



Legislation Review Committee

LEGISLATION REVIEW DIGEST

NO. 18/57 – 4 August 2020



New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2020, 26pp 30cm

Chair: Felicity Wilson MP

4 August 2020

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 18 of 57

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 18 of 57

The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

Contents

Membership	ii
Guide to the Digest	iii
Conclusions	iv
PART ONE – BILLS	1
1. DEFAMATION AMENDMENT BILL 2020	1
2. STATE REVENUE LEGISLATION (COVID-19 HOUSING RESPONSE) BILL 2020	13
APPENDIX ONE – FUNCTIONS OF THE COMMITTEE	17

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Guide to the Digest

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

COMMENT ON REGULATIONS

This section contains the Legislation Review Committee's reports on Regulations in accordance with section 9 of the *Legislation Review Act 1987*.

Conclusions

PART ONE – BILLS

1. DEFAMATION AMENDMENT BILL 2020

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Right to obtain a remedy for defamation – serious harm threshold

Schedule 1, item 6 of the Bill seeks to amend the *Defamation Act 2005* to provide that it is an element of a cause of action for defamation that the publication of defamatory matter about a person has caused or is likely to cause serious harm to the reputation of the person. This means that the plaintiff would have to prove serious harm to bring a successful action for defamation.

Under the current law, all publications of defamatory matter are actionable without proof of special damage. However, there is a defence to the publication of defamatory matter if the defendant proves that the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm.

By raising the threshold for a plaintiff to bring a successful action, the Bill thereby further limits a plaintiff's ability to obtain a remedy for defamation. However, the Committee notes that this amendment follows extensive stakeholder consultation by the Defamation Working Party that convened at the agreement of the Council of Attorneys-General, and which comprised representatives from all jurisdictions. Stakeholders consulted as part of this process overwhelmingly supported a serious harm threshold after concerns that a rise in inconsequential claims is causing expense and stress for private individuals, and using significant amounts of court time and resources. In the circumstances, the Committee makes no further comment.

Right to obtain a remedy for defamation – requirement to attempt settlement

Schedule 1, item 9 to the Bill seeks to amend the *Defamation Act 2005* so that an aggrieved person cannot commence defamation proceedings unless the person has given the proposed defendant a 'concerns notice' in respect of the matter concerned; the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice; and the applicable period for an offer to make amends has elapsed (generally 28 days).

In so doing, the Bill further limits a plaintiff's right to commence defamation proceedings without first trying to settle. This may result in an aggrieved person having to settle on a smaller amount of compensation in a given case than that which they may otherwise achieve. Under the current law it is not mandatory for an aggrieved person to issue a concerns notice to a publisher before commencing defamation proceedings. However, if an aggrieved person does not accept a reasonable offer made prior to commencing proceedings and a defence being filed, this may result in a defence for the publisher in any subsequent proceedings.

The Committee considers that further limiting the plaintiff's right to commence defamation proceedings without first trying to settle is reasonable in the circumstances. The Act already

encourages non-litigious methods of dispute resolution and the amendments respond to concerns raised by stakeholders during the Defamation Working Party's consultation process that these provisions needed to be strengthened. This is particularly appropriate given the more general concerns discussed above about an increase in inconsequential claims consuming the resources of courts and private individuals. In the circumstances, the Committee makes no further comment.

Right to obtain a remedy for defamation – requirement for leave to commence proceedings

Under section 23 of the *Defamation Act 2005*, a person must obtain the leave of the court to commence defamation proceedings if the person has already brought defamation proceedings for damages (in NSW or elsewhere) against the same defendant about the same or any other publication of the same or like matter.

Schedule 1, item 25 of the Bill seeks to amend section 23 so that a person would also require the leave of the court to bring defamation proceedings against associates of the previous defendant. This may have some effect on a plaintiff's right to obtain a remedy for defamation.

However, the Committee notes that under the current law there can be multiple proceedings in the same matter because a plaintiff chooses to sue an associate rather than a previous defendant. Further, the amendment does not completely remove the right to sue an associate, it is still open to the court to grant leave in an appropriate case. In the circumstances, the Committee makes no further comment.

Right to obtain a remedy for defamation – damages

Section 35 of the *Defamation Act 2005* provides for a maximum amount of damages that may be awarded for non-economic loss in defamation proceedings. There have been differing interpretations of section 35, one being that section 35 sets a scale or range of damages, with the maximum amount reserved for the worst kinds of damage even if the publication does not warrant an award of aggravated damages. The other is that the maximum amount operates as a cut-off, rather than setting a scale, that can be set aside in circumstances where aggravated damages are warranted.

Schedule 1, items 33 and 34 of the Bill seek to amend section 35 to confirm the first interpretation: that the maximum amount for damages for non-economic loss provided for therein sets a scale or range rather than a cut-off, with the maximum amount to be awarded only in the most serious case; and to require awards of aggravated damages to be made separately to awards of damages for non-economic loss so that the scale or range for damages for non-economic loss continues to apply for non-economic loss even if aggravated damages are awarded.

