DRAFT SECOND READING SPEECH
HON ELISE ARCHER MP
Defamation Amendment Bill 2021

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Mr Speaker, I move that the Bill now be read a second time.

Together with all other states and territories, Tasmania has committed to introducing reforms to the model defamation provisions to ensure ongoing national uniformity. The Defamation Amendment Bill 2021 will amend Tasmania's *Defamation Act 2005* to fulfil this commitment.

The Bill before Parliament today is the result of a statutory review of the uniform defamation laws and the development of model defamation amendment provisions. At the outset, I want to acknowledge the significant work by all jurisdictions, in particular New South Wales, who led the national Defamation Working Party in delivering these important reforms.

The media landscape has changed rapidly since the model defamation provisions were first enacted in 2005, and the review identified a range of reforms to modernise and improve the uniform laws. The product of the review was the drafting of the Model Defamation Amendment Provisions 2020.

The model amendments seek to ensure that defamation law continues to strike an appropriate balance between providing fair remedies for a person whose reputation is harmed by a publication and avoiding unreasonable limits on freedom of expression, particularly about matters of public interest. The model amendments also seek to promote prompt and non-litigious dispute resolution.

Mr Speaker, the Bill introduces new provisions in the *Defamation Act 2005* while clarifying and refining existing provisions to ensure that the Act operates to meet its original objectives in an environment that has seen the rise of digital platforms and online publications.

Updating the model defamation laws will provide greater clarity to the courts, the community, and the media.

Achieving and maintaining uniformity of defamation law is important for many reasons. Uniformity is particularly beneficial given that it is common for the same matter to be published in more than one Australian jurisdiction. Other benefits include ensuring that individual and corporate publishers do not need to consider the potential impact of different state and territory defamation laws before deciding whether to publish material, as well as limiting circumstances or potential for forum-shopping to favour a party's claim or defence.

The amendments in the Bill have been proposed after considerable consultation with the public, legal and academic experts, and stakeholders. This includes an extensive review process undertaken by the Defamation Working Party – a multi-jurisdictional working group of officials overseen by the now Meeting of Attorneys-General (or MAG), previously Council of Attorneys-General (or CAG).

Led by New South Wales, the Defamation Working Party carried out a two-year review involving two rounds of public consultation, four stakeholder round tables and the engagement of an expert panel comprised of judges, academics, defamation practitioners and the New South Wales Solicitor-General. Public and targeted stakeholder consultation was also undertaken on a draft version of this Bill by the Department of Justice in Tasmania.

Differing views were expressed by stakeholders and carefully considered by the Defamation Working Party during the review process. The model amendments reflect the former Council of Attorneys-General's (CAG) settled position which takes into consideration all submissions received and aims to reflect a fairer balance between freedom of expression and the protection of reputation against harm.

The Bill closely mirrors the model defamation amendment provisions as agreed.

Some of the more significant model amendments in the Bill include:

- the introduction of a serious harm element;
- a single publication rule;
- changes to the pre-litigation processes;
- new defences relating to public interest journalism and peer reviewed material published in academic or scientific journals; and
- clarification of an award of damages for non-economic loss and an award of aggravated damages.

I now turn to the key provisions of the Bill before the House.

Clause 6 of the Bill inserts section 10 from the original 2005 Model Defamation Provisions. Section 10 provides that there is no cause of action for defamation for, or against, deceased persons, whether or not the defamation occurred before or after the person's death.

Section 10 was previously agreed to by all Australian jurisdictions but does not currently form part of the Tasmanian *Defamation Act 2005* as it was not passed by the Parliament in 2005 due to an amendment in the Legislative Council. The House of Assembly subsequently approved the amendment on an understanding the amendment had "little relevance" as the common law position applies in any event.

However, Mr Speaker, a review of this issue identified that it is time to clarify Tasmania's position, consistent with other jurisdictions.

Mr Speaker, the common law does not allow the dead to sue or be sued in defamation. As a person's reputation is regarded as so personal an attribute, an action for defamation does not survive a death of a party for the benefit of the plaintiff's estate.

However, section 27 of the *Administration and Probate Act 1935* (Tas) has the effect of varying the common law position. Section 27(1) of that Act provides that causes of actions generally subsist against, or vest in, the deceased's estate. Section 27 applies where the deceased person was defamed by another person, or had defamed another person, before the death of the

deceased person, and acts to continue any cause of action for defamation in respect of the deceased person.

Tasmania is the only jurisdiction where a deceased person's defamation action may survive their death. Inserting section 10 into the *Defamation Act 2005* will override the general operation of section 27 of the *Administration and Probate Act* with respect to defamation causes of action, codify the general law of defamation with respect to deceased persons, and bring Tasmania's *Defamation Act 2005* in-line with other jurisdictions.

Mr Speaker, a significant new provision in the Bill is the introduction of a "serious harm threshold" as an additional element of the cause of action for defamation. The insertion of section 10A in the *Defamation Act 2005* will place the onus on the plaintiff to establish that the publication of allegedly defamatory matter has caused, or is likely to cause, serious harm to their reputation. If the plaintiff is a corporation, it must prove that serious financial loss has been caused, or is likely to be caused, by the publication.

This important reform will operate to prevent trivial, minor, or insignificant defamation claims at the outset, reducing the cost and stress of unwarranted defamation litigation on businesses, individuals, and the courts. It may also encourage early resolution of claims, as it allows a party or a judicial officer to determine this threshold issue early in proceedings. As a result of the introduction of the serious harm element, the defence of triviality, which provides a defence if the defendant proves that the circumstances of the publication of defamatory material was such that the plaintiff was unlikely to sustain any harm, will be repealed.

