



**Australian
Press Council**



**Submission to the
Council of Attorneys-General
Review of Model Defamation Provisions**

May 2019

Introduction

The Australian Press Council welcomes the invitation to make a submission to the Council of Attorneys-General in response to its Review of Model Defamation Provisions Discussion Paper.

The objects of the Press Council, as stated in its constitution, are to promote freedom of speech through responsible and independent print and digital media, and adherence to high journalistic and editorial standards.

The Press Council is also the principal body with responsibility for setting and promoting high professional standards for publisher members and for considering, dealing and responding to complaints about Australian newspapers, magazines and associated digital outlets. It seeks to meet its objectives by:

- a) encouraging and supporting initiatives by the print and digital media to address the causes for readers' complaints and concerns;
- b) keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest and may consequently threaten the public's right to know;
- c) making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- d) undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues;
- e) promoting an understanding of the objects and activities of the association especially among editors, journalists and journalism schools.

The Press Council currently covers more than 900 print and online mastheads. Constituent bodies include all but one (Seven West Media) of the major newspapers and magazine publishers in Australia.¹

These include the mainstream publishers (such as Nine Publishing and News Corp Australia) and their associated online websites, hundreds of community newspapers and rural and regional newspapers, as well as the new generation of online-only publishers (such as nine.com.au Daily Mail Australia, Mumbrella, The New Daily, New Matilda and Crikey). A significant number of the top-ranking news sites news (in terms of reach and influence) are members of the Press Council.

The Press Council's governing body has 18 members comprising nine public members (including the Chair and two Vice Chairs), eight publisher members and one independent journalist member. The Press Council has a secretariat headed by a Council-appointed Executive Director.

The Press Council considers complaints about print and online publications. Where appropriate, it seeks to achieve agreed remedies, issues letters of advice to publishers and publishes formal adjudications regarding certain complaints. In 2017–2018, the Council received 669 in-scope complaints.

The Press Council sets General Principles covering accuracy and clarity; fairness and balance; privacy and the avoidance of harm; and integrity and transparency. It has approved Specific Standards on the coverage of suicide and of contacting patients in care. It has also approved a Statement of Privacy Principles (in consultation with the Federal Privacy Commissioner) and Advisory Guidelines on a range of journalistic issues.

The Press Council also undertakes educational work to promote responsible journalism. It currently provides university journalism schools with teaching materials and case studies based on Press

¹ A list of the constituent bodies of the Press Council is set out in Annexure 1.

Council adjudications to promote learning about the Council's standards. In partnership with the Journalism Education and Research Association of Australia (JERAA), the Press Council funds prizes for outstanding work by journalism students at undergraduate and postgraduate level—as well as funding an award for the journalism student of the year.

The Review and Terms of Reference

The Press Council understands that the main purpose of the Review is to consider whether the policy objectives of the Model Defamation Provisions (MDPs) as stipulated in section 3 of the MDPs remain valid and whether the MDPs remain appropriate to achieve those objectives.

The Press Council notes that the Terms of Reference for the Defamation Working Party identify the matters to be taken into consideration in the course carrying out the Review, including:

- (a) the recommendations and findings of the June 2018 statutory review of the *Defamation Act 2005* (NSW);
- (b) any proposals for reform tabled by individual members of the Defamation Working Party;
- (c) relevant developments in case law in Australian jurisdictions and internationally;
- (d) relevant developments in technology since the commencement of the MDPs; and
- (e) any other relevant matters.

The Press Council considers the Terms of Reference for the Defamation Working Party to be appropriate in scope and clearly stated, and appreciates the breadth afforded to the DWP to consider “any other relevant matters.”

General Observations

The Council is conscious of the complexity and intricacy of the law of defamation. Accordingly, in this submission, the Press Council concentrates only on those discussion questions most relevant to its operations. In doing so, it notes that it is the principal body responsible for handling extrajudicial complaints about Australian print publications and associated digital outlets, and further notes that media organisations (including the Press Council's members) accounted for only 25.9% of all defendants in Australian defamation cases from 2013-2017.²

Individual publisher members of the Press Council may wish to make separate, independent submissions in response to CAG's Review of Model Defamation Provisions Discussion Paper.

