

Review of Model Defamation Provisions  
c/o Justice Strategy and Policy Division  
NSW Department of Justice  
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## **REVIEW OF MODEL DEFAMATION PROVISIONS**

This submission responds to the invitation to comment on the Council of Attorneys-General (CAG) 2019 Discussion Paper regarding the Review of Model Defamation Provisions.

The submission is made by Asst Professor Dr Sarah Ailwood and Asst Professor Dr Bruce Baer Arnold of the Canberra Law School (University of Canberra). Both have published widely on defamation, media regulation, privacy, trade practices and human rights, with research appearing in peer-reviewed Australian and overseas journals and collections in addition to cited contributions to a range of law reform reports. The submission does not represent what would be reasonably construed as a conflict of interest.

The following pages initially offer key responses and then address specific questions in the Discussion Paper. The authors are available to follow up particular points if requested.

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## REVIEW OF MODEL DEFAMATION PROVISIONS

### Key responses

This Review of the Model Defamation Provisions has been established in response to developments in technology (particularly the prevalence of digital publishing and the dominance of social media platforms and content hosting intermediaries), and to recent developments in Australian caselaw, and specifically the damages that have been awarded to successful plaintiffs. We submit that the emergence and increasing influence of the MeToo movement, which has a complex relationship with defamation law in Australia and which has sharpened public attention on the effects of defamation law, is a 'relevant matter' that the Defamation Working Party (DWP) should consider within the scope of clause 3(e) of the Terms of Reference.

MeToo is a global social movement constituted by the publication of individual experiences of sexual assault, unlawful sexual harassment and lawful sexual misconduct. Such publications typically name the perpetrators of such conduct; indeed, their purpose is to achieve public justice against perpetrators in circumstances where victims rightly question the possibility of redress through their employers and/or the justice system. Clearly, such publications may become the subject of defamation proceedings by the named perpetrators.

There is a widely-held view among journalists and other leaders of the MeToo movement that Australia's defamation laws are having a 'chilling' effect on the effectiveness of the movement in Australia because the range of defences available under the Model Defamation Laws, which are narrower than in comparable jurisdictions, prevent the publication of stories. In particular, journalists are advocating for the introduction of a 'public interest' defence that would provide a complete defence to a publication that would otherwise be defamatory. This 'public interest' defence could be a wholly new defence, or could be a reform of the existing qualified privilege defence. It is claimed that such a defence would increase the scope for public interest reporting, not only on the MeToo movement but on myriad matters of 'public interest'.

The DWP should be cautious in responding to calls for the introduction of a public interest defence. Although we support expanding the scope of public interest journalism in Australia through such a defence, it is critical that safeguards are built in to the legislation to protect individuals – particularly the victims or complainants of sexual assault, harassment or misconduct. In Australia, far from enabling the victims of sexual assault and harassment to publicise their experiences and name perpetrators, the MeToo movement has enabled media organisations, driven by profit and brinkmanship with their competitors, to appropriate the experiences of victims and publicise their stories, often without their involvement or consent. In December 2017 the *Daily Telegraph* published its reports regarding Geoffrey Rush without the knowledge, involvement or consent of the complainant, Eryn-Jean Norvill; in February 2018 *The Weekend Australian* publicly named Catherine Marriott as the complainant in a sexual harassment complaint against Barnaby Joyce lodged with the National Party; in a different though related context, NSW MP David Elliott used absolute privilege to publicly name Ashleigh Raper as a sexual harassment victim in a political attack on then NSW Opposition Leader Luke Foley. Each of these women wanted their experience of sexual harassment to remain confidential. Australian law does not provide women whose experiences are publicised in this way with redress of any kind. A common law or statutory tort of privacy may either prevent the publication of such deeply personal information, or

provide an avenue of legal redress, but this cause of action does not exist in Australian law.

There is a risk that introducing a public interest defence will make it easier not only for publishers to publish MeToo stories revealing perpetrators, but also for them to do so without the knowledge, involvement or consent of the victims or complainants of sexual assault and harassment, who may not wish to have such deeply personal experiences exposed to the public. Essentially, such a defence risks making it easier for publishers to repeat the conduct of the *Daily Telegraph* in relation to Geoffrey Rush and Eryn-Jean Norvill in *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496.

