

Review of Model Defamation Provisions

Submission to the Council of Attorneys-General Review of Model Defamation Provisions Discussion Paper - February 2019

Introduction

The Victorian Legal Services Board and the Victorian Legal Services Commissioner are the independent statutory authorities responsible for the regulation of the legal profession in Victoria under the *Legal Profession Uniform Law* (Uniform Law), both authorities being accountable to the Victorian Parliament. The two authorities effectively operate as one body, the VLSB+C.

VLSB+C acknowledges the importance of this review for ensuring the policy objectives of the Model Defamation Provisions remain fit for purpose. We appreciate and support that the appropriate balance must be struck between the rights of individuals to protection from reputational damage while ensuring that freedom of speech is not unduly curtailed and that information that is in the public interest is released.

VLSB+C welcomes the opportunity to assist in the review. Our comments are limited to only those matters within our expertise. Specifically, we wish to draw your attention to two concerns we have. The first is in relation to the defence of absolute privilege and the second is a broader concern about the appropriate balance to be struck between the policy objectives outlined above, in the context allegations of sexual harassment, where the perceived or actual threat of a defamation may prevent individuals making complaints to regulators about improper or illegal conduct.

Regulation of the Legal Profession – Overview

The legal profession has been regulated in Victoria for over a century. The Uniform Law currently provides a robust and effective regulatory framework with a strong consumer protection focus through promotion, monitoring and enforcement of the high professional standards of legal practitioners.¹ VLSB+C works co-operatively with the Law Institute of Victoria (LIV), the Victorian Bar (the Bar)² and a range of other organisations, including regulators forming part of the Uniform Law framework,³ in support of these standards. 22,438 lawyers held practising certificates in Victoria as at 30 June 2018.⁴

The Uniform Law commenced on 1 July 2015 in Victoria and New South Wales, establishing a common ‘uniform’ framework for regulation across both states. The Uniform Law currently covers around 70% of practising lawyers in Australia. Western Australia is set to join from 1 July 2020. In Victoria, the Uniform Law forms Schedule 1 of the *Legal Profession Uniform Law Application Act* (Vic) 2014 (Application Act) and is implemented in Victoria through that Act. One of the main objectives of the Uniform Law is to provide and promote inter-jurisdictional consistency in the regulation of legal practitioners.

Although VLSB+C operates effectively as one body, the Board and Commissioner are allocated separate regulatory functions under the Application Act. The Board is responsible for a broad range of regulatory functions, including most relevantly to this submission:

¹ The six objectives of the Uniform Law are set out in section 3 of Schedule 1 of the Application Act

² Some statutory functions are delegated to these bodies, for example, continuing professional development compliance is a function delegated to the LIV

³ Including the Commissioner for Uniform Legal Services Regulation, the Legal Services Council and the NSW regulators

⁴ Extensive further data may be found in our Annual Report for 2017-2018

- a) issuing, renewing, suspending, cancelling and imposing conditions on practising certificates including making decisions about the whether the applicant is a fit and proper person to practice law;
- b) maintaining the Victorian legal profession register and register of disciplinary action; and
- c) monitoring, inspecting and conducting investigations of law practices' trust accounts and conducting audits of business management systems.

The Commissioner is responsible for the receipt, management and resolution of complaints about the professional conduct of lawyers by members of the community or by own motion, which can extend to a lawyer's conduct outside of legal practice. Complaints can also be made by other lawyers and can be about the conduct of a legal practice as an entity through the responsible principals of that entity. Complaints can include allegations of failures to comply with the Uniform Law, the Application Act and the supporting sets of Uniform Rules, including relevantly for this submission the sets of 'Conduct Rules' for solicitors and barristers respectively⁵.

Any such investigation may result in the Commissioner taking a variety of disciplinary actions including imposing fines, issuing reprimands and requiring further education or counselling. The more serious allegations of professional misconduct must be brought before the Victorian Civil & Administrative Tribunal (VCAT) for decision. Regulatory actions against lawyers are in addition to any other criminal or civil sanctions imposed and both authorities are obliged to report serious offences to the relevant prosecuting authority for example the Victoria Police or Worksafe Victoria.⁶

The Commissioner also has an important statutory role in the education of the community and the legal profession as to regulatory and other issues of relevance to the legal profession and the delivery of legal services to the community.

