Defamation Amendment Bill

Second Reading
In Committee

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DEFAMATION AMENDMENT BILL

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Second Reading

The Hon. IAN MACDONALD (Parliamentary Secretary) [2.38 p.m.]: I move:

That this bill be now read a second time.

I seek leave to incorporate my second reading speech in *Hansard.*

Leave granted.

This bill amends the Defamation Act 1974 to give effect to the principal recommendations of the report of the Attorney General's Task Force on Defamation Law Reform, which was released in July of this year.

The main focus of the amendments is to strike a balance between the free flow of information of matters of public interest and importance, and the protection of reputation. The amendments are both procedural, and involve changes to the substantive law.

Broadly speaking, the aims of the amendments are:

- To provide effective and appropriate remedies for those whose reputations are harmed by the publication of defamatory material;
- To ensure the law does not place unreasonable limits on the publication and discussion of matters of public interest and importance;
- To promote speedy and non-litigious methods of resolving disputes; and
- To avoid protracted litigation wherever possible.

To emphasise the importance with which the Government regards these aims, they will form a statement of objects to clarify the purpose of the Act.

The inclusion of such a statement will send a clear message that the Defamation Act should not be interpreted in a way which unreasonably limits discussion on matters of public importance, and that litigation should be considered to be a dispute resolution method of last resort.

A clear priority of these proposed amendments is to divert those cases that can be dealt with by other means away from extended litigation. In order to achieve this aim, the bill inserts a new part into the act, entitled "Resolution of Disputes Without Litigation". As the title suggests, the object of this part is to encourage the early settlement of disputes involving the publication of defamatory matter. I am strongly of the view that the speedy and public vindication of a person's reputation, through a revised and strengthened offer of amends procedure, is the preferable way to resolve defamation cases. The Defamation Act currently provides for an offer of amends process, but it is not being used extensively. This appears to be because it is only available in respect of innocent publications and because it may be difficult to comply with some of the practical requirements of the process.

Proposed section 9D sets out how the new process for making offers of amends will work. A publisher will be able to make an offer of amends to a person aggrieved by a defamatory or purportedly defamatory statement. The offer must include a number of elements, including an offer to publish a reasonable correction and apology, and an offer to pay the expenses reasonably incurred by the aggrieved person. The publisher may also decide to include an offer to pay compensation in appropriate cases.

Any offer must be made within 14 days of the publisher being told by the aggrieved person that the matter in question is or may be defamatory or within 14 days of the publisher serving a defence to an action for defamation on the aggrieved person. I have no doubt that, in a fair proportion of cases, the initial offers of amends will be largely acceptable to aggrieved parties, but will require some negotiation and fine tuning before they can be reasonably accepted. For this reason, the bill provides scope for negotiations to continue beyond the 14 days, provided any renewed offer of amends represents a genuine attempt by the publisher to address matters of concern raised by the aggrieved person about an earlier offer**.**

The bill ensures that once a publisher performs its part of a settlement offer, including paying any agreed compensation, the aggrieved person cannot begin or continue a defamation action. Further the bill provides that it will be a defence to an action in defamation if the publisher made an offer of amends that was not accepted, that offer was reasonable in the circumstances, it was made as soon as practicable after the publisher became aware that the publication in question may have been defamatory, and the publisher was ready and willing to perform the offer before the trial.

As a further incentive to settle defamation proceedings before they reach the courts, the bill provides that costs penalties will apply to an unreasonable failure to resolve a matter.

The normal costs rule is that the successful party recovers costs on a party-party basis. Typically, this amounts to about 60 to 80% of their actual legal costs. Both the Supreme and District Courts have a general discretion as to the amount of costs to be paid by parties, including the award of indemnity costs. Indemnity costs are usually awarded where there has been a flagrant breach of procedural rules by the unsuccessful party and can amount to 80 to 90% of actual costs. In practice, indemnity costs are seldom awarded.

The bill adds section 48A to the Defamation Act which requires the court to consider an order for costs on an indemnity basis where it forms the view that there has been an unreasonable failure on the part of either the plaintiff or the defendant to resolve the matter. For example, a plaintiff would be at risk of an indemnity costs order if he or she were not to accept an offer of correction or apology where the offer was reasonable. A defendant would be at risk of an indemnity costs order were it not to make a settlement offer when it would have been appropriate to do so.

There is understandable concern about wealthy parties, whether plaintiffs or defendants, using their deep pockets to wear down opponents of modest means to discourage them from continuing, or indeed even commencing, defamation proceedings for fear of a ruinous costs order. It is not unheard of, for example, for property developers to commence proceedings known as SLAPP (Strategic Lawsuits Against Public Participation) suits against individuals or community groups to silence their opposition to a proposed development. There is also anecdotal evidence of some wealthy individuals pursuing every procedural avenue open to them despite the prospects of success being slim and despite their legal fees far outweighing any potential damages award. The object in such cases is to intimidate the defendant into settling the matter at the risk, however slight, of losing the case and being subject to a large costs order. Such tactics can have the serious consequence of either constraining free speech or allowing a reputation to be irreparably damaged.

While the addition of section 48A(2) into the Act will provide greater discretion to a judge in awarding costs in instances where parties have been recalcitrant than currently exists, section 48A(1) makes it abundantly clear that in awarding costs the court may take account of the way the parties have conducted their case. The court will be able to take into account such matters as whether either party has used their significantly more powerful financial position in a way that hinders the effective discharge of justice.

In keeping with the Government's objective to ensure the Defamation Act promotes the right balance between the free flow of information of matters of public interest and importance, and the protection of reputation the bill inserts a new section 8A that provides a corporation does not have the right to sue for defamation.

The law of defamation rightly protects reputation and the interest which individuals have in their honour, dignity and standing in the community. A corporation's interest in reputation, on the other hand, is purely financial. When corporate bodies are defamed, there are other possible actions available to them such as the torts of injurious falsehood or passing off, as well as remedies under the Commonwealth Trade Practices Act for misleading and deceptive or unconscionable conduct.

While the remedies available to corporations under the Trade Practices Act would ordinarily be against their commercial rivals rather than against media organisations, there is sufficient protection available to corporations to safeguard their economic interests. Unlike most individuals, these organisations frequently have the ability to engage in counter advertising and to run effective publicity campaigns to protect their public profile.

Of course, small, family-run businesses will not have the same resources as large companies to pursue counter-advertising or publicity campaigns to protect their reputation. Small, family companies, however, are almost always inextricably linked to the individual directors running them, and the bill makes it clear that individual members of corporations will still be able to sue in their own right, rather than in the company name. This will apply in every case where an individual is personally defamed, regardless of whether the corporation is large or small.

I note that while the bill provides that corporations (including those constituted for a governmental or other public purpose) will no longer be able to sue for defamation, local councils and government departments have not been able to sue for defamation since 1994 when the Court of Appeal handed down its decision in *Ballina Shire Council v Ringland* which followed an earlier decision of the House of Lords in *Derbyshire County Council v Times Newspapers.*

The current section 22 of the Defamation Act provides a defendant with a defence of qualified privilege when certain conditions are met, including when the conduct of the publisher was reasonable in the circumstances. There are currently no criteria set out in the act to provide guidance on what is reasonable and I appreciate that publishers need a practical means of interpreting what is, and is not, reasonable. Accordingly, the bill adds section 22(2A) to the Act which sets out the factors that a court may take into account when determining whether a publisher has acted reasonably. These factors include: the extent to which the matter published is of public concern; the extent to which the matter published concerns the public functions or activities of the plaintiff; the seriousness of the imputations; the extent to which the matter distinguishes between facts, suspicions and allegations; whether it was necessary for the matter to be published expeditiously; the sources of the information and the integrity of those sources; and any attempts to verify the information or to get the plaintiff's side of the story.

