[redacted]

24 January 2020

Council of Attorneys-General Review of Model Defamation Amendment Provisions Submission by Esther Rockett in response to draft amendments

1. Unfortunately, I missed last year's opportunity to make submissions to this review. My submissions therefore raise some issues beyond the draft amendments.

2. My submissions are in three parts:

    a. from para 9 to 73 are details of the litigation that informs my submissions;

    b. from para 74 to 146 is feedback on the '2020 draft 15' amendments to the Defamation Act 2005; and

    c. from para 147 I put forward some further issues related to defamation law that became apparent to me in respect of search engine and social media takedown requests, costs, discovery, trial dates and case management.

3. I make these submissions as the successful defendant in defamation actions brought by the leader and members of the 'Universal Medicine' organization; as a defamation complainant against that plaintiff and several of his associates; and as an investigative writer with close contact with people who have been adversely affected by cults and other extremist or high demand groups.

4. Last year I gave a talk to members of a volunteer network, 'Cult Information and Family Support' on the defamation actions I was involved in. Among the audience was a person currently being sued by the very litigious leader of a high demand group, and a number of others who would like to speak out about the harms done by similar groups but are deterred from doing so out of fear of being sued.

5. There are many harmful groups in Australia that are not subjected to public scrutiny or accountability due to their capacity to shut down exposure and complaints by victims and critics.

6. As a result, government, authorities and public lack proper awareness of their number, size, influence or the true extent of their harms. Our public institutions are not unequipped to hold such.

7. Over seven years I communicated frequently with members of the press, all of whom have been frustrated by Australia's defamation laws, which have unquestionably had a chilling effect on reporting on very serious harms and risks posed by coercive groups.

8. My experience shows that anti-social organizations not only bring defamation actions as a means to censor exposure, but use social media to defame critics, and exploit the prohibitive expense and exertion of litigation to frustrate just resolution and harass opponents.

Background: 'Socially harmful cult'- Supreme Court of New South Wales findings on Universal Medicine proprietor and leader, Serge Benhayon

9. The defamation proceedings of Serge Isaac Benhayon v Esther Mary Rockett (*Benhayon v Rockett (No 8) [2019] NSWSC 169*) were filed in November 2015 and went to a six week trial from 3 September 2018.

10. Prior to serving the claim, the plaintiff did not issue a concerns notice to me.

11. Mr Benhayon initially sued on five publications: a blog, three blog comments and one tweet, but eleven months later expanded that to twenty publications: the majority of which were tweets.

12. The jury found that in respect of two of the tweets, none of the plaintiff's imputations were conveyed.

13. My defence to the remaining eighteen publications was a comprehensive success in that the following defences were upheld pursuant to:

    - s 25 justification, for thirteen publications;
    - s 26 contextual truth, for one publication;
    - s 30 statutory qualified privilege/reasonableness, for all publications; and
    - s 31 honest opinion for all but one publication.

14. In the course of upholding the s 25 defence of justification, I proved 36 imputations about Universal Medicine and its leader, Serge Benhayon, substantially true, to the

effect that it is true to say that he is a charlatan and leader of a socially harmful and exploitative cult that makes false claims to healing; engages in misleading conduct in promoting its bogus therapies; who has indecently touched a number of his clients in his treatment room; has an indecent interest in girls as young as ten whom he causes to stay in his home unaccompanied; and who has unduly influenced and financially preyed upon cancer patients.

15. Attached is a schedule of the imputations proven true, as these are not immediately identifiable when reading the published judgment.

16. Mr Benhayon was ordered to pay my costs on the indemnity basis. Justice Lonergan found that he unreasonably failed to accept a settlement offer I made early in the proceedings.[1]

17. In his response to my offer of settlement in February 2016, Mr Benhayon indicated that 'the only basis' on which he would settle would be if I falsely incriminated myself by agreeing to make a false admission, to be read in open court, that I had 'fabricated' sexual allegations against him and published the matters complained of out of malice.[2]

18. Consequently, Mr Benhayon paid approx. $1.2m in legal costs incurred in my defence.

19. Following the trial, Justice Lonergan referred Mr Benhayon's solicitor, Paula Fletcher, to the Office of the Legal Services Commissioner for investigation of possible unsatisfactory professional conduct or misconduct in Ms Fletcher's direct interactions with me while I was not represented by a solicitor.[3]

Universal Medicine corporation and community

20. Universal Medicine is the trading name of a commercial corporation that profits from 'esoteric healing' services and course. It is also the name of the corporation's associated quasi-spiritual community that claim to follow the 'Way of the Livingness' 'religion' as founded by Benhayon.

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[1] *Benhayon v Rockett* (No 9) [2019] NSWSC 172

[2] Ibid. at 44 and 47.

[3] *Benhayon v Rockett* (No 10) [2019] NSWSC 792

21. Mr Benhayon has no formal qualifications, is the sole shareholder of all of its profit making businesses, and the group's spiritual leader.

22. The trial of Benhayon v Rockett heard evidence that UM's main commercial business turns over approximately $2m per annum.

23. The trial also heard evidence that Mr Benhayon and his interests have received millions of dollars in gifts and bequests from followers in the past ten years. Of those Mr Benhayon personally received approx. $1.7m in assets from two women followers who died from cancer.

24. The court heard evidence that Mr Benhayon's wife, children and their spouses are wholly dependent on UM for their income.

25. UM has relatively few employees and a degree of its profitability can be attributed to unpaid labour.

26. Among Mr Benhayon's follower/promoters are a couple of dozen registered health professionals, as well as at least six legal professionals, including one Queensland based barrister, and four solicitors based in NSW and Queensland, all of whom were involved in the defamation litigation.

