



**SUBMISSION TO THE COUNCIL OF ATTORNEYS-GENERAL DEFAMATION WORKING PARTY REGARDING THE MODEL DEFAMATION AMENDMENT PROVISIONS 2020 (CONSULTATION DRAFT)**

**24 JANUARY 2020**

Australia’s Right to Know (ARTK) coalition of media organisations welcomes the opportunity to make this submission to the Council of Attorneys-General Defamation Work Party regarding the Consultation Draft (Consultation Draft) of the Model Defamation Amendment Provisions (Draft Provisions).

ARTK appreciates the work undertaken by the Working Party to date, and looks forward to ensuring the final draft amendments are workable. To that end we make the following comments and recommend amendments to the Draft Provisions.

**1. OBJECTIVES OF THE PROVISIONS (QUESTION 1)**

**MDAP Recommendation 1:** No change to the objects of the Model Defamation Provisions in clause 3.

ARTK makes no comment regarding this recommendation.

**2. THE RIGHT OF CORPORATIONS TO SUE FOR DEFAMATION (QUESTION 2)**

**MDAP Recommendation 2:**

- a) Amend clause 9(2)(b) to clarify that the persons to be counted as ‘employees’ include individuals engaged in the day to day operations of the corporation, and who are subject to its direction and control (for example, contractors and persons supplied by labour hire firms).

*This is reflected in the draft MDAPs amendments to cls 9(2)(b) and 9(6).*

- b) Require “excluded corporations” to, as part of their claims, show that the publication has caused, or is likely to cause, serious financial loss.

ARTK previous recommendation to the Discussion Paper

ARTK considers that the meaning of an ‘excluded corporation’ in section 9(2)(b) should be clarified to provide that the reference to ‘employs’ does not denote a formal employment relationship, but is intended in the broader sense where there is any arrangement or understanding under which a person provides services to

the corporation, and could include directors, officers, independent contractors, subcontractors, casuals and volunteers.

ARTK recommended the law be amended such that the exception for not for profit organisations is removed.

#### ARTK comments on the Draft Provisions

ARTK supports the Proposed Provision as it clarifies that the calculation of employees for the purposes of determining whether a corporation is an excluded corporation. However, for the purposes of consistency we recommend a change of definition.

We note the Proposed Provision does not revoke the exception for not for profit corporations.

#### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

- ARTK requests that subsection 9(4) be amended to refer to the definition of associated entities under s 50AAA of the Corporations Act, rather than to the definition of related bodies corporate. This would be consistent with proposed section 23(3) and the proposed single publication rule. The drafting would be as follows:

*(4) In determining whether a corporation is related to another corporation for the purposes of subsection (2)(b), section 50AAA of the Corporations Act 2001 of the Commonwealth applies as if entities references to ~~bodies corporate~~ in that section were references to corporations within the meaning of this section.*

- ARTK also presses the recommendation that the exception for not for profit corporations to be revoked.

### **3. SINGLE PUBLICATION RULE (QUESTION 3)**

#### **MDAP Recommendation 3:**

- a) Introduce a single publication rule in similar terms to section 8 of the Defamation Act 2013 (UK), which:
  - i. applies to all publications;
  - ii. applies to publications by a single publisher and its related bodies corporate and individual employees/contractors; and
  - iii. provides that, for digital publications, the 'date of first publication' is the date on which the material was first uploaded by the publisher.

*This is reflected in the draft MDAPs in cl 1A to Schedule 4.1, which contains amendments proposed to the limitation legislation of each state and territory.*

- b) Amend the relevant limitation period to extend the one year limitation period in a manner similar to that of section 32A of the Limitation Act 1980 (UK), with an outer limit of three years.

*This is reflected in the draft MDAPs in cl 1B to Schedule 4.1, which contains amendments proposed to the limitation legislation of each state and territory.*

## ARTK previous recommendation to the Discussion Paper

ARTK strongly supported amending the law to include a single publication rule in similar terms of section 8 of the *Defamation Act 2013 (UK)* that applies to first publication of the material regardless of the medium.

## ARTK comments on the Draft Provisions

ARTK strongly supports the introduction of a single publication rule.

However, there is some ambiguity in the meaning of the word “manner” in subsections 3 and 4 and this has not yet been tested in the UK. For clarity, ARTK considers that these subsections should be excluded from the revised MDP, given that subsection 1(b) already makes clear that the rule applies only to matter that is “substantially the same”. If they remain, the subsections may prevent the single publication rule from applying once the technology and means for content delivery advances, as it will inevitably.

### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

- ARTK considers that subsections 3 and 4 should be excluded from the provision.
- ARTK also recommends changes to the proposed drafting of the definitions in subsection 6:

*(6) In this section—*

***associate*** of an original publisher means—

*(a) an employee of the publisher, or*

*(b) a person publishing matter as a contractor of the publisher, or*

*(c) an associated entity (within the meaning of the Corporations Act 2001 of the Commonwealth) of the publisher, including an employee of the associated entity or a person publishing matter as a contractor of the associated entity.*

***day of first publication***, in relation to publication of matter ~~on a website or in any other in an~~ electronic form, means the day on which the matter was first made available to the public by the original publisher ~~posted or uploaded on the website or sent electronically.~~

***subsequent publication***, in relation to publication of matter in an electronic form, includes when the matter is received or downloaded and comprehended by a person other than the original recipient.