By confirming the first interpretation, the Bill may result in more modest amounts of damages being awarded for non-economic loss than would otherwise be the case. The Bill may thereby have some effect on a plaintiff's right to seek a remedy for defamation. However, the Committee acknowledges that the amendments set down in schedule 1, items 33 and 34 are consistent with the original policy intent of section 35 and aim to prevent excessive amounts of damages being awarded. In the circumstances, the Committee makes no further comment.

Right to obtain a remedy for defamation – limitation period

Under section 14B of the *Limitation Act 1969*, an action for defamation must generally be brought by a plaintiff within one year running from the date of the publication complained of.

For publications on the Internet, publication occurs each time a third party downloads the webpage concerned rather than when it is posted by the publisher. This is called the 'multiple publication rule'. As webpages may be downloaded many times, this means that there is a separate cause of action for each download and the limitation period applicable to each download will vary even though the same matter is involved.

Schedule 2, item 2 of the Bill seeks to amend the *Limitation Act 1969* to introduce a 'single publication rule'. Under this rule, the date of the first publication will be treated as the start date for the limitation period for all subsequent publications, except if the manner of a subsequent publication is materially different from the first publication. Further, for electronic publications, the date of first publication would be the date the publication was first uploaded for access or sent to a recipient.

In introducing the single publication rule, the Bill may mean that plaintiffs who would not have been statute barred from bringing a defamation action in a given case now find that they are. However, the rule is designed for the digital age to stop plaintiffs circumventing limitation periods and bringing actions for material downloaded many years after it was first published. The current multiple publication rule means that the limitation period effectively does not apply where there are subsequent downloads. The introduction of a single publication rule received strong stakeholder support during consultations conducted by the Defamation Working Party. In the circumstances, the Committee makes no further comment.

Right to jury trial

Under section 21(1) of the *Defamation Act 2005*, a plaintiff or defendant can elect for proceedings to be tried by a jury. However, schedule 1, item 22 to the Bill would amend the Act to provide that such an election can be revoked with the consent of all the parties to the proceedings, or if all the parties do not consent, with the leave of the court. The Court may, on application of a party to the proceedings grant such leave but "only if satisfied that it is in the interests of justice for the election to be revoked".

By allowing the court to revoke a jury election, the Bill may impact on the right of parties to have their matter tried by one's peers according to prevailing social norms. However, a court can only so revoke if it is in the interests of justice to do so. The Committee acknowledges that cases may arise where there are compelling reasons to revoke an election, notwithstanding the important role of juries in defamation proceedings e.g. where one party has been unduly prejudiced by pre-trial publicity. In the circumstances, the Committee makes no further comment.

2. STATE REVENUE LEGISLATION (COVID-19 HOUSING RESPONSE) BILL 2020

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 8A(1)(b)(v) of the LRA

Significant matters not subject to parliamentary scrutiny

Schedule 3 of the Bill seeks to amend the *Land Tax Management Act 1956* to introduce new land tax concessions for certain new build-to-rent developments. Build-to-rent housing refers to housing built specifically for rental purposes.

The Bill proposes a new section 9E which reduces the value of a parcel of land for the purposes of assessing land tax by 50 per cent in the following circumstances:

- if a building is situated on the land, and
- construction of the building commenced on or after 1 July 2020, and
- the Chief Commissioner is satisfied that the building is being used and occupied for a build-to-rent property in accordance with guidelines approved by the Treasurer for the purposes of this section, and
- an application for the reduction is made in accordance with this section.

Subsection 3 of the proposed section 9E establishes what may be contained in the guidelines used to assess if a building is being used for a build-to-rent property. This includes the planning or development standards that must be complied with; the minimum lease conditions that must be offered to tenants; the minimum scale of a building; and the nature of the ownership and management of the building and the land on which the building is situated. The guidelines may also set out the circumstances in which the applicant is required to give an undertaking not to subdivide the land or otherwise divide the ownership of the land. Further, the guidelines may make provision for other matters relating to build-to-rent properties and the land on which build-to-rent properties are situated as the Treasurer determines appropriate.

As the matters dealt with in the guidelines have bearing on the grant of significant tax concessions, the Committee would prefer that they were dealt with by regulation. This would foster an appropriate level of parliamentary oversight. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. There appears to be no such requirement for the guidelines in question. The Committee refers the matter to Parliament for consideration.

Part One – Bills

1. Defamation Amendment Bill 2020

Date introduced	29 July 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Defamation Act 2005* and the *Limitation Act 1969* to implement nationally agreed changes to the law of defamation.
2. In November 2004, the Attorneys General of the States and Territories agreed to support the enactment in their respective jurisdictions of uniform model provisions in relation to the law of defamation called the Model Defamation Provisions (the MDPs). The MDPs were prepared by the Australasian Parliamentary Counsel’s Committee. Each State and Territory subsequently enacted legislation to give effect to the MDPs.
3. In New South Wales, the MDPs were enacted in the *Defamation Act 2005* (the 2005 Act). The 2005 Act also located provisions concerning the limitation period for actions for defamation in the *Limitation Act 1969*.
4. Each State and Territory is a party to the Model Defamation Provisions Intergovernmental Agreement. The Agreement establishes the Model Defamation Law Working Party (the DWP). The functions of the DWP include reporting to the Council of Attorneys-General on proposals to amend the MDPs.
5. In 2018, the Council of Attorneys-General reconvened the DWP to review the MDPs. The review, led by New South Wales, was conducted in 2019 and 2020.
6. The DWP recommended to the Council of Attorneys-General that certain amendments also prepared by the Australasian Parliamentary Counsel’s Committee be made to the MDPs. The Council agreed in July 2020 to support the enactment of *the Model Defamation Amendment Provisions 2020* by each State and Territory.
7. The aims of the *Model Defamation Amendment Provisions 2020* are as follows—
 - a. to provide for serious harm to be an element of the cause of action for defamation,
 - b. to require that, if raised by a party, a judicial officer is generally to determine whether the serious harm element is established as soon as practicable before the trial of defamation proceedings so as to deal with insignificant claims early in the proceedings,

