

**REVIEW OF MODEL DEFAMATION PROVISIONS—SUBMISSION OF THE AUSTRALIAN TAXPAYERS'
ALLIANCE (ATA)**

- 1 The ATA is a 75,000+ member grassroots taxpayers' advocacy group which stands for the principles of individual freedom, minimising government waste and rolling back inefficient or ineffective regulatory barriers which impede the progress and prosperity of Australia's economy and the welfare of taxpaying individuals and businesses.
- 2 The ATA is concerned with defamation laws both as a result of high-level considerations about the impact of defamation laws on individual freedom—particularly the freedom of speech—and from a real-world perspective, having been the subject of a number of threatened defamation suits in the past. Those disputes were resolved on a confidential basis and therefore are not specifically discussed here, but they have substantially shaped the submissions that the ATA makes.
- 3 Defamation laws must necessarily balance the competing considerations of providing an effective remedy to the victims of defamatory publications on the one hand, and protecting the freedom of expression on the other. The ATA submits that the regime that currently exists under the Model Defamation Provisions (“MDPs”) does not get this balance right. Australia has the most “plaintiff-friendly” defamation laws of comparable English-speaking common law jurisdictions, and this has considerable detrimental consequences for freedom of expression in this country. In our submission, the MDPs ought to be amended in a number of respects in order to provide more robust protections for statements made in the course of public debate regarding matters of public interest. Many of the reforms which the ATA proposes are drawn from the 2013 reforms to the defamation laws in the UK, which the ATA submits were effective and well-structured, and for the most part provide an appropriate model for defamation reform in Australia.
- 4 The ATA also submits that defamation laws in Australia could benefit from significant procedural reform in addition to the substantive reforms discussed in the discussion paper. The procedural reforms we propose are:
 - (a) that the “concerns notice” procedure be made a mandatory prerequisite to commencing a defamation claim;
 - (b) that parties to defamation disputes should be encouraged to attend a mediation or conciliation prior to the commencement of litigation; and

- (c) that, as has occurred at least in the Australian Capital Territory, state civil and administrative tribunals or local/magistrates' courts be given jurisdiction over smaller claims for defamation, subject to:
 - (i) less formality than ordinary court procedures;
 - (ii) a presumption that parties will not be legally represented; and
 - (iii) no or limited ability to recover costs.

5 These procedural reforms are further discussed in sections 6 and 18 of this submission.

1. Question 1

Do the policy objectives of the Model Defamation Provisions remain valid?

- 1.1 The MPDs presently contain four objectives in clause 3. Each of these objectives is important and ought to be maintained.
- 1.2 However, we submit that two additional objectives ought to be added to the four extant objectives, as follows:
 - (a) to minimise the costs and burden on the parties of litigation regarding disputes about the publication of defamatory matter; and
 - (b) to ensure as far as possible that parties to disputes about the publication of defamatory matter are not unduly disadvantaged by a comparative lack of resources relative to other parties.
- 1.3 The first proposed objective is consistent with the growing recognition that litigation causes a substantial burden on the parties and this ought to be minimised. It overlaps somewhat with the current fourth objective in the MDP, but where the current objective is directed to the non-litigious resolution of disputes, the proposed objective applies where litigation is nevertheless commenced.
- 1.4 The second proposed objective recognises that a disparity in resources is a regular occurrence in disputes regarding defamatory matter. This applies both to plaintiffs and defendants.
- 1.5 In many cases, the plaintiff will be a natural person of limited means, and the defendant will be a large and well-funded media organisation.
- 1.6 Conversely, in many other cases (including matters in which the ATA has been involved), well-resourced individuals employ defamation laws as a tool for suppressing comments about them with which they disagree. Often such cases will involve a large institution backing an individual plaintiff. In these cases, the defendant will often lack the means to properly defend the claim that is brought against them.

2. Question 2

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

- 2.1 The distinction presently drawn between for-profit and not-for profit corporations does not achieve its stated objective of preventing “strategic litigation against public participation”.
- 2.2 The Discussion Paper recognises at [2.8] that the decision of the Standing Committee of Attorneys-General to permit only excluded corporations to retain the right to sue in defamation “recognised that non-profit bodies are less likely to have the resources to pursue alternative causes of action, and that small, for-profit bodies may be disproportionately affected by a defamatory publication and less likely to weather its consequences.”
- 2.3 The ATA agrees with the latter proposition, but the former is not always the case. The fact that a corporation is not a for-profit corporation does not necessarily mean that it lacks resources.
- 2.4 In *The Registered Clubs Association of NSW v Australian Broadcasting Corporation* [2016] NSWSC 835, the peak industry group for registered clubs in NSW brought a defamation claim against the ABC. It was apparently in issue whether the plaintiff was a not-for-profit organisation, and its objects were accordingly considered. The matter appears to have resolved before any judicial determination of this issue. However, according to its website:¹
- “The Association’s purpose is to lead a sustainable industry that makes a growing contribution to the NSW community, seeks to strengthen conditions for those working within the industry, and to support the local communities they serve.”¹
- 2.5 It follows that the Association apparently is not a for-profit corporation and so would be exempt under s 9(2) of the MDPs. It is probably safe to assume that the Association was not short on resources.
- 2.6 Other not-for-profit organisations of substantial means which have sued for defamation in recent years include large religious bodies,² and the Sporting Shooters Association of Australia.³ We are also aware of cases with no published decisions where the plaintiff has been a large charity or a union. According to the 2016 Charities Report by the Australian Charities and Not-for-profits Commission,

¹ <https://www.clubsnsw.com.au/about-us/organisation-information/corporate-profile>

² *Greek Orthodox Community of South Australia Inc & Ors v Pashalis* [2015] SASC 122; *Plymouth Brethren (Exclusive Brethren) Christian Church v The Age Company Ltd* [2018] NSWCA 95.

