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SUBMISSION
TO THE
COUNCIL OF ATTORNEYS-GENERAL
REVIEW OF MODEL DEFAMATION PROVISIONS

JUSTICE STRATEGY AND POLICY DIVISION, NSW DEPARTMENT OF JUSTICE

Submission prepared by LawRight

Review of Model Defamation Provisions

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LAWRIGHT SUBMISSION
REVIEW OF MODEL DEFAMATION PROVISIONS

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Background

LawRight welcomes the opportunity to make a submission to the Council of Attorneys-General in their review of the Model Defamation Provisions, and has also read the *Discussion Paper* provided by the Council. In the course of providing legal assistance to clients in relation to defamation, LawRight's Self Representation Service (**SRS**) has identified a number of areas which could be improved to better achieve the objectives of the Model Defamation Provisions.

LawRight (formerly the Queensland Public Interest Law Clearing House) is an independent, not-for-profit, community-based legal organisation coordinating the provision of pro bono legal services for individuals and community groups in Queensland. We are a partnership of law firms, barristers, Community Legal Centres, the Queensland Law Society, the Queensland Bar Association, Legal Aid Queensland, university law schools, accountancy firms and government and corporate legal units.

LawRight undertakes law reform, policy work and legal education, and operates civil law pro bono referral schemes and direct legal services for particular disadvantaged client groups through a number of programs. This submission seeks to provide feedback on the Model Defamation Provisions from the perspective of LawRight's SRS operating in the Queensland Courts (civil jurisdictions of the Supreme and District Courts of Queensland and the Queensland Court of Appeal).

LawRight SRS assistance with defamation matters

LawRight started the SRS in the Queensland Courts in 2007 to provide pro bono legal assistance to self-represented litigants who were not eligible for funding through Legal Aid and could not afford private legal assistance.

LawRight's SRS assists eligible parties with defamation matters in the Supreme and District Courts of Queensland and the Queensland Court of Appeal by:

- providing skilled pro bono legal advice and practical task assistance during appointments with volunteer lawyers from 15 participating law firms;
- where appropriate, encouraging early resolution and diversion from the courts, including by providing advice to clients proposing to commence claims with no real prospects of success or a misunderstanding of defamation law, assisting clients to make or respond to offers to make amends and settlement offers, and by referring clients to pro bono mediators to facilitate settlement discussions; and
- providing useful and accessible legal education materials to promote understanding of the legal system and relevant procedures.

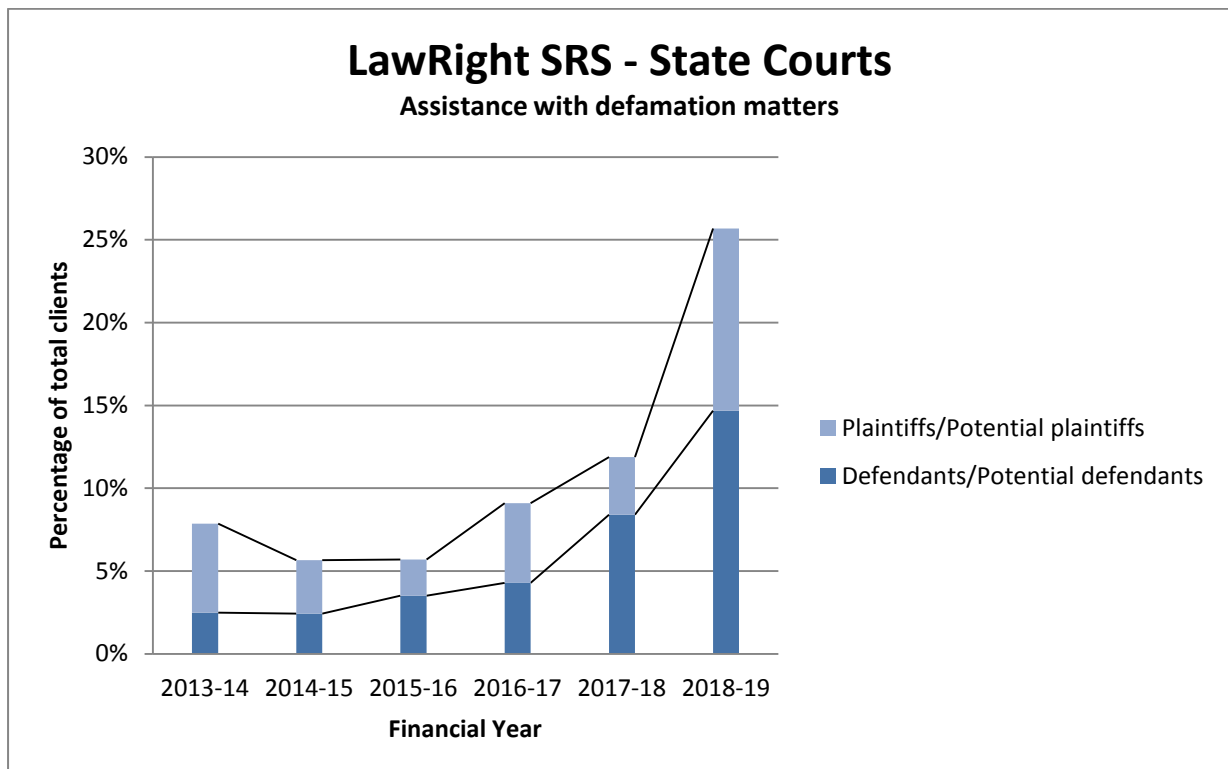
LawRight's interactions with people seeking legal assistance in relation to defamation matters occur at all stages of legal action. This includes the pre-litigation process, such as the concerns notice and offer to make amends stage, as well as court proceedings and, where relevant, alternative dispute resolution.

