17 May 2019

Review of Model Defamation Provisions,
Justice Strategy and Policy Division,
NSW Department of Justice,
GPO Box 31, Sydney, 2001

*By email: policy@justice.nsw.gov.au*

Dear Colleagues,

**Re: Submission to the Council of Attorneys-General regarding the review of model defamation provisions.**

The Bar Association of Queensland ('the Association') appreciates the opportunity to provide its submissions to the Council of Attorneys-General In response to the discussion paper released by the Council of Attorneys-General inviting submissions on defamation reform the Bar Association of Queensland makes the following submissions.

What follows does not substantively address all eighteen questions (and sub-questions) raised. Rather, these submissions purport to answer the majority of the questions raised[1], and, here appropriate, the answers are accompanied with some detail. The detail provided is intended to address (and reflect upon) some of the practical considerations which have arisen in defamation law and practice in Queensland since the commencement of the *Defamation Act 2005* (Qld).

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

1. The Model Defamation Provisions should be amended to broaden the right of corporations to sue for defamation. The amendment should simply restore the common law position. At common law a corporation could sue regardless of its size or the size of its profit. That was the position in Queensland until the Model Defamation Provisions came into effect.[2]

[1] Questions 1 and 18 are not addressed.
[2] The Model Defamation Provisions restricting the ability of corporations to sue for defamation were, in large measure, adopted from the *Defamation Act 1974* (NSW).

[redacted]

2. There is no compelling reason to restrict the ability of corporations to sue for defamation. Corporations are simply a legal structure utilised to arrange and manage legal relationships and affairs. Their nature is such that they can have a reputation which can be adversely affected (and seriously so) by things said about it.

3. To restrict the ability of a corporation to sue for defamation in the manner currently provided for in s 9 of the *Defamation Act 2005* (Qld) is both arbitrary and inconsistent with the practical reality that corporations which fall outside the definition of an "excluded corporation" are equally vulnerable to attacks on reputation as those falling within the definition.

4. The prospects of an attack exist regardless of the size of a corporation (measured in the number of employees) or its profit (which is, in any event, irrelevant under s 9). The vulnerability to an attack is particularly ripe in the context of social media. The nature of social media and its potential impacts (which might be characterised as profound and prolific) are phenomena which had not been conceived at the time when the Model Defamation Provisions were promulgated.

5. Notably, when the United Kingdom undertook extensive reforms to its libel laws, the end product - the *Defamation Act 2013* (UK) – retained the right of corporations to sue for sue for defamation. That right was retained without any (arbitrary) restriction similar to s 9 of the *Defamation Act 2005* (Qld).

6. There is simply no compelling reason why corporations should not have a similar right to sue in Australia. The reasons identified in the discussion paper at paragraph 2.5 against corporations retaining the right to sue regardless of size are weak. As to these:

   (a) The concern that SLAPP law suits may deter publication of material the release of which is in the public interest is simply speculative;

   (b) The notion that reputation is "principally a personal right" is inconsistent with the reality that corporations can be adversely affected (obviously in its pocket only) by defamatory publication. It also ignores the practical

reality that in all cases there are individuals standing behind corporations (investors/shareholders/owners/operators) who can also be directly impacted by the publication of defamatory matter about a corporation;

(c) The proposition that there are options open to corporations to defend their corporate reputation under the *Competition and Consumer Act 2010* (Cth) (presumably a reference to s 18 of the *Australian Consumer Law*) and the tort of injurious falsehood ignore two important limitations of those causes of action. The first of these is 19 of the ACL which renders an "information provider" being a person "who carries on the business of providing information" immune from the s 18 cause of action. The second limitation for the tort of injurious falsehood are the requirements for plaintiffs to prove actual malice (something which any defamation practitioner will appreciate is an exercise not without difficulties) and actual financial loss.

**Question 3: should the model defamation provisions be amended to include a single publication rule?**

7. Any reform should include the introduction of a single publication rule.

8. In the absence of such a rule a publisher runs the risk of being burdened with claims for defamation well after the expiration of the limitation period. This risk is not limited to online publications.

