



Law Council
OF AUSTRALIA

Office of the President

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Community Rights Team
Community Justice | Justice Policy and Legislation
Department of Justice and Community Safety
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Dear Community Rights Team

REVIEW OF MODEL DEFAMATION PROVISIONS STAGE 2 PART B: EXPOSURE DRAFT AMENDMENTS AND CONSULTATION PAPER

1. The Law Council welcomes the opportunity to make a submission to the Attorneys-General, regarding Part B of the Review of the Model Defamation Provisions (**MDPs**).
2. On 12 August 2022, the Meeting of Attorneys-General agreed to seek further public feedback on the consultation draft amendments to the MDPs. On 24 August 2022, consultation opened for the Part B consultation draft Model Defamation Amendment Provisions 2022 (**Proposed Amendments**) and the associated Consultation Paper, 'Review of the Model Defamation Provisions Stage 2 Part B Policy Options' (**Consultation Paper**).
3. The Law Council is grateful for the assistance of its Defamation Working Group, the Law Society of Western Australia, and the New South Wales Bar Association in the preparation of this submission.

General Position

4. The Law Council does not underestimate the challenges faced by victim-survivors in bringing complaints about sexual harassment, sexual assault, and family violence. Its response below has careful regard to the need to empower victim-survivors, noting that access to justice (legal services, information, and education) can be a more appropriate vehicle of change than law reform.
5. It is the Law Council's general view that the qualified privilege defence currently provides the appropriate level of protection to individuals in making genuine, honest complaints to appropriate recipients.¹ The qualified privilege defence appropriately balances protection for complainants with the significant reputational harm that could be caused by false and malicious reports or allegations.

¹ The Law Council notes the alternative position of the Law Society of Tasmania's Employment, Diversity and Inclusion Committee specific to sexual harassment and bullying in the legal profession provided in the Law Council's previous submission: Law Council of Australia, Submission to the Attorneys-General, *Review of Model Defamation Provisions - Stage 2 Discussion Paper* (4 June 2021) 19-20.

6. A defence of qualified privilege is defeated if the plaintiff (that is the person alleging that their reputation has been unjustifiably harmed) proves that the defendant was ‘actuated by malice’ in publishing the complaint. Malice is highly difficult for the plaintiff to prove, and the defence of qualified privilege provides a high level of protection for a person making a complaint.²
7. As noted by the New South Wales Bar Association, the availability of qualified privilege is a significant deterrent to potential plaintiffs bringing defamation proceedings.³
8. The Law Council also notes that sections 47A and 94 of the *Sex Discrimination Act 1984* (Cth) (and comparable federal discrimination laws) may also offer additional protection against ‘victimisation’ in certain cases.⁴ It is arguable that a person commencing defamation proceedings, or threatening to bring defamation proceedings, against a person who has made, or proposes to make, a complaint has committed an act of victimisation. The Law Council understands that there are two current matters before the Federal Court of Australia where this issue has been raised.⁵ At the time of writing, those judgments are reserved. These provisions provide for significant penalties and may act as further deterrents to potential plaintiffs bringing defamation proceedings in many circumstances.⁶
9. However, the Law Council recognises that the threat or fear of being sued for defamation (however unlikely in actuality) can also be a deterrent for some victim–survivors in bringing complaints (particularly in relation to sexual harassment, sexual assault, and family violence). In its previous submission, the Law Council noted that:

*... anecdotally, defamation is occasionally used as a threat against people who have reported workplace sexual harassment. While such threats rarely lead to legal proceedings, they may intimidate complainants at a vulnerable time, deterring them from proceeding with the complaint.*⁷
10. It is consistently recognised throughout the Consultation Paper that there is often a power imbalance between the person making an allegation and the alleged offender, that the law (particularly as it relates to qualified privilege) is not well-understood, and that the legal system can be complex and difficult to navigate.
11. It is unclear to the Law Council how, in and of itself, the proposal to extend the circumstances when absolute privilege applies in relation to potential defamation liability, would address this type of ‘chilling effect’. In the Law Council’s view, changes to the law will not address these concerns. For example, a person being threatened with defamation proceedings who is not aware of the potential protection of the qualified

² For further information see New South Wales Bar Association, Submission to the Attorneys-General, *Discussion Paper: Review of Model Defamation Provisions – Stage 2* (31 May 2021) 32–3.

³ *Ibid.*

⁴ It should be noted that the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) is currently before the Australian Parliament. Should this Bill be passed, provisions similar to sections 47A and 94 of the *Sex Discrimination Act 1984* (Cth) would also be inserted in the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth) and *Racial Discrimination Act 1975* (Cth).

