



Defamation (Model Provisions) and Other Legislation Amendment Bill 2021

Report No. 9, 57th Parliament
Legal Affairs and Safety Committee
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Legal Affairs and Safety Committee

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All web address references are current at the time of publishing.

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Abbreviations

Attorney-General	Hon SM Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence
Bill	Defamation (Model Provisions) and Other Legislation Amendment Bill 2021
committee	Legal Affairs and Safety Committee
Council	Council of Attorneys-General
Defamation Act	<i>Defamation Act 2005</i>
DJAG	Department of Justice and Attorney-General
DTMR	Department of Transport and Main Roads
DWP	Model Defamation Law Working Party
HVNL	Heavy Vehicle National Law
Heavy Vehicle National Law Act/HVNL Act	<i>Heavy Vehicle National Law and Other Legislation Amendment Act 2019</i>
HRA	<i>Human Rights Act 2019</i>
Limitation of Actions Act	<i>Limitation of Actions Act 1974</i>
LSA	<i>Legislative Standards Act 1992</i>
MAG	meeting of Attorneys-General
MDAPs	Model Defamation Amendment Provisions 2020
MDPs	Model Defamation Provisions
PBS	performance based standards
QLS	Queensland Law Society
Regulator/NHVR	National Heavy Vehicle Regulator
UK Act	<i>Defamation Act 2013 (UK)</i>
4ZZZ	4ZZZ Radio

Chair's foreword

This report presents a summary of the Legal Affairs and Safety Committee's examination of the Defamation (Model Provisions) and Other Legislation Amendment Bill 2021.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff, the Department of Justice and Attorney-General and the Department of Transport and Main Roads.

I commend this report to the House.



Peter Russo MP

Chair

Recommendation

Recommendation

2

The committee recommends that the Defamation (Model Provisions) and Other Legislation Amendment Bill 2021 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 26 November 2020 under the *Parliament of Queensland Act 2001* and the *Standing Rules and Orders of the Legislative Assembly*.¹

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Women and the Prevention of Domestic and Family Violence
- Police and Corrective Services
- Fire and Emergency Services.

The functions of a portfolio committee include the examination of bills and subordinate legislation in its portfolio area to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the *Human Rights Act 2019*
- for subordinate legislation – its lawfulness.²

The Defamation (Model Provisions) and Other Legislation Amendment Bill 2021 (Bill) was introduced into the Legislative Assembly and referred to the committee on 20 April 2021. The committee is to report to the Legislative Assembly by 4 June 2021.

1.2 Inquiry process

On 27 April 2021, the committee invited stakeholders and subscribers to make written submissions on the Bill. Six submissions were received; see Appendix A for a list of submitters.

The committee received a public briefing about the Bill from the Department of Justice and Attorney-General (DJAG) and the Department of Transport and Main Roads (DTMR) on 10 May 2021. A transcript is published on the committee's web page; see Appendix B for a list of officials at the briefing.

The committee received written advice from the department in response to matters raised in submissions.

The submissions, correspondence from the department and transcript of the briefing are available on the committee's webpage.

1.3 Policy objectives 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 and
- the *Heavy Vehicle National Law and Other Legislation Amendment Act 2019* (Heavy Vehicle National Law Act) to repeal sections 10 and 11 before their commencement (due on 27 September 2021).

¹ *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

² *Parliament of Queensland Act 2001*, s 93; and *Human Rights Act 2019* (HRA), ss 39, 40, 41 and 57.

These are discussed in more detail in chapter 2 of the report.

1.4 Consultation prior to the introduction of the Bill

In regards to consultation on the Defamation Act amendments proposed in the Bill, the explanatory notes state:

In reviewing the MDPs, the DWP [Model Defamation Law Working Party] undertook an extensive public consultation process over a two year period which included the public release of a discussion paper, background paper and draft amendments for comment, four stakeholder roundtables and the engagement of an expert panel comprised of judges, academics, defamation practitioners and the NSW Solicitor-General.

The heads of jurisdiction and legal stakeholders in Queensland were consulted during the DWP's consultation process. Additionally, information about the DWP's consultation processes was uploaded onto the Department of Justice and Attorney-General's community consultation page.³

In regards to consultation on the proposed amendments to the Heavy Vehicle National Law Act, the explanatory notes state:

The heavy vehicle amendments were developed by the National Transport Commission and the Regulator [National Heavy Vehicle Regulator] in consultation with state and territory government transport and enforcement agencies. Consultation was also undertaken with peak transport industry organisations and other key stakeholder representatives.

While Western Australia and the Northern Territory are not participating jurisdictions at this time, they have been consulted on the development of these amendments.⁴

The explanatory notes also advise that stakeholders indicated support for all amendments.⁵

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation

The committee recommends that the Defamation (Model Provisions) and Other Legislation Amendment Bill 2021 be passed.

³ Explanatory notes, p 5.

⁴ Explanatory notes, p 5.

⁵ Explanatory notes, p 5.

2 Examination of the Bill

This section discusses the Bill's proposed amendments and details submitters' comments.

2.1 Amendments to the Defamation Act and Limitation of Actions Act

2.1.1 Background and policy intent

The Attorneys-General of the States and Territories agreed in November 2004 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). The MDPs were subsequently enacted. In Queensland, the MDPs were enacted in the Defamation Act.⁶

Each State and Territory is a party to the Model Defamation Provisions Intergovernmental Agreement. The Agreement establishes the Model Defamation Law Working Party (DWP). The functions of the DWP include reporting to the Council of Attorneys-General (Council) on proposals to amend the MDPs. In 2018, the Council reconvened the DWP to review the MDPs and consider whether their policy objectives remained valid and the provisions were appropriate for the purpose of achieving their objectives. The review, led by New South Wales, was conducted in 2019 and 2020.⁷

The review process included 2 rounds of public consultation, 4 stakeholder roundtables and the engagement of an expert panel.⁸

The DWP recommended to the Council that certain amendments prepared by the Australasian Parliamentary Counsel's Committee be made to the MDPs. The Council agreed in July 2020 that all jurisdictions would enact and commence the Model Defamation Amendment Provisions 2020 (MDAPs) as soon as possible.⁹ DJAG advised:

at the meeting of Attorneys-General (MAG) on 31 March 2021, Attorneys-General agreed that New South Wales, South Australia, Victoria and all other jurisdictions that are able to do so will commence the MDAPs on 1 July 2021, with remaining jurisdictions to commence those provisions as soon as possible thereafter.¹⁰

The Bill fulfils:

Queensland's commitment to introduce the Model Defamation Amendment Provisions, as well as Queensland's obligations under the Model Defamation Provisions Intergovernmental Agreement, and ensures continued uniformity of defamation law in Australia.¹¹

DJAG clarified why it is important that jurisdictions achieve and maintain defamation law uniformity, stating that it is:

based on the fact that it is commonplace for the same matter to be published in more than one Australian jurisdiction and it is important for potential [plaintiffs] and publishers to know their rights and limitations under defamation law, without having to consider differing state and territory laws.¹²

⁶ Explanatory notes, p 1.

