

# Background paper

## Model Defamation Amendment Provisions 2020 (Consultation Draft)

December 2019

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## Executive Summary

This paper is released together with the consultation draft Model Defamation Amendment Provisions 2020 (**draft MDAPs**).

The purpose of this paper is to explain the policy rationale for the proposed amendments in the draft MDAPs. The paper also confirms the position reached by the Council of Attorneys-General (**CAG**) in relation to each question raised in the Discussion Paper that was released for comment in February 2019 (available at [www.justice.nsw.gov.au/defamationreview](http://www.justice.nsw.gov.au/defamationreview)).

### Background

Prior to 2005, each Australian jurisdiction had a different regime for regulating defamation actions. While Queensland and Tasmania had codified their laws, other jurisdictions retained the common law but supplemented or altered it to varying degrees with differing statutory provisions.

In November 2004, state and territory Attorneys-General endorsed the MDPs. This was in recognition of the need for uniform defamation law in Australia. Each jurisdiction subsequently enacted the Model Defamation Provisions (**MDPs**) through its own legislation.

All states and territories are parties to the MDP Intergovernmental Agreement (**IGA**). The IGA establishes the Model Defamation Law Working Party (**DWP**) which is required, amongst other functions, to report to the Standing Committee of Attorneys-General (now CAG) on proposals to amend the MDPs and to act as a forum for discussion of issues affecting the protection of reputation, freedom of expression and publication.

### Review of the MDPs

In 2018, CAG reconvened the DWP to review the MDPs.

On 26 February 2019, CAG released a public Discussion Paper, inviting written submissions in response to 17 topics and asking stakeholders to raise any additional issues affecting the MDPs. Forty-four written submissions were received. Respondents included media and digital industry stakeholders, legal stakeholders, academics, and individuals with experience in bringing or defending defamation claims. Public submissions are available online at <https://www.justice.nsw.gov.au/defamationreview>.

Three roundtables were held with stakeholders in June 2019 to discuss key issues.

The DWP carefully considered all issues raised by stakeholders and developed options for reform. This culminated in the DWP presenting 19 recommendations for reform to CAG in September 2019. The draft MDAPs are based on those recommendations.

### Key changes reflected in the draft MDAPs

The draft MDAPs strike a balance between the need to provide fair remedies for a person whose reputation is harmed by a publication and the need to ensure defamation law does not place unreasonable limits on freedom of expression, particularly about matters of public interest.

The draft MDAPs include the following key changes:

- Introducing a **serious harm threshold** to require plaintiffs to establish that a publication caused, or is likely to cause, serious harm to their reputation;
- Introducing a **single publication rule** to provide that the applicable one-year limitation period runs from the date material is uploaded to the internet;
- Strengthening requirements to encourage parties to settle disputes without resorting to litigation, by making it **mandatory to issue a concerns notice** and clarifying when a publisher's reasonable offer to make amends will give rise to a defence;
- Introducing a new **public interest defence**, modelled on the New Zealand common law defence of responsible communication on a matter of public interest;
- Introducing a new defence for peer-reviewed statements and assessments in scientific and academic journals; and
- Clarifying that the cap on damages for non-economic loss operates as a scale, and that **aggravated damages are awarded separately to damages for non-economic loss**.

The above changes respond to the most pressing concerns raised by stakeholders throughout the consultation process, representing a significant modernisation of defamation law in Australia.

## **Stage 2 reforms will address digital platform issues**

The Discussion Paper raised a number of broad questions about the application of the MDPs to digital platforms (see Question 15). The issues raised by stakeholders in response to these questions are both technical and complex.

On 26 July 2019, the ACCC published its *Digital Platforms Inquiry Report*, making important findings about the functions of digital platforms and the need for consistency across definitions and 'take-down' regimes. The Commonwealth Government's response to the ACCC *Digital Platforms Inquiry Report* is expected by the end of 2019.

CAG has agreed that the DWP will undertake a separate 'Stage 2' review process to consider potential amendments to the MDPs that address the responsibilities and liability of digital platforms for defamatory content published online. This will include consideration of the issues raised by the ACCC in the *Digital Platforms Inquiry Report* and the Commonwealth Government's response. For further information, see page 30.

### **Feedback on the draft MDAPs**

The Defamation Working Party is seeking stakeholder comments on the draft MDAPs by close of business on **Friday 24 January 2020**.

Please send your comments or enquiries to:

[defamationreview@justice.nsw.gov.au](mailto:defamationreview@justice.nsw.gov.au)

## Recommendations

*Note: Recommendations relating to the use of juries will only apply to those jurisdictions that have jury trials in defamation claims (all except for South Australia, the Northern Territory and the Australian Capital Territory).*

Recommendation	MDAP
1. No change to the objects of the Model Defamation Provisions in clause 3.	N/A.
<p>2.</p> <p>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), and</p> <p>b) Require "excluded corporations" to, as part of their claims, show measurable actual financial loss directly attributable to the publication in question.</p>	<p>Reflected in amendments to cls 9(2)(b) and 9(6).</p> <p>Reflected in a new cl 7A(2).</p>
<p>3.</p> <p>a) Introduce a single publication rule in similar terms to section 8 of the <i>Defamation Act 2013</i> (UK), which:</p> <ul style="list-style-type: none"> <li>i. applies to all publications;</li> <li>ii. applies to publications by a single publisher and its related bodies corporate and individual employees/contractors; and</li> <li>iii. provides that, for digital publications, the 'date of first publication' is the date on which the material was first uploaded by the publisher.</li> </ul> <p>b) Amend the relevant limitation period to extend the one year limitation period in a manner similar to that of section 32A of the <i>Limitation Act 1980</i> (UK), with an outer limit of three years.</p>	<p>Reflected in cl 1A to Schedule 4.1, which contains amendments proposed to the limitation legislation of each state and territory.</p> <p>Reflected in cl 1B to Schedule 4.1, which contains amendments proposed to the limitation legislation of each state and territory.</p>
<p>4. Make the following amendments to Part 3 of the Model Defamation Provisions, to clarify and enhance pre-trial procedures.</p> <p>a) Amend Part 3 to make it mandatory that an aggrieved person issue a concerns notice in writing to a publisher prior to commencing court proceedings.</p> <p>b) Amend clause 18(1)(a) to provide that, for the purpose of the defence to an action for defamation the relevant period in which an offer must be made by the publisher is the period that is "as soon as reasonably practicable", and in any event within 28 days of receipt of a concerns notice.</p> <p>c) Introduce a new requirement for an initial offer to make amends to remain open for acceptance for a period of not less than 28 days from the date of offer. Amend clause 18(1)(b) to clarify that an offer to make amends does not need to remain open until the first day of the trial.</p> <p>d) Introduce a new provision to provide that the limitation period is extended if a concerns notice is issued prior to the expiry of the limitation period, for the duration of the pre-trial process.</p>	<p>Reflected in a new cl 12A.</p> <p>Reflected in amendments to cl 18(1)(a).</p> <p>Reflected in a new cl 15(1)(b1) and in amendments to cl 18(1)(b).</p> <p>Reflected in cl 1(2) to Schedule 4.1, which contains amendments proposed to the limitation legislation of each state and territory.</p>
5. Amend the Model Defamation Provisions to require that the offer to make amends defence is to be determined by the judge.	Reflected in a new cl 18(3).

Recommendation	MDAP
<p><b>6.</b></p> <p>a) Amend Part 3 to provide that the aggrieved person must specify in the concerns notice the location of the publication of the defamatory matter (for example the URL).</p> <p>b) Amend clause 15(1)(d) to require that an offer to make amends include an offer to publish a reasonable correction, clarification or inclusion of additional information.</p> <p>c) Amend clause 15 to make clear that an offer to make amends does not require an apology.</p>	<p>Reflected in a new cl 14(2)(a1) and a consequential amendment to cl 14(3).</p> <p>Reflected in amendments to cl 15(1)(d).</p> <p>Reflected in amendments to cl 15(1A).</p>
<p><b>7.</b> No change to clause 21 of the Model Defamation Provisions.</p>	<p>N/A.</p>
<p><b>8.</b> The Commonwealth Government should consider legislative amendments relating to jury trials in the Federal Court, to improve national uniformity and consistency in defamation proceedings. This should occur in alignment with the agreed timetable for the reform process.</p>	<p>N/A.</p>
<p><b>9.</b> Amend clause 26 of the Model Defamation Provisions to ensure that it operates as intended, allowing a defendant to ‘plead back’ imputations raised by the plaintiff.</p>	<p>Reflected in amendments to cl 26.</p>
<p><b>10.</b> Introduce a new defence for peer-reviewed statements and assessments in a scientific or academic journal, modelled on section 6 of the <i>Defamation Act 2013</i> (UK).</p>	<p>Reflected in a new cl 30A.</p>
<p><b>11.</b></p> <p>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 <i>Durie v Gardiner</i> [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 the jury should be required to consider, but which are not all required to be satisfied – as follows:</p> <ul style="list-style-type: none"> <li>• The seriousness of any defamatory imputation carried by the matter published</li> <li>• The extent to which the matter published distinguishes between suspicions, allegations and proven facts</li> <li>• The extent to which the matter published relates to the performance of the public functions or activities of the person</li> <li>• Whether it was in the public interest in the circumstances for the matter to be published expeditiously</li> <li>• 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 revealed</li> <li>• Extent of compliance with any applicable professional codes or standards</li> <li>• 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</li> <li>• Any other steps taken to verify the information in the matter published</li> <li>• Any other circumstances that the court considers relevant</li> </ul>	<p>Reflected in a new cl 29A.</p>
<p>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</p>	<p>Reflected in new cls 30(3A) and (3B).</p>

