



**CENTRE FOR MEDIA TRANSITION**

# **Review of Model Defamation Provisions – Discussion Paper**

**Submission to Council of Attorneys-General**

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## About the Centre for Media Transition

The Centre for Media Transition is an interdisciplinary research centre established jointly by the Faculty of Law and the Faculty of Arts and Social Sciences at the University of Technology Sydney.

We investigate key areas of media evolution and transition, including: journalism and industry best practice; new business models; and regulatory adaptation. We work with industry, public and private institutions to explore the ongoing movements and pressures wrought by disruption. Emphasising the impact and promise of new technologies, we aim to understand how digital transition can be harnessed to develop local media and to enhance the role of journalism in democratic, civil society.

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## Introduction

Thank you for the opportunity to contribute to this review. Our submission covers the following points.

1. Brief responses to selected questions in the Discussion Paper.
2. Additional comments on the 'serious harm' threshold test (question 14) incorporating information from our 2018 research report, [Trends in Digital Defamation: Defendants, Plaintiffs, Platforms](#).

We note the Discussion Paper raises important matters of public policy. We hope to contribute more substantively on more of the issues it raises in a future round of submissions. Specifically, we hope to conduct more work on non-litigious methods of resolving disputes and the standards that apply in establishing 'reasonable steps' on the part of journalists and news media. This new work will build on research conducted for the ACCC's Digital Platforms Inquiry. In Chapter 3 of our report for the ACCC, [The Impact of Digital Platforms on News and Journalistic Content](#), we consider the fragmented environment for journalistic standards schemes and approaches to assessing journalistic standards and quality.

### 1. Brief responses to questions in the Discussion Paper

Question 1	The <b>policy objectives</b> of the Model Defamation Provisions should be amended to better reflect the contemporary environment. By its very nature, an action for defamation involves publication. The conditions for publication have changed fundamentally over the past two decades to the point where most people are likely to qualify as a 'publisher' at some point. As explained below, we support the introduction of a single publication rule and a serious harm threshold test to address the obstacles to free expression that have developed over the past decade. It is appropriate that the underlying reasons for these new provisions are reflected in new policy objectives.
Question 2	The Model Defamation Provisions should be amended to narrow the <b>right of corporations to sue</b> for defamation. It is not in the public interest for large corporations to have access to remedies more suited to harm to personal reputation. While we appreciate the difference in relation to non-profit and small companies, we think the public policy objective in giving them additional protection is outweighed by the public interest in freedom of speech.
Question 3	The Model Defamation Provisions should be amended to include a <b>'single publication rule'</b> . While protection of personal reputation is a legitimate policy objective, it must be considered alongside the public interest in ready access to online news media archives – a consideration that had far less significance in past decades. A reasonable accommodation of these competing aspects of public interest could be achieved by introducing a single publication rule but placing limits on the extent of subsequent publications, outside the limitation period, in a new form or by a different publisher.
Question 8	Federal Court defamation trials should be <b>jury trials</b> , except in the usual circumstances where a court dispenses with a jury.