⁷ Explanatory notes, p 1; DJAG, correspondence, 6 May 2021, p 1; DJAG, public briefing transcript, Brisbane, 10 May 2021, p 2.

⁸ DJAG, correspondence, 6 May 2021, p 1.

⁹ Explanatory notes, p 1.

¹⁰ DJAG, correspondence, 6 May 2021, p 1.

¹¹ DJAG, correspondence, 6 May 2021, p 1.

¹² DJAG, correspondence, 6 May 2021, p 1.

In her introduction for the Bill, the Attorney-General stated that the amendments to the Defamation Act and the Limitation of Actions Act are 'aimed at protecting reputations from serious harm whilst encouraging responsible free speech'.¹³ The Attorney-General continued:

The amendments will discourage and prevent expensive litigation for minor or insignificant claims; otherwise encourage the early resolution of defamation claims; ensure that the law of defamation does not place unreasonable limits on the freedom of expression by encouraging open and transparent reporting and public discussion here in Queensland; and modernise provisions to apply more appropriately to digital publications.¹⁴

2.1.2 Defamation law amendments

The Bill proposes to implement the MDAPs and includes amendments to:

- introduce a single publication rule for multiple publications of the same defamatory matter by the same publisher or an associate of the publisher so that:
 - the start date of the 1-year limitation period for each publication runs from the date of the first publication
 - for an electronic publication, the start date runs from when it is uploaded for access or sent to the recipient rather than when it is downloaded or received
- provide flexibility to extend the limitation period by up to 3 years running from the date of publication where it is just and reasonable to do so and to enable pre-trial processes to be concluded
- introduce a serious harm element for an action for defamation, coupled with the abolition of the defence of triviality, so that:
 - a statement will not be defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the plaintiff, with the onus on the plaintiff to establish serious harm and, if the plaintiff is a corporation, that serious financial loss has been caused or is likely to be caused by the publication
 - if raised by a party, a judicial officer is generally to determine whether the serious harm element is established as soon as practicable before trial
- provide for certain individuals to be counted as employees of a corporation for the purpose of determining whether the corporation can sue for defamation
- require a plaintiff, before defamation proceedings are commenced, to give a concerns notice to the publisher of potential defamatory matter, subject to some exceptions: for example, if the court is satisfied it is just and reasonable to grant the plaintiff leave to commence despite non-compliance
- make various amendments with respect to the form, content and timing for concerns notices and offers to make amends
- clarify that a defendant may plead back imputations relied on by the plaintiff as well as those relied on by the defendant to establish the defence of contextual truth ensuring the defence operates as was originally intended

¹³ Hon SM Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, Queensland Parliament, Record of Proceedings, 20 April 2021, p 925.

¹⁴ Hon SM Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, record of proceedings, 20 April 2021, p 925.

- provide for a defence for the publication of defamatory matter concerning an issue of public interest:
 - where the defendant can prove that the statement complained of was, or formed part of, a statement on a matter of public interest and reasonably believed that publishing the statement was in the public interest
 - which includes a non-exhaustive list of factors the court may take into account when considering the defence
- make consequential amendments to the existing defence of qualified privilege to avoid overlap with the new public interest defence
- provide a defence in respect of peer-reviewed matters published in academic or scientific journals
- clarify when material is sufficiently identified in a publication of defamatory matter for it to be treated as proper material on which to base the defence of honest opinion
- confirm that the maximum amount of damages for non-economic loss specified by the MDPs operates to set an upper limit of a scale or range of damages and applies regardless of whether aggravated damages are awarded
- require the leave of the court to commence defamation proceedings against certain associates of a defendant previously sued for defamation in respect of the publication of the same matter
- provide that an election to have defamation proceedings tried by jury can be revoked only with the consent of all the parties or with the leave of the court on the application of a party
- allow a court to determine costs in respect of defamation proceedings that end because of the death of a party if it is in the interests of justice to do so
- allow notices and other documents to be sent to an email address specified by the recipient for the giving or service of documents
- make certain other consequential or related amendments.¹⁵

Subject to the Bill's passage, the amendments to the Defamation Act and Limitations of Actions Act are expected to commence on 1 July 2021, as is the case in New South Wales, Victoria and South Australia.¹⁶

General submitter comments

Submitters were generally supportive of the proposed amendments to defamation law.¹⁷ The Queensland Law Society (QLS) particularly welcomed the objective to achieve consistency across Australian jurisdictions but noted that 'some of the reforms introduce significant changes to this area of the law' and that 'The effect of these changes in Queensland and elsewhere across Australia should be monitored to ensure that any unintended consequences [that] arise can be identified and addressed'.¹⁸ DJAG noted QLS's comments in this regard.¹⁹

The committee received a late submission from Sue Chrysanthou SC who raised several matters relating to the national model provisions for defamation. The submission was received too late for the committee to consider it fully, incorporate it into the report, or for DJAG to respond to the submitter's

¹⁵ DJAG, correspondence, 6 May 2021, pp 3-4.

¹⁶ DJAG, correspondence, 6 May 2021, p 4.

¹⁷ Refer submissions 3, 4, and 5.

¹⁸ Submission 5, p 1.

¹⁹ DJAG, correspondence, 18 May 2021, attachment, p 1.

comments. The submission has been published and is available to read on the committee's inquiry webpage.

The committee notes that the submission is a briefing paper that addresses the 'consequences of commencing the *Defamation Amendment Act 2020 (NSW)*'.²⁰ As the amendments in the Queensland Bill propose to enact national model provisions which are mirrored in the NSW Act, the comments made in the briefing paper apply to the Bill.

Significant amendments contained in the Bill are addressed in more detail below.