³ *Sporting Shooters Association of Australia v Judge (No 2)* [2013] NSWSC 1821; *Sporting Shooters Association of Australia (New South Wales) Inc v McGuire (No 2)* [2015] NSWSC 1239.

in the 2016 financial year there were 12 registered charities which each reported revenue of over \$1 billion.⁴ It seems a perverse policy outcome to exempt entities that earn more than \$1 billion each year from the prohibition on corporations suing for defamation, on the basis that, because they are not-for-profits, they are “less likely” to have the resources to defend their reputation through other means than a small business with 10 full-time employees.

- 2.7 Similarly, subparagraph 9(2)(b) of the MDPs is a flawed means of discriminating between companies that have the means to weather the consequences of defamatory publications and those that do not. The requirement that the company employ fewer than 10 employees applies only to persons who are employed full-time. A company could have any number of independent contractors or paid directors and it would still be an “excluded corporation” for the purposes of the MDPs.⁵ As for the requirement that the company not be related to other companies, it is an arbitrary criterion and really has no bearing on the company’s means. Many small businesses are established through multi-corporate structures, such as having a separate holding company and trading company. The provision has the effect of excluding companies based on the structure that their owners choose to employ, rather than their means.
- 2.8 The ATA submits that if the policy basis for excluding certain corporations from the prohibition on suing for defamation is to permit actions to be brought by corporations that lack the means to defend their reputations through other methods, then the test for exclusion should be directly referable to the corporation’s means. That is, defamation should not be open to any corporation with, for example, annual revenue in excess of \$5 million or net assets in excess of \$2.5 million. Where the corporation is related to another corporation then the assets and revenue of the group of companies should be taken together in determining whether the corporation is excluded. Whether or not the corporation is a for-profit corporation should not be relevant.

⁴ See, <https://www.acnc.gov.au/tools/reports/australian-charities-report>.

⁵ *Sydney Security Services Pty Ltd v iGuard Australia Pty Ltd* [2016] NSWSC 1808; *Cummings v Fairfax Digital Australia & New Zealand Pty Limited* [2017] NSWSC 657 at [28]-[34]; *Born Brands Pty Ltd v Nine Network Australia Pty Ltd* (2014) 88 NSWLR 421; [2014] NSWCA 369, at [104]; *Le Mottee v Dingle* [2017] NSWSC 1270.

3. 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 operate only in relation to the same publisher, similar to section 8 (single publication rule) of the *Defamation Act 2013 (UK)*?

3.1 The "multiple publication rule" that presently exists has the pernicious effect of rendering the limitation period for defamation actions effectively void in any case where the allegedly defamatory material was published online. On the other hand, a "single publication rule" may have the effect of shutting out claims that ought reasonably to be available because the same publication is republished in a different manner or to a different audience.

3.2 The ATA submits that the "single-publication rule" in s 8 of the *Defamation Act 2013 (UK)* mostly achieves an appropriate balance regarding these competing considerations by imposing a single publication rule, save where the manner of the further publication is materially different from the manner of the first publication. However, the ATA submits that it would also be preferable if courts were empowered to permit a multiple publication rule to apply if it is otherwise in the interests of justice in the circumstances of the case—recognising that the manner of publication is not the only circumstance that ought to be taken into account. For example, a defamatory publication that initially had a relatively limited distribution could, years later, be rediscovered and suddenly shared to a broad audience. If that were to occur, the manner of publication would be the same, but there would nevertheless be a new circumstance which ought to justify the bringing of a defamation claim. The courts are best placed to decide whether, in the particular circumstances of each case, an exception to the ordinary rule should be permitted.

4. 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?

4.1 The ATA support the proposal that these matters should be clarified. It should be clear that a defendant can rely on an offer to make amends as a defence if the offer is provided within the period prescribed under cl 14. The prescribed period of 28 days provides certainty to litigants. It also avoids unnecessary and costly inquiries as to whether it may or may not have been practicable for an offer to have been made earlier.

(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?

4.2 The concerns in relation to this question appear to arise from the NSW Court of Appeal's decision in *Nationwide News Pty Ltd v Vass* [2018] NSWCA 259. That case concerned an offer of amends which was expressed in plain terms to be "open to be accepted until the commencement of the trial, unless withdrawn in writing." The plaintiff made an offer of compromise under the UCPR, which was rejected, and then accepted the offer of amends. The defendant then sought to resile from the offer and the Court held that it could not do so. Each of the three judges reached the same conclusion, but unfortunately they did so through different processes of reasoning. Further, there were conflicting comments made in *obiter* regarding the way in which cl 18 of the MDPs applied. Accordingly, there is now some uncertainty as to the application of cl 18 of the MDPs.