LawRight's SRS assists both plaintiffs/potential plaintiffs and defendants/potential defendants in relation to defamation. However, due to the availability of speculative legal assistance for matters with good prospects of success, the assistance provided by LawRight's SRS to plaintiffs and potential plaintiffs is often limited to general advice about defamation, court proceedings, and, in certain circumstances, potential evidentiary issues the client will need to address to proceed with their claim. The assistance we provide to potential plaintiffs is often

aimed at diverting litigants from the court process rather than assistance to commence proceedings.

Over the past five financial years, we have observed a steady increase in demand for pro bono assistance in relation to defamation matters, both from plaintiffs/potential plaintiffs and from defendants/potential defendants.

In 2014-15 and 2015-16, approximately 6% of applications for assistance received by LawRight's SRS concerned defamation matters. Demand for pro bono legal assistance with defamation matters increased to 9% in 2016-17, and to 12% in 2017-18. In the current financial year, 2018-19, this has increased to 26% of all SRS clients.



Summary of recommendations

LawRight's recommendations can be summarised as follows:

- a) Rather than introducing a single publication rule, the Model Defamation Provisions should be amended to make mandatory the procedures aimed at resolving matters prior to the commencement of proceedings (the giving of concerns notices and offers to make amends);
- b) Part 3, Division 1 of the Model Defamation Provisions (offers to make amends) should also be amended to clarify the specific content and timing related to the giving of concerns notices and offers to make amends;
- c) Clause 31 of the Model Defamation Provisions (the defence of honest opinion) should be amended to clarify whether the proper material on which an opinion must be stated or included in the publication; and
- d) We generally support the implementation of a threshold 'harm' test into the Model Defamation Provisions, noting this may remove the need for the defence of triviality.

We note that our recommendations have been made in general terms only, and do not include specific drafting or wording for any recommended amendments.

1. Single publication rule

LawRight acknowledges that a ‘single publication rule’ may be helpful for media organisations and companies maintaining online archives, in particular in the case of material published via the internet, and aims to reduce fear of exposure to indefinite potential liability.

However, material published on the internet may still be accessed by the public more than one year from the date of the original publication. When the material is first published it may not be widely accessed or downloaded, but various circumstances may give rise to that material being accessed and downloaded some time in the future, causing damage to the aggrieved’s reputation at that later time.

Suppose a plaintiff conducts an internet search about him or herself, and discovers defamatory material published about him or her on a small blog that is not widely read. The plaintiff shortly thereafter contacts the publisher of the blog to request that the material be removed, but the publisher refuses or does not respond. The plaintiff then elects not to commence defamation proceedings due to the extremely small readership of the blog, the fact that the plaintiff has not experienced any damage to his or her reputation, and because of the plaintiff’s inability to afford the costs of litigation. However, suppose further that three years later, the plaintiff has taken a job that puts him or herself in the public eye, prompting members of the public to conduct internet searches about the plaintiff and access the defamatory material published on the blog. As a result of the sudden increase in communication of the defamatory material, the plaintiff’s reputation is severely damaged. Under a single publication rule, the plaintiff would not be able to commence proceedings in relation to the publication, unless the court grants an extension of the limitation period under the relevant legislation.