2.1.2.1 Single publication rule (sections 10AA, 10AB, 32A and 41A of the Limitation of Actions Act)

Currently, under the Limitation of Actions Act, an action for defamation is to be brought within one year from the date of publication; however, the court has the power to extend the limitation period by up to 3 years if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in the 1-year period.²¹

Also currently, each publication of a defamatory matter is a separate cause of action, and publication occurs when it is received in a communicable form by at least one third party, or in the case of internet publications, when a third party downloads the webpage. Each time a webpage containing defamatory matter is downloaded, a separate cause of action arises even though the content is the same. This may result in a plaintiff avoiding the strict application of the limitation period.²²

In this regard, DJAG explained the proposed new single publication rule amendment:

To ensure the limitation period is effectual, particularly for internet publications, the Bill introduces a single publication rule based on section 8 of the *Defamation Act 2013 (UK)* (UK Act). The rule applies if a person publishes, or uploads in the case of internet publications, a statement to the public (first publication) and subsequently publishes or uploads that statement or a statement which is substantially the same. In the scenario, the single publication rule will apply so that the date of the first publication is the start date for the limitation period for all publications, except where the subsequent publication is materially different from the first publication.

The court will be empowered to extend the limitation period for up to three years from the date of publication if the plaintiff satisfies the court that it is just and reasonable to do so in all the circumstances of the case.²³

Submitter comments

LawRight expressed the view that the Bill 'appropriately balance[s] the protection of a plaintiff's reputation with the need to reduce the risk of 'endless' limitation periods caused by digital publication and online archiving'.²⁴

2.1.2.2 Serious harm and associated changes (new section 10A in the Defamation Act)

DJAG advised that during their consultation, stakeholders expressed concern that defamation law was becoming 'increasingly used for trivial, insignificant and vexatious claims'.²⁵ DJAG advised:

Currently there is no obligation on the plaintiffs to prove that harm was caused by the defamatory imputation; however, a defendant can rely on the defence of triviality where they can prove the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm.²⁶

²⁰ Submission 6, p 1.

²¹ DJAG, correspondence, 6 May 2021, pp 4-5.

²² DJAG, correspondence, 6 May 2021, p 5.

²³ DJAG, correspondence, 6 May 2021, p 5.

²⁴ Submission 4, p 2.

²⁵ DJAG, public briefing transcript, 10 May 2021, p 4.

²⁶ DJAG, public briefing transcript, 10 May 2021, p 4.

In this regard, the Bill introduces a serious harm element which provides that a statement will not be defamatory unless its publication has caused, or is likely to cause, serious harm to the reputation of the plaintiff, with the onus on the plaintiff to establish serious harm. This is similar to section 1 of the UK Act. If serious harm is raised, the relevant judicial officer is to determine the issue as soon as practicable before the trial commences unless there are circumstances justifying postponement.²⁷

The purpose of this amendment is to encourage the ‘early resolution of defamation proceedings by enabling the issue to be dealt with as a threshold issue’.²⁸

Serious harm is not defined in the Bill.²⁹ However, DJAG advised that as the amendment is based on the UK provision, ‘it is expected that the Australian courts will look to the jurisprudence developed in the UK when considering whether [serious harm] is established’.³⁰ DJAG continued:

There was a leading case called *Lachaux v Independent Print Ltd and Evening Standard Ltd*. In that case they considered that the serious harm threshold must be determined by reference to the actual facts about the impact rather than the meaning of the words having any presumption of reputational damage. This is dependent on an assessment of the actual consequences resulting from the publication and may include the size and characteristics of the relevant audience and the quality of the publication, and whether the claimant had any reputation to begin with.

The inherent tendency of the words ‘to cause harm’ is not on its own enough. Instead, the plaintiff is required to show that, through a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated, harm is or is likely to have been caused to the reputation. In that particular case, the finding of serious harm was actually based on the scale of the publication, the fact that the defamatory statements had come to the attention of at least one other person in the UK known to the claimant, that the publications were likely to come to the attention of others who knew the complainant and would come to know him in the future, and the gravity of the statements themselves.³¹

DJAG concluded that establishing serious harm under the Bill would be on a ‘case-by-case basis as we are not defining it in the provisions’.³²

Submitter comments

Submitters 4ZZZ Radio (4ZZZ) and LawRight were supportive of clause 6 (inserting new section 10A) and clause 20 (omitting section 33 – defence of triviality).³³ LawRight stated that the ‘introduction of [a serious harm] threshold will hopefully discourage spurious or trivial claims and allow a mechanism for such proceedings to be resolved promptly’.³⁴ In relation to the potential impact of the amendment on the legal profession, LawRight stated:

we often see relatively trivial claims commenced for ulterior or improper reasons and we are hopeful that this provision will limit the number of these matters that progress through the court. We also look forward to judicial interpretation about the practical procedure and relevant factors to consider when the serious harm question is heard and determined at an early stage in the court proceedings.³⁵

²⁷ DJAG, correspondence, 6 May 2021, p 5.

²⁸ DJAG, correspondence, 6 May 2021, p 5.

²⁹ DJAG, correspondence, 6 May 2021, p 5.

³⁰ DJAG, public briefing transcript, 10 May 2021, p 4.

³¹ DJAG, public briefing transcript, 10 May 2021, pp 4-5.

³² DJAG, public briefing transcript, 10 May 2021, p 5.

³³ Refer submissions 3 and 4.

³⁴ Submission 4, p 3.

³⁵ Submission 4, p 3.

4ZZZ explained the potential benefits of the serious harm amendment to its organisation:

As a publisher of news and current affairs content, we take measures to ensure that content broadcasted by us is accurate and fair-minded. In the rare case our collective work may be considered to be defamatory, it would be challenging for an organisation of our size to mount a significant legal defence, given our limited resources. This would be especially frustrating in cases where the perceived harm is trivial to the complainant. The problem with using a defence in a court case for us would be the significant time and resources that would go into mounting such a defence.

