



RESPONSE TO COUNCIL OF ATTORNEYS-GENERAL

REVIEW OF MODEL DEFAMATION PROVISIONS

DISCUSSION PAPER

3 MAY 2019

INTRODUCTION

This submission is provided by Australia’s Right to Know (ARTK) coalition of media companies. Members of ARTK are AAP, ABC, Australian Subscription Television and Radio Association (ASTRA), Bauer Media, Commercial Radio Australia (CRA) – representing Australia’s commercial radio broadcasters, Community Broadcasting Association of Australia (CBAA) – representing community radio and TV, Free TV – representing Australia’s commercial free-to-air TV networks, Guardian Australia, HT&E, Media Entertainment and Arts Alliance (MEAA), News Corp Australia, Nine Entertainment Co, SBS and The West Australian.

We welcome the opportunity to make a submission to the *Council of Attorneys-General (CAG) Review of Model Defamation Provisions Discussion Paper* (the Discussion Paper).

With the operation of the uniform defamation law ticking over 13 years, ARTK presents a united view that it is time to update the law to:

- Take account of international best practice, including recent amendments adopted in the UK, to update the law to be fit-for-purpose for digital news reporting; and
- Address some aspects of the law which, through 13 years of ‘road testing,’ do not operate as intended.

Some have suggested that it would be appropriate to undertake a root and branch review of the legislation. While we are not adverse to that suggestion, we are also keen to get on with addressing the long-standing problems without further unnecessary delay. As Judge Judith Gibson of the District Court of NSW said in her March 2019 keynote address, and associated paper¹, at the UNSW Defamation and Media Law update, *‘the long-standing problems of effecting defamation law reform are as well-known as they are widely discussed.’*

For this reason we are supportive of the scope of the Discussion Paper, including question 18 which provides the opportunity for other issues to be considered, and the timeline as committed to by the CAG for Parliament-ready legislation.

Our submission responds to the questions posed by the Discussion Paper.

Question 1

Do the policy objectives of the Model Defamation Provisions (MDP) remain valid?

The objects, at section 3 of the MDP, are:

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

As ARTK has raised in submissions to other inquiries and legislative processes the overarching issue is that Australia lacks a legislative protection for freedom of speech.

¹ 20 March 2019, Judge Judith Gibson, *‘The NSW Government Discussion Paper on Defamation Law Reform’*, Defamation and Media Law Conference, UNSW

The right to free speech, a free media and access to information are fundamental to Australia's modern democratic society, a society that prides itself on openness, responsibility and accountability.

However, unlike some comparable modern democracies, Australia has no laws enshrining these rights. In the United States of America the right to freedom of communication and freedom of the press are enshrined in the First Amendment of the Constitution and enacted by state and federal laws. In the United Kingdom freedom of expression is protected under section 12 of the *Human Rights Act 1998* subject to appropriate restrictions to protect other rights that are considered necessary in a democratic society.

We note this here in this submission, to again shine a light on the importance of ensuring appropriate legal protections for public interest reporting in Australia, be that defences or exceptions. In the case of defamation law this requires an acknowledgement of freedom of speech as a central tenet of causes of action and also defences for reportage.

Although the object in section 3(b) of the MDP is '*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*', we are concerned that this object is not adequately reflected in the operative provisions of the MDP. Under the MDP, the plaintiff retains the following practical advantages:

- damage is presumed; an individual need not prove loss or even the extent of their reputation;
- an individual, once they have discharged proof of the basic elements of the action, publication, meaning and identification, bears no further burden of proof except in limited circumstances (i.e. malice); and
- an individual does not and need not prove the falsity of the matter.

In contrast, a defendant usually has limited recourse to material relating to the issue of falsity or truth and has limited procedural rights to such information. These procedural advantages have a real and significant impact on the conduct of defamation proceedings and how defendants conduct themselves prior to publication.

In these circumstances, we consider that the current MDP do place unreasonable limits on freedom of expression, including the publication and discussion of matters of public interest and importance. We therefore recommend that the MDP should be amended to better enact this object, in particular by introducing a serious harm threshold (see our recommendations in Question 14), by introducing changes to the contextual truth defence (see our recommendations in question 9) and to the qualified privilege defence (see our recommendations in Question 11) and to addressing the issues in relation to damages (see our recommendations in Question 16).

Without these changes, we consider that the MDP will continue to have a chilling effect on freedom of expression in Australia.

Question 2

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

ARTK does not support broadening the scope of corporations to sue for defamation, given the adequate alternative remedies available to corporations under the Australian Consumer Law and injurious falsehood.