9. A compelling illustration of why the rule should be introduced is in fact a case involving hardcopy material. In *Walker v Brimblecombe* [2016] 2 Qd R 384 two original publishers of hardcopy material (which was arguably defamatory) were sued in respect of the republication of that material by a third party after the limitation period. Notwithstanding that the original publication occurred in excess of a year before the proceeding was commenced the plaintiff (in accordance with the existing law) was able to maintain proceedings against the original publishers in circumstances where he did not sue the third party republisher. That decision was, on the existing state of the law, plainly correct. The single publication rule would however have prevented that case from proceeding.

10. Any proposed amendment to introduce the single publication rule should be in similar terms as that provided for in s 8 of the *Defamation Act 2013* (UK). That provision applies to both online and hardcopy publications. It also operates in relation to the same publisher.

11. However, there is, as the discussion paper records, a potential practical problem with online publications. In the case of online publications publication occurs each time online material is downloaded, read and comprehended by a person (see *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 at [26],[40], [44], [124]). It follows that the limitation period commences afresh each time online material is accessed by a third person. While there are various arguments which defendants do in practice deploy in response to plaintiffs who complain of *historical* online publications the capacity for a publisher to be sued for these publications - potentially years after the material was first uploaded - remains a reality (see for example *Loutchansky v Times Newspapers Ltd and others (Nos. 2-5)* [2002] QB 783).

12. If a single publication rule is introduced there should be clarity as to when for the purposes of an online publication the "date of first publication" occurs. There are two immediate candidates. The first is when the material is first downloaded, read and comprehended by a third person. The second option is when the material is first uploaded and available for download.

13. Neither option is entirely satisfactory. As to the first, in practical terms how can a plaintiff realistically assess when online material was first downloaded? The second option suffers from a more fundamental problem: it is in fact contrary to the existing common law as to when publication occurs. Publication does not occur until a third person downloads and comprehends the defamatory material (see *Gutnick* above).

14. The UK has adopted the first option. Section 15 of the *Defamation Act 2013* (UK) defines the term "publish" to have the same meaning "for the purposes of the law of defamation generally". Despite the practical difficulty facing plaintiffs identified above, adopting the first option is consistent the well-settled principle and is the preferable option.

15. There is no reason why the existing limitation period should be amended in the event a single publication rule is adopted. One would expect that if a plaintiff failed to commence proceedings within the limitation period because they simply had no knowledge of the offending publication would be a potential reason why the limitation period could be extended in accordance with s 32A of the *Limitation of Actions Act 1974* (Qld) and its equivalent in other states and territories.

**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?**

16. The issues raised by these questions, the substance of which is directed towards the absence of proscriptive time limits, were the subject of comment in *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, see in particular Fraser JA at [11] and Applegarth J at [104] to [108].[3]

17. While it may be accepted that non-litigious methods of resolving disputes are in the best interests of the parties, the absence of time limits imposed by the *Defamation Act 2005* (Qld) has the potential to generate protracted negotiations. However, obviously enough, protracted negotiations are not necessarily in the best interests of litigants. For these reasons alone, the Model Defamation Provisions should be amended in the manner contemplated by questions 4(a),

[3] The comments of Fraser JA and Applegarth J were made in the context of an application to extend a limitation period and the case did not call for an examination of the issues raised by question 4.

(b) and (c). To achieve these outcomes the amendments need only specify periods of time. Thus:

(a) *For the purposes of question 4(a):* subsection 18(a) should be deleted entirely and the following words "at any time before the trial" should be deleted from subsection 18(b);

(b) *For the purposes of question 4(b):* section 15 can be amended to specify a minimum time as to how long the offer can remain open for. There is some sense in such a provision appearing in the section which defines the actual content of an offer to make amends; and

(c) *For the purposes of question 4(c):* section 16 can easily be amended so as to clarify the matters identified.

