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LAWYERS

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Council of Attorneys-General Review of Model Defamation Provisions
Submission by Banki Haddock Fiora on the
Draft Model Defamation Amendment Provisions and Recommendations

This submission is made by Banki Haddock Fiora (**BHF**), a Sydney-based boutique media and intellectual property law firm, in response to the consultation draft of the Model Defamation Amendment Provisions released on 12 November 2019 in connection with the Council of Attorneys-General Review of Model Defamation Provisions (**Draft Amendment Provisions**) and the recommendations set out in the Background Paper accompanying the Draft Amendment Provisions (**Recommendations**).

BHF welcomes the Draft Amendment Provisions, which address a number of significant issues identified both by the Working Party and stakeholders with respect to the current legislative regime. However, BHF submits that several matters warrant further attention if the Working Party is to take full advantage of what is a once-in-a-generation opportunity to enact truly meaningful and much needed reform of Australian defamation law.

These submissions generally refer and respond to the Recommendations set out in the Background Paper, rather than to the Draft Amendment Provisions themselves. For the sake of simplicity, where BHF supports or has no comment in relation to any particular Recommendation, that Recommendation is not referred to in these submissions.

1. Recommendation 1 – Policy objectives

1.1. BHF notes that concerns were raised in submissions that the operative provisions of the current Model Defamation Provisions (**MDPs**) do not give adequate weight to freedom of expression, with the effect that the balance is significantly tilted in favour of the protection of reputation. While BHF acknowledges the Working Party's view that Courts *should* take the objects of the MDPs into account, experience has shown that in many cases they do not. BHF therefore submits that, absent any changes to the objects of the MDPs, the Court should be required to have regard to freedom of expression in

considering the availability of a re-formulated public interest journalism defence (see BHF's response to Recommendation 11 below).

2. Recommendation 2 – Broadening the right of corporations to sue for defamation

2.1. BHF supports the proposed amendments, but also submits that the definition of “associated entities” in clause 9(4) of the MDPs should be amended to refer to the definition of associated entities under section 50AAA of the *Corporations Act 2001* (Cth), rather than to the narrower definition of related bodies corporate in that Act. This would ensure consistency both with the proposed single publication rule and proposed clause 23(3).

3. Recommendation 3 – ‘Single publication rule’

3.1. BHF strongly supports the introduction of a single publication rule.

3.2. However, BHF submits that there is simply no basis for broadening the discretion to extend the limitation period, whether in line with section 32A of the *Limitation Act 1980* (UK) or otherwise. The purpose of introducing a single publication rule is to ensure that the practical effect of the law better reflects the rationale for the existing one-year limitation period, and to address the virtually endless limitation period for online publications resulting from the multiple publication rule. A single publication rule would not, it is submitted, unreasonably limit or abrogate the rights of aggrieved persons to commence proceedings. Rather, such a rule merely reflects the status quo for all types of defamatory publication other than online publications. Consequently, BHF submits that the current provisions (for example, section 56A of the *Limitation Act 1969* (NSW)) are appropriate and should be retained.

3.3. BHF acknowledges that the proposed wording of the single publication rule has been adapted from the language of section 4 of the *Defamation Act 2013* (UK) (**UK Act**), including the proviso in clause 3 that the rule does not apply to a subsequent publication “if the *manner* of that publication is materially different from the *manner* of the first publication” (emphasis added). However, BHF submits that the references to the “manner” of publication are ambiguous and imprecise, noting that the equivalent provision has not yet been tested in the UK. For example, it is not clear whether a hyperlink to an earlier online article would constitute a subsequent publication for the purpose of clause 1A of the Draft Amendment Provisions.