Recommendation	MDAP
<p>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.</p> <p>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 and the public functions or activities of the person that the material relates to.</p> <p>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.</p>	<p>Reflected in amendments to cl 30(3).</p> <p>Reflected in a new cl 29A(4) and cl 30(6).</p>
<p><b>12.</b> Amend clause 31 of the Model Defamation Provisions to clarify that the proper material must be:</p> <p>a) set out in the publication in specific or general terms,</p> <p>b) notorious,</p> <p>c) linked in the publication, or</p> <p>d) otherwise apparent from the context of the publication.</p>	<p>Reflected in amendments to cl 31(5).</p>
<p><b>13.</b> No change to clause 31(4)(b) of the Model Defamation Provisions.</p>	<p>N/A.</p>
<p><b>14.</b></p> <p>a) Introduce a serious harm threshold, similar to the test in section 1 (serious harm) of the <i>Defamation Act 2013</i> (UK), whereby:</p> <p style="padding-left: 20px;">i. A statement is not defamatory unless its publication has caused or is likely to cause serious harm to reputation of the plaintiff; and</p> <p style="padding-left: 20px;">ii. The onus is on the plaintiff to establish serious harm.</p> <p>b) Abolish the defence of triviality.</p>	<p>Reflected in a new cl 7A(1).</p> <p>Reflected in deletion of cl 33.</p>
<p><b>15.</b> The Defamation Working Party will undertake a separate review process to consider potential amendments to the Model Defamation Provisions to address the responsibilities and liability of digital platforms for defamatory content published online. This will include consideration of the issues raised by the Australian Competition and Consumer Commission in the <i>Digital Platforms Inquiry Report</i> published on 26 July 2019. Recommendations will be made to the Council of Attorneys-General following this process.</p>	<p>N/A.</p>
<p><b>16.</b> Amend clause 35 to clarify that the cap:</p> <p>a) sets the upper limit on a scale of damages which may be awarded for non-economic loss in defamation claims; and</p> <p>b) is applicable regardless of whether aggravated damages apply. Aggravated damages, if warranted, should be awarded separately to general compensatory damages, rather than as part of an award of compensatory damages.</p>	<p>Reflected in amendments to cl 35(2).</p> <p>Reflected in amendments to cls 35(2A) and (2B).</p>
<p><b>17.</b> Amend clause 23 to require that leave of the court is required to bring further proceedings in relation to publication of same or like matter by the same or associated defendants. Associated defendants are any employees, contractors, or associated entities (as defined in the <i>Corporations Act 2001</i> (Cth)). Leave must be obtained before commencing further proceedings.</p>	<p>Reflected in amendments to cl 23.</p>
<p><b>18.</b> Amend clause 21 to provide that a party’s election to trial by jury is irrevocable, consistent with the decision of the NSW Court of Appeal in <i>Chel v Fairfax Media Publications Pty Ltd (No 2)</i> [2015] NSWCA 379.</p>	<p>Reflected in amendments to cl 21.</p>
<p><b>19.</b> Amend clause 10 to allow a court to determine questions of costs, if it is in</p>	<p>Reflected in amendments to</p>

Recommendation	MDAP
the interests of justice to do so, despite the death of a party, in any proceedings commenced before the death of the party.	cl 10.



# Report back on Discussion Paper issues

On 26 February 2019, CAG released a public Discussion Paper seeking written submissions in response to 17 questions and asking stakeholders to raise any additional issues that should be considered. The Discussion Paper and public submissions are available at:

[www.justice.nsw.gov.au/defamationreview](http://www.justice.nsw.gov.au/defamationreview).

This section outlines the key points raised by stakeholders in response to each of the Discussion Paper questions and the positions agreed by CAG. The relevant draft MDAP is noted where a change to the uniform laws is recommended.

## 1. Objectives of the provisions (Question 1)

It is considered that the objects in cl 3 of the MDPs remain valid.

While stakeholders expressed different views as to whether the MDPs strike the right balance between freedom of speech and the protection of reputation, most were satisfied that the objects of the MDPs remain appropriate.

Some stakeholders submitted that the uniform laws are not achieving the object of promoting speedy and non-litigious methods of resolving disputes. A number of stakeholders noted that the cost of defending a claim can be prohibitive for ordinary members of the public and that there is potential for defamation claims to be used to coerce a defendant into doing something. These issues are addressed through proposed changes to the substantive MDPs including: pre-trial procedures (see recommendations 4-6); and the introduction of a new serious harm threshold (see recommendation 14).

Some stakeholders recommended that it should be mandatory for a judge to specifically address each of the objects (b), (c) and (d) either at trial, or at the first directions hearing or case management conference. This is not considered necessary as courts should consider the objects of the MDPs in the context of applying the provisions.

Some stakeholders recommended that a legislative protection for freedom of speech should be introduced in Australia. This proposal is beyond the scope of the review.

### **Recommendation 1:**

No change to the objects of the Model Defamation Provisions in clause 3.

## 2. The right of corporations to sue in defamation (Question 2)

Clause 9 of the MDPs abolished the right of most corporations to sue for defamation with the exception of “excluded corporations” which include (a) not for profit companies, and (b) companies that employ fewer than 10 persons.

The policy rationale for preventing corporations from instigating defamation proceedings is that:

- a) Defamation is a tort directed to the right of individuals. The concepts of personal distress and hurt have no application to corporations.
- b) Corporations have recourse to alternative causes of action such as the tort of injurious falsehood and misleading and deceptive conduct claims in the *Competition and Consumer Act 2010* (Cth).

- c) Corporations generally have the capacity to protect their reputations through marketing, public relations and other means.

The 2005 reforms preserved the right of smaller corporations and not-for-profit organisations to sue for defamation. This was on the basis they are less likely to have the resources to pursue alternative causes of action and may be disproportionately affected by a defamatory publication. For example, a small business or not-for-profit company may not have the ability to engage in costly marketing exercises to overcome the harm caused by defamation. The alternative causes of action referred to above are also more onerous, requiring plaintiffs to prove additional elements such as falsity.

Very few stakeholders supported broadening the right of corporations to sue. The vast majority of stakeholders supported either narrowing or recasting the ‘excluded corporations’ test to further restrict the types of corporations able to sue for defamation, or maintaining the current test.

One option put forward by stakeholders was that excluded corporations should be required to demonstrate actual financial loss resulting from a publication, consistent with the UK approach.

Several stakeholders noted that the definition of “excluded corporation” is arbitrary and should be clarified. They argued that defining companies by reference to employees is no longer appropriate because it is increasingly common for businesses to use contractors, persons supplied by labour hire firms, service companies or agencies. Some stakeholders recommended defining “excluded corporations” by reference to revenue, profits or total asset size rather than employees.

It is recommended that the definition of “excluded corporation” be amended to provide that “employees” include individuals engaged in the day-to-day operations of the corporation and subject to its direction and control. This will avoid courts needing to assess the definition of “employee”. It will also ensure that large corporations do not engage in employment practices solely for the purpose of retaining their ability to sue for defamation (for example, by only engaging contractors).

Finally, it is recommended that excluded corporations should be required to show that the defamatory publication has caused serious financial loss. Section 1 of the *Defamation Act 2013* (UK) specifies that harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss. This should be incorporated into the ‘serious harm’ threshold outlined at Recommendation 14, similar to the approach taken in the UK.

#### **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).

*This is reflected in the draft MDAPs amendments to cls 9(2)(b) and 9(6).*

- b) Require “excluded corporations” to, as part of their claims, show that the publication has caused, or is likely to cause, serious financial loss.

*This is reflected in the draft MDAPs in a new cl 7A(2).*

### **3. Single publication rule (Question 3)**

#### **The rationale for a single publication rule**

Defamation occurs whenever a defamatory meaning is communicated to somebody other than the person being defamed (a third party). Under the various limitation acts of each state and territory, a person who has been defamed generally has one year from the date of communication to commence proceedings.

In the case of online materials, communication occurs whenever a third party downloads the material. This is known as the ‘multiple publication rule’.

Some other jurisdictions, including several US states, Ireland and the UK, have adopted a ‘single publication rule’. For example, s 8 of the *Defamation Act 2013* (UK) has the effect that the one-year limitation period commences on the date of first publication by a publisher. Any cause of action for subsequent publications by that publisher is treated as having accrued on the date of the first publication, unless the subsequent publication is materially different.

