



Australian
Press Council



Submission to the

**Council of Attorneys-General Defamation
Working Party**

**Background Paper Model Defamation Amendment
Provisions 2020 (Consultation Draft)**

January 2020

Introduction

The Australian Press Council welcomes the invitation to make a submission to the Council of Attorneys-General Defamation Working Party in response to its Background Paper Model Defamation Amendment Provisions 2020 (Consultation Draft).

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's governing body has 20 members comprising 10 public members (including the Chair and Vice-Chair), seven publisher members and three independent journalist members. The Press Council covers more than 900 print and online mastheads.¹

Further information about the Press Council's objects and work is set out in the Press Council's earlier submission of May 2019 to the Council of Attorneys-General Review of Model Defamation Provisions.

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 recommendations 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 Model Defamation Amendment Provisions 2020. The Press Council notes that Australia's Right to Know, which includes publisher members of the Press Council, has made a submission.

Objectives of the MDAP

MDAP Recommendation 1: No change to the objects of the Model Defamation Provisions in clause 3.

The Press Council supports this recommendation in principle.

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.

¹ A list of the constituent bodies of the Press Council is set out at Annexure1.

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

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 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.

In its previous submission, the Press Council stated that it saw 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 The Press Council notes that the Working Party considered this point and decided no amendment was necessary.

Corporations suing for defamation

MDAP Recommendation 2:

- (a) Amend clause 9(2)(b) to clarify that the persons to be counted as ‘employees’ include individuals engaged in the day to day operations of the corporation, and who are subject to its direction and control (for example, contractors and persons supplied by labour hire firms).**
- (b) Require “excluded corporations” to, as part of their claims, show that the publication has caused, or is likely to cause, serious financial loss.**

The Press Council does not comment on the technical detail of these recommendations but supports in principle recommendations that narrow the right of corporations to sue for defamation.

As stated in its earlier submission, 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, media landscape in which small, independent publications can play a pivotal role.

Single Publication Rule

MDAP Recommendation 3

- a) Introduce a single publication rule in similar terms to section 8 of the *Defamation Act 2013 (UK)*, which:
 - i. applies to all publications;**
 - ii. applies to publications by a single publisher and its related bodies corporate and individual employees/contractors; and**
 - iii. provides that, for digital publications, the ‘date of first publication’ is the date on which the material was first uploaded by the publisher.****
- b) Amend the relevant limitation period to extend the one year limitation period in a manner similar to that of section 32A of the *Limitation Act 1980 (UK)*, with an outer limit of three years.**

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

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

⁵ Above no 3, at 1.14.

The Press Council supports this recommendation in principle.

The Press Council does not offer an opinion on the specific terms and operation of the single publication rule. However, it notes that the Working Party is proposing a provision similar to section 8 of the *Defamation Act 2013* (UK) and considers it appropriate that guidance be obtained from this section.

As noted in its earlier submission, the Press Council considers that the current common law position (that a defamatory communication occurs when the publication is in comprehensible form) 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,⁶ 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.⁷

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."⁸

New defence for peer-reviewed statements

MDAP Recommendation 10

Introduce a new defence for peer-reviewed statements and assessments in a scientific or academic journal, modelled on section 6 of the *Defamation Act 2013* (UK).

The Press Council supports this recommendation in principle. It considers that consideration should also be given to protecting fair reports of proceedings at a press conference on matters of public interest. An appropriate definition of press conference would need to be determined.

The Press Council considers it appropriate that protection for 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.

Public interest defence

MDAP Recommendation 11:

- a) Amend the Model Defamation Provisions to introduce a new public interest defence modelled on the New Zealand common law defence of responsible communication on a matter of public interest (established in *Durie v Gardiner [2018] NZCA 278*). The defence is made out if the publication is 1) in the public interest and 2) responsible. The provision should provide a mandatory, non-exhaustive list of considerations that**

⁶ 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*.

⁷ Australia's Right to Know Submission to NSW Department of Justice, *Statutory Review – Defamation Act 2005*, p. 31.