4. Recommendation 4 – Offers to make amends

4.1. **4(a)** – BHF welcomes the introduction of proposed clause 12A, requiring a concerns notice to be served before a plaintiff can commence proceedings. However, BHF submits that clause 12A(1)(c) should provide that a person cannot commence

proceedings unless a period of at least 28 days (not 14 days) has elapsed from *receipt* of a concerns notice. The use of the term “given” in clause 12A(1)(c) establishes a timeline by reference to an event over which the prospective defendant has no control. Experience has shown that concerns notices addressed to media entities are often sent to inappropriate recipients, such as journalists or editors, or to generic “feedback” email addresses, which may or may not be received in a timely fashion or at all. The timeline for a response should therefore be established from the date the concerns notice is received (with a similar amendment made to clauses 14(1)(a) and 18(1)(a)).

- 4.2. Further, allowing a complainant to commence proceedings within 14 days after the defendant receives a concerns notice, when the prospective defendant still has a further 14 days within which to respond, undermines the purpose of the clause of encouraging the earliest possible resolution of disputes and avoiding litigation where possible, because the complainant is under no obligation to allow the full amount of time for a response to elapse before the parties are subjected to costly and time-consuming proceedings.
- 4.3. **4(b)** – BHF submits that the words “as soon as reasonably practicable” should be omitted from clause 18(1)(a). The inclusion both of the 28-day time limit and the phrase “as soon as reasonably practicable” renders the provision even more ambiguous than the current clause 18(1)(a), and is apt to result in uncertainty and confusion amongst parties, practitioners and the Court.
- 4.4. **4(d)** – BHF submits that the proposed amendments to the statute of limitations in each jurisdiction that are set out in paragraph 31 of the Draft Amendment Provisions (for new subsections 1(2), (3) and (4) to replace the existing subsection 1(2) in Schedule 4, Part 4.1 to the statute of limitations) are unnecessary, given the effect of clause 12A(3). BHF also submits that the automatic extension will likely act as a disincentive for plaintiffs to serve concerns notices in a timely fashion, undermining the purpose of clause 12A and the one-year limitation period. BHF submits that these clauses should be deleted from the amended MDPs.

5. Recommendation 5 – Juries’ consideration of offers to make amends

- 5.1. BHF reiterates its original submission that the jury, and not the judge, should determine whether an offer of amends defence has been established. BHF also submits that the offer of amends defence should be considered after all other matters have been determined by the jury, in light of the potential prejudice to the jury that could arise from having it consider without prejudice material early in the proceedings.
- 5.2. BHF accepts that having the jury consider the relevant without prejudice material for the purpose of considering the availability of the defence, after the other issues in the trial

have been determined, might take some additional time. However, having the issue determined by the judge could result in even a longer delay to the resolution of the proceedings. For example, the judge might direct the parties to prepare submissions on the issue, and in many cases would be likely to reserve his or her decision, resulting in a further substantial adjournment.

5.3. Further, having the jury determine the issue is consistent with the position in relation to other defences, almost all of which are determined by the jury.

5.4. Alternatively, the jury should be directed that the offer does not constitute an admission of liability and was made in the interests of resolving the dispute as early as possible, and to seek to avoid the cost and inconvenience of trial.

6. Recommendation 6 – Content of offers to make amends and concerns notices

6.1. **6(a)** – While BHF supports the amendment in principle, we submit that the term “location” used in clause 14(2)(b) is imprecise. The MDPs should provide that the complainant is required to annex the matter complained of to the concerns notice. If the publication is in an audio/visual format, the complainant should be required to provide it to the publisher (for example, on a USB stick), or otherwise provide a transcript of the broadcast or publication.

6.2. **6(b)** - BHF supports the proposed amendments to clause 15(1)(d), but would also propose that such an apology, correction or information could be disseminated by any means that is reasonable in the circumstances, rather than just being published (given that “publication” may not be appropriate or desirable in all instances).

6.4. With respect to the issue of the award of indemnity costs where the plaintiff issues proceedings before the expiration of the period during which an offer to make amends may be made, BHF submits that, provided the 14-day period in clause 12A of the Draft Amendment Provisions is amended to 28 days (for the sake of consistency with clauses 14(1)(a) and 18(1)(a)), no further amendments are necessary.