Question 9	The statutory defence of <b>contextual truth</b> should be amended to be closer to the position under the former New South Wales Act, or to otherwise provide an effective defence in cases where the defendant has published substantially true imputations.
Question 10	The Model Defamation Provisions should be amended to provide greater protection for <b>peer reviewed statements</b> published in an academic or scientific journal and to fair reports of <b>proceedings at a press conference</b> . While there may be other defences available for peer reviewed statements, the manifest public interest in their publication means there should be a clear, easily applied defence.
Question 11	<p>The well-established failure of the Model Defamation Provisions to provide an appropriate defence for journalism makes this a priority for reform. It is regrettable that the tension between the protection of reputation and the need for journalistic interrogation of those in public life (and especially those holding public office) should so often be resolved in a plaintiff's favour. At least one cause for this imbalance could be remedied through the overhaul of the test of reasonable conduct on the part of journalists and publishers, thereby lowering the threshold for the <b>defence of qualified privilege</b>.</p> <p>In our view, the most important aspects are (i) that the material is in the public interest and (ii) that the steps taken by the journalist or publisher in gathering and publishing the material were reasonable. This is at the core of journalistic ethics and it is appropriate that there be a thorough review of what constitutes reasonable steps. It is also appropriate that decisions on whether such conduct was reasonable are questions for a jury, not a judge.</p>
Question 12	The scope of the <b>defence of honest opinion</b> requires clarification; it would also benefit from modernisation. While the conditions of publication and consumption have changed dramatically in recent years and the law should reflect these changes, it would be unfair to allow publishers to establish context through supporting material that is too remote or difficult to access. A middle ground is needed. The law should recognise that with some forms of digital publication it is reasonable to rely on material that is not strictly part of the same 'publication', yet there is also a point at which it is unreasonable to expect a reader to follow multiple links or access deeply nested documents.
Question 13	The <b>employer's defence of honest opinion</b> should be amended to reduce potential for journalists to be sued personally or jointly with their employers.
Question 14	A priority for reform – along with the overhaul of the qualified privilege defence and the shift to a single publication rule – is the introduction of an effective mechanism for filtering out claims that unnecessarily impede freedom of speech. For the reasons set out in the Discussion Paper, the existing <b>defence of triviality</b> cannot be considered a useful and effective element of the Model Defamation Provisions, especially in relation to digital publications. It is not sufficient to rely on the piecemeal development and application through the courts of the concept of proportionality. A <b>serious harm test</b> should be introduced as a threshold requirement, with an amended defence of triviality,

	<p>more applicable to digital publication, which could still be applied if it is decided the material was defamatory. In section 2 below, we provide some further information on the nature of recent defamation actions and awards showing the need for a more effective filtering mechanism.</p>
<p>Question 15</p>	<p>Our responses above are generally in favour of enhanced freedom of speech and these recommendations mostly apply in favour of news media organisations. We also support reasonable exemptions (through an <b>innocent dissemination defence</b> coupled with a pragmatic <b>takedown scheme</b>) for digital platforms and ISPs from the more extensive obligations placed on publishers. For reasons set out in our <a href="#">report to the ACCC for its Digital Platforms Inquiry</a>, we do not consider it desirable to regard platforms as publishers. This does not mean that platforms should be free of legal and regulatory responsibilities; it just means their responsibilities are different to those of publishers.</p> <p>In the context of defamation, we think it is reasonable for there to be takedown obligations on digital platforms to take action at some point after they are notified of offending material, but it is unreasonable to expect that to occur immediately and it will harm the public's access to information if take-down is not reasonably justified. We do not at this stage propose specific rules for the circumstances under which liability might arise, but we think it is a topic of public policy well suited to resolution by parliaments, rather than the courts.</p> <p>We also think some explicit protection should be afforded to news media organisations, whose principal business is publication of the work of professional journalists, from liability for user comments posted in response to professional content. This would apply where the news provider makes a reasonable attempt to moderate the user comments. This should not apply to content from third party affiliates, for which publishers should remain liable under reformed Model Defamation Provisions.</p>
<p>Question 16</p>	<p>We support the operation of a <b>cap on damages</b> for non-economic loss. It is hard to see any truth in the claim that larger publishers might regard the existence of the cap as a reason to publish defamatory matter and absorb the penalties (both damages and legal costs) as a cost of business.</p> <p>However, the application of the cap should be clarified: the cap should be regarded as the top end of a range of damages and it should not be exceeded as a result of the separate award of aggravated damages.</p> <p>This is not to say that there should not be awards for economic loss or aggravated damages, or even that there should not be awards at the higher end of a range of damages for non-economic loss. However, we do question sizable awards for harm to a person's feelings, where the quantum exceeds that of payments for harms such as physical impairment or sexual harassment.</p>

## 2. Additional comments on the ‘serious harm’ threshold test: from public figures to private citizens

Comments on the proposed introduction of a serious harm test are provided under the response to question 14 above. Below we present some information extracted from our 2018 report, [Trends in Digital Defamation: Defendants, Plaintiffs, Platforms](#). The report provides data on aspects of digital defamation cases over the five-year period 2013 to 2017.

By ‘digital defamation’ we mean matters where publication in digital form is a core part, though not necessarily the exclusive form, of publication.