## **4. OFFER TO MAKE AMENDS – CLARIFICATION OF PROCEDURES AND INTERACTION OF PROVISIONS (QUESTION 4)**

**MDAP Recommendation 4:** Make the following amendments to Part 3 of the Model Defamation Provisions, to clarify and enhance pre-trial procedures.

- a) Amend Part 3 to make it mandatory that an aggrieved person issue a concerns notice in writing to a publisher prior to commencing court proceedings.

*This is reflected in the draft MDAPs in a new cl 12A.*

- b) Amend clause 18(1)(a) to provide that, for the purpose of the defence to an action for defamation the relevant period in which an offer must be made by the publisher is the period that is “as soon as reasonably practicable”, and in any event within 28 days of receipt of a concerns notice.

*This requirement is reflected in the draft MDAPs in amendment of cl 18(1)(a).*

- c) Introduce a new requirement for an initial offer to make amends to remain open for acceptance for a period of not less than 28 days from the date of offer. Amend clause 18(1)(b) to clarify that an offer to make amends does not need to remain open until the first day of the trial.

*This is reflected in the draft MDAPs in a new cl 15(1)(b1) and amendments to cl 18(1)(b).*

- d) Introduce a new provision to provide that the limitation period is extended if a concerns notice is issued prior to the expiry of the limitation period, for the duration of the pre-trial process.

*This is reflected in the draft MDAPs in cl 1(2) to Schedule 4.1, which contains amendments proposed to the limitation legislation of each state and territory.*

#### **MDAP Recommendation 4a**

##### ARTK comments on the Draft Provisions

ARTK agrees with the new section 12A. However we do not support the period of 14 days provided for in subsection 12A(1)(c). We recommend that subsection 12A(1)(c) should provide that a period of at least 28 days from receipt of a concerns notice has elapsed before proceedings can be commenced, given this would be consistent with the period for a publisher to make any offer to make amends under section 14. It is appropriate that the timeframe for a publisher to make an offer to make amends has expired before proceedings can be commenced.

ARTK also recommends that a section 12A(1)(d) be added to prevent plaintiffs issuing proceedings if they haven't complied with the requirements of section 14(2).

#### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

Section 12A(1) should be amended as follows:

*(c) a period of at least ~~28~~ 14 days has elapsed since the concerns notice was given in relation to each proposed defendant, and*

*(d) the concerns notice otherwise complies with the requirements set out in section 14(2) of this Act.*

#### **MDAP Recommendation 4b**

##### ARTK previous recommendation to the Discussion Paper

ARTK recommends that section 18(1)(a) be amended so that an offer to make amends which is made within 28 days, or before filing a defence if no concerns notice is provided, is reasonable for the purpose of an offer to make amends defence, rather than requiring the offer be made “as soon as practicable”.

### ARTK comments on the Draft Provisions

ARTK considers that the words “as soon as reasonably practicable” should be omitted from section 18(1)(a), with the only requirement being that the offer must be made within 28 days after the publisher received the concerns notice.

#### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

Section 18(1) should be amended as follows:

*(1) If an offer to make amends is made in relation to the matter in question but is not accepted, it is a defence to an action for defamation against the publisher in relation to the matter if—*

- (a) the publisher made the offer ~~as soon as reasonably practicable after being given a concerns notice in respect of the matter (and, in any event, within 28 days after the concerns notice is received given),~~ and*
- (b) the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer, and*
- (c) in all the circumstances the offer was reasonable.*

#### **MDAP Recommendation 4c**

##### ARTK previous recommendation to the Discussion Paper

ARTK recommended the law be amended to make clear that an offer to make amends does not have to remain open at all times from when it is made until the start of the trial in order to be reasonable.

##### ARTK comments on the Draft Provisions

ARTK supports this amendment.

#### **MDAP Recommendation 4d**

##### ARTK comments on the Draft Provisions

ARTK strongly opposes this amendment.

ARTK considers that the amendment to the statute of limitations in each jurisdiction to allow automatic extensions to the limitation period if a concerns notice is given to the proposed defendant on a day within the period of 56 days before the limitation period expires is problematic and should be excluded. There should NOT be an automatic extension of the limitation period because a concerns notice is sent late - the legislation should be encouraging plaintiffs to send concerns notices as soon as possible. This is important for evidentiary reasons and in order for plaintiffs to mitigate their loss or damage.

This proposal is confusing and is inconsistent with the purpose of the offer to make amends scheme, which is to encourage the early resolution of complaints.

#### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

ARTK requests that the drafting under Schedule 4, Part 4.1 Statute of limitations, subsections 1(2), (3) and (4) be deleted in its entirety.

## 5. OFFER TO MAKE AMENDS – WHETHER JURIES SHOULD RETURN A VERDICT ON ALL OTHER MATTERS FIRST (QUESTION 5)

**MDAP Recommendation 5:** Amend the Model Defamation Provisions to require that the offer to make amends defence is to be determined by the judge.