The Defamation Act currently includes a defence relating to the publication of fair protected reports. Schedule 2 of the Act explains that protected reports relate to reports on the public proceedings of parliament, courts, and other public bodies. In the interests of greater clarity and certainty about the scope of protected reports, the bill inserts a new section 25A into the Act which extends protection to accurately reported third party statements. Specifically, this includes the publication of reports of media conferences given, or media releases issued, by or on behalf of public officials or public authorities in their official capacities. The new section also protects subsequent reports based on earlier reports of media conferences, if the person making the subsequent report is not aware that the earlier report is unfair.

To encourage plaintiffs to seek to vindicate their reputations at the earliest possible opportunity, the bill will insert a new section 14B into the Limitation Act 1969. The new section will shorten the limitation period for bringing a defamation action from six years to one year, with a discretion to extend the period in appropriate cases. To ensure that the one year limitation period is not extended

by the courts to an unreasonable extent, the bill provides for a new section 56A of the Limitation Act which enables the court to extend the limitation period where the interests of justice require, to a maximum of three years from the date of publication**.**

Finally, a significant number of defamation actions are now heard in the District Court, as well as in the Supreme Court. Last year 48 claims for defamation were filed in the District Court, while 62 claims were filed in the Supreme Court. To ensure consistency between the availability of juries in the District and Supreme Courts, the bill will insert the equivalent of part 6 division 2 section 86 of the Supreme Court Act into the District Court Act. This will ensure that juries will continue to be involved in defamation actions in the District Court, unless the court orders that any prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury, or unless all parties consent to the order.

I commend the bill to the House.

The Hon. GREG PEARCE [2.38 p.m.]: I lead for the Opposition on this bill, which the Opposition generally supports. The reform of defamation law in New South Wales is in the public interest. That is especially so in relation to encouraging the settlement of disputes in a timely and cost-effective manner and attempting to strike a better balance between the democratic imperative of freedom of speech and the free flow of information and the rightful maintenance of an individual's reputation. The bill generally implements the recommendations of the Attorney General's task force on defamation law reform. The Coalition supports the bill but intends to move amendments to it. The first of those amendments relates to the rights of small business. Although the bill takes away the right of corporations to sue for defamation, the Coalition believes that a small business, particularly a family-based business, could be adversely impacted by the taking away of that right. We will move an amendment in relation to that.

The Coalition supports also the change to the limitation period provided by the bill as well as other parts of it. A little while ago I was handed a copy of amendments that the Government proposes to move. It is regrettable that again the Government has failed, until the last minute, to consult on a bill of this importance. From a quick look at the Government amendments, it seems they will address a number of significant concerns that the Opposition had about the bill and in particular some defects in the way in which it will operate. I will not deal with those now, because they will be dealt with in Committee. The Coalition will support the bill with amendments.

Reverend the Hon. FRED NILE [2.40 p.m.]: The Christian Democratic Party supports the Defamation Amendment Bill. It has been a long time coming, and we are pleased it is now before Parliament. It will amend the Defamation Act 1974, the District Court Act 1973 and the Limitation Act 1969. The bill results from the report of the Attorney General's task force on defamation law reform, which was released in July this year. The bill is aimed at striking a balance between the free flow of information on matters of public importance and interest and the protection of reputation.

I have first-hand experience with this State's defamation laws. I have been involved in a number of cases over the years, thankfully not many in recent times. Prominent among those was a case in which I was sued by the Chief Censor of the Australian Film Censorship Board for criticising her actions in releasing the film *Hail Mary*. That long, drawn-out case cost me tens of thousands of dollars. With legal and other costs, the figure was nearly $89,000. I had good lawyers, who indicated that it is very difficult to defend a defamation case and that, under the laws to be amended by the bill, a defendant is vulnerable because the person suing only has to sustain an argument that the statements complained of taints the person's reputation with public contempt and odium. That is a subjective test.

In another case I was sued by George Petersen when he was the member for Illawarra. That case related to remarks I made on the ABC which made no reference to any individual. I am usually careful in what I say because I know how the defamation law works. In that case it was argued that, by implication, I was referring to Mr Petersen even though I did not mention his name. That case was settled out of court, as was the previously mentioned case, at the request of both Janet Strickland and George Petersen. But that is after a lot of money is spent on solicitors and other

legal fees, with potential costs of up to $250,000 when a case goes for a number of days in the Supreme Court. If the case is lost there, one has to pay a huge amount in legal expenses as well as any damages awarded to the plaintiff. So I am enthusiastic about any reform of the defamation laws of this State that makes them fairer and unable to be abused.

One aspect of the Janet Strickland case that disturbed me related to a letter that I sent out asking for prayer and support. Somehow she got a copy of that letter and used it to ground a claim for aggravated damages. So cases can become more and more serious at an accelerating rate. Apparently, you must suffer in silence; you should not even talk about something. One could say she had me by the throat on that occasion. So I am pleased to support the bill in the hope that it will bring much more fairness and justice to our system in the future, and provide for freedom of speech.

The Hon. RICHARD JONES [2.44 p.m.]: A bill that addresses the problems associated with defamation laws is long overdue. The figures confirm that Sydney is the defamation capital of the world, with one writ in New South Wales for each 79,000 of population. That is higher than England, with one per 121,000, and far higher than the United States of America, with one per 2.3 million. There were 87 defamation matters dealt with by the New South Wales courts in 1999, 107 in 2000 and 102 last year.

In New South Wales truth alone is an insufficient defence. A public interest test must also be satisfied. This is one of the easiest elements to satisfy, as even greyhound racing has been held by the courts to be in the public interest. Perhaps the high rate of defamation proceedings initiated in New South Wales has something to do with that. It should be noted that in South Australia truth by itself is a complete defence, regardless of how damaging a statement may be to a person's reputation. South Australia has dealt with only 26 defamation matters in the past 23 years, the Australian Capital Territory has dealt with 27, Victoria with 21, Queensland 19, Western Australia 14, Tasmania 8, and the Northern Territory 6. In comparison, New South Wales courts have dealt with 79 defamation cases.

New South Wales is the only State with million-dollar payouts. In the past 23 years the courts have awarded the following approximate figures in damages: in the Australian Capital Territory $2.85 million, in Victoria $2.15 million, in Queensland $2 million, in South Australia $1.5 million, in Western Australia $580,000, in the Northern Territory $160,000, and in Tasmania $88,000. In New South Wales the figure is astronomical—$16.4 million.

The Premier told a gathering at the Sydney Institute on 9 July that a general damages cap of $350,000 for defamation cases would be provided for in the legislation. However, the bill that we are now debating does not provide that cap. I anticipate that the Government will argue that in effect section 46A of the Act already provides that compensation for non-economic loss for defamation cases will be kept in line with that given in personal injury cases. Section 46A provides that:

> ... in determining the amount of damages for non-economic loss to be awarded in any proceedings for defamation, the court is to take into consideration the general range of damages for non-economic lost in personal injury awards in the State.

While that offers some assistance, it does not explicitly provide what the Premier indicated on 9 July would be included in this bill. He stated then that there would be a cap on general damages. Section 46A does not cap damages; it merely offers guidance. The Premier said:

> ... too often damages awards for loss of reputation (non-economic loss) are excessive... We will provide that compensation for non-economic loss will not exceed payouts in personal injury cases—that is $350,000.

I wonder what happened to that promise. The Premier's press release of the same day said:

> The NSW Government will undertake a comprehensive reform of the State's defamation law, including limiting payouts for non-economic loss to $350,000.

