Speech By

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DEFAMATION (MODEL PROVISIONS) AND OTHER LEGISLATION AMENDMENT BILL

Mr NICHOLLS (Clayfield—LNP) (11.27 am): In 1976 when addressing a gathering of the New South Wales Law Society at Thredbo, Justice Michael Kirby, then chairman of the Law Reform Commission of Australia, claimed—

> Defamation actions show up Australian law at its worst. The substantive law is complex. The procedures are dilatory. The remedies are elusive and problematical. When obtained, they are generally not apt for the wrong that has been done. Above all, there are eight systems of law operating in a nation where modern mass communications media render fine local distinctions confusing and on occasions mischievous.

Now, with the possible exception of the claim about eight systems of law operating in our nation, many people might feel like little has changed in the 45 years since that statement was made. Indeed, Professor David Rolph, one of Australia's current leading academics in the law of defamation, has made a similar claim that—

> Australian defamation law, in its present form, is the product of historical accident, piecemeal reform and comparative neglect. The hold of its history needs to be loosened in order for it to be modernised properly.

Recently the former president of the Victorian Bar Association, a noted defamation barrister, Dr Matt Collins QC, said 'we inherited the English common law and then made it worse'.

There is a long history of civilisations setting in place rules or laws to protect reputations. Over the years, plaintiffs have used the various laws of defamation to air their grievances and to seek reparation for injury done, speaking broadly, to their reputations. Successful and unsuccessful suits have ranged from the serious, such as the damage caused by allegations of theft, murder or sexual harassment, to the seemingly more trivial, such as suggestions that a plaintiff stunk of brimstone or the publication of internet memes inspired by a plaintiff's mullet hairstyle.

Where did all this mess come from and why are we still trying to fix it all up today? Ancient Sumerian, Babylonian and Israelite laws punished wrongful accusations, while Roman law criminalised defamatory statements and publications. The early sixth century compilation of the laws of the Salian Franks—a Teutonic tribe up in Germany—the Lex Salica, imposed monetary penalties for particular language; for example, calling a man a wolf or a hare or making false imputations of unchastity. False assertions of being a thief or a manslayer in Norman law would result in the payment of damages and the additional punishment of publicly confessing the lie whilst holding one's nose. In the days of Alfred the Great, the King of Wessex in the ninth century, slander was punished harshly, by removing the source of the problem—the speaker's tongue.

In England, the laws of defamation developed in ecclesiastical courts, manorial courts, the Star Chamber and the Royal Courts of Justice. As far back as William the Conqueror, ecclesiastical courts dealt with defamation based on the biblical requirement 'you shall not bear false witness against your neighbour'. Punishment included excommunication, which in those days was of course a serious and compelling punishment, as well as other acts of penance, and the focus of these ecclesiastical courts

was on the trustworthiness of the defamer and whether they had sworn, on a Bible of course, truly. So the focus was on the defamer and the punishment of their sin, rather than on the reputation of the plaintiff. It is interesting that by the 16th and 17th centuries the vast majority of suits in this jurisdiction were related to sexual slander, and it is reckoned that about 60 per cent to 70 per cent of the plaintiffs were women. From about the 16th century onwards to the 19th century there was a battle between the jurisdictions—that is, the ecclesiastical jurisdictions and the temporal jurisdictions—that was finally resolved in favour of the temporal courts of royal justice in 1855.

Add to this mix the Star Chamber, which operated by exercising the royal prerogative and which also developed defamation law, particularly criminal libel and seditious libel. The Star Chamber, while used primarily for political purposes and for the suppression of political pamphlets, could also make awards for damages and often did so. In one celebrated instance it ordered a Sir Richard Grenville, a political opponent of the Earl of Suffolk, to pay a £4,000 fine and £4,000 in damages and locked him up as well. Today that might be worth something in the order of $2 million to $3 million. Abolished in 1641, nevertheless it made a contribution to the laws of defamation after its jurisdiction was subsequently taken up by the royal courts.

The cumulative effect of these various sources was an English law which, rather than existing as the result of deliberate and defined efforts, grew in a piecemeal fashion and was shaped by particular conditions. The law was described in the early part of the 20th century—even at that stage—as absurd in theory and very often mischievous in its practical operation. Of course, this 'absurd in theory and mischievous in its application' law was the very law inherited in the colony of New South Wales and developed in Australia as a result.

