19 May 2021

Policy Reform & Legislation
Department of Communities and Justice
GPO Box 6
Sydney NSW 2001
by email: defamationreview@justice.nsw.gov.au

Dear Sir or Madam

Re: Review of Model Defamation Provisions, Stage 2 – Submissions of Dr Jelena Gligorijevic in response to Discussion Paper

Thank you for initiating the second stage of the review of the Model Defamation Provisions. I enclose with this letter my submissions in response to the Discussion Paper of 31 March 2021. I target my submissions to those questions with which I am most concerned, primarily the availability of pre-trial injunctions, and extending the defence of absolute privilege. I make these submissions as an academic who specialises in media law, with particular interest in the principles applicable to granting non-publication orders, and the nature and operation of absolute privilege.

Thank you for the opportunity to provide submissions at this stage of the review.

Yours sincerely

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REVIEW OF MODEL DEFAMATION PROVISIONS – STAGE 2

SUBMISSIONS IN RESPONSE TO DISCUSSION PAPER

Dr Jelena Gligorijevic

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19 May 2021

Question no 15(a). What should be the threshold for obtaining an order before a trial to require the defendant to take down allegedly defamatory material?

In respect of online publication, the threshold for pre-trial interim injunctions in defamation cases should be lower than is currently applied by the courts. The threshold should be:

(a) There is a probability that the plaintiff's claim in defamation will succeed at trial, taking into account the absence or inapplicability of the defence of truth; and

(b) The balance of convenience lies in favour granting an interim injunction, taking into account the harm that the plaintiff is likely to suffer if one is not granted, on the basis of both the substance of the publication and the online nature of publication.

There is a particular and peculiar harm in online publication of defamatory (or otherwise unlawfully published) material, due to the nature of the medium. The relevant harm in online publication is not limited to the substance of the publication (in defamation law, the seriousness of the allegation, or the 'sharpness' of the sting in the imputation); there is material harm also in the greater rapidity and breadth of dissemination enabled by online publication. This nature of online dissemination amplifies or exacerbates the harm contained in the substance of the publication, and it does so to an extent that justifies alleviating the burden currently borne by plaintiffs in defamation who seek a pre-trial interim injunction.

I agree with Law Commission of Ontario's (LCO) position[1] that the type of harm of online defamation is of a particular nature as to give rise, at least, to the question of whether existing thresholds are adequate.

Currently in Australia the courts are less likely, in practice, to grant an interlocutory injunction in defamation cases,[2] even if, as a matter of principle, defamation injunctions are not exceptional to the rules of equity that normally apply to interlocutory injunctions generally.[3] In principle, the same degree of judicial discretion ("exercised on the basis of justice and convenience")[4] is preserved in respect of defamation cases as it would be in any other injunction application.

However, the practical rarity of success in obtaining an interim injunction in defamation cases is because the "special context of a defamation action"[5] will see the courts place special emphasis on the common law principle of freedom of expression,[6] reflecting (though not adopting as a rule) the reasoning of Lord Coleridge CJ in *Bonnard v Perryman*, including that "[t]he right of free speech is one which it is for the public interest that individuals should possess", even in spite of the likelihood (pending determination) that the tort of defamation has been committed.[7]

Therefore, even though the Australian courts have not adopted a stricter approach, in principle, to interim defamation injunctions as have the courts in comparable jurisdictions,[8] in practice the courts will take into account additional considerations in undertaking the normal equitable test for interlocutory injunctions,[9] which relate to the specific content of the publication and the rights that

[1] Law Commission of Ontario *Defamation Law in the Internet Age* (Final Report, March 2020).
[2] See, for example: *Advanced Medical Institute Pty Ltd v Channel Seven Sydney Pty Ltd* [2007] NSWSC 793; and *McJannett v Daley* [2012] WASC 217.
[3] *ABC v O'Neill* (2006) 227 CLR 57, at 67-68. As to the general equitable rule for interim injunctions, see *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 (probability of success at trial), and *American Cyanamid v Ethicon Ltd* [1975] AC 396 (serious issue to be tried). There is disagreement in the jurisprudence as to which of the two standards should be applied (probability of success or serious issue to be tried), before considering the balance of convenience.
[4] *ABC v O'Neill* (2006) 227 CLR 57, at 67.
[5] *ABC v O'Neill* (2006) 227 CLR 57, at 60.
[6] *ABC v O'Neill* (2006) 227 CLR 57, at 72.
[7] *Bonnard v Perryman* [1891] 2 Ch 269 at 284.
[8] In England and Wales, for example, *Green v Associated Press Ltd* [2005] QB 972; and in New Zealand, for example, *McSweeney v Berryman* [1980] 2 NZLR 168.
[9] *ABC v O'Neill* (2006) 227 CLR 57, at 81-82.

