



RESPONSE TO SUPPLEMENTARY QUESTIONS TO STAKEHOLDERS

Australia's Right to Know (ARTK) coalition of media organisations provides the following comments regarding the *Council of Attorneys-General Review of Model Defamation Provisions, Supplementary questions to stakeholders*.

We have responded to the supplementary questions which we consider are material to media organisations. We have not dealt with questions which we consider to either be adequately covered by the Discussion Paper or beyond of the scope of the Review.

18a – Formalised pre-litigation processes

ARTK considers that the issuance of a written concerns notice should be a mandatory requirement prior to defamation litigation being commenced. However beyond that ARTK considers that pre-litigation processes should be a matter for the parties to determine between themselves depending on the circumstances of each dispute.

ARTK notes the requirement under s 6 of the *Civil Dispute Resolution Act 2011 (Cth)* for a genuine steps statement to be filed in Federal Court proceedings at the time of filing the application commencing proceedings, however failure to take genuine steps to try to resolve the issues in dispute generally does not have any consequences, and case management judges usually pay very little attention to it. If pre-litigation requirements are to be introduced, they must be enforced. For example, failure to send a written concerns notice prior to commencing proceedings could be a ground for the proceedings to be summarily dismissed as an abuse of process.

ARTK notes that the publication of an apology or correction are matters already covered in s 38 of the Model Defamation Provisions (MDP) as factors to be taken into account in determining mitigation of damages. ARTK considers that the takedown of the defamatory matter from the internet should be added as a further factor to be taken into account under that section.

18b – Choice of Law Rules

ARTK considers that s 11 of the MDP is not effective in preventing forum shopping due to the recent influx of proceedings being commenced in the Federal Court, which has the effect in practice of ensuring that the

matter is heard by a judge alone without a jury. In this regard, ARTK refers to our response to Question 8 of the Discussion Paper.

18c – Jurisdiction of courts and tribunals

ARTK strongly opposes the suggestion that civil and administrative tribunals, local/magistrate's courts and the Federal Circuit Court should have jurisdiction to determine defamation claims. Defamation claims are technical in nature, and should be heard by specialist defamation lawyers who understand the issues at play.

18d – Plaintiff to certify falsity

ARTK considers this to be a desirable proposal, but is of the view that this can be adequately dealt with under existing summary dismissal procedures.

18e – Defeasance provisions

ARTK does not wish to make a submission on this issue at this time, but reserves the right to comment if this proposal is taken further.

18f – Defamatory capacity

ARTK does not wish to make a submission on this issue at this time, but reserves the right to comment if this proposal is taken further.

18g – Definition of 'matter'

ARTK strongly supports this proposal, and refers to its initial submission in respect to Question 18 of the Discussion Paper in this regard.

18h – Election to trial by jury

ARTK does not wish to make a submission on this issue at this time, but reserves the right to comment if this proposal is taken further.

18i – Summary judgment procedure

ARTK strongly supports this proposal, and refers to its initial submission in respect to Question 18 of the Discussion Paper in this regard.

ARTK considers that a matter should be capable of being summarily dismissed on the following bases:

- a. A person is not entitled to bring defamation proceedings;
- b. A claimant has not issued a written concerns notice prior to commencing proceedings (if this is introduced as a mandatory requirement as proposed in 18a above);
- c. A defence of absolute privilege is raised;
- d. Other proceedings have been brought for the same publication;
- e. There are issues of proportionality;
- f. Proceedings have been commenced out of time;
- g. Claims are hopeless on their face;
- h. Claims have been brought for an ulterior purpose; or
- i. There is arguably no defamatory meaning on the face of the publication.

18j – Reversal of onus of proof of establishing truth or falsity of imputations

ARTK does not wish to make a submission on this issue at this time, but reserves the right to comment if this proposal is taken further.

18k – Pleading multiple defences

ARTK does not wish to make a submission on this issue at this time, but reserves the right to comment if this proposal is taken further.

18l – Absolute privilege defence

ARTK notes that absolute privilege already applies to court proceedings and to proceedings relating to professional standards applying to medical practitioners and legal practitioners (see Schedule 1 of the MDP). ARTK agrees that absolute privilege should also apply to proceedings and determinations relating to:

- a. sporting tribunals and judiciaries;
- b. regulatory bodies and industry bodies, such as the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA); and
- c. stock exchanges.

18m – Common-law defences: Hore-Lacey and consent

ARTK considers that if its recommendations made in respect of Question 9 of the Discussion Paper (contextual truth) are implemented, there would be no need to enact the Hore-Lacey defence in the MDP. However, if contextual truth is not fixed appropriately, then ARTK considers that the common law defences should remain available uniformly across all jurisdictions.

18n – Public figure defence

ARTK supports the proposal to introduce a public figure defence into the MDP. The drafting would need to carefully define the scope of a 'public figure' for the purposes of the defence.

18o – Death of a party

ARTK does not wish to make a submission on this issue at this time, but reserves the right to comment if this proposal is taken further.

18p – Simplifying jury questions

ARTK does not wish to make a submission on this issue at this time, but reserves the right to comment if this proposal is taken further.

18q – Jury determination of damages

ARTK strongly opposes amending the MDP so that juries determine damages.

18r – Alternative remedies

ARTK strongly opposes the ordering of permanent injunctive relief in defamation cases involving the media.

18s – Indemnity costs clause

ARTK agrees that indemnity costs provisions equivalent to those in s 40(2)(a) of the MDP should be introduced for situations where a plaintiff unreasonably failed to make a settlement offer or agree to a settlement offer by the defendant.

18t – Costs consequences for unfounded allegations of malice

ARTK does not wish to make a submission on this issue at this time, but reserves the right to comment if this proposal is taken further.

18u – Scope of jurisdiction

ARTK agrees that any orders for injunctive relief should be confined appropriately in their geographical scope, but considers that this is an issue beyond the scope of the MDP.

18v – Criminal defamation

ARTK strongly believes that criminal defamation should be abolished.