Case study 1

“Kevin”¹ is an unemployed basketball coach, and his son is a professional basketball player. In June 2017, two articles were published on online news websites about criminal charges laid against another professional basketball player, which linked Kevin with the player’s actions. Kevin was concerned that the publications were defamatory, but was unable to afford legal advice.

Kevin was referred to LawRight’s SRS in January 2019. Kevin sought advice at this time because he had recently experienced difficulties in obtaining employment as a basketball coach, which he suspected was due to potential employers conducting internet searches of his name and locating the articles published online in June 2017.

In our view, unless additional consideration is given to the limitation period for actions in defamation and the associated discretionary power of the courts to extend those limitation periods, a single publication rule may not provide sufficient protections and remedies for persons whose reputations are harmed by the publication of defamatory matter.

Rather than introduce a single publication rule, our recommendation would be to formalise pre-litigation processes such that publishers must be notified if a person considers material published by them to be defamatory, and are then given the opportunity to retract, correct

¹ All case studies included in this submission are published with clients’ consent, using fictitious names, and omitting or changing other details so that the parties involved cannot be identified.

and/or delete the potentially defamatory material before the aggrieved person can commence proceedings. Making these types of pre-litigation processes mandatory would avoid both the need for publishers to constantly review their published content and archives, and unfair restrictions on persons seeking remedies where their reputations have been harmed by material originally published more than one year ago but communicated more recently.

We have made further comments on formalising pre-litigation processes below.

2. Offers to make amends

LawRight acknowledges that the main purpose of Part 3, Division 1 of the Model Defamation Provisions (offers to make amends) is to encourage the early resolution of disputes outside of litigation. To this end, the provisions give publishers the option to make offers to an aggrieved person with the aim of avoiding litigation, with the protection of the defence set out in clause 18 if a reasonable offer is rejected.

However, in our experience, the offers to make amends provisions are confusing, and may not go far enough to encourage the early resolution of disputes. We have identified confusion arising out of issues in relation to the time limits prescribed for offers to make amends, the lack of guidance or requirements in relation to concerns notices, and the requirements for the content of offers to make amends. Our recommendation is that these pre-litigation processes be formalised, clarified and made mandatory, to promote the early resolution of disputes without resort to litigation.

2.1 Time limits

In our experience, it is difficult for both publishers to understand and for LawRight to advise clients about the different time limits associated with offers to make amends.

Clause 14(1) of the Model Defamation Provisions states that offers cannot be made if 28 days have elapsed since receipt of a concerns notice, or if a defence has been served.

However, since it is not mandatory for an aggrieved person to issue a concerns notice, it is possible that an aggrieved person may elect to commence proceedings without first sending the publisher a concerns notice. This means that the provisions may have limited utility in encouraging the resolution of disputes outside of litigation, particularly where an aggrieved person with a spurious or indefensible claim may commence proceedings without prior notice to the publisher. A publisher who is not given a concerns notice before proceedings are commenced would need to consider making an offer to make amends at the same time as preparing a defence to the action, and requires legal advice. However, many publishers are often low or middle-income individuals, who cannot afford legal advice and must self-represent and/or seek pro bono legal assistance, which is often unavailable at short notice.

In addition, while clauses 14(3) to 14(5) set out the process for a publisher to seek further particulars of a concerns notice, the provisions do not clearly set out how the timing of this process aligns with the requirements of clause 14(1). For example, if a publisher receives a concerns notice, then 14 days later sends the aggrieved person a further particulars notice after obtaining legal advice, does the offer to make amends still have to be made 14 days later? If the aggrieved person give the publisher the further particulars 14 days after the further particulars notice (i.e. 28 days after the concerns notice was first given), has the time for the publisher to make an offer to make amends now passed? This confusion appears to be an unintended consequence of the wording of clauses 14(3) to 14(5).