⁵ *Burston v Hanson* (Federal Court of Australia, NSD652/2020, 5 June 2020); *Hanson v Burston* (Federal Court of Australia, NSD1210/2020, 3 November 2020).

⁶ The Law Council notes that as drafted, the defence of absolute privilege would not apply to complaints to the Australian Human Rights Commission under the *Sex Discrimination Act 1984* (Cth). See further discussion at paragraph [25] of this submission.

⁷ Law Council of Australia, Submission to the Attorneys-General, *Review of Model Defamation Provisions - Stage 2 Discussion Paper* (4 June 2021) 19, [81].

privilege defence, is similarly unlikely to be aware of the potential protection of the absolute privilege defence (should it be expanded as proposed).

12. The key to addressing such power and information imbalances, and emboldening victim–survivors to proceed with complaints, is to improve the information provided by police and other organisations receiving complaints, increasing community legal education and, most critically, ensuring that legal advice and support is readily available to persons considering making a complaint.

Additional observations

13. The Law Council makes the following additional observations concerning the Consultation Paper:

- (a) Breakout box 1 on page 11 is materially inaccurate. It consistently refers to indicia contained within the defence of statutory (rather than common law) qualified privilege (see section 30 of the MDPs). However, reports of criminal or unlawful activity made to the police occur on a recognised occasion of common law qualified privilege. The Law Council accepts that a defence of common law qualified privilege may be more costly to litigate than a defence of absolute privilege. However, that is unsurprising given the defence of absolute privilege confers an extraordinary benefit on a publisher—being absolute protection from the making of a false and malicious statement.

- (b) In section 1.3 of the Consultation Paper headed ‘False reports are rare’, the first sentence cites in support of the notion that false complaints of sexual assault are ‘rare’, a 2016 paper by Claire Ferguson and John Malouff entitled ‘Assessing police classifications of sexual assault reports: A meta-analysis of false reporting rates’.

The classification of reports as false is not straightforward. Assuming that false report data can be accurately collected and using a conservative definition for false reports, the authors concluded that confirmed false reports of sexual assault occur at a rate of about 5 per cent. The authors noted the difficulty of obtaining reliable research on rates of false reporting of non-sexual violent crimes, but made a tentative observation that false allegations of sexual crimes happened more frequently than false allegations of other types of crime.

While the Law Council accepts that the vast majority of reports by complainants are genuine, the figure of 5 per cent is not insignificant. It would in fact represent a substantial number of reports made annually to police in this country.

The only other protections available against false and malicious statements consist of criminal offences for the making of false complaints. Those offences may be prosecuted from time to time, but resourcing constraints invariably mean that such an avenue is rarely pursued. Without the prospect of bringing defamation proceedings, the person subject to the false or malicious complaint will then have no personal remedy available notwithstanding potentially devastating consequences.

- (c) Section 1.3 of the Consultation Paper further observes that absolute privilege has been extended to reports made to the Australian Health Practitioner Regulation Agency. Although the source is not referenced, under clauses 15 and 27 of Schedule 1 to the *Defamation Act 2005* (NSW), absolute privilege is extended to some communications in relation to medical practitioner complaints and some

communications to the Health Care Complaints Commission. These protections are limited, and their precise scope is uncertain.⁸ However, section 237 of the Health Practitioner Regulation National Law (NSW) (**the National Law**) extends protections against any civil or criminal liability only to communications (including notifications and the provision of information under the National Law) that are made in good faith.⁹

14. The Law Council suggests that if, contrary to the Law Council's general position, the defence of absolute privilege is to be extended to police reports, then consideration could be given to whether the defence should be qualified by a provision that the defence is lost if the plaintiff establishes that the complaint was not made in good faith. Section 237 of the National Law provides a useful precedent in this regard.

The drafting of the proposed amendments to sections 4 and 27 of the MDPs

15. The Law Council opposes Recommendation 1.
16. This recommendation states that the 'preferred scope of publications to be protected by the defence of absolute privilege is allegations of unlawful personal conduct'. 'Unlawful personal conduct' is defined in the Proposed Amendments to mean:

criminal conduct or other conduct by an individual against another individual that is unlawful under a law of an Australian jurisdiction, including conduct involving the infringement of a human right for which a law of an Australian jurisdiction provides a remedy or complaint mechanism.

