

From Free Speech Victoria & Liberty Victoria

To: The Attorney-General
The Hon Rob Hulls
Parliament House
MELBOURNE 3000

Dear Mr Hulls,

Re: *Defamation law reform*

At Liberty's recent meeting with you we raised the issue of defamation law reform, and particularly the concerns we have about the use of defamation proceedings to silence public discourse and the democratic process, and you indicated some interest to hear further from us in relation to this issue.

Liberty Victoria joins with Free Speech Victoria in advocating changes to the State's defamation laws. The enclosed book, *Slapping on the writs*, by Brian Walters SC (a member of both Free Speech and Liberty committees) examines a number of instances of community debate on matters of legitimate public interest being silenced by defamation proceedings or the threat of such proceedings, and it includes a draft of a new bill to protect public participation. [The draft bill is also attached to this letter.]

The misuse of defamation laws in Victoria is a growing phenomenon, and if citizens are not to be denied their right to speak on matters of public importance then they need legislative protection to prevent actions designed to silence them.

We note that the meeting of Attorneys-General from states and territories last year once again considered the need for uniform legislation across the Commonwealth in order to prevent opportunistic jurisdiction shopping as is currently the practice. Our proposed legislation might be something on which you could take a lead in that connexion.

We believe that the High Court's judgment (particularly that of Deane J) in the case of *Theophanous v The Herald and Weekly Times*, although subsequently diluted, remains an excellent statement as to the requirements of freedom of speech in the proper working of any democracy.

We are encouraged by the reforms to the defamation law in New South Wales, enacted last year, which have implemented one of our proposed changes, viz., that corporations shall not have the right to sue in order to prevent criticism of their practices.

We would be happy to meet again with you or with your representative to discuss this issue further.

PROTECTION OF PUBLIC PARTICIPATION BILL

Purposes of this Act

1 The purposes of this Act are to

- (a) encourage public participation, and dissuade persons from bringing or maintaining proceedings or claims for an improper purpose, by providing
 - (i) an opportunity, at or before the trial of a proceeding, for a defendant to allege that, and for the court to consider whether, the proceeding or a claim within the proceeding is brought or maintained for an improper purpose,
 - (ii) a means by which a proceeding or claim that is brought or maintained for an improper purpose can be summarily dismissed,
 - (iii) a means by which persons who are subjected to a proceeding or a claim that is brought or maintained for an improper purpose may obtain reimbursement for all reasonable costs and expenses that they incur as a result,
 - (iv) a means by which punitive or exemplary damages may be imposed in respect of a proceeding or claim that is brought or maintained for an improper purpose, and
 - (v) protection from liability for defamation if the defamatory communication or conduct constitutes public participation; and
- (b) preserve the right of access to the courts for all proceedings and claims that are not brought or maintained for an improper purpose;
- (c) to make the law of Victoria conform more nearly to the International Covenant on Civil and Political Rights, and in particular Article 19 thereof, by better protecting the right to freedom of expression.

Definitions

2 (1) In this Act:

"claim" means any claim for relief within a proceeding;

"defendant" means a person against whom a proceeding is brought or maintained;

"government body" means any level of government, and includes

- (a) any body funded by government;
- (b) any body appointed or established by, or from which advice is requested by, the State government, and any equivalent body of any other level of government, and
- (c) any local government body

"improper purpose" has the meaning set out in subsection (2);

"level of government" includes

- (a) the Commonwealth government,
- (b) the State government,
- (c) the government of any other State of Australia, and
- (d) the government of any municipality;

"plaintiff" means a person who initiates or maintains a proceeding against a defendant;

"proceeding" means any action, suit, matter, cause, counterclaim, appeal or originating application that is brought in any court, but does not include a prosecution for an offence or a crime;

"public participation" means communication or conduct aimed at influencing public opinion, or promoting or furthering lawful action by the public or by any government body, in relation to an issue of public interest, but does not include communication or conduct

- (a) in respect of which an information has been laid or an indictment has been preferred in a prosecution conducted by the Director of Public Prosecutions,
- (b) that constitutes a breach of any enactment,
- (c) that contravenes any order of any court,
- (d) that intentionally or recklessly causes damage to or destruction of real property or personal property,
- (e) that intentionally or recklessly causes physical injury,
- (f) that constitutes trespass to real or personal property,
- (g) by way of advertising for commercial goods or services; or
- (g) that is otherwise considered by a court to be unlawful or an unwarranted interference by the defendant with the rights or property of a person;

"reasonable costs and expenses", in relation to a proceeding or claim, means costs and expenses that

- (a) have been agreed on between the plaintiff and the defendant, or
- (b) if no agreement has been reached, consist of the following:
 - (i) the amount of legal fees and disbursements that are determined by a court to be payable to a defendant for all matters related to the proceeding or claim, as the case may be, including all of the reasonable costs and expenses incurred by the

defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding or claim;

(ii) any other costs and expenses that the court considers to be reasonably incurred by the defendant in relation to the proceeding or claim.