- c. to provide for certain individuals to be counted as employees of a corporation for the purpose of determining whether the corporation can sue for defamation,
- d. to require a concerns notice to be given to the publisher of matter that is or may be defamatory before defamation proceedings may be commenced against the publisher in respect of the matter,
- e. to make various amendments with respect to the form, content and timing for concerns notices and offers to make amends,
- f. to clarify that a defendant may plead back imputations relied on by the plaintiff as well as those relied on by the defendant to establish the defence of contextual truth,
- g. to provide for a defence for the publication of defamatory matter concerning an issue of public interest,
- h. to provide for a defence in respect of peer reviewed matters published in academic or scientific journals,
- i. to clarify when material is sufficiently identified in a publication of defamatory matter for it to be treated as proper material on which to base the defence of honest opinion,
- j. to make it clear that the maximum amount of damages for non-economic loss specified by the MDPs operates to create a scale or range of damages rather than a cap,
- k. to require the leave of the court to commence defamation proceedings against certain associates of a defendant previously sued for defamation in respect of the publication of the same matter,
- l. to provide that an election to have defamation proceedings tried by jury can be revoked only with the consent of all the parties or with the leave of the court on the application of a party,
- m. to allow a court to determine costs in respect of defamation proceedings that end because of the death of a party if it is in the interests of justice to do so,
- n. to introduce a single publication rule concerning the limitation period for multiple publications of the same defamatory matter by the same publisher or an associate of the publisher so that—
 - i. the start date of the 1-year limitation period for each publication runs from the date of the first publication, and
 - ii. for an electronic publication, the start date runs from when it is uploaded for access or sent to the recipient rather than when it is downloaded or received,

- o. to provide for the limitation period for commencing defamation proceedings to be extended to enable pre-trial processes to be concluded and to provide courts with greater flexibility to extend the limitation period,
- p. to allow notices and other documents to be sent to an email address specified by the recipient for the giving or service of documents,
- q. to make certain other consequential or related amendments.

BACKGROUND

8. In the Second Reading Speech, the Hon Mark Speakman SC MP, Attorney General, noted it has been 15 years since the *Defamation Act 2005* was passed, and that the Act implemented model defamation provisions (MDPs) which were agreed to by the then Standing Committee of Attorneys General, in 2004. The Attorney General further noted that the primary object of these MDPs was to achieve national uniformity.
9. However, with the evolution of the digital age, there have been many changes since the implementation of the MDPs. In particular, the Attorney General stated that a 2018 report by the University of Technology Sydney found that it is becoming increasingly common for private individuals to be plaintiffs in defamation actions, and in 2017, more than 50 per cent of defamation matters involved digital publications, up from 15 per cent in 2007.
10. Further, the Attorney General noted that the growth of social media has seen a rise in the number of defamation matters in NSW courts. The Attorney General told Parliament that in September 2019 Matt Collins QC gave an address to the National Press Club of Australia during which he noted that between 2014 and 2018, there were 268 references to defamation law in the decisions of superior courts in the United Kingdom compared with 577 in Australia, and that 312 of those references came from NSW.
11. The Attorney General stated:

As the objects of the Model Defamation Provisions make clear, a person whose reputation is harmed by the publication of defamatory matter should have access to effective and fair remedy, but this needs to be balanced against the spiralling numbers of expensive, stressful but ultimately minor matters in our courts...These are some of the issues that the Bill seeks to remedy.
12. The Attorney General also provided details about the process that was followed, culminating in the Bill. He told Parliament that in 2018, the then NSW Department of Justice reviewed the *Defamation Act 2005*, identifying a number of provisions – and thus by implication a number of provisions in the MDPs – that would benefit from amendment. Therefore, the Attorney General referred this NSW review to the Council of Attorneys General (CAG) and recommended that a defamation law working group be reconvened to review the model laws, and the CAG agreed.
13. The Attorney General stated that detailed policy work followed with two rounds of stakeholder consultation. In early 2019, a discussion paper was released about which 44 submissions were received and three stakeholder roundtables were held. The Attorney General told Parliament that six main themes emerged from the stakeholder submissions:

