a publication by him*** (emphasis added by Isaacs J). I contend that the issue of publication on the internet has wider implications for the general community beyond the questions raised in *Voller.*

In *Loder*, the appellant was found liable as a secondary publisher of defamatory material for a comment she made on a politically inspired Facebook page. The comment was included in the primary judgement *Bolton v Stoltenberg and Loder* [2018] NSWSC 1518 [at 173]: ***Ann Loder**: Anyone else agree about getting ICAC and the Minister for local government involved **need to like this post**. We need to let Council know we are serious and are not going to be intimidated by them* (emphasis added by primary judge). Separate to any question about the political nature of this comment, there is an important question yet to be answered about secondary publication on the internet.

Given that a person cannot be liable in defamation law for 'liking' a post on Facebook, it follows that the person should not be held liable for asking others to 'like' the post. The primary judge found [at 175] that Ms Loder had *by words and conduct in this instance, drawn the attention of another to defamatory words*. There must be something more in my opinion than an analysis of the words of a Facebook comment and the conduct involved in making the comment, otherwise the thumbs-up icon of 'liking' a post would also qualify as a defamatory publication.

Another question for consideration on the subject of Facebook comments is how can a person participate as a secondary publisher in the publication of defamatory matter <u>after</u> it has been published? This question is additional to the question in *Voller* of the potential liability of digital platform operators. I am not aware of any judicial authority on point. It can surely be argued, however, that any Facebook comment on another person's page that fails to add additional material cannot be defamatory as a secondary publication as there has been no participation in the original publication.

The questions that bother me about secondary publication in *Loder* are amplified by practical aspects of the way Facebook works. Intention to participate in the whole of the original post should be relevant in my opinion as Facebook users might be incensed by a few words or lines in an online publication, while remaining indifferent to the bulk of the publication. Or perhaps they have read only part of a post. It should be necessary to prove publication beyond the original post, since a comment on the post on its own has no context. A person is unlikely to read or even comprehend a comment without first reading the original post. Reading the comment should be more shocking and doubly scandalising, so to speak, in order to rebut a presumption that the offending material is in the original post, not the subsequent comment.

Publication more generally on Facebook is a tricky question since Facebook has total control over who has access to Facebook accounts and what may or may not be said on the platform. One example is that the Facebook algorithm determines who actually can see what a person posts on the internet. A person may have several hundred followers on Facebook but only a couple of dozen followers will be able to read what the person posts in their Facebook feed. Even fewer followers will be able to see comments posted on the person's page. The question arose several times in *Loder* about what was meant when the parties talked about the 'reach' of Facebook. In the absence of an explanation from the bar table, the primary judge resolved to ask his teenage children at home.

Anyone who makes a comment on a Facebook page may be directing their comments to the author of a post, or the wider audience likely to read the post. Intention of the person making the comment must therefore be relevant to the test of whether the person has *intentionally lent his assistance to* publishing the defamatory words. In *Loder*, the defendant, Ann Loder, was trying to determine the level of support for a complaint to the ICAC about potential breaches of the Local Government Act. To this end, she asked

readers to like the original post, and the court found that this was an endorsement of the post, including any defamatory imputations it may contain. I remain puzzled that asking readers to 'like' a post on Facebook is defamatory while actually 'liking' the post is not.

Ann Loder was referred to me as an indigent litigant by the Environmental Defender's Office. I formed the view that she was the defendant in what may have been a SLAPP suit in response to her political opposition to coal seam gas mining under the Great Artesian Basin in western New South Wales. Other cases I have been involved in over the years may have been in the same category of litigation. These public interest cases occupy an inordinate amount of court time and cost hundreds of thousands of dollars to run. The damages are generally low or may be nominal. I would argue that serious defamation law reform could include some form of Preliminary Merits Assessment to determine in advance whether the public interest demands recognition that some people are reluctant litigants who may be entitled to a costs indemnity in certain circumstances.

Preliminary Merits Assessment may assist to reduce the cost of defamation proceedings

The 2020 amendments promoted by the attorney did nothing to help clarify the political free speech defence, but they were intended to help mass media organisations defend defamation actions by introducing a 'new' defence of publication of a matter of public interest. In his opinion piece in the *Law Society Journal* referred to above, the attorney lamented the 'fact' that no media organisation had succeeded in a qualified privilege defence since the uniform laws were introduced in 2005, 'even if the public arguably had a right to know the information published'. The attorney was quite wrong—numerous mass media organisations since 2005 have succeeded in a qualified privilege defence.

This so-called 'Right to Know' campaign had been waged by local mass media companies ever since the public benefit and interest tests in the states and territories were subsumed by the 2005 uniform law. In 2005, the same media organisations that now want the right to know, lobbied politicians to the effect that a public interest defence was unnecessary in the uniform law, arguing that truth alone was an adequate defence. Prior to 2005 in New South Wales, for example, a defendant had to prove both substantial truth and public interest to succeed in a defence of truth. What happened after 2005 was that media organisations had to prove the accuracy of sources to a higher standard than the old public interest test to establish truth alone as a defence.

Earlier this year, a group of specialist defamation practitioners (including four senior counsel) wrote to the attorney, urging him to reconsider the consequences of introducing another public interest defence to bolster the truth alone defence in the uniform law. The letter pointed out that the recent decision in *Pell v R* [2020] HCA 12 demonstrates that mere subjective belief is not a good basis for deciding that something is true. Journalists should have an obligation to test their sources and verify allegations, even if publication of the allegations is in the public interest.