Most stakeholders strongly supported the introduction of a single publication rule on the basis that:

- digital publication and online archiving creates a potentially endless limitation period as material may be stored and downloaded repeatedly for an indefinite period,
- there are evidentiary difficulties for publishers if material is downloaded long after the date of upload, and
- plaintiffs should be required to bring suit promptly.

### **Date of first publication**

One practical issue affecting the introduction of a single publication rule is whether the “date of first publication” occurs when the material is first downloaded, read and comprehended by a third person, or first uploaded. The UK has adopted the first approach and it appears this has resulted in challenges for parties trying to identify when the material was downloaded.

For this reason, it is recommended that the date of publication should be the date on which material is uploaded. This is more readily identifiable by referencing, for example, the date of an article, the date a website was edited or the timestamp on a social media post.

### **Application of the rule**

Stakeholders were asked whether the single publication rule should apply to online publications only or should be medium-neutral. Stakeholders who responded to this question were uniformly of the view that a medium-neutral rule should be introduced to avoid anomalous results.

### **Related publishers**

Stakeholders were asked whether the single publication rule should apply in relation to the same publisher only, as it does in s 8 of the *Defamation Act 2013* (UK).

No stakeholders submitted that the single publication rule should apply to unrelated publishers.

However, some stakeholders submitted that the single publication rule should also apply to related bodies corporate, and should offer protection for journalists, editors and other individuals involved in the original publication. Those stakeholders submitted that this extension is necessary to avoid cross claims by third party publishers, which would effectively undermine the rationale and effectiveness of a single publication rule.

### **Limitation periods**

The Discussion Paper asked stakeholders about the limitation period in the context of the single publication rule proposal.

Many stakeholders indicated support for retaining the one year limitation period, with the possibility of extension for three years.

Some stakeholders opposed the introduction of a single publication rule on the basis that the harm or extent of harm may not be suffered until after the expiry of a year and the plaintiff may not know for a considerable period of time that the publication exists.

Legislation in all states and territories provides that a one year limitation period from the date of publication applies to defamation actions, with the possibility of an extension for up to three years from the date of publication<sup>1</sup> where “it was not reasonable in the circumstances for the plaintiff to have commenced” proceedings within one year. This provision was introduced by Schedule 4 of the MDPs in 2005, and is almost identical in all jurisdictions’ limitation acts (or, in Tasmania, its *Defamation Act*). Several stakeholders submitted that the standard to which the court must be satisfied to grant an extension is too high, particularly in the context of the introduction of a single publication rule. They submitted that the limitation period is rigid and the court’s discretion to grant an extension only applies in limited circumstances. Those stakeholders argued that if a single publication rule were to be introduced, the threshold for the court to grant an extension to the limitation period should be lowered. The UK *Limitation Act 1980* provides a broader discretion to the courts to extend the one year time limit if, for example, the claimant did not become aware of the publication until after the initial one year period (s 32A).

Specifically, s 32A of the UK Act provides that, in granting an extension, the court considers:

- whether the one year limitation period may prejudice the claimant,
- the length of and reasons for the delay on the part of the claimant, and
- where a reason for the delay was that the claimant was not aware of the facts relevant to the cause of action, the behaviour of the claimant once aware of the facts.

It is recommended that the limitation period should be extended in a similar manner to that of s 32A of the UK *Limitation Act 1980*, but with an outer limit of three years.

### **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.

***This is reflected in the draft MDAPs in cl 1A to Schedule 4.1, which contains amendments proposed to the limitation legislation of each state and territory.***

- 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.

***This is reflected in the draft MDAPs in cl 1B to Schedule 4.1, which contains amendments proposed to the limitation legislation of each state and territory.***

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<sup>1</sup>In Western Australia, the extension a court may make is not limited to three years, but the application to extend the limitation period cannot be made after three years from the date of publication.

## 4. Offer to make amends—clarification of procedures and interaction of provisions (Question 4)

One of the objects of the MDPs is to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter. Part 3 of the MDPs covers resolution of civil disputes without litigation. This applies if a person (the publisher) publishes matter that is, or may be defamatory of another person (the aggrieved person). In summary:

- Clause 13 enables a publisher to offer to make amends to an aggrieved person.
- Clause 14 provides that the offer cannot be made if 28 days have elapsed since the publisher has been given a concerns notice by the aggrieved person or if a defence in an action for defamation brought by the aggrieved person has been served. A concerns notice must be in writing and inform the publisher of the imputations of concern.
- Clause 15 specifies what an offer to make amends must or may contain. For example, among other things, it must be in writing and include an offer to publish a reasonable correction. It may include an offer to publish an apology or to pay compensation.
- Clause 16 enables a publisher to withdraw an offer to make amends and to make a renewed offer.
- Clause 17 provides that if the publisher carries out the terms of an accepted offer to make amends the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher.
- Clause 18 provides a defence if the publisher made an offer to make amends that was not accepted and a) the offer was made as soon as practicable after the publisher became aware that the matter in question was or may be defamatory, b) the publisher was ready and willing to carry out the terms of the offer and c) the offer was reasonable in all the circumstances.

Through the consultation process, a number of issues were identified in relation to Part 3 of the MDPs.

### **The concerns notice**

Stakeholders submitted that too many defamation actions proceed to trial as parties are not sufficiently incentivised to engage in non-litigious dispute resolution.

Stakeholders indicated that the potential availability of the complete defence (cl 18) is a strong incentive for a publisher to make an offer to make amends as soon as practicable. Clause 40 of the MDPs also provides that costs against an unsuccessful party are to be assessed on an indemnity basis if the court is satisfied that the party unreasonably failed to make (the defendant) or accept (both defendant and plaintiff) a settlement offer (including an offer to make amends).

However, stakeholders noted that there is no requirement for an aggrieved person to first issue a concerns notice to the publisher, and submitted that there was little incentive for them to do so.

There was broad support for making it mandatory for an aggrieved person to issue a concerns notice to the publisher prior to commencing court proceedings. This, in conjunction with the other proposed changes to Part 3 of the MDPs, is intended to promote swift resolution of disputes without recourse to litigation.

It is proposed that plaintiffs be required to wait 14 days after sending a publisher a concerns notice before commencing a claim, unless the waiting period extends beyond the expiry of the limitation period or there are other exceptional circumstances.

## **Timeframe for making offers to make amends**

Clause 14(1) of the MDPs states that an offer to make amends cannot be made if 28 days have elapsed since the receipt of a concerns notice or after the delivery of a defence. However, cl 18(1)(a) and (b) provides a defence if a publisher made an offer “as soon as practicable” after becoming aware the matter was defamatory, and was ready and willing at any time before trial to carry out the terms of the offer, if accepted. Stakeholders submitted that the interaction of cls 14 and 18 is ambiguous and requires clarification.

Some stakeholders argued that the wording “as soon as practicable” is subjective and creates uncertainty regarding how quickly the offer to make amends must be made. Media stakeholders submitted that in many cases it takes up to 28 days to properly consider a claim. Some claims may be straightforward and can be dealt with quickly. However, in circumstances where claims are more complex, they may require in depth investigation (for example, through reviewing content, conferring with the journalist and checking public documents).

The alternative view is that 28 days may be too long a time period in which to make an offer to make amends for the purposes of the defence in s 18, given the potential for harm to be magnified by further dissemination of defamatory information. In some cases, it will be immediately apparent on receipt of a concerns notice that the material is defamatory and an offer to make amends should be made. There is a concern that providing a fixed 28 day timeframe could result in publishers taking the full 28 days to issue an offer to make amends, when an offer could reasonably be made sooner.

It is recommended that cl 18(1)(a) be amended to replace “as soon as practicable” with “as soon as reasonably practicable, and in any event within 28 days”, to encourage publishers to act quickly where possible, while clarifying the interaction of cl 18 with cl 14.

Stakeholders also requested greater procedural clarity and incentive for an offer to make amends to be genuinely considered by a plaintiff by including a new requirement that an offer remain open for acceptance for a period of not less than 28 days from the date of offer.

Some stakeholders submitted that cl 18(1)(b) could be read as requiring a publisher to be ‘ready , willing and able’ to carry out the terms of the offer at all times from the date of offer up to the date of a trial’s commencements. This is inconsistent with the clause’s application in case law (see *Bushara v Nobananbas Pty Ltd* [2012] NSWSC 63 at [10]-[14]). To resolve this confusion, it is recommended that provisions make explicit that an offer to make amends does not need to remain open until the first day of trial.

## **Extension to the limitation period for the offer to make amends period to run**

Some stakeholders suggested that if a concerns notice were made mandatory, protection should be provided to the aggrieved person to ensure that the statutory limitation period does not expire while the dispute resolution process is running. Otherwise the aggrieved person may have no option but to commence proceedings prior to the completion of the process.

It is considered that the limitation period should be extended if a concerns notice is issued immediately prior to the expiry of the limitation period, for the duration of the offer to make amends process. For example, if a concerns notice is given 7 days before the limitation period expires (meaning that there are 6 days left before the limitation period expires), the limitation period would be extended by 56 days (to allow 28 days after the concerns notice is issued for the offer to make amends to be made, and 28 days for it to remain open) minus 6 days – that is, 50 days.