4.3 Basten JA's analysis in *Vass* at [135]-[141] does expose a number of deficiencies in the present drafting of cl 18. In addition to the apparent conflict between the 28 days specified in cl 14 and the requirement that an offer of amends be made "as soon as practicable" in cl 18(1)(a), there is a significant uncertainty as to whether the words "at any time before trial" in cl 18(1)(b) require the publisher to be ready and willing to carry out the terms of the offer at all times before trial, or at any particular time before trial, as specified in the offer (although the latter is a far more practical reading of the clause). Further, cl 18(2)(a) has substantial difficulties, as identified by his Honour at [141]. The ATA submits that these matters ought to be clarified by amendments.

4.4 On the other hand, contrary to the apparent concerns of stakeholders noted in the Discussion Paper, the Court in *Vass* made no finding that an offer of amends could not be terminated by being expressly or impliedly rejected by the plaintiff. McColl

JA stated that where there is no time limit specified, by analogy to the law of contract, a failure to accept an offer within a reasonable period will be tantamount to rejection, and what constitutes a “reasonable period” will depend on the circumstances,⁶ and Leeming JA stated that, “It is for the offeror to determine the manner of acceptance and also the circumstances in which an offer will come to an end.”⁷ Basten JA noted arguments each way but did not decide the question.⁸ However, given that these remarks were all *obiter* and Basten JA seemed to lean towards the conclusion that an offer of amends must be open until trial in order for a cl 18 defence to apply, there is a degree of uncertainty, and it would be beneficial to clarify the clause by making it clear that an offer of amends can be terminated in any manner specified in the offer.

5. 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?

- 5.1 The current approach under cl 18 of the MDPs, whereby an offer to make amends can be relied on as a substantive defence which is heard at the liability stage of the proceedings, effectively means that if the defendant sends an offer to make amends, the defendant can make a forensic decision to expose the offer and any responses to the jury’s scrutiny at the liability phase of the proceeding. As the Discussion Paper observes, this may discourage defendants from relying on that defence, as the making of the offer to make amends may be viewed by the jury as an admission of liability. Another risk is that it may discourage *plaintiffs* from making reasonable counter-offers, again to avoid the jury’s scrutiny or the perception of any admission being made. In other words, the present system may unintentionally be counterproductive to negotiations between the parties.
- 5.2 These issues cannot be properly considered without having regard to the broadly accepted policy that parties should be encouraged to engage in “without prejudice” negotiations and that such negotiations should be privileged.⁹ This rule has developed on two bases.¹⁰ First, there is a public interest in the early settlement of disputes, and therefore it is important to encourage parties to exchange positions freely and frankly, without having to worry that anything said can be used against them in the primary dispute. Second, there is an implied contract between parties

⁶ *Vass* at [87]-[89] (McColl JA), and see at [170] (Leeming JA).

⁷ *Vass* at [170] (Leeming JA).

⁸ See, *Vass* at [159]-[160] (Basten JA).

⁹ See, eg, *Evidence Act 1995* (NSW) s 131.

¹⁰ See generally, *Pihiga Pty Ltd v Roche* [2011] FCA 240; 278 ALR 209 at [80]-[87] (Lander J).

to negotiations that the negotiations will be kept confidential. Because of the implied contract, the privilege is a joint privilege between both parties, and cannot be waived unilaterally by one party and not the other.¹¹

- 5.3 The policy behind without prejudice privilege is expressly contemplated in cl 19(1) of the MDPs, which provides that statements or admissions made in connection with the making or acceptance of an offer to make amends are not admissible as evidence in any legal proceedings. However, there is an exception in cl 19(2)(a) for proceedings to determine an issue arising under Part 3 Division 1 of the MDPs—which would relevantly apply only to the cl 18 defence, as no other provision in the Division creates a substantive cause of action or defence.¹²
- 5.4 It follows that the defence in cl 18 of the MDPs, together with the carve-out in cl 19(2), abrogates the parties' common law rights to negotiate without fear of prejudicing their positions in the primary dispute. The effect of the clause is that an offer to make amends cannot be entirely without prejudice, as the fact of the offer and its reasonableness can be live issues in the proceedings. Further, any response to the offer also cannot be without prejudice, as the reasons for the aggrieved person's failure to accept the offer are expressly relevant under cl 18(2)(b)(i).
- 5.5 The ATA submits that there is a sound policy basis for the common law without prejudice rule, and this ought to be reflected in cl 18 of the MDPs. Accordingly, there should be a presumption that a defence under cl 18 will not be heard until after liability has otherwise been determined.
- 5.6 This leaves the issue identified in the Discussion Paper regarding the inevitable expense and delay associated with the bifurcation of the hearing of different defences. The ATA submits that this is a case management issue, and is best left to the courts to determine, based on the individual circumstances of each case. Accordingly, we submit that there should be a *presumption* only of a bifurcated trial, and it should be possible, on the application of a party, for the cl 18 defence to be heard together with the other defences. In making a determination on this issue, the court should have regard to:
- (a) any inefficiencies that may result from bifurcation of the proceedings;
 - (b) the right of parties to negotiate without prejudice and to keep such negotiations confidential;

¹¹ *Walker v Wilsher* (1889) 23 QBD 335; *Cutts v Head* [1984] 2 WLR 349 at 366-367 (Fox LJ).