The first court in early colonial New South Wales was the Court of Civil Jurisdiction, presided over by judge advocates who were required to apply British law but who also adapted it to the particular conditions facing the colony. Between 1788 and 1809, 18 out of the 292 cases heard by the Court of Civil Jurisdiction had defamation as the cause of action. Members might be interested to know that one early defamation case heard in that court—

Ms Boyd: We're not.

Mr NICHOLLS: You may not, but you are going to anyway. Use it as an opportunity to enhance your knowledge about the history of Australia.

One early defamation case heard in that court concerned one Maria Lewin. According to gossip, Mrs Lewin had been sexually involved with two men as she travelled from England to Australia on a different ship to her husband. The defendant claimed to have witnessed Mrs Lewin and one of the men 'criminally connected on the steps of Captain Raven's door'. Her case was successful and the court awarded £30 of damages. The case was also significant for the way the result diverged from English law. As a so-called moral issue and without a claim for special damages, no common law action should have been available; nor should damages have been awarded, according to orthodox English law. However, the nature of the court, coupled with the possible legal ignorance of those involved, resulted in an outcome many would say suited the circumstances.

Having been reformed in 1847 in New South Wales; codified in Queensland in 1889; modified in 1899 by the Queensland Criminal Code—a code adopted by New South Wales in its 1958 Defamation Act; and subsequently replaced again in New South Wales in 1974, by the second half of the 20th century in Australia there were eight different jurisdictions with different laws, all of which might apply to publication of the same material. All of this was founded on the foul witch's brew of the previous thousand years of English common law.

Recommendations for reform were made by Michael Kirby and the Australian Law Reform Commission in 1979 after a three-year review but were not taken up until the Commonwealth threatened to introduce its own laws in 2004. Philip Ruddock was the attorney-general at the time. The states at that time had to be drawn kicking and screaming to finally act, and that occurred in 2005 and resulted in the uniform laws being introduced in 2005 and 2006. Members will be pleased to know that it is those laws and the changes to those laws that we are dealing with today. That is how we got here. I might say that we are also dealing with the weight of history and the burden of precedent of the last thousand years.

Is it any surprise, then, that our defamation laws are held in such low esteem? Those laws and their reputation are not helped by the fact that we are here today at the last gasp, as it were, passing amendments to the Defamation Act 2005 in the shadow of a budget and on the last possible date before the revised nationally agreed commencement of the amendments set for 1 July this year, in just on 14 days time. Despite these amendments being agreed to following 18 months of review by the Council of Attorneys-General in July 2020, despite agreement at that time to enact the model provisions 'as soon

as possible' and despite New South Wales, Victoria and South Australia all having passed their legislation last year, Queensland has lagged. What reason there is for this is not explained anywhere, leaving the only reasonable conclusion—

Mr Stevens: Incompetent.

Mr NICHOLLS:—the incompetence of this government; I take the interjection of the member for Mermaid Beach. Certainly it cannot be COVID this time around. It might be for the budget—we might be spinning the wheel there—but not for this. The excuse of an election does not hold water either, given this parliament was able to continue sitting throughout the pandemic and given the same conditions applied in New South Wales, Victoria and South Australia. Indeed, the *Australian Financial Review* in January this year reported—

NSW has warned its patience is running out with states that have not passed uniform defamation laws, and that it is ready to commence the new regime on July 1 ...

New South Wales was the first to pass the laws last August, with South Australia following suit in October and Victoria in December. Given the tardiness of other states, including Queensland, the planned start date of 1 January had to be pushed back to avoid forum shopping by plaintiffs, in fact making the situation worse. It is no wonder, then, that the New South Wales Attorney-General, Mark Speakman, said in the same article that the laggard states should just 'get on with it'. He went on to say—

This should be very easy—it's simply a matter of copying and pasting the model provisions to which each jurisdiction agreed last July.

He also said—

There's no excuse for delaying beyond July this year a new defamation regime that encourages public interest journalism.

At that time—in January this year—Queensland and Western Australia offered no timetable for implementation. The Attorney-General was quoted as saying—

Defamation reform is one of the three priorities on the CAG Council of Attorneys-General agenda this year and we're progressing implementation in Queensland.