Therefore, we are very supportive of provisions that would see trivial claims dealt with before the need for court proceedings. The proposed amendments will not cover every case, but they may help with some stories where the overall consequences of the publication are minimal.³⁶

2.1.2.3 *Changes relating to corporations*

DJAG detailed the proposed changes relating to corporations:

- The Bill amends the definition of ‘employee’ in section 9 of the Defamation Act to include a person who is engaged in the day to day operations of the corporation (other than as a volunteer) and subject to the control and direction of the corporation for the purpose of avoiding courts needing to assess the definition and ensuring large corporations do not engage in employment practices so they can retain their ability to sue for defamation (eg by only engaging contractors).
- In regards to referencing a related company in the definition of ‘excluded corporation’, the Bill instead refers to an associated entity of another corporation within the meaning of section 50AAA of the *Corporations Act 2001* (Cth) so as to be consistent with other MDAPs which reference associated entities.
- If the plaintiff is a corporation, when establishing the serious harm element in new section 10A, a corporation must prove that serious financial loss has been caused, or is likely to be caused, by the publication.³⁷

2.1.2.4 *Changes to the pre-litigation process (Part 3 of the Defamation Act)*

The purpose of the proposed amendments to Part 3 of the Defamation Act is ‘to clarify and refine pre-litigation processes and procedures to better facilitate resolution of defamation disputes without litigation’.³⁸ DJAG summarised the proposed amendments to the pre-litigation process as:

- making it mandatory to issue a concerns notice prior to commencing defamation proceedings in court detailing the defamatory imputations to be relied upon before proceedings commence under new section 12B
- formalising the requirements of a concerns notice, which include the need to specify the location of the publication (eg a webpage address) and, if practicable, including a copy of the publication, as well as including information about the serious harm caused, or likely to be caused, or, in the case of corporations, the actual or likely serious financial loss caused by the publication (new section 12A). It is noted that a court may still enable a plaintiff to commence proceedings without going through the concerns process if the court is satisfied that it is just and reasonable to do so (new section 12B).
- providing further clarity around the ‘offer to make amends’ process including the required content and the timeframe. These amendments to sections 14 and 15 of the Defamation Act would require that the offer must be made as soon as reasonably practicable after receipt of

³⁶ Submission 3, p 2.

³⁷ DJAG, correspondence, 6 May 2021, p 6.

³⁸ DJAG correspondence, 6 May 2021, p 6.

the concerns notice and that the offer must remain open for at least 28 days from the date it is made.³⁹

DJAG summarised:

The purpose of the concerns notice is actually to encourage the plaintiffs to turn their minds to the serious harm element early in the proceedings to ensure that the publishers have sufficient information to enable them to make reasonable offers to make amends. If a reasonable offer to make amends is accepted and carried out effectively, it bars the defamation action. Basically, what happens is: the concerns notice is issued, and that provides the defendant with an opportunity to make an offer to make amends, which may be taking down relevant material, offering some compensation or giving an apology. All of those things combined are designed to try to assist people in resolving disputes before things get to the court.⁴⁰

Submitter comments

LawRight was supportive of clauses 8 and 9 of the Bill which make amendments to pre-trial procedures, particularly regarding mandatory concerns notices and the content of offers to make amends. LawRight had expressed several concerns in its MDAPs submissions and was 'pleased that the MDAPs clarified the relevant timing of the offer to make amendments' and that clause 8 'clarifies that the court can excuse non-compliance with the relevant provisions pursuant to the proposed s 12B(3)'. LawRight anticipated 'seeing further judicial interpretation of this section and in what circumstances the court will excuse non-compliance in circumstances where it is *just and reasonable* to do so'.⁴¹ LawRight concluded:

the introduction and improvement of the section relating to mandatory concerns notices will significantly aid the clients we assist. If independent advice is available for all parties, these amendments should help resolve a significant number of disputes without the need for proceedings to be commenced.⁴²

4ZZZ commented on the timeframe for responding to a concerns notice in that it differs between the Bill (28 days) and the broadcasting standards it operates under (60 days). 4ZZZ argued for some flexibility in the timeframe, explaining:

In line with the requirements of these bodies [the Australian Communication and Media Authority and the Community Broadcasting Association of Australia], 4ZZZ has developed a complaints process that tasks a responsible person with the receipt, acknowledgement and planned response of any complaint referring to the conditions of our broadcast license. We mention this here as it aligns very closely with the proposed mechanism for concern notices as proposed in the legislation, though it does specify a shorter period of time in which to make a response (28 days for defamation and 60 days for a breach of broadcast standards).

Aligning processes like this will make it considerably easier for an organisation like ours to handle complaints, but we would also like to highlight that while 28 days may be reasonable for an organisation with paid staff, our organisation, which is reliant on the work of volunteers may find it more difficult to prepare a response in the timeframe. We are fortunate to have some paid staff, but I would imagine for a similar community news organisation with a lower budget, this might be a challenge. Community news organisations would benefit from some flexibility in the legislation around meeting the requirement for a response within 28 days.⁴³

In regard to concerns about the timeframe for responding to a concerns notice, DJAG advised:

The Defamation Act currently provides that an offer to make amends cannot be made if 28 days have elapsed since the publisher was given a concerns notice, or a defence has been served in the action.

³⁹ DJAG, public briefing transcript, Brisbane, 10 May 2021, p 2; DJAG correspondence, 6 May 2021, p 6.

⁴⁰ DJAG, public briefing transcript, Brisbane, 10 May 2021, p 7.

⁴¹ Submission 4, p 2. Italics in original.

⁴² Submission 4, pp 2-3.

⁴³ Submission 3, p 1.

The changes to section 14 of the Defamation Act, which are consistent with the *Model Defamation Amendment Provisions 2020* (MDAPs), continue to reflect the current 28 day timeframe during which it is open for the publisher to make an offer to make amends, whilst reflecting the ability of a publisher to request a further particulars notice and vary the timeframes for responding to accommodate that process.⁴⁴

4ZZZ supported the amendments that would provide options for resolution outside of litigation for 2 reasons: it would be less expensive to prosecute and 'because as a community organisation it is in our best interest to maintain good relationships with our local community and prolonged legal actions could erode such relationships'.⁴⁵

2.1.2.5 New defences

DJAG advised:

- The Bill introduces in clause 16 a new public interest defence (section 29A of the Defamation Act) to protect reasonable public interest journalism, based on section 4 of the UK Act and will apply 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.⁴⁶
- The Bill specifies some non-exhaustive factors the court may take into account when considering the defence: for example, the seriousness of the defamatory imputation; whether the matter published relates to the performance of the public functions or activities of the person; and the importance of freedom of expression in the discussion of issues of public interest.⁴⁷
- As a result of the creation of the new public interest defence, the Bill amends the factors the court may take into account when considering the existing defence of qualified privilege in section 30 of the Defamation Act to ensure there is no overlap between it and the new public interest defence.⁴⁸
- The Bill also introduces a new defence in clause 18 (section 30A of the Defamation Act) which applies to the publication of a defamatory statement in a scientific or academic journal where an independent review of the statement's merit is undertaken by either the editor of the journal (if the editor has relevant expertise) or by one or more other persons with relevant experience.