Another of the more enlightened features of the pre-2005 defamation laws in New South Wales was the requirement in section 7A of the *Defamation Act* 1974 (NSW) for juries to decide early in proceedings whether the alleged defamatory imputations were carried by the published material. If the jury decided the meaning of the published material in favour of the plaintiff, then that was more or less the end of the case, leaving just the question of damages to be resolved. Most cases settled where the jury supported the plaintiff's imputations. Given the decision to return to the old law with a public interest defence in defamation law, why not go further and bring back section 7A jury trials by creating a new tribunal of experts and call it the Preliminary Merits Assessment Panel?

In many ways, section 7A jury trials were more efficient than today's case management system, deciding the meaning of the alleged defamatory words at the beginning of the case rather than at the end. These early trials as to meaning often helped media organisations as much as private individuals, given that jurors frequently rejected the plaintiff's assertions as to the nature of the imputations or their defamatory meaning. Both parties avoided costly and drawn-out disputes about meaning and had the opportunity early in proceedings to comprehend the opposing case. A panel of experts early on could resolve many aspects of a case, saving litigants an arm and a leg.

In the politically charged case of *Porter v Australian Broadcasting Corporation* [2021] FCA 206, the parties have attempted to reduce the costs of the litigation with an early resolution of the meanings of the alleged defamatory imputations in the published material. This is exactly how the case would have moved forward prior to the uniform law amendments in 2005 in a section 7A jury trial—an effective form of preliminary merits assessment. What the jury would have decided in NSW between 1974 and 2005, the judge is now being asked to determine in 2021. While the court is the final arbiter of what a publication says, in many cases this issue is not resolved until the end of the trial, as pointed out in the *Sydney Morning Herald*.

> In the application filed yesterday, Mr Porter's lawyers ask for these questions of meaning to be 'determined separately to and in advance of any other question of liability'. This has the potential to resolve the proceedings more quickly because the ABC would only have to defend the meanings the court finds were conveyed by the article, rather than seeking to defend all the potential meanings (Michaela Whitbourn, *Sydney Morning Herald*, May 7, 2021, p15).

One difficulty for unrepresented litigants (now 40 per cent of cases I am told) is they have no idea about the complexity of defamation laws or the potential costs of their cases if they lose, which they mostly do. A Preliminary Merits Assessment Panel could assist to resolve these cases, pointing out to the unrepresented litigants that lawyers in defamation cases are not dissimilar to family law property lawyers—they can often run up legal bills that far exceed the monetary value of the dispute.

Another important feature of a Preliminary Merits Assessment Panel might be to narrow the issues in a dispute to the point where the Local Court has jurisdiction, allowing the aggrieved party seeking minimal or nominal damages (as assessed by the panel) to run their case in the Small Claims Division of the Local Court where there is a ceiling of $20,000 on damages and no adverse costs orders. Aggrieved plaintiffs might have their day in court and hapless defendants will not be punished by costs orders out of all proportion to the damage inflicted on the plaintiff.

<u>A word or two about suing foreign publishers such as Google and Facebook</u>.

Recently I tried to sue Facebook for de-platforming me for more than a year when I innocently changed telephone numbers and discovered that the new number I received from Vodafone was the log-in for Joe Bloggs' Facebook page. All my private information

on Facebook was immediately accessible by Joe Bloggs who Facebook accused of impersonating a public figure (me). I approached the Local Court with my statement of claim and was immediately informed that I would need leave of the Supreme Court to sue a foreign company. White & Case for Facebook Inc. in the USA had informed me:

> Facebook Australia is a separate entity, independent of and legally distinct from Facebook Inc. Facebook Australia is not a party to the Terms of Service, and it does not own, operate, control or host the Facebook Service. Please also refer to the decision of *Young v Facebook Australia Pty Limited* [2015] FCA 1440 as an example of a case in which Facebook Australia was held to be the wrong respondent for claims pertaining to the Facebook Service (letter dated 12 May 2021 from White & Case to the author).

Most surprising to me is that while Facebook Australia might not be a formal party to the Facebook Service, clause 4.4 of the Facebook Terms of Service provides as follows:

> If you are a consumer, the laws of the country in which you reside will apply to any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms or the Facebook Products, and you may resolve your claim in any competent court in that country that has jurisdiction over the claim.

Of course, what the clause fails to say is that the judgement of a foreign court outside the USA is unenforceable. You must sue Facebook Inc. in the USA and/or the Republic of Ireland to secure an enforceable judgement against the media monolith. One small defamation law reform that would greatly assist Australian consumers is a statutory provision that requires foreign corporations and/or their local representatives that seek to benefit from the local market to have claims against them adjudicated and enforced locally. The difficulty of suing Facebook Inc. in the USA and/or the Republic of Ireland over a local privacy or defamation issue is just ridiculously complicated and expensive. One such case is *Australian Information Commissioner v Facebook Inc and Facebook Ireland Limited* [2020] FCA 246, a case that appears to be hibernating for the winter.

The proposed statutory reform would overcome the difficulty of adjudication and enforcement outside the USA−conveniently described in the letter from White & Case representing Facebook Inc. and referred to above: *You will appreciate that, as an entity located outside the Commonwealth of Australia, Facebook Inc. is not within Australian jurisdiction. Facebook Inc. does not submit to Australian jurisdiction and reserves all available objections.* Some of us believe it is bad enough that companies like Google and Facebook fail to pay their fair share of taxes in Australia; to allow them to operate outside our legal system is a bridge too far in my submission.

Yours sincerely

PETER BREEN