Those are the words of the Premier. The recent passing of the Civil Liability Amendment (Personal Responsibility) Bill shows that the Government clearly believes that it is all right to have statutory caps on general damages for personal injury but this is not the case for so-called loss of reputation. Apparently it is acceptable for people who have lost their arms or legs, or stumbled on an uneven footpath, or suffered mental debilitation in the course of their employment to have their damages capped. By not capping defamation payouts are we, by assumption, saying that someone's reputation is worth more than that?

For many years it has been acknowledged that reform of defamation laws is long overdue. Quite justifiably, concerns have been expressed at the size of awards made in defamation cases, the complexity of the law and the lack of uniformity between jurisdictions. The system is fragmented and open to abuse by plaintiffs who believe that they can save their reputations if they receive fat payouts. Defamation laws should not be used simply to achieve economic ends, which in many cases they are. Apparently, this is currently the norm.

The public liability insurance crisis has prompted a push for reforms such as caps on damages for physical injury caused by negligence. It is surely incongruent to have defamation laws where sky's-the-limit payouts are possible. In July the Premier acknowledged that this needed to be addressed. I am sorry that the Government does not have the courage to follow through now. In a 10 October 2001 submission to the Attorney General on reforms to the New South Wales defamation laws the Press Council noted:

In New South Wales, for some personal injury and compensation matters, there is legislative guidance on the sums that can be awarded. The Court of Appeal has also provided lower courts with guiding principles for sentencing and the award of damages in some cases. The principle of comparability should prevail. Similar amendments to legislation and guiding principles on the award of damages in defamation actions... [would] lead to more realistic trade-offs between the costs of going to trial and settlement of actions.

The details of damages in defamation trials in each State and Territory of Australia over the past 23 years listed by the *Gazette of Law and Journalism* make interesting reading. New South Wales is the only State with $1 million or $500,000 payouts. One example is the famous *Erskine v John Fairfax Group Pty Ltd*, in which $2.5 million was awarded to Sydney entrepreneur James Erskine when the *Sydney Morning Herald* reported allegations made under oath in an affidavit.

The system in the United States provides that plaintiffs who are public figures must prove malice, that is, knowledge or recklessness as to falsity. The statistics relating to the number of writs issued per person clearly show the benefit of the American system. The Americans, despite their litigious reputation, create fewer than twice the writs issued in New South Wales, even with a population some 40 times greater. This is extraordinary. Compare the $2.5 million that was awarded to James Erskine with the maximum compensation payable for any injury under the statutory scheme for victims of crime, which is $50,000, and $350,000, which is the maximum compensation for non-economic loss under the Civil Liability Act 2002.

Non-economic loss, or general damages, covers emotional hurt, damages to personal relationships and professional standing. If the plaintiff can prove economic loss demonstrably related to the defamation, that figure is recoverable in addition to the general damages. Currently, plaintiffs in New South Wales rarely bother to prove economic loss, being content with the generosity of general damages. Capping damages has attracted a lot of attention. In 2000 the average defamation award was $233,000. Figures provided by the Communications Law Centre show that in New South Wales 73 per cent of plaintiffs are men, 8 per cent are women, and 19 per cent are corporations. These figures are similar to the United States figures, which are 72 per cent for men, 14 per cent for women and 14 per cent for corporations.

In New South Wales media, arts and sports people are the plaintiffs in 14 per cent of cases, and politicians are plaintiffs in 15 per cent of cases. In the United States politicians are the plaintiffs in only 4 per cent of cases and media, arts and sports people in 6 per cent of cases. It is essential that we change the laws to provide that the law of defamation is not regarded purely as a means of

recovering damages. Plaintiffs should seek published clarifications, corrections and apologies. Roy Baker from the Communications Law Centre notes that capping damages and costs is a measure that plays with the symptoms rather than the causes. He said:

High costs stem from the law's systemic failings, mired as defamation is in fruitless technicalities of pleading.

While that is certainly true, he and many others note that there is clearly no reason why defamation plaintiffs should be favoured over personal injury plaintiffs when it comes to damages. It does not make sense. Defamation law already favours plaintiffs hugely by beginning with the presumption that publications which damage reputation cannot be defended. Given that this presumption works in the plaintiff's favour, how can it be justifiable to also presume that the plaintiff has suffered harm and use that as the basis for compensation that is inappropriately disparate?

The amendments that I will move at the Committee stage will provide that damages in defamation cases shall not exceed damages that are payable in personal injury cases, that is, $350,000. That is what the Premier promised last July. I thank particularly Roy Baker from the Communications Law Centre, Richard Ackland from the Law Press for their input, and Christine Black for her work on the legislation. I commend the bill, with the amendments I will move at the Committee stage, to the House.

The Hon. IAN COHEN [2.53 p.m.]: The Greens have serious concerns about this bill. By saying that we are probably flying in the face of the opinions of most members of this House who seem to welcome it. Having gone through a number of defamation cases and having won an out-of-court settlement from the *Daily Telegraph* over an article by Piers Akerman, I well know the fear of members of the general public when dealing with large corporations and the inherent unfairness in the capping of damages. An example is Mr John Marsden, who, although representing a different perspective to that of many members of this House, nonetheless was badly done by because of a long, drawn-out defamation case. He won the case, but it was an empty victory because of the massive costs. Reform of defamation law is almost always surrounded in controversy. There is a balancing act in managing the conflict between, on the one hand, the principle of freedom of speech and the free flow of information and, on the other hand, the right to protection from attacks on reputation. It is a conflict between competing public interests, as the High Court stated in 1997 in Lange's case:

The purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech. It is not to be supposed that the protection of reputation is a purpose that is incompatible with the requirement of freedom of communication imposed by the Constitution. The protection of the reputation of those who take part in the government and political life of this country from false and defamatory statements is conducive to the public good.

Since the Government was elected in 1995 there have been attempts to reform the Defamation Act. In September 1995 the New South Wales Law Reform Commission released its report on defamation. Its key recommendations were that falsity should be an ingredient of the cause of action in defamation, with the burden of proof resting on the plaintiff, and the declaration of falsity should be introduced as an alternative to damages. In September 1986 the Defamation Bill was introduced into the Legislative Council. The bill was largely based on the recommendations of the Law Reform Commission. However, the bill was strongly criticised by many in the community, including defamation lawyers, the Australian Press Council and the Free Speech Committee. The bill did not proceed past its second reading.

Earlier this year the Government set up the Attorney General's task force on defamation law reform. The task force reported in July this year. This bill implements the main recommendations of the task force. This bill amends the Defamation Act, and the Government has stated that the main thrust of the amendments is to strike a balance between the free flow of information in matters of public interest and importance and the protection of reputation. Those who are harmed by the publication of defamatory material should have access to redress. This right to pursue redress against defamation must be protected. However the Government has been keen to emphasise that it

wishes to ensure that the law does not place unreasonable limits on the publication and discussion of matters of public interest and importance, promotes speedy and non-litigious methods of resolving disputes and avoids protracted litigation wherever possible.

As all honourable members know, John Marsden was seriously defamed by Channel 7 and is well qualified to speak on how persons seeking redress encounter defamation law after being defamed in the media. He has argued strongly against the amendments proposed by this bill. He is strongly opposed to the provisions of the bill which seek to try to force early settlements, early apologies and the bringing together of parties. Mr Marsden says his own experiences have made him dubious about such measures. He said:

Within six months of the defamation I tried to get the parties together. Within six months of the defamation I filed in the Court Offers of Compromise of $250,000 which, of course, at the end, was the verdict we got. However, whilst we filed that, we ran into costs of in excess of $7 million. The whole purpose of this legislation is a sham.