¹² Note that the exception would also apply to proceedings to enforce an agreement resulting from the acceptance of an offer to make amends, but such an exception is in line with the orthodox principles applying to without prejudice privilege: *Unilever Plc v The Procter & Gamble Co* [2001] 1 All ER 784 at 791-792.

- (c) the public interest in encouraging early settlement of disputes; and
 - (d) the interests of justice.
- 5.7 Such a provision would permit the proceedings to be bifurcated in an appropriate case, while also preventing this from occurring where the cost of the associated inefficiencies would outweigh any benefit. Significantly, the proposed amendments would also go some way towards restoring the traditional common law right to without prejudice privilege for parties to defamation disputes.

6. 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?

- 6.1 The ATA supports this proposal, as the publisher may not otherwise be able to identify the publication the subject of a concerns notice.

(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?

- 6.2 The ATA supports this proposal. An ingenuine apology is an undesirable outcome, for the reasons discussed by Mortimer J in *Wotton v Queensland (No 5)* (2016) 352 ALR 146 at [1550]-[1592].

(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?

- 6.3 The ATA supports this proposal, but in fact submits that the reforms should go further. Rather than just providing for an indemnity costs order in the defendant's favour if the plaintiff commences proceedings during the period of time in which an offer to make amends may be made, the plaintiff should be precluded from doing so. Further, the issuing of a concerns notice should be a compulsory procedure.

- 6.4 In other words, the ATA proposes that:

- (a) prior to commencing an action for defamation, a complainant should be required to issue a concerns notice;
- (b) an action for defamation should be permitted to be commenced only after the last to occur of:
 - (i) the expiry of the time in which an offer to make amends may be made; or

- (ii) if an offer to make amends is made, the expiry of the time in which it is open for acceptance;
 - (c) the limitation period relating to an action for defamation should be suspended from the date the concerns notice is issued until 28 days after the date referred to in sub-paragraph (b).
- 6.5 We note that, while a novel proposition in relation to defamation in particular, the requirement for a demand to be made and rejected (or not complied with) before commencing litigation is far from unknown to the common law. For example, a cause of action in detinue “accrues once a lawful demand for the return of possession of the chattel is made and the demand is refused”,¹³ and in certain circumstances a party cannot bring a claim to terminate a contract for failure to comply without first serving a notice to complete.¹⁴
- 6.6 This proposed concerns notice procedure will dovetail with the proposed conciliation procedure outlined in section 18 of this submission. However, even if the conciliation procedure is not adopted, the ATA submits that the proposed concerns notice procedure would be consistent with the objectives of promoting speedy and non-litigious methods of resolving disputes about the publication of defamatory matter, and minimising the costs and burden on the parties of litigation regarding disputes about the publication of defamatory matter.
- 6.7 Another reform that the ATA submits would be appropriate for the concerns notice procedure would be for there to be a statutory cap on the quantum of costs that can be sought by the plaintiff at the concerns notice stage. At present, plaintiffs have often conducted extensive preparatory work for the commencement of their claims at the time the concerns notice is sent, and will claim the costs of that work in the concerns notice. The ATA submits that the costs claimable in a concerns notice should be limited to the reasonable costs of preparing the concerns notice, including obtaining advice in relation to its preparation, and should not be permitted to include other incidental work. There should be a prescribed cap on the amount that can be claimed in such circumstances, an appropriate amount being, for example, about \$3,000.

7. 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

¹³ *Grant v YYH Holdings Pty Ltd* [2012] NSWCA 360 at [43].

¹⁴ See, eg, *Galafassi v Kelly* [2014] NSWCA 190; 87 NSWLR 119 at [96]-[110].

would be in the interests of justice (which may include case management considerations)?

- 7.1 The ATA is concerned at the continual erosion in Australia of the right to jury trials in civil disputes. While the ATA recognises, as submitted in section 18 below, that it may be desirable for smaller defamation matters to be dealt with in a less formal setting, the ATA submits that parties to defamation disputes should have the right to be heard by a jury of their peers in order to ensure that the dispute is determined in accordance with community standards. The tendency identified in the Discussion Paper for plaintiffs to commence in certain jurisdictions in order to avoid a trial by jury is emblematic of the problem that should be avoided.
- 7.2 Accordingly, the ATA opposes the proposal in Question 7.

8. 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?

- 8.1 The ATA submits that the *Federal Court of Australia Act 1976 (Cth)* should be amended to provide that all of the procedural provisions in the MDPs apply to proceedings in the Federal Court. The fact that they do not apply by reason of their inconsistency with the *Federal Court of Australia Act 1976 (Cth)* (and potentially with the *Federal Court Rules 2011 (Cth)*) is a historical accident resulting from the MDPs having been drafted before the Federal Court's jurisdiction to determine defamation matters was widely accepted.
- 8.2 The ATA also notes that with the recent expansion of its criminal jurisdiction, the Federal Court is now better equipped than ever to hold jury trials. Further, the status quo likely encourages parties seeking to avoid a trial by jury in order to avoid being subjected to community standards to file in the Federal Court instead of in a state court. Accordingly, jury trials ought to be presumed in Federal Court proceedings as they are in state court proceedings.
- 8.3 Further, the ATA submits that the Federal Circuit Court ought to have jurisdiction to hear defamation disputes.