27. UM has also established two charities; one each in Australia and the UK. The Australian charity was established for the purpose of 'advancing education' and raising money for a 'school building' in which the group could promote Mr Benhayon's teachings.

28. The court heard evidence that the College of Universal Medicine charity in Australia had its deductible gift recipient endorsement revoked by the Australian Tax Office, and the Charities Commission moved to place conditions on a proposed lease agreement by the College to lease its school premises from Mr Benhayon. Those actions resulted from complaints I made to the authorities.

29. The UM corporation consists of a couple of dozen trading companies, investment trusts and promotional front businesses owned and/or operated by Mr Benhayon, his family and longstanding followers. Mr Benhayon is the trustee of his associated family and other investment trusts and thereby almost wholly controls the income of his immediate family and the spouses of his children.

30. UM has run events and activities for children, targeting parents and schools with misleading marketing.

31. UM operates over fifty websites and since 2012 has produced thousands of website articles and pages promoting Mr Benhayon and his interests.

Universal Medicine's strategic litigation

32. I was uniquely placed to publish about UM due to my first-hand experience of Mr Benhayon and his workshops, my profession as a registered Chinese Medicine practitioner (with training, knowledge and experience in health sciences) and my major in religious studies from the University of Queensland that included the study of New Religious Movements and cults. My background gave me a reasonably good understanding of his activities and influence on his followers and clients.

33. I commenced publishing exposure of Universal Medicine in 2012.

34. UM's solicitors (primarily Paula Fletcher) responded by making defamation and copyright infringement complaints to Google and the blogging platforms I was using.

35. A number of links to my blogs were removed from the Google search index, and my Google Blogger blog, and one Facebook page were shut down as a result of untested complaints of defamation, in which no notice was ever served to me and no redress whatsoever was available. I received confirmation of the Google complaints by making repeated requests to Google's legal department over a number of months.

36. I gave evidence at the trial that a subpoena to the NSW Police showed that Mr Benhayon and about thirty UM associates had made complaints to the police of 'harassment' based on my criticisms of their promotions of UM.

37. A request I made to the ACCC under the FOI Act also showed that in early 2014, one hundred and fifty UM associates sought to have me prosecuted under Australian Consumer Law for publishing 'false reviews' in the form of blogs criticising the complainants' involvement in UM activities. The ACCC dismissed those complaints at the initial assessment stage. The police, however, were put under some pressure by the professionals within UM to investigate. No complaints proceeded to prosecution.

38. In 2013 and 2014, associates of Mr Benhayon, including three psychologists, made five unsuccessful complaints to the Australian Health Practitioners Regulatory Agency (AHPRA) claiming that my blogging about UM (under a pseudonym and

where I had never identified my profession) was evidence I was suffering from undiagnosed psychosis and sociopathy and was therefore unfit to practice Chinese Medicine.

39. From May 2014 to mid 2018 UM published over one hundred online articles about me and others containing very serious allegations about our characters, businesses and my professional competence. The majority were published on websites owned by Mr Benhayon. Those articles were shared thousands of times on social media by UM followers from 2014 up to and during the trial, *sub judice*.

40. When myself and others attempted to post corrections or questions in the 'reply' areas of the UM blogs, our comments were not published.

41. People who spoke out about UM or its promoters were subjected to legal threats, or had to answer to their employers when the group contacted their workplaces to make complaints of harassment.

42. Since the trial I also learned that UM issued legal threats to community organisations and harassed social workers who sought to discourage their associates from promoting the organisation and its fronts, including to children.

43. I have had contact with hundreds of people aggrieved by Universal Medicine, but the majority fear the kind of retaliation I was subjected to if they speak out. Consequently they refuse to go on the record to make complaints to authorities, and they refuse to to go on the record to the press. This has made it exceedingly challenging to inform the public about the group and bring responsible persons to account.

44. The main reasons witnesses are unwilling to come forward are:

    a. Fear that UM's community of around 750 ardent followers may retaliate violently or via harassment or stalking;

    b. Fear of being sued for defamation and the consequences – loss of livelihood, assets and reputation;

    c. Fear of being defamed by UM and its followers *en masse*;

    d. Fear of shunning, relationship conflict or losing contact with loved ones involved in the group; and

    e. Guilt and shame associated with involvement in the group.

45. A year after Mr Benhayon filed his defamation claim in Sydney, his colleagues, Ray Karam and Caroline Raphael filed a defamation claim against me in the District Court of Queensland, Brisbane (*Raphael & Karam v Rockett 5080/16*) complaining they were defamed in an email and six tweets in which I criticised their promotions of UM.

46. Ms Raphael is a psychologist who works at the Universal Medicine clinic alongside Mr Benhayon and promotes him and UM publicly. Mr Karam is a UM promoter who ran for election to Ballina Shire Council and for the seat of mayor.

47. I pleaded defences to that action pursuant to sections 25, 26, 30, 31 and 33 of the Act. I pleaded the s 25 defence to all of the plaintiff's imputations.

48. The plaintiffs in that case were represented by Benhayon's solicitor, Paula Fletcher of Universal Law Solicitors, and Mr Benhayon's associate, barrister Charles Wilson, who acted in the Benhayon v Rockett proceedings as junior to Mr Kieran Smark SC until a month before the trial. Mr Wilson is a public promoter of UM and director of its College charity. (Mr Smark has no affiliation with UM.)

49. From March 2017 to May 2018 I self-represented without a solicitor in the NSW proceedings, and from March 2017 to October 2018 in the Queensland proceedings.

50. In spite of having retained counsel, however, I self-represented at two arguments in Queensland when the plaintiffs refused to negotiate hearing dates. The arguments did not need to be heard with any urgency as they were not in relation to any direction given by the court.