**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?**

18. There has not yet been a jury trial in Queensland which has considered the defence under s 18 of the *Defamation Act 2005* (Qld).

19. There is, however, no benefit in having juries determine cases in separate stages.

20. To the extent that there is a concern or fear that defendants might be discouraged from relying on the offer of amends as a defence because it may affect the success of any other defences, the concerns is lacking in substance. Juries are routinely asked to decide various questions in a defamation trial that are inconsistent. For example, juries are often to decide questions of identification and defamatory meaning in addition to substantive defences. Experience suggests that juries are rarely distracted or confused by those tasks. There is no reason to suggest that a defence which involves the provision of an apology will somehow distract a jury properly directed.

**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?**

21. In response to question 6(a), it is appropriate that a concerns notice (which is not adequately defined in the Model Defamation Provisions) should include details of the alleged defamatory matter. Whilst in practice most prudent practitioners do in fact send concerns notices which identify the matter complained of, it would be ideal if the legislation specified this as a requirement.

22. In response to question 6(b), certainty in interpretation is, to the extent it is possible, should always be commended. To that end, the provision should be amendment to include the clarification identified.

23. In response to question 6(c), there is adequate provision in s 40 to cover a situation where a plaintiff fails to accept a reasonable offer. There is no reason for an additional measure in the manner contemplated by question 6(c).

**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)?**

24. It is understood that question 7 is essentially asking whether an amendment which would allow the court to dispense with a jury of its own motion should be made. If this understanding is correct, then such an amendment should be made.

25. However, it is inappropriate to fetter the exercise of the discretion by laying down guidelines which state generally binding rules, for example, "case management consideration". This is because there is already a general discretion contained in s 21 which provides an adequate basis for a jury to dispensed with

on broad grounds, and thus can accommodate, if relevant, considerations such as case management. Section 21 in fact confers two powers to dispense with a jury in defamation proceedings: see *Channel Seven Sydney Pty Ltd v Fierravanti-Wells* (2011) 81 NSWLR 315 at [42]. The first power is s 21(1) which permits the court to order otherwise. This is an unfettered discretionary power: *Fierravanti-Wells* at [43]. The second is in the circumstances identified in s 21(3), namely, where the trial requires a prolonged examination of records, or, involves any technical, scientific or other issue that can not be conveniently considered and resolved by a jury.

26. The general discretionary power in s 21(1) is "unconfined except in so far as the subject matter and scope and purpose of the statutory enactments may enable the court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view": see *Water Conversation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J). Like all discretionary powers s 21(1) is to be exercised judicially, not arbitrarily, capriciously or so as to frustrate the legislative intent of the Defamation Act: see *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [22]. In accordance with these principles, case management considerations are potentially relevant to the exercise of discretion. This proposition is unremarkable. In *Syddall v National Mutual Life Association of Australasia Limited* [2008] QSC 101 at [21] (not a defamation case, but which involved dispensing with a civil jury under the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**)) Daubney J observed that:

> "The enlarged time which would in any event be attributable to the trial being conducted by jury would, in my view, most likely be significantly expanded further by reason of the nature of the issues, and the necessity to understand and determine those issues in the documentary evidentiary context which will be sought to be advanced by the defendant. That will inexorably lead to a significant increase in costs."

27. His Honour also considered that it was appropriate for the court to have regard in its discretion to the philosophy and objectives of the civil procedure rules, specifically rules 5(1) and 5(2) of the UCPR. Similar comments were made by

Chesterman JA (in dissent) in *Cornois v Jilt Pty Ltd* [2013] 1 Qd R 104 at [70]-[71].

**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?**

28. Unlike other jurisdictions there have been comparatively few defamation claims commenced in the Queensland registry of the Federal Court.

29. Of the very few claims filed there is little doubt that applicants have sought to invoke the Federal Court's jurisdiction to avoid or minimise the prospect of a jury trial. The motivations for this are not limited to fears and uncertainties introduced by juries; they also include a perception that litigating without juries is more economical.