are implicated. The High Court in *O'Neill* confirmed that it was material, in defamation cases in particular, that there was "a public interest in the right of free speech", that the success or failure of the defence of truth is determinative of whether the plaintiff's legal rights have been infringed, that the truth defence is normally a jury matter, and that the plaintiff might ultimately recover only nominal damages.[10] These considerations underpinned the High Court majority's decision in that case to allow the appeal against the injunction granted by the lower Court.

There is also merit in recognising that the potential remedies available to a defamation plaintiff, especially in relation to print media publications, include apology, retraction and correction (most often in addition to or in mitigation of damages). This reinforces the underlying normative stance that it is better that a plaintiff recover damages (and other remedies) for harm suffered in defamation *ex post*, than that members of the public and the media suffer (prior) restraint on their freedom of expression.[11]

However, there is a material difference between the harm of defamatory imputations that are published in print media, and the harm of those published online: the rapidity of dissemination, and the wider reach, of online publications justifies deviating from the expectation that, prior to final judgment, the impugned material should remain publicly accessible, and any final remedies should be sufficient to address the harm or vindicate reputational interests.

This special harm of online publication should therefore be an explicit part of the threshold or test for pre-trial injunctions (or take-down orders) in defamation cases, in order to reduce the capacity of concerns for freedom of expression disproportionately to frustrate injunctive relief (where there is a probability of success at trial and the balance of convenience lies in favour of injunction). The established principles of how the courts assess the balance of convenience, including having due regard to freedom of expression, will continue to apply, but an adjusted threshold for online defamation cases will direct courts to take into account the special harm of online dissemination.

It is worth recalling the general purpose of pre-trial interim injunctions: they are issued predominantly in order to preserve a particular status quo, pending the resolution of a legal matter. This is particularly obvious in cases where the plaintiff seeks to vindicate any interests in confidentiality or informational privacy, and where publication would effectively extinguish the claim.[12] The court exercises its equitable jurisdiction in aid of preserving a person's legal or equitable right of action, and their ability to protect or vindicate that right. The injunction is temporary, because it is granted only pending the resolution of the matter whether or not that right actually arises on the facts and would actually be or have been breached on the facts.

Although the interests underpinning the laws of confidentiality and privacy, on the one hand, and the law of defamation, on the other, are unquestionably distinct, given the nature of online publication, if a defamatory statement is published online before final judgment, the harm done to reputation may be so great as to render inadequate (though not necessarily extinguish) the remedy of compensation following final judgment. This assumes that the statement published gives rise to a probability of success in establishing all elements of the tort of defamation, which, following the enactment of the amended model defamation provisions, will include a 'serious harm threshold', and a 'public interest' defence.

Therefore, it is justified on the basis of the nature of online publication, and it is not an unjustified encroachment on freedom of expression, to adjust the threshold of pre-trial interim injunctions in online defamation cases to the following:

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[10] *ABC v O'Neill* (2006) 227 CLR 57, at 68-69.
[11] *National Mutual Life Assoc v GTV Corp* [1989] VR 747, at 764. See also: *Bonnard v Perryman* [1891] 2 Ch 269.
[12] See, for example, *Bacich v ABC* (1992) 29 NSWLR 1; *Nationwide News v ABC* [2005] NSWSC 945; and *BAT Australia v John Fairfax Publications* [2006] NSWSC 1197. These can also include anonymised injunctions (*ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329), and 'super-'injunctions (*CTB v NGN Ltd* [2011] EWHC 1326 (QB)). For an elaboration of the principles underpinning the jurisdiction to grant injunctive relief and how these account for concerns to uphold freedom of expression in different contexts, see: J Gligorijevic "Publication restrictions on judgments and judicial proceedings: problems with the presumptive equivalence of rights" (2017) 9(2) *Journal of Media Law* 215-231.

(a) There is a probability that the plaintiff's claim in defamation will succeed at trial, taking into account the absence or inapplicability of the defence of truth; and

(b) The balance of convenience lies in favour granting an interim injunction, taking into account the harm that the plaintiff is likely to suffer if one is not granted, on the basis of both the substance of the publication and the online nature of publication.

