

Defamation (Model Provisions) and Other Legislation Amendment Bill 2021

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic Violence, make this statement of compatibility with respect to the Defamation (Model Provisions) and Other Legislation Amendment Bill 2021 (the Bill).

While I accept that there may be an alternative view as to the compatibility of the Bill, it is my opinion that the amendments in the Bill are compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill amends the *Defamation Act 2005* (Defamation Act) and the *Limitation of Actions Act 1974* (Limitation of Actions Act) to implement the *Model Defamation Amendment Provisions 2020* (MDAPs).

In November 2004, the Attorneys-General of the States and Territories agreed to support the enactment in their respective jurisdictions of uniform model provisions in relation to the law of defamation called the Model Defamation Provisions (MDPs). Each State and Territory subsequently enacted legislation to give effect to the MDPs. In Queensland, the MDPs were enacted in the Defamation Act.

Each State and Territory is a party to the Model Defamation Provisions Intergovernmental Agreement. The Agreement establishes the Model Defamation Law Working Party (DWP). In 2018, the former Council of Attorneys-General (Council) reconvened the DWP, led by New South Wales, to review the MDPs.

The DWP recommended to the Council that certain amendments be made to the MDPs. In July 2020, the Council agreed to support the enactment of the MDAPs by each jurisdiction.

In Queensland, the MDAPs are implemented by the Bill. Some of the more significant reforms include amendments (primarily to the Defamation Act) to:

- introduce a single publication rule similar to section 8 of the *Defamation Act 2013* (UK) (UK Act) for multiple publications of the same defamation matter by the same publisher (or an associate of the publisher) so that the start date of the one-year limitation period for each publication runs from the date of the first publication; and, for an electronic publication, from when it is uploaded or sent to the recipient;

- introduce a serious harm threshold, requiring the plaintiff to establish that the publication has caused or is likely to cause serious harm to their reputation and the abolition of the defence of triviality;
- make it mandatory to issue a concerns notice prior to going to court;
- clarify the offer to make amends process, including the required content and the timeframes;
- introduce two new defences - a public interest defence based on the defence of "publication on matter of public interest" in section 4 of the UK Act and providing that peer-reviewed statements/assessments in a scientific or academic journal are privileged; and
- clarify that the cap on damages for non-economic loss sets the upper limit on a scale and applies regardless of whether aggravated damages apply.

Further, the Bill will amend the *Heavy Vehicle National Law and Other Legislation Amendment Act 2019* (Amendment Act) to repeal sections 10 and 11 before their automatic commencement on 27 September 2021.

The commencement of sections 10 and 11 would cause unintended and inconsistent mass and dimension enforcement outcomes for Performance Based Standards (PBS) vehicles detected operating off route compared with other heavy vehicle classes, including the initiation of court proceedings instead of the issue of a penalty infringement notice, or the use of additional enforcement powers, such as a direction not to move the vehicle until the breach has been rectified or to move it to a safe location.

At the Infrastructure and Transport Ministers' Meeting on 20 November 2020, Ministers agreed to repeal sections 10 and 11. The repeal of these section will retain the status quo in relation to PBS vehicles detected operating off route and provide time for the issues to be addressed in a more fundamental and holistic way as part of the HVNL Review being led by the National Transport Commission.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my view, the expected repeal of sections 10 and 11 of the Amendment Act is compatible with the HR Act.

In relation to the amendments to the Defamation Act and the Limitation of Actions Act, I consider the following human rights to be relevant:

- Right to freedom of expression (section 21 of the HR Act);
- Right of protection of reputation (section 25 of the HR Act); and
- Right to a fair hearing (section 31 of the HR Act).

Amendments promoting human rights

Right to freedom of expression (section 21 of the HR Act)

Defamation law is inherently a restriction on the right to freedom of expression. Several amendments, including: the introduction of a single publication rule and changes to the limitation period; the introduction of a serious harm threshold; and creation of two new defences for publishers, will promote the *right to freedom of expression*.

The right to freedom of expression is considered ‘*one of the essential pillars of a democratic system of government, because it enables citizens to freely and effectively participate in the political, social, economic and other affairs of their community.*’¹

The European Court of Human Rights (ECHR) describes the right as ‘*one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment*’.