9. 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?

- 9.1 The ATA agrees with the concerns expressed in the Discussion Paper that cl 26 of the MDPs, as drafted, may be unintentionally restrictive, and should be amended so that it applies as intended.

9.2 The ATA submits that an appropriate amendment may be to adopt some elements of s 2(3) of the *Defamation Act 2013* (UK), as follows:

- (a) In this section, “*contextual imputation*” refers to an imputation which is substantially true.
- (b) It is a defence to the publication of defamatory matter if the defendant proves that, having regard to any contextual imputations which the matter carried, the defamatory imputations did not seriously harm the plaintiff’s reputation.

10. 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?

10.1 The ATA agrees with the concerns expressed in the Discussion Paper in relation to the threats posed by defamation law to vigorous and robust debate in the scientific and academic community. However, the ATA sees no particular need for protection of statements published in peer reviewed journals and reports of matters at press conferences. The protection of those matters is important, but so is the protection of statements made in journals that are not peer reviewed, and reports of matters that occur otherwise than at press conferences. Any statements published in the course of a debate on matters in the public interest, or reports on matters in the public interest, are equally worthy of protection, whether or not they are peer reviewed or concern a press conference.

10.2 Accordingly, the ATA submits that peer reviewed journals and reports of press conferences should be protected as part of the broader protection of statements regarding matters in the public interest. This submission is developed below.

11. Question 11

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

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

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

(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?

11.1 The ATA submits that the defence of qualified privilege as it exists in the MDPs is overly complex and restrictive, and is poorly suited to the important purpose of

protecting publications regarding matters in the public interest. As the Discussion Paper identifies, the defence is more suited to protecting statements made in private, such as job references, answering police inquiries, or parent-teacher interviews, rather than statements made to the general public on matters of public importance.

11.2 We submit that the approach in s 4 of the *Defamation Act 1913* (UK) is appropriate and should be available as a defence to litigants in Australia. All statements forming part of a statement on a matter of public interest and which the maker reasonably believes to have been in the public interest ought to be protected, unless the statements are made with malice. Further, it would be appropriate to specify particular categories of statements that are presumed to be in the public interest unless proven otherwise. These should include:

- (a) statements in academic or scientific journals (whether or not peer reviewed);
- (b) reports on statements made or business conducted:
 - (i) in a legislature;
 - (ii) in proceedings in a court or statutory tribunal;
 - (iii) in the course of a public inquiry;
 - (iv) in an international organisation or conference; or
 - (v) in a press conference;
- (c) statements made in forums or conferences convened by:
 - (i) a registered charity;
 - (ii) a registered not-for-profit organisation; or
 - (iii) a registered political party.

11.3 In relation to this proposal, note that all universities in Australia are registered charities, and therefore this presumption would apply to academic conferences.

12. 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?

12.1 The ATA submits that the statutory defence of honest opinion should be amended in order to clarify the definition of “proper material” on which the opinion expressed is based. We submit that the current test is unduly complicated and places the defendant in an unfair position.

12.2 In considering the defence of honest opinion the policy considerations underlying the defence must be front and centre. That is, the defence exists in order to ensure

that the law of defamation does not operate to prevent discussions taking place and opinions being expressed on matters in the public interest, where the opinions are based on proper material. The defence is a fundamental cornerstone of the objective in cl 3(b) of the MDPs, “to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance”. Of all the defences in the MDPs (subject to the introduction of a defence of publication in the public interest as proposed above), honest opinion is the defence most targeted to achieving this end. Accordingly, a robust defence of fair comment is a vital component of Australia’s defamation regime.

- 12.3 The current test for “proper material” has three limbs—that is, the material must be:
- (a) substantially true; or
 - (b) published on an occasion of absolute or qualified privilege; or
 - (c) published on an occasion that attracted the protection of a defence under cl 28, 29, or 31 of the MDPs.
- 12.4 The main difficulty created by these requirements is that they are all matters that may be outside of the knowledge or control of the person expressing the opinion. For example, if a person expresses an opinion based on a news report that turns out not to have been true and which does not otherwise qualify for one of the defences referred to in sub-paragraphs (b) or (c) because the original publisher of that news report was knowingly misrepresenting the facts, then the material will not have been “proper material” and the defence will fail. This is despite the fact that the person expressing the opinion may have been acting entirely reasonably in relying on a report from an ostensibly reputable source, and may have had no means of verifying the truth or otherwise of the report or the motives of the person who published it.
- 12.5 The ATA submits that a preferable approach would be to define “proper material” as “material on which, in all of the circumstances of the case, it was reasonable for the person expressing the opinion to rely”. In assessing whether material is proper material, the matters in the current test can be stated to be relevant factors, and other relevant factors could include:
- (a) any material that was available to the person expressing the opinion but was not relied on by that person; and
 - (b) any steps the person took or omitted to take to confirm the contents of the material relied upon.
- 12.6 However, the ultimate question should be whether it was reasonable for the person expressing the opinion to rely on the materials that were in fact relied upon.