30. There are compelling reasons why parties should retain the right to elect for trial by jury in defamation cases.[4] Arguably a jury, who perform a representative function, is best placed to determine whether the matter in question is defamatory. However, if juries are to be retained then there should be consistency between all jurisdictions[5] as to the manner of election for trial by jury and also the circumstances where a jury may be dispensed with.

**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?**

31. The contextual truth defence introduced by the model defamation provisions contains an unintentional drafting error. That error is the inclusion of the words *"in addition to"*.

32. The potential consequences of this error are correctly identified in paragraph 5.6 of the discussion paper: a plaintiff may easily defeat the defence by either pleading all available imputations in a statement of claim or by simply adopting

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[4] See *Australian Broadcasting Corporation v Reading* [2004] NSWCA 411 at [143] to [145].
[5] It is noted that civil juries in the Australian Capital Territory and South Australia were abolished well before the Model Defamation Provisions were enacted.

contextual imputations pleaded by a defendant in a defence. If the latter of these is adopted the defendant is deprived of the defence because the imputations are no longer "in addition to" those of which the plaintiff complains.

33. This error was identified by Mr Applegarth SC (as his Honour then was) over ten years ago. In a paper delivered in 2008[6] Mr Applegarth SC observed:

> "37. The purpose of a contextual truth defence is to provide a defence where the publication conveys various imputations, substantially different from one another, so that a defendant should be able to plead that the truth of a more serious imputation (or imputations) means that a less serious imputation (or imputations) did not further harm the plaintiff's reputation. The defence is intended to bring about a just result and to prevent an undeserving plaintiff from succeeding by reason of the truth of what was in fact published. A simple example is where a newspaper article alleges that the plaintiff stole a bicycle and is a murderer. If the plaintiff chooses to sue only over the bicycle thief imputation, then under the defence of contextual truth the defendant is able to plead the murder imputation, prove that it is true, and demonstrate that the truth of the murder imputation meant that the bicycle thief imputation caused no further harm to the plaintiff's reputation.
>
> 38. The 1974 New South Wales Act also allowed a defence of contextual truth to operate where the plaintiff sued over both the bicycle imputation and the murder imputation. Under the 2005 Act this may not be possible. By definition the 'contextual imputations' are imputations other than the imputations of which the plaintiff complains. This drafting difference may have unintended consequences."
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> [footnotes omitted]

34. The potential consequences of the error are such that the existing defence should be amended to be closer to s 16 of the *Defamation Act 1974* (NSW). Without such an amendment the defence is easily defeated and its true purpose potentially frustrated.

**Question 10**

**(a) Should the Model Defamation Provisions be amended to provide greater protection to peer reviewed statements published in an academic or**

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[6] *"Defamation: recent changes and emerging issues"* delivered at the Queensland Law Society Symposium on 8 March 2008.

**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?**

35. There are no known examples of cases which support the proposition that the model defamation provisions do not meet their objective in relation to peer reviewed statements published in academic or scientific journals or proceedings at a press conference. For this reason, there is simply insufficient evidence to demonstrate that amendment is necessary.

**Question 11**

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

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

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

**(d) Should the defence clarify, in proceedings where a jury has been empanelled, what, if any, aspects of the defence of statutory qualified privilege are to be determined by the jury?**

36. There is insufficient evidence to demonstrate that the reasonableness test in clause 30 is failing to achieve the objects of the model defamation provisions. The fact that media organisations have rarely successfully established the defence is not a reason which justifies amendment, nor does it suggest the existing threshold is too strict.

37. Further, there is no need to amend the provision to clarify that the matters listed in sub-clause 30(3) are not a check list which each need to be satisfied. That is obvious from a plain reading of the provision, see *Stone v Moore* [2016] SASCFC 50 at [120].