51. Like Benhayon, the plaintiffs in Queensland refused my early offers to settle, and refused Everson JDC's informal recommendation during an interlocutory hearing that they enter mediation with me. I welcomed the judge's suggestion. Mr Wilson, for the plaintiffs, told Judge Everson in open court (BDC, 5 May 2017) that the plaintiffs would not settle. Mr Wilson also claimed at the same hearing that I was a malicious person who was being sued in NSW for 'trolling'.

52. I petitioned for bankruptcy in December 2017 when Raphael and Karam pursued a $20,000 costs order made against me, commenced enforcement hearings and indicated in open court that they intended to continue enforcement proceedings even though I had no assets, had provided a sworn statement of financial position to that effect with supporting documents, and had submitted to cross examination at hearing

where no evidence was found that I had any assets. The plaintiffs also sought costs for those proceedings, which I successfully argued against.

53. Apart from the six week trial in the NSW Supreme Court, the two proceedings involved over a dozen interlocutory arguments in the Brisbane and Sydney courts.

Trial aftermath

54. During and since the trial of Benhayon v Rockett, Mr Benhayon and his organization received an unprecedented level of press scrutiny internationally.

55. The Raphael & Karam action was settled out of court six weeks after the jury returned in Benhayon v Rockett. The proceedings were dismissed by consent and all costs orders vacated, including the order that forced me into bankruptcy.

56. Ballina Shire Council moved in late 2018 to ban UM from use of its event facilities citing risks to children.

57. MP for Lismore, Janelle Saffin, has called on NSW Parliament to initiate a public inquiry into Universal Medicine's infiltration of publicly funded workplaces, including NSW Health, and NSW Dept of Families and Community Services in the area of child protection.

58. UM is currently under investigation by the NSW Health Care Complaints Commission, and the Commission's investigators have sought my assistance in the provision of materials for their investigation. The Commission is currently investigating complaints substantially the same as those I made to the Commission in 2012 and 2013 which were not investigated at that time.

59. The defamatory allegations UM published about me were proven untrue in the Benhayon proceedings. However, the articles UM published about me remained online after both legal actions came to an end. I therefore made a complaint of defamation to the publishers and negotiated a settlement in my favour that included an agreement that UM take down the offending material and all substantially similar material and publish apologies. (N.B. there is no confidentiality clause in the settlements.)

60. The findings of fact in Benhayon v Rockett strongly indicate that Universal Medicine is an organisation that is a risk to the community.

61. My s 25 defence of truth succeeded in circumstances where the overwhelming majority Universal Medicine's victims are unwilling to go on the record. I could only conscionably call witnesses who were willing to testify.

62. In those circumstances, where I was acutely aware of UM's dangers, but where victims won't come forward, I was faced with a terrible dilemma of whether to risk bankruptcy, loss of livelihood, home and reputation; or allow UM to continue its anti-social activities and its aggressive expansion unscrutinised, at enormous risk to vulnerable people, including children.

63. That burden on any individual member of the public strikes me as unjust. I am certainly satisfied with the court's decision, and the win was certainly a win for the public, but it was a Pyrrhic victory for me personally.

64. The burden partly results from a failure in governmental consumer protection, but it also resulted from the media's reluctance to investigate UM, deterred by legal threats of defamation action.

65. I was at a considerable financial disadvantage in the legal actions. I exhausted all of my assets in the first months of defending the Benhayon claim, and had borrowed money from family and friends to continue.

66. From late 2016 through 2018 I worked full time on my defences. Once bankrupt I became homeless in April 2018, and had to travel in a borrowed car between Brisbane and Sydney to attend hearings. I was not eligible for Centrelink benefits, and the bankruptcy rules prohibited me from crowdfunding – even to be able to afford food, petrol and stationery.

67. Since the Benhayon v Rockett proceedings it took a full year to have my bankruptcy annulled. I was left homeless, displaced, without a livelihood, and very considerably out of pocket. I do not expect to recover financially for some time, if at all.

68. I was fortunate to have the assistance of barristers either on contingency or pro bono basis throughout both proceedings.

69. Solicitors Peter O'Brien and Stewart O'Connell of O'Brien Civil and Criminal Solicitors represented me on a contingent fee basis from May 2018.

70. All lawyers who assisted me took a considerable financial risk in committing very significant time to my defence.

71. The plaintiffs in both states made very numerous attempts over 18 months – via threats to seek orders for further discovery; subpoenas to my contacts that my team successfully argued to have set aside; and via a confounding successful application during a costs enforcement hearing to compel me to unredact names from a list of donors to my defence – to compel me to divulge the identities of UM's 'detractors' and produce confidential correspondence. My contacts were not 'sources' and the correspondence was not relevant, as in capable of proving or disproving any facts in issue in either proceeding.

72. I indicated to counsel that I wanted to seek a ruling of abuse of process in relation to the attempts to compel unwarranted disclosure, and the persistent listing of hearings without negotiating mutually convenient hearing dates, however I was discouraged from doing so on advice of the risk in terms of another costs order that could have plunged me into further debt.

73. In my opinion, both the Benhayon and the Raphael and Karam proceedings were not legitimate attempts to protect 'good reputation'. Rather, they were an unjustifiable exploitation of the Act and an exceedingly wasteful misuse of public infrastructure.

Section 3 Objects of Act

74. I welcome the majority of draft amendments to the Act and believe they will bring it in closer alignment to its objects, hopefully deterring disreputable people from initiating defamation actions that lack legitimacy.

75. While the decision in Benhayon v Rockett comprehensively vindicated my publishing, the adversity I experienced through and since the litigation was punitive. There is no guarantee I will recover from it.

76. Section 3 has a clause for effective and fair remedies for plaintiffs, but does not include any allowance for publishers who are subject to spurious litigation, particularly where the findings of fact indicate that the proceedings were brought for reasons other than remedying harm to reputation. I consider the severe adversity brought by such litigation does place an unreasonable limit on freedom of expression and on publication in the public interest.