- The urgent need for model laws to be modernised to adapt to digital communications.
 - Increasing use of defamation law for trivial and vexatious matters. The Attorney General stated the submissions suggested that these matters tended to be quite minor with low damages but to result in disproportionately high legal costs. He also noted that "Minor claims are also placing a substantial burden on court resources".
 - Parties not having sufficient incentives to resolve disputes without resorting to litigation.
 - The need for a dedicated public interest defence to protect the ability of journalists and media organisations to report on matters of public concern.
 - For those jurisdictions in which defamation proceedings may be tried by jury, the respective roles of judges and juries.
 - A number of provisions requiring clarification and refinement to ensure they operate as originally intended.
14. The Attorney General further stated that the Defamation Working Party, comprising representatives from all jurisdictions, considered the issues raised and in late 2019 exposure draft Model Defamation Amendment Provisions (MDAPs) were released for public consultation. 36 submissions were received, another roundtable held, and changes made to the MDAPs to address stakeholder feedback. On 27 July 2020, the CAG agreed to support the enactment of the final MDAPs by each State and Territory.
15. The Attorney General told Parliament:
- The Model Defamation Amendment Provisions agreed by the CAG are far-reaching. The ultimate aim is to strike a better balance between, on the one hand, providing fair remedies for a person whose reputation is harmed by a publication and, on the other hand, ensuring defamation law does not place unreasonable limits on freedom of expression, particularly about matters of public interest.

ISSUES CONSIDERED BY THE COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Right to obtain a remedy for defamation – serious harm threshold

16. Schedule 1, item 6 of the Bill seeks to amend the *Defamation Act 2005* to provide that it is an element of a cause of action for defamation that the publication of defamatory matter about a person has caused or is likely to cause serious harm to the reputation of the person. This means that the plaintiff would have to prove serious harm to bring a successful action for defamation.
17. The explanatory note to the Bill details that under the current law, all publications of defamatory matter are actionable without proof of special damage. However, section 33 of the *Defamation Act 2005* does provide that it is a defence to the publication of defamatory matter if the defendant proves that the circumstances of the publication

were such that the plaintiff was unlikely to sustain any harm. This is called the 'defence of triviality'.

18. In the Second Reading Speech, the Attorney General provided the following background to the amendment:

Stakeholders raised significant concerns that defamation law is increasingly being used for trivial, spurious and vexatious backyard claims. The costs and stress of defending a defamation claim can be prohibitive for private individuals. As the Law Council noted in its submission responding to the discussion paper: "The case management of [proceedings between self-represented natural persons] invariably involves a disproportionate amount of judicial time and resources when the likely award of damages and vindication will be small or the meanings contended for are barely, if at all, defamatory".

19. The Attorney General stated that it was on this basis that stakeholders consulted regarding the MDAPs overwhelmingly supported the introduction of a serious harm threshold.

Schedule 1, item 6 of the Bill seeks to amend the *Defamation Act 2005* to provide that it is an element of a cause of action for defamation that the publication of defamatory matter about a person has caused or is likely to cause serious harm to the reputation of the person. This means that the plaintiff would have to prove serious harm to bring a successful action for defamation.

Under the current law, all publications of defamatory matter are actionable without proof of special damage. However, there is a defence to the publication of defamatory matter if the defendant proves that the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm.

By raising the threshold for a plaintiff to bring a successful action, the Bill thereby further limits a plaintiff's ability to obtain a remedy for defamation. However, the Committee notes that this amendment follows extensive stakeholder consultation by the Defamation Working Party that convened at the agreement of the Council of Attorneys-General, and which comprised representatives from all jurisdictions. Stakeholders consulted as part of this process overwhelmingly supported a serious harm threshold after concerns that a rise in inconsequential claims is causing expense and stress for private individuals, and using significant amounts of court time and resources. In the circumstances, the Committee makes no further comment.

Right to obtain a remedy for defamation – requirement to attempt settlement

20. Part 3 of the *Defamation Act 2005* contains provisions to encourage the resolution of disputes without litigation. As noted in the explanatory note to the Bill, the main features of these provisions are as follows:

- an aggrieved person may give a publisher a 'concerns notice' setting out the imputations of which the aggrieved person complains and any other matters,
- the publisher may seek further particulars after a concerns notice is given,

- the publisher may make an offer to make amends in the form provided by the provisions but not if it is made after 28 days of the concerns notice being given or after a defence is served in defamation proceedings for the matter in question,
 - the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher in relation to the matter in question if the publisher carries out the terms of an offer to make amends accepted by the aggrieved person,
 - the publisher has a defence in defamation proceedings for the matter in question if the aggrieved person refuses to accept a reasonable offer to make amends made in compliance with certain requirements.
21. As the explanatory note details, it is not mandatory under these provisions for the aggrieved person to give a concerns notice to the publisher. Therefore, an aggrieved person can commence defamation proceedings instead of giving a concerns notice. However, if the aggrieved person does not give a concerns notice, the publisher can make an offer of amends until proceedings are commenced and a defence is filed. The rejection of a reasonable offer of amends might result in a defence for the publisher in these circumstances.
22. Schedule 1, item 9 to the Bill seeks to amend the *Defamation Act 2005* to make it mandatory to issue a concerns notice before proceedings can commence. That is, an aggrieved person cannot commence defamation proceedings unless:
- the person has given the proposed defendant a concerns notice in respect of the matter concerned, and
 - the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice, and
 - the applicable period for an offer to make amends has elapsed (generally 28 days).
23. The Attorney General provided the following background to the amendment:
- One of the objects of the *Defamation Act 2005* is to promote speedy and non-litigious methods of dispute resolution. Part 3 of the Act establishes a procedure to enable parties to settle disputes without the need for expensive litigation ...Stakeholders identified a range of issues with the provisions in part 3. They suggested that too many defamation actions proceed to trial as there is insufficient incentive for parties to engage in non-litigious dispute resolution. The bill proposes to address those concerns by clarifying the dispute resolution mechanisms in the Act.
24. The Attorney General continued:
- A key concern is that there is no requirement for an aggrieved person to issue a concerns notice. Stakeholders including the Law Society of New South Wales identified the necessity of providing that concerns notices be mandatory, saying: "Without this step, the offer to make amends process may lack potency and in some instances may be overlooked".