DJAG continued:

The defence also extends to any peer reviewed assessment of the matter and to a fair summary of, or fair extract from, a matter or assessment to which a defence applies. The defence can be defeated if the plaintiff proves that the statement or assessment was not published honestly for the information of the public or the advancement of education.⁴⁹

DJAG provided an example of when the defence of scientific or academic peer review would apply:

The defence might apply where, for example, a scientist authors an article in a journal which casts doubt on the medical benefits of a treatment option developed by another scientist. Provided the article is independently reviewed, for example, by the editor of the journal who has expertise in that scientific issue or by one or more people with expertise in the relevant issue, the defence will apply. If, however, the plaintiff proves that the author's article was not published honestly for the information of the public

⁴⁴ DJAG, correspondence, 18 May 2021, pp 2-3.

⁴⁵ Submission 3, p 2.

⁴⁶ DJAG, correspondence, 6 May 2021, p 7.

⁴⁷ DJAG, correspondence, 6 May 2021, p 7.

⁴⁸ DJAG, public briefing transcript, Brisbane, 10 May 2021, p 2.

⁴⁹ DJAG, correspondence, 6 May 2021, p 7.

or advancement of education (for example in retaliation for personal issues between the parties), then the defence will be defeated.⁵⁰

Submitter comments

4ZZZ supported 'a consistent and clear definition of 'public interest' as defined in clause 16 of the Bill, including considerations for the protection of confidential sources in defamation hearings'.⁵¹ 4ZZZ explained why the amendment would assist smaller broadcasters:

The defence of Qualified Privilege pursuant to s 30 of the *Defamation Act 2005* (Qld) sets an extremely high bar for smaller broadcasters such as 4ZZZ to establish, particularly given the limited resources available to us. The proposal to include public interest as a defence is one that will assist those of us who do not have the same ability to pursue and establish Qualified Privilege.⁵²

Robert Heron indicated that one point worth clarifying is how an academic journal may be authoritatively declared to not be an infamous publication so as to bring greater certainty for academics and stated that it would be 'prudent to list graduate research professionals as Politically Exposed Persons'.⁵³ DJAG responded:

This clause mirrors the MDAPs to provide a defence for publishers of defamatory matter relating to a scientific or academic issue, published in a scientific or academic journal (including in electronic form) that has been subject to an independent review. A uniform approach will result in academics and scientists having greater certainty about their rights and obligations when publishing matter in peer reviewed scientific and academic journals.⁵⁴

2.1.2.6 Changes to existing defence provisions

The Bill proposes to replace section 26 to make it clear that, in order to establish the defence of context truth, a defendant may rely on (or plead back) substantially true imputations originally pleaded by the plaintiff.⁵⁵ DJAG stated:

This amendment will address case law which indicates that the defence, as drafted, may deprive the defendant of the full effect of the defence. For instance, where the plaintiff claims that all imputations, even those that are substantially true, are defamatory, it leaves no substantially true imputations for the defendant to rely on to base this defence. The replacement of the section will ensure the defence operates as intended.

To ensure there is no overlap between the qualified privilege defence in section 30 of the Defamation Act and the new public interest defence (new section 29A), the Bill will also make amendments to the factors the court may take into account when considering the defence of qualified privilege. The defence of qualified privilege protects situations where there is a legal or moral duty to make what might otherwise be defamatory statements (e.g. employment references and reporting suspected crimes to the police) and the conduct of the defendant in publishing must be reasonable in the circumstances.

The defence of honest opinion (section 31 of the Defamation Act) applies where the defamatory matter was an expression of opinion rather than a statement of fact, relates to a matter of public interest and is based on proper material. As indicated above, the Bill will clarify that an opinion is based on proper material if the material is: set out in specific or general terms in the publication; notorious; accessible

⁵⁰ DJAG, correspondence, 17 May 2021, p 2.

⁵¹ Submission 3, p 2.

⁵² Submission 3, p 2.

⁵³ Submission 2.

⁵⁴ DJAG, correspondence, 18 May 2021, p 4.

⁵⁵ DJAG, correspondence, 6 May 2021, p 7.

from a reference, link or other access point included in the matter; or otherwise apparent from the context in which the matter was published.⁵⁶

Submitter comments

LawRight expressed support for clause 19 of the Bill which amends section 31 of the Defamation Act (Defences of honest opinion), particularly the clarification for the purposes of this section as to when an opinion is based on proper material. LawRight stated that ‘the amendments recognise the ways in which contextual information is made available or accessible in digital publications which will increase the accessibility of this defence for online publications’.⁵⁷

2.1.2.7 Changes to damages

DJAG clarified the Bill’s amendments to section 35 of the Defamation Act would provide that a maximum amount that may be awarded for non-economic loss sets a scale or range, with the maximum amount to be awarded only in a most serious case.⁵⁸ DJAG continued:

Damages for non-economic loss are aimed at providing compensatory damages to cover the intangible matters of consolation for hurt feelings, damage to reputation and the vindication of the plaintiffs reputation. The current maximum amount for section 35 of the Defamation Act is \$421,000.

The amendments also require awards for aggravated damages to be made separately to awards for damages for non-economic loss so that the scale or range of damages for non-economic loss continues to apply even if aggravated damages are awarded. Aggravated damages may be awarded in defamation proceedings if, in the publication of the matter complained of or in the defence of the proceeding, the defendant engages in conduct that is improper, unjustifiable or not bona fide and such conduct increases the plaintiffs injury.⁵⁹

Submitter comments

4ZZZ advised that currently, for small organisations, a defamation action might be enough to shut them down, ‘if not cripple our ability to function’, which results in a ‘significantly higher risk of substantial loss than larger organisations’.⁶⁰ 4ZZZ continued:

In general, the provisions to instruct the court to award damages based on severity is commendable, but does little to mitigate such a risk. Insurance provides a level of security, but will inherently influence decision-making for stories of significant scope. This, in turn, makes it harder to produce stories for our communities without needing to take on risk beyond that of other, larger commercial news organisations.

Certainly, provisions for a fairer and more just allocation or assessment of damages, in line with the means of a publisher, would be preferable for the purposes of the Act.⁶¹

DJAG responded:

The Bill confirms that the maximum amount provided for in section 35 of the *Defamation Act 2005* (\$421,000 indexed annually) sets a scale or range of damages, with the maximum amount to be awarded only in a most serious case. An award of aggravated damages is to be made separately to any award of damages for non-economic loss.

⁵⁶ DJAG, correspondence, 6 May 2021, pp 7-8; the case law referred to in the quotation is referenced in the original as *Kermode v Fairfax Media Publications Pty Ltd* (2010] NSWSC 852); *Besser v Kermode* [2011] NSWCA 174.