Question 15(c). What circumstances would justify an interim or preliminary take down order to be made prior to trial in relation to content hosted by an internet intermediary? Should courts of all levels be given such powers? For example, in some jurisdictions lower courts have limited powers to make orders depending on the value of the claim.

The circumstances that would justify issuing a pre-trial interim injunction (take-down order) against an internet intermediary would be the same as those justifying issuing a pre-trial interim injunction against the defendant (most likely the originator of the content), and, in addition to that, circumstances in which the online content can be removed only or most efficiently by the intermediary. Courts of all levels should be given such powers.

If it is recognised, as I have argued above, that there is a particular harm in online publications, by virtue of the nature of the online medium, and:

- if the threshold for issuing a pre-trial interim injunction against the defendant (the originator of the online content) has been met; and

- if the online content can be removed only or most efficiently by the internet intermediary,

then it would be justified and principled to extend the jurisdiction to grant such interim relief to internet intermediaries. This would ensure that any interim injunction issued against the defendant is not frustrated by the defendant's refusal[13] or inability to comply, or, more broadly, that the protection a court has decided ought to be given to a plaintiff in this context is not frustrated. In the same way that the nature of online dissemination materially amplifies the harm of a substantive publication, it can also make it difficult to control the accessibility of that publication. If the relevant thresholds are met for issuing a pre-trial injunction (including those incorporating the new element of serious harm, the absence of a truth defence, and the applicability of the new 'public interest' defence), then it would be justified to enjoin those parties who are able to ensure the injunctive relief is delivered: the controllers of the publication, or internet intermediaries.

It is worth noting, particularly in the (news) media context, that the courts already have jurisdiction to punish media for contempt of court where they breach an injunction, even if they were not subject to that injunction, where they knew of its existence.[14] Someone who is not party to the proceedings, and against whom the injunction was not issued, can still be prosecuted for and found guilty of criminal contempt, if they knew of the injunction and breached it.

Although the case of internet intermediaries is not identical to the case of newspapers reporting on matters subject to interim injunctions, the enforceability of injunctions against those not subject to them or not party to the proceedings provides a normative (if not doctrinal) footing for courts to issue injunctions (and enforce them against) those parties who are deemed in control of and responsible for the online publication of the material subject to trial.

As the Discussion Paper notes, the courts have already exercised this power against internet intermediaries in the context of online defamation actions.[15]

[13] As occurred, for example, in *Webster v Brewer (No 2)* [2020] 727.
[14] *AG (UK) v Times Newspapers (Spycatcher case)* [1992] 1 AC 191.
[15] *KT v Google LLC* [2019] NSWSC 1015.

The threshold for issuing a pre-trial interim injunction against internet intermediaries should incorporate the threshold proposed for such injunctions issued against the defendant (content originator), and take the following form:

(a) There is a probability that the plaintiff's claim in defamation will succeed at trial, taking into account the absence or inapplicability of the defence of truth; and

(b) The balance of convenience lies in favour granting an interim injunction, taking into account the harm that the plaintiff is likely to suffer if one is not granted, on the basis of both the substance of the publication and the online nature of publication; and

(c) The publication can be removed only or most efficiently by the relevant internet intermediary.

Any court with jurisdiction to hear a defamation claim should be empowered to issue such pre-trial interim injunctions, regardless of any existing limitations on the jurisdiction to issue such orders, based on the value of a claim. This position is justified by reference to the plaintiff having already established there is a probability that he or she will succeed at trial, including proving the publication has or would cause him or her serious harm. That 'serious harm' threshold is a new threshold introduced in the amended model defamation provisions in 2020. In the absence of that threshold (and until that threshold is enacted), a value-cap limited jurisdiction to issue pre-trial injunctions, even in online defamation cases, may be justified

The originator of the content (for example, the internet platform user), as well as the controller of publication (the internet intermediary, for example, a search engine, or content host, or social media platform), should be given the opportunity to respond to the application for an interim injunction in the same way as in respect of pre-trial interim injunctions in other civil cases, and in accordance with the threshold test outlined above. *Ex parte* orders should be the exception, rather than the rule, in response to the particular urgency of any case or the particular seriousness of harm from any publication, in keeping with the courts' general approach to *ex parte* hearings.

Question 15(d). Should a court be given power to make an order which requires blocking of content worldwide in appropriate circumstances?