⁸ Above no 4, at 2.16.

the jury should be required to consider, but which are not all required to be satisfied – as follows:

- **The seriousness of any defamatory imputation carried by the matter published**
 - **The extent to which the matter published distinguishes between suspicions, allegations and proven facts**
 - **The extent to which the matter published relates to the performance of the public functions or activities of the person**
 - **Whether it was in the public interest in the circumstances for the matter to be published expeditiously**
 - **The sources of the information in the matter published, including the integrity of the sources, recognising that some may be confidential meaning their identity cannot be Council of Attorneys-General Review of the Model Defamation Provisions—Background paper D19/415348/DJ December 2019 23 revealed**
 - **Extent of compliance with any applicable professional codes or standards**
 - **Whether the matter published contained the substance of the person’s side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person**
 - **Any other steps taken to verify the information in the matter published**
 - **Any other circumstances that the court considers relevant.**
- b) Retain clause 30 of the Model Defamation Provisions so that it can be relied upon by all individuals and entities, in publishing matters which may not necessarily be in the ‘public interest’ but remain of interest to the recipients, but make clear that it is not a requirement that all of the factors listed in clause 30(3) have to be met.**
- c) Amend clause 30 to reduce the potential for overlap between the new public interest defence and clause 30, by removing paragraphs 30(3)(a) and (b), which relate to issues of public interest or the public functions or activities of the person that the material relates to.**
- d) For both the new public interest defence and the amended clause 30, provide that the jury is to determine whether the defence has been established**
- e) 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 supports in principle a public interest defence that is workable and that does not place unreasonable limits on freedom of expression. In this regard, it notes that ARTK has advocated that the public interest defence be based on section 4 of the *Defamation Act 2013* (UK), which has been tested, rather than on the New Zealand model proposed by CAG.⁹ This may be an issue that CAG would want to consider further, especially given that other model defamation provisions have been based on the UK model.

In relation to the New Zealand model proposed by CAG, the Press Council limits its comments to the proposed mandatory consideration “extent of compliance with any applicable professional codes or

⁹ Australia’s Right to Know Submission to the Council of Attorneys-General Defamation Working Party *Review of the Model Defamation Amendment Provisions 2020 (Consultation Draft)*, pp. 9-11.

standards". In this regard, the Press Council notes that there are troubling problems with the practical application of this section. For example:

- is it envisaged that the Court or the Press Council would determine the extent of any compliance with the Press Council's Standards of Practice? The Press Council would not support the Court making decisions on whether the Press Council's Standards of Practice had been breached—not least because the application of the Standards involve different tests than consideration of whether a person has been defamed.
- Would a Court be able to go behind a Press Council adjudication and decide that, notwithstanding, a Press Council adjudication decision, the Court's view of whether there had been compliance was the relevant one? Again, the Press Council would not support the Court being able to undertake this role.
- How would consideration of this factor apply to the vast majority of complaints that the Press Council does not refer to adjudication?

The Press Council considers that a more workable mandatory consideration would be whether the publisher was a member of the Australian Press Council or of a comparable body with professional standards of practice and a complaints process that considers whether those standards of practice have been breached. The Working Party may wish to consider section 7B(4)(b) of the *Privacy Act 1988* (Cth) in this context, as that section provides a similar approach to that suggested by the Press Council.

Serious harm threshold

MDAP Recommendation 14:

- a) **Introduce a serious harm threshold, similar to the test in section 1 (serious harm) of the Defamation Act 2013 (UK), whereby:**
 - i. **a statement is not defamatory unless its publication has caused or is likely to cause serious harm to reputation of the plaintiff; and**
 - ii. **the onus is on the plaintiff to establish serious harm.**
- b) **Abolish the defence of triviality.**

The Press Council supports this recommendation in principle. It notes that the serious harm threshold is consistent with the approach in the Press Council's General Principle 6 of its Standards of Practice, which requires publications to take reasonable steps to avoid causing or contributing materially to **substantial** offence, distress or prejudice, or a **substantial** risk to health or safety, unless doing so is sufficiently in the public interest. (emphasis added).

Other matters

The Press Council notes that the Stage 2 reforms will address digital platform issues and it looks forward to learning the timetable for the completion of Stage 2 reforms.

The Press Council would also welcome a provision requiring a review of the MDAP provisions within two years of implementation to ensure that the proposed provisions are operating as intended.

Conclusion

Thank you for the opportunity to make this submission.

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



John Pender

Executive Director

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.