*This is reflected in the draft MDAPs in a new cl 18(3).*

### ARTK previous recommendation to the Discussion Paper

If the offer to make amends defence is to prove effective, it should be argued as a separate point after other defences have been considered by the jury, which would give the trial judge the opportunity to give appropriate directions to the jury as to the evidentiary considerations to be applied.

### ARTK comments on the Draft Provisions

ARTK opposes this amendment.

ARTK continues to hold the view that the jury should determine whether a defence under this section is established, after determining the other defences.

The primary rationale for this is that the defence should be determined prior to any consideration by the judge of the damages to be awarded, and the risk if this defence is left to a judge is that consideration of the defence has the potential to lead to confusion and may be conflated with an assessment of damages, which would undermine the utility of the defence. Having the jury determine this defence is consistent with the position on all other defences, including the determination of reasonableness under the amended section 30 (qualified privilege).

### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

Section 18(3) should be amended as follows:

*(3) Without affecting the application of section 22 to other defences, the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established.*

#### **Additional comment**

If the Working Party decides that the jury is to determine whether an offer to make amends defence is established, it should be provided for in the MDP that any without prejudice material is not provided to the jury until after liability and the other defences have been determined.

## 6. OFFER TO MAKE AMENDS – OTHER ISSUES (QUESTION 6)

### **MDAP Recommendation 6:**

- a) Amend Part 3 to provide that the aggrieved person must specify in the concerns notice the location of the publication of the defamatory matter (for example the URL).

*This is reflected in the draft MDAPs in a new cl 14(2)(a1) and a consequential amendment to cl 14(3).*

- b) Amend clause 15(1)(d) to require that an offer to make amends include an offer to publish a reasonable correction, clarification or inclusion of additional information.

*This is reflected in the draft MDAPs in amendment of cl 15(1)(d).*

- c) Amend clause 15 to make clear that an offer to make amends does not require an apology.

*This is reflected in the draft MDAPs in a new cl 15(1A).*

## **MDAP recommendation 6a**

### ARTK previous recommendation to the Discussion Paper

ARTK recommends introducing a provision to require that an aggrieved person sufficiently identify the publication complained of, including the URL at which the material is published (if applicable), be included in concerns notices, and if not included, for the publisher to be able to request this information in a further particulars notice under section 14 of the Act.

### ARTK comments on the Draft Provisions

ARTK supports the Draft Provision.

#### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

If the Working Group is minded to consider further refinement, further certainty could be provided by amending section 14(2)(a1) as follows:

*(a1) specifies the location where specifically identifies the matter in question and where it can be accessed (for example, including, where possible, by providing or annexing to the concerns notice a copy of the publication (including a transcript of any audio or audio visual publication), or by reference to a URL or website address), and*

## **MDAP recommendation 6b**

### ARTK previous recommendation to the Discussion Paper

ARTK recommends the law be amended to clarify that the 'correction' required in an offer to make amends in section 15(1)(d) of the Act is the correction of any false statement, and does not require an apology.

### ARTK comments on the Draft Provisions

ARTK supports the Draft Provision.

#### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

If the Working Group is minded to consider further refinement, further certainty could be provided by amending the proposed new version of section 15(1)(d):

*(d) must include an offer to publish or disseminate by any means that is reasonable in the circumstances, or join in publishing or disseminating, a reasonable correction of, or a clarification of,*

*or additional information about, the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited, and*

#### **MDAP recommendation 6c**

##### ARTK comments on the Draft Provisions

ARTK supports this amendment.

### **7. JURIES – DISPENSING WITH JURY TRIAL IN THE INTERESTS OF JUSTICE (QUESTION 7)**

**MDAP Recommendation 7:** No change to clause 21 of the Model Defamation Provisions.

##### ARTK previous recommendation to the Discussion Paper

ARTK does not support an amendment to enable the court to dispense with a jury on its own motion. Rather, we support maintaining the current provisions and procedures under the MDP and UCPR – without any amendment – regarding this matter. Further, we recommend these be applied across all jurisdictions for a consistent approach to defamation cases and to bring an end to ‘forum shopping’.

##### ARTK comments on the Draft Provisions

ARTK notes that the MDAP Recommendation states no change to clause 21 of the Model Defamation Provisions.

However, recommendation 18 proposes a change to clause 21 to provide that a party’s election to trial by jury is irrevocable and this is reflected in the Unofficial Consolidation – the mark-up of the legislation – which adds a new section 21(2A) that states ‘An election is irrevocable’.

#### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

ARTK does not support the Draft Provision and instead proposes that the new section 21(2A) should provide:

*An election is ~~irrevocable~~ only revocable with the consent of all parties to the proceeding*

### **8. JURIES – JURY TRIALS IN THE FEDERAL COURT (QUESTION 8)**

**MDAP Recommendation 8:** The Commonwealth Government should consider legislative amendments relating to jury trials in the Federal Court, to improve national uniformity and consistency in defamation proceedings. This should occur in alignment with the agreed timetable for the reform process.

##### ARTK previous recommendation to the Discussion Paper

The purpose of a unified law that applies across all jurisdictions is to be that – unified – in practice and process. It is important that there is consistency across all jurisdictions hearing defamation matters. Unfortunately this is not the case – as has been outlined in the review documents.



