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LAW REFORM
INSTITUTE

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Director, Strategic Legislation and Policy
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Office of the Secretary
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By email: haveyoursay@justice.tas.gov.au

Dear Director,

Defamation Amendment Bill 2021: Amendment to Uniform Defamation Laws in Australia

Thank you for the opportunity to provide feedback on the abovestated draft bill.

The Tasmania Law Reform Institute (TLRI) supports the continuing review and reform of defamation law in the state for the benefit of all Tasmanians.

As a matter of general principle the TLRI endorses the move towards greater uniformity between Tasmanian defamation law and that of other Australian jurisdictions. Historic differences in the establishment of, and defence to defamation, generated burdens and injustice, particularly through forum shopping.

TLRI notes that the present bill implements model provisions agreed to nationally by the Council of Attorney's General Defamation Working Party. TLRI also notes that the national model provisions have already been legislatively implemented in other Australian jurisdictions.

To the extent that uniformity in the establishment of, and defence to defamation is a paramount law reform consideration the Institute is reluctant to recommend substantive deviation from the model bill by Tasmania. However, in the TLRI's opinion there are

some matters which the Tasmanian Government and Parliament should consider before implementing the bill.

Gender Neutral Language

The TLRI supports the addition of section 10 of the original national model law to the Tasmanian Act. However the TLRI recommends that gender neutral language should be used in 10(1)(a) "(whether published before or after his death)", the pronoun "his" should be changed to "their", or at the very least be substituted for 'his or her'. This should be the case throughout the amendmets.

Balance between rights of plaintiffs and protection of defendants

As a general note the Bill appears to be predominantly directed to introducing provisions aimed at reducing litigation and protecting potential or actual defendants against whom defamation is claimed. The TLRI agrees that:

- It is beneficial to reduce burdens on the legal system from frivolous claims.
- Non adversarial resolution of disputes should, wherever possible, be encouraged as an alternative to litigation; and
- Defamation law should be regulated to reduce any disproportionate effects on constitutional and common law rights and freedoms, particularly freedom of political communication and freedom of speech more generally.

However, in the TLRI's view those aims need to be balanced against the benefits and protections of defamation law for plaintiffs and the public.

Defamation provides an avenue to remedy reckless or intentionally harmful statements which can cause significant damage to individual's public reputation and by consequence their livelihoods, relationships and personal wellbeing. This is especially important given the financial and structural imbalance between media companies and individuals.[1] The introduction of social-media, and the concentration of conventional media ownership in states like Tasmania – in some domains to single actors – has arguably served to compound that imbalance.[2]

[1] *ABC v Lenah Game Meats* (2001) 208 CLR 199, per Callinan J at 302-303.

[2] Conventional news remains the primary 'source' of news stories, but social media serves to amplify its scale, reach and permanency by acting as a network through which they are distributed (i.e. through 'sharing' or 're-tweeting' the story or opinion). Whilst it is true that social media provides individuals an easier access point to the 'marketplace of ideas'; the reality is that, unless the individual

Defamation also has a role to play in promoting the public interest by holding to account persons who publish disinformation about individuals and matters of public interest; especially publications aimed at undermining public confidence in core democratic and constitutional systems.[3] This has been most acutely evident in the use of defamation to reduce the damage caused by the promotion of false conspiracy theories about the 2020 US Presidential election.[4] A more discrete Australian example is the use of defamation to correct the public record after another Senator made untrue statements about what had been said within Parliament outside of Parliament (and therefore outside of the Senate's authority to sanction).[5]

Both the above situations indicate the importance of protecting the rights of plaintiffs to remedy untrue statements and harmful disinformation. However, the present Bill appears predominantly (arguably only) concerned with the rights of defendant publishers. Whilst the previous reforms to defamation law were justified by evidence that the law was unbalanced in favour of plaintiffs the Institute is not aware of any Tasmanian relevant data which justifies a move to further limit the rights of plaintiffs to pursue actions in defamation.

The TLRI understands concerns in that jurisdiction led to a consultation and report from NSW to the Council of Attorney's General.[6] However, by consequence the drivers of reform which led to the drafting of this Bill are necessarily the views of stakeholders and data from that jurisdiction. Since the passing of the *Defamation Act 2005* (Tas) there has been no marked increase in defamation actions under that Act.[7] Indeed, the opposite

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has the online audience and social-network reach of the conventional publisher, they are highly unlikely have the ability to effectively counter the damage caused.

[3] Indeed, earlier this year, the High Court confirmed the legitimacy and proportionality of laws designed to reduce disinformation and propaganda *LibertyWorks Inc v Commonwealth of* Australia [2021] HCA 18 (16 June 2021)

[4]For instance it appears that defamation suits in have been more successful than legislative measures in reducing the spread of lies and unfounded conspiracies about the U.S election by public figures and media organisations See e.g. *US Dominion, Inc. v Giuliani*, 1:21-cv-0021; *US Dominion, Inc. v. Powell* (1:21-cv-00040); a discussion of the effects of these suits is discussed in Nancy Costello "Dominion, Smartmatic lawsuits against Fox News may not threaten freedom of the press" *The Conversation*, 27 March 2021. Whilst such litigation would be limited by current uniform Australian defamation laws, the U.S example indicates the importance of defamation law as a check on irresponsible use of the media to unjustifiably undermine public trust and confidence in fundamental democratic systems.

[5] *Leyonhjelm v Hanson-Young* [2021] FCAFC 22

[6] Council of Attorneys-General, *Review of Model Defamation Provisions: Discussion Paper* (2019).

