24 January 2020

COMMUNICATIONS ALLIANCE LTD
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Mr Paul McKnight
Chair, Defamation Working Party
Executive Director
Policy, Reform and Legislation
NSW Department of Communities and Justice

Submitted via email only:
defamationreview@justice.nsw.gov.au

Dear Mr McKnight,

RE: Draft Model Defamation Amendment Provisions

Communications Alliance welcomes the opportunity to provide feedback to the Defamation Working Party (DWP) on the draft Model Defamation Amendment Provisions (MDAPs).

We note that Recommendations 3 (single publication rule), 14 (serious harm threshold) and 15 (separate review process in relation to digital platforms) are of particular interest to our members. Consequently, we will focus our commentary on these three recommendations.

At this stage, we do not have any particular objections to the other recommendations but highlight that we reserve final judgement of these recommendations to the extent that they interact with potential amendments to or application of the Model Defamation Provisions (MDPs) for online intermediaries.

Recommendation 3 – single publication rule

We welcome the recommendation to amend the MDPs to include a single publication rule in line with other relevant jurisdictions for the reasons outlined in our previous submission and in the Background Paper published by the DWP.

We agree that the date of first publication is most practically defined as the date on which the material under consideration is uploaded to a website. We also lend our support to a general one-year limitation period from the date of first publication, with the possibility of an extension where a Court finds that an extension (of up to 3 years) is just and reasonable. Overall, the suggested drafting associated with this recommendation appears useful and practical.

Recommendation 14 – serious harm threshold

We commend the DWP for recommending the inclusion of a serious harm threshold into the MDAPs. As recognised in the Background Paper, doing so will assist with striking the balance between protecting an individual's reputation and not unduly limiting freedom of speech in a practical manner, and is likely to reduce the burden on Courts by limiting the number of cases brought before them.

We also concur that a definition of seriousness or the inclusion of guiding factors into the MDAPs is impractical as the circumstances are likely to vary so widely that any definition or

guiding factors would need to be of such general nature that little or no additional certainty for litigants or publishers is likely to be derived from them.

We do not offer any additional drafting suggestions for Recommendation 14.

Recommendation 15 – separate review process in relation to digital platforms

Recommendation 15 proposes to postpone the amendment of the MDPs with respect to the potential responsibilities and liabilities of digital platforms to a 'stage 2' review process.

We agree that the questions around innocent dissemination, safe harbour and take-down processes for digital platforms are complex and warrant careful consideration. Consequently, we welcome a separate review that will be able to take into account Government's recent response to the Final Report of the ACCC's Digital Platforms Review (DPI).

Given the Background Paper specifically references the DPI, which included search engines in its scope, we assume that the foreshadowed review will also look at search engines and indexation in a defamation context.

However, we are concerned that the scope of the future review appears to be limited to digital platforms (including search engines) and does not appear to include other online intermediaries such as hosting providers, content providers or internet service providers (ISPs).

As explained in our previous submission, we believe that the MDAPs ought to put beyond doubt that the mere provision of a carriage service that can be used to access defamatory content does not amount to publication and, consequently, ISPs will not be required to rely on a defence (e.g. the 'innocent dissemination defence' or 'Broadcasting Services Act defence').

More broadly, the amended provisions ought to make clear that the mere facilitation of dissemination does not amount to publication of the defamatory matter. In cases where, prima facie, an online intermediary may be liable as a publisher, practical and meaningful safe harbour provisions ought to provide certainty to both individuals making a claim of defamation and intermediaries.

We urge the DWG, therefore, to ensure that the stage 2 review puts the status of ISPs beyond doubt and also considers other online intermediaries alongside the more 'traditional' digital platforms.

Other considerations

We note that the recent Online Safety Reform Proposals include the introduction of a new take-down and reporting scheme to tackle cyber abuse directed at Australian adults.

Under the proposed regime, the eSafety Commissioner can request the "take-down of serious cyber abuse material that is menacing, harassing or offensive and has the intended effect of causing serious distress or harm."[1] It is easily conceivable that the material that may be subject to take-down requests under this new proposal could also be covered under the MDAPs.

Consequently, it will be important to carefully consider the interaction between the two regimes to avoid duplication or, worse, friction between the two regimes.

[1] *Fact sheet – Online Safety Reform Proposals – Adult Cyber Abuse Scheme*, https://www.communications.gov.au/have-your-say/consultation-new-online-safety-act

[redacted]

We look forward to further engaging with the DWP and other relevant stakeholders over the development of MDPs that are fit-for-purpose in a digital age.

Please contact Christiane Gillespie-Jones (c.gillespiejones@commsalliance.com.au) if you have any questions or wish to discuss.

Yours sincerely,

John Stanton

Chief Executive Officer
Communications Alliance