




Speech By  
**Jason Hunt**

**MEMBER FOR CALOUNDRA**

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Record of Proceedings, 15 June 2021

## **DEFAMATION (MODEL PROVISIONS) AND OTHER LEGISLATION AMENDMENT BILL**

 **Mr HUNT** (Caloundra—ALP) (12.14 pm): I rise to speak in support of the Defamation (Model Provisions) and Other Legislation Amendment Bill 2021. This amendment has been aided by six submitters, including, but not limited to, 4ZZZ radio, LawRight and the Queensland Law Society. In April of this year, the committee invited these stakeholders and subscribers to make written submissions. The committee also received a public briefing from the Department of Justice and Attorney-General and the Department of Transport and Main Roads.

By way of background, in 2004 the attorneys-general of the states and territories agreed to support uniform model provisions in relation to the law of defamation called the Model Defamation Provisions, or MDPs, and as a consequence, these were subsequently enacted into the Queensland Defamation Act. In 2018, the Model Defamation Working Party reviewed the MDP and the idea that the objectives of same were still valid. The review was conducted across 2019 and 2020.

The DWP recommended that, based on the work of the Australasian Parliamentary Counsel's Committee, Model Defamation Amendment Provisions be enacted as soon as possible. Queensland's commitment to the Model Defamation Amendment Provisions helps ensure a continuity of defamation laws in Australia. Because it is common for subject matter to be published in more than one Australian jurisdiction, it is vital that plaintiffs and publishers know their rights and limitations under defamation law without complications arising from potential differing state and territory laws.

The state Attorney-General has quite correctly identified that the amendments are aimed at protecting reputations from serious harm while encouraging responsible free speech. The Attorney-General further clarified that 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.

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 one-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. It will 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 enable pre-trial processes to be concluded.

The bill will 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.

The bill will provide for certain individuals to be counted as employees of a corporation for the purpose of determining whether the corporation can sue for defamation. It will 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 noncompliance.

It will make various amendments with respect to the form, content and timing for concerns notices and offers to make amends. It will 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.

The bill will 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 the publishing of the statement was in the best public interest which includes a non-exhaustive list of factors the court may take into account when considering the defence.

It will make consequential amendments to the existing defence of qualified privilege to avoid overlap with new public interest defence. It will provide a defence in respect of peer reviewed matters, published in academic or scientific journals. It will 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. It will confirm that the maximum amount of damages for non-economic loss specified by the MDPs operates to a set upper limit of a scale or range of damages that applies regardless of whether aggravated damages are awarded.

The bill will require leave of the court to commence defamation proceedings against certain associates of the defendant previously sued for defamation in respect of the publication of the same matter. It will provide that an election to have defamation proceedings trialled by a jury can be revoked only with the consent of all parties or with leave of the court on application of a party. It will 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. Finally, it will allow notices and other documents to be sent to an email address specified by the recipient for the giving or service of documents. While the Queensland Law Society noted that the changes should be monitored to ensure that any unintended consequences can be identified and addressed, they were also pleased that there was an objective to achieve nationwide consistency.

It should also be noted that, whilst serious harm is not defined in the bill, 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. DJAG also advised that there was a leading case of *Lachaux v Independent Print Ltd and Evening Standard Ltd* in which 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 inherent tendency of the words and their actual impacts on those to whom they were communicated, harm is or is likely to have been caused to reputation. In that particular case, the finding of serious harm was actually based on the scale of the publication and 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. DJAG concluded that establishing serious harm under the bill would be on a case-by-case basis as it will not be defined in the provisions.

In so far as the amendments to the Heavy Vehicle National Law and Other Legislation Amendment Act are concerned, the bill seeks to repeal sections 10 and 11 of the aforementioned act as it was identified that they would have unintended and inconsistent mass and enforcement outcomes for PBS—performance based standard—vehicles detected off route compared with other heavy vehicle classes. Repealing these sections prior to their commencement will retain the status quo in relation to PBS vehicles detected operating off-road and provide time for the issue 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. I commend the bill to the House.