7. Recommendation 8 - Jury trials in the Federal Court of Australia

7.1. BHF supports the amendments to the *Federal Court of Australia Act 1976* (Cth) as recommended by the Working Party. BHF also considers that Federal Government should become a signatory to the Intergovernmental Agreement.

8. Recommendation 9 – Amendment of clause 26 (defence of contextual truth)

9.1. BHF supports reform of the contextual truth defence provisions of the MDPs, and notes that clause 26 of the Draft Amendment Provisions are a significant improvement on the current provisions, including in relation to pleading back the plaintiff’s imputations proven true at trial.

9.2. Nevertheless, BHF submits that the following further amendments to clause 26 would render the defence simpler and clearer (amendments to the Draft Amendment Provisions in red):

26 Defence of contextual truth

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter ~~carried, in addition to the defamatory imputations of which the plaintiff complains,~~ carried one or more ~~other~~ imputations that are substantially true (**contextual true imputations**) ~~that are substantially true~~), and
 - (b) any defamatory imputations of which the defamatory plaintiff complains that are not ~~contextual-true~~ imputations and are also carried by the matter do not further harm the reputation of the plaintiff because of the substantial truth of the **contextual-true** imputations.
- (2) The ~~contextual~~ imputations on which the defendant may rely to establish the defence include imputations of which the plaintiff complains.

9. Recommendation 11 – Amendment of “reasonableness test” in s 30

9.1. **11(a)** – BHF submits that the introduction of a new public interest reporting defence is, in principle, a vital and welcome reform. However, BHF submits that the new defence should be based on section 4 of the UK Act, rather the New Zealand Court of Appeal decision of *Durie v Gardiner* [2018] 3 NZLR 131.

9.2. BHF submits that the structure of the proposed defence in clause 29A too closely emulates the statutory qualified privilege defence in clause 30, with little practical difference between the two defences. The only substantial distinction between proposed clause 29A and the existing clause 30 can be summarised as follows:

- (a) public interest is an element of the clause 29A defence, whereas public interest is merely a relevant consideration under the clause 30 defence (per clauses 30(3)(a) and (c)), noting that 30(3)(a) has been slated for removal under the Draft Amendment Provisions; and
- (b) the conduct must be “responsible” under clause 29A as opposed to being “reasonable in the circumstances” under clause 30, both of which are to be considered objectively, but which we submit do not greatly differ in practical terms.

9.3. By contrast, a defence modelled on section 4 of the UK Act would provide a genuine public interest journalism defence, distinct from qualified privilege but without affecting

the availability of that defence, where appropriate.

- 9.4. Further, the list of considerations set out in proposed clause 29A(2) would be likely to be treated by the Court in virtually the same way as the current clause 30(3) considerations, as requiring a “counsel of perfection” (notwithstanding Justice White’s comments to the contrary in *Hockey v Fairfax Media Publications* [2015] FCA 652; 237 FCR 33), or as a series of “trip-wires” or hurdles, each of which must be overcome by the defendant in order to make out the defence. The difficulties faced by media publishers in seeking to rely on statutory qualified privilege are well known, such that to our knowledge there have been no cases since the enactment of the *Defamation Act 2005* where a media publisher, in the absence of justification defence, has successfully defended a proceeding solely on the basis of that defence.
- 9.5. Consequently, BHF submits that a public interest journalism defence modelled on section 4 of the UK Act should not include a list of *Reynolds* considerations. The relevant enquiry under the UK formulation of the defence is on the reasonableness of the publisher’s subjective belief that the publication was in the public interest, considered by reference to any matter that is relevant in the circumstances. By contrast, the list of considerations set in proposed clause 29A(2) are relevant to determining the objective reasonableness of the publisher’s *conduct*, as distinct from their *belief*. It is notable that the UK formulation of the defence does not include any such list of considerations.
- 9.6. The decision in *Durie v Gardiner* reflects the New Zealand Court of Appeal’s recognition of the need to strike a new balance between the competing rights of freedom of expression and the right to protection of reputation. This recognition was spurred, in part, by factors including (at [56(b)]):

The increasing prominence of the New Zealand Bill of Rights Act including the right to freedom of expression in our jurisprudence; the greater exploration of the boundaries of that right and a closer consideration of the right to privacy, all of which in combination justify extending the scope of the defence beyond political discussion by mainstream media but subject to a responsibility requirement.