Defence of Absolute Privilege

We seek to draw the Defamation Working Party's attention to a potential issue relating to clause 27(d) of the Model Defamation Provisions, being the defence of absolute privilege, as it has been enacted in New South Wales and consequently in Victoria. The Office of the Legal Services Commissioner of New South Wales (OLSC NSW) drew this issue to our attention. The OLSC NSW has shared its submission to this review, dated 11 February 2019, with us. We agree with the position put forward by the OLSC in that submission and would like to add some additional comments relevant to Victoria.

The defence of absolute privilege and other protections provided under defamation law provide an additional layer of protection on top of the broad immunity from suit provided to VLSBC investigators under section 389 of the Uniform Law. The section 389 immunity applies to investigations discussed later in this submission, and specifically includes immunity from actions in defamation where the officer is acting in good faith. Officers are permitted to disclosure information obtained during investigations in certain circumstances, such as for the investigation of a criminal offence or to a Court of Tribunal.⁷

However, in our view some amendment to the respective State provisions supporting absolute privilege are required for greater certainty and clarity. The deficiency is not with the clause 27 of the Model Defamation Provisions or with the equivalent clause 27 as enacted by NSW or Victoria. Rather:

⁵ There are several sets of rules under the Uniform Law, including rules about business management, continuing professional development and general rules, all of which are subordinate legislation. The sets of Conduct Rules include matters such as lawyers' fundamental duty to the Court, management of conflicts of interest and maintaining client confidentiality. The Conduct Rules are promulgated Australia wide by the peak professional associations for barristers and solicitors and have been picked up as subordinate legislation in a number of state jurisdictions including under the Uniform Law for Victoria and NSW.

⁶ See Section 465 of the Uniform Law

⁷ See section 462 of the Uniform Law

- a) There is a deficiency in clause 18 of Schedule 1 to the *Defamation Act 2005* (NSW) (DANSW) as it does not capture 'compliance audits' and 'external examinations' undertaken pursuant to Chapter 4 of the Uniform Law, for the purposes of section 27(2)(d); and
- b) Victoria has consequently inherited this deficiency because it has relied on NSW's clause 18 rather than enacting its own provisions.

Schedule 1 to the DANSW sets out additional publications to which absolute privilege applies. Clause 18 of Schedule 1 applies absolute privilege to the NSW Application Act and the Uniform Law, and makes specific reference to publication to and by specific bodies, and in relation to specific chapters and parts of the Application Act and Uniform Law, including complaints and licensing decisions. However, publication to or by a body in the context of a compliance audit, as noted by the OLSC is not referenced in this way as it sits within Chapter 4 of the Uniform Law. Additionally, there is another investigation 'type' sitting within Chapter 4, an external examination, which is also not specifically referenced in clause 18.

Schedule 1 to the *Defamation Act 2005* (Victoria) (DAV) is vacant. However, section 27(2)(c) of the DAV states that a matter attracts absolute privilege in Victoria if the matter is published on an occasion that if published in another Australian jurisdiction would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to this section. This has the effect of applying the NSW Schedule in Victoria, and relevantly to this submission, the publications set out in clause 18 of Schedule 1 to the DANSW that reference the Uniform Law.

The power to conduct a compliance audit is contained within section 256 of the Uniform Law and is conferred on the Board. A compliance audit is a regulatory tool we use to assist law practices with more systemic issues such as where there are a number of complaints about non-compliant costs disclosure or poor billing practices. Often, the trigger for a compliance audit is a complaint being made under Chapter 5 of the Uniform Law, which is specifically referenced in clause 18 of Schedule 1 of the DANSW. Although we find the vast majority of law practices accept and take action on the contents of reports, on some occasions a 'management system direction' is issued which can lead to formal sanctions if the law practice does not take action. The Board engages the services of the Law Institute of Victoria (LIV), the professional association for solicitors in Victoria, to partner in conducting compliance audits with final reports finalised by the Board and shared with both the audited law practice and the LIV. In the context of our broader submission on sexual harassment complaints, we see compliance audits as a critical tool in combating issues that stem from poor management practices.

The power to conduct an external examination is contained within Division 4 of Chapter 4 of the Uniform Law. It is an important tool as it is focused on the examination of law practices' handling of their clients' trust money and trust property. It is an area of high risk to consumers of legal services. Although theft from trust accounts is rare, when it does occur, it usually involve large amounts of money and delinquent individuals. Currently, we engage both external and LIV expert trust account inspectors to provide reports to us. The purpose of this investigation is to provide an early warning of potentially fraudulent and dishonest conduct.