ARTK also considers that the meaning of an '*excluded corporation*' in section 9(2)(b) should be clarified to provide that the reference to '*employs*' does not denote a formal employment relationship, but is intended in the broader sense where there is any arrangement or understanding under which a person provides

services to the corporation, and could include directors, officers, independent contractors, subcontractors, casuals and volunteers.

Further, ARTK recommends the law be amended such that the exception for not for profit organisations is removed. We are seeing unions, football clubs and churches suing for defamation. The exemption does not have a clear policy rationale and should be removed. Permitting defamation suits by not for profits, utilising funds raised by a not for profit for the benefit of its beneficiaries seems an abuse of the tax and other benefits that such organisations receive.

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. (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)?

ARTK strongly supports amending the law to include a single publication rule.

[Section 14B of the Limitations Act 1968](#) (NSW) provides that an action in defamation is not maintainable if brought after the end of a limitation period of one year from the date of publication of the matter in question. For print, TV and radio publications this date is fixed. However, due to [Dow Jones and Company Inc v Gutnick](#) as long as material in question is available to be downloaded from the internet it continues to be published anew each time it is accessed, and the limitation period runs again from that date.

This is untenable in the digital publishing environment, not only for ARTK's members but for all Internet users. The key problems with a multiple publication rule are that never-ending liability for online publications could place an unreasonable limit on freedom of expression, and draws out disputes over longer periods and with more litigation. There are also evidentiary issues for defendants, in that the more time that passes between publication and trial, the harder it is to locate documents and witnesses, and memories fade over time. Conversely, a single publication rule in conjunction with the one-year limitation period from first publication facilitates the availability of effective remedies - the sooner a plaintiff obtains a verdict in their favour and a damages award, the greater the vindication.

The multiple publication rule also produces perverse results – in [Otto v Gold Coast Publications Pty Ltd](#), the plaintiff's claim against a newspaper was dismissed but his claim for the same article on a website was held to survive. This demonstrates a clear need for legislative reform.

Accordingly, ARTK recommends introducing a single publication rule in similar terms of [section 8 of the Defamation Act 2013 \(UK\)](#) that applies to first publication of the material regardless of the medium.

Such an approach would align Australia with international best practice (UK, Ireland and several US states); update Australia's defamation law for the digital age; ensure technology neutrality and consistent treatment across medium platforms (e.g. print, broadcast and online); avoid evidentiary difficulties due to the passing of time; and minimise the impact of laws that are out of step with digital publishing and have the real potential to undermine news media reporting.

Question 4

- a) Should the Model Defamation Provisions be amended to clarify how clauses 14 (when offer to make amends may be made) and 18 (effect of failure to accept reasonable offer to make amends)

interact, and, particularly, how the requirement that an offer be made ‘as soon as practicable’ under clause 18 should be applied?

- b) Should the Model Defamation Provisions be amended to clarify clause 18(1)(b) and how long an offer of amends remains open in order for it to be able to be relied upon as a defence, and if so, how?
- c) Should the Model Defamation Provisions be amended to clarify that the withdrawal of an offer to make amends by the offeror is not the only way to terminate an offer to make amends, that it may also be terminated by being rejected by the plaintiff, either expressly or impliedly (for example, by making a counter offer or commencing proceedings), and that this does not deny a defendant a defence under clause 18?

a) Offer to make amends – timeframe to make offer

A publisher may become aware of a claim of defamation upon receipt of a concerns notice. The law provides at least 28 days after receipt of a concerns notice to investigate and determine whether an offer to make amends should be made. However, a defence pursuant to [section 18\(1\)\(a\) of the Act](#) requires that the offer be made ‘as soon as practicable’ – which is inconsistent and has the obtuse outcome of encouraging concerns notices to demand that an offer to make amends be made within a period significantly less than 28 days (frequently 7 days).

ARTK recommends that section 18(1)(a) be amended so that an offer to make amends which is made within 28 days, or before filing a defence if no concerns notice is provided, is reasonable for the purpose of an offer to make amends defence, rather than requiring the offer be made ‘as soon as practicable’.

Such an amendment would ensure consistency and ensure the law works as intended.

b) Offer to make amends – duration of offer

[Section 18\(1\)\(b\) of the Act](#) provides that an offer to make amends is reasonable if “*at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer*”.

There have been inconsistent findings as to whether or not this requires an offer to remain open at all times up to trial: see [Nationwide News Pty Limited v Vass](#), [Vass v Nationwide News Pty Limited](#), [Zoef v Nationwide News Pty Ltd](#), [Bushara v Nobananas Pty Ltd & Anor](#) and [Pingel v Toowoomba Newspapers Pty Ltd](#).

ARTK recommends the law be amended to make clear that an offer to make amends does not have to remain open at all times from when it is made until the start of the trial in order to be reasonable.

