



Review of Model Defamation Provisions
c/o Policy, Reform and Legislation
NSW Department of Communities and Justice
By email: defamationreview@justice.nsw.gov.au

January 24, 2020

Dear Defamation Working Party members,

The Digital Industry Group Inc. (DIGI) welcomes the opportunity to provide a submission to the Council of Attorneys-General (CAG) Defamation Working Party (DWP) on the draft Model Defamation Amendment Provisions 2020 (draft MDAPs).

By way of background, DIGI is a non-profit industry association that advocates for the interests of the digital industry in Australia, with Google, Facebook, Twitter and Verizon Media as its founding members. DIGI also has an associate membership program and our other members include Redbubble, eBay and GoFundMe. DIGI's vision is a thriving Australian digitally-enabled economy that fosters innovation, a growing selection of digital products and services, and where online safety and privacy are protected.

We welcome the rigour of the review that the DWP has undertaken, and the extent to which it has addressed stakeholder feedback including the input provided by DIGI in its May 2019 submission, and in subsequent consultation roundtables. In this submission, we provide our position in relation to four aspects of the draft MDAPs:

1. the nature of concerns notices and offers to make amends, as contemplated by the changes proposed to Part 3, Division 1 of the Model Defamation Provisions;
2. the proposed abolition of the defence of triviality;
3. the defence of qualified privilege becoming a matter for determination by juries; and
4. the operation of the single publication rule in respect of content aggregation platforms.

We also welcome the DWP's decision to dedicate focussed attention to defamation issues relating to digital platforms specifically. In order for Australia to be a country where technology companies of all sizes can grow and where Internet users can access the world's best digital products and services, we need legal protections and certainty for online intermediaries that host content authored by other people. Today, the Internet is where people share opinions and ideas, connect with others and access information; this free exchange is a crucial part of Australian democracy, and the ability for Internet companies to enable this speech must be protected.

DIGI looks forward to continuing to engage with the DWP as its inquiry progresses, and participating in the Stage 2 review process that will respond to issues relating to digital platforms, including issues emerging from the ACCC's *Digital Platforms Inquiry Report*. In this submission, we have also included some guiding principles that the DWP may consider as it embarks upon Stage 2 of the reform process relating to digital platforms.

Should you have any questions or wish to discuss any of the representations made in this submission further, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read 'Sunita Bose', written over a light blue horizontal line.

Sunita Bose
Managing Director, Digital Industry Group Inc. (DIGI)

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1. Concerns notices and offers to make amends

Overall, DIGI supports the amendments that have been proposed by the DWP to clarify and enhance the pre-trial procedures contained in the Model Defamation Provisions. DIGI particularly supports the proposal that aggrieved persons be required to send concerns notices prior to commencing litigation, and considers that this amendment aligns with the object of the Model Defamation Provisions to “promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter”. DIGI is also in favour of the amendments that would require aggrieved persons to provide certain information in a concerns notice. In DIGI’s view, requiring notices to specify, for example, the precise location of a matter, avoids the unnecessary expenditure of time and resources by a “publisher” (including a subordinate distributor or website operator) to either identify a matter itself based on a vague description, or engage in correspondence with the aggrieved person for the sole purpose of clarifying the matter that is the subject of their complaint. This is particularly relevant for a website operator, who without precise information may be unable to easily identify which particular web page under their remit is the subject of a notice. Rather, the publisher is able to identify, consider, and respond to the matter in an efficient manner, and there is no unnecessary delay in the aggrieved person receiving a response to their notice.

However, DIGI considers that some minor amendments to the draft MDAPs may better achieve these purposes.

- (a) First, it is proposed in the draft MDAPs that an aggrieved person ordinarily be prevented from commencing proceedings unless they have given a concerns notice at least 14 days prior. DIGI submits that in conjunction with other existing and proposed provisions, this requirement will not operate as intended, and instead will operate in a way that is inconsistent with the objects of the Model Defamation Provisions. Relevantly, the Model Defamation Provisions currently allow a publisher to make an offer to make amends for up to 28 days after receiving a concerns notice. It is also proposed that such an offer will need to be open for acceptance for up to 28 days.

