



ATSILS
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24th May 2023

The Hon. Yvette D'Ath
Attorney-General and Minister for Justice
Minister for Women
Minister for the Prevention of Domestic and Family Violence
GPO Box 149
Brisbane QLD 4001

By email: attorney@ministerial.qld.gov.au

Dear Attorney-General,

Re: Consultation on Part B of the Stage 2 Review of the Model Defamation Provisions

Thank you for the opportunity to provide comments in relation to the final policy recommendations for Part B of the Stage 2 Review of the Model Defamation Provisions (MDPs) which include extending the defence of absolute privilege to all matter published to police and all matter published to state and territory complaint-handling bodies that have functions to receive and handle complaints about relevant conduct (such as sexual offences) (Consultation). The proposed reforms, if enacted, would mean that a person that is the subject of a complaint made to police or another relevant complaint-handling body about serious conduct, such as sexual assault or harassment, has no legal recourse in defamation law against their accuser even if the allegations levelled against them are false or made with malice. In our view, the proposed reforms limit the right of an individual to not be subjected to unlawful reputational damage in a manner that is neither reasonable nor proportionate. Accordingly, we do not support the policy recommendations.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by over five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Response to consultation

Whilst the underreporting of serious conduct including sexual offences is a significant concern within Aboriginal and Torres Strait Islander communities, the reasons for reluctance to report such conduct by Aboriginal and Torres Strait Islander victim-survivors are complex and are more likely to be related to existing socio-economic iniquities faced by Aboriginal and Torres Strait Islander individuals and cultural considerations rather than the threat of defamation proceedings being instituted against a victim-survivor by the accused. Notwithstanding, we appreciate that there may be contexts where a victim-survivor may feel discouraged to report relevant conduct due to the fear of the accused instituting defamation proceedings (or threatening to do the same) against them, for example, where the accused is in a position of power when compared with the victim-survivor and may have more resources at their disposal for such proceedings.

Further, we appreciate that:

- (a) the policy objective behind these reforms is to minimise the purported chilling effect of defamation law on the reporting of relevant conduct (including sexual assault and sexual harassment) by victim-survivors; and
- (b) underreporting of serious conduct (including sexual harassment and sexual assault) by victim-survivors is a legitimate concern and measures should be taken to support victim-survivors in coming forward to report such conduct.

However, the proposed reforms, if enacted, would mean that a person that is the subject of a complaint made to police or another relevant complaint-handling body about serious conduct, such as sexual crimes, has no legal recourse in defamation law against their accuser even if the allegations made against them are false or made with malice. The reputational harm that is associated with such allegations is likely to be significant and long-lasting. Any statutory limitation on the human rights of an individual must be reasonable and proportionate. We consider that the proposed reforms do not meet this standard and fail to strike the appropriate balance between the rights of a victim-survivor when reporting relevant conduct and the rights of an individual accused to not be subjected to unlawful reputational harm.

Furthermore, in our view, the existing qualified privilege defence which provides a complainant with protection from a defamation action except in the case where such a report has been proven to the civil standard¹ to be false, fraudulent, malicious, frivolous or vexatious, strikes a more suitable balance between protecting a victim-survivor when reporting unlawful conduct whilst also preserving the rights of the accused to not be subject to unlawful attacks on the individual's reputation². The qualified privilege defence provides an avenue of redress for a person who is wrongly accused which, in our view, is essential.

Recommendations

We respectfully recommend that:

- the final Part B policy recommendations are not adopted on the basis that the existing qualified privilege defence contains sufficient legal safeguards to balance the rights of the victim-survivor and an accused; and

¹ *Briginshaw v Briginshaw* [1938] HCA 34.

² Right to privacy and reputation as enshrined in Article 17 of the International Covenant on Civil and Political Rights to which Australia has signed and ratified.

Legal Submission: Part B of the Stage 2 Review of the Model Defamation Provisions

- SCAG consider other, more appropriate, means of reducing the underreporting of relevant conduct, such as, targeted community education campaigns and the provision of adequate support services for victim-survivors.

We thank you for the opportunity to provide feedback on the Consultation.

Yours faithfully,

Shane Duffy
Chief Executive Officer