Such an amendment would clarify the current ambiguity and ensure the law works as intended.

c) Offer to make amends – withdrawal

[Section 16\(1\) of the Act](#) provides that an offer to make amends may be withdrawn before it is accepted by notice in writing.

In [Vass v Nationwide News Pty Limited](#), Justice McCallum at [25]-[26] appears to have concluded that the only way to bring to an end an offer of amends (whether an initial offer or a renewed offer) is by the withdrawal of that offer by the offeror. The [Court of Appeal](#) found that ordinary contractual principles

do not apply to offers to make amends, such that a counter offer does not constitute a rejection of an offer to make amends.

ARTK recommends the law be amended to make clear that withdrawal of an offer to make amends by the offeror is not the only way to terminate the offer. If an offer to make amends is rejected by a plaintiff, either expressly or impliedly (for example, by making a counter offer or by commencing proceedings), then the offer does not remain open and this does not deny a defendant the defence under [section 18 of the Act](#).

Such an amendment would clarify the current ambiguity and ensure the law works as intended.

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?

Although offers to make amends are made on a '*without prejudice*' and '*without admissions*' basis, and section 19 of the MDP provides that evidence of any statement or admission made in connection with an offer to make amends is not admissible as evidence in any legal proceedings, this is a difficult legal argument for a defendant to make a jury understand in the face of any other form of defence. For example, where a truth defence is also raised, arguing at the same time that it was reasonable for the defendant to make an offer of amends which included concessions that some or all of the matter complained of wasn't true (such as by offering a correction or apology) is akin to arguing something is both black and white. It would be difficult for a jury to divorce these alternative arguments in their deliberations.

If the offer to make amends defence is to prove effective, it should be argued as a separate point after other defences have been considered by the jury, which would give the trial judge the opportunity to give appropriate directions to the jury as to the evidentiary considerations to be applied. This would ensure that juries are not prejudiced when considering whether the other defences have been made out.

Question 6

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

- a) require that a concerns notice specify where the matter in question was published?
- b) clarify that clause 15(1)(d) (an offer to make amends must include an offer to publish a reasonable correction) does not require an apology?
- c) provide for indemnity costs to be awarded in a defendant's favour where the plaintiff issues proceedings before the expiration of any period of time in which an offer to make amends may be made, in the event the court subsequently finds that an offer of amends made to the plaintiff after proceedings were commenced was reasonable?

(a) URLs in concerns notices

The current law did not foresee the practical implications of digital/online publishing and does not include a requirement for the aggrieved person to list the URL of material published online in a concerns notice.

ARTK recommends introducing a provision to require that an aggrieved person sufficiently identify the publication complained of, including the URL at which the material is published (if applicable), be

included in concerns notices, and if not included, for the publisher to be able to request this information in a further particulars notice under [section 14 of the Act](#).

Such an amendment would update the law for the digital age and ensure consistency with pleading requirements in [rule 15.19 of the Uniform Civil Procedure Rules 2005 \(NSW\)](#).

(b) Offer to make amends – correction of any error in fact

An effective offer to make amends requires an offer to publish a ‘reasonable correction’ of the matter in question or the imputations relating to the offer. It does not require an apology.

This deliberate lack of requirement for an apology was addressed by the Honourable Bob Debus, then NSW Attorney-General in his second reading speech to Parliament regarding the unified defamation law. He said regarding the changed offer to make amends provisions: *‘There are just a few changes that I would like to highlight. The first is that the publication of an apology will no longer be a mandatory component of an offer of amends.’*

The Attorney-General went on to say: *‘This should encourage more publishers to use the "offer of amends" procedure, particularly where a publisher believes that the matter published was both truthful and fair but wishes to settle the case without an expensive hearing.’*

However, it is often the case that plaintiff lawyers assert that a correction which does not include an apology is not reasonable when it comes to assessing the offer as a defence pursuant to [section 18\(1\) of the Act](#). This is clearly not the intention of the Act.

ARTK recommends the law be amended to clarify that the ‘correction’ required in an offer to make amends in [section 15\(1\)\(d\) of the Act](#) is the correction of any false statement, and does not require an apology.

Such an amendment would ensure the law works as intended. It would also ensure consistency with established law that a court cannot (and should not) exercise a power to compel a party to apologise, as in [Summertime Holdings Pty Ltd v Environmental Defender’s Office Ltd](#).

(c) Offer to make amends – issuing proceedings before the expiration of the period allowed for an offer to make amends

[Section 14\(1\)\(a\) of the Act](#) provides for 28 days for the defendant to assess a claim and determine whether to make an offer of amends. However, plaintiff lawyers often commence proceedings before this time period has elapsed or without issuing a concerns notice at all.