DIGI supports the introduction of mandatory concerns notices as a means of encouraging parties to engage in non-litigious dispute resolution and avoid, where possible, the commencement of proceedings. However, it is submitted that this purpose will not be achieved if an aggrieved person is able to commence proceedings during a period in which a publisher may be diligently investigating the subject of the concerns notice and/or formulating an offer to make amends. DIGI is concerned that the proposed drafting may instead lead to unintended outcomes, such as concerns notices coming to be seen as a mere administrative step to be satisfied before commencing proceedings, rather than facilitating genuine settlement discussions. Publishers may also be compelled to expend time and resources preparing for possible litigation during a time that would otherwise be spent considering an offer. Even once an offer was made, such preparations would need to continue while the offer remained open for at least 28 days, in case the aggrieved person commenced proceedings without responding to the offer.

Rather, it is appropriate that the time period for which an aggrieved person is barred from commencing proceedings be aligned with the period in which a publisher may make an offer, such that an aggrieved person cannot commence proceedings until the time available to the publisher to consider the notice and make an offer has lapsed. As mentioned in the DWP's background paper, it can often take up to 28 days of in depth investigation to properly assess and respond to a concerns notice, and DIGI submits that the time period in 12A(1)(c) should be increased from 14 days to 28 days.

- (b) Second, the draft MDAPs propose that concerns notices will need to “*specify the location where the matter in question can be accessed (for example, a website address)*”. It is important here to distinguish between the term ‘website address’, which is an umbrella term which refers to a collection of individual web pages which share a common domain name, and a ‘web page address’ or ‘URL’, which identifies the specific page on a website on which a matter appears. Given this distinction, DIGI supports replacing the words ‘website address’ in section 14(2)(a1) of the draft MDAPs with alternate words, such as ‘web page address’ or ‘URL’.

This change would be consistent with the approach taken in section 5 of the *Defamation Act 2013* (UK), which requires that notices issued to website operators specify “*where on the website the statement was posted*”. DIGI also understands this to be consistent with the DWP's intention in amending the section – as stated in the background paper released in conjunction with the draft MDAPs, the change was proposed to have aggrieved persons “*specify in the concerns notice the location of the publication of the defamatory matter (for example, the URL)*”.

DIGI also considers that the change it proposes would not impose any further burden on the aggrieved person, who presumably must have become aware of the particular web page address in order to have identified the matter of concern to them.

DIGI acknowledges that the draft MDAPs provide that where a concerns notice does not identify the location of the matter sufficiently, this may be addressed by the sending of a further particulars notice. However, in circumstances where the DWP proposes to provide an example of the level of detail that ought to be included in a concerns notice (i.e. the words ‘*for example, a website address*’), DIGI considers it appropriate to identify a more specific location address, such as a web page address or URL.

- (c) Third, the draft MDAPs also propose changes to the content that an offer to make amends must contain, including, relevantly, “*an offer to publish, or join in publishing, a reasonable correction of, or a clarification of or additional information about, the matter in question...*”. This supplements the provision currently in force under which the publisher is to offer, relevantly, only a “*reasonable correction of the matter in question*”. DIGI submits that while the offer of a reasonable correction or clarification may be appropriate where the publisher in question is a traditional media outlet, with a logical and meaningful place to publish corrections and clarifications, this is not the case for every potential recipient of a concerns notice who may wish to avoid litigation by making an offer to make amends in accordance with the Model Defamation Provisions.

In the case of subordinate distributors and website operators, it is more technically feasible, and indeed, likely more satisfactory to the aggrieved person, to offer to remove the content that is the cause of the complaint. It is also unfairly burdensome to require these types of publishers, who typically have not authored and are unfamiliar with the content of the matter complained of, to take on the task of identifying what properly requires correction or clarification, particularly where removal of the content may be a readily available option.

DIGI submits that section 15(1)(d) should be amended to provide that an offer include either a clarification of, additional information about, or removal of, the matter in question.