[7] Claims in defamation by now-defunct Tasmanian company Gunns Ltd against several activists and campaigners which were lodged in 2004 and concluded by settlement in 2010 are, in the TLRI's view, an example of the potential for unregulated defamation law to disproportionately affect other rights and freedoms. However, those actions were commenced before the enactment of the present uniform defamation laws. Those actions would not be permitted under the present Tasmanian Defamation Act 2005 due to the reforms contained within it. The Institute is unaware of any similar punitive litigation occurring in Tasmania under the 2005 Act.

appears to be true. Nor is the TLRI aware of any data suggesting that threats of defamation are a problem in Tasmania following the enactment of the present Act.

Noting what is said above about the preference for uniformity it is still essential that Tasmanian law be appropriate and adapted to Tasmanian circumstances, particularly in ensuring it does not undermine private or public rights and interests here. In particular the Institute is concerned about the Bill unjustifiably further raising the bar to Tasmanian individuals, small businesses and/or start-up plaintiffs whose rights are affected by defamatory publications by larger corporations. Notably the introduction of serious harm and single publication rules are heavily focused on the rights of defendant media organisations without balance for their potential impact on the rights of plaintiffs.

Serious Harm and Single Publication

Proposed Section 10A introduces a serious harm element, without defining what serious harm is, how it can be pleaded, or how it should be determined by the Court.

- The TLRI is concerned that the absence of such legislative directions will generate case-management burdens and increase cost barriers for parties.

The TLRI is also concerned that the serious harm element will favour established corporations and public figures who can easily establish an existing financial, political or social reputation. It will be much harder for persons or organisations who are emerging into the market or establishing a reputation there to prove serious harm, even though arguably they would be more vulnerable to reputational attack. That would include, for instance Tasmanians who are:

- At start of their career who are damaged by a negligent misstatement affecting their future employment potential;
- Involved in student politics or citizens aspiring to a political career who are not yet in elected office;
- Business start-ups that have not yet penetrated the market or made a profit; or
- Inventors, who have not taken their product to market.

Given the costs of litigation already serve as a disincentive to such entities commencing a defamation action, the serious harm threshold in 10A is likely to broaden the gap between those with and without resources accessing justice.

Similarly, the single publication rule in proposed s 20AB, combined with the statutory time bar in Section 20A, has the potential to disproportionately impact the rights of emergent, rather than established individuals and businesses.

Notably, the proposed additions and amendments in 10A, 20A and 20AB do not:

- Take into account that those at the beginning of their career or product development may be increasingly affected by a historic publication;
- Recognise that people's careers or business may change over time such that a publication which may not meet the 'serious harm' threshold in 10A at one point in their life serves to cause serious harm at another stage in their lives;
- Require knowledge of the original defamatory publication by the plaintiff (either in present or amended s 20A).

By way of practical example, the following hypothetical scenarios highlight the unfairness created by these new provisions:

- A publication by person Y states person X, a lawyer is a 'well known CCP sympathiser with connections to Beijing'. The claim is based only on having represented a client with such connections. X chooses not to pursue the publisher given the time and cost expenses and the view that a claim in defamation will not, at that time, meet the 'serious harm' test in 10A. Three years later the lawyer is appointed by the Commonwealth Government at a national defence agency. Y republishes the story given its heightened newsworthiness. X seeks its removal and an apology given their employment context has substantially changed and the imputations will now have a 'serious harm' to their professional reputation. Because of the operation of s 20A, X is statute barred from requiring that Y apologise, withdraw the publication or pay damages for continued publications of the defamatory imputations.
- Person A invents new type of storage battery. Person B publishes an article in an online technology magazine implying that A misappropriated B's IP to make the product. Person A is *unaware* of the publication at the time. Three years later the product completes regulatory and safety testing and A seeks funding to bring the product to market. B republishes the allegations in near identical form which receives international attention online damaging the market release of the new battery. A is statute barred from restraining the publication or obtaining damages for loss of income.

Reform consideration

The TLRI is very supportive of measures to reduce interjurisdictional conflicts and stop forum shopping. The Institute is also aware that the introduction of specific provisions to protect the reputation and financial rights over Tasmanians would likely infringe the free trade provisions found in s 92 of the Commonwealth Constitution. The ability of Tasmania to introduce special provisions to protect plaintiffs' rights, whilst also discouraging interstate litigants from forum shopping here are extremely limited.

The preference for national uniformity is to ensure that the rule of law, procedural fairness and the advancement of rights and interests are promoted. However, if uniformity leads to injustice, or inequitable circumstances in this jurisdiction then there is cause to pause local enactment, or to encourage further national debate.

The Institute is concerned that the present reform agenda reflects the circumstances in specific jurisdictions without consideration of the impact on the procedural or legal rights of litigants in other jurisdictions. The Institute is also concerned that the reform agenda is dominated by concerns about conventional media companies being defendants in actions involving republication of their material in digital or social media forums. That is a legitimate concern, but the response does not address the major inequity with defamation law, which is its favouring of well resourced litigants over poorly sourced ones. In fact, it appears likely to broaden the gap between those who can access justice and those who can't.

Further reforms in a nationally consistent framework should be informed by both national and local circumstances and data. This reform agenda should apply to both plaintiffs and defendants and incorporate data and stakeholder feedback from all jurisdictions, but especially Tasmania. In particular the TLRI would encourage engagement with defendant lawyer organisations, small business, and civil society before restricting the ability of individuals present and future capacity to obtain remedies for defamatory publications. The Institute suggests that the most appropriate body to consider the efficacy of further amendments to nationally consistent laws is the Australian Law Reform Commission.

Staff of the TLRI are available to discuss these concerns and views as needed.

Yours Sincerely,

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