77. I do not think the litigation by the UM plaintiffs had anything to do with justice. To me it ran counter to the objects of the Act, and the judicial system in general. Nobody benefitted from the two proceedings, except for the lawyers who were remunerated,

and partly myself in the sense that I was eventually legally vindicated, however benefits to lawyers and a period of public 'glory' for successful publishers are not the objects described in s 3. The other outcomes were contrary to it in that the litigation was a lengthy and unjustifiable drain on personal finances and publicly funded infrastructure, and resulted in greater disrepute for Mr Benhayon.

78. I would like to see legislation that explicitly addresses abuse of the process.

79. That might be be incorporated into the Act by awarding monetary compensation to the defendant for each imputation proven to be substantially true, and to base the amount of compensation on the overall success of the defence, the scale and duration of the litigation, and the weight of evidence against the plaintiff. The more mischief a plaintiff engages in, the more they should pay.

80. I also request that the Attorneys General consider the introduction of anti-SLAPP laws, that penalize misuse of the judicial system for the purpose of intimidating publishers and shutting down exposure.

Section 7A Serious harm required for cause of action for defamation

81. The amendment is unspecific about how serious harm is to be proven.

82. For example, when Universal Medicine published masses of material attacking my professional competence I was in the process of relocating my practice and residence to a different state and building the business. It's impossible for me to prove how many people were deterred from using my services or avoided me personally if I never heard from those people and they simply chose not to associate with me.

83. I'm therefore of the view that there are circumstances where harm can be assumed.

84. If the serious harm section is introduced, it should at least take into account the seriousness of the allegations and the extent of publication.

85. The harm test should also take into account the public profile of the plaintiff and the context of the matter complained of. A matter that is critical of the activities of a high profile politician or business leader in their public capacities can be assumed to be unlikely to cause serious reputational harm.

86. For example, a mining magnate and sometime politician embroiled in multiple legal disputes and public controversies is unlikely to endure any significant reputational harm.

87. A member of the public might also assume that a politician who sues a news outlet over a publication critical of that politician's business interactions has caused more harm to his reputation by taking the matter to trial than was caused by the matter complained of.

88. Multiple sexual assault allegations have been levelled at President Trump and numerous US establishment figures that appear to have had no significant detriment to their reputations.

89. The examples above regarding high profile, politically influential persons are very different circumstances to those in which a private person's livelihood or personal standing in their community, or the reputation of a respected surgeon for example, could be seriously impacted by unfounded or malicious publications. I believe harm should be assumed, in the way it currently is, in these cases, particularly where there is a distinct power disparity between publisher and plaintiff.

Section 9 (2)(b) and 9 (6)

90. I'm of the view that defamation is a personal action and that all corporations should be excluded. There are other remedies available to corporations for damage to commercial reputation.

91. In addition, I'm unaware of the rationale behind the criteria of an excluded corporation. While the number of employees may be indicative of a small business, Universal Medicine, like many cultic or coercive enterprises, remunerates a relatively small number of people proportionate to its commercial turnover, and could be said to financially benefit from a large amount of unpaid labour.

92. My submission is that unpaid workers should be included as employees where the corporation has a substantial commercial turnover.

93. A business should also be assessed in terms of it relationship to larger commercial companies in a capacity that is aimed at promoting the interests of or increasing the commercial turnover or profit of a larger company or corporation.

94. For example, UM's barrister Charles Wilson argued at an interlocutory hearing that front companies with the main purpose of promoting Mr Benhayon's UM interests were not part of the UM corporation. One of those, the UM charity, was founded by Benhayon, and he had been chairman of its board until 2012 when he stepped down

under media scrutiny of potential conflicts of interest. The main business activity of another front company that Mr Wilson argued was 'unrelated' is the direct promotion of Mr Benhayon's UM commercial services. That company, Estoeric Women's Health is owned and operated by Benhayon's daughter, who is a full time member of UM's management.

Section 10 deceased persons

95. While I agree that persons acting for a deceased person should not be allowed to assert a cause of action for defamation, I don't believe it is in the interests of justice that the death of a party to a defamation action should cause the termination of that action.

96. Both plaintiff and defendant should be allowed to clear their name.

97. Further, pursuant to the proposed amendment at s 10(2) determining the question of costs would appear to be extremely difficult without trying the merits of the case.

Section 21 (2A) – an election for defamation proceeding to be tried by jury is irrevocable

98. Mr Benhayon unsuccessfully motioned to dispense with the jury in Benhayon v Rockett, using an argument that the proceeding would require the jury to read highly sophisticated 'esoteric' philosophy. That claim was grossly exaggerated. Any textual material tendered did not require expert reading, and was in any case only a small portion of the evidence relied upon by either side.

99. Justice McCallum rejected Mr Benhayon's argument. At hearing she remarked that it was a 'community values' case at which a jury was better equipped to make decisions based on current social mores.

100. The jury was able to deliver a final determination in a fraction of the time a judge would have taken, which satisfies the objective of expediting resolution.

101. In terms of use of public infrastructure, I believe the jury represented a saving on public spending, in that Justice Lonergan would have had the task of ruling on four defences of about 60 imputations across 20 publications. The judgment would have extended to many hundreds of pages and occupied an enormous amount of her time, whereas the jury's deliberation for about five days probably enabled Her Honour to attend to reserved judgments or other court business. It also represented a saving for the appeals court in terms of a jury decision's resistance to appeal.