⁵⁷ Submission 4, p 3.

⁵⁸ DJAG, correspondence, 6 May 2021, p 8.

⁵⁹ DJAG, correspondence, 6 May 2021, p 8.

⁶⁰ Submission 3, p 2.

⁶¹ Submission 3, p 2.

Damages for non-economic loss are aimed at providing compensatory damages to cover the intangible matters of consolation for hurt feelings, damage to reputation and the vindication of the plaintiff's reputation, and are not concerned with the capacity or means of the defendant to satisfy the award.⁶²

2.1.2.8 *Transitional arrangements*

The amendments to the Defamation Act would apply to defamatory matters published after the commencement of the amendments with changes to the Limitation of Actions Act similarly applying to publications of defamatory matter after commencement; however, the single publication rule in new section 10AB extends to the first publication before the commencement, but only in respect of subsequent publications after commencement of the section.⁶³

2.1.3 Defamatory content published online

The committee notes that the Bill does not cover the responsibilities and liability of digital platforms for defamatory content published online. In this regard, DJAG advised:

the implementation of the model defamation amendment provisions in Queensland concludes what is known as stage 1 of the review of the model defamation provisions. A second stage of the review is currently underway and is focused on the responsibilities and liability of digital platforms for defamatory content published online as well as defences applying to disclosures of criminal conduct and misconduct in the workforce.⁶⁴

During her introductory speech on the Bill, the Attorney-General advised that a stage 2 discussion paper had been released, calling for submissions, and that consultation on the discussion paper had concluded on 19 May 2021.⁶⁵

2.1.4 Outside the scope of the Bill

4ZZZ advocated for the development of a public interest defence fund to support public interest journalism and small publishers, especially community not-for-profits, in defending defamation proceedings on matters of public interest.⁶⁶ DJAG noted the suggestion and advised that the proposal was outside the scope of the Bill.⁶⁷

2.2 Amendments to the Heavy Vehicle National Law Act

2.2.1 Background of the Heavy Vehicle National Law Act

The *Heavy Vehicle National Law Act 2012* (HVNL Act) provides a single national law for the consistent regulation of heavy vehicle operations across most of Australia (with the exception of Western Australia and the Northern Territory) and also establishes the National Heavy Vehicle Regulator (NHVR) to administer the Heavy Vehicle National Law (HVNL), which is contained in the Schedule to the HVNL Act.⁶⁸ The HVNL:

aims to ensure that industry can operate across state borders without conflicting regulatory requirements. It regulates matters about the operation of heavy vehicles, such as mass and dimension requirements, safety standards, accreditation, the use of intelligent transport systems and driver fatigue.

⁶² DJAG, correspondence, 18 May 2021, pp 4-5.

⁶³ DJAG, correspondence, 6 May 2021, p 8.

⁶⁴ DJAG, public briefing transcript, Brisbane, 10 May 2021, p 3.

⁶⁵ Hon SM Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, Queensland Parliament, Record of Proceedings, 20 April 2021, p 925.

⁶⁶ Submission 3, p 2.

⁶⁷ DJAG, correspondence, 18 May 2021, p 5.

⁶⁸ DJAG, correspondence, 6 May 2021, pp 1-2.

The HVNL also places obligations on identified off-road parties involved in the transport and logistics chain (chain of responsibility parties) and includes enforcement powers and administrative provisions.⁶⁹

Operational provisions of the HVNL Act commenced on 10 February 2014.⁷⁰

2.2.2 Performance Based Standards (PBS) Scheme

The HVNL regulates road freight with 'tightly defined prescriptive vehicle mass and dimension rules which exist to ensure road safety and protect infrastructure'.⁷¹ DJAG continued:

The PBS Scheme, which has been in operation since October 2007, provides an alternative approach to heavy vehicle regulation, by focusing on how well the vehicle behaves on the road, rather than on the prescriptive vehicle mass and dimension rules.

...

The PBS Scheme offers the heavy vehicle industry the potential to achieve higher productivity and safety outcomes through innovative and optimised vehicle design, resulting in fewer trucks on the road for the same freight task, improved road safety, less transport emissions and a more competitive domestic economy.⁷²

2.2.3 Amendments in the Bill

The Bill proposes to repeal sections 10 and 11 of the *Heavy Vehicle National Law and Other Legislation Act 2019* as it was identified that their commencement will cause unintended and inconsistent mass and dimension enforcement outcomes for PBS vehicles detected off-route compared with other heavy vehicle classes. Unintended outcomes could include the initiation of court proceedings instead of the issue of a penalty infringement notice, and the use of additional enforcement powers, such as a direction not to move a vehicle until the breach has been rectified or to move it to a safe location.⁷³

DJAG elaborated:

Currently, PBS mass and dimension limits apply to PBS vehicles detected operating off-route, which means that a PBS vehicle can only be breached for being off-route (section 137) not for being over mass (section 96) or over dimension (section 102). The penalty for being off-route is considerably lower than for being over mass or over dimension.

The effect of sections 10 and 11 is that a PBS vehicle detected operating off-route will lose its PBS Vehicle Approval mass and dimension limits. The prescribed (and lower) mass and dimension limits under the Heavy Vehicle (Mass, Dimension and Loading) National Regulation would apply to the vehicle instead.

This would result in potential adverse and inconsistent enforcement outcomes for PBS vehicles found 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.

As PBS vehicles pose the same risk to infrastructure as any non-PBS vehicle when travelling on roads not assessed and approved for their use, the same penalties for breach of general mass and dimension requirements should apply.

The unintended consequences and issues identified are not solely the result of sections 10 and 11 but have exacerbated existing anomalies and inconsistencies within the current HVNL Act.⁷⁴

⁶⁹ DJAG, correspondence, 6 May 2021, p 2.

⁷⁰ DJAG, correspondence, 6 May 2021, p 1.

⁷¹ DJAG, correspondence, 6 May 2021, p 2.

⁷² DJAG, correspondence, 6 May 2021, p 2.

⁷³ Explanatory notes, p 2.

⁷⁴ DJAG, correspondence, 6 May 2021, p 9. Also refer to the public briefing transcript, Brisbane, 10 May 2021, pp 3-4.

DJAG advised that ‘extensive consultation with stakeholders’ had determined that no ‘operational remedies were available and that further legislative changes [were] required to address the unintended consequences’.⁷⁵

For this reason, the Bill proposes to repeal these provisions.