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

The objectives of the MDPs are to:

- (a) enact provisions to promote uniform laws of defamation in Australia;
- (b) 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;
- (c) provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter; and
- (d) promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.

The Press Council echoes the views of the NSW Review that the objectives of the MDPs remain valid,³ noting that the essential policy objective of the model legislation is to formulate a legal

² University of Technology Sydney, Centre for Media Transition, *Trends in Digital Defamation: Defendants, Plaintiffs, Platforms* (University of Technology Sydney, 2018), p. 5.

³ NSW Department of Justice, *Statutory Review – Defamation Act 2005* (June 2018), at 1.14.

framework that “strike[s] a balance between protecting individuals from reputational damage from defamatory publications, while also ensuring that freedom of expression is not unduly curtailed, and that information in the public interest is released.”⁴ In particular, objectives (b) and (d) align with several core objectives of the Press Council as set out in clause 3 of its Constitution, namely to promote freedom of speech and the dissemination of information of public interest, and to provide non-litigious methods of resolving complaints about published material.

Nevertheless, the Council sees merit in the NSW Review’s recommendation, that the MDPs “would benefit from some amendments to clarify the application of terms, reduce ambiguity, and better articulate how some of its legal principles apply.”⁵

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

The Press Council notes the current restrictions on the right of corporations to sue for defamation under Division 2 of the MDPs, in which a corporation has no cause of action in defamation unless it is a private, not-for-profit corporation, or a private corporation that employs fewer than 10 people and is not related to another corporation.

While the Press Council understands that various stakeholders including the NSW Bar Association have advocated expanding clause 9 so as to permit all corporations to sue for defamation,⁶ it considers that such an amendment may have the potential to disrupt the balance between safeguarding the right to reputation and ensuring freedom of expression is not unduly curtailed, which is core to the objectives of the MDPs.

The Press Council is cognisant of the potential for large, well-resourced corporations to engage in Strategic Litigation Against Public Participation (‘SLAPP’) litigation, particularly against smaller media outlets and thereby deter or prevent the publication of information otherwise in the public interest. In this regard, due consideration should be given to the importance of encouraging and maintaining a diverse, vibrant media landscape in which small, independent publications can play a pivotal role.

In addition to the legal protections already available to corporations under the *Competition and Consumer Act 2010* (Cth) and the tort of injurious falsehood, the Press Council accepts complaints made by corporate entities both large and small as well as public organisations and individuals. As such, member publications are bound to adhere to the Council’s Standards of Practice when reporting matters relating to corporations.

Question 3(a): Should the Model Defamation Provisions be amended to include a ‘single publication rule’?

The Press Council sees merit in considering the introduction of a single publication rule in Australia. The common law position, confirmed by the High Court in *Dow Jones & Co v Gutnick*,⁷ is that a defamatory communication occurs when the publication is in comprehensible form. As noted in CAG’s Review of Model Defamation Provisions Discussion Paper:

In the case of internet materials, it ruled that the publication is in comprehensible form when downloaded onto the computer of the reader. This could have the consequence that, for the purposes of the multiple publication rule, each time an internet user accesses and downloads

⁴ Council of Attorneys-General, *Review of Model Defamation Provisions Discussion Paper* (February 2019), at 1.13.

⁵ Above no 3, at 1.14.

⁶ Above no 4, at 2.4.

⁷ *Dow Jones & Co v Gutnick* (2002) 210 CLR 575.

information from a webpage, this constitutes a 'publication' that may give rise to separate causes of action each with its own limitation period.⁸

The Council considers that the current common law position may raise certain difficulties for modern media outlets operating in an increasingly digital industry. Of particular concern is the potential for the multiple publication rule to discourage publishers from keeping and maintaining digital archives, in order to minimise exposure to ongoing defamation liability for historical content. In this regard, the Press Council notes the immense public benefit in having freely accessible digital news archives.