102. The jury did have a large amount of reading to do in Benhayon v Rockett, and were required to answer up to 68 pages of questions. However, I don't believe that the task was excessively arduous. The process was assisted in two ways:

    a. Justice Lonergan gave clear instructions. In empanelling the jury, Her Honour informed the potential jurors that it was a defamation proceeding that concerned the meaning of words, that it would involve a good deal of reading, and that jurors would need to be confident in their literacy. She then allowed potential jurors to excuse themselves from selection if they did not have that confidence (or for other reasons in relation to other commitments etc.). I believe Justice Lonergan's approach enabled selection of a competent jury.

    b. The questions to the jury were carefully drafted by counsel by consent.

Section 23 Leave required for further proceedings in relation to publication of same defamatory matter

103. I welcome this amendment.

104. I am aware of a case currently before the courts where a serial plaintiff is suing a defendant with scarce financial resources where the defendant previously received a judgment in her favour.

105. The plaintiff ran out of funds in the weeks prior to the first trial against the defendant (who was self-represented) and her media co-defendants. The plaintiff attended trial unrepresented having done no trial preparation herself. The parties subsequently settled in the first days. The merits of the case were therefore not tried.

106. However, the plaintiff was described within Supreme Court interlocutory judgments in two jurisdictions as an 'unreliable witness' with an 'irresponsible attitude to litigation' who had given evidence at hearings that was 'demonstrably untrue' and 'deliberately prevaricating'.

107. The first trial was an action over a news publication featuring statements by the defendant. Following the judgment in her favour, the defendant self-published a book providing more detail about her experience of the plaintiff than was given in the media report. The defendant's book included the Supreme Court judge's remarks about the plaintiff.

108. I believe it is in the interests of justice for such a plaintiff to require the leave of the court to pursue the claim.

109. Currently, the onus is on the defendant to seek a *res judicata* ruling if applicable, and accept the accompanying risk in terms of adverse costs orders.

110. The defendant has opted to defend the case unrepresented, and is aiming for a vindication similar to mine. She has pleaded the s 25, 26, 30 and 31 defences.

111. The plaintiff is a registered and practising psychologist who has worked in the public sector, and there are strong concerns about her influence on vulnerable patients. She has also conducted public 'personal development' workshops and services. It is therefore a public interest case.

112. If the plaintiff walks away from the claim, or fails, as she did on the previous occasion, to prosecute it, the defendant will have wasted very considerable time and resources on censorious mischief.

113. In my lay opinion, the amended s 26 defence of contextual truth would defeat the plaintiff's claim on the basis of the Supreme Court judge's remarks about the plaintiff alone.

Section 26 Defence of contextual truth

114. I support this amendment but in my view it would be more efficient to merge s 26 with s 25.

115. Mr Benhayon motioned the court to strike out my original contextual truth defence but failed. He then adopted those contextual truth imputations.

116. It made no sense to me that the plaintiff has the liberty to define the defamatory imputations and adopt contextual imputations, but the defendant is not allowed to plead those back.

117. Sections 25 and 26 should be merged seeing the amended s 26 removes the distinction between plaintiffs' and contextual imputations when either are proven true.

118. It serves no purpose for the two defences to be pleaded separately. If merged, a defendant could plead contextual imputations under s 25 (2). Any of the plaintiff's imputations proven true would then automatically be decided under the section

without troubling the defendant to make a separate pleading, or troubling the court to consider a separate s 26 defence.

Section 29A Defence of responsible communication in the public interest

119. I welcome this amendment and believe it goes some way to mitigating the risk of publishing controversial material that's in the public interest.

120. In my view it addresses an issue with the plaintiff's advantage of defining the imputations, and the onerous task for defendants in proving the truth of an imputation the publisher honestly did not intend to convey. In my view, disputes of imputational interpretation can occur even when a publication is carefully considered and written.

121. The UM case is a good illustration of the utility of this defence, particularly in terms of a harmful organization that has wielded the Act as a way of silencing negative publicity.

122. Above I described a situation where those best placed to comment publicly about the organization were deterred from doing so. Universal Medicine:

    a. very effectively intimidated victims from coming forward, and the press from reporting on issues that public needs to know;

    b. intimidated people involved in social services capacities from responsibly expressing misgivings about the organisation and its activities to colleagues, employers and the demographic UM was aggressively targeting with its services; and

    c. was promoted by a cohort of registered health and other professionals, in a situation that unduly influenced followers and members of the public in respect of UM's legitimacy.

123. In addition, I have been in contact with credentialed persons with years of research and consulting on harmful groups behind them who refused to express an opinion about UM out of fear of being sued. One such expert attempted to warn me off doing the same.

124. In terms of s 29A(2)(g), in my view it is in the interests of justice that some protection is written into the Act for sources who have good reason to remain anonymous.

125. In my view the unwillingness of sources to come forward, or to provide copies of relevant documents should not preclude publishers from publishing information in the public interest, particularly where there is a risk of harm to unsuspecting members of the public if information remains inaccessible.

126. Above I described a situation where UM made numerous attempts to coerce me into disclosing the identities of my contacts, even those who were not sources. At para 44 I spelled out the potential consequences of exposing those people. I consider those to be among 'good reasons' pursuant to the Act for not disclosing the identities of sources. It is not just a matter of a witness or whistleblower being subject to professional codes of conduct.

Section 31 Defences of honest opinion

127. At s 31, the word 'matter' (where it refers to the publication in question) should be replaced by the word 'imputation'. The current wording does not fit the definition of 'matter' at s 4 and I believe is inexplicably ambiguous. For example, 31(1)(a) would be better worded 'the imputation arose as an expression of opinion' rather than the 'the matter was an expression of opinion', which seems to imply the entire publication. A publication, particularly one of any length, such as a blog article or email might contain a mix of assertions of fact and expressions of opinion.

128. I welcome the clarification of what constitutes proper material at s 31(5), and the acknowledgement that online publications have the capacity to link to proper material.