## **Termination of offer to make amends**

Some stakeholders argued there is a need to clarify that the withdrawal of an offer to make amends by the publisher is not the only way to terminate an offer to make amends. Recommendation 4(c), that the offer remain open for an acceptance period of not less than 28 days, will have the effect of

clarifying that an offer remain open for this period regardless of any action taken by the aggrieved person (counter-offer, rejection or otherwise).

#### **Recommendation 4:**

Make the following amendments to Part 3 of the Model Defamation Provisions, to clarify and enhance pre-trial procedures.

- a) Amend Part 3 to make it mandatory that an aggrieved person issue a concerns notice in writing to a publisher prior to commencing court proceedings.

*This is reflected in the draft MDAPs in a new cl 12A.*

- b) Amend clause 18(1)(a) to provide that, for the purpose of the defence to an action for defamation the relevant period in which an offer must be made by the publisher is the period that is "as soon as reasonably practicable", and in any event within 28 days of receipt of a concerns notice.

*This requirement is reflected in the draft MDAPs in amendment of cl 18(1)(a).*

- c) Introduce a new requirement for an initial offer to make amends to remain open for acceptance for a period of not less than 28 days from the date of offer. Amend clause 18(1)(b) to clarify that an offer to make amends does not need to remain open until the first day of the trial.

*This is reflected in the draft MDAPs in a new cl 15(1)(b1) and amendments to cl 18(1)(b).*

- d) Introduce a new provision to provide that the limitation period is extended if a concerns notice is issued prior to the expiry of the limitation period, for the duration of the pre-trial process.

*This is reflected in the draft MDAPs in cl 1(2) to Schedule 4.1, which contains amendments proposed to the limitation legislation of each state and territory.*

## **5. Offer to make amends — whether juries should return a verdict on all other matters first (Question 5)**

Stakeholders were generally supportive of requiring a jury to return a verdict on the offer to make amends defence. However, there were mixed views as to how this should be done. There are concerns about the potential for jury prejudice if juries have before them an offer to make amends when considering other defences in a case. It may create a difficult situation for a jury where it is required to assess a defence of an offer to make amends and then artificially exclude that information from its deliberations when determining other defences raised by the defendant.

Some stakeholders argued that this could be resolved by a requirement that a jury return a verdict on all other issues before the offer to make amends defence is put before them. However, this has the potential to protract proceedings, resulting in additional time and costs for the parties and the court.

There is a strong argument that the consideration of an offer to make amends defence is a complex and technical exercise better suited to a judge. Further, given damages is an issue reserved for the judge and assessment of the reasonableness of an offer to make amends inevitably involves consideration of quantum, it is recommended that judges determine the offer to make amends defence.

#### **Recommendation 5:**

Amend the Model Defamation Provisions to require that the offer to make amends defence is to be determined by the judge.

*This is reflected in the draft MDAPs in a new cl 18(3).*

## 6. Offer to make amends — other issues (Question 6)

### Content of a concerns notice

Stakeholders reported difficulties with identifying the publication that is the subject of a concerns notice. The current provision in cl 14(2) requires that the aggrieved person specify the “defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question” but not the location of the matter – for example, its URL. Stakeholders report this can make it difficult to respond effectively to a concerns notice in a timely manner, as the publisher may need time to identify the matter in question.

Even in cases where a URL is provided, digital platform stakeholders and individual respondents reported that they experienced problems where the URL has disappeared by the time legal advice has been sought about a concerns notice. Therefore, ensuring the location of publication of defamatory material is included in a concerns notice is recommended.

### Content of an offer to make amends

The wording of current cl 15(1)(d) provides that an offer to make amends “must include an offer to publish, or join in publishing, a reasonable correction of the matter in question”.

Some stakeholders recommended that consideration should be given to whether cl 15(1)(d) incorrectly assumes that every matter complained of is capable of “a reasonable correction”. In many instances, the complaint may not relate to a factual inaccuracy but to an omission of contextual information or implication identified by the complainant, which cannot be “corrected” per se.

Stakeholders indicated that the phrase “reasonable correction” can cause confusion for some self-represented clients, as the word “correction” implies that something in the material is wrong, incorrect or defamatory. To address this issue, it is recommended that cl 15(1)(d) be amended to require the publisher to “offer to publish a reasonable correction, clarification or inclusion of additional information”.

Some stakeholders also submitted that defendants are sometimes confused as to whether an apology is required. It can be difficult for self-represented persons to understand the difference between making an apology, which is not required in an offer to make amends, and publishing a “correction”. Other stakeholders also submitted that plaintiff lawyers often assert that a correction which does not include an apology is not a ‘reasonable’ offer pursuant to the defence in cl 18.

Clarification of cl 15(1)(d) is not strictly necessary as it already draws a distinction between a correction and apology. However, express clarification may be of some use in preventing complainants from mistakenly believing that an apology is a requirement of an offer to make amends. For the avoidance of doubt, it is therefore recommended to clarify in cl 15 that an apology may be included, but is not required, as part of an offer to make amends.

### Indemnity costs

The Discussion Paper asked stakeholders to consider whether the MDPs should provide for indemnity costs to be awarded in a defendant’s favour where the plaintiff commences proceedings before the expiration of any period of time in which an offer to make amends may be made. This is if the court subsequently finds that an offer to make amends made to the plaintiff after proceedings were commenced was reasonable.

Clause 40 of the MDPs requires a court to order costs against an unsuccessful party to proceedings for defamation on an indemnity basis if the court is satisfied that the party unreasonably failed to accept (or offer if the defendant) a settlement offer made by the other party to the proceedings.



Some stakeholders indicated support for this proposal to ensure the early resolution of complaints. However, others submitted that there is no need for amendment as the situation described in the Discussion Paper question would likely result in an award of indemnity costs in the defendant's favour under cl 40(2).

Given existing indemnity costs provisions under cl 40, no further change is recommended.

**Recommendation 6:**

- a) Amend Part 3 to provide that the aggrieved person must specify in the concerns notice the location of the publication of the defamatory matter (for example the URL).

*This is reflected in the draft MDAPs in a new cl 14(2)(a1) and a consequential amendment to cl 14(3).*

- b) Amend clause 15(1)(d) to require that an offer to make amends include an offer to publish a reasonable correction, clarification or inclusion of additional information.

*This is reflected in the draft MDAPs in amendment of cl 15(1)(d).*

- c) Amend clause 15 to make clear that an offer to make amends does not require an apology.

*This is reflected in the draft MDAPs in a new cl 15(1A).*

## 7. Juries—dispensing with jury trial in the interests of justice (Question 7)

Clause 21 of the MDPs provides that, for jurisdictions that have jury trials for defamation claims (all except for South Australia, the Australian Capital Territory and the Northern Territory), a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury unless the court orders otherwise. A court may order otherwise if the trial requires the prolonged examination of records or the involvement of technical, scientific or other issues that cannot be conveniently considered or resolved by a jury (cl 21(3)). The NSW Court of Appeal has held that a cl 21(3) order must not be made on the court's own motion, but only on the application of a party.<sup>2</sup>

In Question 7 of the CAG Discussion Paper, stakeholders were asked to comment on whether cl 21 should 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 doing so would be in the interests of justice (which may include case management considerations).

The issue of whether an *opposing party* should be able to apply to dispense with a jury trial in the interests of justice is regarded as one to be addressed in each jurisdiction's civil procedure rules. In some jurisdictions, there are specific provisions for an opposing party to apply to have a jury election dispensed with (for example, *Uniform Civil Procedure Act 2005* (NSW) r 29.2A(4)) and there are prescribed time limits for such applications. This provides certainty to the parties as to whether or not the trial is to be by jury.

Most stakeholders also opposed amending cl 21 to allow an order to be made on the *court's motion* on the basis that the existing provision strikes an appropriate balance between the two competing issues of case management considerations and the parties' interest in the right to a trial by jury. Stakeholders noted that juries play an important role and that the parties' right to elect for a jury trial should not be abrogated in favour of case management considerations.

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<sup>2</sup> *Channel Seven Sydney Pty Ltd v Senator Concetta Fierravanti-Wells* [2011] NSWCA 246.

It is recommended that cl 21 is retained without amendment.

**Recommendation 7:**

No change to clause 21 of the Model Defamation Provisions.

## 8. Juries—jury trials in the Federal Court (Question 8)

Defamation proceedings commenced in the Federal Court are conducted by a judge alone, unless the court orders otherwise.

In *Wing v Fairfax Media Publications Media Pty Limited* [2017] FCAFC 191, the Full Federal Court found that there is direct inconsistency between ss 39 and 40 of the *Federal Court of Australia Act 1976* (Cth) (which provide that civil trials are to be conducted by a judge alone) and ss 21 and 22 of the MDPs (which provide for the right of parties to elect for proceedings to be tried by jury).<sup>3</sup> Clauses 21 and 22 are therefore inoperative in relation to Federal Court proceedings.

