

24 January 2020

Review of Model Defamation Provisions  
c/o Policy, Reform and Legislation  
NSW Department of Communities and Justice  
GPO Box 31  
Sydney NSW 2001

Sent by email to [defamationreview@justice.nsw.gov.au](mailto:defamationreview@justice.nsw.gov.au)

Dear Members of The Defamation Working Party

## **ARTS LAW SUBMISSIONS – REVIEW OF MODEL DEFAMATION PROVISIONS**

### **Introduction and executive summary**

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The Arts Law Centre of Australia ('Arts Law') is a national community legal centre providing free or low-cost advice to artistic creators residing in all Australian states and territories. Defamation law is one of the many legal areas that Arts Law advises on. Arts Law primarily provides pre-publication advice however also assists in the pre-litigation process through the review or drafting of correspondence between parties.

Arts Law makes this submission on behalf of our broad client base including those who practice as:

- authors including journalists;
- digital storytellers (such as podcasters);
- film makers including documentary film makers;
- visual artists including photographers; and
- peak or professional organisations which represent the interests of the above clients.

Arts Law did not make a previous submission to the February 2019 discussion paper, however we have been following the discussions around reform to the Model Defamation Provisions. As we have clients who may be impacted by the proposed amendments, we are writing to provide our support on a number of the proposed key changes released in the 'Model Defamation Amendment Provisions 2020 (Consultation Draft)'.

It is the overall position of Arts Law that there are several outdated provisions under the current legislation, especially as they apply in the digital era. These provisions have favoured plaintiffs

seeking to protect their reputations above freedom of expression. Arts Law wishes to provide support on recommendations 3, 4, 11 & 14 and provides brief comment on each of these.

### **Recommendation 3 - *Single Publication Rule***

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Arts law generally supports the recommendation of the introduction of a single publication rule similar to existing legislation in the United Kingdom. For online publications, applying the limitation period to the date the publication was first uploaded, rather than the date the material is downloaded would appear a sensible approach.

Under the current legislation, publishers are exposed to a high level of risk over publications that no longer have currency or relevance. Where legal action is commenced many years from the initial publication (under the current multiple publication provisions) a publisher may no longer have possession of materials, or have contact with employees who were present at the time of the alleged defamation, to support any relevant defences. This is particularly applicable to independent publishers who have limited resources to efficiently archive their research supporting publication of material.

### **Recommendation 4 - *Mandatory Issue of a Concerns Notice***

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Arts Law supports this recommendation and agrees that it could assist with promoting the speedy and non-litigious resolution of defamation disputes to require an aggrieved person to issue a concerns notice in writing to a publisher prior to commencing court proceedings. This mandatory step would be of benefit for parties who have limited access to legal resources and wish to resolve the matter swiftly and without the expense of court proceedings. It would also serve to discourage litigation and encourage negotiation.

### **Recommendation 11 - *Public Interest Defence***

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Arts Law supports the introduction of a public interest defence in order to strike a better balance between the ability to report on matters that are relevant to the public while ensuring that individuals reputations aren't unfairly damaged.

Arts Law commends the recommendation to consider the extent of compliance by publishers with industry codes and standards such as journalists' codes of ethics. Industry bodies such as the Australian Press Council and the Journalists Association have the relevant expertise and are well placed to guide publishers on such industry standards.

#### **Recommendation 14 – Serious Harm Threshold**

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Arts Law supports the introduction of a serious harm threshold which would seek to limit litigation to cases where the plaintiff can demonstrate that the publication is likely, or has caused serious harm, to them. Arts Law agrees this would remove the need for the triviality defence.

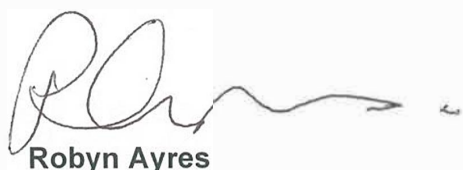
The introduction of a serious harm threshold would encourage freedom of expression and decrease the risk of litigation for artistic creators who are often publishing to a smaller audience where serious harm to a plaintiff's reputation would be unlikely.

#### **Conclusion**

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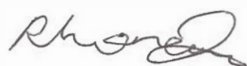
Arts Law appreciates the opportunity to make these submissions and welcomes any further discussion. Please contact Robyn Ayres (Chief Executive Officer) (02) 9356 2566 if you would like us to expand on any aspect of this submission, verbally or in writing.

#### **ARTSLAW**

A handwritten signature in black ink, appearing to be "Robyn Ayres", written in a cursive style.

**Robyn Ayres**

Chief Executive Officer

A handwritten signature in black ink, appearing to be "Roxanne Lorenz", written in a cursive style.

**Roxanne Lorenz**

Solicitor