



Review of Model Defamation Provisions

% Policy, Reform and Legislation
NSW Department of Communities and Justice
GPO Box 31
Sydney NSW 2001

Dear Mr McKnight

RE: Model Defamation Amendment Provisions 2020 (Consultation Draft)

CHOICE appreciates the opportunity to comment on the draft Model Defamation Amendment Provisions 2020 (**draft MDAPs**). To continue to ensure that CHOICE, other not-for-profit consumer groups and news organisations continue to assist consumers by addressing the information asymmetry that frequently occurs between them and businesses an effective, nationally consistent defamation law needs to exist.

As Australia's leading consumer advocacy organisation, CHOICE works to provide consumers with the best information on products and services through reviews, advice and campaigns. As part of this process, the organisation often publicises the details of companies who have not acted in the best interests of consumers. Any information that is published goes through a thorough investigation and verification process in the months prior. However, if companies could sue for defamation, there is no doubt some would use this power to silence criticism and undermine consumer rights. To date, there has never been a single successful legal defamation action against the organisation. In order for CHOICE to continue to keep people informed we need defamation laws to protect reasonable criticism of corporate interests.

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For this reason, CHOICE supports all of the proposed changes in the draft MDAPs. The following four changes will be particularly beneficial to consumers:

1. introducing a **serious harm threshold** to require plaintiffs to establish that a publication caused, or is likely to cause, serious harm to their reputation.

CHOICE strongly supports the continued exclusion of for-profit corporations to be able to sue for defamation. The introduction of a serious harm threshold assists in narrowing the test for situations when corporations are able to sue for defamation.

2. introducing a **single publication rule** to provide that the applicable one-year limitation period runs from the date material is uploaded to the internet.

CHOICE supports this amendment because it provides a concise, nationally-consistent approach when interpreting material published on digital platforms.

3. introducing a new **public interest defence**, modelled on the New Zealand common law defence of responsible communication on a matter of public interest.

This proposed amendment has the greatest significance for CHOICE's work. For example, in 2006 CHOICE launched its annual Shonky Awards. The Shonky Awards exist to name and shame the shonkiest products and companies taking advantage of Australian consumers. From its inception, the Shonky Awards set out to very deliberately - backed by extensive investigation and evidence - injure the reputation of companies to pressure them to do better by their customers in circumstances where they repeatedly failed to respond to individual consumer complaints. 14 years later, CHOICE continues to call out safety risks, misleading advertising and poorly performing products and the Shonky Awards are achieving their original objective.

The public interest defence would arguably capture both the Shonkys, and CHOICE's wider investigative work as well. CHOICE's investigative team has looked into a wide and diverse range of industries, from mortgage broking to the funeral industry. Releasing the results of these investigations is in the public interest, and there is public benefit in using the media to pressure companies to do the right thing.

4. introducing a new **defence for peer-reviewed statements and assessments** in scientific and academic journals.

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As with point 3, this defence will assist CHOICE in its work protecting consumers, but would be particularly applicable in consumer areas where scientific research is a key feature of a product's known qualities, such as alternative medicines.

Reform still required

We recommend removing the exemption for corporations with less than ten employees. The same reasons for publicly calling out bad behaviour still exist with smaller corporations and the exemption is not justified.

CHOICE at times avoids highlighting some problems with businesses who hire less than 10 employees because of the risk that defamation presents, even when our claims are well-researched and based on facts. This harms consumers - there are certain kinds of small businesses that have structured what they do to exploit consumers. They are less likely to be exposed for predatory or harmful behaviour by journalists or public interest bodies like CHOICE due to the high costs and higher potential of legal action. Notable examples of predatory industries with small business structures include:

- property advice providers that have no obligation to provide good quality advice in the interest of their clients.
- providers of high-interest payday loans targeting people on low incomes.
- providers of niche alternative therapies with no proven evidence base.

CHOICE is happy to discuss our concerns on this in further detail.

CHOICE also understands that the Councils of Attorneys-General have agreed that the Defamation Working Party (**DWP**) will undertake a separate 'Stage 2' review process to consider potential amendments to the MDAPs that address the responsibilities and liability of digital platforms for defamatory content published online, including issues raised by the ACCC in the *Digital Platforms Inquiry Report* and the Commonwealth Government's response. We welcome the opportunity to comment on that process at the appropriate time.

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For further information please contact CHOICE on jsteward@choice.com.au

Yours sincerely,



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