The right to freedom of expression protects the right of all persons to hold an opinion without interference and the right of all persons to seek, receive and express information and ideas (including verbal and non-verbal communication). The forms of protected expression are broad; expression can be oral, written, in print, art or any other medium and means of expression may include spoken or sign language, books, newspapers, pamphlets, posters, banners, dress, legal submissions, and audio-visual, electronic and internet-based expressions.

The right to freedom of expression and the free flow of information and ideas between people and through the media, particularly about public and political issues, is considered to be a touchstone of healthy democratic society. Indeed, the underlying values and interests represented by a right to the freedom of expression have been described as “*freedom, self-actualisation and democratic participation for individuals personally; and freedom, democracy under the rule of law and ensuring governmental transparency and accountability for society generally*”.²

A central concern with defamation laws is whether any measures taken have a ‘chilling effect’ on debates on matters of legitimate public interest. A chilling effect may arise, in the words of the ECHR, where a person engages in self-censorship, due to a fear of disproportionate sanctions or a fear of prosecution under overbroad laws. This chilling effect works to the detriment of society as a whole.

Several amendments in the Bill are being progressed in order to promote freedom of expression and guard against the chilling effect. This is consistent with the objects of the MDPs which include “*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 area where freedom of expression is promoted by the Bill is the introduction of the single publication rule and changes to the limitation period. The ECHR has commented on the importance of appropriate limitation periods. Appropriate limitation periods support freedom of expression by ensuring that defamation actions can be defended unhindered by the passage

¹ *Magee v Delaney* [2012] VSC 407, 181.

² *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 at [22], per Bell J.

of time. It is well established that the inadequacy of appropriate procedural safeguards may form serious impediments to freedom of expression.³

Another area where freedom of expression is promoted is the introduction of the serious harm threshold. The new serious harm threshold is based on section 1 of the UK Act whereby:

- (a) a statement is not defamatory unless its publication has caused or is likely to cause serious harm to reputation of the plaintiff; and
- (b) the onus is on the plaintiff to establish serious harm.

Freedom of expression is promoted by discouraging trivial or unmeritorious claims that represent a disproportionate response to the actual injury. The concept of serious harm in the UK Act is considered a useful and proportionate approach.

Freedom of expression is further promoted by the introduction of a new public interest defence based on section 4 of the UK Act. This defence applies where the defendant can prove that the statement complained of was, or formed part of, a statement on a matter of public interest and the defendant reasonably believed that publishing the statement was in the public interest.

Unlike the UK approach, the provision specifies some non-exhaustive factors the court may take into account when considering the defence. They include: 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; and the importance of freedom of expression in the discussion of issues of public interest.

Allowing the publication of matters of public interest can contribute greatly to public debate. The defence removes any barriers which may have previously prevented the media publishing important stories whilst encouraging careful research and practices in journalism.

Amendments which introduce a new defence for peer-reviewed statements and assessments in scientific and academic journals, modelled on section 6 of the UK Act, also promote the right to freedom of expression. There was general agreement among 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 critical public discussion, and scrutinise material without facing the threat of defamation.

The ability of persons to make public statements; scientists and academics to express peer-reviewed statements freely; and the media to report matters of public interest, is an important part of the democratic process and ensuring accountability. Also enabling interested individuals and/or members of the public to receive information about matters of public, scientific or academic interest promotes freedom of expression.

Right to a fair hearing (section 31 of the HR Act).

The Bill contains several amendments which promote the ***right to a fair hearing*** by ensuring that justice can be delivered in defamation proceedings in a timely, fair and efficient manner.

³ <https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-1/16804915c5> (page 8).

The right to a fair hearing affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal. It applies to both criminal and civil proceedings and guarantees such matters must be heard and decided by a competent, impartial and independent court or tribunal. What constitutes a ‘fair’ hearing depends on the facts of the case and requires the weighing of a number of public interest factors.

Broadly, this right ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to their opponent and also embraces principles of unimpeded access to courts, a reasonably expeditious hearing, rights to legal advice and representation, and the privilege against self-incrimination.