12.7 As the Discussion Paper identifies, the Victorian Court of Appeal in *The Herald & Weekly Times Pty Ltd v Buckley* (2009) 21 VR 661 held that the common law rule in the defence of fair comment as to the identification of the material on which the comment was based applies equally to the statutory defence of honest opinion. That rule has been stated as follows:

“[C]omment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts *stated or referred to* by him, or in *the common knowledge of the person speaking and those to whom the words are addressed* and from which his conclusion may be reasonably inferred. If a statement in words of a fact stands by itself naked, without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words are addressed, there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact.”¹⁵

12.8 As the Discussion Paper also identifies, this rule presents some challenges given the manner in which many people publish commentary digitally on social media platforms, websites and the like. That is, it is now common for comments to be published which are no longer than one or two sentences and make no direct reference to any material on which the opinion is based. It may therefore be unrealistic, or even unfair, to expect that the material on which opinions are based will be directly referred to in the publications.

12.9 That said, the common law position may still be sufficient to apply in an online environment. In *Buckley*, the Court referred at [77] to Gleeson CJ’s observation in *Channel Seven Adelaide Pty Ltd v Manock*, that “it is enough if the facts are ‘... sufficiently indicated or notorious to enable persons to whom the defamatory matter is published to judge for themselves how far the opinion expressed in the comment is well founded.’”

12.10 The ATA submits that, framed in this manner, the test appears to be appropriate. That is, the material on which the comment is based should be sufficiently apparent that the comment would appear to the persons to whom it is published to be an expression of opinion and not “a bare statement of fact”. There may nevertheless be some value in codifying this test in the MDPs.

13. 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) be defeated if defendant did not believe opinion was honestly held by the employee or agent at

¹⁵ *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60; 232 CLR 245 at 263, quoting *O’Brien v Marquis of Salisbury* (1889) 6 TLR 133 at 137.

time of publication) be amended to reduce potential for journalists to be sued personally or jointly with their employers?

- 13.1 The ATA accepts that cl 31(4)(b) of the MDPs as presently framed may encourage suits to be brought against journalists personally instead of, or in addition to, their employers. However, the ATA is not convinced that there is a sound policy basis for holding employers strictly liable for defamatory publications by journalists when the employers had no reason to believe that the journalists did not honestly hold the relevant opinion, and neither is there a sound policy basis for shielding journalists who publish defamatory publications from liability for their actions by encouraging claims to be brought against their employers instead of them. Accordingly, the ATA does not support an amendment to this provision.

14. 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)?

- 14.1 The ATA submits that a threshold test such as a "serious harm" test is desirable and ought to be introduced into the MDPs. For the reasons stated below, the existing defence of triviality is insufficient.
- 14.2 At common law, the general test for whether a publication is defamatory is whether it would lower the estimation of the plaintiff in the mind of a hypothetical ordinary reasonable person to whom the matter was published.¹⁶ Once it is established that a matter is defamatory, there is a presumption that it has caused damage to the plaintiff's reputation, and there is no requirement for the plaintiff to prove that damages have been suffered.¹⁷
- 14.3 As a result of those matters, the bar to establishing liability and damages in defamation is extraordinarily low. The ATA submits that it is in fact too low.
- 14.4 The rationale behind the presumption of damage was succinctly summarised by Lord Phillips MR in *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946 at [31]:

There have always been strong pragmatic reasons for proceeding on the premise that a defamatory publication will have caused the victim some damage rather than opening the door to the claimant and the defendant each marshalling witnesses to say that, respectively, they did or did not consider that the article damaged the claimant's reputation.

¹⁶ *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at [37].

¹⁷ *Bristow v Adams* [2012] NSWCA 166 at [20]-[31].

- 14.5 In other words, while the law recognises that an individual's reputation is something of value, it is difficult to prove harm to reputation, depending as it does on the lowering of a person's estimation in the eyes of third parties. The exercise described by Lord Phillips MR would be the obvious way of approaching this task, but that exercise would be fraught with difficulty and complication, and would likely be of limited utility. After all, except in the rare cases when a defamatory matter is published to a limited class of known individuals, it is impossible to prove one way or the other whether the plaintiff's reputation was in fact damaged in the eyes of the indeterminate number of anonymous third parties who viewed the publication. Further, even where all of the recipients of the publication can be identified, if there are more than a handful of them obtaining evidence from each one would require prohibitive costs and take an inordinate amount of time.
- 14.6 In view of those considerations, the law has arrived at the compromise position whereby the court determines whether it is objectively likely that the matter affected the plaintiff's reputation, and if this is found to be objectively likely then it is presumed to have occurred unless proven otherwise. This is a sensible solution to the difficulties identified above. However, in our submission, recognising that it is a compromise solution and it departs from the ordinary principle in tort law that damages must be proved and are not simply presumed, it is undesirable to place on the defendant the onus of proving that the matter is unlikely to have caused the plaintiff to sustain harm. Rather, if the plaintiff is not required to prove that it in fact suffered harm, it should at least be required to show that it was likely to suffer substantial harm.
- 14.7 Relatedly, the extant defence of triviality is unfavourable to defendants not only because the defendant carries the onus of proof, but also because it creates an extremely low threshold. That is, in order to succeed the defendant is required to show that the circumstances of the publication were such that there was "no real chance" that the plaintiff would suffer *any* harm.¹⁸ There is no requirement that the harm be substantial or non-trivial. In other words, to call it the defence of "triviality" may be a misnomer. The defence fails even where it is established that the harm to the plaintiff was no more than trivial.
- 14.8 For these reasons, the ATA submits that it would be desirable for a "serious harm" threshold test to be introduced into the MDPs. This would balance out the current anomalous advantage that plaintiffs in defamation suits enjoy in establishing an entitlement to damages, and would reduce the risk of plaintiffs succeeding in claims and being awarded damages despite having in fact suffered no real harm to their reputations as a result of the impugned publications.