John Marsden suggests that the reason a defamation action gets out of control is the way it is run. He suggested that the process should be clarified in this way:

1. You are defamed.
2. You are the Plaintiff and you sue.
3. The defendant puts on the defence.
4. The matter goes to Court.
5. The Jury should be removed from the process—a jury is unnecessary.

Then a judge should decide on the following matters:

a) Is the statement defamatory?
b) If so, has it damaged you?
c) What are the damages?

He went on to state:

In my case, there were 17 interlocutory appeals to the Court of Appeal during the trial. That added over $1 million to the costs. There should be a clear provision preventing interlocutory appeals. There should not be appeals or an appeal process during the Court case.

In a letter he wrote to me on 4 December he stated:

The second issue is that in my case, after they defamed me on TV, somehow or other, people came out of the woodwork, people who made the allegations on TV knew people, supplied to them by the Police, who were then able to be called as witnesses - another ten (10) people. That shouldn't happen. The people who made the allegations are the people who should substantiate the allegations. We shouldn't say "John Marsden is a paedophile and these eight (8) people said so on TV. Now they say he is not a paedophile but we've found eight (8) new people who say he is a paedophile." That simply should not be able to happen.

The question of an apology, in my case and in serious defamation cases, would make no difference. Even though I won my Court case, I will be known as a paedophile for the rest of my life. I am tainted and damaged for the rest of my life. I don't have the influence I used to have. I thought of getting involved again with the Council for Civil Liberties but I never would because people will say "Oh, he is only a paedophile and what he says is only because he is a paedophile."

The question of tying the damages up with personal injury damages is ridiculous. In my case, if I'd had the money, I would have pursued an economic loss claim because of the damage it did to the office. Our office, for a period of six (6) years, had our income cut in half. However, it would have cost me over $1 million to have an expert come in and examine our books, together with Mallesons coming in and examining our books, to produce that to the Court. It should be able to be proved in a

much simpler way. Evidence should be simpler.

Then, of course, was the fact that:

a) I had to prove the defamation, which I did before a jury and the jury said I was defamed.

b) I then had to prove that I was damaged. We had to go through that process, which was a waste of time because if, at the end of the day, Channel Seven had been able to prove I was a paedophile and we'd wasted six (6) months in Court proving I was damaged and they later proved I was a paedophile.

The issue as to whether I was a paedophile should have been able to be proved first. Then the damages.

The other issue is, on the question of damages, one should be able to look at things speaking for themselves. I had to go to a number of psychiatrists. That's not an easy thing for anyone to do, particular someone with an ego as big as mine.

I am sure you saw that I was totally and absolutely emotionally damaged. I thought seriously of suicide. I have never, ever, ever denied that. However, because the psychiatrist got his evidence confused, the Judge refused to allow any damages for psychiatric damage.

The Judge had to be stark-raving crazy mad not to think that I was not psychologically damaged from what happened to me. I went through people spitting on me in the streets, throwing bricks at me, excreta on my doorstep etc. Not psychologically damaged?

The interesting part I see in the new legislation is Clause 48A which says "In awarding costs in respect of proceedings for defamation, the Court may have regard to the following matters:

(a) The way in which the parties to the proceedings conducted their case (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings),"

That is, of course, what happened in my case. There was no effort to settle because they didn't want to settle. They had plenty of money. It has cost me over $7 Million. What has it cost Channel Seven who had double the amount of representation? They had two QC's whilst I had one; they used their excess power.

That letter was sent to my office by John Marsden, senior partner in Marsdens law firm. This bill provides a bandaid approach to serious problems within defamation law. Though the Greens are always supporters of progressive law reform that will improve the delivery of justice and clarify legal processes or make them more efficient, we are unconvinced that this bill will deliver on these fronts. We appreciate the measures that the Government has adopted in order to make clear how this legislation should be interpreted. We also appreciate that it is emphasising that litigation should be considered a dispute resolution of last resort. The kinds of pressures that litigants face largely through the misuse of litigation should not be underestimated. However, the Greens do not believe that the Government should throw its hands up at the current state of our judicial system and simply encourage or indeed legislate to encourage people to avoid it. This is avoiding the real issue. As I said earlier, it is a bandaid solution. The pursuit of justice is a worthy aim and governments should legislate in the name of justice, not in the name of attempting to avoid confronting social and/or legal problems that appear impossible or not in the direct interest of the Government to resolve.

New part 2A is entitled "Resolutions of disputes without litigation". As the Government indicated, the object of this provision is to encourage the early settlement of disputes. Traditionally, those with lesser financial or other power within our community are those who are disadvantaged by the early and/or out-of-court resolutions of disputes. Justice should not be delivered—and indeed be encouraged to be delivered—only to those who can afford to pay. The bill provides that if an offer is made by the publisher to make amends for a defamatory statement it will be a defence to an action

in defamation if the offer was reasonable in the circumstances. Whilst the Greens support attempts to prevent vexatious defamation actions clogging up the courts, we would not like to see people prevented from pursuing justice through the courts to properly clear their name because they are effectively forced to settle out of court. We are concerned that the bill may go to an extreme which may once again prevent the delivery of justice in a substantial number of cases. As has been noted by the Government:

There is understandable concern about wealthy parties, whether plaintiffs or defendants, using their deep pockets to wear down opponents of modest means to discourage them from continuing, or indeed even commencing, defamation proceedings for fear of a ruinous costs order. It is not unheard of, for example, for property developers to commence proceedings known as SLAPPs—strategic lawsuits against public participation—against individuals or community groups to silence their opposition to a proposed development.

Over the years I have been aware of many individuals and community groups that have been threatened by or issued with strategic lawsuits against public participation [SLAPPs]. They are lawsuits brought against individuals and community groups who do such things as circulate petitions, write to public officials, speak at or even attend public meetings, organise boycotts or engage in peaceful rallies and demonstrations. According to Sharon Beder in an article written in the *Current Affairs Bulletin* in 1995, SLAPPs are "a civil court action that alleges that injury has been caused by the efforts of individuals or non-government organisations to influence government action on an issue of public interest or concern". SLAPPs are big in the United States and have been known to occur here, particularly at the instigation of disgruntled developers. An example of a SLAPP in action can be seen in the Helensburgh SLAPP case. While this is an old case, it is a good demonstration of how a SLAPP works.

In this case the Helensburgh District Protection Society was formed after Wollongong City Council proposed that the town of Helensburgh be dramatically expanded. Members of the society were of the view that the development would have adverse impacts on the environment. The Donohoes and Tim Tapsell were active members of the society. Tim Tapsell acted as spokesperson on several occasions and Jenny Donohoe acted as the secretary. The society opposed a number of developments over a number of years, including a council plan in 1990 to rezone land in the green belt between Sydney and Wollongong. There were over 5,000 submissions in response to the rezoning proposal, the vast majority opposing the urban expansion. As a result, in 1991, the council dropped the plan. The following year the council put a new plan on public display that included the rezoning of much of the land as "environmental protection".

Public submissions were invited on the plan. The society was careful in all its activities not to name individuals or companies so that it would avoid defamation suits. According to the writ against the society, it had printed and arranged for more than 1,000 letters promoting the rezoning to be signed and forwarded to council. It had also written articles in favour of the rezoning as environmental protection that were published. The developers argued that the effect of the rezoning to environmental protection would be to prevent them from developing the land. They claimed that the defendants were aware of the effect and sought to achieve this effect. They sought to claim damages for the losses. The developers also alleged that the articles were inaccurate and misleading because they claimed that environmental damage would result from the residential development. The defendants, on the other hand, claimed that, far from conspiring to deprive the developers of profits, they were responding to a request from the council for the public to make submissions to the draft local environmental plan.