Yes.

The power to make an order (and the scope or reach of that order) should depend on whether the relevant threshold has been met (whether the relevant degree of risk or harm has been established to justify the court's intervention), rather than whether that order can or will necessarily be enforced.

As stated above, the nature of online publication amplifies the harm in a substantive publication by virtue of the increased rapidity and breadth of dissemination via the internet. As a matter of legal principle, therefore, a court which is empowered to address that harm ought to be empowered to do so to the full extent of that harm, which is not delimited by the boundaries of any single municipal jurisdiction. Put another way, a court in such circumstances should not be disempowered to issue a 'worldwide' or extraterritorial injunction, simply because it is unlikely that it will be enforced outside the home jurisdiction.

It is important to recall that courts retain discretion in issuing injunctions, as part of their equitable jurisdiction. The importance of this was emphasised by the High Court in *O'Neill*.[16] Given as much, it would remain open to a court, empowered to issue a 'worldwide' injunction, to refuse to do so, on the basis that the relevant threshold has not be met, *in respect of that extended scope.* It would appear inconsistent with the recognition of the nature of and harm in online publication, and therefore unprincipled, to deny the courts this power.

[16] *ABC v O'Neill* (2006) 227 CLR 57, at 67.

Question 19(a). Should the defence of absolute privilege be extended to statements made to police related to alleged criminal conduct?

Question 19(b). Should the defence of absolute privilege be extended to statements made to statutory investigative agencies related to alleged criminal conduct? If yes, what types of agencies?

Question 21(a). Should absolute privilege be extended to complaints of unlawful conduct such as sexual harassment or discrimination made to: (i) employers, or to investigators engaged by employers to investigate the allegation; and (ii) professional disciplinary bodies?

Absolute privilege should not be extended to any of these occasions.

Any consideration of whether to extend absolute privilege as a defence to the tort of defamation must begin by recognising the nature of absolute privilege, as the Discussion Paper already outlines. It is worth re-emphasising the nature of absolute privilege.

Absolute privilege is an exceptional mechanism by which otherwise justiciable matters are prohibited from being tried in the courts, and by which a person who may have breached another's legal right has absolute immunity from suit, regardless of the circumstances. It is, in effect, a way of depriving individuals access to court – access to justice – in respect of the matter covered by privilege. Equally, it disempowers the courts from hearing claims and adjudicating on the particular circumstances of the case. The effect of absolute privilege on otherwise justiciable legal rights is to render them incapable of being vindicated or protected; it is not unreasonable to say that absolute privilege has a nugatory effect on those rights which might arise in privileged occasions.

Given as much, strong justifications are necessary for extending the scope of absolute privilege to occasions previously not covered by such a defence. This was confirmed by the High Court when it determined that the correct justification and threshold for recognising absolute privilege was necessity, rather than efficiency or public policy.[17]

The paramount importance of protecting freedom of expression in Parliament, for example, is one justification underpinning the centuries-old absolute privilege in Parliament: the indispensability of this freedom to the democratic order, as a matter of constitutional principle, justifies the exclusion of the courts' jurisdiction from matters said or done in parliamentary proceedings.[18] Absolute privilege reflects and maintains the need to preserve free and frank parliamentary debate (and other business), as well as the need to preserve the separation of judicial from legislative power. It complements the convention that matters *sub judice* should not be commented upon in Parliament. In this sense, privilege embodies the constitutional principle of mutual respect and restraint exercised by the judicial and legislative branches.

The justification for absolute privilege in respect of some occasions within the executive branch of government (including provision of ministerial advice to the Crown), and the justification in respect of occasions within the judicial branch (conducting judicial proceedings and the administration of justice), differ in substance from the justification for parliamentary absolute privilege, but they carry the same degree of *exceptional constitutional importance*, and *necessity*. The mere availability of a cause of action on such occasions is deemed to pose too great a risk of frustrating the principles and practices that are foundational to the constitutional order, including the provision of full and frank advice to the Crown, and the hearing of honest and comprehensive testimony (or other forms of evidence) in court.

[17] *Mann v O'Neill* (1997) 191 CLR 204.

[18] *Parliamentary Privileges Act 1987 (Cth)*, s 16(1); and *Bill of Rights 1688 (Eng)*, art 9. In defamation law, see *ABC v Chatterton* (1986) 46 SASR 1, 18. For an elaboration the normative justifications for, and proper scope of, the absolute parliamentary privilege of freedom of expression, see J Gligorijevic "Parliamentary privilege reaffirmed" [2014] *New Zealand Law Journal* 393.