Furthermore, the defence set out in clause 18 requires an offer to make amends to have been made “as soon as practicable”, but clause 14(1) allows offers to be made 28 days after a

concerns notice is given, or prior to serving a defence (generally 28 days after the service of a claim). The term “as soon as practicable” is of concern as it is not clear what this means in the context of the time limits allowed for making an offer. LawRight notes that our clients generally require legal advice to respond to any concerns notices or defamation proceedings, including advice about the content and effect of offers to make amends. However, due to their financial circumstances, they must rely on pro bono legal assistance which usually cannot be provided on an urgent basis. While it is possible that an offer to make amends under these circumstances will be considered by the courts to have been made “as soon as practicable”, LawRight’s view is that clause 18(1)(a) should be amended to clarify that the defence is available when an offer has been made within the time limits set out in clause 14(1). In this regard, we note that recent case law has found that an offer to make amends made within 28 days of receipt of service of defamation proceedings (i.e. within the time limits allowed in clause 14(1)) to be “as soon as practicable” for the purposes of the defence in clause 18.²

2.2 Concerns notices

While the requirements for offers to make amends are well established in Part 3, Division 1 of the Model Defamation Provisions, there is little guidance regarding what is required for a concerns notice.

There are no provisions which govern the timing associated with issuing a concerns notice, and how long an aggrieved person should then wait before commencing court proceedings. LawRight’s SRS has observed that concerns notices are frequently combined with letters of demand, requiring publishers to make apologies, correct or remove defamatory material, pay compensation or do other acts. These types of concerns notices frequently threaten to commence proceedings if those acts are not done within a certain time, and the time stated is frequently shorter than the time periods allowed for a publisher to make an offer to make amends under clause 14(1). It is therefore possible for an aggrieved person to commence proceedings before a publisher has had the opportunity to obtain advice about and make an offer to make amends. The lack of clear guidance about when proceedings can or should be commenced after a concerns notice is issued means there is limited incentive for an aggrieved person to attempt to resolve the dispute prior to commencing proceedings.

In addition, the only requirement for the content of a concerns notice is that the notice must inform the publisher of the defamatory imputations that the aggrieved person considers are or may be carried by the matter in question. There is no specific requirement to identify the details of the publication, such as where, when and to whom it was published. Whilst the provisions of clauses 14(3) to 14(5) allow a publisher to make requests for particulars upon receipt of a concerns notice, as noted above, there is some confusion about how requests for particulars affect the time limits to make offers to make amends. In addition, the process of making and responding to requests for particulars can result in delays to the resolution of the dispute, and both parties having to pay more legal costs. These issues could be resolved by clarifying that certain details of the relevant publication must be included in a concerns notice.

2.3 Content of offers to make amends

Clause 15(1) of the Model Defamation Provisions sets out the required content of an offer to make amends. While offers to make amends can be made in relation to the publication of material that *may* be defamatory, the wording of the requirements set out in clause 15(1) can be interpreted to suggest a pre-supposition that the material complained about was in fact incorrect or defamatory. For example, under clause 15(1)(d), the offer must include “an offer

² *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201 at [716] per Flanagan J; *Zoef v Nationwide News Pty Ltd* [2016] NSWCA 283 at [92]-[93].

to publish, or join in publishing, a reasonable correction of the matter in question”. The phrase “reasonable correction” can cause confusion for some clients, as the word ‘correction’ implies that something in the material is wrong, incorrect or defamatory. It can be difficult to ascertain what type of ‘correction’ the publisher should offer to make in situations where, for example, a publisher does not accept that the material was defamatory or incorrect, but is still willing to remove or amend the publication in acknowledgement that the material caused harm to the aggrieved person. Whilst clause 19 provides that evidence of statements and admissions made in connection with the making or acceptance of an offer to make amends is not admissible in subsequent proceedings, it can be difficult for self-represented persons to accept that they must offer to ‘correct’ their publication when they do not consider their publication to be defamatory and do not think that they have done anything wrong. Further to this point, it can be difficult for self-represented persons to understand the difference between making an apology, which is not required in an offer to make amends, and publishing a ‘correction’. This issue could be resolved by reconsidering the wording of clause 15(1), such as by clarifying what ‘reasonable correction’ means and stating that it does not require an apology.

Clause 15(1)(f) also states that an offer to make amends must include “an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer”. In circumstances where an aggrieved person can elect to commence proceedings against a publisher without needing to first issue a concerns notice, the publisher can be required to offer to pay more costs or expenses than if the aggrieved had chosen to send a concerns notice first.

Case Study 2

“Mallory” took her cat to a veterinary surgery, but was unhappy with the service she received there. A couple of months later, Mallory posted a review of the surgery on a review website, criticising the surgery as well as the veterinarian for their treatment of her cat and the surgery’s billing practices.

