

**Jane Doe 1 & Ors v Shane Dowling**  
**NSW Supreme Court Proceedings 2016/383575**  
**Plaintiffs' submissions in reply**

1. These submissions deal briefly with the question of confidentiality under s. 92 of the *Sex Discrimination Act* 1984 (Cth) (**SDA**) in light of a matter raised by the defendant's written submissions of 10 September 2019.
2. In this case, the statutory obligation of confidence imposed by s 92 of the SDA operated until:
  - a. the President of the Australian Human Rights Commission (**Commission**) "commenced to inquire" into Ms Amber Harrison's complaint; or
  - b. the complaint was withdrawn under s 45PG of the *Australian Human Rights Commission Act* 1986 (Cth) (**AHRC Act**); or
  - c. the President terminated the complaint under s 46PE or 46PH of the AHRC Act.
3. At the hearing, the plaintiffs submitted that the effect of s 92 of the SDA was that Ms Harrison's complaint to the Commission (including her reference to the plaintiffs) was confidential until 17 March 2017 pursuant to s 92(1)(c) of the SDA, i.e being the date on which the President terminated that complaint under s 46PH of the AHRC Act: see Exhibit A and T185.21-36. Accordingly, the plaintiffs submitted that Mr Dowling's publication of their names in the 21 December 2016 Article and 19 February 2017 Article breached s 92 of the SDA, and that at least one basis upon which to support the continuation of the non-publication order would be in order to preserve the anonymity provided for in s 92 of the SDA.
4. In his written submissions, the defendant raised a matter not previously put before the Court, namely that at least by 13 May 2016 (the date of the failed AHRC conciliation conference), the President had "commenced to inquire" into Ms Harrison's AHRC complaint, and therefore no statutory obligation of confidence was owed at least on and from that date, pursuant to s 92(1)(a) of the SDA: page 3 of the defendant's written submissions.
5. There is no evidence in these proceedings that the date of the failed AHRC conciliation conference occurred on 13 May 2016, rather, the defendant relied in his

submissions solely on the Court's reference to it in *Seven Network (Operations) Limited and anor v Amber Harrison* [2017] NSWSC 405 at [13]-[15] per Sackar J: page 2-3 of the defendant's written submissions.

6. Nonetheless, if it is the case that Ms Harrison's complaint was subject to a conciliation (and there is no reason to doubt it given Sackar J's reference to it), the plaintiffs take the view that the proper construction of the AHRC Act supports the proposition that at least on and from the date of the conciliation the President had "commenced to inquire" into the act (the subject of Ms Harrison's complaint) for the purposes of s. 92(1)(a) of the SDA.
7. However, there is no need for the Court to decide the proper construction of the AHRC Act or the SDA, or otherwise resolve this issue. That is because these matters do not in any way:
  - a. give Mr Dowling any defence to the publication of the matters complained of (including the defence of absolute privilege under s 27 of the *Defamation Act NSW* (2005) as claimed by the defendant); or
  - b. affect the necessity of a non-publication order to be made in favour of the plaintiffs as part of the final relief sought in these proceedings, for the reasons previously submitted by the plaintiffs.
8. There is nothing else in the defendant's written submissions which calls for a reply.

17 September 2019

**A T S Dawson SC**  
Banco Chambers  
(02) 8239 0237  
sandy.dawson@banco.net.au

**M A Cowden**  
Level 22 Chambers  
(02) 9151 2227  
mcowden@level22.com.au

Counsel for the Plaintiffs