Schedule 1, item 9 to the Bill seeks to amend the *Defamation Act 2005* so that an aggrieved person cannot commence defamation proceedings unless the person has given the proposed defendant a 'concerns notice' in respect of the matter concerned; the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice; and the applicable period for an offer to make amends has elapsed (generally 28 days).

In so doing, the Bill further limits a plaintiff's right to commence defamation proceedings without first trying to settle. This may result in an aggrieved person having to settle on a smaller amount of compensation in a given case than that which they may otherwise achieve. Under the current law it is not mandatory for an aggrieved person to issue a concerns notice to a publisher before commencing defamation proceedings. However, if an aggrieved person does not accept a reasonable offer made prior to commencing proceedings and a defence being filed, this may result in a defence for the publisher in any subsequent proceedings.

The Committee considers that further limiting the plaintiff's right to commence defamation proceedings without first trying to settle is reasonable in the circumstances. The Act already encourages non-litigious methods of dispute resolution and the amendments respond to concerns raised by stakeholders during the Defamation Working Party's consultation process that these provisions needed to be strengthened. This is particularly appropriate given the more general concerns discussed above about an increase in inconsequential claims consuming the resources of courts and private individuals. In the circumstances, the Committee makes no further comment.

Right to obtain a remedy for defamation – requirement for leave to commence proceedings

25. Under section 23 of the *Defamation Act 2005*, a person must obtain the leave of the court to commence defamation proceedings if the person has already brought defamation proceedings for damages (in NSW or elsewhere) against the same defendant about the same or any other publication of the same or like matter.
26. Schedule 1, item 25 of the Bill seeks to amend section 23 so that a person would also require the leave of the court to bring defamation proceedings against associates of the previous defendant. These are persons who at the time of the publication by the previous defendant were:
 - employees of the defendant,
 - persons publishing matter as contractors of the defendant, or
 - associated entities of the defendant (or employees or contractors of these associated entities).
27. In the Second Reading Speech, the Minister stated:

Currently the Act does not prevent a person bringing defamation proceedings against persons who are closely associated with a previously sued defendant at the time of the publication—for example, employees or contractors. This can result in multiple proceedings in respect of the

same matter, simply because the plaintiff chooses to sue an associate rather than the previous defendant.

Under section 23 of the *Defamation Act 2005*, a person must obtain the leave of the court to commence defamation proceedings if the person has already brought defamation proceedings for damages (in NSW or elsewhere) against the same defendant about the same or any other publication of the same or like matter.

Schedule 1, item 25 of the Bill seeks to amend section 23 so that a person would also require the leave of the court to bring defamation proceedings against associates of the previous defendant. This may have some effect on a plaintiff's right to obtain a remedy for defamation.

However, the Committee notes that under the current law there can be multiple proceedings in the same matter because a plaintiff chooses to sue an associate rather than a previous defendant. Further, the amendment does not completely remove the right to sue an associate, it is still open to the court to grant leave in an appropriate case. In the circumstances, the Committee makes no further comment.

Right to obtain a remedy for defamation – damages

28. Section 35 of the *Defamation Act 2005* provides for a maximum amount of damages that may be awarded for non-economic loss in defamation proceedings. In the Second Reading Speech, the Attorney General explained that there are two main issues that have arisen in interpreting section 35:
- whether the maximum amount operates as a scale or a cut-off, and
 - whether the maximum amount applies where a court is satisfied that aggravated damages should be awarded.
29. The explanatory note to the Bill details that one interpretation is that section 35 sets a scale or range of damages, with the maximum amount reserved for the worst kinds of damage even if the publication does not warrant an award of aggravated damages (*Murray v Raynor* [2019] NSWCA 274).
30. The other interpretation is that the maximum amount operates as a cut-off, rather than setting a scale, that can be set aside in circumstances where aggravated damages are warranted (*Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154).
31. The explanatory note to the Bill further details that the second interpretation (that if aggravated damages are warranted the cap on non-economic loss no longer applies), has resulted in excessive damages for non-economic loss being awarded in some cases.
32. The Attorney General also told Parliament that the second interpretation is not consistent with the original policy intent of section 35:

As former Attorney General Bob Debus said in his second reading speech introducing the Defamation Bill 2005: "The bill proposes an indexed cap of \$250,000 for general damages, retention of aggravated damages and abolition of exemplary damages, but no cap on economic loss. Aggravated damages may be awarded where the injury to the plaintiff has been

exacerbated by the conduct of the defendant, for example, if the defendant has acted maliciously".