ARTK recommends the law be amended to provide that indemnity costs be awarded in the defendant’s favour if a plaintiff issues proceedings before issuing a concerns notice or before the expiration of any period of time in which an offer to make amends may be made, in the event that the court subsequently finds that an offer of amends made to the plaintiff after proceedings were commenced was reasonable.

Such an amendment would ensure the law operates as intended, and promote the efficient allocation of resources, including court resources.

Question 7

Should clause 21 (election for defamation proceedings to be tried by jury) be amended to clarify that the court may dispense with a jury on application by the opposing party, or on its own motion, where the court

considers that to do so would be in the interests of justice (which may include case management considerations)?

ARTK does not support an amendment to enable the court to dispense with a jury on its own motion. Rather, we support maintaining the current provisions and procedures under the MDP and UCPR – without any amendment – regarding this matter. Further, we recommend these be applied across all jurisdictions for a consistent approach to defamation cases and to bring an end to ‘forum shopping’.

Specifically, we support the current procedures whereby either party in defamation proceedings may elect for the proceedings to be tried by jury; and a court may only order the defamation proceedings are not to be tried by a jury under the conditions at section 21(3)(a) and (b) of the MDP. We therefore consider that the provisions of the MDP already permit the court to dispense with a jury on application by the opposing party, and a clarification in this regard is unnecessary.

The Discussion Paper raises concerns with ‘forum shopping’. We believe this arises from some jurisdictions *not* facilitating jury trials for defamation proceedings, rather than the other way around. Therefore we hold that the best outcome is for all jurisdictions to allow for parties to opt-in for jury trials.

To the extent there is a concern regarding the efficient allocation of court resources – in terms of number of trials and/or case management and/or efficient operation of the court – we are of the view that modernising the MDP with a serious harm test would be useful.

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?

ARTK has serious concerns about jurisdictional inconsistency of the provisions and procedures regarding juries in defamation cases.

As the Discussion Paper states, juries continue to have no role in any ACT, South Australia or Northern Territory defamation cases. There is also a presumption that juries will not play a role in defamation cases heard in the Federal Court.

While both of these scenarios are concerning, the inconsistency is most glaring between the Federal Court and the MDP.

As the Discussion Paper details, in [Wing v Fairfax Media Publications Pty Limited](#) the Full Federal Court held that since there is direct inconsistency between sections [39](#) and [40](#) of the *Federal Court of Australia Act 1979* (Cth) (which provide for a presumption that civil trials are to be by a judge without a jury) and sections [21](#) and [22](#) of the MDP (under which any party in defamation proceedings may elect for the proceedings to be tried by a jury), the NSW provisions cannot be binding on the Federal Court by reason of that inconsistency and are not relevant to the exercise of the discretion in [section 40](#) to order a jury.

This situation is productive of forum shopping, as can be seen from the number of recent high profile cases being commenced in the Federal Court, presumably to avoid a jury on the basis that plaintiffs perceive their prospects of success as being greater before a judge sitting alone.

ARTK considers that juries are best placed to act as the “ordinary reasonable reader” in defamation cases and to apply community standards appropriately and conscientiously.

Accordingly, ARTK recommends that:

- a) The Federal Government must become a signatory to the Intergovernmental Agreement for the MDP; and
- b) The Federal Government must amend the *Federal Court of Australia Act 1976* (Cth) to incorporate sections 21 and 22 of the MDP. This is a more specific recommendation than that proposed in the Discussion Paper. We believe this is necessary because it is important that the provisions and procedures be precisely the same across jurisdictions; and
- c) The ACT, South Australian and Northern Territory laws should also be amended to incorporate sections 21 and 22 of the MDP.

Such changes would ensure consistency across jurisdictions and extinguish any incentive/s for forum shopping. It would also meet the object of the MDP to promote uniform laws throughout Australia.

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?

ARTK holds that the current contextual truth defence under the MDP has become unworkable and requires amendment. ARTK considers that the drafting of the contextual truth defence in the MDP did not reflect the intention of the legislature, and has been interpreted by courts in such a way as to render the defence redundant.

The policy underlying the defence is that where a false imputation conveyed by a publication has not further damaged the reputation of the plaintiff having regard to the substantial truth of the publication as a whole, the plaintiff should not be entitled to recover damages.

However, defendants are having their contextual imputations struck out because of the strict interpretation of the phrase 'in addition to' – that is, not only is there a requirement that a defendant's contextual imputation must differ in substance from a plaintiff's imputation, but that it must be 'in addition' to the plaintiff's imputations. This has the effect that if a plaintiff claims that all imputations arising from a matter complained of are defamatory, even if some are substantially true, there will be no substantially true imputations left for a defendant to rely on.

