



Speech By
Hon. Shannon Fentiman

MEMBER FOR WATERFORD

Record of Proceedings, 20 April 2021

DEFAMATION (MODEL PROVISIONS) AND OTHER LEGISLATION AMENDMENT BILL

Introduction

 **Hon. SM FENTIMAN** (Waterford—ALP) (Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence) (11.17 am): I present a bill for an act to amend the Defamation Act 2005, the Heavy Vehicle National Law and Other Legislation Amendment Act 2019 and the Limitation of Actions Act 1974 for particular purposes. I table the bill, the explanatory notes and a statement of compatibility with human rights. I nominate the Legal Affairs and Safety Committee to consider the bill.

Tabled paper: Defamation (Model Provisions) and Other Legislation Amendment Bill 2021 [511](#).

Tabled paper: Defamation (Model Provisions) and Other Legislation Amendment Bill 2021, explanatory notes [512](#).

Tabled paper: Defamation (Model Provisions) and Other Legislation Amendment Bill 2021, statement of compatibility with human rights [513](#).

In July 2020 Queensland committed to introduce defamation reforms to ensure continued uniformity with other Australian jurisdictions. The amendments to the Defamation Act 2005 and the Limitation of Actions Act 1974 contained in the bill will fulfil this commitment. Following a national review process, the Defamation Act which enacted the model defamation provisions commenced in Queensland on 1 January 2006. In June 2018 a review of the model defamation provisions commenced to consider whether the provisions remained valid and appropriate to achieve their objectives. On 27 July 2020, the former council of Attorneys-General agreed that all jurisdictions would enact and commence the model defamation amendment provisions. The bill closely mirrors the model defamation amendment provisions as agreed at a national level. Updating the national approach to defamation laws will provide greater clarity to the courts, the community and the media. They are important in people knowing their rights and limitations under the law.

The decision to achieve and maintain uniformity of defamation law is based on the fact that it is commonplace for the same matter to be published in more than one Australian jurisdiction and individual and corporate publishers should not need to consider the potential impact of different state and territory defamation laws before deciding whether to publish material. Also, given the changes to the uniform laws may be considered more or less favourable to a party depending on the circumstances of their claim or defence, there is of course potential for forum shopping until the legislation of all jurisdictions becomes uniform again.

These updates to our laws around defamation 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 over a two-year period 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.

Differing views were expressed by stakeholders and considered by the Defamation Working Party during the review process. The proposed amendments to the model defamation provisions reflect the former CAG's 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.

Some of the more significant model defamation amendment provisions in the bill include the introduction of a single publication rule; a serious harm element; changes to the prelitigation process and awards for aggravated damages; new defences relating to public interest; and journalism and peer reviewed material published in academic or scientific journals. 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, although the court could 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, publication occurs when it is received in a communicable form or downloaded by at least one third party and each publication constitutes a separate course of action. For internet publications, publication occurs each time a webpage containing defamatory matter is downloaded even though the content is the same and a plaintiff could rely on later publications, in some cases years after the initial publication, to avoid the strict application of the limitation period.

The single publication rule addresses these issues. The rule, based on section 8 of the UK's Defamation Act 2013, will apply if a person publishes or uploads in the case of internet publications a statement to the public—the first publication—and subsequently publishes or uploads that statement or a statement which is substantially the same. The date of the first publication is the start date for a limitation period for all publications unless the subsequent publication is materially different from the first. The court will be empowered to extend the limitation period if the plaintiff satisfies the court that it is just and reasonable to do so in all of the circumstances of the case.

The bill introduces a serious harm element similar to section 1 of the UK act 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. 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 the defamatory matter has not caused or is unlikely to cause serious harm to the reputation of the plaintiff or serious financial harm to a corporation, an action can be dispensed with early in the proceedings rather than being the subject of lengthy and expensive litigation. It is hoped that this change will deter the bringing of claims and proceedings for trivial, minor or insignificant matters. 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 modifies the prelitigation process in part 3 of the Defamation Act. The modified process will ensure the provisions are more effective in encouraging the resolution of claims without the need for litigation. It will now be 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. The bill 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 a corporation, serious financial loss caused by the publication. Despite these changes, a court may enable a plaintiff to commence proceedings without going through the concerns notice process if the court is satisfied it is just and reasonable to do so. The bill also 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.

The defence of qualified privilege contained in section 30 of the Defamation Act currently protects situations where there is a legal or moral duty to make what otherwise might be defamatory statements—that is, 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 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' defamation laws have on debates of matters of legitimate public interest and to protect reasonable public interest journalism, the bill will introduce a new public interest defence based on section 4 of the UK act. This defence applies where the defendant can prove that the statement complained of was, or formed part of, a statement on a matter of public interest and the defendant reasonably believed that publishing the statement was in the public interest.

Unlike the UK approach, the bill specifies a non-exhaustive list of 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. To ensure that there is no overlap between the qualified privilege defence and the new public interest defence, the bill will also make amendments to the factors the court may take into account when considering the defence of qualified privilege. The bill introduces an additional new defence 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 has been undertaken. The defence also extends to assessments in the same journal about the defamatory statements and a defence for 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.

The Defamation Act 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 the intangible matters of 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 review indicated that this provision has been applied in conflicting ways. Accordingly, the bill will amend section 35 of the Defamation Act to confirm the original intent of the provision by providing 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 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 continue to apply even if aggravated damages are awarded.

The amendments to the Defamation Act and Limitation of Actions Act are aimed at protecting reputations from serious harm whilst encouraging responsible free speech. 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.

It is intended that, subject to passage, the amendments to the Defamation Act and the Limitations of Actions Act will commence on 1 July 2021 in line with jurisdictions including New South Wales, Victoria and South Australia. The passage of these amendments in the parliaments of Australian states and territories concludes stage 1 of the review of the model defamation provisions.

I also wanted to use this opportunity to note that a second stage of the review is currently underway, with Attorneys-General recently approving the release of a stage 2 discussion paper. Stage 2 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. The discussion paper and information about how to make a submission can be accessed from the Department of Justice and Attorney-General's community consultation page or the New South Wales Communities and Justice website. Consultation on the stage 2 discussion paper concludes on 19 May 2021.

The bill also contains amendments to repeal two uncommenced provisions from the Heavy Vehicle National Law and Other Legislation Amendment Act 2019. Sections 10 and 11 of that act were intended to harmonise penalty provisions within the heavy vehicle national law to ensure that performance based standards—or PBS—vehicles travelling on general access roads do not breach general mass and dimension limits. Prior to the commencement of these sections, implementation concerns were raised by the National Heavy Vehicle Regulator. Consultation with key stakeholders found that commencement of these sections would cause adverse and inconsistent mass and dimension enforcement outcomes for PBS vehicles found off-route compared to other heavy vehicle classes. Industry and jurisdictions worked closely with the regulator, but all stakeholders agreed that a suitable resolution could not be achieved before their commencement on 27 September this year. The repeal of these two sections will prevent significant unintended consequences for PBS heavy vehicle operators and will also ensure enforcement issues are appropriately resolved in the longer term. I commend the bill to the House.

First Reading

Hon. SM FENTIMAN (Waterford—ALP) (Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence) (11.31 am): I move—

That the bill be now read a first time.

Question put—That the bill be now read a first time.

Motion agreed to.

Bill read a first time.

Referral to Legal Affairs and Safety Committee

Madam DEPUTY SPEAKER (Ms Bush): In accordance with standing order 131, the bill is now referred to the Legal Affairs and Safety Committee.