33. The Attorney General also stated:

The purpose of introducing the cap on damages for non-economic loss was to ensure that the amounts awarded would be commensurate with awards of general damages in personal injury claims. The amount of damages awarded for non-economic loss should vary according to the harm to reputation in each case. At the same time, it is important that exorbitant amounts are not awarded. This is why there is a set limit.

34. Therefore, schedule 1, items 33 and 34 of the Bill seek to amend section 35 of the *Defamation Act 2005* to:

- confirm that the maximum amount for damages for non-economic loss provided for therein sets a scale or range rather than a cut-off, with the maximum amount to be awarded only in the most serious case, and
- require awards of aggravated damages to be made separately to awards of damages for non-economic loss so that the scale or range for damages for non-economic loss continues to apply for non-economic loss even if aggravated damages are awarded.

Section 35 of the *Defamation Act 2005* provides for a maximum amount of damages that may be awarded for non-economic loss in defamation proceedings. There have been differing interpretations of section 35, one being that section 35 sets a scale or range of damages, with the maximum amount reserved for the worst kinds of damage even if the publication does not warrant an award of aggravated damages. The other is that the maximum amount operates as a cut-off, rather than setting a scale, that can be set aside in circumstances where aggravated damages are warranted.

Schedule 1, items 33 and 34 of the Bill seek to amend section 35 to confirm the first interpretation: that the maximum amount for damages for non-economic loss provided for therein sets a scale or range rather than a cut-off, with the maximum amount to be awarded only in the most serious case; and to require awards of aggravated damages to be made separately to awards of damages for non-economic loss so that the scale or range for damages for non-economic loss continues to apply for non-economic loss even if aggravated damages are awarded.

By confirming the first interpretation, the Bill may result in more modest amounts of damages being awarded for non-economic loss than would otherwise be the case. The Bill may thereby have some effect on a plaintiff's right to seek a remedy for defamation. However, the Committee acknowledges that the amendments set down in schedule 1, items 33 and 34 are consistent with the original policy intent of section 35 and aim to prevent excessive amounts of damages being awarded. In the circumstances, the Committee makes no further comment.

Right to obtain a remedy for defamation – limitation period

35. Under section 14B of the *Limitation Act 1969*, an action for defamation must be brought by a plaintiff within one year running from the date of the publication complained of. Further, section 56A provides that a court can extend this limitation period to a period of up to three years running from the date of the publication if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced the action within 1 year.
36. The explanatory note to the Bill details that for publications on the Internet, publication occurs when a third party downloads the webpage concerned rather than when it is posted by the publisher. Therefore, it was held by the High Court in *Dow Jones v Gutnick* (2002) 210 CLR 575 that the law applicable for an action of defamation is the law of the place it is downloaded, not uploaded.
37. The explanatory note to the Bill further states:
- As webpages may be downloaded many thousands of times, this means that there is a separate cause of action for each download and the limitation period applicable to each download will vary even though the same matter is involved. This may enable plaintiffs to circumvent the purpose behind the limitation period by relying on later downloads of the same matter, which may occur many years after the webpage was first uploaded.
38. According to the Second Reading Speech, the rule that publication of online material occurs each time a party downloads the material is known as the 'multiple publication rule'.
39. Schedule 2, item 2 of the Bill seeks to amend the *Limitation Act 1969* to introduce a 'single publication rule'. In the Second Reading Speech, the Attorney General stated:
- Under the single publication rule, the date of the first publication will be treated as the start date for the limitation period for all subsequent publications, except if the manner of a subsequent publication is materially different from the first publication. While the rule proposed is medium neutral, for electronic publications the date of first publication is the date the publication was first uploaded for access or sent to a recipient.
40. The Attorney General also stated that a single publication rule had strong stakeholder support during the consultations conducted by the Defamation Working Party.

The University of Technology Sydney's Centre for Media Transition submitted that a single publication rule would be "responsive to the contemporary environment for media publication, distribution and consumption". Facebook submitted that "The proposal to introduce a single publication rule is a reform fit for the digital age" and that "This is a significant improvement on the law which recognises multiple publication". Professor David Rolph described the reform as overdue.

Under section 14B of the *Limitation Act 1969*, an action for defamation must generally be brought by a plaintiff within one year running from the date of the publication complained of.

For publications on the Internet, publication occurs each time a third party downloads the webpage concerned rather than when it is posted by the publisher. This is called the 'multiple publication rule'. As webpages may be

downloaded many times, this means that there is a separate cause of action for each download and the limitation period applicable to each download will vary even though the same matter is involved.

Schedule 2, item 2 of the Bill seeks to amend the *Limitation Act 1969* to introduce a 'single publication rule'. Under this rule, the date of the first publication will be treated as the start date for the limitation period for all subsequent publications, except if the manner of a subsequent publication is materially different from the first publication. Further, for electronic publications, the date of first publication would be the date the publication was first uploaded for access or sent to a recipient.

