



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: LLP: HRas1817239

24 January 2020

Mr Paul McKnight
Chair, Defamation Working Party
Review of Model Defamation Provisions
C/o Policy, Reform and Legislation
NSW Department of Communities and Justice
GPO Box 31 Sydney NSW 2001

By email: defamationreview@justice.nsw.gov.au

Dear Mr McKnight,

Draft Model Defamation Amendment Provisions

The Law Society of NSW appreciates the opportunity to comment on the draft Model Defamation Amendment Provisions 2020 (“draft MDAPs”) developed by the Council of Attorneys-General Defamation Working Party (“DWP”).

The Law Society’s responses to specific recommendations outlined in the Background Paper accompanying the draft MDAPs (“Background Paper”) are below. Our Litigation Law and Practice Committee has contributed to this submission.

Recommendation 2: Broadening the right of corporations to sue for defamation

The Law Society supports the proposed amendments to cls 9(2)(b) and 9(6) and the proposed new cl 7A(2) to provide clarity as to the definition of the term “excluded corporation” and require excluded corporations to show that a publication has caused, or is likely to cause, serious financial loss as part of their claim.

The Law Society further considers that cl 9(4) in the Model Defamation Provisions (“MDPs”) should be amended to refer to associated entities under s 50AAA of the *Corporations Act 2001* (Cth), rather than to bodies corporate under s 50 of that Act. This would have the effect of providing a more comprehensive definition of “excluded corporations”, and would also be consistent with proposed new cl 23(3) and cl 1A to Schedule 4.1 in the draft MDAPs, both of which refer to associated entities within the meaning of the *Corporations Act 2001* (Cth), rather than related bodies corporate.

Recommendation 3: Single publication rule

- a) The Law Society strongly supports proposed cl 1A to Schedule 4.1 in the draft MDAPs which would introduce a single publication rule. We consider that the multiple publication rule in operation in Australia is unworkable in the modern digital environment. We note, however, that there is some uncertainty regarding the interpretation of the word “manner” in cls 1A(3) and (4), as the equivalent provision at s 8 of the *Defamation Act 2013* (UK) has not yet been tested.

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au



Law Council
OF AUSTRALIA
CONSTITUENT BODY

Recommendation 4: Offer to make amends—clarification of procedures and interaction of provisions

- a) The Law Society welcomes proposed s 12A in the draft MDAPs requiring a concerns notice to be issued in writing prior to commencing court proceedings. We consider this to be a positive development consistent with the objectives of the MDPs.

We suggest, however, that cl 12A(1)(c) in the draft MDAPs provide that an aggrieved person cannot commence defamation proceedings unless a period of at least 28 days has elapsed since the concerns notice was given, rather than 14 days. This would align with the timeframe at cl 14(1)(a) in the current MDPs: that a publisher may offer to make amends at any point until 28 days have elapsed since they were given a concerns notice by the aggrieved person. Allowing a plaintiff to commence proceedings during the period when the proposed defendant is still considering whether to make an offer to make amends may not align with the object of promoting speedy and non-litigious methods of resolving disputes, as a defendant may effectively be pressured into responding prematurely within the first 14 days, or may be dissuaded from making an offer by the sudden commencement of proceedings.

- b) The Law Society supports the provision at cl 18(1)(a) of the draft MDAPs that would require an initial offer to make amends to be made within 28 days of the concern notice being given to the proposed defendant in order for the defence to be available.

Recommendation 6: Offer to make amends — other issues

- a) The Law Society supports cl 14(2)(a1) in the draft MDAPs in principle. Where the matter complained of is not properly identified in a concerns notice, the publisher cannot assess the merits of the complaint. In this regard, we query whether the term “location” is sufficiently precise, given URLs are not permanent. A publisher would be assisted in assessing the merits of the complaint if a complaints notice contained the name of the publication, the date of publication and, if applicable, the headline. We suggest that a copy of the matter complained of should also be annexed to a concerns notice where possible.