A plaintiff can also amend their pleading to adopt contextual imputations which have been pleaded by a defendant in its defence, thus depriving the defendant of a contextual truth defence: [Kermode v Fairfax Media Publications Pty Ltd](#), [Fairfax Media Publications v Zeccola](#) and [Jones v TCN Channel Nine Pty Ltd](#). This gives rise to procedural unfairness, particularly in circumstances where a plaintiff is aware that the contextual imputations being adopted are substantially true.

In these circumstances, the best the defendant can do is to rely upon the truth of the imputation in partial justification of the plaintiff's claim, but the defendant will be unable to defeat the plaintiff's cause of action entirely. This clearly does not meet the policy objective underlying this defence.

Additionally, in [Fairfax Media Publications Pty Limited v Bateman](#) the NSW Court of Appeal found that NSW – unlike Victoria – does not permit a Hore-Lacy pleading (i.e., where a defendant pleads and seeks to justify any imputation carried by the publication which has a 'common sting' to an imputation pleaded by the plaintiff), creating a disparity between jurisdictions where there should be none.

ARTK recommends the law be amended so that a defendant has a defence of contextual truth where the defendant proves that, by reason of the substantial truth of any imputations conveyed by a publication, any defamatory imputations of which the plaintiff complains that are not substantially true do not further

harm the reputation of the plaintiff. The defence should provide that a contextual imputation need not differ in substance from the imputations pleaded by a plaintiff, and can include certain of the plaintiff's imputations (i.e., the "pleading back" practice which was permitted in NSW under the previous section 16 of the Defamation Act 1974 (NSW)) and imputations which share a "common sting" with the plaintiff's imputations.

Such amendment would ensure the law operates as intended, ensure consistency across jurisdictions and avoid procedural unfairness arising from defendants being denied a substantive defence.

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?

Defence of public documents/proceedings

The MDP currently includes defences for fair report of public documents and proceedings. However, it does not include documents issued or published by, and presentations at, a scientific or academic conference and press conferences held to discuss matters of public interest.

ARTK recommends the law be amended to include documents issued or published by, and presentations at, a scientific or academic conference and press conferences held to discuss matters of public interest to the defences of fair report or public documents and proceedings of public concern. This could be achieved by adopting provisions similar to those at [section 6 of the Defamation Act 2013 \(UK\)](#).

This would align Australian defamation law with international best practice.

Question 11

- a) Should the 'reasonableness test' in clause 30 of the Model Defamation Provisions (defence of qualified privilege for provision of certain information) be amended?
- b) Should the existing threshold to establish the defence be lowered?
- 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?

The object of the qualified privilege defence is to protect publications which contain inaccuracies which are made honestly and with the best of intentions in circumstances in which the person who made it had a legal, moral or social duty to make it, and the recipients had a legitimate interest in receiving it. It is a defence which applies when people get it wrong (or at least cannot prove truth) in circumstances where it is considered better that they speak out and get it wrong, than say nothing at all.

However, the statutory qualified privilege defence under [section 30 of the Act](#) has rarely been held to be available to media defendants due to the scope of publication and the position taken by the courts on "reasonableness". The courts have approached the matters to be taken into account as a series of (cumulative) hurdles to be overcome rather than matters that 'may' be taken into account. The standards being imposed by courts are unrealistic for media organisations – let alone members of the public – to attain, and reflect a lack of understanding about the important role the media plays in society in shining a light on issues of public concern and public importance, and how media organisations operate and are resourced.

We note the inclusion in the Discussion Paper [at 5.24] of the views of other stakeholders. With due respect, we strongly disagree with stakeholders that suggest the statutory qualified privilege defence is ‘well adapted at achieving the objects of the MDP’. The Discussion Paper also opines that there is a question of whether there is sufficient evidence to demonstrate that change is necessary [at 5.25]. The fact that the defence has not been successfully argued by any media defendant since the introduction of the MDP should be sufficient evidence in and of itself. The unrealistic criticisms of journalists by courts in defamation judgments is further evidence that something needs to change (see, for example, the recent decision of the Federal Court in [Chau v Fairfax Media Publications Pty Ltd](#), which is currently the subject of an appeal).

For the statutory qualified privilege defence to usefully serve the purpose for which it exists in the legislation, it needs to be available in appropriate circumstances and publishers need to be able to rely on it with confidence. However, given judicial interpretation of the “reasonableness” requirement, that is simply not the case. The defence needs to be reformulated to address this issue.

ARTK recommends replacing [section 30 of the Act](#) with the public interest defence in [section 4 of the Defamation Act 2013 \(UK\)](#).