ARTK recommended that:

- a) The Federal Government must become a signatory to the Intergovernmental Agreement; and
- b) The Federal Government must amend the *Federal Court of Australia Act 1976* (Cth) to incorporate sections 21 and 22 of the MDP. This is a more specific recommendation than that proposed in the Discussion Paper. We believe this is necessary because it is important that the provisions and procedures be precisely the same across jurisdictions; and
- c) The ACT, South Australian and Northern Territory laws should also be amended to incorporate sections 21 and 22 of the MDP.

#### ARTK comments on the Draft Provisions

The Consultation Draft paper makes sensible recommendations to the Federal Government. We support these and urge the Federal Government to undertake these actions in the timeframe recommended by the Defamation Working Group of the Council of Attorneys General.

We also note comments made by the Federal Attorney-General, Christian Porter, supporting recommendation 8. The Attorney-General said *“The Government supports recommendation 8 of the review and believes that defamation proceedings and outcomes should not depend on where a case is filed”*<sup>1</sup>.

#### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

ARTK reiterates the recommendations outlined previously, and included above, as the optimal way the Federal Government can action the intent of this recommendation.

### **9. DEFENCES – CONTEXTUAL TRUTH (QUESTION 9)**

**MDAP Recommendation 9:** Amend clause 26 of the Model Defamation Provisions to ensure that it operates as intended, allowing a defendant to ‘plead back’ imputations raised by the plaintiff.

*This is reflected in the draft MDAPs in amendments to cl 26.*

#### ARTK previous recommendation to the Discussion Paper

ARTK recommended the law be amended so that a defendant has a defence of contextual truth where the defendant proves that, by reason of the substantial truth of any imputations conveyed by a publication, any defamatory imputations of which the plaintiff complains that are not substantially true do not further harm the reputation of the plaintiff. The defence should provide that a contextual imputation need not differ in substance from the imputations pleaded by a plaintiff, and can include certain of the plaintiff’s imputations (i.e., the “pleading back” practice which was permitted in NSW under the previous section 16 of the Defamation Act 1974 (NSW)) and imputations which share a “common sting” with the plaintiff’s imputations.

#### ARTK comments on the Draft Provisions

ARTK supports the Draft Provision.

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<sup>1</sup> 10 December 2019, [AG backs shake-up of defamation law to curb celebrity ‘forum shopping’](#), Sydney Morning Herald

## 10. DEFENCES – ACADEMIC PROTECTIONS (QUESTION 10)

**MDAP Recommendation 10:** Introduce a new defence for peer-reviewed statements and assessments in a scientific or academic journal, modelled on section 6 of the Defamation Act 2013 (UK).

*This is reflected in the draft MDAPs in a new cl 30A.*

### ARTK previous recommendation to the Discussion Paper

ARTK recommended the law be amended to include documents issued or published by, and presentations at, a scientific or academic conference and press conferences held to discuss matters of public interest to the defences of fair report or public documents and proceedings of public concern. This could be achieved by adopting provisions similar to those at section 6 of the *Defamation Act 2013 (UK)*.

### ARTK comments on the Draft Provisions

ARTK supports the Draft Provision in respect of scientific or academic peer review.

However, the issue of fair reports of press conferences has not been dealt with.

### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

Rather than introduce a new section to provide a defence for fair reports of press conferences on matters of public interest, ARTK presses for the adoption of our recommended revised drafting for section 29A which could apply to fair reports of press conferences on matters of public interest. See ARTK comments at Section 11 of this submission.

Alternatively, the wording of section 29(4)(l) of the Act could be amended to make it plain that ‘public meetings’ include press conferences, as set out below.

*29(4)(l) any proceedings of a public meeting (with or without restriction on the people attending) or a press conference held anywhere in Australia if the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for public office, or*

## 11. DEFENCES – QUALIFIED PRIVILEGE (QUESTION 11)

### **MDAP Recommendation 11:**

- a) Amend the Model Defamation Provisions to introduce a new public interest defence modelled on the New Zealand common law defence of responsible communication on a matter of public interest (established in *Durie v Gardiner [2018] NZCA 278*). The defence is made out if the publication is 1) in the public interest and 2) responsible. The provision should provide a mandatory, non-exhaustive list of considerations that the jury should be required to consider, but which are not all required to be satisfied – as follows:
  - The seriousness of any defamatory imputation carried by the matter published
  - The extent to which the matter published distinguishes between suspicions, allegations and proven facts The extent to which the matter published relates to the performance of the public functions or activities of the person
  - Whether it was in the public interest in the circumstances for the matter to be published expeditiously

- The sources of the information in the matter published, including the integrity of the sources, recognising that some may be confidential meaning their identity cannot be revealed
- Extent of compliance with any applicable professional codes or standards
- Whether the matter published contained the substance of the person’s side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person
- Any other steps taken to verify the information in the matter published
- Any other circumstances that the court considers relevant.