Finally, it gets here. In fact, the situation becomes so concerning that in March this year at another meeting of the states' attorneys-general a communique was issued saying—

Attorneys-General agreed that New South Wales, South Australia, Victoria and all other jurisdictions that are able to do so will commence the Model Defamation Amendment Provisions 2020 on 1 July 2021, and remaining jurisdictions will commence those provisions as soon as possible thereafter.

Obviously there was frustration from those that had got on with the job and passed the model defamation provisions with those that had not, including, at that stage, Queensland. That is the history of how we got here today, the delays that have been experienced and the lengthy failures to bring this bill before the House and why we are now passing it at the deadline.

What evil are the changes addressing? Again, a look at the figures is useful. In 2018 the Centre for Media Transition at the University of Technology Sydney published a report titled *Trends in digital defamation: defendants, plaintiffs, platforms* which reviewed defamation cases heard over the five-year period to 2017 and made the following findings. New South Wales was the preferred forum for defamation actions and more matters reached a substantive decision in New South Wales than in all other jurisdictions combined, so 95 cases for New South Wales compared with 94 cases in all other jurisdictions. As well as those 189 cases with substantive decisions located through the searches that it undertook, there were 609 related decisions—for example, separate rulings on evidence. There were also 322 other matters in the system, including appeals from earlier decisions and preliminary decisions on new matters. The report acknowledged—

A complete picture of legal action on defamation would include other matters that were the subject of summary dismissals, and the many matters that are settled before a claim is filed in court.

It went on to say that, of the 189 cases, 51.3 per cent were digital cases, only 21 per cent of the plaintiffs in judgements could be considered public figures and only 25.9 per cent of the defendant publishers were media companies. One might ask: why are those figures important? What does that signify? What that shows is a genuine transition in the way defamation actions are being conducted and who is taking those defamation actions and where the defamatory material is allegedly being published.

More than half of the cases were digital cases, indicating that technology is overtaking the written word in terms of a printed document or a spoken word in respect of radio or TV as the main source for defamation complaints. With only 21 per cent of the plaintiffs in judgements considered public figures, the reality is it is not MPs or sports stars or other people who might be considered to be public figures who are bringing these cases. What is occurring is that neighbourhood disputes are increasing. The

prevalence of Facebook and other digital platforms, allowing more people to have their say more permanently, more rapidly and with less consideration online, is driving more and more ordinary folk to go about defamation proceedings.

An honourable member interjected.

Mr NICHOLLS: I beg your pardon?

Government members interjected.

Mr NICHOLLS: It is rare that I do not get a response to an interjection, particularly when I am polite about it. In any event—

Government members interjected.

Mr NICHOLLS: They are totally lost for words. I think the rapture with which they are listening to this dissertation on the history of defamation law—

An opposition member: Mesmerised!

Mr NICHOLLS:—has members on the other side mesmerised. I can reliably inform members that when I printed my speech out it was 29 pages; the bill itself is only 27 pages, so it is going to be an interesting morning. It is certainly going to be more interesting than the budget!

What these figures do highlight is the transition away from traditional defamation where people who felt they had a public reputation or public standing would take action for defamatory statements made in newspapers or on TV or on radio to ordinary citizens having a grudge or something nasty said about them on Facebook or on Twitter or on some other platform taking that action in court, and that is what we are dealing with. Overall, about a third of plaintiffs were successful and of the 87 awards for damages 38 were $100,000 or more and the number of defamation cases—that is, the matters for which there was a substantive decision—in that year was almost the same in 2017 as it was in 2007 with 30 compared to 29 and the number of decisions was the same in each year.

These numbers are part of the discussion paper put out by the New South Wales government in terms of considering these reforms. It is no wonder that Australia has been called the defamation capital of the world and in Australia New South Wales is the defamation capital. Defamation issues considered by superior courts in New South Wales are said to happen 10 times more frequently on a per capita basis than in the UK and the amount of damages and the costs incurred in both—that is, bringing and defending actions—in defamation continue to mount. The recent case involving a record payout to Geoffrey Rush, a well-known actor, highlighted the problems with the 2005 laws and highlighted the fact that despite it all no-one, as both Mr Rush and the complainant, Ms Norvill, stated afterwards, came out winners.