In respect of absolute privilege covering occasions of judicial or quasi-judicial proceedings, the way in which the High Court has described the type of proceedings where such privilege will apply reflects this underlying justification: the question to ask is "whether there will emerge from the proceedings a determination the truth and justice of which is a matter of public concern".[19] The key issues are whether the powers exercised in the proceedings are judicial in nature (including that the determination has some degree of finality), and whether the determination is of public concern. The Australian courts have extended absolute privilege to bodies exercising (quasi-)judicial power in their proceedings, and not extended it to bodies found not to be exercising judicial or quasi-judicial power (or not making determinations of public concern).

Extending absolute privilege, and thereby disabling individuals from vindicating or protecting their legal rights in the courts, ought to be justified to the same degree and in the same nature as is the existing remit of absolute privilege: there must be proximity to core constitutional functions (including administration of justice, due process, and the rule of law), and, as recognised by the courts, it should be a matter of necessity.

Absolute privilege has been extended by legislation (in one or more Australian jurisdictions) to cover occasions that are sufficiently proximate to the core occasions (contained within the legislative, executive and judicial branches of government, and justified in accordance with constitutional principles and functions), so as to be properly justified; for example:

- Australian Human Rights Commission complaints including witness statements[20] – the interests protected by absolute privilege are those proximate to the administration of justice, specifically, ensuring complaints can be tried and decided according to the most comprehensive pool of evidence before the Commission, and in accordance with the procedural rules binding that Commission.

- Ombudsman investigations in some jurisdictions[21] – similarly, the interests protected by absolute privilege are proximate to the administration of justice, specifically, ensuring matters can be investigated according to the most comprehensive pool of information before the Ombudsman, and in accordance with the procedural rules applicable to such an investigation, resulting in a final outcome.

- Whistleblower occasions[22] – the interests protected by absolute privilege are those proximate to the maintenance of accountability of (executive) power, ensuring the exercise of power is done in accordance with the rule of law, and rule-of-law principles.

The extension of absolute privilege to the occasions suggested in the Discussion Paper is not justified to the degree or in the manner normatively (and doctrinally) required. Although those occasions might lead to (quasi-)judicial proceedings, they are not sufficiently normatively proximate occasions because they are not *part* of those proceedings. The investigatory processes undertaken by police, statutory investigatory bodies, employers, and professional disciplinary bodies do not resemble adjudicative or tribunal (quasi-judicial) procedures, are not bound by the same procedural rules, and are not underpinned by the same ultimate objective: the resolution of a contentious matter following a hearing and reasoned decision on the facts in light of the applicable law. The justifications for extending absolute privilege do not apply to these occasions.

The English and Welsh Court of Appeal's extension of absolute privilege to the reporting of criminal activity to police, even when it did not lead to prosecution,[23] extends the justifications of this privilege beyond its normative limits, as reflected in Australian common law. The Court's reasoning

[19] *Mann v O'Neill* (1997) 191 CLR 204, at 212, quoting *Lincoln v Daniels* [1962] 1 QB 237, at 255-256.
[20] See: *Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth); Age Discrimination Act 2004 (Cth);* and *Racial Discrimination Act 1975 (Cth).*
[21] For example: *Health Ombudsman Act 2013 (Qld)*.
[22] At the federal level: *Public Interest Disclosure Act 2013 (Cth)*, s 10. Legislation also provides for this privilege most of the states and territories.
[23] *Westcott v Westcott* [2008] EWCA Civ 818.

that, "[b]ecause society expects that criminal activity will be reported and when reported investigated and, when appropriate, prosecuted, all those who participate in a criminal investigation are entitled to the benefit of absolute privilege in respect of the statements which they make", is inconsistent with the normative underpinnings of absolute privilege, as recognised by the High Court. It is more consistent with the normative justification and purpose of *qualified* privilege, namely, to protect the sharing of information between interested parties where it is in the public interest in, or there is a moral impetus for, the sharing of that information.[24]

The Discussion Paper likewise raises a different justification for extending absolute privilege to the proposed occasions, namely, that the availability of the cause of action in defamation may be frustrating the reporting of serious wrongdoing, including by having a chilling effect on victims of serious wrongdoing.

There are three main reasons why this is an inappropriate or insufficient justification for extending absolute privilege.