The introduction of a public interest defence, or the expansion of the existing defence of qualified privilege, must include safeguards for victims and complainants to prevent media organisations from publishing their stories without their knowledge, involvement or consent. It is apparent from the conduct of the *Daily Telegraph* and the *Weekend Australian* that relying on journalistic ethics is an insufficient protection. We outline suggested safeguards in our response to Question 11.

As a corollary, in considering questions in the Discussion Paper we suggest two issues for consideration by the DWP.

The first issue is the importance of fostering community understanding of individual rights and responsibilities in the online environment through a sustained community education program that underpins a truly uniform defamation regime. Policymakers must recognise that individuals appear to be increasingly using online platforms to disseminate defamatory statements. Those platforms, such as Facebook, are weakly self-regulated. Experience overseas (in for example Canada and the European Union) indicates that they are both strongly resistant to effective intervention by the state and indifferent to penalties that dwarf the overall revenue of many traditional media organisations. Reform of the Australian defamation regime both can and should be complemented by education that alerts individuals that harmful statements are wrong, may attract meaningful sanctions and require action by platform providers. Such action is consistent with the implied freedom of political communication, which is not an invitation to defame individuals or vilify specific communities. Our research indicates that many people have a deficient understanding of the implied freedom, in particular because their understanding is shaped by US popular literature regarding 'free speech' and notions that 'there is no law' (aka no accountability) in cyberspace.

The second issue is that both traditional media organisations and individuals who characterise themselves as 'citizen journalists' are subject to a social licence; in other words, they are expected to behave responsibly. Journalists and media organisations have pertinently and commendably highlighted the significance of speaking truth to power, revealing corruption, condemning sexual or other harassment and otherwise engaging in communication that might be restricted by litigants who use defamation to chill legitimate inquiry. It is important to recognise, however, that some leading Australian publishers and broadcasters on occasion have clearly disregarded their social licence in search of an audience and thus revenue. The preceding paragraphs have noted the willingness of media organisations to disregard third parties and to deliberately make statements that were either meant to harm or were egregiously negligent. That profit-driven negligence, evident in for example *Rush v Nationwide News Pty Ltd* and *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510, is of particular concern because the organisations have the editorial gatekeepers that are unavailable to individual citizen journalists. In considering representations about the Discussion Paper the DWP should accordingly be wary

about changes to the Australian defamation regime that privilege media organisations that fail to regulate themselves and, by extension, reinforce the position of global platform operators that seek the privileges of media organisations without accepting the responsibilities of those organisations.

**Question 1 Do the policy objectives of the Model Defamation Provisions remain valid?**

Overall, the policy objectives remain valid and as noted above should be affirmed through

- a) the establishment of a truly uniform regime across all Australian jurisdictions, imperative given that ‘new media’ dissolves traditional state/territory demarcations and
- b) an ongoing community awareness program about defamation and vilification.

**Question 2 Should the Model Defamation Provisions be amended to broaden or to narrow the right of corporations to sue for defamation?**

It is inappropriate to provide corporations with rights identical to those of natural persons. We note concerns that the personality of small companies may be inextricably entwined with that of their owners. However, as CAG has previously recognised corporations such as IBM, AMP and BHP Billiton are in a very different position to that of an individual. Corporations and their executives/directors have on occasion sought to fundamentally chill legitimate inquiry and the expression of views by shareholders, human rights advocates or environmental activists. It is imperative that if the position of corporations is strengthened through changes to the defamation regime that the law reform is complemented through consistent, Australia-wide and effective anti-SLAPP legislation, that is law aimed at litigation that seeks to shield wrongdoing by deterring legitimate communication.

**Question 3**

**(a) Should the Model Defamation Provisions be amended to include a ‘single publication rule’?**

**(b) If the single publication rule is supported: (i) should the time limit that operates in relation to the first publication of the matter be the same as the limitation period for all defamation claims? (ii) should the rule apply to online publications only? (iii) should the rule should operate only in relation to the same publisher, similar to section 8 (single publication rule) of the *Defamation Act 2013* (UK)?**

On balance, we suggest that a single publication rule not be adopted.