The changes in this bill attempt to address some of the problems identified over the last decade and a half. By introducing a single publication rule based in large part on section 8 of the UK Defamation Act 2013 and requiring an action to commence between one year of publication, in the main, the changes require a complainant to take positive action promptly. That is commensurate with both issues arising from technology and also with the policy that an aggrieved person should seek a remedy quickly to protect their reputation. If you claim you are defamed, you should not wait two years to take action to seek a remedy. You should move promptly and quickly to do so.

Issues in relation to the multiple publication rule have become more prominent in recent years as a result of the development of online archives. The effect of the multiple publication rule in relation to online material is that each hit on a webpage creates a new publication, potentially giving rise to a separate cause of action should it contain defamatory material. Each cause of action has its own limitation period that runs from the time at which the material is accessed. As a result, publishers are potentially liable for any defamatory material published by them and accessed via their online archive—which we all have access to from a phone, iPad, laptop or other tablet device—however long after the initial publication the material is accessed and whether proceedings have already been brought in relation to the initial publication. That means that many actions would be available at any time without this amendment to the defamation law.

This is also the case with offline archive material—for example, a library like the State Library or a council library—but the accessibility of online archives means that the potential for claims is much greater in respect of material accessed online just because it is much more readily able to be accessed and, clearly, this is not suitable for the modern internet age. A major problem is that the current law creates the potential of open-ended liability for online publishers who store information on their archives and thereby undermines the basis of the limitation period in defamation proceedings. There is no point having a limitation period if the cause of action continues to roll on forever.

As the Attorney mentioned, the bill also introduces a serious harm element in a cause of action for defamation and this is modelled, again, largely on section 1 of the Defamation Act 2013 in the United Kingdom. That serious harm element can be determined early on application by one of the parties in the process and it then becomes incumbent on the plaintiff to show that they have suffered serious harm in order for their case to proceed. This is an attempt to reduce the number of actions particularly on social media and technology platforms arising from comments and minor grievances.

If someone calls you a nasty name on Facebook or publishes something on Twitter, before you can proceed with your defamation action the test has to be that that actually caused you serious harm. That is not now a requirement. This is an attempt to reduce the number of actions particularly arising on social media and technology platforms, as I have said, from comments and minor grievances. As a corollary, the defence of triviality, which, according to my research, has never been successfully applied, is to be abolished.

Rather than going through the process and getting to the end of a trial and the defendant saying, 'This is a trivial matter. There should be no award of damages', the matter can be determined at the front end by the plaintiff having to show serious harm thereby negating the need for the triviality defence. As I said, it has been in place in the United Kingdom since 2013 and it has taken six years for serious harm to be finally judicially considered in the United Kingdom.

In 2020 the Supreme Court in the United Kingdom handed down a decision on an appeal in the case of Lachaux v Independent Print Limited and Another, which I think was the Huffington Post. The UK Supreme Court unanimously held that the Defamation Act 2013, which contains the same clause, altered the common law presumption of general damages and defamation. It is no longer sufficient for the imposition of liability for a statement complained of to be inherently injurious or have a tendency to injure a complainant's reputation, which was then the law in the UK. Instead, the language of section 1 of the act, which is similar to the proposed section 10A being introduced in this legislation, requires a statement to produce serious harm to reputation before it can be considered defamatory. This was after a decision from the UK Court of Appeal which in fact found differently.

In the UK section 1 has been upheld but its impact still remains uncertain. Lord Sumption, who was one of the Law Lords who delivered the judgement, commented that the changes to the common law are 'no revolution in the law of defamation'. That comment was given in the context of considering whether section 1 had a knock-on effect on other provisions in the 2013 act. However, the statement may hold true more broadly at least as far as the numbers of claims and the practice of litigating defamation claims are concerned. That is, it may not necessarily change the number of claims being made or the manner in which those claims are litigated.

The explanatory notes to the 2013 UK act state that the serious harm provision raises the bar for bringing a claim so that only cases involving serious harm to the claimant's reputation can be brought. However, a number of commentators have noted that, setting aside a spike in 2018 following the Court of Appeal judgement, there has been no significant drop in the average annual number of defamation claims issued following commencement of the act. It is important to note that because one of the claims made in relation to these changes is that they will reduce the number of claims being made. The experience in the UK since 2013, with one spike in the year 2018 following a court decision which was subsequently reversed, is that the numbers are relatively unchanged. It will be interesting to see whether the changes we are debating today will have the desired effect of reducing the number of claims and winnowing out the trivial and unmeritorious.