¹⁸ *Jones v Sutton* [2004] NSWCA 439; 61 NSWLR 614 at [44]-[50]

(b) If a serious harm test is supported:**(i) should proportionality and other case management considerations be incorporated into the serious harm test?**

14.9 The ATA submits that proportionality and other case management considerations should be incorporated into the serious harm test. There has been a growing recognition over the past few decades that parties should not be encouraged to bring litigious proceedings when the costs of doing so are out of all proportion with the subject matter of the dispute. Defamation is an area particularly plagued by this issue, and therefore the introduction of case management considerations into the proportionality test would be appropriate.

(ii) should the defence of triviality be retained or abolished if a serious harm test is introduced?

14.10 The ATA submits that a serious harm test would render the defence of triviality otiose, and therefore it ought to be abolished.

15. 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?**

15.1 The ATA submits that the innocent dissemination defence requires amendment in cl 32(2)(c), which provides that a "subordinate distributor" must have had no capacity to exercise editorial control over the content of the matter before it was published. The requirement that the person not have any capacity is too high of a bar.

15.2 The ATA has first hand experience of the defect that this provision creates in the defence. What occurred was that an allegedly defamatory comment was made by a speaker during a conference hosted by the ATA. The ATA then published a video of the entire session of the conference online (as occurred with each of the sessions at the conference). The ATA was then subject to threats of legal action despite having no knowledge that the allegedly defamatory comment was made or was defamatory.

15.3 The ATA submits that cl 32(2)(c) should be repealed in its entirety. In order to be a subordinate distributor it should be sufficient that a person was not the first or

primary distributor of the matter and was not the author or originator of the matter. The question of editorial control should not be a consideration.

- 15.4 Further, the ATA submits that there ought to be a clear “takedown” procedure in the MDPs in order to protect digital publishers. The procedure could dovetail with the compulsory concerns notice procedure that the ATA proposes. That is, the concerns notice must specify whether the complainant seeks for a defamatory digital publication to be taken down, and the publisher should then be given a specified period in which the publication should be taken down. Only after a failure to take the publication down should the publisher be liable.

16. 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?

- 16.1 The ATA submits that clause 35 should expressly state that it fixes the top end of a range, rather than operating as a cut-off. This is consistent with personal injury legislation, and is also reflective of the purpose of introducing a statutory cap which reflects the maximum amount of damages that can be awarded.

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

- 16.2 The ATA submits that cl 35(2) should be amended such that the cap for non-economic damages continues to apply if aggravated damages are awarded, but that aggravated damages are excluded from the cap. The alternative would have the effect of risking inconsistent awards between jurisdictions in cases where aggravated damages are awarded.

17. 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’?

- 17.1 The concerns raised in the Discussion Paper regarding these questions are borne out even in the published cases. There are numerous examples of published judgments relating to cases where parties have apparently (and sometimes even openly) commenced multiple proceedings in relation to essentially the same

subject matter in order to avoid the application of the statutory cap.¹⁹ In those judgments, sometimes the proceedings are then consolidated, and other times they are not. It is also highly likely that there have been many more such instances which are not identified in published judgments, as either the relevant procedural judgment was not published, or no application was made for a consolidation or cross-vesting order.

- 17.2 The ATA submits that this loophole in the present legislation ought to be closed. However, applying the cap to each cause of action is not the appropriate solution. The publication of a single defamatory matter often gives rise to multiple causes of action as there are multiple people responsible for the publication. As McCallum J observed in *Dank v Whittaker (No 4)* [2014] NSWSC 732 at [23]-[25]:

The publication of defamatory matter will often give rise to more than one cause of action. In the case of a publication in the mass media, there will almost invariably be several persons and entities jointly liable as publishers of the same defamatory matter (such as journalists, editors, the newspaper proprietor and the printer). A defamed person has a cause of action against each such person or entity.

Strictly speaking, there is also a separate cause of action for each separate publication, that is, each occasion on which the defamatory matter is comprehended by an individual reader. Thus a defamatory article in a newspaper bought and read by 100,000 persons would give rise to 100,000 causes of action: *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513 at 519E - 520C per Asprey JA.