The section in the UK Act better reflects the intentions of *Reynolds v Times Newspapers Ltd* [2001] AC 127, is simpler and is more likely to result in a publisher being able to reasonably rely on statutory qualified privilege as a defence. This defence requires a defendant to show that the statement complained of was, or formed part of, a statement on a matter of public interest and that the defendant reasonably believed that publishing the statement was in the public interest.

The amendment should also provide for a public figure defence akin to that in the United States, whereby public figures suing for defamation must prove that the allegations made against them are false and were published with malice.

Such amendments would ensure the law operates as intended; align with international best practice; and promote the efficient allocation of resources, including court resources.

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?

The defence of honest opinion does not afford a defence as it was intended. Specifically, it does not clarify that [it is not necessary](#) that the proper material upon which the opinion is based be stated or referred to in the matter in question, and it was held by the Victorian Court of Appeal in [The Herald & Weekly Times Pty Ltd v Buckley](#) that section 31 is to be interpreted as if there were such a requirement.

ARTK recommends the law be amended to expressly state the defence does not require the facts upon which an opinion is based to be stated or indicated in the publication.

We also recommend that a definition of ‘opinion’ be inserted to clarify that the defence protects the same range of comments as the common law defence. This amendment would address the issue of courts finding that the honest opinion defence is not available because the material is a ‘statement of fact’ rather than an ‘opinion’. The definition of ‘opinion’ could be framed in accordance with the description by Lush J in his judgment in *Clarke v Norton* [1910] VLR 494 at 499: anything ‘*which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation*’.

Such amendments would ensure the law operates as intended.

Question 13

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

ARTK supports such an amendment.

The practice of suing a journalist jointly with their employer serves no purpose as the defeasance in section 31(4)(b) turns on the employer's belief, not on the journalist's belief. Yet the practice can cause significant distress to the individual journalist. Moreover, a successful plaintiff's reputation is vindicated by the fact of succeeding against a media entity with no additional reparation to his or her reputation to be had by successfully suing the journalist too.

Question 14

- a) Should a 'serious harm' or other threshold test be introduced into the Model Defamation Provisions, similar to the test in section 1 (serious harm) of the Defamation Act 2013 (UK)? (b) If a serious harm test is supported:
 - i. should proportionality and other case management considerations be incorporated into the serious harm test?
 - ii. should the defence of triviality be retained or abolished if a serious harm test is introduced?

ARTK strongly supports the incorporation of a serious harm test into the MDP.

The law does not adequately deal with spurious claims 'up front' before time, costs and resources are expended. Instead, the law includes a defence of triviality, which does not come into play until trial. In some jurisdictions, matters can be dismissed as an abuse of process for being a disproportionate drain on the resources of the court (e.g. [Bleyer v Google Inc](#) and [Kostov v Nationwide News Pty Limited](#) in NSW), however this has not been recognised in other jurisdictions.

We cite the Trends in Digital Defamation study published by UTS Centre for Media Transition in 2018. That study reviewed defamation cases from 2013 to 2017. It found that private individuals rather than public figures are the primary source of defamation in the digital age, with only 21 percent of plaintiffs in defamation judgments being public figures and only 26 percent of defendants being media companies.

We are of the view that the introduction of a serious harm test would be useful to deal with a number of issues identified, including the optimal allocation of resources including those of the courts. We also note Judge Judith Gibson's comments about the costs of defamation proceedings in her March 2019 paper. We are of the view that an effective and robust serious harm test may assist with these concerns, including addressing the disproportionate growth of the costs of proceedings to the value of the defamation action and the effective disposal of actions which may amount to an abuse of process.

ARTK recommends the introduction of a 'serious harm' threshold test, similar to [section 1 of the Defamation Act 2013 \(UK\)](#), such that a statement is not defamatory unless it has caused or is likely to cause serious harm to the reputation of the claimant. ARTK considers that in order to serve its purpose of reducing the costs of the parties and the drain on the courts' resources, this test must be raised and applied early in the proceedings, rather than being a trial issue.

The serious harm test could be applied in a variety of spurious cases, including where:

- the plaintiff has such a bad reputation it is doubtful it would be seriously harmed any further;

- the claim arises by way of ‘true innuendo’ and the people with special knowledge of the extrinsic facts permitting them to identify the plaintiff would not believe the words seriously harmed the plaintiff’s reputation;
- the matter in question was published on a limited basis within the jurisdiction and/or the plaintiff is not known in the jurisdiction;
- the matter complained of is vulgar abuse, ‘pub talk’ or a mere criticism of goods or services; or
- any damage was transient or short-lived due to a quick retraction, clarification or apology.

If the serious harm test is introduced, then the defence for triviality in [section 33 of the Act](#) can be repealed.