Question 8 of the CAG Discussion Paper asked whether the *Federal Court of Australia Act 1976* (Cth) should be amended to provide for jury trials in the Federal Court in defamation actions unless the court dispenses with a jury for the reasons set out in cl 21(3) of the MDPs.

The majority of stakeholders who responded to the question submitted that the *Federal Court of Australia Act 1976* (Cth) should be amended in the interests of national uniformity. It was also noted that the Federal Court has the resources necessary for jury trials (including courtrooms with jury facilities) due to its criminal jurisdiction.

It is recommended that the Commonwealth Government consider legislative amendments relating to jury trials in the Federal Court to improve national uniformity and consistency in defamation proceedings. CAG has agreed that this should occur in alignment with the agreed timetable for the reform process.

**Recommendation 8:**

The Commonwealth Government should consider legislative amendments relating to jury trials in the Federal Court, to improve national uniformity and consistency in defamation proceedings. This should occur in alignment with the agreed timetable for the reform process.

## 9. Defences — contextual truth (Question 9)

Clause 26 of the MDPs provides for a defence of contextual truth. This is designed to deal with a circumstance where there are a number of defamatory imputations carried by a matter and the plaintiff has chosen to proceed with one or more but not all of them. In this circumstance, a defendant may argue that the substantial truth of the other (contextual) imputations means that the defamatory imputations do not further harm the plaintiff's reputation.

Clause 26 of the MDPs was intended to reflect s 16 of the (now repealed) *Defamation Act 1974* (NSW). Under that Act, it was accepted practice that the defendant could plead the substantial truth of both: imputations that the plaintiff had not pleaded; and imputations that the plaintiff had pleaded (known as 'pleading back'). However, the NSW Supreme Court has found that the phrase "in addition

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<sup>3</sup> The Court considered ss 21 and 22 of the *Defamation Act 2005* (NSW) which are taken from the Model Defamation Provisions.

to the defamatory imputations of which the plaintiff complains” in s 26(a) of the *Defamation Act 2005* (NSW) precludes a defendant from pleading as contextual imputations any of the imputations pleaded by the plaintiff (*Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852). This was affirmed by the NSW Court of Appeal in *Besser v Kermode* [2011] NSWCA 174.

The Discussion Paper asked if cl 26 should be amended to more closely reflect s 16 of the repealed NSW *Defamation Act 1974*. All stakeholders who responded to this question strongly agreed that cl 26 should be amended in order for the statutory defence of contextual truth to operate as intended by allowing a defendant to ‘plead back’ imputations raised by the plaintiff.

**Recommendation 9:**

Amend clause 26 of the Model Defamation Provisions to ensure that it operates as intended, allowing a defendant to ‘plead back’ imputations raised by the plaintiff.

*This is reflected in the draft MDAPs in amendments to cl 26.*

## 10. Defences—academic protections (Question 10)

There was general agreement between stakeholders about the importance of academics and scientists being able to freely express their views on matters which have been peer-reviewed, engage in uninhibited debate, and scrutinise material without facing the threat of defamation.

Most stakeholders strongly supported amendments to the MDPs to provide clearer protections for academic articles.

However, some stakeholders considered this unnecessary, as there is some protection for such publications under the common law and statutory versions of qualified privilege and fair comment/honest opinion, and under cl 29 (Defence of fair report of proceedings of public concern).

Clause 29 provides that it is a defence if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern, unless the matter was not published honestly for the information of the public or the advancement of education. Some stakeholders noted that the provision is likely to cover presentations at scientific, academic and press conferences held to discuss matters of public interest, and in many circumstances, the publication of peer-reviewed and other statements in scientific or academic journals. The defences of fair comment and honest opinion are also likely to apply to statements of opinion appearing in peer-reviewed articles.

Notwithstanding this, it is recommended that there should be a clear, easily applied defence for academic inquiry and critical public discussion by scientists and academics. A clear provision would avoid the risk that these arguments could only be determined at trial, after substantial costs have been incurred. The new provision should be modelled on section 6 of the *Defamation Act 2013* (UK), and provide that:

- a) it is a defence to the publication of defamatory matter if the matter was published in a scientific or academic journal that has been subject to independent expert review;
- b) the defence extends to assessments of the scientific or academic merit of privileged statements published in the same journal (if they were written by one or more independent reviewers in the course of the review of the original privileged statement); and
- c) the defence should be defeated if the plaintiff can show that the defamatory matter or assessment was not published honestly for the information of the public or the advancement of education.

**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).

*This is reflected in the draft MDAPs in a new cl 30A.*

## 11. Defences—qualified privilege (Question 11)

Clause 30 of the MDPs provides for a defence of qualified privilege. The purpose of the defence is to provide protection in a range of situations where there is a moral or legal duty to make what might otherwise be defamatory statements. Examples of these statements include employment references and reporting suspected crimes to the police.

It is a defence to the publication of defamatory matter if the defendant proves that:

- a) the recipient has an interest or apparent interest in having information on some subject,
- b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
- c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

Clause 30 lists a number of factors that the court may take into account in determining whether the defendant acted reasonably. These factors largely reflect the general law as stated by the House of Lords in *Reynolds v Times Newspapers Ltd* (2001) 2 AC 127.

The defence is qualified in the sense that it can be defeated – for example, if the plaintiff proves that the publication was actuated by malice.

Many stakeholders submitted that an overly restrictive approach has been taken to the test of reasonableness in cl 30. It was noted that the standard is too high and that the defence has not been argued successfully by a media defendant since the introduction of the MDPs.

Stakeholders submitted that, to address these concerns, potential options for reform include:

- the introduction of a public interest defence; and
- amendments to cl 30 to clarify its application and provide certainty.

### **A new public interest defence**

One of the objects of the MDPs 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”. One stakeholder submitted that the defence designed to achieve this object is statutory qualified privilege. The apparent inability of media defendants to rely on the defence indicates that this object is not being met.

Many stakeholders indicated that a public interest defence is required in order to protect the ability of journalists and media organisations to publish on matters of public concern. Of these stakeholders, a large proportion endorsed the approach taken in s 4 of the UK *Defamation Act 2013*. Others endorsed the common law defence of “responsible communication on a matter of public interest” established by the New Zealand Court of Appeal in *Durie v Gardiner* [2018] NZCA 27.

The UK approach is based on the *Reynolds* defence. A defendant must show that, firstly, the statement was on a matter of public interest and, secondly, that the defendant reasonably believed that publishing the particular statement was in the public interest. In determining “reasonable belief” the court is to have regard to all the circumstances of the case and “make such allowance for editorial judgment as it considers appropriate”.

In 2018 the New Zealand Court of Appeal delivered a decision establishing a new defence for responsible communication on a matter of public interest in *Durie v Gardiner* [2018] NZCA 27. The defence is made out if the publication (1) is in the public interest, and (2) is responsible. It does not just apply to political or government speech. The court determines whether the communication is responsible having regard to all the relevant circumstances of the publication.

On balance, the New Zealand approach is preferred to the UK model. It is a simpler solution for protecting communications on matters of public interest. This approach acknowledges the importance of the public interest but appropriately safeguards individual reputations by requiring that communications are responsible. This directs the court's attention to the actual conduct of the publisher, rather than the reasonableness of the publisher's beliefs.

It is also recommended that the provision include the following mandatory, non-exhaustive list of considerations for determining whether the communication is responsible:

- a) The seriousness of any defamatory imputation carried by the matter published
- b) The extent to which the matter published distinguishes between suspicions, allegations and proven facts
- c) The extent to which the matter published relates to the performance of the public functions or activities of the person
- d) Whether it was in the public interest in the circumstances for the matter to be published expeditiously
- e) 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 revealed
- f) Extent of compliance with any applicable professional codes or standards
- g) 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
- h) Any other steps taken to verify the information in the matter published
- i) Any other circumstances that the court considers relevant.

This list includes factors from the existing cl 30 that are relevant to the new test as they refer to the general circumstance of the publication as well as the public interest in the publication.

Factor (e) addresses the fact that journalists' sources may be confidential and that journalists may be bound by ethical obligations not to reveal their sources. In appropriate cases, this may allow the defence to be made out where one or more of the sources for the material remain confidential. The ultimate standard is whether the communication is responsible, and if this can be judged from the material before the court without revealing a confidential source, then the defence may succeed.

Factor (f) aims to take into account compliance with applicable codes or standards such as journalists' codes of ethics. These codes may include the Australian Journalists' Association Code of Ethics 1994 and the Australian Press Council Standards of Practice. The Journalists Association Code of Ethics applies to its members and the Standards of Practice apply to publishers who are members of the Council. Both deal with standards relating to issues such as accuracy and clarity, fairness and balance, privacy and avoidance of harm and integrity and transparency. This factor would allow a court to consider the defendant's conduct in the context of standards of responsible journalism.