Aided by the efforts of the society, the council received more than 7,000 submissions with more than 5,000 supporting the rezoning. The council decided to go ahead with the rezoning but the Minister ordered a commission of inquiry into the rezoning. Shortly before the inquiry the Donohoes were threatened with further legal action for lobbying to have the inquiry cancelled. Many others who had intended to make submissions to the inquiry removed their submissions because they were also concerned about legal action. The developers kept the writ running for many years without bringing the case on for hearing. The Greens are pleased to see that the bill reforms the limitation period from six years to one year, which should stop this kind of litigation threat hanging around for

many years on an old case. The limitation period can only be extended for a maximum of three years from the date of publication when the interests of justice require it.

By way of example I also wish to bring to the attention of the House the case of Mr Bill Ringland, a member of an organisation known as the Clean Seas Coalition. Bill Ringland is a good friend of mine and I also was a member of the Clean Seas Coalition. In early 1993 the coalition became involved in a dispute with the Council of the Shire of Ballina about sewage disposal. On 1 April 1993 Bill Ringland issued a press release, which unfortunately I wrote together with Bill, that suggested that the council was increasing its use of an outfall at Lennox Head and that sewage was being pumped out surreptitiously at night and during storms. The council called a meeting for the purpose of considering what to do about the press release. The council then sued Bill Ringland for defamation, alleging that the press release imputed that the council was conducting its activities of sewage disposal secretly and unlawfully, that it was setting out to deceive residents, that it was falsifying published environmental material, and that it had misled environmental authorities. The council also claimed special damages of $800 for injurious falsehood, being the cost of arranging the council meeting. Bill Ringland cross-claimed, alleging that the proceedings were an abuse of process. Of course, there are numerous examples of how defamation law has been abused, this being just one of them.

The abuse of defamation law can destroy lives. The reform of defamation law needs to be carried out very carefully. Mr Ringland's case started in 1978, when he was about 79 years of age, and it continued over several years. He was very well represented by Clive Evatt through many stages of the case. Bill Ringland was a good friend of mine. He was acting in the public interest and, fortunately, the court decided his way. However, he and his wife, Jean, endured a huge amount of stress and worried that they may lose their only possession—their house—as a result of the vindictive case brought by council. As was noted by Justice Kirby in regard to the case:

Can it be seriously suggested that ratepayers or others would refrain from using the council's sewerage facilities—or even other "commercial services" by the shock they received upon Mr Ringland's press release and reports of it?

Of course, thousands of cases demonstrate the problems that exist within defamation law. However, the changes proposed by the Government will not remedy those problems. The Greens are concerned about the potential impact of the bill in this regard. The Greens are also concerned that corporations, particularly small corporations or small businesses, will not be able to sue. We are opposed to this measure. We believe that, at the very least, the bill should be amended to ensure that smaller businesses and companies are not adversely affected by the sweeping restrictions on pursuing action that this bill will put in place. The State Chamber of Commerce has commented that it is concerned that the Government has proposed these changes without consulting business. Furthermore, despite undertakings made by Premier Carr at the Sydney Institute on 9 July, there has been no evident consideration given to exempting small businesses from the bill. The State Chamber of Commerce said:

The removal of small business owners' right to defend their trading name through the law of defamation is particularly unjust. Small businesses have neither the resources or the time to defend their name in the public arena through public relations or counter advertising as the Attorney General has suggested.

I had a defamation issue with *News Ltd*—it ran a major story that defamed me. Several years later, after going through an extremely excruciating court process, I received an apology, which was printed in the *Daily Telegraph*. It was small compensation for the suffering that I had received as a public figure who had been defamed. It is ridiculous that this sort of situation occurs. The result is that support for the plaintiff in these circumstances is often too little too late. On top of this, the Government has claimed that corporations will be able to seek redress under the Trade Practices Act for misleading and deceptive or unconscionable conduct. This Government has misled the House on this point. In fact, under section 65A of the Trade Practices Act publishers and other information providers are exempted from sections 52, 53 and 55 relating to deceptive and misleading information. Therefore, a publisher of a newspaper or the owner of a radio or television station will not

be liable for misleading or deceptive conduct or misleading representations in the course of news reporting or otherwise providing information.

It is also an interesting possibility that under this legislation the Internet and similar services can be immune from prosecution as primary publishers, unless the publication concerns their goods and services. However, this will require a proclamation that the Internet and similar services are prescribed publications. That has not yet occurred. What is the situation with respect to Internet media commentary by the likes of *crikey.com*? Is there an opportunity for recourse? Are people going to be defamed and not be able to defend themselves? I ask the Government to clarify this point. The media should not have free rein to publish what they please about corporations of any size without a proper range of potential legal redress. The Greens consider this to be a serious problem. As has been noted by Chief Justice Gleeson in the New South Wales Court of Appeal:

Media power is, in the relevant sense, arbitrary: it is not subject to publicly-enforceable rules which control what may be published, nor are those who publish accountable for what is published other than through the law of defamation. The media exercises power, because and to the extent that, by what it publishes, it can cause or influence public power to be exercised in a particular way. And it is, in the relevant sense, subject to no laws and accountable to no one: it needs no authority to say what it wishes to say, or to influence the exercise of public power by those who exercise it.

The media may, by the exercise of this power, influence what is done by others for a purpose which is good or bad. It may do so to achieve a public good or its private interest. It is, in this sense, the last significant area of arbitrary public power. The law of defamation is the only or the only substantial legal control over what the media may say in order to influence public authorities to do what they would have them do.

I am involved with other ongoing defamation issues, as are some of my friends. It is a harrowing situation. People in my community and many other areas have made utterances in the public interest and have been dragged through a court case, often on the most spurious of charges. That is an absolute disaster for those people. Today I have received from Mr Clive Evatt—a barrister who has represented me a number of times on these defamation issues—notification of his major concerns with this bill. He makes the following comments:

(1) The proposed abolition of the right of a corporation to bring a claim for defamation is unjust and makes no sense.

It has been said that corporations are protected by the Trade Practices Act. However, section 65A of that Act exempt the media and other prescribed information providers from claims.

A small company could be put out of business by false, defamatory imputations published by a newspaper with no redress. The right of the directors to bring a claim would not entitle them to recover losses suffered solely by the company.

I suggest that the proposed section 8A not apply to smaller companies with 30 or less employees.

(2) The proposed offers to make amends under section 9D seems to assume that all defamation actions are brought against the media. Reference as to publishing a reasonable correction or publishing a reasonable apology are mainly applicable to the media who are in a position to do this.

Many defamation actions do not involve the media. The parties are often private citizens and the defamation concerned may relate to a letter or limited circulation of defamatory words. To publish a correction or apology in a newspaper would aggravate the situation because the defamation, even though there is an apology or correction, would be brought to the attention of all the readers of the newspaper.

The offer of amends is of assistance to the media who having published the defamatory matter is in a position to publish a correction or apology. As all the readers were aware of the defamatory matter they would know what was meant by the apology. This is not the case for individuals where the offer of amends would be useless.

Mr Evatt's next point is interesting. He candidly says:

> (3) Lawyers will welcome the new bill because it makes our complicated defamation laws even more complicated. Lawyers can look forward to a substantial increase in income particularly in view of the generous cost orders set out in the new section 48A.
>
> Generally the aim of the new legislation is to further remove brakes on the media so that they can ruin with impunity a person's reputation by false or irresponsible journalism.