- b) The Law Society supports the proposed amendment at cl 15(1)(d) of the draft MDAPs.

- c) The Law Society supports the proposed amendment at cl 15(1A) of the draft MDAPs.

Recommendation 7: Juries—dispensing with jury trial in the interests of justice

The Law Society supports the DWP proposal to maintain cl 21 of the MDPs without amendment.

Recommendation 8: Juries—jury trials in the Federal Court

The Law Society supports the DWPs recommendation that the Commonwealth Government consider legislative amendments relating to jury trials in the Federal Court, to improve national uniformity and consistency in defamation proceedings.

Recommendation 9: Defences — contextual truth

The Law Society supports the proposed amendment contained in cl 26 of the draft MDAPs which would allow a defendant to ‘plead back’ imputations raised by the plaintiff.

Recommendation 10: Defences—academic protections

The Law Society supports the introduction of the proposed cl 30A in the draft MDAPs to provide a clear defence for academic inquiry and critical public discussion by scientists and academics.

Recommendation 11: Defences—qualified privilege

- a) The Law Society supports the introduction of a new defence of responsible communication in the public interest.
- b) The Law Society supports the proposed amendments at cls 30(3A) and (3B) of the draft MDAPs.
- c) The Law Society supports the proposed amendments at cl 30(3) of the draft MDAPs.
- d) The Law Society supports the inclusion of new cls 29A(4) and 30(6) in the draft MDAPs.

Recommendation 12: Defences—honest opinion

The Law Society supports proposed cl 31(5) in the draft MDAPs to provide clarity as how proper material is to be made apparent.

Recommendation 14: Serious harm threshold

- a) The Law Society supports the introduction of a serious harm threshold as provided for at cl 7A(1) of the draft MDAPs.

We further take the view that the serious harm threshold should be considered by the court at an early stage of proceedings, to minimise the cost to the court and other parties of unmeritorious or spurious claims that do not satisfy the threshold. However we recognise that the DWP may not wish to enact provisions in the MDPs that impose procedural requirements on various jurisdictions, given their separate and distinct procedural rules.

- b) The Law Society does not support the proposal to abolish the defence of triviality. If a judge is reluctant to dismiss proceedings at an early stage on the basis of serious harm, we consider that a defendant should still be able to argue at trial that the publication is defensible because the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.

Recommendation 15: Responsibilities and liability of digital platforms

The Law Society notes that this issue will be dealt with through a separate review process, as outlined in the Background Paper. We look forward to providing input at a later date.

Recommendation 16: Remedies—clarifications related to damages quantum

The Law Society supports the proposed amendments to cl 35 of the MDPs.

Recommendation 17: Remedies—multiple proceedings

The Law Society supports the DWP's proposal to amend cl 23 of the MDPs to extend the prohibition on commencing proceedings, without leave, against an associate of a previous defendant in relation to the publication of the same or similar matter.

In addition to the measures proposed in the draft MDAPs, the Law Society would support legislative guidance on the circumstances in which the consolidation of separate defamation proceedings will or will not be appropriate.

Recommendation 18: Other

The Law Society does not support the proposal in the draft MDAPs that an election to trial by jury be made irrevocable. This does not account for the possibility that it may only emerge during the course of proceedings (and after an election has been made) that a matter is factually complicated, sensitive, or high profile, making it more appropriate to be determined by a judge alone.

As an alternative, the DWP may wish to consider providing at cl 21(2A) of the draft MDAPs that an election to trial by jury is only revocable with the consent of all parties to the proceeding.

Recommendation 19: Other

The Law Society supports the proposed amendments at cl 10 of the draft MDAPs.

The Law Society thanks you for the opportunity to provide a submission on the draft MDAPs. If you have any questions, please contact Andrew Small, Acting Principal Policy Lawyer on Andrew.Small@lawsociety.com.au or (02) 9926 0252.

Yours sincerely,



Richard Harvey
President