17. In the Law Council's view, the proposed definition of 'unlawful personal conduct' is too broad and ambiguous. A wide range of offending, including theft, fraud, crimes of dishonesty and others, could be argued to fall within this definition. Such an expansive definition could mean that false reports of crimes other than sexual crimes, or crimes of violence, would be protected by the defence of absolute privilege when that does not appear to be the intention of the proposed reforms.
18. Additionally, the reference in the definition to a 'human right for which a law of an Australian jurisdiction provides a remedy or complaint mechanism' is also potentially confusing and uncertain. What may be considered a 'human right' will have different meanings and applications depending on the context, some of which may not be intended to be captured for the purpose of the defence.
19. If the intent is to capture sexual offences and offences involving violence, then the provision should simply say as much.
20. Should the proposed reforms proceed, the Law Council suggests that a narrow scope of unlawful personal conduct, designed to protect reporters of sexual offences and offences involving violence, be considered which does not otherwise extend the reach of the absolute privilege defence.
21. The Law Council is also concerned with the wording of the proposed new subsection 27(2) insofar as it applies where 'the matter published concerns alleged unlawful

⁸ See for instance *Hunter v Hanson* [2017] NSWCA 164 at [28]-[30], *Lucire v Parmegiani* [2012] NSWCA 86.

⁹ See to similar effect section 176E of the *Health Practitioner Regulation National Law* (NSW) and section 245G of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which also extend protection to particular communications made in good faith.

personal conduct that is published ... to a police force'. The Law Council identifies difficulties with this provision:

- (a) First, there is nothing stopping a person making such a complaint at the same time as publishing to others and then seeking to claim the benefit of the new defence. Reports or complaints to police are often made in informal public or other non-private settings where other persons are present or can hear the complaint. An example would be an email sent to police, but which is also copied to various media organisations. Should the proposed reforms proceed, the provision should limit the defence to communications made solely to the police. A practical way to achieve this, for example, would be to insert after proposed paragraphs 27(b1)(i) and (ii) the words 'and published to no other person'.
- (b) Secondly, the defence would appear to extend to situations where, for example, a relatively low-level assault appears alongside other far more defamatory material. Indeed, it would be possible for a malicious complainant to tailor their complaint to the police to ensure it fell within the protection by adding such material. The word 'concerns' is insufficient to address this problem, as that word could arguably apply to a small part of a whole complaint. One option to partially alleviate this problem would be to insert the word 'primarily' before 'concerns'.

Police

- 22. In accordance with the general position stated above, the Law Council does not consider that an extension of absolute privilege to reports to police (Recommendation 2) strikes the right balance between the public interest in shielding complaints and the rights of persons to protect their reputations. Accepting that false complaints are rare, qualified privilege still allows a person to seek relief for malicious reports, which an absolute defence does not.

Other Bodies

- 23. Should the proposed reforms proceed, the Law Council does not oppose Recommendation 3 to the extent it seeks to bring other states and territories in line with New South Wales by extending the defence of absolute privilege to protect communications involving various statutory and other bodies within existing statutory frameworks. However, the Law Council opposes further extension of the defence.
- 24. It is appropriate that each jurisdiction identify to which 'other bodies' the absolute privilege defence would apply. As identified at page 42 of the Consultation Paper, it is important that each jurisdiction retains discretion to not extend absolute privilege to publications made to any particular body where safeguards (such as confidentiality requirements) are insufficient.
- 25. The Law Council also suggests that, should the reforms proceed, consideration also be given as to whether the absolute privilege defence should be extended to apply to complaints (or potential complaints) to federal bodies, such as the Australian Human Rights Commission (as is noted at page 36 of the Consultation Paper).

Employers

- 26. The Law Council supports Recommendation 4 and agrees that the defence of absolute privilege should not be extended to publications alleging unlawful personal conduct made to employers.

Safeguards to protect against reputation damage

27. The Law Council reiterates its position that the defence of qualified privilege is preferred to an extension of absolute privilege, and a qualified privilege defence provides the appropriate safeguards against false and malicious reports.
28. The Law Council submits that, should the defence of absolute privilege be extended, including to police reports (contrary to the Law Council's position), further safeguards should be introduced to protect against the making of false and misleading publications. An appropriate option might be a 'good faith' provision.
29. As another safeguard, the Law Council submits that the MDPs should be amended to include an express provision that such complaints to the police or any other specified body are not public documents for the purposes of section 28, and that any report by the media or other person of such a complaint is not protected by the defence. Additionally the complainant should not receive the benefit of the defence where the complaint is passed on to anyone beyond the relevant investigatory or disciplinary body.
30. Alternatively, the question of safeguards could be revisited if there is a demonstrable increase in false and misleading reports to bodies once the amendments to the MDPs are made and enacted in the states and territories.

Contact

31. Please contact Mr John Farrell, Senior Policy Lawyer, on (02) 6246 3724 or at john.farrell@lawcouncil.asn.au in the first instance if you require further information or clarification.

Yours sincerely



Mr Tass Liveris
President