

26 February 2016

The Hon Yvette D'Ath
Attorney-General
GPO Box 149
BRISBANE QLD 4001

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

Dear Attorney-General,

The media organisations that are parties to this correspondence – AAP, ABC, APN News & Media, Australian Subscription television and Radio Association, Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax media, Free TV, MEAA, News Corp Australia, SBS, The Newspaper Works and The West Australian – welcome the opportunity to respond to your correspondence to various media organisations and industry bodies regarding recommendations in the Special Taskforce on Domestic and Family Violence in Queensland (the Taskforce).

As you are aware, the media organisations that are parties to this correspondence are committed to fair and ethical reporting of domestic and family violence.

Without at all detracting from this important societal issue, reporting on this subject, and other potential crimes, highlights a number of complex matters which need careful attention and examination in order to achieve workable best practice outcomes.

In relation to reporting on domestic and family violence those complex matters include contempt of court, family law, defamation and statutory restrictions on the reporting of violence which differ between jurisdictions. These requirements inevitably shape media reporting of domestic and family violence, particularly in how the actions of accused or alleged perpetrators are reported prior to or during court proceedings, until proven or otherwise. Accordingly, we believe that these complex and often interconnected legal issues, in concert with ethical issues, should be considered with due care.

TASKFORCE RECOMMENDATIONS

We offer the following regarding Taskforce recommendations:

Taskforce Recommendation 67

Recommendation 67 recommends amending the unified defamation laws to provide a defence to defamation against media for publishing domestic and family violence support services information in relation to stories where domestic violence is alleged or intimated but not yet proven.

This recommendation seems to propose a defence to defamation to cover two separate concepts that could be included in a media story:

- (i) Publishing support information – usually at the end of a story – about where to go to seek support and help regarding domestic and family violence; and
- (ii) Instances whereby unproven claims of domestic and family violence are reported as if they are proven.

Regarding (i), we are of the view that there is no bar to defamation to the publication of information about support services.

Regarding (ii):

- *If the alleged perpetrator has been charged:*

The defence is not required. The media would be covered by the fair report of court proceedings defence nationally.

Additionally, if Queensland repealed the current restriction on accessing court documents in domestic violence cases the media could also rely on a public documents defence. This is explored later in this submission;

- *If no charges have been laid:*

The defence to defamation could be of assistance.

However, as media organisations we already implement a range of mitigation strategies to reduce the risk of publishing material that could see us run foul of a range of issues which arise on a case-by-case or story-by-story basis.

This includes offering regular training to editorial teams to take care reporting the allegations in domestic and family violence cases, in addition to offering specific advice. For example, in a specific case, advice may include not identifying the family in question.

Such risk mitigation is necessary because, as outlined previously in this submission, there are a number of complex and interrelated matters that require attention including contempt of court, family law, defamation and statutory restrictions on the reporting of violence which differ between jurisdictions.

If the proposed defence to defamation was to proceed it would not mitigate the risk that may arise from other elements, for example contempt of court.

While the issue of domestic and family violence is an issue that is exceptionally worthy of societal debate and reporting, establishing a basis in Australian defamation law for such a defence is problematic for the reasons above – i.e. that there may and can be multiple parameters on reporting domestic and family violence. Also, in effect, a defence would preference domestic and family violence as an issue more worthy than other subject matter within the defamation framework.

Notwithstanding all of the above, we note that there are provisions in the *Domestic and Family Violence Protection Act 2012* (the Act) – specifically sections 158 (court to be closed), 159 (prohibit the publication of certain information for proceeding) and 160 (prohibit obtaining copies of documents for proceeding) – that are inconsistent with the principle of open justice and limit the ability of the media to report domestic and family violence cases brought before the court. These limitations also, in and of themselves, narrow the value of a defence for defamation where the case is before the court.

We explore these provisions in more detail further in this submission

Taskforce Recommendation 68

Recommendation 68 recommends that if a defence is to be pursued under defamation law it should apply across all jurisdictions.

While we reiterate the complexity of issues outlined above, we support that any changes to defamation law should be pursued across all jurisdictions given the unified nature of the laws that were implemented and came into effect in 2005-06.

Taskforce Recommendation 69

Recommendation 69 recommends that the Queensland Government reviews other laws to identify and amend impediments for the media to publishing information about domestic and family violence services.

We make no further comments to those included above regarding the publishing of information about support services.

MEDIA ORGANISATIONS RECOMMENDATIONS

Amendments to *the Domestic and Family Violence Protection Act 2012*

As above, we note that there are provisions in the *Domestic and Family Violence Protection Act 2012* – specifically sections 158 (court to be closed), 159 (prohibit the publication of certain information for proceeding) and 160 (prohibit obtaining copies of documents for proceeding) – that are inconsistent with the principle of open justice and limit the ability of the media to report domestic and family violence cases brought before the court.

We believe that amending these provisions will assist media reporting of domestic and family violence, and help the Queensland Government to tackle this insidious form of violence. We deal with each of the provisions below:

– Section 158 – Court to be closed

There is a general prohibition on courts hearing matters under the Act to be closed.