2. Defence of triviality

As stated in its submission made to the DWP in May 2019, DIGI supports the adoption of a serious harm test modelled on the test contained in section 1 of the *Defamation Act 2013* (UK). However, DIGI considers that the introduction of a serious harm test neither requires nor justifies the abolition of the defence of triviality, as is currently proposed by the draft MDAPs. The test and defence, whilst both founded in seriousness of harm, are fundamentally different in operation:

- (a) The serious harm test proposed in section 7A of the draft MDAPs, which closely resembles the test implemented in the UK, is designed to act as a threshold, to be determined by a judge at an early stage of defamation proceedings. As is the case in the UK, the test is likely to be focussed on whether the adverse effects of the matter complained of are so serious as to justify the dedication of the court's resources for the duration of the proceedings.
- (b) Conversely, the defence of triviality is determined at the final stage of defamation proceedings by the tribunal of fact, able to consider all the circumstances of the publication that may not have been known at the time the plaintiff was found to satisfy the serious harm test.

DIGI posits that not only is a serious harm test and the defence of triviality capable of operating without conflict, the provisions will have unique work to do. Where the serious harm test is intended to operate as a deterrent to the commencement of proceedings where serious harm is not occasioned by an otherwise defamatory publication, the triviality defence allows defendants the opportunity to have the question of seriousness considered at a time when all the circumstances of the publication have come to light. For example, a defence of triviality would be of use to a defendant where, although a publication as pleaded was considered likely to cause serious harm at the outset, further circumstances emerge throughout the course of the proceeding, enabling the defendant to establish that the harm caused by the publication was trivial in nature, including that it was accessed by a very small audience or, in the case of an oral publication, the words held to have been published are less serious than those the subject of consideration of the serious harm test at the commencement of the proceedings.

In the event that it is the DWP's intention that all circumstances of publication, including consideration of proof of actual publication and the extent of publication, are to be taken into account when assessing whether a plaintiff has or is likely to have suffered serious harm, DIGI considers that this ought to be made clear in the Model Defamation Provisions. In addition, DIGI posits that it should be expressly stated that the question of the serious harm test may be raised at any time during proceedings, to avoid any argument that the test is simply a threshold to be met by the plaintiff only once at the outset of proceedings.

3. Defence of qualified privilege

DIGI notes the proposed amendment to the defence of qualified privilege, by which "*the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established.*"

The Model Defamation Provisions, as currently implemented by those states which have retained trial by jury in defamation proceedings, provide that the question of whether a defence is available is a matter for the jury, with the exception of qualified privilege. This distinction has been recognised by various jurisdictions because the task of determining whether qualified privilege is established is uniquely complex. It involves an assessment of reasonableness, not according to one's own perspective, but from that of an ordinary reasonable person. DIGI submits that this is an onerous task to require of a jury of lay persons unfamiliar with a standard of reasonableness (and unlikely to become familiar during the course of a hearing). Rather, it is a task more appropriately performed by a judicial officer, well-versed in the law of reasonableness. This has the further benefit of retaining the opportunity to appeal in the event of error. As stated by Justice McClellan, "*The complexity of the*

*defences will inevitably produce error. Whether when that error is made by a jury it can be corrected by the appellate court is doubtful. Errors made by a judge who must give reasons are far more readily corrected than errors made by a jury.*¹ For these reasons, DIGI does not support expanding the remit of juries to include determining whether a defence of qualified privilege is established.

4. Single publication rule

As stated in its first submission to the DWP in May 2019, DIGI strongly supports the introduction of a single publication rule in the Model Defamation Provisions. DIGI considers that a single publication rule is the most effective and appropriate way to address the loophole that currently exists in Australian defamation law, whereby a publication that remains online is not subject to any limitation period so long as a plaintiff can prove that it was downloaded and viewed by at least one reader within 12 months of bringing a claim.

DIGI also maintains the position, stated in its earlier submission, that the form of a new single publication rule ought to be such that it establishes a limitation period in relation to the first publication of a statement by any person, and not just the original publisher.

