

Parliamentary Committee Briefing Note

Legal Affairs and Safety Committee

Defamation (Model Provisions) and Other Legislation Amendment Bill 2021

Background and Policy Intent

Amendments to the Defamation Act 2005 and the Limitation of Actions Act 1974

In November 2004, the former Standing Committee of Attorneys-General endorsed the Model Defamation Provisions (MDPs) which were enacted in each Australian state and territory. In Queensland, the *Defamation Act 2005* (Defamation Act) commenced on 1 January 2006.

In June 2018, the former Council of Attorneys-General (CAG) agreed to reconvene the Defamation Working Party (DWP), led by New South Wales, to consider whether the policy objectives of the MDPs remain valid and whether the provisions remain appropriate to achieve these objectives.

The development of the Model Defamation Amendment Provisions (MDAPs) follow an extensive review process undertaken by the DWP over a two-year period which involved two rounds of public consultation, four stakeholder roundtables and the engagement of an expert panel.

On 27 July 2020, CAG agreed that all jurisdictions would enact and commence the MDAPs as soon as possible and 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.

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. The decision by jurisdictions to achieve and maintain uniformity 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 plaintiff's and publishers to know their rights and limitations under defamation law, without having to consider differing state and territory laws.

Amendments to the Heavy Vehicle National Law and Other Legislation Amendment Act 2019

Operational provisions of the Heavy Vehicle National Law Act 2012 (the Act) commenced on 10 February 2014. The Act provides a single national law for the consistent regulation of heavy vehicle operations across most of Australia. The Act also established the National Heavy Vehicle Regulator (NHVR) to administer the Heavy Vehicle National Law (HVNL) which is contained in the Schedule to the Act.

All Australian states and territories, except Western Australia and the Northern Territory, are participating jurisdictions for the purposes of the HVNL and have applied the HVNL as a law of each of their jurisdictions.

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.

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.

Performance Based Standards (PBS) Scheme

Road freight is regulated under the HVNL by tightly defined prescriptive vehicle mass and dimension rules which exist to ensure road safety and protect infrastructure.

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.

It provides the industry with opportunities to increase heavy vehicle productivity by exceeding conventional mass and dimension limits, provided performance is deemed satisfactory and conventional axle masses are not exceeded.

PBS approved vehicles are tested against sixteen stringent safety standards and four infrastructure standards to ensure the vehicles can safely operate on the existing road network.

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.

HVNL Amendments

The *Heavy Vehicle National Law and Other Legislation Amendment Act 2019* (Amendment Act) made a range of amendments to the HVNL Act that addressed several operational, minor and technical drafting issues to improve roadside enforcement, reduce the compliance burden for industry and reduce the administrative burden for the NHVR.

The Amendment Act was assented to on 26 September 2019. To facilitate the effective implementation of the amendments and to provide a common commencement date in all HVNL Act participating jurisdictions, Part 3 of the Amendment Act was proclaimed on 28 February 2020, other than sections 10 and 11, which are due to automatically commence on 27 September 2021.

However, it has been identified that the commencement of sections 10 and 11 will have significant unintended operational outcomes for PBS heavy vehicle operators and as a result it is proposed to repeal these provisions.

Amendments in the Bill

Amendments to the Defamation Act 2005 and the Limitation of Actions Act 1974

The Defamation (Model Provisions) and Other Legislation Amendment Bill 2021 (Bill) implements 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, and
 - 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 three 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;

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- 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; and
 - 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; and
- make certain other consequential or related amendments.

Subject to passage, the amendments to the Defamation Act and the *Limitations of Actions Act 1974* (Limitation of Actions Act) will commence on 1 July 2021, as expected in New South Wales, Victoria and South Australia.

The brief outlines below some of the more significant amendments contained in the Bill.

Single publication rule (sections 10AA, 10AB, 32A and 41A)

Under the current provisions in the Limitation of Actions Act, an action for defamation is to be brought within one year from the date of publication. However, the court is empowered to

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extend the limitation period by up to three years if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in the one-year period.

Currently, each publication of 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.

For internet publications, each time the webpage containing defamatory matter is downloaded a separate cause of action arises, even though the content is the same. Accordingly, a plaintiff may rely on later publications, in some cases years after the initial publication, to avoid the strict application of the limitation period.

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.

Serious Harm and associated changes (new section 10A)

The Bill introduces a serious harm element similar to section 1 of the UK Act 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. If the plaintiff is a corporation, the corporation must also prove that serious financial loss has been caused, or is likely to be caused, by the publication.

If serious harm is raised by a party, the relevant judicial officer is to determine the issue as soon as practicable before the trial commences unless there are circumstances justifying postponement.