Introducing such a provision would align Australia with international best practice; ensure the efficient allocation of resources, including court resources; deter trivial, vexatious or spurious claims; and could discourage forum shopping.

Question 15

- 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?
- Are existing protections for digital publishers sufficient?
- Would a specific ‘safe harbour’ provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions?
- Are clear ‘takedown’ procedures for digital publishers necessary, and, if so, how should any such provisions be expressed?

ARTK recognises that the innocent dissemination defence requires review in light of the significant changes in digital publication since the MDP were implemented.

ARTK also submits that the review should recognise and address the distinction between content prepared or created by a media organisation and posted online, and user generated comments posted in response to that content. Consideration needs to also be given to the concept of “editorial control” and how that concept is able to be applied practically in the digital and social media context by media organisations including the availability – or lack thereof – of controls for media companies to manage legal risk on digital platforms.

This consideration must also balance the firm desire not to place unreasonable limits on freedom of expression, especially with regard to publication of matter in the public interest.

Question 16

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

Operation of statutory cap on damages

The MDP provides for a maximum amount of damages for non-economic loss that may be awarded in defamation proceedings.

The Hon Bob Debus, then NSW Attorney-General, said in the second reading speech of the law: *‘Damages for non-economic loss, or general damages, are awarded to compensate plaintiffs for the less tangible harm they have suffered. For example, in personal injury actions, general damages compensate for pain and*

suffering. In defamation actions, damages compensate for injury to feelings and loss of esteem.’ He went on to say, *‘While I have no doubt that false and defamatory statements are harmful, the fact is that reputations may be restored and injured feelings may pass after a time. The pain and suffering associated with an affliction like quadriplegia, on the other hand, will last a lifetime. The bill ensures that this glaring discrepancy in the way damages are awarded is addressed’.*

Since the then Attorney-General’s second reading speech various judgements have undermined any cap for non-economic loss.

In [Bauer Media Pty Ltd v Wilson \(No 2\)](#), it was held that once the court is satisfied that an award of aggravated damages is warranted, the court is no longer constrained by the cap and may order damages for non-economic loss that exceed the maximum damages amount.

Recent judgments which disregard the cap once aggravated damages are deemed appropriate include \$850,000 to each plaintiff in [Wagner & Ors v Harbour Radio & Ors](#) and \$850,000 in [Rush v Nationwide News \(No 7\)](#).

We are of the view that section 35 of the MDP was aligned with, and intended to, provide certainty and consistency in the awarding of damages for non-economic loss including the award of aggravated damages. Further, it was also essential to strike the balance between the competing objectives of the avoidance of unreasonable limits on freedom of expression on the one hand, and the provision of fair and effective remedies for persons whose reputations are harmed on the other.

Treating the cap as disposable reintroduces the *‘glaring discrepancy in the way damages are awarded’* referred to in the second reading speech. It also reduces certainty in damages awards and disturbs the balance between freedom of speech and fair and effective remedies – both of which are essential to the law operating as intended.

Aggravated damages – a slippery slope towards exemplary damages

The MDP was meant to do away with exemplary damages.

However, we observe that the award of aggravated damages – when combined with the way section 35 has been interpreted to make the cap disposable – is, in effect, less about compensating injury to feelings and has more of the flavour of punishing the defendant thus reintroducing exemplary damages. This should be reversed.

The cap = general damages AND aggravated damages TOGETHER

Given these various interpretations ARTK holds that it is more than timely for this review to clarify the law and ensure it is true to the then Attorney-General’s clear intent – to ensure those that suffer reputational injury and hurt feelings are not ‘compensated’ beyond those that suffer physical injury.

ARTK recommends:

- The law be amended to clarify that the maximum damages amount in s 35(1) fixes the cap of general damages AND aggravated damages (if aggravated damages are deemed appropriate) TOGETHER at the existing cap (currently being just under \$400,000 for 2019); and
- Repeal section 35(2).

Such amendments would ensure the law operates as intended; establishes consistency across jurisdictions and matters; and re-establishes proportionality with non-economic loss for personal injury matters.

How the cap applies – range and allocation

Since the then Attorney-General's second reading speech, there have been inconsistent decisions as to whether the statutory cap on damages creates the outer limit of a range (i.e. a 'a scaling effect') or operates as a cut-off. There have been four first-instance decisions of the NSW Supreme Court where the judges have treated s 35(1) as establishing the upper-limit of a range. However in [Bauer Media Pty Ltd v Wilson \(No 2\)](#), the Court held to the contrary (see analysis at [184]-[213]).

In short, it should be clear that there is a range WITHIN the cap.

The award of damages should be determined between \$0 and the cap based on a range of seriousness factors.