*This is reflected in the draft MDAPs in a new cl 29A.*

- b) Retain clause 30 of the Model Defamation Provisions so that it can be relied upon by all individuals and entities, in publishing matters which may not necessarily be in the ‘public interest’ but remain of interest to the recipients, but make clear that it is not a requirement that all of the factors listed in clause 30(3) have to be met

*This is reflected in the draft MDAPs in new cls 30(3A) and (3B).*

- c) Amend clause 30 to reduce the potential for overlap between the new public interest defence and clause 30, by removing paragraphs 30(3)(a) and (b), which relate to issues of public interest or the public functions or activities of the person that the material relates to

*This is reflected in the draft MDAPs in amendments to cl 30(3).*

- d) For both the new public interest defence and the amended clause 30, provide that the jury is to determine whether the defence has been established.

*This is reflected in the draft MDAPs in new cl 29A(4) and cl 30(6).*

#### ARTK previous recommendation to the Discussion Paper

ARTK recommended that for the statutory qualified privilege defence to usefully serve the purpose for which it exists in the legislation, it needs to be available in appropriate circumstances and publishers need to be able to rely on it with confidence. However, given judicial interpretation of the “reasonableness” requirement, that is simply not the case. The defence needs to be reformulated to address this issue.

Specifically, ARTK recommended replacing section 30 of the Act with the public interest defence in section 4 of the *Defamation Act 2013 (UK)*.

The section in the UK Act better reflects the intentions of *Reynolds v Times Newspapers Ltd* [2001] AC 127, is simpler and is more likely to result in a publisher being able to reasonably rely on statutory qualified privilege as a defence. This defence requires a defendant to show that the statement complained of was, or formed part of, a statement on a matter of public interest and that the defendant reasonably believed that publishing the statement was in the public interest.

The amendment should also provide for a public figure defence akin to that in the United States, whereby public figures suing for defamation must prove that the allegations made against them are false and were published with malice.

## ARTK comments on the Draft Provisions

ARTK does not support the Draft Provision.

This proposed new defence based on the New Zealand common law defence of responsible communication on a matter of public interest shifts the focus from “reasonableness” to “responsible communication”. It is arguable that a “responsible” threshold is even higher than a “reasonable” threshold. ARTK does not consider that this new defence would make any difference in practice, given courts will most likely continue to apply a standard of perfection when determining whether a communication is “responsible”.

Further, it is likely that courts will apply the factors in subsection 2 as an impossibly high checklist which ignores how newsrooms operate in practice and the important role that the media plays as the fourth estate.

It is important to note that the New Zealand common law defence of responsible communication in the public interest is still relatively new and has not yet been tested in subsequent cases at a final hearing. ARTK is concerned that if the defence is introduced in this form, we will be having the same debate about the efficacy of the section in 12 months’ time.

The defence needs to meet the objective in clause 3 of the MDP to ensure that defamation law does not place unreasonable limits on freedom of expression. Accordingly, ARTK strongly presses for the introduction of a defence along the lines of section 4 of the *Defamation Act 2013* (UK), with appropriate adaptations for the Australian context. In particular, ARTK considers that the defence should require the Court to have regard to freedom of expression, particularly given the paucity of statutory or constitutional protections of freedom of expression here (by contrast to the UK, New Zealand and Canada).

In relation to the wording of the proposed s 29A, subsection 2(g) undermines the statutory journalist source protection found in most jurisdictions. It permits a court to consider matters which would not otherwise be considered absent an application by a party for the statutory protection to not apply. This subsection stands to not only lengthen hearings and increase interlocutory discovery and interrogatory disputes but also to undo the gains made by the introduction of the protection.

### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

ARTK proposes the following section 29A:

#### ***29A Defence of publication on matter of public interest***

*(1) It is a defence to the publication of defamatory matter if the defendant proves that—*

- (a) the matter was of public interest; and*
- (b) the defendant reasonably believed that publishing the matter was in the public interest.*

*(2) In determining for the purposes of subsection (1) whether the defendant reasonably believed that publishing the matter was in the public interest, the court-*

- (a) must have regard to the interest in freedom of expression on the publication and discussion of matters of public interest and importance, and*
- (b) must make such allowance for the editorial judgement of the defendant as it considers appropriate, particularly in cases involving professional editors and journalists.*

*(3) If the defamatory matter was, or formed part of, an accurate and impartial account of a dispute to which the person was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the matter was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.*

*(4) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the defamatory matter is a statement of fact or a statement of opinion.*

*(5) Without affecting the application of section 22 to other defences, the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established.*

ARTK's support of section 30 in the Draft Provisions is subject to the section 29A recommendation (above) being adopted.

ARTK agrees that for both the new public interest defence and the amended clause 30, the jury should determine whether the defence has been established.

## 12. DEFENCES – HONEST OPINION (QUESTION 12)

**MDAP Recommendation 12:** Amend clause 31 of the Model Defamation Provisions to clarify that the proper material must be:

- a) set out in the publication in specific or general terms,
- b) notorious,
- c) linked in the publication, or
- d) otherwise apparent from the context of the publication.

*This is reflected in the draft MDAPs in amendments to cl 31(5).*

### ARTK previous recommendation to the Discussion Paper

ARTK recommended the law be amended to expressly state the defence does not require the facts upon which an opinion is based to be stated or indicated in the publication.

We also recommended that a definition of 'opinion' be inserted to clarify that the defence protects the same range of comments as the common law defence. This amendment would address the issue of courts finding that the honest opinion defence is not available because the material is a 'statement of fact' rather than an 'opinion'. The definition of 'opinion' could be framed in accordance with the description by Lush J in his judgment in *Clarke v Norton* [1910] VLR 494 at 499: anything '*which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation*'.