In regards to the timeframe, DJAG advised:

Due to the complexity of the access arrangements in the HVNL, it was determined that there was insufficient time to develop a nationally agreed policy approach that would ensure that further unintended consequences were not created and would also allow for the provisions to be amended prior to their automatic commencement on 27 September 2021.⁷⁶

The committee notes DJAG’s advice that this legislative approach is ‘supported by industry and jurisdictions’ and that the repeal of these 2 sections prior to their commencement 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 Heavy Vehicle National Law Review, currently being led by the National Transport Commission.⁷⁷

⁷⁵ DJAG, correspondence, 6 May 2021, p 9.

⁷⁶ DJAG, correspondence, 6 May 2021, p 9.

⁷⁷ DJAG, correspondence, 6 May 2021, pp 9, 10.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

Clauses 8 and 12 of the Bill raise minor issues of fundamental legislative principle.

Legislative Standards Act 1992, section 4(2)(a) – rights and liberties of individuals

Does the Bill have sufficient regard to the rights and liberties of individuals?

- general rights and liberties

Clauses 8 and 12

Summary of provisions

Clause 8 inserts new section 12B in the Defamation Act. The provision will require that plaintiffs give defendants a concerns notice and wait 14 days from the date of service before commencing legal proceedings.

Clause 12 amends section 21 of the Defamation Act. The amendment provides that a party’s election as to whether a judge or jury should be the decision maker in the trial will be irrevocable, except with the consent of all the parties to the proceedings or, in the case of disagreement, with leave of the court. The court can only grant leave if satisfied it is in the interests of justice for the election to be revoked.

Issue of fundamental legislative principle

The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to the rights and liberties of individuals.

Legislation should be reasonable and fair in its treatment of individuals.⁷⁸

New section 12B could impact upon a plaintiff’s ability to proceed straight to hearing, particularly in urgent cases.

In the words of the explanatory notes, ‘Placing limitations on the person’s right to elect the arbiter of proceedings could potentially impede upon their rights ...’.⁷⁹

⁷⁸ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 133.

⁷⁹ Explanatory notes, p 5.

3.1.1.1 Committee comment

The explanatory notes provide this justification in relation to the requirement for a concerns notice:

This change will facilitate the greater use of the pre-litigation process in the hope that parties may settle their disputes without the need to proceed to court. This is beneficial to the parties as well as the court and the public as a whole by freeing up court time and resources for other legal matters.⁸⁰

Further, a person can seek a waiver of the requirement in certain circumstances:

Despite new section 12B, a plaintiff will be able to apply to the court to waive this requirement where the court is satisfied it is just and reasonable to do so.⁸¹

In relation to the amendment to section 21, the explanatory notes provide this justification:

Placing limitations on the person's right to elect the arbiter of proceedings could potentially impede upon their rights, however, the provisions are aimed at ensuring a party cannot unilaterally make decisions for their own benefit and contain sufficient latitude for the court to grant leave to change arrangements in appropriate circumstances.⁸²

The committee is satisfied that any breaches of an individual's rights and liberties are justified in the circumstances.

3.1.2 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

⁸⁰ Explanatory notes, pp 4-5.

⁸¹ Explanatory notes, p 4.

⁸² Explanatory notes, p 5.

4 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.⁸³

A Bill is compatible with human rights if the Bill:

- (a) does not limit a human right, or
- (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HRA.⁸⁴

The HRA protects fundamental human rights drawn from international human rights law.⁸⁵ Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility. The committee brings the following to the attention of the Legislative Assembly.

4.1 Human rights compatibility

4.1.1 Human rights issues

The human rights issues raised by the Bill arise under sections 21, 25 and 31 of the HRA. Section 21 enshrines the human right to freedom of expression in Queensland law. Section 25 enshrines the human right to protection of reputation in Queensland law. Section 31 enshrines the right to a fair hearing in Queensland law.

The analysis that follows sets out the nature of the purpose of the relevant limitations, the relationship between the legislative limitations and their purposes, consideration whether there are less restrictive and reasonably appropriate ways to achieve the relevant purposes, the importance of the purposes of the relevant limitations, the importance of preserving the human rights and the balance between the importance of the purposes of the relevant limitations and the importance of preserving the relevant human rights. Precedents from Queensland and other jurisdictions are included in context.

Since the Bill raises issues at the confluence of the three rights identified above, the analysis will be conducted on a clause by clause basis.

In the course of the analysis that follows, a person who wants to take action for defamation will be referred to as a complainant, or if they lodge proceedings, a plaintiff. A person who allegedly publishes defamatory material will be referred to as a publisher.

In conducting this analysis, the committee has considered the observations of the United Nations Human Rights Committee's General Comment No 34, adopted in 2011 at the 102nd session of the UN, which provides guidance on the interpretation of Article 19 of the International Covenant on Civil and Political Rights, upon which sections 21 and 25 of the HRA are based. The General Comment states, in part that 'defamation laws must be crafted with care to ensure that they ... do not serve, in practice, to stifle freedom of expression'.⁸⁶

⁸³ HRA, s 39.

⁸⁴ HRA, s 8.

⁸⁵ The human rights protected by the HRA are set out in sections 15 to 37 of the Act. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included; HRA, s 12.

⁸⁶ United Nations Human Rights Committee, General Comment No 34, Article 19.

4.1.1.1 Committee comment

Clause 4 deprives some corporations of the opportunity to sue for defamation. Since corporations are not humans, they do not have human rights per se, and no further analysis of their position under the HRA will be considered. They can, of course, be publishers for the purposes of the law of defamation.

Clause 5 (which amends section 10 of the Defamation Act) introduces a provision that no cause of action in defamation shall be available by or against a person who is deceased. While the question whether a dead person continues to have human rights might invite interesting philosophical speculation, a decision to legislatively terminate rights and duties under the law of defamation at death represents a sensible and balanced response to the right to protect reputation in section 25 that preserves the right of free expression under section 21, as a dead person no longer suffers serious harm if defamed. The amendment in clause 5 gives the publisher the opportunity to seek costs of a suit if a plaintiff has died which is a sensible and proportionate response to the human rights in issue. The court's power is 'in the interests of justice', giving them a wide discretion to do just that.

Clause 6 introduces a new section 10A into the Defamation Act. The serious harm threshold enhances freedom of expression by ensuring that defamation law is not used inappropriately to chill public discourse. The serious harm threshold sets an appropriate balance between the human rights of freedom of expression (section 21) and the right to protection of reputation (section 25), and is consistent with the balancing of rights contemplated by UN General Comment No 34 (referred to above). Minds could reasonably differ on the question whether the question of legal harm should be restricted to the judge alone, but the human right to a fair hearing is preserved by ensuring that judges, who constitutionally must be and be seen to be independent and impartial, retain this task.⁸⁷ It is noted that clause 20 of the Bill, which omits the section 33 defence of triviality, can be understood as reinforcing the serious harm threshold.