By contrast to the UK, New Zealand and Canada, there is no substantive legislative or constitutional protection of freedom of speech in Australia. Consequently, a public interest journalism defence modelled on the UK Act should expressly require the Court to have regard to freedom of expression in determining whether the defence is available to the defendant, in keeping with the objects of the MDPs.

10. Recommendation 14 – Introduction of a serious harm test

- 10.1. BHF supports the introduction of a serious harm test. However, it is our submission that unless the issue of serious harm is determined at an early stage of proceedings, trivial and spurious claims will continue to act as a significant burden on the Court's resources, and also on parties engaged in lengthy and costly Court proceedings.
- 10.2. Given that each jurisdiction has its own separate and distinct procedural rules, BHF recognises that there may be impediments to incorporating overly prescriptive procedural requirements in the MDPs. Nevertheless, BHF submits that the MDPs could readily include a straightforward procedure, as follows:
- (a) where a defendant considers that the issue of serious harm arises, the defendant would be obliged to raise the issue within a set period of, say, 28 days after commencement of proceedings;
 - (b) if the defendant is not satisfied with the plaintiff's response, the defendant could then bring an application within that 28-day period to have the proceedings struck out for failure to disclose serious harm;
 - (c) where such an application has been brought, the defendant would not be required to put on a defence until after the determination of the application.

11. Recommendation 17 – Multiple proceedings

- 11.1. BHF supports the proposed amendments to clause 23 extending the prohibition on commencing proceedings, without leave, against an associate of a previous defendant in relation to the publication of the same or similar matter.
- 11.2. However, BHF submits that the amendments do not sufficiently address the issues highlighted by cases such as *Fairfax Media Publications Pty Limited & Ors v Cummings*; *Fairfax Digital Australia and New Zealand Pty Limited & Anor v Cummings & Anor* [2013] ACTCA 37 (where two sets of proceedings were brought over essentially the same article published on different platforms operated by the same media group). BHF submits that clause 23 should be further amended to require a plaintiff to bring only one set of proceedings against related defendants in relation to publication of the same or similar defamatory matter. The MDPs should also provide that any such proceedings that have been commenced must be consolidated, to avoid plaintiffs commencing multiple proceedings to seek to take advantage of separate damages caps in relation to each proceeding.

12. Recommendation 18 – Revocation of election for trial by jury

- 12.1. BHF notes that the state of the law is not settled with respect to a party's ability to revoke an election, in light of contrary authority in NSW and Queensland. BHF submits that the new clause 21(2A) should provide that an election is only revocable with the

consent of all parties to the proceeding. It is in keeping with the overarching purpose to allow a party to revoke an election with the consent of all parties to the proceeding, given that proceedings before a judge alone are likely to be quicker and cheaper, and allowing such a revocation by unanimous consent would serve the interests of justice.

13. Additional submissions – ongoing review of the MDPs

13.1. It is not clear on the face of the Draft Amendment Provisions whether the review provisions at clause 49 of the MDPs are intended to be omitted. If so, it is our submission that a similar provision to clause 49 should be enacted, requiring that the MDPs must be reviewed within five years, on an ongoing basis. Such a review ought to be carried out promptly, given the increasingly swift advances in technology and methods of communication. The need for enacting a review mechanism is starkly illustrated by the recent and ongoing proliferation of social media defamation cases, whereby publication occurs via platforms that barely existed at the time the MDPs were enacted, but which are now ubiquitous. A prompt and efficient review mechanism will ensure that such new laws remain in keeping with the technology and cultural expectations that will exist in five years' time.

BANKI HADDOCK FIORA

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