The Bill also proposes to modify pre-litigation processes to encourage early resolution of defamation disputes. The Bill will make it mandatory for an aggrieved person to issue a written concerns notice, with adequate particulars of the complaint, to the publisher before commencing defamation proceedings.

The enhanced concerns notice process provided for by these new sections will encourage the aggrieved person to turn their mind to the serious harm threshold at the time of preparing the concerns notice, and will also provide the publisher with sufficient information on which to make a reasonable offer of amends.

The 'offer to make amends' procedure will be refined. The Bill modifies the timing and content of offers to make amends, including that the offer must be made as soon as reasonably practicable after receipt of the concerns notice and that the offer must remain open for at least 28 days from the date it is made.

These reforms will help and encourage parties to resolve disputes without resorting to litigation, easing the burden on courts, and reducing the cost and time taken for individuals to resolve defamation disputes.

Another provision of the Bill that modernises defamation law for the digital age is the introduction of a 'single publication rule'. The insertion of this rule in the new section 20AB will ensure that the limitation period for defamation proceedings is consistent in its application to digital and non-digital publications.

The single publication rule will apply if a person publishes, uploads or sends a statement to the public – 'the first publication' – and subsequently publishes or uploads that statement or a statement which is substantially the same. In practice, the one-year limitation period will commence from the date the first publication is uploaded for access or sent to a recipient, instead of restarting each time the material is downloaded by a third party, as is currently the case. Under new section 20AC, the court will be empowered to extend the limitation period to three years from the alleged publication date if the plaintiff satisfies the court that it is just and reasonable to do so in all of the circumstances of the case.

Mr Speaker, the Bill also introduces new defences to provide protection for public interest journalism and academics.

Currently, the defence of qualified privilege contained in section 30 of the *Defamation Act 2005* protects situations where there is a legal, social or moral duty to make what otherwise might be defamatory statements – for example, employment references and reporting suspected crimes to the police. The conduct of the defendant in publishing must be reasonable in the circumstances and, in determining reasonableness, a court may consider various matters, including that the matter was in the public interest.

During consultation, the defence of qualified privilege was criticised by some stakeholders for not generally applying to publications by media organisations because it is difficult to prove that a broad readership has an interest in knowing the subject information. In order to guard against the potential 'chilling effect' that defamation laws have on debates of matters of legitimate public interest and to protect reasonable public interest journalism, the Bill introduces a new public interest defence at section 29A. 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.

The insertion of a dedicated public interest defence protects the ability of journalists and media organisations to publish on matters of public concern without fear of defamation litigation. This new defence recognises that reporting on and discussion of matters of public interest is critical to our democracy. Section 29A specifies a non-exhaustive list of factors that the court may take into account when considering the defence. These include 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.

The Bill also inserts section 30A, introducing a new defence for peer-reviewed statements and assessments published in a scientific or academic journal. This defence recognises the importance of academic and scientific dialogue in a free and open society. This defence applies to the publication of a defamatory statement which relates to a scientific or academic issue and where an independent review of the statement's merit has been undertaken by an editor or related expert.

The defence also extends to assessments in the same journal about the defamatory statements and fair reports of the statements. 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.

Section 35 of the *Defamation Act 2005* currently provides for the maximum amount of damages that may be awarded for non-economic loss in defamation proceedings. Damages for non-economic loss are aimed at providing compensatory damages to cover intangible matters, such as consolation for hurt feelings, damage to reputation and the vindication of a plaintiff's reputation. A court may order a greater amount than the maximum where the court is satisfied that the circumstances of the publication warrant an award of aggravated damages.

Submissions to the statutory review indicated that this provision has been applied by the courts in conflicting ways. The original intent of section 35 was to specify a range or scale of damages, with the maximum amount to be awarded only in the most serious case. However, some courts have interpreted section 35 as a cap that can be set aside if aggravated damages are warranted, leading to excessive awards of damages for non-economic loss.

Accordingly, the Bill amends section 35 of the *Defamation Act 2005* to confirm the original intent that the maximum amount sets a scale or range, with the maximum amount to be awarded only in the most serious case. The amendments also provide that awards for aggravated damages are to be made separately to damages for non-economic loss.

Mr Speaker, the Bill includes amendments to clarify and refine the operation of other existing provisions to ensure that they operate as intended. At clause 19, amendments to the section 26 defence of contextual truth corrects a technical pleading issue, while the section 31 honest opinion defence is amended by clause 23 to clarify what constitutes "proper material" on which to base an opinion in the age of digital publications.

Finally, the Bill amends the definition of "employee" at section 9 of the *Defamation Act 2005* to include all individuals involved in the day-to-day operation of a corporation, including independent contractors, to preserve the policy intent that larger corporations should not have an action in defamation.

Enacting the model amendments will conclude Stage 1 of the national review into defamation law. Stage 2 of the review has commenced with the release of a Discussion Paper during April and May of this year. Stage 2 focuses on the liabilities and responsibilities of digital platforms for defamatory content published online and will consider, amongst other issues, take-down procedures for defamatory content published online and the extension of privilege to statements made to employers about allegations of unlawful conduct.

I look forward to continuing to work with my state and territory counterparts to progress these ongoing reforms, and improve the effective operation and uniformity of defamation laws throughout Australia.

Mr Speaker, this is an important Bill. The Bill implements the nationally-agreed model defamation amendments by MAG in July 2020 and fulfils Tasmania's commitment to the other states and territories.

This Bill modernises Tasmania's *Defamation Act 2005* and ensures continued uniformity with defamation legislation around Australia - 16 years after implementation of the original model laws.

I commend the Bill to the House.