In introducing the single publication rule, the Bill may mean that plaintiffs who would not have been statute barred from bringing a defamation action in a given case now find that they are. However, the rule is designed for the digital age to stop plaintiffs circumventing limitation periods and bringing actions for material downloaded many years after it was first published. The current multiple publication rule means that the limitation period effectively does not apply where there are subsequent downloads. The introduction of a single publication rule received strong stakeholder support during consultations conducted by the Defamation Working Party. In the circumstances, the Committee makes no further comment.

Right to jury trial

41. Under section 21(1) of the *Defamation Act 2005*, a plaintiff or defendant can elect for proceedings to be tried by a jury. However, schedule 1, item 22 to the Bill would amend the Act to provide that such an election can be revoked:
 - with the consent of all the parties to the proceedings, or
 - if all the parties do not consent, with the leave of the court.
42. The Court may, on application of a party to the proceedings grant such leave but "only if satisfied that it is in the interests of justice for the election to be revoked".
43. In the Second Reading Speech, the Attorney General provided the following background to the amendment:

The court will be permitted to grant leave only if satisfied that it is in the interests of justice for the election to be revoked...the discretion to allow a revocation of an election is not intended to allow the election to be displaced lightly. An example where it might be in the interests of justice to allow a revocation is if pre-trial publicity has created an unacceptable climate of hostility or prejudice against the party.

Under section 21(1) of the *Defamation Act 2005*, a plaintiff or defendant can elect for proceedings to be tried by a jury. However, schedule 1, item 22 to the Bill would amend the Act to provide that such an election can be revoked with the consent of all the parties to the proceedings, or if all the parties do not consent, with the leave of the court. The Court may, on application of a party to the proceedings grant such leave but "only if satisfied that it is in the interests of justice for the election to be revoked".

By allowing the court to revoke a jury election, the Bill may impact on the right of parties to have their matter tried by one's peers according to prevailing social norms. However, a court can only so revoke if it is in the interests of justice to do so. The Committee acknowledges that cases may arise where there are compelling reasons to revoke an election, notwithstanding the important role of juries in defamation proceedings e.g. where one party has been unduly prejudiced by pre-trial publicity. In the circumstances, the Committee makes no further comment.

2. State Revenue Legislation (COVID-19 Housing Response) Bill 2020

Date introduced	29 July 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasurer

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend State revenue legislation in connection with the COVID-19 pandemic response as follows—
 - a. the *Duties Act 1997* is amended to increase duty concessions available under the First Home Buyers Assistance scheme for certain agreements and transfers that are entered into during the period beginning on 1 August 2020 and ending on 31 July 2021,
 - b. the *Duties Act 1997*, the *Land Tax Act 1956* and the *Land Tax Management Act 1956* are amended—
 - i. to provide a land tax concession to apply until 2040, being that the value of land on which certain build-to-rent properties are constructed is, for the purposes of assessing land tax, to be reduced by 50 per cent, and
 - ii. to provide for exemptions from and refunds of surcharge purchaser duty and surcharge land tax payable in respect of land on which build-to-rent properties are situated,
 - c. the *Payroll Tax Act 2007* is amended to provide that certain wages paid or payable to employees that are funded by the Commonwealth program known as the Aged Care Workforce Retention Grant Opportunity are to be exempt from payroll tax.

BACKGROUND

2. In the Second Reading Speech, the Treasurer addressed the economic impact of the COVID-19 pandemic on the Australian economy, stating that:

The Australian economy fell by 0.3 per cent in the March quarter—its first decline in nine years. Restrictions to reduce the spread of COVID-19 are expected to cause a further drop in activity in the June quarter. This is expected to drive the Australian economy into a technical recession for the first time in 29 years.

3. The Treasurer went on to highlight the impact on the NSW economy, noting that:

The national economic downturn is being felt here in New South Wales too. At the time of the half-yearly review our economy was on track to grow by 1¼ per cent over 2019-20 and return to trend growth of 2½ per cent by 2021-22. Following a severe bushfire season, and then the

pandemic, the State economy is now expected to contract by around 10 per cent over the second half of the 2019-20 fiscal year. In practical terms, the economic impact has put thousands of businesses under intense pressure and cost hundreds of thousands of New South Wales citizens their jobs. From March to May this year the number of people employed in New South Wales fell by a staggering 269,300. The easing of restrictions led to an increase of 80,800 jobs in June, but there are still 188,500 fewer people in work since March, just in our State.

4. The Treasurer outlined how the Bill would contribute to the overall economic recovery in NSW, stating that:

It will support our efforts to keep the most vulnerable members of our community safe by facilitating the Commonwealth Government's aged care retention bonus, and it will stimulate jobs and help drive economic recovery, with targeted support for the residential construction sector. The bill achieves these outcomes by reducing the tax burden on employers in the aged care sector and on the construction of new homes. In this way the bill will ensure that taxes are not a barrier to either quality care for our older citizens or to the recovery of the economy in the months and years ahead.

ISSUES CONSIDERED BY THE COMMITTEE

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 8A(1)(b)(v) of the LRA

Significant matters not subject to parliamentary scrutiny

5. Schedule 3 of the Bill seeks to amend the current land tax structure as it applies to build-to-rent development. When describing build-to-rent housing, the Treasurer told the Parliament that:

Build-to-rent housing refers to high-density developments built with the intention of creating high-quality rental housing for those who want it. Because they are built with the specific purpose of providing rental accommodation, build-to-rent developments offer greater security for tenants because they are better able to accommodate long-term leases. They also provide a counter-cyclical source of housing supply and improve housing diversity, offering more choice for New South Wales citizens in finding a place to call home.