The Greens are uneasy about the impact the bill could have on people. We do not support it.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [3.20 p.m.]: I speak in favour of the Defamation Amendment Bill on behalf of the Australian Democrats. In June 1990 the Attorneys General of New South Wales, Queensland, the Australian Capital Territory and Victoria initiated a project to discuss the implementation of uniform defamation laws. Unfortunately, the process fell apart as successive States left the project. The regimes in all States are quite different, as are the outcomes for litigants. No State was prepared to adopt the regime of the other. Ultimately, the project was left to meetings between New South Wales and the Australian Capital Territory, which proved fruitful. In 1994 the Australian Capital Territory produced a report, which was tabled in the ACT Legislative Assembly, outlining reforms. Recently, the Australian Capital Territory reformed its Act and incorporated some of the recommendations. I am pleased to say that the report from the Australian Capital Territory was largely written by my current staffer, Guy Ellicott. The report, together with the 1995 New South Wales Law Reform Commission report, made a raft of recommendations along similar lines to reform the law of defamation.

The report covered all the main areas of the law of defamation, including absolute and qualified privilege, the public figure test, the role of a judge and jury, defences, damages and alternative dispute resolutions. The bill addresses some of these areas and is moving in the right direction. It does not go as far as it should, but it is significant progress. The problem with wholesale changes is that since much of the print and electronic media, and the Internet, is generally Australiawide the dissemination of defamatory material crosses State borders and litigants can go shopping: they can initiate action in the jurisdiction that offers the best return. The Press Council submission to the Attorney General's Department review of the Defamation Act emphasises that we need uniform defamation laws across Australia. This positive bill partly returns the law of defamation to restoring a person's reputation. Defamation has become a cash cow for public figures who have the financial muscle to take on the media. It has been said that Joh Bjelke-Petersen ran his "Kingaroy" property on the proceeds of his defamation actions.

I have received letters of demand since I have been in this House. During the 14 years I ran my radio program *Puff Off*—which was Australia's leading radio program on smoking broadcast through the enthusiastically run university radio station 2SERFM—I also received a number of letters. I gave the tobacco industry a hard time. The radio station was very careful to caution me that it had received other complaints and that it could not afford insurance at the quoted price. Had the radio station been sued, it would have gone bankrupt and disappeared. Speaking the truth about the tobacco industry was extremely hazardous for many years. Near the end I regularly called them murderers each week to see whether I would be sued. It is interesting to note that the tobacco industry did not have the guts to sue me. Had I been sued I probably would have won; if not, they would have been laughed out of court. I am aware that a Sydney rugby league footballer received $250,000 because he was photographed naked in the shower. Presumably, his reputation was damaged because his genitals were photographed. But contrast that with the $51,000 he would have received under the table of maims if he had lost his genitals in an industrial accident! Relativities

between the damages for physical injury and the damages, so-called, for reputation are absurd.

Obviously, avoiding litigation is a worthy aim. Litigation is extraordinarily expensive in western jurisdictions, which is part of the problem. As one German said, "Yes, the British have a Rolls Royce legal system. The problem is that most people cannot afford Rolls Royces." The legal system is inequitable because it favours the rich who can afford to continue their cases for a long time with the best lawyers. Ideally, the object of defamation law would be to make restitution. Sometimes restitution can be made by giving people money but in other cases that is not so. It seemed extremely likely that my colleague Ian Gilfillan would win a seat in the South Australian Parliament. The day before the election a newspaper printed a defamatory article to which he was not able to respond, which probably cost him the seat. If my colleague were to be compensated financially, a court would have to take into account the probability of his winning based on private polling or opinions before the election and other things he may have been able to achieve, which are not necessarily easily quantified.

When opportunity costs are involved restitution is often very difficult. However, it is a shame there is no cap when it is simply reputation. Presumably, people who make huge amounts of money and whose reputations are called into question, which results in huge financial losses, could quantify those losses. It is a remedy for the rich. When poorer people are killed, compensation for the family is far less than that awarded to people whose reputations have been sullied. Some of us might say that life is more important than reputation. In the *Crucible* John Proctor says, "Take my life but leave my name", which is very heroic because he will be killed if he does not confess. If he dies his reputation remains intact, if he confesses to something he did not do his life is spared, but he will be disgraced. For most people it would be more important to win the case and have their reputations restored by some order of the court or statement by the person who had done wrong rather than be awarded damages greatly in excess of what other people would receive if their lives were ruined through physical injury. It is a shame that the cap has not been brought in at $350,000.

The practical aspects of the Internet must be tested. The Standing Committee on Social Issues is examining the power of the Internet and the possible censorship of pornographic material. The late Doug Moppett, who had the gift of magnificent commonsense, summed it up when he said that it was like shutting the window after the wall has blown away. When material published on the Internet is subject to the law of defamation in New South Wales, technically it will be very difficult for people to sue for information published on the Internet in the New South Wales jurisdiction. In practice it will have a great deal of effect on defamation action and defamation law in the medium term. It has not happened yet, but we are on the brink of it. We must congratulate the Government on the progress it is making, but we need uniform defamation laws in Australia. If the Internet is to be managed in any way defamation laws throughout the English-speaking world must be uniform.

The Hon. IAN MACDONALD (Parliamentary Secretary) [3.28 p.m.], in reply: I shall respond to the comments made by the Hon. Ian Cohen and then seek leave to incorporate my reply to the second reading debate in *Hansard*. The law of defamation exists to protect the reputations of individuals and the interests they have in their honour, dignity and standing in the community. It also plays a crucial role in ensuring a correct balance between the protection of that individual reputation and free speech. Freedom of speech is a cornerstone of a free and democratic society. It can be quickly stifled when individuals are threatened with a defamation action by powerful corporations. It is the mere threat of litigation that can force people into silence.

While court statistics show that very few defamation matters in which the plaintiff is a company make it to final judgment, those that do can eat up an enormous amount of the parties' money and the court's time, not to mention the fact that they can be a public relations disaster for the corporation suing. Perhaps the most infamous example of why corporations should not be allowed to sue for defamation is the English case dubbed "McLibel", in which McDonalds sued two activists for handing out anti-McDonalds leaflets. The case ran for 2½ years in the mid-1990s and remains the longest-running trial in English legal history. If a corporation is so concerned about its reputation that it believes litigation is the only way to protect it, a number of options can be pursued. Corporations have always been, and will continue to be, able to sue for injurious falsehood or passing off, as well as bring a claim under the Commonwealth Trade Practices Act for misleading

and deceptive or unconscionable conduct. While I appreciate that the remedies available to corporations under the Trade Practices Act will be against their commercial rivals rather than against media organisations, sufficient protection is available to corporations to safeguard their economic interests. Unlike most individuals, corporations frequently have the ability to engage in counteradvertising and to run effective publicity campaigns to protect their public profile.

As I mentioned in the debate last week, small or family businesses are unlikely to be seriously affected by the proposal to prevent corporations from suing for defamation. This is because it will commonly be the case that individuals will be sufficiently identified to sue in their own right, rather than in the company name. After all, a story on a current affairs program about a small family company, such as a hairdressing business, motor repair shop or a restaurant is not much of a story unless it identifies and obtains comments from, or at least attempts to obtain comments from, the people who are responsible for the business. Should a small business suffer economic loss as a result of its reputation being harmed, the principals of the business would almost always be able to sue for their own economic loss in an action for defamation. After all, most individuals associated with a small company would rely on that company for their main or sole source of income.

The Defamation Task Force advised me that there would be very few, if any, cases in which individuals are not identified in a story about a small company, and that an action would generally be available in injurious falsehood, which requires the plaintiff to demonstrate falsity, malice and economic loss. I appreciate that establishing malice can sometimes be difficult to prove, but it is important to understand that one way in which malice can be established is by showing reckless indifference by the defendant as to whether the material is true or false. Approached from this angle, any careless reporting conducted by a current affairs program, for example, would be at serious risk of an adverse court finding.