The Press Council is also mindful that the multiple publication rule may create evidentiary complications for news outlets,⁹ as detailed, documentary evidence cannot feasibly be retained on every story published for an indefinite amount of time. This is reflected in the Press Council's own procedures in which complaints must normally be made within 30 days of the first publication of the relevant material. The practical implication of the multiple publication rule may be to undermine the limitation period in the legislation.¹⁰

However, the Council also appreciates that "material on the internet is more readily accessed by search engines, and may continue to do damage into the future."¹¹

The Press Council also encourages the Review to consider whether the single publication rule should apply to all publishers (including individuals), the majority of whom do not provide digital news archives of public benefit.

The Press Council does not offer an opinion on the specific terms and operation of the single publication rule. However, it notes that some guidance may be gleaned from section 8 of the *Defamation Act 2013* (UK) which, in effect, provides that a one-year limitation period applies for defamation claims commencing from the date of first publication by the publisher.

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?

The Press Council encourages further consideration of whether protection to genuine peer reviewed statements published in an academic or scientific journal, and to fair reports of proceedings at a press conference should be increased, noting that such material is, by its very nature, likely to be of public interest. Similarly, the Council recognises the public interest in allowing free and public debate, scrutiny and criticism of academic material and public information.

In considering this question further, the Council notes it may be appropriate to consider factors such as accuracy, clarity, fairness, balance, and the public interest value of relevant disclosures—all of which align with the Council's Standards of Practice.

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?

The Press Council has long been concerned with the growing role and influence of digital platforms as publishers of news and other content. In its recent submission to the ACCC Digital Platforms Inquiry, the Council noted:

⁸ Above no 4, at 2.12.

⁹ See Submissions from Australia's Right to Know, p. 28; and the Law Council of Australia, p. 4 to the NSW Department of Justice, *Statutory Review – Defamation Act 2005*.

¹⁰ Australia's Right to Know Submission to NSW Department of Justice, *Statutory Review – Defamation Act 2005*, p. 31.

¹¹ Above no 4, at 2.16.

The Press Council agrees with the ACCC finding that content aggregators are “considerably more than mere distributors or pure intermediaries in the supply of news” as a result of their role in selecting which content to carry on their platforms.¹²

Accordingly, in considering the above question, the Press Council encourages the Review to be cognisant of the role that content aggregators play as publishers. It supports further consideration of measures aimed at promoting the responsible dissemination of journalistic and other content online, but also notes such measures must be consistent with the objectives of the MDPs and strike an appropriate balance between protecting individuals from defamatory publications, and ensuring that freedom of expression is not unduly curtailed.

Conclusion:

The Press Council looks forward to the findings and recommendations of the Review.

Please let us know if we can be of further assistance.

John Pender

Executive Director

¹² Australian Press Council Submission to the ACCC *Digital Platforms Inquiry* (February 2019), p3.

ANNEXURE 1 – Australian Press Council Constituent Bodies

The following organisations are confirmed as constituent bodies of the Australian Press Council:

- Adelphi Printing Pty Ltd (the Monthly Chronicle)
- Agenda Media Pty Ltd trading as Women's Agenda
- Altmedia Pty Ltd
- At Large Media
- Australian Associated Press
- Australian Property Journal
- Australian Rural Publishers Association
- Bauer Media Group
- Beaconwood Holdings Pty Ltd
- Budsoar Pty Ltd trading as the Koori Mail
- Community Newspapers of Australia
- Country Press Australia
- Crinkling News Pty Ltd trading as Crinkling News
- Dailymail.com Australia Pty Ltd
- Echo Publications Pty Ltd
- Emanila Pty Ltd
- Fairfax Media
- Focal Attractions
- Highlife Publishing Pty Ltd
- HT&E Limited
- Independent Australia Pty Ltd
- Inside Story Publishing Pty Ltd
- Media Entertainment and Arts Alliance
- National Indigenous Times Holdings Pty Ltd
- News Limited
- Nine.com.au
- Private Media
- Radiowise Productions Pty Ltd
- Schwartz Media (in relation to The Saturday Paper owned by Trustee for the Liberty 2701 and The Monthly owned by Trustee for the Monthly Trust)
- Solstice Media Limited
- Western Sydney publishing Group Pty Ltd
- WorkDay Media.