129. I propose that a phrase is added at subsection (5)(b)(i) to the effect that the material 'constitutes a rational basis for the opinion expressed' as well as being substantially true etc.

Section 33 Defence of triviality

130. In my view it is a mistake to remove this defence, particularly where proposed section 7A is not specific about what comprises serious harm.

131. According to the pleadings in the Raphael & Karam v Rockett defamation claim, the email complained of, which contained the majority of allegedly defamatory imputations in the plaintiffs' claim, was read by one person who was a friend and associate of at least one of the plaintiffs, and who was photographed socializing with that plaintiff several times after the defamation claim was filed.

132. The email was sent to Ballina Councillors at the commencement of a Council election campaign and questioned the plaintiffs' public promotions of UM, which was at the time a publicly controversial organization. It cited their involvement in public sector workplaces, and Mr Karam's involvement in UM initiatives that were adversarial toward complainants.

133. Again, in my view, and given that the plaintiffs abandoned their legal action after 23 months, a number of interlocutory hearings, and very considerable work invested by all involved, the complaint caused unjustifiable expense to the taxpayer that was grossly disproportionate to any alleged harm.

Schedule 4 Section 1 limitation period and single publication rule

134. I do not support the single publication rule.

135. Internet publishing is very different to hardcopy publishing of yesteryear. Where it required considerable searches to access a hardcopy after initial publication, online material is relatively easily located by search engines even many years after publication.

136. Online publications can also be enlivened by social media sharing many years after initial publication. For example a Twitter or Facebook user with a substantial following might cause hundreds or thousands of readers to visit an item published outside the twelve month limitation period.

137. It seems inconsistent with the objects of the Act to remove plaintiffs' recourse to justice under these circumstances.

138. In addition, the amendment unjustly allows a defamatory matter to be republished after a publisher is found liable for damages, with no recourse available to the plaintiff.

139. I support the provision in the Act for the court to extend the limitation period.

140. In respect of UM's publishing, more than half a dozen websites and a couple of dozen publishers published articles containing serious allegations about me and others that were found at the trial of Benhayon v Rockett to be false. The allegations included that I was a liar, a vexatious complainant and a false accuser.

141. The allegations were repeated in over one hundred web articles and shared thousands of times on social media (by several hundred UM followers) over the course of four

years. Some UM promoters regularly shared articles that had been first published well over twelve months before and did so before and during the Benhayon trial.

142. In my opinion this was an organized campaign of defamation.

143. I did not have the resources available to me to take legal action against a large group of zealous publishers who are well resourced.

144. In my view, the court should be able to take into account the compound effect of repeated publications of similar material beyond the limitation period, particularly where there is evidence that it is an organized campaign of intimidatory defamation.

145. Under s 1A(6), the definition of 'associate' should be extended to include persons who are otherwise known to the original publisher and share a demonstrably common cause or agenda in publishing about the plaintiff.

146. By extending that definition the law could address the harm caused by defamatory misinformation campaigns by cults, organized crime or extremist groups, and the like.

PART 3 Additional issues relevant to defamation law

Takedown requests to search engines and social media platforms

147. Some clear legislation is needed for search engines and social media platforms in respect of defamation.

148. As mentioned above at paras 34 and 35, my Universal Medicine Accountability blog was taken down by the Google Blogger platform, which removed it in its entirety from the view of Australian and UK readers.

149. At the time, the Google Blogger terms and conditions stated that Google would not take down allegedly defamatory content without a court order. The takedown therefore represented a breach of the company's terms.

150. I reposted the content on the US based Wordpress platform in early 2013, and continued my blogging on that platform, where it remains.

151. Benhayon and associates' solicitor Paula Fletcher, and some UM associates, also made copyright and trademark infringement complaints to the Wordpress platform (Automattic Inc.).

152. Wordpress forwarded the complaints to me via their standard process, and rejected Paula Fletcher's trademark infringement complaints by applying common sense.

153. Wordpress temporarily removed the allegedly copyright infringing content (pursuant to the *Digital Millennium Copyright Act* DMCA) but provided me with the opportunity to issue a counter-notice to the complaint in which I agreed to accept all liability for publication of the material in question, thereby exempting Automattic Inc. from liability.

    a. Wordpress even provides an online form/template to allow content providers to easily issue a counter-notice. Wordpress forwards the notice to the complainant.

    b. Once the counter-notice is forwarded, the complainant is allowed 10 business days in which to provide proof that they have initiated legal proceedings though the courts. If the complainant does not provide such proof, the content is restored.

154. YouTube has a similar process for issuing counter-notices for copyright infringement complaints.

155. URL links to my blogs and other websites were removed from the Google search index in response to UM's untested complaints of defamation and copyright infringement.

156. Unlike the Wordpress complaints, I was not notified of any of the Google or Facebook removals, and there were no avenues for redress. The platforms provided none and there is no remedy in any legislation I am aware of.

157. Since the final determination and findings of fact in Benhayon v Rockett, I have written again to Google requesting that the URLs are restored to the index. I have received no response, and to the best of my knowledge, they have not been restored.

158. In respect of the liability of search engines; they provide an essential service in making information accessible to the public, but they are not publishers.

159. No allegedly defamatory URLs should be removed from search engine indexes without a court order, unless they contain genuine, legally defined, 'hate speech'. Removals otherwise are contrary to s 3 of the Act.

160. Similarly, social media platforms such as Facebook should not remove allegedly defamatory content without court orders, or clear guidelines on what constitutes hate speech.