Of course, in the case of individuals associated with a corporation, the bill makes it clear that an individual who is a member of a company, including a director or shareholder, can bring a claim for defamation if he or she is defamed in a publication that also defames the company. In other words, in no way does the new rule preventing corporations from suing for defamation preclude an individual in the company from asserting that right. By providing in the bill that corporations will no longer be able to sue for defamation, we will be ensuring that an essential component of a free and open democracy-free speech-is protected and encouraged. To leave the law as it stands would serve only to allow the threat of litigation to have a chilling effect on free speech. As I foreshadowed earlier, I now seek leave to incorporate my reply to the second reading debate.

Leave granted.

Defamation Law Reform has generated considerable interest for some time. It was the subject of a Law Reform Commission Report in 1995, a forum was convened in 2000 and there have been attempts over the years through the Standing Committee of Attorneys General to achieve some sort of uniformity across Australia. Perhaps the principal reason the topic of defamation law reform frequently provokes heated debate is that so many powerful interests collide under this sphere of law: freedom of speech; protection of reputation; and protection of privacy.

The reforms contained in the bill before the House today will ensure that the Defamation Act provides the people of New South Wales with effective and appropriate remedies should their reputations be harmed. They will ensure that the law of defamation does not place unreasonable limits on the publication and discussion of matters of public interest and importance. They will promote speedy and non-litigious methods of resolving disputes, and they will avoid protracted litigation wherever possible.

These reforms will be achieved in a number of specific ways. Amendments to the Defamation Act will divert those cases that can be dealt with by other means away from extended litigation by a revised. and upgraded offer of amends procedure. A publisher will be able to make an offer of amends to a person aggrieved by a defamatory or purportedly defamatory statement, The offer must include an offer to publish a reasonable correction and apology, if appropriate, and an offer to pay the expenses reasonably incurred by the aggrieved person, The publisher may also decide to

include an offer to pay compensation in appropriate cases. Under amendments proposed by the Government a publisher will have 28 days within which to make an offer of amends after being told that a publication is or may be defamatory, although there will be scope for negotiations to continue beyond the 28 days, provided any renewed offer of amends is genuine. Once a publisher performs its part of a settlement offer, including paying any agreed compensation, the aggrieved person cannot begin or continue a defamation action.

The amendments will also provide an incentive to settle defamation proceedings before they reach the courts by applying costs penalties to an unreasonable failure to resolve a matter. It will also be a defence in defamation proceedings that a reasonable offer of amends was made but that it was not accepted. The Government has been assisted in the preparation of this bill by some very worthwhile contributions by other members of Parliament. The honourable member for Manly in the Legislative Assembly made some useful suggestions in relation to the costs provisions of the bill and his amendments have been incorporated into this section.

It is important to keep in mind that the revised offer of amends is one option for parties to settle proceedings, and is aimed at settlement occurring before litigation gets under way. It does not preclude parties from pursuing other forms of settlement. Parties will still be able to settle matters according to the offer of compromise regimes under the Supreme Court and District Court Rules, and, of course, they will also be entitled to settle defamation matters on any terms they see fit at any time of the proceedings. Nevertheless, to further encourage plaintiffs to seek to vindicate their reputations at the earliest possible opportunity, the bill will shorten the limitation period for bringing a defamation action from six years to one year, with a discretion to extend the period in appropriate cases to a maximum of three years from the date of publication.

In my view, what is important in weighing up a balance between free speech and protection of reputation is ensuring that responsible discussions of matters of public importance are protected This has been achieved, I believe, by providing greater guidance to the court in assessing a defence of qualified privilege The bill sets out a list of factors that a court may take into account when determining qualified privilege, Those factors include the extent to which the matter published is of public concern and the extent of a person's public functions or activities.

In keeping with the view that the law of defamation exists to protect reputation and the interest which individuals have in their honour, dignity and standing in the community and that, conversely, a corporation's interest in reputation is economic, corporations will not have the right to sue for defamation. In the interests of greater clarity and certainty about the scope of protected reports, the amendments will extend protection to accurately reported third party statements. Specifically, this includes the publication of reports of media conferences given, or media releases issued, by or on behalf of public officials or public authorities in their official capacities.

Finally, the Government is proposing some minor amendments to the offer of amends procedure as originally proposed in the bill. These amendments will essentially clarify certain aspects of the making of offers of amends that I am confident will further encourage parties to resolve any dispute early and with as little cost and inconvenience as possible. In summary, the amendments to the Defamation Act contained in the bill will strike a balance between the free flow of information of matters of public interest and importance, and the protection of reputation.

Motion agreed to.

Bill read a second time.

Motion by the Hon. Richard Jones agreed to:

That standing orders be suspended to allow the moving of a motion forthwith: That it be an instruction to the Committee of the Whole that it has the power to consider amendments relating to damages for non-economic loss.

Motion by the Hon. Richard Jones agreed to:

That it be an instruction to the Committee of the Whole it has have the power to consider amendments relating to damages for non-economic loss.

In Committee

Clauses 1 to 4 agreed to.

Schedule 1

The Hon. GREG PEARCE [3.35 p.m.]: I move Opposition amendment No. 1:

No. 1 Page 4, schedule 1 [5], proposed section 8A. Insert after line 12:

(3) Despite subsection (1), a corporation may assert or enforce a cause of action in defamation in respect of the publication of any matter by means of which a defamatory imputation about the corporation is made if:

(a) the corporation employs fewer than 10 persons at the time of publication of the matter, and

(b) the corporation has no subsidiaries (within the meaning of the *Corporations Act 2001* of the Commonwealth) at that time.

The Opposition is not satisfied with the Government's suggestion that small businesses would not be adversely affected by this sledgehammer approach to removing the right of corporations to sue. It is certainly not happy with, and disagrees with, the assumption that individuals will always be identified when a small private or family company is defamed. The defamation of a small business could cause significant injury to the family or the individuals involved in the company. It is not acceptable to argue that compensation for damage to reputation can be obtained through injurious falsehood, because that remedy is available only for provable financial loss. In addition, to succeed, one must prove malice, which would be extremely difficult for a small business. The Government suggested that individuals would always be identified and, therefore, would have the right to sue. It is not fair to expose small businesses to potential damage by having their rights removed and to expect them to seek other legal recourse.

The Hon. IAN MACDONALD (Parliamentary Secretary) [3.37 p.m.]: The Government does not support this amendment. In the case of small or family businesses that are defamed, it will commonly be the case that in practice individuals will be sufficiently identified to sue in their own right rather than in the company name. After all, a story about a small family company is not much of a story unless it is connected to and identifies individuals. The Defamation Task Force considered that there would be few cases in which individuals were not identified in the case of a small company. In those cases, an action in injurious falsehood would generally be available. To make an exception for a small or family company would create more problems than it would solve. For example, it would not be fair to base the exception on the number of shareholders or directors, because some very large and powerful businesses may have relatively few shareholders or directors. This presents a definitional problem.

The Hon. RICHARD JONES [3.38 p.m.]: I support the Liberal Party amendment. Often when small businesses comprising 10 or fewer people are defamed the person involved is not identified. The company could be very small and could be ruined. Family and small businesses need adequate protection. Therefore, I support the amendment.

The Hon. IAN COHEN [3.39 p.m.]: The Greens support the amendment moved by the Liberal Party. In fact, in discussions with the Opposition we sought to have the figure increased to 20. Small family companies could easily have 20 employees when one counts cleaners and other staff, including, more recently, security staff. Small companies with that number of employees, particularly family businesses, should receive that level of protection. Therefore, the Greens support

the amendment.