## Amendments to cl 30 for clarification and certainty

There is some conceptual overlap between the existing statutory defence of qualified privilege in cl 30 and the proposed new defence of responsible communication on a matter of public interest. However, it is recommended to retain the defence in cl 30 as it can apply to matters which may not necessarily be in the public interest, but remain of interest to the recipients. The purpose of the defence of qualified privilege is to provide protection in a range of situations where there is a moral or legal duty to make what might otherwise be defamatory statements. Examples of these statements include employment references and reporting suspected crimes to the police.

To reduce potential overlap between the existing defence and the proposed new defence, it is recommended that cls 30(3)(a) and (b) should be removed. These factors consider the public interest in the publication and the public functions or activities of the person the material relates to. Where these factors are relevant, they would be covered by the new proposed public interest defence.

A large number of stakeholders submitted that the factors in cl 30(3) are being treated as a checklist that has to be satisfied – making it very difficult to establish the defence potentially for both media and individual defendants. While this may already be apparent on plain reading of the provision, stakeholders strongly submitted that cl 30 be amended to make clear that all of the factors do not have to be met.

### The role of the jury

At common law, the question of qualified privilege is an issue of law determined by a judge (based on facts as they are found by the jury). However, cl 22(2) of the MDPs states that in defamation proceedings tried by a jury, the jury is to determine whether a defendant has published defamatory matter about a plaintiff and, if so, whether any defence is established. This has resulted in some confusion as to whether cl 22 requires any issue relevant to the defence of qualified privilege to be determined by the jury.

Many stakeholders submitted that the defence of statutory qualified privilege should be determined by a jury, or at a minimum, the issue of reasonableness in cl 30(1)(c) should be an issue for the jury. It is considered the jury should be responsible for determining whether the defences have been established for both the new public interest defence and the amended clause 30.

#### 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 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

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.

***This is reflected in the draft MDAPs in a new cl 29A.***

- 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

***This is reflected in the draft MDAPs in new cls 30(3A) and (3B).***

- 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

***This is reflected in the draft MDAPs in amendments to cl 30(3).***

- 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.

***This is reflected in the draft MDAPs in new cl 29A(4) and cl 30(6).***

## 12. Defences—honest opinion (Question 12)

Clause 31 of the MDPs provides a defence relating to the publication of matter that expresses an opinion that is honestly held by its maker rather than a statement of fact.

The statutory defence of honest opinion in cl 31 is intended to protect freedom of speech, by providing defendants with scope to comment on matters of public interest.

It is based on the common law defence of “fair comment”, and provides a complete defence to an action in defamation provided that three elements are satisfied:

- the matter was an expression of the defendant’s opinion, rather than a statement of fact,
- the opinion related to a matter of public interest, and
- the opinion is based on “proper material”.

“Proper material” is defined to include material that is substantially true, or was published on an occasion of absolute or qualified privilege, or was published on an occasion that attracted the protection afforded by cl 28 (defence for publication of public documents) or cl 29 (defences of fair report of proceedings of public concern). Although this is not set out in cl 31, it is a requirement that the opinion set out the proper material upon which it is based.

The purpose of the defence of honest opinion and its common law counterpart is to enable open discussion by those who express their opinion on facts. This allows the publication of restaurant, art, literary and concert reviews as well as commentary on public affairs.

The Discussion Paper asked stakeholders if the defence should be amended in relation to contextual material relating to the proper basis of the opinion, in particular to better articulate if and how the defence applies to digital publications.

The two issues raised by stakeholders in response to this question were the need to clarify when an opinion is based on proper material (particularly in the context of digital publications) and whether the public interest requirement remains appropriate.

### **Proper material**

Some stakeholders argued that the requirement stemming from case law<sup>4</sup> that the opinion set out the proper material on which it is based is no longer appropriate in the age of digital publications. Publishing opinions in text message or tweets, for example, provides little space for contextual information.

The purpose of this requirement is to ensure that the reader can judge for themselves the fairness of the statement, based on the facts. This reflects the rationale under the common law that a recipient must be able to assess for themselves whether they agree with the defendant's comments. This is seen as the reciprocal obligation of the defendant being afforded great latitude to express their opinion.

A potential alternative put forward by many stakeholders is to amend cl 31 to clarify how proper material is to be made apparent – particularly in the context of digital publications. A range of options were put forward – including following the approach in s 3 of the *Defamation Act 2013* (UK). The UK defence of honest opinion makes it a condition that the “statement complained of indicated, whether in general or specific terms, the basis of the opinion” (s 3(3)). This proposal would not change the fundamental requirement that the opinion be based upon the material, but simply provide more clarity as to how the connection between the two should be expressed.

Recommendation 12 is broadly based on the UK approach but includes additional detail – for example, proposing that the proper material could be linked in the publication. The recommendation also includes an option that the proper material be otherwise apparent from the context of the publication (Recommendation 12(c)). This is intended to capture circumstances – such as the publication of a review of a restaurant or film – where it is implied by the circumstances of the review that the statement is based upon the reviewer's personal experience of the restaurant or the film.

### **The public interest requirement**

A small number of stakeholders proposed removing the requirement that an honest opinion must relate to a matter of public interest. The reason put forward was that there is no public interest requirement for a defence of justification under cl 25, so it does not follow that there should be one to publish an opinion.

However, the public interest element of the statutory defence of honest opinion has been imported from the common law defence of fair comment. Under the common law, the public interest requirement of the defence has been interpreted broadly to include criticism of public figures, and critiques or reviews of goods or services. McColl J observed in *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484; [2007] NSWCA 364 at 516) “the concept of public interest is a critical mechanism for the purpose of the law of defamation by which the law seeks to resolve the tension between privacy and freedom of speech”.

It is therefore recommended that the public interest element of the defence be retained in its current form.

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<sup>4</sup> See for example *Orr v Isles* [1965] NSWLR 677 at 697 per Taylor J; *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510 at 553 per Smithers J.



**Recommendation 12:**

Amend clause 31 of the Model Defamation Provisions to clarify that the proper material must be:

- a) set out in the publication in specific or general terms,
- b) notorious,
- c) linked in the publication, or
- d) otherwise apparent from the context of the publication.

*This is reflected in the draft MDAPs in amendments to cl 31(5).*

### 13. Defences—honest opinion in the employer-employee context (Question 13)

Within the defence of honest opinion are two provisions covering circumstances where:

- the defamatory matter was the defendant’s employee’s or agent’s opinion (cl 31(2)), and
- the defamatory matter was the opinion of a commentator who was not an employee or agent, published by the defendant (cl 31(3)).

In either case, it is a defence to the publication if the relevant person’s opinion related to a matter of public interest, and was based on proper material.

The defences can only be defeated if the plaintiff can show (respectively) that the defendant did not believe that the employee or agent honestly held the opinion at the time of publication (cl 31(4)(b)), or that the defendant had reasonable grounds to believe that the commentator did not honestly hold the opinion at the time of publication (cl 31(4)(c)).

Some stakeholders raised concerns that this requirement means that journalists, editors and other individuals involved in the production of the allegedly defamatory matter are being unnecessarily joined to defamation cases against the primary defendant of the publisher, in order to prove their “state of mind” for the purposes of cl 31(4). A number of submissions suggested that consideration be given to amending cl 31 to prevent claims being made against journalists personally, or the joinder of journalists as parties to proceedings.

However, the weight of judicial authority indicates that such joinder is not required by the current form of cl 31(4), and so no change to cl 31 is necessary.

Other stakeholders were opposed to changing the clause because protecting journalists from being sued directly or jointly with their employers may confer upon publishers far greater protection from liability, 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.

**Recommendation 13:**

No change to clause 31(4)(b) of the Model Defamation Provisions.

### 14. Serious harm threshold (Question 14)

It is becoming more common for defamation law to be used for “neighbourly disputes” and “backyard defamation” claims, whereby ordinary citizens sue each other for comments made on digital platforms. Stakeholders submitted that, while some matters are relatively minor with low damages awarded, they come with disproportionately high legal costs and take up significant court resources.

In keeping with the objects of the MDPs, the reforms aim to ensure that only a plaintiff who has suffered sufficient harm to reputation can sue for defamation. This reflects the balance between protecting individuals' reputation and not unduly limiting freedom of expression. This balance may be maintained by three potential mechanisms:

- a) a defence of triviality (currently included in the MDPs),
- b) using a “proportionality” concept and other case management considerations to determine whether a case may proceed, and
- c) introducing a serious harm threshold (recommended).

### **Defence of triviality**

Clause 33 of the MDPs provides a defence to the publication of defamatory matter if the defendant proves that the circumstances of the publication were such that the plaintiff was unlikely to sustain harm. This is known as the defence of triviality.

The defence of triviality is challenging to mount successfully and has generally only been effective in circumstances where the publication of the material has been limited, such as where an oral statement is made in front of a small number of people.<sup>5</sup> The defence is arguably not adequately performing its role of excluding minor or insignificant cases where the overall circumstances of the matter suggest the plaintiff has not sustained real harm.