6. The Treasurer went on to describe how the Bill would facilitate this kind of development, stating that:

One of the barriers to build-to-rent development is the current structure of land tax in New South Wales. To mitigate that tax discrepancy the bill—in an Australian first—introduces a 50 per cent discount to land valuations for the purposes of calculating land tax. The discount applies to new build-to-rent developments until 2040. By limiting the benefit to new developments the measure will help support new construction during this difficult time. Providing those benefits until 2040 ensures a period of certainty for investors, with the greatest benefit flowing to those who start building sooner.

7. Further, the Treasurer stated that this change, in addition to other changes contained in the Bill, form part of the broader response to the economic impacts of COVID-19:

Both the first home buyer and build-to-rent elements of the bill are designed to drive the creation of new housing for the people of New South Wales. They will further contribute to improving housing affordability over the medium term and they will act as an important stimulus measure, supporting job creation in the near future to help get New South Wales working again and on the path to a robust recovery.

8. The amendment contained in Schedule 3 of the Bill, seeks to amend the *Land Tax Management Act 1956* by inserting a new section 9E. This section provides a land tax concession that will apply until 2040 for land on which certain build-to-rent properties are constructed. For properties to which this section applies, their land value (for the purposes of assessing land tax), will be reduced by 50 per cent.
9. Subsection 2 of the new section 9E sets out the circumstances in which this land tax reduction will apply. It states that for the purposes of assessing land tax, the land value of a parcel of land is to be reduced by 50 per cent if –
 - a. a building is situated on the land, and
 - b. construction of the building commenced on or after 1 July 2020, and
 - c. the Chief Commissioner is satisfied that the building is being used and occupied for a build-to-rent property in accordance with guidelines approved by the Treasurer for the purposes of this section, and
 - d. an application for the reduction is made in accordance with this section.
10. Subsection 3 of the new the section 9E sets out what can be contained in the guidelines referred to in subsection 2(c), stating that the guidelines may include provisions with respect to the following:
 - a. the circumstances in which a building is taken to be a build-to-rent property, including in relation to the following—
 - i. the planning or development standards that must be complied with,
 - ii. the minimum lease conditions that must be offered to tenants of the build-to-rent property,
 - iii. the minimum scale of a building to qualify as a build-to-rent property,
 - iv. the nature of the ownership and management of the building and the land on which the building is situated,
 - b. the circumstances in which the applicant is required to give an undertaking to not subdivide the land or otherwise divide the ownership of the land,
 - c. other matters relating to build-to-rent properties and the land on which build-to-rent properties are situated as the Treasurer determines appropriate.
11. With regard to the guidelines, the Treasurer stated in the Second Reading Speech that:

...The bill provides for further details of the build-to-rent land tax policy to be set out in guidelines. The guidelines will be administered by the chief commissioner of taxation, including technical details of what constitutes a build-to-rent development.

Schedule 3 of the Bill seeks to amend the *Land Tax Management Act 1956* to introduce new land tax concessions for certain new build-to-rent developments. Build-to-rent housing refers to housing built specifically for rental purposes.

The Bill proposes a new section 9E which reduces the value of a parcel of land for the purposes of assessing land tax by 50 per cent in the following circumstances:

- **if a building is situated on the land, and**
- **construction of the building commenced on or after 1 July 2020, and**
- **the Chief Commissioner is satisfied that the building is being used and occupied for a build-to-rent property in accordance with guidelines approved by the Treasurer for the purposes of this section, and**
- **an application for the reduction is made in accordance with this section.**

Subsection 3 of the proposed section 9E establishes what may be contained in the guidelines used to assess if a building is being used for a build-to-rent property. This includes the planning or development standards that must be complied with; the minimum lease conditions that must be offered to tenants; the minimum scale of a building; and the nature of the ownership and management of the building and the land on which the building is situated. The guidelines may also set out the circumstances in which the applicant is required to give an undertaking not to subdivide the land or otherwise divide the ownership of the land. Further, the guidelines may make provision for other matters relating to build-to-rent properties and the land on which build-to-rent properties are situated as the Treasurer determines appropriate.

As the matters dealt with in the guidelines have bearing on the grant of significant tax concessions, the Committee would prefer that they were dealt with by regulation. This would foster an appropriate level of parliamentary oversight. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. There appears to be no such requirement for the guidelines in question. The Committee refers the matter to Parliament for consideration.

Appendix One – Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

- 1 The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - i trespasses unduly on personal rights and liberties, or
 - ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - iv inappropriately delegates legislative powers, or
 - v insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- 2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

- 1 The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - i that the regulation trespasses unduly on personal rights and liberties,
 - ii that the regulation may have an adverse impact on the business community,
 - iii that the regulation may not have been within the general objects of the legislation under which it was made,
 - iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

- v that the objective of the regulation could have been achieved by alternative and more effective means,
 - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - vii that the form or intention of the regulation calls for elucidation, or
 - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
- (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.