The aspect we think is worth considering in the context of the review is the rise of neighbourly disputes, or at least the trend in ordinary citizens suing each other for comments on various forms of digital communication. Our review found the following:

- In the period 2013 to 2017, only 21% of the plaintiffs in judgments we examined could be considered public figures.
- Only 25.9% of the defendant ‘publishers’ were media companies.

This is a contrast to the conventional idea of a public figure bringing a cause of action against a media company.

This trend brings into focus the suitability of defamation law – with all its costs to the individual and the community – as the appropriate forum for resolving low level accusations that might conceivably affect a person’s reputation. We think there is value in exploring with digital platforms and others the ways in which a self-regulatory forum could be developed for such disputes. In the context of the current review, this trend towards ‘backyard’ defamation actions may well add support to the arguments in favour of a serious harm test.

### Snapshot of 2016 2017 digital defamation cases

To provide an indication of the matters arising, below we copy tables showing digital defamation matters across the various jurisdictions in the final years of our study, 2016 and 2017. (See Table 55 and 56, pp 55-59. For an explanation of the scope and limits of this review, see the Methodology section of the report.)

#### Digital defamation cases, across jurisdictions, 2016

Case	First substantive decision	Type of Publication	Type of Defendant	Type of Plaintiff
<a href="#">Reid v Dukic</a>	[2016] ACTSC 344	Defendant had published nine statements as posts on his own Facebook page	Individual who made the Facebook posts	Individual
<a href="#">Bottril v Cristian &amp; Anor</a>	[2016] ACAT 7	Comments on a website. Respondents were owners of the website on which other people posted. Comments included a hyperlink with further defamatory comments	Individuals who owned the website	Individual

<a href="#">Schoch v Palmer</a>	[2016] QSC 147	Statements published in different media, with some continuing to be published on media websites	The individual who made statements to journalists	Individual
<a href="#">Kelly v Levick</a>	[2016] QMC 11	Facebook post on own Facebook page	Individual who made the Facebook post	Individual
<a href="#">Price v Davies &amp; Anor</a>	[2016] QDC 201	Words published on website	First respondent is an individual who wrote the words, second respondent is the individual's employer	Individual
<a href="#">Poniatowska v Channel Seven Sydney Pty Ltd &amp; Anor (No 4)</a>	[2016] SASC 137	Television segment republished on Channel Seven website	Media organisation	Individual
<a href="#">Fleming v Advertiser-News Weekend Publishing Company Pty Ltd (No 2)</a>	[2016] SASC 26	Articles published in online media website	The relevant media companies	Individual
<a href="#">Maras v Lesses</a>	[2016] SADC 40	Email publication	Individual	Individual
<a href="#">Douglas v McLernon [No 4]</a>	[2016] WASC 320	Publications on different websites	Individuals	
<a href="#">Pham v Legal Services Commissioner</a>	[2016] VSC 450	Document published online by the Legal Services Commissioner	Legal Services Commissioner	Individual
<a href="#">Trkulja v Dobrijevic</a>	[2016] VSC 421	Issue of republication of statements from a bishop's ruling on an overseas website	The bishop	Individual
<a href="#">Dods v McDonald (No 1)</a>	[2016] VSC 200	Statements made on a website.	Individual who administered the website	Individual
<a href="#">Van Garderen v Channel Seven Melbourne Pty Ltd &amp; Ors</a>	[2016] VCC 953	Content on an internet news service and on a website	Media organisations	Individual
<a href="#">Al Muderis v Duncan</a>	[2016] NSWSC 1363	Publication of material on the internet, (website, YouTube and a Facebook page).	The Individual who posted the YouTube material, set up the Facebook page and website which included the material, the registrant of the relevant website and the relevant host registration authority	Individual