Question—That the amendment be agreed to—put.

The Committee divided.

Ayes, 22

Mr Breen	Mr M. I. Jones	Dr Pezzutti
Dr Chesterfield-Evans	Mr R. S. L. Jones	Ms Rhiannon
Mr Cohen	Mr Lynn	Mr Ryan
Mrs Forsythe	Reverend Dr Moyes	Mrs Sham-Ho
Mr Gallacher	Reverend Nile	
Miss Gardiner	Mr Oldfield	*Tellers,*
Mr Gay	Mrs Pavey	Mr Colless
Mr Harwin	Mr Pearce	Mr Jobling

NOES, 14

Dr Burgmann	Mr Egan	Ms Tebbutt
Ms Burnswoods	Mr Hatzistergos	Mr Tsang
Mr Costa	Mr Macdonald	*Tellers,*
Mr Della Bosca	Mr Obeid	Ms Fazio
Mr Dyer	Ms Saffin	Mr Primrose

Pair

Mr Samios	Mr West

Question resolved in the affirmative.

Amendment agreed to.

The Hon. IAN MACDONALD (Parliamentary Secretary) [3.45 p.m.], by leave: I move Government amendments Nos 1 to 5 in globo:

No. 1 Page 5, schedule 1 [6], proposed section 9D (3) (c), line 16. Omit "(if any)". Insert instead "(if appropriate in the circumstances)".

No. 2 Page 5, schedule 1 [6], proposed section 9D (3) (d), line 19. Omit "(if any)". Insert instead "(if appropriate in the circumstances)".

No. 3 Page 5, schedule 1 [6], proposed section 9D (3) (g), lines 30 and 31. Omit all words on those lines. Insert instead:

(g) must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer,

No. 4 Page 6, schedule 1 [6], proposed section 9D (5) (a), lines 17-19. Omit all words on those lines. Insert instead:

(a) the end of 28 days after the day the aggrieved person gives the publisher notice in writing informing the publisher that the matter in question is or may be defamatory of the person, or

No. 5 Page 7, schedule 1 [6], proposed section 9D. Insert after line 10:

(12) An offer to make amends is taken to have been made without prejudice, unless the offer otherwise provides.

I commend the amendments to the Committee.

The Hon. GREG PEARCE [3.45 p.m.]: The Opposition supports the amendments.

Amendments agreed to.

The Hon. GREG PEARCE [3.46 p.m.]: I move Opposition amendment No. 2:

No. 2 Pages 10 to 12, schedule 1 [12] and [13], line 1 on page 10 to line 18 on page 12. Omit all words on those lines.

This amendment will remove new section 25A, about which the Opposition has great concerns, as it would allow immunity for press releases and press conferences, particularly by government departments and spokesmen. This section is inappropriate in the lead-up to the forthcoming election.

The Hon. IAN MACDONALD (Parliamentary Secretary) [3.47 p.m.]: The Government does not support the amendment. The Defamation Act currently includes a defence relating to the publication of fair and protected reports. Schedule 2 to the Act explains that protected reports relate to reports on the public proceedings of Parliament, courts and other public bodies. In the interests of greater clarity and certainty about the scope of protected reports, the bill will insert a new section 25A into the Act to extend protection to accurately report third party statements.

Specifically, this will include the publication of reports of media conferences given, or media releases issued, by or on behalf of public officials or public authorities in their official capacities. The new section will also protect subsequent reports based on earlier reports of media conferences, if the person making the subsequent report is not aware that the earlier report is unfair. The new section will not preclude a person bringing a defamation claim against the original maker of the statement. However, the section will protect media organisations that subsequently publish the report.

Question—That the amendment be agreed to—put.

The Committee divided.

Ayes, 22

Mr Breen	Mr M. I. Jones	Dr Pezzutti
Dr Chesterfield-Evans	Mr R. S. L. Jones	Ms Rhiannon
Mr Cohen	Mr Lynn	Mr Ryan
Mrs Forsythe	Reverend Dr Moyes	Mrs Sham-Ho
Mr Gallacher	Reverend Nile	
Miss Gardiner	Mr Oldfield	*Tellers,*
Mr Gay	Mrs Pavey	Mr Colless
Mr Harwin	Mr Pearce	Mr Jobling

Noes, 14

Dr Burgmann	Mr Egan	Ms Tebbutt
Ms Burnswoods	Mr Hatzistergos	Mr Tsang
Mr Costa	Mr Macdonald	*Tellers,*
Mr Della Bosca	Mr Obeid	Ms Fazio

Mr Dyer Ms Saffin Mr Primrose

Pair

Mr Samios Mr West

Question resolved in the affirmative.

Amendment agreed to.

The Hon. RICHARD JONES [3.51 p.m.]: I move:

Page 12, schedule 1. Insert after line 23:

[16] Section 46A Factors relevant in damages assessment

Insert after section 46A (2):

(3) However, a court is not to make an award of damages for non-economic loss that exceeds the maximum amount that may be awarded to a claimant for non-economic loss for the purposes of section 16 (2) of the *Civil Liability Act 2002*.

The amendment provides that the highest amount of compensation payable for non-economic loss in defamation cases should be the same as the highest amount payable in personal injury cases. Section 16 (2) of the Civil Liability Act 2002 provides that the maximum amount of damages that may be awarded to a claimant for non-economic loss is $350,000. The defamation laws in Australia are notorious for being skewed in favour of protecting the reputations of prominent people, and there has been ongoing concern about the frequency of defamation cases and the size of awards made.

New South Wales produces more defamation writs per capita than England and the United States of America, with one writ in New South Wales per 79,000 people. In contrast, England produces one defamation writ per 121,000 people, and the United States produces one defamation writ per 2.3 million people. The Government recently legislated to cap compensation for non-economic loss in personal injury cases. There is clearly no reason why defamation plaintiffs should be favoured over personal injury plaintiffs.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [3.52 p.m.]: I support the amendment. As I said in the second reading debate, it is unreasonable to suggest that one person's reputation is more important than another person's life, and the amendment addresses that issue. A plaintiff who wins his or her case and is awarded damages is, in a sense, vindicated. The damages awarded in defamation cases should not be greater than the maximum award of damages in personal injury cases.

The Hon. IAN MACDONALD (Parliamentary Secretary) [3.53 p.m.]: The Government does not support the amendment. As honourable members will be aware, the Civil Liability Act 2002 limits the maximum award of damages for non-economic loss in personal injury claims to $350,000, an amount that is indexed annually. The indexed amount currently stands at $365,000.

Section 46A of the Defamation Act directs a court to take into consideration the general range of damages for non-economic loss in personal injury awards in New South Wales, including damages awards limited by statute. Of course, this means that a court must take into account the cap on damages specified in the Civil Liability Act. In my view, section 46A provides adequate guidance for courts in assessing damages for non-economic loss, and I am confident that the courts will give serious consideration to the cap on damages set out in the Civil Liability Act.

The Hon. GREG PEARCE [3.53 p.m.]: The Opposition is not convinced that harm to reputation equates in some way to non-economic loss for personal injuries and, therefore, it does not support the amendment.

Amendment negatived.

Schedule 1 as amended agreed to.

Scheduled 2 agreed to.

Title agreed to.

Bill reported from Committee with amendments and passed through remaining stages.

Bill Name:	Defamation Amendment Bill
Stage:	Second Reading, In Committee
Business Type:	Bill, Debate
Keywords:	2R, COMM
Speakers:	Nile, Reverend The Hon Fred; Macdonald, The Hon Ian; Pearce, The Hon Greg; Jones, The Hon Richard; Cohen, The Hon Ian; Chesterfield-Evans, The Hon Dr Arthur
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