Clause 7, which requires a concerns notice be issued by a complainant (the proposed section 12A of the Defamation Act) is a measure that promotes freedom of expression by ensuring that a publisher who is alleged to have engaged in defamatory conduct has an opportunity to explain their conduct before being required to appear in court proceedings. It also makes it clear what defamatory imputations are expressed to be of concern.⁸⁸ It settles a reasonable balance between the rights enunciated in sections 21 and 25 of the HRA and helps ensure that matters are resolved swiftly.

Clause 8, which requires a concerns notice be issued by a complainant before litigation (the proposed section 12B of the Defamation Act), helps ensure that the scope of a dispute is made clear to the defendant at every step, helping to ensure that matters are resolved in a speedy way and with a minimum of potentially costly court involvement.

Clause 9 (amendments to section 14 of the Defamation Act), which proscribes the length of time for an offer of amends, settles a reasonable balance between the rights enunciated in sections 21 and 25 of the HRA, and helps ensure that matters are resolved swiftly.

Clause 10 (amendments to section 14 of the Defamation Act) which regulates the content of an offer to make amends, settles a reasonable balance between the rights enunciated in sections 21 and 25 of the HRA, and helps ensure that matters are resolved swiftly.

Clause 11 (amendments to section 18 relating to the effect of a failure on the part of a person to accept a reasonable offer by the publisher to make amends) settles a reasonable balance between the rights enunciated in sections 21 and 25 of the HRA, and helps ensure that matters are resolved swiftly, and in doing so, advances the right to a fair hearing in section 31 of the HRA.

⁸⁷ *North Australian Legal Aid Service v Bradley* (2004) 218 CLR 146, 163.

⁸⁸ As to which, see *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [25].

Clause 12 (amendments to section 21 of the Defamation Act) which allows a court to order that the trial be heard by a judge alone in some circumstances does not deprive the plaintiff of a human right, and at any rate preserves and advances the human right to a fair hearing under section 31 by ensuring that judges, who constitutionally must be and be seen to be independent and impartial, retain this task.⁸⁹

Clause 13 (amendments to section 22 of the Defamation Act), which enable juries to determine matters that can otherwise be determined by judges, does not dispense with any remedy available on appeal, which can then ensure that a fair hearing pursuant to section 31 takes place before an appeal bench that is and is seen to be, independent and impartial.

Clause 14 introduces a single publication rule, by way of replacing section 23 of the Defamation Act. The multiple publication rule that has operated in Australia⁹⁰ may expose a publisher to suit long after a matter has been published, prejudicing their opportunity to conduct a viable defence (which can adversely impact their right to a fair hearing under section 31). The introduction of a single publication rule is designed to ensure that defamation proceedings are more efficient, and enhances freedom of expression by ensuring that people whose freedom of expression is sought to be curtailed are not exposed to a multiplicity of suits, which can have a chilling effect. There is a requirement of leave before a second or subsequent suits can be filed, which can address circumstances where there has been a wilful republication of defamatory material.

Clause 15, which replaces section 26 of the Defamation Act, sets out the defence of contextual truth, and settles a reasonable balance between the rights enunciated in sections 21 and 25 of the HRA.

Clause 16, which adds a new section 29A to the Defamation Act, ensures that matters of public interest are protected by freedom of expression (section 21, HRA), and this can be a defence to an action for defamation. The provision helps ensure that information and ideas can be imparted, consistently with General Comment No 34.

Clause 17, which amends section 30 of the Defamation Act, provides a modified defence of qualified privilege for the provision of certain information, and settles a reasonable balance between the rights enunciated in sections 21 and 25 of the HRA.

Clause 18, which inserts a new section 30A of the Defamation Act, provides a defence of scientific or academic peer review, and settles a reasonable balance between the rights enunciated in sections 21 and 25 of the HRA.

Clause 19, which amends section 31 of the Defamation Act, provides a modified defence of honest opinion, and settles a reasonable balance between the rights enunciated in sections 21 and 25 of the HRA.

Clause 20, which omits the section 33 defence of triviality, reinforces the serious harm threshold analysed above.

Clause 21, which amends section 35 of the Defamation Act, provides for maximum amounts and aggravated damages in some circumstances, which clearly advances section 25 of the HRA, and aims to settle an appropriate balance between the rights enunciated in sections 21 and 25 of the HRA in the circumstances of a given case.

Clause 22, which amends section 44 of the Defamation Act, enables documents to be sent by email, which enhances access to justice and advances the likelihood of speedy justice.

⁸⁹ *North Australian Legal Aid Service v Bradley* (2004) 218 CLR 146, 163.

⁹⁰ As to which, see *Duke of Brunswick v Harmer* (1849) 14 QB 185 [117 ER 75]; *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513, 519-520, 528; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 599-605, particularly 600 [27].

Clause 24 ensures that the amendments are prospective, which is preferable.

Clauses 23 and 25 raise no human rights issues.

The Bill does not directly address the sometimes punitive effect of ordinary costs orders in defamation proceedings, which can have an effect on free speech. That said, the common law discretion to make an order for apportioned costs or that parties bear their own costs is unaffected by the proposed law.

In conclusion, the committee is satisfied that the human rights limitations identified are justified in the circumstances, having regard to section 13 of the HRA. The committee finds the Bill is compatible with human rights.

4.2 Statement of compatibility

Section 38 of the HRA requires that a member who introduces a Bill in the Legislative Assembly must prepare and table a statement of the Bill's compatibility with human rights.

A statement of compatibility was tabled with the introduction of the Bill and a sufficient level of information was provided to facilitate understanding of the Bill in relation to its compatibility with human rights.

Appendix A – Submitters

Sub #	Submitter
001	Confidential
002	Robert Heron
003	4ZZZ Radio
004	LawRight
005	Queensland Law Society
006	Sue Chrysanthou SC

Appendix B – Officials at public departmental briefing

Department of Justice and Attorney-General

- Mrs Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services
- Ms Imelda Bradley, Director, Strategic Policy and Legal Services

Department of Transport and Main Roads

- Mr Karl Frank, Executive Director, Heavy Vehicles and Prosecutions, Land Transport Safety and Regulation

National Heavy Vehicle Regulator

Ms Jennifer Rotili, Principal Advisor, Regulatory Standards and Policy