### **Proportionality and other case management considerations**

In Australia, trivial claims have also been managed by the courts through the application of proportionality reasoning, depending on the jurisdiction. Proportionality reasoning is the concept that the costs of bringing legal proceedings (including the cost to the courts and the legal costs of pursuing and defending a claim) should be proportionate to the damages at stake. Where a damages award is likely to be low, the disproportionately high costs in pursuing a complex claim are hard to justify. The Discussion Paper posed the question of whether proportionality and other case management considerations should be incorporated into a serious harm test. Stakeholder responses were mixed.

In *Bleyer v Google Inc.*,<sup>6</sup> the NSW Supreme Court considered proportionality in assessing whether to grant a permanent stay to proceedings under s 60 of the *Civil Procedure Act 2005*.<sup>7</sup> The court considered the interest of the claimant, the legal complexity of the case, and the resources of the court and the parties. The disproportionality of the claimant's interest (to vindicate the claimant's reputation in the eyes of one person) and the resources required to determine the claim was such that it was a species of abuse of process.<sup>8</sup> However, the court was explicit that such a finding of disproportionality would be rare given that the primary function of the court is to assess the claim according to law and the merits of the case.<sup>9</sup>

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<sup>5</sup> See *Chappell v Mirror Newspapers Ltd* (1984) Aust Torts Reports 80-691 and *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749.

<sup>6</sup> [2014] NSWSC 897.

<sup>7</sup> Section 60 of the *Civil Procedure Act 2005* (NSW) states “[i]n any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.”

<sup>8</sup> *Ibid* at [62].

<sup>9</sup> *Ibid* at [63].

Several stakeholders argued that proportionality and case management considerations should be incorporated in the threshold test. However, most stakeholders argued against this proposal including because:

- it would introduce conceptual confusion to incorporate considerations of proportionality and abuse of process into any statutory minimum threshold of seriousness,
- it would undermine the efficacy of the minimum threshold of seriousness by imposing too high a bar, and
- these matters are best addressed by principles of case management at common law or under civil procedure legislation in each jurisdiction.

The issue of proportionality is best dealt with by jurisdictions through their own procedural rules and not through the MDPs.

### **A ‘serious harm’ threshold**

Some overseas jurisdictions have excluded trivial actions by introducing a threshold of harm, placing the onus on the claimant to establish that a defamatory matter materially harmed his or her reputation. Section 1 of the *Defamation Act 2013* (UK) provides that “a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant”. The term “serious harm” is not defined and has been interpreted by UK courts as an ordinary word in common usage, on a case-by-case basis.

Submissions to the Discussion Paper were overwhelmingly in favour of introducing a serious harm threshold in the MDPs. Some argued that a serious harm threshold would reduce the risk of plaintiffs succeeding in claims and being awarded damages and costs despite having suffered no real harm. Some noted that the current defence of triviality is only considered once costs have been incurred in litigation whereas introducing the serious harm test could potentially reduce the need for litigation – to the benefit of all parties and the courts.

The serious harm threshold could deter unnecessary claims by clarifying that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the plaintiff’s reputation. This would prevent vexatious or oppressive litigation tactics by claimants where no significant harm is suffered.<sup>10</sup> Lawyers would advise clients not to commence litigation if their dispute is relatively minor, in the expectation that the threshold would not be met.

Arguments against the introduction of a serious harm threshold include that:

- determining the extent of harm is currently and properly a judicial function, within the context of determining damages, whereas making serious harm a further element for a plaintiff to prove in order to succeed may result in this question being directed to juries, and
- the threshold test would complicate already difficult claims for self-represented plaintiffs – the introduction of a threshold test raises evidentiary questions as to whether a plaintiff must adduce evidence to establish serious harm, or whether a plaintiff can invite a court to infer that actual or likely serious harm would be suffered,
- determining what amounts to serious harm is not simple. A separate monetary threshold should apply, allowing courts to dismiss claims for less than that amount.

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<sup>10</sup> Phoebe Galbally, ‘A ‘Serious’ Response to Trivial Defamation Claims: An Examination of S 1(1) of the *Defamation Act 2013* (UK) from an Australian Perspective’ (2015) 20 *Media and Arts Law Review*.

## The proposal to introduce a ‘serious harm’ threshold and its practical effects

The concept of serious harm in the *Defamation Act 2013* (UK) mentioned above is considered a useful and proportionate approach which goes some way to addressing these concerns. The provision extends to situations where publication is “likely” to cause serious harm in order to cover situations where the harm has not yet occurred at the time the action for defamation is commenced. Subsection 2 indicates that for the purposes of the section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss. This reflects the fact that bodies trading for profit are already prevented from claiming damages for certain types of harm such as injury to feelings, and are in practice likely to have to show actual or likely financial loss.

The introduction of a serious harm threshold in Australia may require time for courts to flesh out what constitutes “serious” in the circumstances of particular cases. It is recommended that the definition of seriousness be left up to the courts and that providing a definition in the legislation would not necessarily improve certainty for litigants or the courts.

Courts could be assisted by considering UK jurisprudence, particularly the judgment in *Lachaux*, which, despite not being directly applicable in Australia due to legal differences between the UK and Australia, would still be helpful for analysis and analogy.<sup>11</sup> In this case, the UK Supreme Court considered that serious harm included:

- actual serious harm, established as a finding of fact by reference to the impact of the defamatory material is shown to have had, and
- actual serious harm which is likely to be caused (probable future harm established by fact).

In assessing actual serious harm, the court had regard to:<sup>12</sup>

- a) the scale of the publications,
- b) the fact that the statements complained of had come to the attention of at least one identifiable person in relevant jurisdiction that knew the claimant,
- c) that the publications were likely to have come to the attention of others who either knew the claimant or would come to know the claimant in future, and
- d) the gravity of the statements themselves.

It would be reasonable to expect courts to consider a range of forms of harm when making an assessment, including damage to reputation and economic loss.

Some submissions which supported the adoption of a serious harm threshold based on s 1 of the *Defamation Act 2013* (UK) were concerned that this would impact the presumption of damage. In the UK, the Supreme Court decision in *Lachaux* concluded that the common law presumption of damage in the UK did not survive the introduction of the serious harm threshold in s 1 of the *Defamation Act 2013* (UK). A serious harm threshold would not necessarily displace the presumption of damage to reputation in Australia, given cl 7 of the Model Provisions, however it would render the presumption otiose as the plaintiff would be required to show the “seriousness” of the harm.

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<sup>11</sup> *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27.

<sup>12</sup> *Ibid* at [14] and [21].

## Whether to include factors guiding courts' interpretation of serious harm

Some stakeholders advocating for a serious harm test also suggested that the MDPs should provide factorial guidance as to its interpretation. For example, one submission suggested the following factors:

- seriousness of the imputation or imputations alleged to be conveyed by the matter,
- extent of the alleged publication,
- alleged audience of the publication, and
- circumstances of the publication.

However, on balance such guidance is unlikely to provide additional certainty regarding whether the threshold of serious harm would be met, and may add complexity and artificiality to the assessment of serious harm by the courts. The factors outlined above would inevitably be considered by the court. The serious harm threshold contained in s 1 of the *Defamation Act 2013* (UK) does not contain factorial guidance.

It is therefore recommended that the proposed serious harm threshold should not contain a prescribed list of factors.

## Whether to retain the defence of triviality

Stakeholders were also asked to consider whether the defence of triviality in cl 33 of the MDPs should be retained if a serious harm threshold were to be introduced. Stakeholders were divided on this issue.

Some stakeholders argued the provision should be retained, because the defence of triviality in cl 33 is formulated to focus on the circumstances of publication and matters within the power of the publisher, whereas the seriousness threshold focuses on the tendency of the matters complained of to adversely affect the claimant.

Other stakeholders argued the provision should be abolished, because it would serve no useful purpose, as the serious harm threshold should be effective in removing spurious or trivial claims before the courts. Stakeholders referred to the sufficiency of the UK approach, which does not include such a defence. Stakeholders also noted limitations in the defence of triviality, including the requirement in cl 33 that the defendant prove that “the plaintiff was unlikely to sustain *any* harm” (emphasis added). It was also noted that the abolition of the defence would not preclude applications being brought on the basis of an abuse of process or on other bases recognised at common law. For these reasons it is recommended that the triviality defence be abolished.

### 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.

***This is reflected in the draft MDAPs in a new cl 7A(1).***

- b) Abolish the defence of triviality.

***This is reflected in the draft MDAPs in deletion of cl 33.***

## 15. Responsibilities and liability of digital platforms (Question 15)

Question 15 raised several broad questions about the responsibilities and liability of digital platforms, including whether existing protections such as innocent dissemination are adequate and whether a safe harbour provision or take down procedure would be beneficial.

The issues raised by stakeholders in response to these questions are extremely complex and require further consultation and consideration. The DWP will consult on the issues further before making draft recommendations to CAG.

On 26 July 2019, the Australian Competition and Consumer Commission published the *Digital Platforms Inquiry Report*. The findings in the report are broadly relevant to considering issues around determining the liability of digital platforms for defamatory content published online. The Commonwealth Government response to the ACCC *Digital Platforms Inquiry Report* is expected by the end of 2019. The DWP will consider both the ACCC report and the Commonwealth Government response as part of its policy development and further consultation on these issues.