The following reforms in the Bill are consistent with and promote the right to a fair hearing:

- amendments to the “offer to make amends” defence so that it is determined by the judge, not the jury, to reduce the potential for jury prejudice; and
- amendments that provide that a party’s election to trial by jury may only be revoked with the consent of all the parties to the proceedings or, if all the parties do not consent, with the leave of the court if it is satisfied it is in the interests of justice.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 HR Act)

(a) the nature of the right

Right to privacy and reputation (section 25 of the HR Act).

Section 25 of the HR Act gives rise to the ***right to privacy and reputation***. The right to privacy and reputation is based on the prohibition on interference with privacy and attacks on reputation contained in article 17 of the International Covenant on Civil and Political Rights (ICCPR).

The United Nations Human Rights Committee (UNHRC) has not defined ‘privacy.’ It is generally understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.⁴

The underlying value of the right to privacy is the ‘*protect[ion] and enhance[ment of] the liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere.*’⁵ It protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad, but at its most basic is concerned with notions of personal autonomy and dignity. The UNHRC has said that it refers to those aspects of life in which a person can freely express his or her identity, either alone or in relationships with others.⁶

The right protects privacy in that personal sense (and in the sense of personal information, data collection and correspondence) but also extends to an individual’s private life more generally. For example, the right to privacy protects the individual against interference with their physical

⁴ See <https://www.ag.gov.au/sites/default/files/2020-03/Privacyandreputation-guidancesheet.pdf>.

⁵ *Director of Housing v Sudi* (2010) 33 VAR 139, 29 (Bell J).

⁶ *Coeriel and Aurik v The Netherlands* (Communication No 45/1991) [10.2].

and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender).

The right to privacy under the HR Act protects individuals against unlawful or arbitrary interference with their privacy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law. According to the ECHR, an interference will be lawful if it is authorised by a law that is adequately accessible and formulated with sufficient precision to enable a person to regulate his or her conduct by it.⁷ These are concepts that are consistent with the rule of law principles. The concept of arbitrariness in the context of the right to privacy carries a human rights meaning of ‘*capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought*’.⁸ Reputation in the context of the right refers to one’s appraisal by others. The HR Act protects against unlawful attacks on reputation.

Subsection 25(2) of the HR Act protects individuals from having their reputation unlawfully attacked. This captures attacks which are intentional and based on untrue allegations. Like all rights in the Act, the right to privacy and reputation can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Unlike the right to privacy in section 25(1) of the HR Act which refers to unlawful and arbitrary inference, the right to reputation does not extend to arbitrary attacks on a person’s reputation. The Victorian Government Solicitor’s office indicates that, for the purposes of the Victorian HR Act, this means “*that if there is lawful authority for a disclosure of information about someone else, s. 13(b) will not be breached, even if a particular attack may be unreasonable. For example, if the conduct is defensible under defamation law, the right will not be interfered with (see Defamation Act 2005 (Vic))*”.⁹

The UNHRC has stated that countries have an obligation to adopt legislative and other measures to give effect to the prohibitions in article 17, including the prohibition on attacks on reputation.

Article 17 of the ICCPR does not set out the reasons for which the guarantees in it may be limited. However, limitations contained in other articles, for example, those which are necessary in a democratic society in the interests of national security, public order, the protection of public health or the protection of the rights and freedoms of others, might be legitimate objectives in appropriate circumstances in respect of the prohibition on interference with privacy and attacks on reputation.

(b) The nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

⁷ *Sunday Times v United Kingdom* [1979] ECHR 1, [49].

⁸ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 114.

⁹ <https://humanrights.vgso.vic.gov.au/charter-guide/charter-rights-by-section/section-13-privacy-and-reputation>.

One of the objectives of the Defamation Act is to “*enact provisions to promote uniform laws of defamation in Australia*” (section 3(a) of the Defamation Act). Currently, each Australian State and Territory is a party to the Model Defamation Provisions Intergovernmental Agreement under which parties agree to achieve and maintain uniformity in respect of the law of defamation within Australia.