- The first reason is that it deviates from the way in which absolute privilege is normally justified, as an exceptional, absolute mechanism used to secure a core element of the constitutional order, including the integrity and efficacy of the exercise of (quasi-)judicial power (in conducting proceedings).

- The second reason is that the defence of qualified privilege is an adequate and appropriate measure taken to enable and encourage the reporting of serious wrongdoing (among other communciations).

- The third reason is that concerns about deterring the reporting of serious wrongdoing ought to be substantiated in robust empirical research as to causes of any chilling effect that there might be, before the core interests protected by the tort of defamation are set aside by the extension of absolute privilege.

The first reason, relating to the appropriate justifications for extending absolute privilege, particularly to occasions of (quasi-)judicial proceedings, has been discussed above. It is worth reiterating that there are important normative reasons, recognised by the High Court, for limiting occasions of absolute privilege to proceedings which involve the exercise of (quasi-)judicial powers, including producing a final determination on a contentious matter which is tried in a process bound by rules aimed at securing the integrity, fairness and comprehensiveness of that process and the final determination. Occasions where a person makes a complaint to a body responsible for investigating such complaints do not fall into this category, and are not sufficiently normatively proximate to it.

The second reason, relating to qualified privilege, rests on the principle that the very purpose and nature of qualified privilege is targeted at protecting occasions of reporting serious wrongdoing. The purpose of qualified privilege, in the context of complaints of serious wrongdoing, is to ensure that legitimate complaints can be made without fear of suit in defamation; such complaints, being truthful and legitimate, will never fall foul of the qualifications of malice or unreasonableness, which would defeat the defence and its protective quality. The concern underpinning qualified privilege is precisely to secure occasions in which communication of information ought to be free from risk of liability, where that communication is not maliciously or unreasonably infringing another's reputational rights.[25] The qualified nature of this defence, and the conditions for its defeasibility, are important guarantees of protection for these reputational rights.

[24] I discuss qualified privilege below.

[25] *Toogood v Spyring* (1834) 1 C M & R 181; and *Papaconstuntinos v Holmes A Court* (2012) 249 CLR 534, at 548; see also: *Justin v Associated Newspapers Ltd* [1967] 1 NSWR 61. This was the basis on which qualified privilege was extended by the High Court in *Lange v ABC* (1997) 189 CLR 520 to account for the implied constitutional freedom of political communication.

Qualified privilege is also defeated (or simply not made out) if the scope of the privileged occasion is exceeded[26] by, for example, publication at large, or to the media, or online.[27] This is a vital control on false accusations that can cause lasting reputational harm to an individual accused of wrongdoing before the particular case has been tried and determined, and especially in circumstances where real or perceived institutional shortcomings encourage complainants to take their complaints to the media. If there are shortcomings in how complaints of serious wrongdoing are received or investigated by police, or statutory investigatory bodies, or employers, the remedy for these institutional shortcomings is not to weaken important protections offered by the tort of defamation, but to strengthen or reform those institutions responsible for processing those complaints.

It is also worth noting that the defence of qualified privilege effectively carries a 'presumption' of honesty or reasonableness on the part of the complainant (potential defendant in defamation proceedings). It is defeasible only by proof of malice (or unreasonableness), the onus for which is borne by the plaintiff.[28] It cannot be said that the very availability or nature of *qualified* privilege (as opposed to absolute privilege) necessarily generates a chilling effect on complainants who wish to make genuine reports of serious wrongdoing to the appropriate body.

Furthermore, as the Discussion Paper recognises,[29] anti-victimisation laws in the context of complaints to employers or discrimination complaints-processes are an appropriate remedy for the aggressive, combative and disingenuous use of defamation law against a complainant. Given the targeted purpose and nature of such laws, it would be more appropriate to strengthen those laws (where necessary), than to displace altogether reputational rights by covering qualified privilege occasions with absolute privilege.

The third reason, relating to evidence of a chilling effect being necessary before these interests underpinning defamation law are displaced, is based upon the recognition that the tort of defamation has a concrete protective function, and rests on long established legal interests. Even if there were to be a shift in the normative basis for absolute privilege, there needs to be clear empirical evidence of a causal relationship between the availability of the cause of action in defamation and a reluctance or refusal to report serious wrongdoing, in spite of the availability of the qualified privilege defence.