### Recommendation 15:

The Defamation Working Party will undertake a separate review process to consider potential amendments to the Model Defamation Provisions to address the responsibilities and liability of digital platforms for defamatory content published online. This will include consideration of the issues raised by the Australian Competition and Consumer Commission in the *Digital Platforms Inquiry Report* published on 26 July 2019. Recommendations will be made to CAG following this process.

## 16. Remedies—clarifications related to damages quantum (Question 16)

Clause 35 of the MDPs provides that, unless the situation warrants an award of aggravated damages, the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is \$250,000, adjusted annually by CPI or similar (\$407,500 from 1 July 2019).

There are two key issues relating to the interpretation of cl 35:

- a) whether the statutory cap on damages for non-economic loss operates as a scale or as a cut-off, and
- b) the applicability of the statutory cap when a court is satisfied that aggravated damages should be awarded.

In relation to the first issue, the majority of stakeholders supported the view that cl 35 was intended to create a scale or range of damages (that is, to set the cap on the maximum awarded for the worst damage) rather than being a “cut-off”.

Some stakeholders noted that if the cap were simply treated as a “cut-off”, it would be near impossible for courts to compare the harm to reputation in one case to the harm done in another.

It is recommended that the legislation be amended to clarify that the cap operates as a maximum amount in a scale of damages for non-economic loss. In other words, damages for non-economic loss must not exceed the cap, but may be less than the cap.

In *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 (***Bauer (No 2)***) the Victorian Court of Appeal found that cl 35(2) applies so as to make the statutory cap entirely inapplicable if the circumstances warrant aggravated damages. The result of the decision is that if a defamation claim warrants the award of aggravated damages, the court may award any amount for non-economic loss, without having regard to the cap.

There is a question about whether this is appropriate. Stakeholders have expressed different views on this issue.

Some stakeholders opposed amendment on the basis that the interpretation of cl 35 is sufficiently clear following the *Bauer (No 2)* decision and the decisions which have followed it. It was suggested that large awards in recent defamation claims (for example, *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496) do not warrant concern about the efficacy of the statutory cap, as the cases are atypical and have involved serious reputational damage.

Other stakeholders submitted that the interpretation in *Bauer (No 2)* does not reflect what the legislature intended. They submitted that treating the cap as disposable reduces certainty in damages awards and disturbs the balance between freedom of speech and fair and effective remedies.

One stakeholder suggested that the current interpretation of cl 35(2) is hard to justify in principle as it “may result in an increasingly two-tiered system, where similar damage suffered by one plaintiff can result in a substantially higher damages award, just because the damages were aggravated in some way that does not wholly justify the difference in the awards”. It was also agreed that clarification is needed to ensure consistency between jurisdictions – that is, to avoid the risk of inconsistent awards between jurisdictions in cases where aggravated damages are awarded.

For these reasons, it is recommended that cl 35 be clarified to ensure that the cap on damages for non-economic loss applies regardless of whether aggravated damages are awarded. Aggravated damages should be awarded as a separate amount and should not impact on non-economic loss awards.

**Recommendation 16:**

Amend clause 35 to clarify that the cap:

- a) sets the upper limit on a scale of damages which may be awarded for non-economic loss in defamation claims

*This is reflected in the draft MDAPs in a new cl 35(2).*

- b) is applicable regardless of whether aggravated damages apply. Aggravated damages, if warranted, should be awarded separately to general compensatory damages, rather than as part of an award of compensatory damages.

*This is reflected in the draft MDAPs in new cls 35(2A) and (2B).*

## 17. Remedies—multiple proceedings (Question 17)

Clause 35 of the MDPs limits damages for non-economic loss to a maximum of \$250,000, as adjusted each year.<sup>13</sup> Damages can exceed that amount only if aggravated damages are warranted.

Clause 23 of the MDPs prevents further proceedings being brought for damages against the same defendant in relation to publication of the same or like matter, except with leave of the court.

Some stakeholders have expressed concern that cl 35 of the MDPs, which applies the cap on non-economic loss to “defamation proceedings” rather than the cause of action or publication, could encourage plaintiffs to commence multiple proceedings in order to circumvent the cap.

In those cases, stakeholders have found that it is difficult to obtain orders to consolidate proceedings. In response to the NSW Statutory Review, several stakeholders cited the Victorian Court of Appeal’s decision in *Buckley v The Herald and Weekly Times Pty Ltd* [2009] VSCA 118, in which it was held

<sup>13</sup> The cap is adjusted annually in accordance with the increase in weekly earnings for full time working adults. From 1 July 2019 the cap will be \$407,500: Government Gazette No 55, 31 May 2019.

that, in general, consolidation orders should only be made on rare occasions and should be limited to cases where the multiple actions brought could have been confined to one writ. The Court also considered that consolidation orders should not be made where they could expose a plaintiff to a substantial risk of real prejudice, including because only one cap on damages would apply.

Some stakeholders submitted that no change is required because:

- a) clause 23 precludes plaintiffs from bringing multiple proceedings for damages relating to the same or like matter against the same defendant without leave of the court,
- b) the provisions are sufficiently clear in that they provide that any subsequent proceeding for which leave is required and obtained under cl 23 is a separate proceeding for the purposes of cl 35 and can be considered separately for damages, and
- c) in any event, where publications sued on are essentially the same, defendants can claim mitigation pursuant to cl 38(1)(d), which permits a defendant to rely on the fact that the plaintiff has brought proceedings for damages for defamation in relation to “any other publication of matter having the same meaning or effect as the defamatory matter” which is in question in the proceedings.

However, despite these protections, it is clear from stakeholder submissions that the limitation in cl 35 to “proceedings” is encouraging the filing of multiple proceedings where one could have sufficed.

Applying the cap to each cause of action is not recommended. As noted in one submission, “strictly speaking, every publication of defamatory matter gives rise to a cause of action. A newspaper article published to 100,000 recipients thus gives rise to 100,000 causes of action”.

Instead, it is recommended that cl 23 be amended to require that leave of the court is required to bring further proceedings in relation to publication of same or like matter by the same or associated defendants. Associated defendants should be considered to be any employees, publishing contractors, or associated entities (as defined in the *Corporations Act 2001* (Cth)) of the defendant.

#### **Recommendation 17:**

Amend clause 23 to require that leave of the court is required to bring further proceedings in relation to publication of same or like matter by the same or associated defendants. Associated defendants are any employees, contractors, or associated entities (as defined in the *Corporations Act 2001* (Cth)). Leave must be obtained before commencing further proceedings.

***This is reflected in the draft MDAPs in amendments to cl 23.***

## **18. Other**

Question 18 in the Discussion Paper asked stakeholders:

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

A wide range of issues were raised in response to this question. These issues were put to stakeholders for comment through supplementary submissions. From that process, two further issues were identified as warranting amendments to the MDPs.

### **Election to trial by jury**

Clause 21 of the MDPs provides that both parties to defamation proceedings may elect for the proceedings to be tried by jury, and that such an election must be made at the time and in the manner prescribed by the rules of the court in which the proceedings are to be tried. Under cl 21(3) the court may order that the proceedings are not to be tried by jury if the trial requires a prolonged examination



of records or involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

There is competing precedent about whether a party's election to trial by jury under cl 21 can be unilaterally revoked. In *Chel v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWCA 379 the NSW Court of Appeal held this is impermissible. In *Kencian v Watney* [2015] QCA 212 the Queensland Court of Appeal held it is permitted.

A practical issue raised by the court in *Chel* was that allowing an electing party to withdraw its election at any time before a jury is empanelled could lead to wasted expenditure on the part of the other parties and perhaps the court, in preparing for a jury, rather than a judge only trial. It may also give rise to opportunities for the electing party to 'judge-shop' by waiting to see which judge is allocated before choosing the mode of trial.

It is therefore recommended that the decision in *Chel*, that a party's election to trial by jury is irrevocable, should be incorporated into cl 21.

**Recommendation 18:**

Amend clause 21 to provide that a party's election to trial by jury is irrevocable, consistent with the decision of the NSW Court of Appeal in *Chel v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWCA 379.

*This is reflected in the draft MDAPs in amendments to cl 21.*

**Death of a party**

Clause 10 of the MDPs provides that a person (including a personal representative of a deceased person) cannot assert, continue or enforce a cause of action for defamation in relation to the publication of defamatory matter about a deceased person or by a person who has died since publishing the matter.

One stakeholder submitted that the consequence of cl 10 is that in cases where one party dies during the course of proceedings, the proceedings come to an end, irrespective of how far they have progressed. It was argued that it is in the interests of justice for the court to have discretion to determine liability for costs in any case.

**Recommendation 19:**

Amend clause 10 to allow a court to determine questions of costs, if it is in the interests of justice to do so, despite the death of a party, in any proceedings commenced before the death of the party.

*This is reflected in the draft MDAPs in amendments to cl 10.*