<a href="#">Kang v Channel Seven Sydney Pty Ltd</a>	[2016] NSWDC 307	Publication on the website of the Department of Fair Trading	First defendant: Media organisation Second defendant: Helen Wellings Third defendant: State of NSW Fourth defendant: The Hon. Matthew Ryan Mason-Cox Fifth defendant: David Byrne, Department of Fair Trading Sixth defendant: Media organisation	Individual
<a href="#">O'Brien v Australian Broadcasting Corporation</a>	[2016] NSWSC 1289	Media Watch television segment, the video and transcript of which remained on the ABC website	ABC	
<a href="#">Carney v Fairfax Media Publications Pty Limited</a>	[2016] NSWSC 1246	Article published in print and online	Media organisations	
<a href="#">Templar v Watt (No 3)</a>	[2016] NSWSC 1230	Statements made in an email	Person who wrote the email and their employer; Central Coast Local Health District	Individual and individual's employer (corporation)
<a href="#">Carolan v Fairfax Media Publications Pty Ltd (No 6)</a>	[2016] NSWSC 1091	Publication of a series of online articles in SMH online. One issue was when an online article includes links to related articles, is this a single publication?	Media organisation and individual journalist (employee)	Individual
<a href="#">Rothe v Scott (No. 4)</a>	[2016] NSWDC 160	Facebook post by defendant on defendant's Facebook page	Individual who made the posts	Individual
<a href="#">Gmitrovic v Commonwealth of Australia</a>	[2016] NSWSC 418	Statements made in two emails	Individual and Individual's employer	Individual
<a href="#">Kang v Immigration News Pty Ltd</a>	[2016] NSWDC 74	Newsletter that was claimed to have been published online.	Immigration News Pty Ltd and an individual, Carl Konrad	Individual
<a href="#">Dank v Nationwide News Pty Ltd</a>	[2016] NSWSC 295	Online versions of newspaper articles	Media organisation (first defendant)	Individual
<a href="#">Leighton v Garnham</a>	[No 4] [2016] WASC 134	Internet publications	Individual	Individual

## Digital defamation cases, across jurisdictions, 2017

Case	First substantive decision	Type of Publication	Type of Defendant	Type of Plaintiff
<a href="#">Cummings v Fairfax Digital Australia &amp; New Zealand Pty Limited; Cummings v Fairfax Media Publications Pty Limited</a>	[2017] NSWSC 657	Internet articles	Media organisation	Individual and the Individual's corporate alter ego
<a href="#">Ghosh v Miller</a>	(No 2) [2017] NSWSC 791	Blog posts and comment posted on the website by readers of the blog	Individuals	Individual
<a href="#">Milne v Ell</a>	[2017] NSWSC 555	Internet publication	Individual	Individual
<a href="#">Gregory v Johnson</a>	[2017] QDC 224	Text message, Facebook message	Individual	Individual
<a href="#">Taylor v Hewitt</a>	[2017] WASC 234	Facebook post by the defendant on the plaintiff's company page	Individual	Individual
<a href="#">Accommodation West Pty Ltd v Aikman</a>	[2017] WASC 157	Emails sent	Individual	Company and individuals who are company directors and a company employee
<a href="#">Piscioneri v Whitaker</a>	[2017] ACTSC 174	Posts made on a website	Individual	Individual
<a href="#">Sheales v The Age &amp; Ors</a>	[2017] VSC 380	Online article	Media organisation	Individual
<a href="#">Wilson v Bauer Media Pty Ltd</a>	[2017] VSC 521	Online articles	Media organisation	Individual
<a href="#">Barrow v Ackland &amp; Gibson</a>	[2017] VSC 485	Website and social media	Individuals	Individual
<a href="#">Deferos v Google Inc &amp; Anor</a>	[2017] VSC 158	Search result pages	Google	Individual
<a href="#">Huang v Zhi &amp; Anor</a>	[2017] VCC 1990	Email publications and messages sent on the We Chat social media platform	Individuals	Individual
<a href="#">Chel v Fairfax Media Publications Pty Ltd</a>	(No 8) [2017] NSWSC 1315	Internet article	Media organisation and individual journalist	Individual
<a href="#">Mahmoud v Australian Broadcasting Corporation</a>	(No 3) [2017] NSWSC 764	Internet article	Various media organisations	Individual

<a href="#">Zaia v Eshow</a>	[2016] NSWSC 921	Facebook posts	Individual who made the posts	Individual
<a href="#">Stokes v Ragless</a>	[2017] SASC 159	Several publications, including website posts, emails and Facebook posts	Individual	Individual