Whilst the term 'serious harm' is undefined, it has been interpreted by courts in the United Kingdom (UK) as an ordinary word in common usage, to be determined on a case by case basis.

This proposal is aimed at encouraging the early resolution of defamation proceedings by enabling the issue to be dealt with as a threshold issue.

Changes relating to corporations

Section 9 of the Defamation Act abolished the right of most corporations to sue for defamation except for excluded corporations which include not for profit companies and companies that employ fewer than 10 persons and are not related to another company (related company). This reflected the fact that these corporations are less likely to have the resources to pursue alternative causes of action and may be disproportionately affected by a defamatory publication.

The Bill amends the definition of employee in section 9 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. This will avoid courts needing to assess the definition of “employee” and will ensure large corporations do not engage in employment practices solely for the purpose of retaining their ability to sue for defamation (for example, by only engaging contractors).

The Bill moves away from referencing a related company in the definition of ‘excluded corporation’, instead referring 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.

Finally, 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.

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

The amendments to Part 3 are intended to clarify and refine pre-litigation processes and procedures to better facilitate resolution of defamation disputes without litigation.

Provisions in the Bill will make it mandatory, rather than optional, for a plaintiff to give the publisher a concerns notice particularising the defamatory imputations to be relied upon before proceedings may commence (new section 12B). The provisions will also formalise the requirements of a concerns notice which include the need to specify the location of the publication (for example, a webpage address) and, if practicable, include a copy of the publication as well as include 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). Despite these changes, a court may enable a plaintiff to commence proceedings without going through the concerns notice process if the court is satisfied that it is just and reasonable to do so (new section 12B)

The Bill also includes amendments to sections 14 and 15 of the Defamation Act relating to 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.

New defences

In order to protect reasonable public interest journalism, the Bill will introduce a new public interest defence (section 29A) 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 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.

The Bill introduces an additional new defence (section 30A), based on section 6 of the UK 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. 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.

Changes to existing defence provisions

The defence of contextual truth in section 26 of the Defamation Act enables a defendant to plead that, in addition to the defamatory imputations relied upon by the plaintiff, other contextual imputation/s arise which are substantially true and, accordingly, no further harm is done to the plaintiff's reputation.

The Bill will replace section 26 (Defence of contextual truth) to make it clear that, in order to establish this defence, a defendant may rely on (or plead back) substantially true imputations originally pleaded by the plaintiff. This amendment will address case law¹ 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

¹ *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852; *Besser v Kermode* [2011] NSWCA 174.

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

Further, as a result of the introduction of the serious harm element, the defence of triviality (section 33), which provides a defence if the defendant proves that the circumstances of the publication of defamatory material were such that the plaintiff was unlikely to sustain any harm, will be repealed.

Changes to damages

The Bill amends section 35 of the Defamation Act to provide that the 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. 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. 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 plaintiff's injury.²

Transitional arrangements

If passed, the amendments to the Defamation Act will apply to defamatory matters published after the commencement of the amendments, meaning existing proceedings will continue under the prior laws.

The changes to the Limitation of Actions Act similarly apply to publications of defamatory matter after commencement, noting, however, that the single publication rule in new section 10AB extends to a first publication before the commencement, but only in respect of subsequent publications after commencement of the section.

² *Triggell v Pheaney* [1951] HCA 23; (1951) 82 CLR 497 and *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; (1993) 178 CLR 44, 71.

Amendments to the Heavy Vehicle National Law and Other Legislation Amendment Act 2019

Sections 10 and 11 of the Amendment Act amend sections 96 (Compliance with mass requirements) and 102 (Compliance with dimension requirements) of the HVNL Act, respectively.

The rationale for amending these sections was to address enforcement issues resulting from the introduction of 'specified PBS vehicles' on 1 October 2018, which allowed specified PBS vehicles operating at general mass limits greater access to the road network without the need for an individual permit.

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.

Following extensive consultation with stakeholders it was determined that no operational remedies were available and further legislative changes are required to address the unintended outcomes. 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.

Their repeal 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.

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This approach is supported by industry and jurisdictions and will prevent significant unintended consequences for the heavy vehicle industry and will also ensure the issues are appropriately resolved.

Fundamental legislative principles

Potential breaches of Fundamental Legislative Principles (FLPs) raised by the amendments are considered justified. The FLP issues and justification are outlined in detail on pages 4 to 5 of the Explanatory Notes to the Bill.

Human rights

The amendments are considered compatible with human rights. The human rights issues and justification are outlined in detail in the Statement of Compatibility for the Bill.