**Question 4**

**(a) Should the Model Defamation Provisions be amended to clarify how clauses 14 (when offer to make amends may be made) and 18 (effect of failure to accept reasonable offer to make amends) interact, and, particularly, how the requirement that an offer be made ‘as soon as practicable’ under clause 18 should be applied?**

**(b) Should the Model Defamation Provisions be amended to clarify clause 18(1)(b) and how long an offer of amends remains open in order for it to be able to be relied upon as a defence, and if so, how?**

**(c) Should the Model Defamation Provisions be amended to clarify that the withdrawal of an offer to make amends by the offeror is not the only way to terminate an offer to make amends, that it may also be terminated**

**by being rejected by the plaintiff, either expressly or impliedly (for example, by making a counter offer or commencing proceedings), and that this does not deny a defendant a defence under clause 18?**

Clarification of the provisions is desirable and achievable.

**Question 5 Should a jury be required to return a verdict on all other matters before determining whether an offer to make amends defence is established, having regard to issues of fairness and trial efficiency?**

Requiring a verdict on all other matters is endorsed.

**Question 6 Should amendments be made to the offer to make amends provisions in the Model Defamation Provisions to:**

**(a) require that a concerns notice specify where the matter in question was published?**

**(b) clarify that clause 15(1)(d) (an offer to make amends must include an offer to publish a reasonable correction) does not require an apology?**

**(c) provide for indemnity costs to be awarded in a defendant's favour where the plaintiff issues proceedings before the expiration of any period of time in which an offer to make amends may be made, in the event the court subsequently finds that an offer of amends made to the plaintiff after proceedings were commenced was reasonable?**

Amendment is supported.

**Question 7 Should clause 21 (election for defamation proceedings to be tried by jury) be amended to clarify that the court may dispense with a jury on application by the opposing party, or on its own motion, where the court considers that to do so would be in the interests of justice (which may include case management considerations)?**

Amendment is supported.

**Question 8 Should the *Federal Court of Australia Act 1976* (Cth) be amended to provide for jury trials in the Federal Court in defamation actions unless that court dispenses with a jury for the reasons set out in clause 21(3) of the Model Defamation Provisions – depending on the answer to question 7 – on an application by the opposing party or on its own motion?**

Amendment is supported.

**Question 9 Should clause 26 (defence of contextual truth) be amended to be closer to section 16 (defence of contextual truth) of the (now repealed) *Defamation Act 1974* (NSW), to ensure the clause applies as intended?**

Amendment is supported.

**Question 10**

**(a) Should the Model Defamation Provisions be amended to provide greater protection to peer reviewed statements published in an academic or scientific journal, and to fair reports of proceedings at a press conference?**

**(b) If so, what is the preferred approach to amendments to achieve this aim – for example, should provisions similar to those in the *Defamation Act 2013* (UK) be adopted?**

Given the existing general defences the amendment is not supported.

**Question 11**

**(a) Should the ‘reasonableness test’ in clause 30 of the Model Defamation Provisions (defence of qualified privilege for provision of certain information) be amended?**

**(b) Should the existing threshold to establish the defence be lowered?**

There is no clear threshold to establishing the defence of qualified privilege. The court is required to adjudicate whether the conduct of the publisher is reasonable in the circumstances, and the Model Defamation Provisions provide a non-exhaustive list of factors that should be considered in making that determination. On its face, there is no reason why the requirement that a publication be reasonable in the circumstances should inhibit public interest journalism; indeed, it would seem to be an important safeguard. Similarly, several of the non-exhaustive list of factors may be considered an attempt to codify aspects of responsible and ethical journalism.

However, as this defence has been narrowly interpreted by the courts and consequently unavailable to media publishers, there are strong arguments for it to be amended to clarify its purpose and signal the legislature’s intention that it be available to media publishers engaged in public interest journalism. We do not, however, support the dilution of the factors that may be considered in determining reasonableness, as these factors represent steps that journalists should be taking in researching, writing and publishing public interest journalism.

We recommend that the list of factors be expanded to consider the impact of the publication on third parties. The subjects of defamatory statements are not the only individuals who are affected by such publications. Media publishers should be required to consider the effects of their publications on other individuals, whether named or anonymous, who feature in their stories. The court should be invited to consider the impact of a publication on third parties in determining the reasonableness of the publication. Such an inclusion could protect complainants and victims of sexual assault, harassment and lawful misconduct in the context of the MeToo movement, and in a range of wider contexts.