The matters specifically referenced within Schedule 1 to the DANSW cover other investigatory functions concerning the management of complaints, licensing and admissions, and engagement in unqualified practice. There does not seem to be any clear policy rationale for omitting compliance audits and external examinations. Although the Schedule is expressed to be without limitation, our preference would be for greater certainty and clarity. While there have not been any challenges in Victoria, the OLSC advised us that a law practice in NSW threatened defamation proceedings against the OLSC after a compliance audit report was published to the Law Society of NSW. At that stage the anomaly with Schedule 1 was subsequently uncovered.

Our preference would be for the DAV to be amended so Schedule 1 to that Act specifically references the Legal Profession Uniform Law (Victoria) and the Legal Profession Uniform Law Application Act 2014 (Victoria) for the purposes of attracting absolute immunity. This has the benefit of alleviating the need to reference the defamation legislation of another state. It also allows for differences between the Application Acts of both states, which unlike the Uniform Law, are not identical. Further, our preference would be for general provisions covering all investigatory functions under these Acts rather than specifically identifying particular functions, to avoid the current issues with Schedule 1 of the DANSW. Alternatively, it may be worthwhile considering extending clause 27 of the Model Provisions to specifically cover investigators acting in good faith.

Defamation and Sexual Harassment in the Legal Profession

We wish to highlight to the Defamation Working Party that we support a broader consideration of the use of threats of defamation proceedings specifically in the context of sexual harassment claims and the consequent effect on the ability of complainants to pursue those claims. We appreciate these matters are not directly contemplated within the scope of the review. However, the issue does fundamentally turn on the balance to be struck between the policy objectives sought to be met by defamation laws: namely the protection of individuals from reputational damage against freedom of expression and the release of information in the public interest. We also appreciate that there are many players in this landscape and that the role of defamation law is only one aspect of a complicated framework.

The #metoo movement has seen increased public airing of the effects of sexual harassment in order to raise awareness of the magnitude and pervasiveness of the problem within Australian society. There has been a corresponding rise in media discussion about the impact defamation threats may have on individual victims of sexual harassment. This has occurred in the context of a number of defamation cases involving high profile individuals, where the victim has not wished to pursue any claim or has sought for the information and their identity to remain private.

Many state and federal regulators have jurisdiction in this area, each having a different focus and with varying ability to act on a broad range of offending conduct. At the VLSBC we consider any form of sexual harassment to be unprofessional conduct and indicative of a lawyer's fitness to practice law. We have a broad range of regulatory powers to investigate lawyers and can hold principal lawyers of law practices accountable where there are failures to ensure the safety of staff and clients. A compliance audit (as discussed in the first section of this submission) is one way we may be able to examine sexual harassment allegations within a law practice in a way that looks beyond the incident itself to more systemic and cultural issues underlying the conduct. We also have powers to compel parties to the investigation, including third party witnesses to provide information and documents.

Research about the prevalence of sexual harassment particularly in the workplace, indicates it is widespread, however consistent with this research, we have traditionally received very few complaints. For example, the recent and extensive survey undertaken by the Australian Human Rights Commission in 2018⁸ found that one in three people surveyed had experienced sexual harassment in the last 5 years but that only 17% had reported it to their employer. Similarly, only a third of persons who had witnessed sexual harassment had reported it. The research indicates a number of common reasons for victims unwillingness to report including that sexual harassment is often not formally reported because the affected person:

- a) felt confusion about complaints policies and processes;
- b) felt they would be perceived as 'over reacting' if they reported an incident;
- c) lacked confidence that the complaint would be handled adequately; or
- d) feared adverse consequences for their career if they made a complaint.

⁸ Everyone's business: Fourth National Survey on sexual harassment in Australian Workplaces

We do not think the legal workplace is any different and have initiated a long-term strategy to explore the dynamics, prevalence and barriers to reporting of sexual harassment in the legal profession with a view to best engaging our regulatory tools to effect real cultural change and reduce both prevalence and consequent harm⁹.