(2) A proceeding or claim is brought or maintained for an improper purpose if

(a) the plaintiff could have no reasonable expectation that the proceeding or claim will succeed at trial, and

(b) a principal purpose for bringing the proceeding or claim is

(i) to dissuade the defendant from engaging in public participation,

(ii) to dissuade other persons from engaging in public participation,

(iii) to divert the defendant's resources from public participation to the proceeding, or

(iv) to penalize the defendant for engaging in public participation.

Part I - DEFAMATION

Defamation

3 Public participation constitutes an occasion of qualified privilege and, for that purpose, the communication or conduct that constitutes the public participation is deemed to be of interest to all persons who, directly or indirectly,

(a) receive the communication, or

(b) witness the conduct.

4 (1) No corporation shall be entitled to sue for any cause of action in defamation, and no person shall be entitled to sue for any cause of action in defamation in reliance on any imputation arising from any statement made about a corporation.

(2) Subsection (1) does not limit any law relating to the protection of competition

5 No politician, public servant or public official shall be entitled to sue for any cause of action in defamation arising from statements relating to his or her conduct in office or, in the absence of malice, which the plaintiff must prove, fitness for office.

6 (1) In the absence of malice, which the plaintiff must prove, no general damages shall be awarded for defamation.

(2) Where a plaintiff succeeds in an action for defamation, the court may make any of the following orders:

- (a) a declaration that the statement complained of was defamatory and/or untrue,
- (b) a declaration as to the true position as found by the Court;
- (c) an order requiring the defendant to make a retraction;
- (d) an order requiring the defendant to make a correction;
- (e) an order compelling the defendant to publish a retraction, correction or any other statement in such form, in such place, and on such terms as the Court may consider just in all the circumstances;
- (f) an order compensating the plaintiff for any special damages incurred by reason of the defamation.

Part II - PROTECTION OF PUBLIC PARTICIPATION

Application for summary dismissal

7 (1) If a defendant against whom a proceeding is brought or maintained considers that the whole of the proceeding or any claim within the proceeding has been brought or is being maintained for an improper purpose, the defendant may, subject to subsection (2), bring an application for one or more of the following orders:

- (a) to dismiss the proceeding or claim, as the case may be;
- (b) for reasonable costs and expenses;
- (c) for punitive or exemplary damages against the plaintiff.

(2) An application under subsection (1) shall be brought within 60 days of the service of the writ or other process on the defendant, and shall be dealt with by a court as soon as reasonably practicable.

(3) All further applications, procedures or other steps in the proceeding are, unless the court otherwise orders, suspended until the application has been heard and decided.

(4) Nothing in subsection (3) prevents the court from granting an injunction pending a determination of the rights under this Act of the parties to a proceeding.

Orders available to defendant

8 (1) On an application brought by a defendant under subsection 7 (1), the defendant may obtain an order under subsection (2) of this section if the defendant satisfies the court, on the balance of probabilities, that, when viewed on an objective basis,

- (a) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation, and

(b) a principal purpose for which the proceeding or claim was brought or maintained is an improper purpose.

(2) If, on an application brought by a defendant under subsection 7 (1), the defendant satisfies the court under subsection (1) of this section in relation to the proceeding or in relation to a claim within the proceeding,

(a) the defendant may obtain one or both of the following orders:

(i) an order dismissing the proceeding or claim, as the case may be;

(ii) an order that the plaintiff pay all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding or claim, as the case may be, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding or claim, and

(b) the court may, in addition to the orders referred to in paragraph (a), on its own motion or on the application of the defendant, award punitive or exemplary damages against the plaintiff.

(3) If, on an application brought by a defendant under subsection 7 (1), the defendant is unable to satisfy the court under subsection (1) of this section, the defendant may obtain an order under subsection (4) if the defendant satisfies the court that there is a realistic possibility that, when viewed on an objective basis,

(a) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation, and

(b) a principal purpose for which the proceeding or claim was brought or maintained is an improper purpose.

(4) If, on an application brought by a defendant under subsection 7 (1), the defendant satisfies the court as required in subsection (3) of this section in relation to the proceeding or a claim within the proceeding, the court may make the following orders:

(a) an order, on the terms and conditions that the court considers appropriate, that the plaintiff provide as security an amount that, in the court's opinion, will be sufficient to provide payment to the defendant of the full amounts of the reasonable costs and expenses and punitive or exemplary damages to which the defendant may become entitled under this Act;

(b) an order that any settlement, discontinuance or abandonment of the proceeding be effected with the approval of the court and on the terms the court considers appropriate.