**(c) Should the UK approach to the defence be adopted in Australia?**

Section 4(1) of the *Defamation Act 2013* (UK) clearly signals that the defence is for publications in the public interest. That section could form a basis for an amended Clause 30 of the Model Defamation Provisions, if it was supplemented by a requirement that the publication was reasonable in the circumstances (retaining Clause 30(1)(c)).

Section 4(2) (considering all of the circumstances of the case) and 4(4) (allowing for editorial judgment) should not be adopted into Australian law. Section 4(2) does not specify the factors that a court should consider; the list of factors in clause 30(3) of the Model Provisions should be retained. Section 4(4) of the UK Act leaves too much discretion to media publishers to determine the reasonableness of the publication in the public interest. A reasonable belief on the part of a media publisher within the scope of editorial judgment does not offer sufficient safeguards to either the subjects of potentially defamatory publications or third parties affected by them.

**(d) Should the defence clarify, in proceedings where a jury has been empanelled, what, if any, aspects of the defence of statutory qualified privilege are to be determined by the jury?**

Yes. Any amendments should clarify questions of law and questions of fact within the defence.

**Question 12 Should the statutory defence of honest opinion be amended in relation to contextual material relating to the proper basis of the opinion, in particular, to better articulate if and how that defence applies to digital publications?**

Amendment to reflect creation and reception of digital material is supported.

**Question 13 Should clause 31(4)(b) of the Model Defamation Provisions (employer's defence of honest opinion in context of publication by employee or agent is defeated if defendant did not believe opinion was honestly held by the employee or agent at time of publication) be amended to reduce potential for journalists to be sued personally or jointly with their employers?**

Amendment is supported.

**Question 14**

**(a) Should a 'serious harm' or other threshold test be introduced into the Model Defamation Provisions, similar to the test in section 1 (serious harm) of the *Defamation Act 2013* (UK)?**

**(b) If a serious harm test is supported: (i) should proportionality and other case management considerations be incorporated into the serious harm test? (ii) should the defence of triviality be retained or abolished if a serious harm test is introduced?**

Amendment is supported, with inclusion of proportionality and case management considerations (which address concerns regarding triviality).

**Question 15**

**(a) Does the innocent dissemination defence require amendment to better reflect the operation of Internet Service Providers, Internet Content Hosts, social media, search engines, and other digital content aggregators as publishers?**

**(b) Are existing protections for digital publishers sufficient?**

**(c) Would a specific 'safe harbour' provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions?**

**(d) Are clear 'takedown' procedures for digital publishers necessary, and, if so, how should any such provisions be expressed?**

Amendment is supported, consistent with development in the European Union and Canada (and the capabilities of platform operators, which as noted above often have revenue that dwarfs that of Australian 'traditional media' organisations). CAG in looking beyond defamation law reform should strongly encourage the Commonwealth to engage with issues highlighted by a succession of Law Reform Commission and Parliamentary Committee reports regarding privacy, including the establishment of a statutory cause of action regarding serious invasions of privacy and a balanced 'right to obscurity' (often misrepresented as a more exhaustive 'right to be forgotten') in relation to search engines.

**Question 16**

**(a) Should clause 35 be amended to clarify whether it fixes the top end of a range of damages that may be awarded, or whether it operates as a cut-off?**

**(b) Should clause 35(2) be amended to clarify whether or not the cap for noneconomic damages is applicable once the court is satisfied that aggravated damages are appropriate?**

Amendment is supported.

**Question 17**

**(a) Should the interaction between Model Defamation Provisions clauses 35 (damages for non-economic loss limited) and 23 (leave required for further proceedings in relation to publication of same defamatory matter) be clarified?**

**(b) Is further legislative guidance required on the circumstances in which the consolidation of separate defamation proceedings will or will not be appropriate?**

**(c) Should the statutory cap on damages contained in Model Defamation Provisions clause 35 apply to each cause of action rather than each 'defamation proceedings'?**

Clarification is required. Capping should relate to the cause of action rather than overall proceedings.

**Question 18 Are there any other issues relating to defamation law that should be considered?**

As per above.