### ARTK comments on the Draft Provisions

ARTK supports the Draft Provisions as they sufficiently address ARTK's concern to make clear that the facts on which an opinion is based do not need to be stated in the publication.

However, they do not address ARTK's recommendation that a definition of "opinion" be inserted.

### ARTK recommendation regarding the Draft Provisions

ARTK recommend that a definition of “opinion” be inserted such that:

*Opinion means anything which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation.*

## 13. DEFENCES – HONEST OPINION IN THE EMPLOYER-EMPLOYEE CONTEXT (QUESTION 13)

**MDAP Recommendation 13:** No change to clause 31(4)(b) of the Model Defamation Provisions.

ARTK makes no comment regarding this recommendation.

## 14. SERIOUS HARM THRESHOLD (QUESTION 14)

### MDAP Recommendation 14:

- a) Introduce a serious harm threshold, similar to the test in section 1 (serious harm) of the Defamation Act 2013 (UK), whereby:
  - i. a statement is not defamatory unless its publication has caused or is likely to cause serious harm to reputation of the plaintiff; and
  - ii. the onus is on the plaintiff to establish serious harm.

*This is reflected in the draft MDAPs in a new cl 7A(1).*

- b) Abolish the defence of triviality.

*This is reflected in the draft MDAPs in deletion of cl 33.*

### ARTK previous recommendation to the Discussion Paper

ARTK recommends the introduction of a ‘serious harm’ threshold test, similar to section 1 of the *Defamation Act 2013 (UK)*, such that a statement is not defamatory unless it has caused or is likely to cause serious harm to the reputation of the claimant. ARTK considers that in order to serve its purpose of reducing the costs of the parties and the drain on the courts’ resources, this test must be raised and applied early in the proceedings, rather than being a trial issue.

The serious harm test could be applied in a variety of spurious cases, including where:

- the plaintiff has such a bad reputation it is doubtful it would be seriously harmed any further;
- the claim arises by way of ‘true innuendo’ and the people with special knowledge of the extrinsic facts permitting them to identify the plaintiff would not believe the words seriously harmed the plaintiff’s reputation;
- the matter in question was published on a limited basis within the jurisdiction and/or the plaintiff is not known in the jurisdiction;
- the matter complained of is vulgar abuse, ‘pub talk’ or a mere criticism of goods or services; or
- any damage was transient or short-lived due to a quick retraction, clarification or apology.

If the serious harm test is introduced, then the defence for triviality in section 33 of the Act can be repealed.

## ARTK comments on the Draft Provisions

ARTK welcomes the introduction of a serious harm threshold, however it recommends that some further drafting be implemented to clarify the interpretation and procedural issues that have emerged in the UK and have been resolved recently in *Lachaux v Independent Print Ltd* [2019] UKSC 27.

In particular, the section should specify that the threshold question under this section needs to be addressed at an early stage in the proceedings, namely before a defence has been filed. This is not a matter that can be left to trial. Any requirement to file a defence within a specified timeframe needs to be dispensed with if an application is made under this section. This is particularly important in light of the new Federal Court Defamation Practice Note.

### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

- ARTK recommends that the following proposed section 7A be supplemented with the following additional drafting:

*7A(3) In determining for the purposes of subsection (1) or (2) whether the publication causes or is likely to cause serious harm to the reputation of the individual or corporation, a court may take into account any of the following factors-*

- (a) the seriousness of the defamatory imputations of which the plaintiff complains,*
- (b) any actual serious harm to reputation which has occurred since the publication,*
- (c) any serious harm to reputation which is likely to occur in the future,*
- (d) the extent of the publication,*
- (e) the location of recipients of the publication,*
- (f) the reputation held by the individual or corporation in the community in which serious harm was caused or likely to have been caused,*
- (g) the extent to which the conduct of the individual or corporation has contributed to any harm to reputation, and*
- (h) the circumstances of the publication.*

*(4) Subsection (3) does not-*

- (a) require each matter referred to in the subsection to be taken into account, or*
- (b) limit the matters that the court may take into account.*

*(5) The matters in subsections (1) and (2) above are to be determined by a court on the application of a party or of its own motion before a defence is required to be filed in the proceeding.*

*(6) The onus is on the plaintiff to establish the matters in subsections (1) and (2) above on the application of a defendant or by the court of its own motion.*

- ARTK also considers that there should be a rebuttable presumption of indemnity costs in favour of a defendant where a plaintiff fails to meet the serious harm threshold, which would provide a disincentive for plaintiffs to bring unmeritorious claims. This could be addressed in an amendment to section 40 of the MDP as follows:

*40(2)(c) if defamation proceedings are dismissed on the basis that there is no cause of action under section 7A and costs in the proceedings are to be awarded to the defendant – order costs of and incidental to the proceedings to be assessed on an indemnity basis.*

## 15. RESPONSIBILITIES AND LIABILITY OF DIGITAL PLATFORMS (QUESTION 15)

**MDAP Recommendation 15:** The Defamation Working Party will undertake a separate review process to consider potential amendments to the Model Defamation Provisions to address the responsibilities and liability of digital platforms for defamatory content published online. This will include consideration of the issues raised by the Australian Competition and Consumer Commission in the Digital Platforms Inquiry Report published on 26 July 2019. Recommendations will be made to CAG following this process.