161. A process similar to that enabled under the DMCA, and used by Automattic Inc. and YouTube, may be a means to address several issues in respect of defamation complaints to online platforms. A system for content producers to issue counter-notices would:

    a. enable content producers/authors to release online platforms from liability;

    b. defer the adjudication of legal questions to the proper forum – the courts;

    c. provide an avenue of redress for content producers who are, as I am, willing to defend the lawfulness of our publications;

    d. help to ensure that public interest material is not removed unduly, and is restored as quickly as possible where legal complaints are without merit.

162. It is my view however that media organizations are liable for publication of defamatory comments by third parties where they have social media managers employed to moderate comments on Facebook posts. (See *Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd [2019] NSWSC 766*)

163. However, Facebook could do more to remedy this situation, and I suggest that legislation is introduced to compel the platform (and any like it) to allow forum and page administrators to remove problematic material or for those admins to provide an option to the authors of controversial content (such as comments or posts) something similar to the DMCA counter-notice. An author could be given the option to take down the material themselves or accept full liability for it.

    a. Platforms might institute a system to publicly flag questionable comments where the commenter has issued a counter notice.

164. I do not understand why Facebook, with all of its world-leading technology, does not provide a simple mechanism to administrators of public pages to more easily disallow or remove comments.

Costs

165. Under NSW rules, costs of interlocutory hearings in civil proceedings are generally not determined until the conclusion of proceedings. The rule is much fairer than the Queensland rules in which costs of interlocutories follow the event.

166. Raphael and Karam's costs enforcement forays and my ensuing bankruptcy were enormously disruptive to my efforts to defend the claims and caused ongoing expense and hardship to me. I have required ongoing support from my family and friends for accommodation and living expenses.

167. The bankruptcy resulted from a single costs order, early in proceedings, that was ultimately vacated.

168. This is not a just outcome. There is no recourse available to me or my friends and family to recover those losses. In short, I've paid an unjustifiably high price for publishing the truth. In effect I was punished for thoroughly defending meritless claims. I do not think this outcome is in line with s 3 of the Act.

169. I would like to see a rule on costs that is in line with the NSW rule either inserted into s 40 of the Act, or made uniform throughout Australia.

170. Further, a person can be bankrupted in Australia for a debt of $5000, which is too low and needs to be raised to at least $20,000.

171. Trustee fees are about 30% of the funds recovered, in addition to a $4000 flat admin fee plus interest. Those fees are charged even when the bankruptcy trustee has done no actual recovery work, for example when a successful litigant is awarded costs by the court.

Discovery and disclosure rules – classes of documents and document destruction

172. Having been subject to the discovery rules in NSW and Queensland, I found the Queensland rules to be far simpler and less contentious than those in NSW.

173. The requirement in NSW (UCPR r 21.2) to serve the other party with a notice of categories for discovery was exceedingly troublesome. The drafting of categories of documents relevant to sixty diverse imputations was immensely complex and time consuming.

174. Benhayon's initial discovery was inadequate and instigated profuse correspondence I repeatedly made detailed requests for proper disclosure of documents that evidently existed and received truculent replies arguing about the way counsel for the defence set out the categories. That included stupid arguments about the meanings of terms like 'documents recording', as in documents that are a record of relevant material.

These disputes persistently deflected from the issue of the relevance of the documents sought.

175. Despite months of antagonistic correspondence, I successfully obtained orders for additional discovery from the plaintiff, but had to return to court twice for further orders to ensure previous orders were complied with. Some relevant documents were not delivered until a couple of weeks before the trial, eighteen months after the original discovery orders were made.

176. In Queensland, the rule is straightforward. Discovery is automatic after the pleadings are closed; all relevant documents are discoverable; and the definition of relevance is spelled out in the UCPR. It precludes arguments about whether or not a document falls within a requested 'category'.

177. Further, I found no requirement under Commonwealth, NSW or Qld laws or court rules concerning document retention when proceedings are underway or contemplated.

178. In both actions that I defended, the plaintiffs informed me that they habitually deleted all of their emails prior to the commencement of proceedings and while proceedings were underway. This was despite the fact that I had copies of the legal complaints to Google Inc. that indicated two of the plaintiffs were contemplating legal action from late 2012 – so much so that they caused legal complaint letters to be sent to Google.

179. In Mr Benhayon's case, the emails included all email communications about the operation of his businesses, his seeking and obtaining substantial financial gifts from followers, his use of unpaid labour in the operation of his businesses, his advice and guidance to followers, and his efforts to discredit me in various forums. Mr Benhayon/UM operated a private email server. His solicitor claimed that he instructed his staff to delete their emails as well.

180. NSW UCPR r 21.1(c) ('any document that wholly came into existence after the commencement of the proceedings' is an excluded document) was not helpful in this regard where the plaintiff continued to delete relevant emails while proceedings were afoot and also where he had continued the conduct in question in the proceedings.

181. In Raphael and Karam's case, the destruction of emails included communications about their organizational roles and other involvements in extensive UM events and initiatives.

182. It's my understanding that the Victorian Crimes Act 2006 and Evidence Act 2006 and jurisdictions outside of Australia require litigants to retain documents relevant to the issues in dispute, and penalize litigants who dispose of or destroy evidence.

183. In my view Australia needs uniform legislation to prevent the destruction, disposal or withholding of evidence.

Perjury

184. I would like to see real penalties for perjury when a witness demonstrably lies in their evidence or otherwise misleads the court.

185. In my view Judges are in the best position to take action on such contempt for the court and should do so on their own motion.

Allocation of trial dates

186. The trial of Benhayon v Rockett was initially set down for three weeks, however the hearing ran for five, with the jury in deliberation for another week. Counsel for both sides had requested six weeks.

187. I do understand the List Judge's reasons for limiting the length of the trial, to the effect that any award of damages was disproportionate to allowing longer than three weeks. However, that decision was unfavourable to the defence and my legal right to clear my name.