The decision to achieve and maintain uniformity of defamation law is based on the fact that it is commonplace for the same matter to be published in more than one Australian jurisdiction and individual and corporate publishers should not need to consider the potential impact of different State and Territory defamation laws before deciding whether to publish material. Uniformity also assists both parties in knowing their rights and limitations under the law and prevents forum shopping among jurisdictions due to different legal frameworks.

Other purposes of defamation laws are to appropriately balance freedom of expression with the protection of reputation against harm. This is reinforced in the objects section of the MDPs (section 3(b) and (c) of the Defamation Act) which makes specific reference to these two rights and this will remain unchanged under the DWP’s recommendation.

John Fleming’s *The Law of Torts* states that “*both interests are highly valued in our society, one as perhaps the most dearly prized attribution of civilised man, the other the very foundation of a democratic society*”.

The purpose of the Bill, and amendments promoting freedom of expression and limiting the right to privacy and reputation, is to uniformly amend the MDPs to strike a more appropriate balance between these two conflicting rights. During consultation undertaken by the DWP, some stakeholders expressed the view that the current balance unreasonably limits freedom of expression particularly about matters of public interest.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The purpose of the limitations on the right to privacy and reputation in the Bill is to promote the right to freedom of expression. As indicated above, the amendments are proposed to uniformly amend the MDPs to strike a more appropriate balance between these two conflicting rights.

In relation to the limitation period for defamation actions, the DWP background paper states that “*most stakeholders strongly supported the introduction of a single publication rule on the basis that:*

- *digital publication and online archiving create 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*”.¹⁰

¹⁰ Council of Attorneys-General Review of the Model Defamation Provisions – Background Paper at 11.

As indicated above, the ECHR has commented on the importance of appropriate limitation periods. Appropriate limitation periods support freedom of expression by ensuring that defamation actions can be defended unhindered by the passage of time and it is well established that the inadequacy of appropriate procedural safeguards may form serious impediments to freedom of expression.¹¹

Turning to the serious harm threshold, the DWP noted that 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, whilst some of these matters are relatively minor with low damages awarded, they come with disproportionately high legal costs and take up significant court resources.¹²

Consistent with the objects of the MDPs, the Bill aims 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 will be maintained by introducing a serious harm threshold and omitting the defence of triviality. Further, preventing matters, which are trivial or minor in nature, or which do not result in any significant harm to a plaintiff, being the subject of lengthy and expensive litigation also promotes and encourages freedom of expression.

As indicated in the DWP background paper, the apparent inability of journalists and the media to rely on the current defence of qualified privilege in practice, due to an overly restrictive approach to the reasonableness test, is indicative that original policy objective of this defence is not being met.¹³ In response, stakeholders advocated for the introduction of a specific public interest defence in order to protect the ability of journalists and media to publish on matters of public concern. The publication of matters which are of public interest or concern supports freedom of expression.

Aspects of the public interest defence promote the right to privacy and reputation. For example, the court when determining whether the defence is established may consider such facts as whether a person’s side of the story is included, and whether the publication relates to the performance of public duties. These factors may be balanced against others that direct the court to consider freedom of expression, and how it should be weighed against the protection of a person’s privacy.

The new defence for peer-reviewed statements and assessments in scientific and academic journals, modelled on section 6 of the UK Act, should foster the ability for academics and scientists to freely express their views on their areas of expertise (if peer-reviewed), engage in uninhibited debate and critical public discussion, and scrutinise material without facing the threat of defamation.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

¹¹ See <https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-1/16804915c5> (page 8).

¹² *Council of Attorneys-General Review of the Model Defamation Provisions – Background Paper* at 25.

¹³ *Council of Attorneys-General Review of the Model Defamation Provisions – Background Paper* at 20, 25.

There are no less restrictive and reasonably available ways to achieve the policy objective of the Bill. The approach taken in the Bill acknowledges the importance of freedom of expression but includes appropriate safeguards to protect an individual's reputation. For example,

- the new one year limitation period can be extended by the court for a period of up to three years if the court is satisfied it is just and reasonable in all the circumstances of the case;
- instead of providing a triviality defence to be determined at the end of proceedings once significant litigation costs have been incurred for both parties, the Bill proposes a serious harm test to be determined before a trial commences (unless special circumstances exist justifying postponement) - this approach ensures meritorious claims can be pursued, with those actions which currently fail due to the operation of the triviality defence struck out early without accruing significant costs; to the benefit of all parties and the courts;
- in order to prove the new public interest defence, the defendant is not only required to prove that potential defamatory imputations concern an issue of public interest but also that they reasonably believed that the publication of the matter was in the public interest; and
- the new defence for peer-reviewed statements and assessments in scientific and academic journals will 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.