38. In these circumstances, the answer to questions 11(a), (b) and (c) is no.

39. In answer to question 11(d) the fact that there have been differing opinions (of judges of considerable experience in the law of defamation) on the issue of what aspects of the defence are to be determined by the jury is a compelling reason why the defence should be clarified.[7]

**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?**

40. The statutory defence should be amended to include an express requirement to the effect that the proper material must be:

    (a) stated, sufficiently referred to, or notorious in the same publication as the defamatory material sued upon; or

    (b) sufficiently linked in the same publication as the defamatory material sued upon; or

    (c) otherwise apparent from the context in which the defamatory material sued upon is published.

41. Such an amendment is consistent with the defence of fair comment at common law.[8] It is also an adequate response to the concerns raised in relation to digital publications.

**Question 13: Should clause 31(4)(b) of the Model Defamation Provisions (employer's defence of honest opinion in context of publication by employee or agent 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?**

42. There is insufficient reason to suggest that an amendment to clause 31(4)(b) is warranted.

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[7] In Queensland have also been there have been differing views. In *O'Hara v Sims* [2008] QSC 301 the trial judge determined all aspects of the defence (see also the appeal [2009] QCA 186). In *Watney v Kencian & Anor* the issue of reasonableness was left to the jury (although it was ultimately unnecessary for the jury to decide the issue see [2018] QDC 135).

[8] *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at [49], [51], [63], [66] to [69], and [72].

43. Additionally, the amendment contemplated by question 13 also introduces an unacceptable risk: it has the potential to confer upon the employer far greater protection from liability (and at the expense of a plaintiff's reputation) by enabling an employer to hide behind the *opinion* of its employee, without placing any obligation on the employer to independently hold the opinion.

**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?**

44. There is a need to better manage trivial defamation actions. The current means of doing this, the triviality defence, is wholly inadequate.

45. There are two known cases in Queensland in which the triviality defence has been successfully raised. The first is *Smith v Lucht* [2017] 2 Qd R 489, involving a publication to two people each of whom was related, by either blood or marriage, to the plaintiff. The matter proceeded to trial, without a jury, and the trial judge found that the defence was made out, see [2015] QDC 289. That decision was upheld on appeal. The second case is *Watney v Kencian* [2018] QDC 135. In this case, which involved a publication made to one person about a school principal, there were in fact two trials, both heard by a jury. The first trial resulted in a verdict that imputations were conveyed but not defamatory. This verdict was set aside on appeal and a retrial limited to defences ordered: see [2018] 1 Qd R 407. The retrial (before a different jury) resulted in the defendants successfully raising the defence of triviality.

46. It is inappropriate to further comment about these cases, save that the outcome in each is a compelling reason why a more satisfactory means of dealing with trivial defamation cases should be introduced.

47. The main vice of the existing triviality defence is not the circumstances in which it operates; it is that the defence (ordinarily) only falls for consideration at the trial of the proceeding. By the time that stage of a proceeding is reached the parties (if legally represented) will have spent significant funds litigating and the resources of the court required to determine the claim have already been expended.

48. In some jurisdictions the reasoning of proportionality has been used as a means of managing trivial claims. *Bleyer v Google Inc* (2014) 88 NSWLR 670 is an example, taking its lead from the principles identified in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946. However, on one view the reasoning, and outcome, in *Bleyer* and *Jameel* was entirely dependent upon legislative provisions - unique to New South Wales and the England - dealing with proportionality. Indeed, it was essentially for this reason that the decisions have not been followed in Queensland. In *Smith v Lucht* [2014] QDC 302 a District Court judge refused to follow the decisions, although see more recently the comments of Applegarth J in [2018] 1 Qd R 407 at [48] to [56].

49. An amendment to the existing legislation to make provision for the *Jameel/Bleyer* principle is, self-evidently, a means of dealing with trivial claims. However, a more satisfactory means is to amalgamate the *Jameel/Bleyer* principle into a provision which also includes a serious harm threshold similar to section 1 of the *Defamation Act 2013* (UK).