This does not at all meet the principle of open justice.

The principle of Open Justice as applied in Common Law jurisdictions requires that justice be administered in open court.¹ As Lord Scarman said:

‘Justice is done in public so that it may be discussed and criticised in public’².

Further:

‘Whatever [the media’s] motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any

¹ Dr Daniel Stepniak, *The Therapeutic Value of Open Justice*, <http://www.aija.org.au/TherapJurisp06/Papers/Stepniak.pdf>

² *Home Office v Harman* [1982] 1 All ER 532, 547

risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them'.³

The Explanatory Notes to the Act⁴ acknowledge that the provision is not consistent with principles relating to the freedom of communication and the desirability of open courts. It also notes that this provision was carried over from the preceding Act of 1989.

We believe that there is a better approach in 2016 as this issue is now less 'behind closed doors' and a discussion within society – prompting reports such as that tabled by the Taskforce – and that is to embrace open justice and still have the ability to close court. This is an important reversal of the process and rule as it exists in the Act.

It would provide a consistent approach to open justice by aligning Court proceedings under the Act with all other Court proceedings and also enable to Court to close the court on justifiable as-needs bases.

Recommendation regarding section 158 of the Act

We recommend that there be a presumption in favour of open court.

To decide otherwise would therefore be at the discretion of the Court, on a case-by-case basis.

This would align court proceedings under this Act to all other Court proceedings.

– Sections 159 –Prohibition on publication of certain information for proceeding

Section 159 prohibits publication of certain information for proceeding, including regarding identification.

Subsection (2) provides exemptions – for which there is none for media reporting.

The Explanatory Note to the Act says that the exceptions '*effectively balance the need to protect individuals from the publication of highly sensitive and personal information and the need to facilitate the openness and accountability of court processes.*'

We do not support the assertion of the Explanatory Note that a balance has been struck. We say this without advocating that all material put before the Court should be reported in the press.

Rather, we believe that a balance can be struck if the Act was amended to include a provision that allows for publication but with non-publication orders to be made if the Court decides on an as-needs basis. Again, this would place the Act in step with all other Court proceedings.

Recommendation regarding section 159 of the Act

We recommend that there be a presumption in favour of publication.

³ http://www.judcom.nsw.gov.au/publications/benchbks/civil/media_access.html#p1-0200

⁴ http://www.austlii.edu.au/au/legis/qld/bill_en/dafvpb2011389/dafvpb2011389.html

This would include the ability for the Court to apply its discretion to make non-publication and suppression orders on a case-by-case basis.

To protect the identity of children that are party to proceedings, the Court could also restrict their identification under the Act.

This would align court proceedings under this Act to all other Court proceedings, and would align Queensland more closely with other Australian jurisdictions.

– Section 160 – Prohibition on obtaining copies of documents for proceeding

This restricts persons who are not involved in proceedings from obtaining copies of proceedings.

Copies of proceedings would be a valuable resource for journalists reporting domestic and family violence, including that such documents are an actual record of the proceedings.

Recommendation regarding section 160 of the Act

We recommend that there be a presumption that copies of proceedings are available to persons who are not involved in those proceedings.

To decide otherwise would therefore be at the discretion of the Court, on a case-by-case basis.

This would align court proceedings under this Act to all other Court proceedings.

Amendments to section 189 of the *Child Protection Act 1999*

We raise this in the context of successful amendments to sections 158 and 159 of the *Domestic and Family Violence Act*.

If amendments were made to sections 158 and 159 of the *Domestic and Family Violence Act*, section 189(2) of the *Child Protection Act* – prohibition of publication of information leading to identity of children – could still limit our ability to report.

To illustrate, in cases where it was alleged that parent A was violent or abusive towards parent B and the children then section 189(2) would clearly be directly enlivened as you would have children living in Queensland who had either been harmed by parent A (s. 189(2)(a)), were at risk of harm from parent A (s. 189(2)(b)) or both.

Further, harm is defined by section 9 of the *Child Protection Act* as including any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing and expressly includes physical, psychological or emotional abuse, neglect, sexual abuse or exploitation, constituted by a single act or omission or a series thereof. That being the case, even if the allegation was that parent A was only ever violent or abusive to parent B but not to the children, if the violence occurred in the children's presence or in circumstances where they were aware of what was happening, that could still be readily considered psychological harm or harm to their emotional wellbeing. That being the case we would again be at risk of breaching s. 189(2) if we were to report about the abuse.

Recommendation regarding section 189 of the *Child Protection Act*

Subject to amendments being made to sections 158 and 159 of the *Family and Domestic Violence Protection Act* we recommend that section 189(2) of the *Child Protection Act* be deleted.

We trust this provides useful feedback regarding the Taskforce’s recommendations regarding media reporting of domestic and family violence. We also look forward to engaging with you regarding the media organisations’ additional suggested amendments to support media reporting of this important issue that is now seeing more of the light of day.