One month later, Mallory received a concerns notice from the surgery’s legal representatives. The concerns notice included a demand that Mallory delete the online review, sign an attached form or apology, sign an undertaking, and pay the surgery \$3,000 for legal costs. The concerns notice stated that if these demands were not met within seven days, the surgery would immediately commence court proceedings.

Mallory initially sought assistance from Legal Aid, who referred her to LawRight. By the time Mallory applied to LawRight for assistance, four days had already passed since she received the concerns notice. Due to limited resources, the earliest appointment LawRight could provide was one week after the due date specified in the concerns notice. As a result, Mallory sent her own offer to make amends to the Surgery one day before the due date specified in the concerns notice, but because she had not obtained legal advice, her offer to make amends did not comply with the requirements of clause 15 of the Model Defamation Provisions.

LawRight subsequently assisted Mallory to send a further offer to make amends that complied with the legislative requirements.

2.4 Recommendations where offers to make amends

As outlined above, LawRight considers that the current drafting of the offers to make amends provisions cause confusion and do not go far enough to encourage parties to resolve disputes without resort to litigation.

While some of the concerns raised above can be resolved by relatively simple amendments, our overall recommendation is that these pre-litigation processes should be made mandatory, and clarification should be given regarding the specific content and timing of concerns notices and offers to make amends. This would involve amendments such as the following:

- requiring an aggrieved person to give a publisher a concerns notice as a mandatory first step before commencing any court proceedings;
- specifying the content of the concerns notice, such as the particulars of the matter that must be set out in the concerns notice;
- stipulating the following time limits:
 - how long the aggrieved person must wait after giving the concerns notice before he or she can commence proceedings, allowing for exceptions under certain circumstances where an urgent application to the court may be appropriate;
 - when an offer to make amends can be made after receipt of a concerns notice; and
 - when an aggrieved person can commence proceedings after receipt of an offer to make amends;
- if the process for requesting particulars of a concerns notice is still required, specify how that process affects the time limits for making offers and commencing proceedings;
- clarifying the content of offers to make amends, in particular the meaning of 'reasonable correction'; and
- amending clause 18 to make the defence consistent with the above amendments.

It may also be necessary to consider whether amendments are also needed to clarify how a mandatory pre-litigation process would affect the general limitation period for actions in defamation.

If aggrieved persons are required to notify publishers of their concerns as a mandatory first step, they may be encouraged to think more seriously about what they are seeking to achieve or claim before they commence proceedings. This may reduce the number of trivial claims that enter the court system. Publishers would also be afforded the opportunity to review the matter complained about and reconsider the publication before either party is put to the expense of litigation.

It is LawRight's position that a mandatory pre-litigation procedure for the giving of concerns notices and offers to make amends would more effectively encourage parties to resolve their disputes outside of court, and may also help to dissuade some litigants from bringing spurious or indefensible claims.

3. Defence of honest opinion

Clause 31 of the Model Defamation Provisions provides that:

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - a) the matter was an expression of opinion of the defendant rather than a statement of fact; and
 - b) the opinion related to a matter of public interest; and
 - c) the opinion is based on proper material.

As noted in the *Discussion Paper*, clause 31(1)(c) does not make clear whether the proper material on which the opinion is based must be published in the same publication as the purportedly defamatory material.

The interpretation of this section was recently considered by Muir J in *Brose v Baluskas & Ors* [2018] QDC 214. Her Honour provides a useful summary of the relevant case law in this area, concluding that “a defence of honest opinion is not available at common law or pursuant to s31 of the Defamation Act, unless the facts, (not the substratum of facts, subject matter or topic) on which the opinion is based, are stated, referred to in the publication, or are notorious”.³

Finally, in considering the facts of the case, Her Honour stated the test as being whether the publication was “based on material readily available for the ordinary reasonable reader to assess the opinion for themselves.”⁴

As has been noted by other commentators and canvassed in the *Discussion Paper*, the requirement that an opinion be based on proper material (and to go further – that this material be outlined or referenced in the publication itself when it is not well known) does not reflect the way in which opinions are typically published online. For the vast majority of LawRight’s clients seeking assistance to defend defamation proceedings, the proceedings have been brought against them on the basis of short, or a series of short, publications made on social media. These publications do not include an explanation or reference to the material relied upon to make the publication. As a result, on the basis of the current drafting of the legislation and subsequent interpretation by the Queensland District Court, honest opinion may not be a readily available defence for these digital publications.