(e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation.

An analysis of whether the amendments in the Bill which limit the right to privacy and reputation are justified requires consideration of whether a fair balance has been struck between the right to privacy and reputation and the right to freedom of expression.

In keeping with the objects of the MDPs, the Bill aims to ensure that only a plaintiff who has suffered, or is likely to suffer, serious harm to reputation (and serious financial harm in the case of corporations) can sue for defamation. This reflects the balance between protecting individuals' reputation and not unduly limiting freedom of expression. As indicated above, the amendments to the MDPs are intended to strike a more appropriate 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. This is achieved through various mechanisms.

For example, while the amendments in relation to the single publication rule and the limitation period limit the right to privacy and reputation, the ECHR has held that proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with freedom of expression.¹⁴

¹⁴ See <https://www.5rb.com/wp-content/uploads/2013/10/Times-Newspapers-Ltd-v-UK-ECHR-10-Mar-2009.pdf> (page 14).

Given that the amendments will apply in a wide range of contexts, it is considered that the amendments also provide flexibility for courts, when considering cases, to ensure rights are respected.

(f) any other relevant factors

The Bill is important for two additional reasons:

1. to ensure Queensland fulfils its obligations under the Model Defamation Provisions Intergovernmental Agreement; and
2. to limit exposure to forum shopping.

One of the drivers for the introduction of the MDPs was the intention to reduce forum shopping among states and territories which had previously applied different defamation laws. A significant tool to reduce forum shopping was the introduction of an intra-jurisdictional "choice of law" test in section 11 of the MDPs. Section 11 of the MDPs (section 11 of the Defamation Act) introduced a choice of law test for defamation proceedings "*if there is a multiple publication of matter in more than one Australian jurisdictional area*" (s 11(2)). This requires the court to determine with which Australian state or territory jurisdiction "*the harm occasioned by a publication of matter has its closest connection*" according to a non-exhaustive list of factors (s 11(3)):

- the place at the time of publication where the plaintiff was ordinarily resident or, in the case of a corporation, the place where the corporation had its principal place of business at that time;
- the extent of publication in each relevant Australian jurisdictional area;
- the extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area; and
- any other matter that the court considers relevant.

Given the changes to the MDAPs might be considered more/less favourable to a party depending on the circumstances of their claim/defence, there is potential for forum shopping until the legislation of all jurisdictions is uniform again. This risk is further heightened because the defamation landscape has changed. While the internet was a popular medium of publication in 2005, it is now the dominant medium. Social media, which fuels many current defamation proceedings, did not exist in the early 2000s. Accordingly, publication in multiple jurisdictions via online distribution is now more commonplace. There will be circumstances where the application of the section 11(3) factors does not definitively point to one state or territory over another, raising the possibility of increased preliminary disputes under section 11.

The following consequences may arise if forum shopping occurs:

- given that in some matters the MDAP revisions could be determinative, both parties may invest significant resources in making or opposing applications to transfer proceedings to different jurisdictions based on perceived advantage;
- any such applications would increase the expense and delay involved in defamation proceedings filed during the time when laws differ; and

- given defamation forum shopping has been in abeyance for 15 years, it is difficult to know how courts in different states might apply the section 11 choice of law test, or how it would work in the federal jurisdictional context.

Conclusion

I consider that the Bill is compatible with the HR Act because it limits a human right only to the extent that is reasonable and demonstrably justified in accordance with section 13 of the Act.

While I acknowledge the amendments in the Bill limit the right to privacy and reputation and in doing so may be open to conclude that the amendments are incompatible with human rights, it is my view that the limitation is reasonable and justified and appropriately balanced with the right to freedom of expression.

SHANNON FENTIMAN MP
Attorney-General and Minister for Justice,
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