There will often also be multiple instances of publication of the same matter in different forums. It is not uncommon to see the same article, perhaps with slight variation, in different editions of the newspaper, in different newspapers within the same corporate group or syndicate and in different forms, with a version in print which differs only slightly from a version on the Internet.

- 17.3 In those circumstances, particularly in the digital age, applying the cap to each cause of action rather than each proceedings would risk rendering the cap nugatory. However, the fact remains that the limitation to particular “proceedings” encourages the unnecessary filing of multiple proceedings where one could have been filed, in order to circumvent the cap.
- 17.4 The ATA submits that the appropriate solution would be for the damages that may be awarded for non-economic loss to be capped in relation to the publication of a particular defamatory matter. Further, the publication or republication of the same or substantially the same matter across different media or in different outlets

¹⁹ See, eg, *Toben v Mathieson* [2013] NSWSC 1530; *Dank v Whittaker (No 4)* [2014] NSWSC 732; *Tabbaa v Nine Network Australia Pty Ltd* [2015] NSWDC 171; *Boikov v Dailymail.com Australia Pty Ltd* [2016] NSWDC 161; *Hibbert v Nationwide News Pty Ltd* [2016] NSWDC 190.

within a short period of time should be treated as a single publication for this purpose.

- 17.5 Another solution may be to alter the law applying to defamation cases, such that a cause of action arises in relation to each defamatory matter that is published (including any matter that is substantially the same but published on a different platform), rather than each occasion on which it is comprehended by an individual reader.

18. Question 18

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

- 18.1 The ATA submits that defamation laws in Australia could benefit from procedural reform in addition to the substantive reforms discussed in the discussion paper. There are two aspects to this:

- (a) further encouragement of pre-litigation dispute resolution; and
- (b) facilitation of cheaper, less-formal court procedures.

Encouraging pre-litigation dispute resolution

- 18.2 In addition to the compulsory concerns notice procedure proposed above, the ATA submits that the legislation should encourage parties to engage in a mediation or conciliation process prior to commencing litigation. The reason for this is that defamation disputes are inherently emotionally charged, and can often be resolved by the aggrieved party being given an opportunity to air his or her grievances, and the other party giving an apology. This is often the outcome of defamation matters which settle at mediation, however the mediation only occurs after the parties have incurred substantial costs in conducting litigation.
- 18.3 The process of conciliation under Part IIB of the *Australian Human Rights Commission Act 1986* (Cth) in relation to complaints of unlawful discrimination may provide a useful precedent in that regard. The process is that before proceedings are commenced a complaint must be lodged with the Australian Human Rights Commission, which is then conciliated by the commission. According to the Commission's 2018 annual report,²⁰ 74% of complaints resolved at the conciliation stage.
- 18.4 Of course, a process such as the one under the AHRC Act requires the commitment of substantial public resources in order to fund a conciliation body. For this reason, the ATA is weary of recommending that an identical procedure be adopted for defamation matters. However, reforms could nevertheless be implemented to

²⁰ See:

https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_Annual_Report_2017-2018.pdf

encourage dispute resolution processes to be utilised prior to the commencement of litigation. The ATA submits that the following procedure would be appropriate.

- 18.5 When a concerns notice is issued, it should be required to specify whether the complainant is willing to attend a mediation with the respondent. The respondent should then be able to offer to attend the mediation instead of replying immediately with an offer to make amends. A refusal by either party to take part in such a process should be a relevant consideration in relation to the costs of defamation proceedings and, in the plaintiff's case, the failure to mitigate loss.

Cheaper procedures

- 18.6 As stated above, the ATA is concerned at the erosion of the right to jury trials in Australia. However, the ATA recognises that at the bottom end of defamation disputes, jury trials are an expensive means of dispute resolution, and it may be preferable and far cheaper for the parties if the procedures adopted in other matters in order to prevent costs and delay were utilised. That includes such procedures as:

- (a) less formal pleadings;
- (b) evidence being taken by witness statement or affidavit, rather than oral testimony;
- (c) relaxation of the rules of evidence;
- (d) minimisation of disclosure obligations, such as:
 - (i) discovery only occurring after evidence is filed; and
 - (ii) discovery by categories rather than general discovery.

- 18.7 Because most defamation matters are heard by a jury such case management mechanisms are not generally available. However, those procedures could result in a substantial saving of costs and time—as they have for other areas of law.

- 18.8 The ATA notes that such procedures are available in the ACT by virtue of s 16 of the *ACT Civil And Administrative Tribunal Act 2008* (ACT), which confers jurisdiction on the ACT Civil and Administrative Tribunal to hear defamation claims.

- 18.9 Accordingly, the ATA submits that a “fast-track” process should be available for parties to smaller defamation disputes, pursuant to which the case is heard by judge alone, and case management procedures apply such as those discussed above. Parties should not be denied the right to a trial by jury in appropriate cases, however if the parties opt for cheaper case management procedures then this option ought to be available to them. To the extent it is constitutionally permissible, parties should be encouraged to file such claims in lower courts (ie magistrate's or local courts) or in civil and administrative tribunals.

18.10 It also may be preferable to assume in such cases that parties will not be legally represented. Accordingly, accessible prescribed forms should be made available for concerns notices, offers of amends, complaints, and responses.

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