(5) On an application for the settlement, discontinuance or abandonment of a proceeding or claim in respect of which an order was made under subsection (4) (b), the court may, despite any agreement to the contrary between the defendant and the plaintiff, order the plaintiff to pay all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding or claim, as the case may be, including all of the reasonable costs

and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding or claim.

(6) If, in a proceeding in which the defendant has obtained an order under subsection (4), the defendant makes an application to dismiss the proceeding for want of prosecution, the defendant may obtain an order under subsection (7) of this section if

(a) the proceeding is dismissed for want of prosecution, and

(b) the plaintiff is unable to satisfy the court on the application that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding was brought does not constitute public participation, or

(ii) none of the principal purposes for which the proceeding was brought or maintained were improper purposes.

(7) If, under subsection (6), the defendant is entitled to obtain an order under this subsection, the defendant may obtain an order that the plaintiff pay all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding.

Onus on plaintiff at trial

9 (1) A defendant who has obtained an order under sub-section 8 (4) in respect of a proceeding or claim may, at the trial of the proceeding, obtain one or more of the orders referred to in sub-section 8 (2) if

(a) the defendant alleges at trial that

(i) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation, and

(ii) the proceeding or claim was brought or maintained for an improper purpose,

(b) the proceeding or claim is discontinued or abandoned by the plaintiff or is dismissed, and

(c) the plaintiff is unable to satisfy the court at trial that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding or claim was brought does not constitute public participation, or

(ii) none of the principal purposes for which the proceeding or claim was brought or maintained were improper purposes.

(2) A defendant who has not obtained an order under section 8 (4) may, at the trial of the proceeding, obtain one or more of the orders referred to in section 8 (2) if

(a) the defendant gives notice to the plaintiff, at least 60 days before the date scheduled for the trial of the proceeding (or such other time as the court may direct), that the defendant intends at trial to seek an order under this section in respect of a proceeding or claim,

(b) the defendant satisfies the court at trial that there is a realistic possibility that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation, and

(ii) a principal purpose for which the proceeding or claim was brought or maintained is an improper purpose,

(c) the proceeding or claim is discontinued or abandoned by the plaintiff or is dismissed, and

(d) the plaintiff is unable to satisfy the court at trial that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding or claim was brought does not constitute public participation, or

(ii) none of the principal purposes for which the proceeding or claim was brought or maintained were improper purposes.

Court may hear any evidence and argument

10 (1) Without limiting any other rights the parties may have to present evidence and make arguments in an application brought under subsection 7 (1) or at a trial under section 9 (1) or (2), the parties may present evidence and make arguments as follows:

(a) as to whether the communication or conduct in relation to which the proceeding was brought constituted public participation;

(b) as to whether the proceeding was brought or is being maintained for an improper purpose.

(2) The parties may present the evidence or make the arguments referred to in subsection (1) (a) and (b) whether or not the evidence or arguments relate to the particulars of the claim or claims raised by the plaintiff.

Disposition of security

11 (1) If a defendant succeeds under subsection 8 (7) in respect of a proceeding, the defendant may obtain an order that the reasonable costs and expenses to which the defendant is entitled under the order made under subsection 8 (7) be paid to the defendant out of any security provided by the plaintiff under subsection 8 (4).

(2) If a defendant succeeds under subsection 9 (1) in respect of the whole of a proceeding, the defendant may obtain an order that the following amounts be paid to the defendant out of any security provided by the plaintiff under subsection 8 (4):

(a) the reasonable costs and expenses to which the defendant is entitled under the order made under subsection 9 (1);

(b) any punitive or exemplary damages awarded to the defendant by the court.

(3) If a defendant succeeds under subsection 9 (1) in respect of a claim brought as part of a proceeding, the defendant may obtain an order that the following amounts be paid to the defendant out of any security provided by the plaintiff under subsection 8 (4):

(a) whichever of the following the court considers best gives effect to the purposes of this Act:

(i) the proportion of the reasonable costs and expenses referred to in subparagraph (ii) of this paragraph that the claim bears to the proceeding as a whole;

(ii) the reasonable costs and expenses incurred by the defendant in relation to the proceeding, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding;

(b) any punitive or exemplary damages awarded to the defendant by the court.

(4) After the defendant receives payment of the money to which the defendant is entitled out of any security provided by the plaintiff under section 8 (4), any portion of that security that is not provided to the defendant under this section, including any interest that has accrued on that money, must be returned to the plaintiff.