As discussed above, our investigators have immunity from suit under the Uniform Law where disclosures are made in good faith in accordance with the scope of the power exercised. The VLSBC operates in accordance with strict general non-disclosure prohibitions under section 462 of the Uniform Law. In addition, the defences of absolute and qualified privilege apply under the VDA. We have experienced a number of instances where threats of defamation action in differing circumstances have been made against individual officers and the VSBC as an entity, however advice in all matters to date has been that a successful claim for damages for defamation by a lawyer under investigation is unlikely given these protections.

However, in undertaking our project to address sexual harassment within the legal profession we are very aware of the barriers, perceived or real, preventing greater reporting of sexual harassment. Although we are comfortable we would not be bullied by threats of defamation action, we cannot be confident our potential complainants and third party witnesses would not be. Particularly, we note in this context the nature of the profession we regulate. Lawyers know the law and their rights and often occupy positions of power and influence and even public fame. More junior lawyers and non-legal staff, who are statistically more vulnerable to sexual harassment, face an information asymmetry. Further, even if confident in the face of the protections offered by confidential complaint making processes, there is nothing to prevent the sickening effect of a writ, no matter how unlikely its prospect of success.

The public policy considerations in the context of the law of defamation and the legal profession complaints regime was considered in detail in the Victorian case of *Hercules v Phease*¹⁰. The defendants in this matter had made a complaint to the LIV, as was the appropriate statutory avenue for making a complaint about a solicitor at that time. The solicitor commenced defamation proceedings and in this context the LIV suspended the investigation and took no part in the proceedings, even as an intervener, leaving the complainant to rely on the defence of absolute privilege. The Court found ultimately found that absolute privilege did extend to the making of the complaint as it enlivened the ultimate possibility of the judicial process. Therefore, as stated by Marks J:

“the judicial inquiry may never take place if a complainant can be dissuaded from pursuing his or her allegations by being subjected to litigation or other pressure’ and that ‘even if the institute [LIV] had not swerved from its investigatory course and the respondents were vulnerable, because absolute privilege did not apply, to the present writs, there are public policy reasons why they should be protected as much as possible from pressure to withdraw.”.

His Honour then went on to further consider those public policy considerations including that:

“The public must be free to report complaints about solicitors to the proper authority without fear of a suit for defamation. In my opinion the considerations in favour outweigh those against. The relationship between solicitor and client involves trust. The law has become increasingly complex and the public has become commensurately dependent on the services of lawyers.”.

Further His Honour noted that:

“...not all unfounded complaints are defamatory. But, in any case, there can be no better safeguard of reputation against unfounded complaints than the existence of a disciplinary tribunal which is capable of exonerating persons against whom unfounded complaints are made. Moreover, it should not be overlooked that the category of professional persons against whom members of the public need most protection are those who would attempt to “gag” a complainant by the issue of legal proceedings such as those here.”.

⁹ VLSBC Statement on Sexual Harassment in the Legal Profession, 6 February 2019 http://lsbc.vic.gov.au/documents/Statement-Sexual_harassment_in_the_Victorian_Legal_Profession-2019.pdf

¹⁰ [1994] 2 VR 411

In the NSW Court of Appeal case of *Zarath v Williamson & Ors*¹¹ the Court declined to extend absolute or common law qualified privilege in an action for defamation by a solicitor against a former client. In these circumstances, the Court considered publication of a letter to the solicitor, copied to an officer of the OLSC NSW, where a complaint was on foot, as not for the furtherance of the complaint and thus not attracting the defence of absolute privilege. Further, it was for the collateral purpose of pressuring the solicitor into reducing or waiving his costs and therefore malicious and not reasonable. Therefore, its publication did not attract qualified privilege either.

In the course of our project, we are seeking further advice on the intersection of defamation law with legal profession regulation with a view to ensuring we can be clear with potential complainants and third party witnesses when complaints of sexual harassment are brought to our attention. We will also consider making recommendations to government about any legislative reform that is required within our sphere of influence.

In terms of this review, we do not presume to offer solutions, only that the intersection of defamation law in the context of the rising environment of reporting of sexual harassment should be considered from this perspective.

In this context, we support more focus on interlocutory process and confidentiality for the parties and consideration of a threshold 'serious harm test' being introduced or commiserate amendments to shift the onus to the plaintiff in the defence of triviality.

In closing, we thank you for the opportunity to submit to this important review and are happy to discuss any aspect of our submission with you further.

¹¹ [2006] NSWCA 246