The Defamation Working Party is correct to seek evidence of this, in specific terms, and should base its decision on extending absolute privilege on such evidence (if any), and not on media and other public commentary or conjecture about chilling effects, or the appropriateness or otherwise of individuals seeking remedies in the tort of defamation. Care ought to be taken not to conflate serious issues relating to the incidence or prevalence of serious wrongdoing (particularly sexual assault, abuse or harassment), with the availability of a cause of action in defamation. The incidence of serious wrongdoing, and reluctance to report it, are problems that must be addressed, and as a matter of urgency, but not through the narrowing of legal rights to reputation as protected by the tort of defamation.

These legal rights protected by the tort give it its protective function. The tort protects an individual's right to ensure that what other people think of him or her is according to how he or she truly is.[30] It is concerned to protect and vindicate an individual's reputation or standing in his or her community.[31] It has long been accepted that reputational harm amounts to wrongdoing in law, and that a wronged plaintiff will be entitled to compensation for the injury: as Sir Edward Coke reasoned at the turn of the seventeenth century, a person's "good name…ought to be more precious to him than his life".[32] Reputation is understood as how an individual's fellows judge his or her general life

[26] *Adam v Ward* [1917] AC 309, at 321 and 348; see also *Penton v Cowell* (1945) 70 CLR 219, at 242.
[27] Where *Lange* qualified privilege does not arise.
[28] *Barbaro v ATS Pty Ltd* (1985) 1 NSWLR 30, at 51.
[29] At [5.32], p 95.
[30] *Plato Films Ltd v Speidel* [1961] AC 1090, at 1138.
[31] *Berkoff v Burchill* [1996] 4 All ER 1008, at 1018; *Radio 2UE Sydney v Chesterton* (2009) 238 CLR 460, at 466.
[32] *De Libellis Famosis* (1605) 77 ER 250, at 251.

over a period of time,[33] and it has in the past been understood as an individual's highly valuable property, stolen or soiled by false imputations, necessitating the common law's intervention through vindication and compensation.[34] More recently, reputation has been categorised as part of an individual's dignity, and defamation law as a dignitary tort or protection of human dignity,[35] and in some jurisdictions it is included within conceptions of human rights.[36]

The courts have described as defamatory (false) imputations that disparage an individual, "tend[ing] to lower the plaintiff in the estimation of right-thinking members of society generally",[37] diminishing "the esteem in which [the individual] is held by the community",[38] and causing the individual to be shunned and avoided by his or her fellows.[39] The harm is embodied in how the imputation causes ordinary reasonable people to turn away from the plaintiff.

There is no doubt that false accusations of serious wrongdoing would amount to defamation, *ceteris paribus*. However, false accusations of serious wrongdoing are not simply an established category of defamatory meaning; in view of the reasons for protecting reputation, and the ways in which the courts have described what it means to defame someone (as outlined in the previous two paragraphs), false accusations of serious wrongdoing are *the paradigmatic* instance of defamation, reputational harm, and reason for which the tort exists in the first place. It is not only reasonable that members of the community turn away from, or show indignance towards, a person who has committed serious wrongdoing; it is, in many cases, *morally or socially expected* that they do so.[40]

This means that absolute privilege should not be extended to occasions where accusations of serious wrongdoing are routinely made, or, more precisely, occasions which exist *for the purpose of* such accusations to be made: occasions including reporting offences to the police, filing complaints with a statutory investigatory body, and complaining to employers and disciplinary bodies. Individuals should not, on these occasions, be absolutely deprived of access to the courts, and of the chance to vindicate their paradigmatic reputational rights.

[33] *Dingle v Assoc Newspapers* [1961] 2 QB 162, at 181.
[34] *Dixon v Holden* (1869) LR 7 Eq 488, at 492.
[35] *Reynolds v Times Newspapers* [2001] 2 AC 127, at 201.
[36] For example, under article 8 of the *European Convention on Human Rights* 1950; see: *Pfeifer v Austria* (appl. no 12556/03; First Section; 15 November 2007), at [35].
[37] *Sim v Stretch* [1936] 2 All ER 1237.
[38] *Radio 2UE Sydney v Chesterton* (2009) 238 CLR 460, at 466.
[39] *Youssoupoff v MGM* (1934) 50 TLR 581.
[40] Making a complaint about serious wrongdoing contains the imputation of guilt (that the accused *has* committed that wrongdoing), and not an imputation of mere suspicion, which is not considered to be defamatory: *ABC v Comalco* (1983) 12 FCR 510, at 589.