To make this clear, the law should be amended to include a clear statement that there is a scale within the cap – being that only the most serious cases of defamation warrant awards for non-economic loss (general and aggravated) at or close to the cap, and less serious cases for defamation warrant awards for non-economic loss far less than the cap.

Further, to make damages awards transparent the judiciary must allocate the amounts awarded for general damages and aggravated damages.

This is aligned with the agreed concept of open justice, to which it cannot be construed that any reasonable limitation should apply in this regard. Further, it is useful for all parties to have a clear understanding of the allocation, including (if appropriate) the 'cost' of aggravation.

ARTK also recommends:

- The law be amended to include a clear statement that there is a scale within the cap – being that only the most serious cases of defamation warrant awards for non-economic loss (general and aggravated) at or close to the cap, and less serious cases for defamation warrant awards for non-economic loss far less than the cap; and
- The law be amended to include a requirement that the judiciary must allocate the amounts awarded for general damages and aggravated damages
- The law be amended to clarify that the maximum damages amount applies to the proceedings in question, irrespective of how many separate publications have been sued on.

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'?

Proceedings in relation to the same imputations

The 2005 law introduced a cap on damages for non-economic loss. This has resulted in the unintended outcome of plaintiffs bringing multiple proceedings in relation to the same imputations, and ensuing uncertainties. For example, [Buckley v The Herald and Weekly Times Pty Ltd & Anor](#) and [Dank v Whittaker](#).

Due to the operation of section 38(1)(c) of the Act, multiple proceedings about the same or similar imputations also disadvantages the first defendant to go to trial, undermining the overriding purpose of civil procedure rules and incentivising defendants to take steps to ensure theirs is not the first case to proceed to trial.

ARTK recommends the law be amended to make it clearer that the plaintiff can only bring one set of proceedings in relation to the same imputations against all defendants, to which a single cap for non-economic loss applies. If multiple proceedings are brought by a plaintiff, then they should be consolidated where the proceedings concern publications of the same or substantially the same matter, irrespective of whether the matter is published by the same or different publishers, and irrespective of whether the matter is published in or via the same or different media of communication.

Such an amendment would ensure the law works as intended.

ARTK also notes some discussion suggesting that the determination of damages may be appropriately handled by the jury. ARTK does not support this. Notwithstanding the issues we have outlined regarding the cap for non-economic loss, we remain of the view that it is the role of the judiciary to determine damages, and that in doing so it is equally important that reasons be given for the decision/s regarding the awarding of damages. It is not a role that can or should be given to a jury.

Question 18

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

Future/ongoing review of the unified defamation law

ARTK supports the inclusion of a review mechanism in the MDP.

We recommend the law be amended to undertake a review two years post the passage of the amended MDP in 2020 (as per the NSW AG's timeline), with a timeframe of no longer than six months for the completion of that review. We believe this is important given the suboptimal time taken to get to this point, and the importance of ensuring defamation law works as intended.

Subject to the operation of the law and what is raised in the two year review – and what is required to be changed – it may be acceptable for a review to occur every three to five years. This should be ascertained at the completion of the two-year review, by amendment to the MDP.

We reiterate here that we cannot accept dilly-dallying with less than optimally functioning defamation law in the future as has been allowed to happen to date.

Common law defences – Hore-Lacy

In her March 2019 paper, Judge Gibson raises the Hore-Lacy defence, particularly the inconsistency between the New South Wales and Victorian appellate decisions. We agree with Judge Gibson that there is a need for uniformity in relation to the availability of this defence.

An effective summary dismissal procedure

In that same recent paper, Judge Gibson also raises the matter of the need for an effective summary dismissal procedure.

ARTK agrees with Judge Gibson in her discussion of this matter in the paper. The lack of a consistent and effective summary dismissal procedure before trial across jurisdictions is a key contributor to the cost issue and the misallocation of resources, including of the court.

ARTK recommends that a summary dismissal procedure for defamation be legislated, including the ability for defendants to raise strike out arguments and capacity arguments in relation to the imputations pleaded by a plaintiff at an early stage in proceedings, rather than being matters deferred to trial. This will require changes to the docket process of certain courts, including the Federal Court, such that the summary dismissal process is not 'kicked down the road' but rather should be at the start – before significant costs and resources of all parties and the court have been allocated and/or expended.

We agree that defamation claims are capable of being misused in circumstances mounting to abuse of process, and an effective summary dismissal procedure to prevent those claims going to full hearing is an essential part of the law – however Australian courts appear somewhat reluctant to accept or apply the principles of proportionality at first instance and appellate levels.

Judge Gibson notes the successful use of summary procedures in the UK and US warrants consideration.