LawRight agrees with the argument that it would be against the public interest and arguably inconsistent with the Model Defamation Rules to allow individuals to make a defamatory comment on any matter and have a defence of honest opinion in circumstances where the reader or the individual the subject of the publication is not in a position to assess the basis for the opinion. However, if the intention of the defence is to allow for greater expression of public opinion/commentary, then this provision is impractical and potentially naive in the context of digital publications and the realities of the speed and simplicity of expressing an opinion online or via social media.

Clause 31 of the Model Defamation Provisions (the defence of honest opinion) should be amended to clarify whether the proper material on which an opinion is based must be stated or included in the publication and the Council should give particular consideration to the context of digital publication.

³ *Brose v Baluskas & Ors* [2018] QDC 214, [36]

⁴ *Brose v Baluskas & Ors* [2018] QDC 214, [66]

4. Serious harm test

From 1 July 2015 to 30 June 2017, LawRight's SRS provided advice to, or assisted, 27 individuals to defend defamation proceedings. Due to the nature of our service and the limits on our funding, it is difficult to track the outcomes of these matters with absolute certainty. However, our records indicate that three of these matters progressed to trial (two successfully defended, one unsuccessful) and three obtained private representation outside of LawRight's pro bono referral scheme. Of the remaining 21, a small percentage settled their proceedings or otherwise reached an amicable conclusion; however, the majority of these proceedings are in abeyance.⁵

In the cases referred to above, these proceedings have an overarching theme. Proceedings are commenced against individuals (who have no ability to satisfy a judgment in any event) on the basis of short, nonsensical "rants" on social media or in email correspondence. These publications, while inflammatory, are unlikely to have any lasting impact on the plaintiff's reputation and are usually only seen by a very small number of people. In these cases, proceedings are typically commenced and then shortly followed by a settlement offer. The settlement offer generally outlines the high risk of further legal costs being incurred by the plaintiff, and foreshadows the risk the defendant will be required to pay these costs if they are not prepared to immediately settle the matter. When the defendants receive assistance from LawRight to draft a defence to the proceeding or otherwise respond to the letter of offer/demand, that is typically the last contact our client has with the plaintiff, and the matter enters abeyance.

At the risk of oversimplifying the myriad reasons why an individual would commence or discontinue legal proceedings, we believe the introduction of a threshold test would reduce defamation claims being commenced purely to stamp out criticism or prompt a quick settlement offer.

In the context of more serious defamatory publications, the introduction of a threshold test may also prompt quicker resolution of proceedings. For example, if a defendant is more aware of the harm caused, and the potential liability they may be exposed to, they may be more willing to settle at an early stage. Our clients often find it difficult to consider making offers to settle a dispute when, in their mind, the plaintiff has not suffered any loss. It is also difficult for a defendant to decide how to respond to a plaintiff's complaint when disclosure has not yet occurred and the plaintiff has not particularised the damage suffered as a result of the publication. It may be possible to incorporate aspects of a threshold harm test in the mandatory pre-litigation procedures as recommended above, for example by including a requirement for an aggrieved person to set out the harm suffered as a result of the publication in the concerns notice given to the publisher.

The introduction of a threshold test may impact on the need for a triviality defence. If the intention of the threshold test/triviality defence is to reduce the number of spurious/trivial claims before the courts, we note that a threshold test is likely to be a much more efficient tool. The defence of triviality, in a practical sense, operates towards the middle and end of a matter. When defending defamation proceedings, a litigant will have already gone to the expense and time of retaining lawyers or seeking legal advice before they are given an opportunity to raise the defence of triviality. When commencing proceedings, although a prudent lawyer would consider the possible defences raised by the other side before advising a client to commence proceedings, this is not always the case, and such consideration is not always taken by self-represented litigants before starting legal proceedings. However, if potential plaintiffs were forced to consider and potentially plead to

⁵ The data captured by LawRight has limitations and some of these proceedings may continue at a later stage and may ultimately come before the court; however, we believe this data demonstrates a concerning trend.

the harm that has been caused at the time they commence proceedings, this may force litigants to consider at an earlier stage whether they should pursue the proceeding.

Conclusion

While LawRight is generally supportive of the content of the Model Defamation Provisions, we have identified a number of matters that could be improved to better achieve the objectives of the Provisions. Our recommendations may assist to encourage the early resolution of defamation disputes, and provide clarification on matters which have been causing confusion for our client base.

We appreciate the opportunity to make these submissions, and look forward to the next stages of the Review.