However, DIGI is concerned that the precise form of the single publication rule proposed in the draft MDAPs, including the phrase ‘original publisher’, may lead aggrieved persons to incorrectly believe that a limitation period only applies in relation to an action against the party that first published the defamatory matter, and not to a digital content aggregation platform on which the content subsequently appears. While DIGI acknowledges that any subsequent appearance of a matter on a digital content aggregation platform would constitute a unique ‘matter’ separate to the original publication, and the proposed rule would apply from the first appearance of the matter on the relevant platform, this position may not be immediately apparent to aggrieved persons. This potential for misinterpretation may lead aggrieved persons, whose right to pursue a claim against the first publisher has expired, to pursue claims against other entities in error, resulting in the unnecessary expenditure of time and resources.

A potential cure to this issue would be to make clear that the reference to a ‘person’ extends to digital content aggregation platforms, and that the rule applies to such platforms from the first date on which the matter in question appears on their platform. This is made clear, for example, in the single publication rule in section 8(1) of the Defamation Act 2013 (UK), which closely resembles schedule 4, section 1A(1) of the draft MDAPs, but importantly omits a reference to the person being the “original publisher”.

5. Considerations for the Stage 2 reform process

As noted, DIGI looks forward to continuing to engage with the DWP as its inquiry progresses, and participating in the Stage 2 review process that will respond to issues relating to digital platforms, including issues emerging from the ACCC’s Digital Platforms Inquiry Report. In this section, we have included some guiding principles that the DWP may consider as it embarks upon Stage 2 of the reform process relating to digital platforms.

DIGI agrees with the need for reform in relation to defamation and digital platforms. While the Model Defamation Provisions have played an important role in harmonising state-based defamation laws that existed prior to 2005, they were not written for a digital age. Through Stage 2, there is an opportunity to modernise these provisions to offer better solutions for Internet users and online intermediaries, while also ensuring a fair and clear process for people who have their reputations seriously maligned on the Internet.

¹ Justice Peter McClellan, ‘Eloquence and Reason – are juries appropriate for defamation trials?’ [2009] NSWJSchol 14, <<http://classic.austlii.edu.au/au/journals/NSWJSchol/2009/14.html>>.

Reform in this area also needs to acknowledge the fact that digital platforms are not primary publishers, as has been acknowledged in defamation law introduced in overseas jurisdictions in recent years. For example, section 8 of the *Defamation Act 2013* (UK) provides clarification to confirm that any online platform, even if a 'publisher' at common law, is not responsible for the actual creation of the defamatory matter but is instead a 'mere conduit', or host, of such material. This would reflect the widespread consumer use of platforms, including social media, where individual users may publish words, images and videos. It would also reflect the widespread consumer use of search engines that return search results including snippets, being extracts of content created by third parties and published on websites, in response to certain keywords entered into it by end users.

Furthermore, Internet intermediaries should benefit from necessary protections from defamation suits where they are not themselves the original creators of defamatory material that they host, at least until a court has issued a ruling adverse to the original creators and a specific breach of the ruling is brought to the intermediary's attention. For this reason, a safe harbour mechanism needs to be enacted, similar to the framework created by section 5 of the *Defamation Act 2013* (UK). Given that this reform process is happening seven years after the introduction of the UK Defamation Act, there is also an opportunity to further improve the protections offered in that framework.

It is important to emphasise that offering such protections would not diminish protections for plaintiffs, who are still left with recourse against the original authors of defamatory content. For example, if a Court has made a finding that particular content is defamatory of a plaintiff, and that is brought to the attention of an online intermediary in conjunction with a specific allegation that the intermediary is publishing the content, the intermediary's protection from suit may be lost at that point. Finally, none of the above precludes any online intermediary from determining its own content standards about how it responds to complaints about material that is alleged to be defamatory, false, or harassing; the protections would simply offer a level of legal certainty about an intermediary's legal position and exposure. This legal certainty is crucially important given the central role online intermediaries increasingly play in enabling people's free expression of information, opinions and ideas -- such matters are essential to both a thriving digital economy and, more fundamentally, to democracy.