ARTK notes this is carrying over to Stage 2 of the reforms. We urge that Phase 2 be completed by the end of 2020.

## 16. REMEDIES – CLARIFICATION RELATED TO DAMAGES QUANTUM (QUESTION 16)

**MDAP Recommendation 16:** Amend clause 35 to clarify that the cap:

- a) sets the upper limit on a scale of damages which may be awarded for non-economic loss in defamation claims.

*This is reflected in the draft MDAPs in a new cl 35(2).*

- b) is applicable regardless of whether aggravated damages apply. Aggravated damages, if warranted, should be awarded separately to general compensatory damages, rather than as part of an award of compensatory damages.

*This is reflected in the draft MDAPs in new cls 35(2A) and (2B).*

### ARTK previous recommendation to the Discussion Paper

ARTK recommended:

- The law be amended to clarify that the maximum damages amount in s 35(1) fixes the cap of general damages AND aggravated damages (if aggravated damages are deemed appropriate) TOGETHER at the existing cap (currently being just under \$400,000 for 2019); and
- Repeal section 35(2).

ARTK also recommended:

- The law be amended to include a clear statement that there is a scale within the cap – being that only the most serious cases of defamation warrant awards for non-economic loss (general and aggravated) at or close to the cap, and less serious cases for defamation warrant awards for non-economic loss far less than the cap; and
- The law be amended to include a requirement that the judiciary must allocate the amounts awarded for general damages and aggravated damages.

We also recommended the law be amended to clarify that the maximum damages amount applies to the proceedings in question, irrespective of how many separate publications have been sued on.

### ARTK comments on the Draft Provisions

ARTK agrees with new sub-section 2, which makes clear that only the most serious cases of defamation warrant awards for non-economic loss at or close to the cap.



However, it is concerning that there is no limit on awards for aggravated damages. The effect of this is to institutionalise the current penchant for awards well over the cap.

If there is no limit on awards for aggravated damages, it is likely that damages for non-economic loss will continue to be 'at large', with no certainty provided to litigants. The suggested amendment therefore does not achieve the ostensible purpose of the reform.

This can be illustrated by the recent decision in *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284 where at par 412 Applegarth J stated: "I should add that if I had accepted the defendants' submissions about the effect of the cap and adopted the unconventional approach of separately assessing "pure compensatory damages" and "aggravated compensatory damages", then the award against the Nine Network defendants would have been \$400,000 (reflecting the most serious kind of defamation, and to approximate the statutory cap) for "pure compensatory damages", with an additional \$200,000 for aggravated compensatory damages."

ARTK would suggest a 50% uplift for aggravated damages is punitive, which is contrary to section 37 of the MDP. ARTK believes the solution is to cap aggravated damages to no more than 20% of the general damages sum ordered.

#### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

- ARTK recommends that the section 35 be supplemented with the following additional drafting:

*35(2C) The maximum amount of aggravated damages that may be awarded in defamation proceedings is 20 percent of the amount of damages awarded for non-economic loss to which subsection (1) applies.*

- ARTK also requests that courts be obliged to give reasons for quantification of damages. ARTK recommends that the section 35 be supplemented with the following additional drafting:

*35(2D) The court must give reasons which explain the amounts awarded in defamation proceedings for damages for non-economic loss to which subsection (1) applies and for aggravated damages.*

#### **17. REMEDIES – MULTIPLE PROCEEDINGS (QUESTION 17)**

**MDAP Recommendation 17:** Amend clause 23 to require that leave of the court is required to bring further proceedings in relation to publication of same or like matter by the same or associated defendants. Associated defendants are any employees, contractors, or associated entities (as defined in the Corporations Act 2001 (Cth)). Leave must be obtained before commencing further proceedings.

*This is reflected in the draft MDAPs in amendments to cl 23.*

#### ARTK previous recommendation to the Discussion Paper

ARTK recommended the law be amended to make it clearer that the plaintiff can only bring one set of proceedings in relation to the same imputations against all defendants, to which a single cap for non-economic loss applies. If multiple proceedings are brought by a plaintiff, then they should be consolidated where the proceedings concern publications of the same or substantially the same matter, irrespective of whether the matter is published by the same or different publishers, and irrespective of whether the matter is published in or via the same or different media of communication.

## ARTK comments on the Draft Provisions

ARTK supports the Draft Provisions as the amendment largely addresses our concerns.

Additionally, ARTK suggests that the word “previously” in section 23(1) be deleted so that the section can be applied in circumstances where two sets of proceedings are simultaneously brought by a plaintiff against related defendants in relation to publication of the same or similar defamatory matter.

ARTK also recommends that subsection (3)(c) be amended to address cases where plaintiffs bring subsequent proceedings in relation to publication of the same or similar defamatory matter against employees or contractors of the publishing entity (such as the journalists or editors of the publication).

### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

Section 23(1) be amended as follows:

*(1) This section applies to a person who has ~~previously~~ brought defamation proceedings for damages, whether in this jurisdiction or elsewhere, against a person (a **previous defendant**) in relation to the publication of a matter.*

Subsection 3(c) be amended as follows:

*c) an associated entity (within the meaning of the Corporations Act 2001 of the Commonwealth) of the defendant, including an employee of the associated entity or a person publishing matter as a contractor of the associated entity.*

## **18. OTHER (QUESTION 18)**

### **Election of trial by jury**

**MDAP Recommendation 18:** Amend clause 21 to provide that a party’s election to trial by jury is irrevocable, consistent with the decision of the NSW Court of Appeal in *Chel v Fairfax Media Publications Pty Ltd (No 2) [2015] NSWCA 379*.

*This is reflected in the draft MDAPs in amendments to cl 21.*

See ARTK comments at Section 7 above.

### **Death of a party**

**MDAP Recommendation 19:** Amend clause 10 to allow a court to determine questions of costs, if it is in the interests of justice to do so, despite the death of a party, in any proceedings commenced before the death of the party.

*This is reflected in the draft MDAPs in amendments to cl 10.*

ARTK makes no comment regarding this recommendation.

## **OTHER MATTERS RAISED BY ARTK PREVIOUSLY THAT WE RECOMMEND BE CONSIDERED (CURRENTLY NOT ADDRESSED IN THE DRAFT PROVISIONS)**

### **18a – Formalised pre-litigation processes**

#### ARTK previous recommendation to the Discussion Paper

ARTK considers that the issuance of a written concerns notice should be a mandatory requirement prior to defamation litigation being commenced. However beyond that ARTK considers that pre-litigation processes should be a matter for the parties to determine between themselves depending on the circumstances of each dispute.

#### ARTK comments on the Draft Provisions

See ARTK comments at Section 4 above.

### **18g – Definition of ‘matter’**

#### ARTK previous recommendation to the Discussion Paper

ARTK recommended refining the definition of ‘matter’ and refers to our initial submission in respect of Question 18 in this regard.

#### ARTK comments on the Draft Provisions

The terms ‘defamatory matter’, ‘matter’ and ‘matter in question’ are used interchangeably throughout the MDP which is cause for confusion.

#### **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

ARTK considers that the current definition of ‘matter’ in section 4 of the MDP should be amended to clarify that it refers to the “whole of the publication complained of”, including the types of publication listed in the current definition.

Consequential amendments may need to be made throughout the MDP if this change is made – for example, section 31 of the MDP should be amended to clarify that the whole of the publication complained of need not be an expression of opinion in order for the defence of honest opinion to apply.

### **18i – Summary judgment procedure**

#### ARTK previous recommendation to the Discussion Paper

ARTK strongly supported a summary judgement procedure and refers to its initial submission in respect to Question 18 of the Discussion Paper in this regard.

#### ARTK comments on the Draft Provisions

We note the Draft Provisions do not deal with this issue.

In light of the new Federal Court Defamation Practice Note, this issue has taken increased importance and should be implemented in the amended MDP.

## **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

As previously submitted, legislation should specify matters that should be determined upfront rather than being left to trial, including the matters listed in ARTK's recommendation in response to this question, namely where:

- a. A person is not entitled to bring defamation proceedings;
- b. A claimant has not issued a written concerns notice prior to commencing proceedings (if this is introduced as a mandatory requirement as proposed in 18a above);
- c. The publication unambiguously occurred on an occasion attracting absolute privilege (e.g. parliamentary privilege);
- d. Other proceedings have been brought for the same publication;
- e. There are issues of proportionality;
- f. Proceedings have been commenced out of time;
- g. Claims are hopeless on their face;
- h. Claims have been brought for an ulterior purpose; or
- i. There is no defamatory meaning on the face of the publication.

## **FUTURE/ONGOING REVIEW OF THE UNIFIED DEFAMATION LAW**

### ARTK previous recommendation to the Discussion Paper

ARTK expressed a strong requirement for the inclusion of a review mechanism in the MDP.

We recommend the law be amended to undertake a review two years post the passage of the amended MDP in 2020 (as per the agreed CAG Defamation Working Group timeline), with a timeframe of no longer than six months for the completion of that review. We believe this is important given the suboptimal time taken to get to this point, and the importance of ensuring defamation law works as intended.

Subject to the operation of the law and what is raised in the two year review – and what is required to be changed – it may be acceptable for a review to occur every three to five years. This should be ascertained at the completion of the two-year review, by amendment to the MDP.

We reiterate here that we cannot accept dilly-dallying with less than optimally functioning defamation law in the future as has been allowed to happen to date.

### ARTK comments on the Draft Provisions

A review section was previously included in section 49 of the MDP but this seems to have been removed from the proposed MDP without the amendment having been tracked.

In fact, a number of changes have been made in Part 5 of the proposed MDP without tracking.

## **ARTK RECOMMENDATION REGARDING THE DRAFT PROVISIONS**

ARTK reiterates the importance of including a section requiring a review of the amended MDP to occur within two years after the law is implemented and must be completed within six months.

The section should also deal with Stage 2 of the reforms and provide a timeframe in which this must be completed. In ARTK's view Phase 2 should be completed by the end of 2020.