50. It is understood that the introduction of section 1 has proved effective in reducing the number of claims, particularly those involving limited publications. It has not however brought a complete halt to litigation. Indeed, on one view on it has resulted in a shift in focus of litigation.[9]

51. For this reason, if there is appetite to introduce a provision equivalent to section 1, the provision should also expressly incorporate additional considerations of

[9] There have been a number of trials on the preliminary threshold issue of serious harm under section 1: see for example *Theedom v Nourish Training T/A CSP Recruitment Colin Sewell* [2015] EWHC 3769; *Cooke v Mirror Group Newspapers* [2014] EWHC 2831; *Lachaux v Independent Print Limited & Ors* [2015] EWHC 2242 (currently on appeal to the Supreme Court); *Sube v Newsgroup Newspapers Ltd* [2018] EWHC 1961 and [2018] EWHC 1234.

proportionality and case management considerations consistent with *Bleyer/Jameel* which are omitted from the UK provision.

52. Further, any provision which introduces a threshold of serious harm should also clarify the date at which the likelihood of future serious harm falls to be assessed (the issue remains unresolved in the UK).

53. If a provision incorporating the matters identified is enacted, retaining the defence of triviality seems otiose. The UK does not have (and never had) a triviality defence and its reforms appear to be adequately dealing with trivial defamation claims.

**Question 15**

**(a) Does the innocent dissemination defence require amendment to better reflect the operation of Internet Service Providers, Internet Content Hosts, social media, search engines, and other digital content aggregators as publishers?**

**(b) Are existing protections for digital publishers sufficient?**

**(c) Would a specific 'safe harbour' provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions?**

**(d) Are clear 'takedown' procedures for digital publishers necessary, and, if so, how should any such provisions be expressed?**

54. There is insufficient reason to suggest that substantial amendment to clause 32 is warranted.

55. In any competitive environment in which the media operate, the risk of defamation is simply a cost of doing business. It is unnecessary (and arguably incompatible with the objectives of the model defamation provisions) to provide a safe harbour for organisations that simply publish third party content.

56. However, the introduction of clear takedown process is desirable. Such a regime would benefit from the inclusion of a prohibition upon commencing procedures unless and until the takedown process has been exhausted. Realistically, this would encourage the potential parties to engage in sensible negotiations and could (potentially) promote the early resolution of claims. Such a regime could also address the concerns expressed by some media that they have limited

control over their content and that the sheer volume of internet material means it is not always possible to determine whether content is defamatory.

**Question 16**

**(a) Should clause 35 be amended to clarify whether it fixes the top end of a range of damages that may be awarded, or whether it operates as a cut-off?**

**(b) 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?**

57. The fact that there are conflicting decisions as to whether clause 35 fixes the top end of a range of damages that may be awarded or operates as a cut off is a sufficient reason why the provision should be clarified.

58. However, there is no need for clarification of clause 35(2). The construction of that provision by the Victorian Court of Appeal in *Bauer Media Pty Ltd v Rebel Wilson (No 2)* VSCA 154, and the decisions which have followed it, is plainly correct.

**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'?**

59. In response to question 17(a), there is insufficient reason to suggest that the interaction between clause 35 and 23 requires clarification. The terms of each provision are sufficiently clear. Any subsequent proceeding for which leave is required and obtained under clause 23 is a separate proceeding and for the purposes of clause 35 falls to be considered separately. It is also important to note that clauses 38(c) and (c) also operate in such a situation.

60. In response to question 17(b), there is insufficient reason to suggest that further legislative guidance is required.

61. In response to question 17(c), the statutory cap should apply to a cause of action rather than defamation proceedings. To apply the cap to proceedings is arbitrary and has the potential to adversely affect a plaintiff who has, for example, been the subject of several defamatory publications which, through matters of prudence and the filing fees associated with commencing litigation, have been included in one proceeding.

Thank you for the opportunity for the Association to provide input to the Council of Attorneys-General. The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully

**Rebecca Treston QC**
**President**