Case management

188. The NSW defamation list is subject to mandatory case management run by a list judge. I would like to see this adopted in all states as a precaution against abuse of the process.

189. The situation in the Raphael and Karam proceedings was made unbelievably difficult by the plaintiffs calling hearings at short notice without negotiating hearing dates, and then stalling on compliance with the timetables as set out in the rules, with profuse correspondence in the intervening periods. All while I was unable to afford a solicitor and during a period in which my father died, I went bankrupt, was made homeless, was unable to earn a living income, and was travelling between states for hearings while trying to prepare for a six week trial.

190. Mid 2018, Ms Fletcher and Mr Wilson proposed to hold three interlocutory arguments on three separate dates in Brisbane just three months before the commencement of the NSW trial, while also listing several interlocutory arguments in Sydney and issuing a flurry of subpoenas in NSW, that my team succeeded in motioning to the court to set aside, and demanding the delivery of expert reports in both actions despite having no trial date in Queensland.

191. I have brought the conduct to the attention of the Legal Services Commissioners in Queensland and New South Wales, and provided all of the relevant correspondence to the investigations. But again, seeking accountability for Mr Benhayon's lawyers' conduct has been done on my own time and at my own expense.

192. In my opinion, Mr Benhayon's team were taking advantage of my lack of representation and playing the jurisdictions off one another to exasperate my preparations for the trial. I understand that litigation is an 'adversarial' process, but the conduct went well beyond reason or fairness.

193. We had a different judge for each interlocutory hearing in Brisbane, the last of whom, when presented with boxes of court files for the case, described the proceeding as 'off the rails'.

194. The judges in the Queensland District Court are less familiar with defamation law, which added to the difficulty. One judge, for example, on perusing my defence pleadings, expressed irritation and dismay that I could plead that the imputations were true and that I did not admit to publication. He said words to the effect of, 'How can you deny you published something and then plead that it's true?' At that hearing I was represented by a reader, who struggled to assist the judge, and was unable to persuade him that those pleadings were not an anomaly, and are not mutually exclusive. My application for orders for the plaintiffs' further discovery and to answer interrogatories did not go well, and again Mr Wilson took opportunities during the hearing to characterize me as a malicious troll who was persecuting his religious community. The judge's remarks through the hearing indicated that he appeared to accept Mr Wilson's allegations. The judge ordinarily presides in the Land and Environment Court.

Esther Rockett 24 January 2020

Benhayon v Rockett

Jury's findings of imputations proven true

1.	Serge Benhayon had intentionally indecently touched his client Esther Rockett during a consultation in his treatment room.
2.	Serge Benhayon had intentionally indecently touched a number of his clients in his treatment room.
3.	Serge Benhayon instructed students at Universal Medicine training workshops to touch the genitals of victims of sexual abuse.
4.	Serge Benhayon has an indecent interest in young girls as young as ten whom he causes to stay at his house unaccompanied.
5.	Serge Benhayon is the leader of a socially harmful cult.
6.	Serge Benhayon is the leader of Universal Medicine, a group which to his knowledge, engages in misleading conduct in promoting the healing services it offers.
7.	Serge Benhayon is the leader of Universal Medicine, a group which to his knowledge, makes false claims about healing that cause harm to others.
8.	Serge Benhayon as the leader of Universal Medicine exploits the followers of that group through his false and harmful teachings.
9.	Serge Benhayon is dishonest.
10.	Serge Benhayon is the leader of Universal Medicine, a group which to his knowledge preys on cancer patients.
11.	Serge Benhayon engages in inappropriate conduct towards women.
12.	Serge Benhayon dishonestly promotes fraudulent ideas of karma for self-gain.
13.	Serge Benhayon engages in bizarre sexual manipulation to make money for his business.
14.	Serge Benhayon is a hypocrite because his Esoteric Healing has death as its goal.
15.	Serge Benhayon has persuaded followers to shun loved ones who won't join his cult.
16.	Serge Benhayon denigrates life and glorifies death.

17.	Serge Benhayon is the leader of a socially harmful cult, which to his knowledge had engaged in dishonest healing practices.
18.	Serge Benhayon, the leader of Universal Medicine, had exploited children by having them vouch for Universal Medicine's dishonest healing practices.
19.	Serge Benhayon has engaged in bullying to stop Esther Rockett exposing that he is guilty of inappropriate behaviour with children.
20.	Serge Benhayon is guilty of inappropriate behaviour with children.
21.	Serge Benhayon is not a fit person to hold a Working With Children Certificate.
22.	Serge Benhayon vilifies people with disabilities.
23.	Serge Benhayon is the leader of a socially harmful cult that is paternalistic to women.
24.	Serge Benhayon is sexually manipulative of his cult followers.
25.	Serge Benhayon preys on cancer patients.
26.	Serge Benhayon exploits cancer patients by targeting them to leave him bequests in their wills.
27.	Serge Benhayon is a charlatan who makes fraudulent medical claims.
28.	Serge Benhayon swindles cancer patients.
29.	Serge Benhayon was to inherit the bulk of a follower's million-dollar estate as a result of his exercising undue influence on her.
30.	Serge Benhayon is the leader of an exploitative cult.
31.	Serge Benhayon is engaged in a healing fraud that harms people.
32.	Serge Benhayon makes bogus healing claims.
33.	Serge Benhayon is guilty of exploitative behaviour.

Findings of contextual truth – contextual imputations proven true

34.	There are reasonable grounds to believe the plaintiff intentionally sexually preyed upon his client Esther Rockett by administering an "ovarian reading" during a consultation in his treatment room.

35.	There are reasonable grounds to believe the plaintiff had intentionally sexually preyed upon his clients.
36.	There are reasonable grounds to believe the plaintiff had intentionally indecently touched a number of his clients in his treatment room.