Provisions for concerns notices are also included, again seeking an earlier and less costly resolution and allowing for early identification of the alleged defamatory material. Clause 16 of the bill also introduces a new public interest defence, again largely based on section 4 of the UK Defamation Act. As in the UK act, this proposed clause sets out a non-exclusive list of factors the court may, but is not compelled to, take into account. There may be some interest in this clause, if there has not been so far in relation to this bill, for parliament and MPs given the sometimes contentious issues of qualified privilege and the repetition or republication of statements made in this place. Proceedings in parliament, including statements made in the House, committee or otherwise made in the course of or for purposes of or incidental to parliamentary proceedings, are, of course, protected absolutely by parliamentary privilege. However, the repetition of such statements or republication of proceedings outside of this place is not protected by absolute privilege and may have to rely on the defence of qualified privilege.

Under the old defamation law, malice removed qualified privilege. If something was said outside of this place that was said previously inside of this place but was done so with malice, then the defence of qualified privilege did not apply and the defendant would become liable. I believe it is the case that under section 24 of the Defamation Act 2005, defences under division 2, which will include the new section 29A, can be defeated by malice. Malice is almost always present in repetition/republication cases.

The question of what constitutes repetition or republication and the extent to which reference may be made to a protected statement—that is, parliamentary privilege—to establish the meaning of an unprotected statement is always the question. There have been a number of references to parliamentary proceedings in a way that seeks to impeach or question it, but it is prohibited by the Bill of Rights Article 9 protections and there have been many cases in relation to that in Australia and New Zealand, including here in Queensland. In Queensland in the case of Erglis v Buckley reference to the protected statement—my friend the member for Mermaid Beach will be interested in this and I am sure he is listening—was allowed to enable damages to be increased.

Some questions for the Attorney are can the Attorney confirm that nothing in the Defamation Act affects the defence in section 54 of the Parliament of Queensland Act 2001 in respect of publication of fair report and can the Attorney confirm that new clause 16, which establishes the public interest defence in the new section 29A, applies to republishing proceedings in parliament and what factors in section 29A(3) would be enlivened by such a republication. I am sure clarity on these issues will be appreciated, if not immediately then certainly no doubt in the future.

In passing, I note the current defence of qualified privilege is being changed to avoid overlap with the new public interest defence and it removes, via new section 30(3B), the obligation on a defendant to prove the matter complained of concerned an issue of public interest to establish the defence. The final matter adopted from the UK act is in relation to clause 18 that inserts a new section providing a defence for peer reviewed scientific or academic papers. It is important that scientists and academics are free to express their views freely in such peer reviewed academic and similar journals. There are a number of other changes made in relation to the defence of contextual truth which allows pleading back and changes to the cap on damages. There are also amendments to the Heavy Vehicle National Law which the opposition will support.

In conclusion, these laws are welcome and seek to improve the operation of the law of defamation, a law often bewildering in its complexity and frustrating in its application—a law that is less the result of considered position than it is a patchwork of cases and legislation framed over the centuries and applied with degrees of inconsistency and confusion. Even today we see high profile cases and small claims of local disputes and personality differences play out in the courts—just have a look at the papers. Often there are no winners, the damage complained of is repeated ad nauseam and, as Justice Kirby said, the remedies when obtained are generally not apt for the wrong that has been done. More is underway and I note a second stage of reform dealing with digital platforms is proposed. This is to be applauded, but let us hope it does not take another 15 years.

Fundamental questions remain. As Chief Justice Bathurst of the New South Wales Supreme Court in a recent address said—

> To what extent should defamation oppose a fetter on free speech? What is the cost of balancing the right to free speech with the right to reputation? How revolutionary should reforms be, or how much more do they need to be? Is the law truly bound up in its history, or can we detangle and simplify where needed?

No doubt parliaments and courts will have to continue to grapple with these fundamental questions. It is boring. It is complex. It is arcane. Not many people are interested in it until it affects them and that is why it is important we get it right. Let us hope we do not allow the past to constrain the development of a better law for the future. We will be supporting the bill.