DEFAMATION LAW

PROPOSALS FOR REFORM IN NSW

REPORT OF ATTORNEY GENERAL'S TASK FORCE ON DEFAMATION LAW REFORM

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KEY PRINCIPLE

The main focus of this review is to strike a balance between the free flow of information of matters of public interest and importance, and the protection of reputation. The recommendations fall into two groups: those that are, in effect, procedural, and those that involve changes to the substantive law.

OBJECTS AND PRINCIPLES

Recommendation 1: **The *Defamation Act* 1994 should have included in it a statement of objects and principles. These should provide that the purposes of the *Defamation Act* are:**

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[1] The Task Force would like to express its appreciation to a number of people who provided in assistance in various ways. Thanks to Professor Michael Chesterman, Gail Hambly and Andrew Kenyon.

- To provide effective and appropriate remedies for those whose reputations are harmed by publications not protected by this law while ensuring that unreasonable limits are not placed upon the publication and discussion of matters of public interest and importance;

- To promote speedy and non-litigious methods of resolving disputes wherever possible;

- To ensure, so far as practicable, that claims of defamation are resolved in a timely manner and that protracted litigation is avoided wherever possible.

RESOLUTION OF DISPUTES WITHOUT LITIGATION

Need to emphasise prompt and informal dispute resolution: A clear priority of any amendments to defamation law will be to divert those cases that can be dealt with by other means away from extended litigation. This is the rationale for including in the statement of objects and principles a provision emphasising that a key aim of the *Defamation Act* is to promote speedy and non-litigious means of resolving disputes wherever possible.

What do we know about why people sue? There is little if any Australian empirical research on defamation practices. In one (rare) Australian study, Brendan Edgeworth and Michael Newcity reviewed all files of cases that were initiated in the Supreme Court over the period from February 1979 to June 1981.[2] They found that 'a very substantial proportion of those defamation suits filed never proceed to trial, having been either discontinued or settled'.[3] Of the 436 cases filed in the period they reviewed, 215 (or 49.3%) of all the cases initiated resulted in a pre-trial settlement.

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2 Brendan Edgeworth and Michael Newcity, "Politicians, Defamation Law and the 'Public Figure' Defence" (1992) 10 *Law in Context* 39.

3 Edgeworth and Newcity, at 49.

Their methodology was built around an examination of court files, in recognition of the fact that reported decisions are a small and unrepresentative group. However, such a methodology cannot take account of those cases where a process was engaged in prior to the issue of a statement of claim.

By contrast, United States researchers undertaking an empirical study interviewed a number of people to find out why they sued and what they did after the story about which they complained was published.[4] Their research showed that, contrary to popular assumption, most plaintiffs did not go straight to their lawyer, but contacted the media/defendant first. They conclude:

> In a significant proportion of the cases, the way people were treated when they contacted the media was a factor in, if it did not fully account for, their anger and the decision to sue.[5]

While they conceded that "the most perceptive handling of complaints will not deter some litigious persons from suing", they concluded with a number of concrete suggestions for editors that might assist in dealing with complaints about publications before they result in litigation.[6]

Another key finding in their research was that the main motivation for most plaintiffs who litigate is to 'restore their reputation by setting the factual record straight'. In fact, rarely was money damages seen as the reason for suing.[7]

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4 See John Soloski, "The Study and the Libel Plaintiff: Who Sues for Libel?" (1985) 71 *Iowa Law Rev* 217; Randall Bezanson, "Libel Law and the Realities of Litigation: Setting the Record Straight" (1985) 71 *Iowa Law Rev* 226 and Gilbert Cranberg, "Fanning the Fire: The Media's Role in Libel Litigation" (1985) 71 *Iowa Law Rev* 221. See also Soloski and Bezanson (eds), *Reforming Libel Law,* 1992.

5 Cranberg, at 221.

6 "Our findings argue strongly for editors to: (1) impress on media employees the great power the press has to hurt people. Editors should insist that courtesy in dealing with complaints have high newsroom priority. A journalist's in-house training should include instruction in human relations; (2) center responsibility for dealing with complaints in a person with good human relations skills, who is not responsible for news coverage. Editors must be informed and consulted and make final decisions, but, except on smaller papers, they cannot adequately 'bird-dog' complaints. Nor do the qualities that make for good editors necessarily equip them to sensitively deal with people; (3) develop policies and procedures for addressing complaints, put them in writing, and emphasize their importance; (4) make sitting on other than a frivolous complaint a firing offense": Cranberg, at 221.

7 Bezanson, at 227.

From discussions with some of the media lawyers, it is clear that a number of potential cases do get resolved prior to the issuing of proceedings, but the success or effectiveness of that form of resolution will obviously depend to a large extent on each publisher's own processes and responses. It is therefore considered appropriate to introduce a process into the legislation that encourages, and helps to structure and direct, a form of pre-trial dispute resolution.

Current NSW offer of amends process: The legislation currently includes a process for Offer of Amends (only NSW and Tasmania have such provisions).[8] This provides for a publisher who is 'innocent' to make an offer to a person who claims to have been defamed. A publisher will be taken to have published 'innocently' where they have exercised reasonable care in relation to the matter and its publication; did not intend it to be defamatory of the plaintiff; and did not know of circumstances by reason of which it may be defamatory. If such an offer is made, it must include an offer to publish a correction and apology and must, where relevant, include an offer to take such steps as to notify others that it is defamatory. Under s 38, detailed particulars are required to be provided and verified by statutory declaration. And, where an offer has been made but not accepted, it is a defence that the offer was made 'as soon as practicable' after becoming aware it may be defamatory; the offer remains open; and, where the offeror is not the author, the author was not actuated by 'ill will' toward the offeree (s 43).

Anecdotally, it is believed that this process is very little used. It has been described as cumbersome and has been criticised for requiring that the publication be 'innocent'.[9] It has also been pointed out that there is a tension between requiring it to be made 'as soon as practicable', and requiring detailed information to be included which, in practice, takes some time to put together.[10]

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8 The requirements are set out in ss 36-45 of the NSW *Defamation Act*.

9 See Michael Gillooly, *The Law of Defamation in Australia and NZ*, The Federation Press, Sydney, 1998, at 254

10 Gillooly, *The Law of Defamation in Australia and NZ*, at 254; referring to the Neill Committee (UK Supreme Court Procedure Committee 1991); and the Faulks Committee (UK committee on Defamation), 1975. By contrast, the NSWLRC did not consider it such a problem: Report No 75, at 142-145.

The Law Reform Commission's declaration of falsity remedy: In its report on *Defamation*, the Commission recommended the creation of a new remedy providing for a declaration of falsity

> 2.17 In outline, the declaratory remedy which the Commission recommends will be available to plaintiffs where: (i) the cause of action is founded on an imputation which is defamatory of the plaintiff and is false; (ii) the matter is published by the defendant of and concerning the plaintiff; and (iii) the remedy is sought within four weeks of publication (or, exceptionally, within such longer period as the court may in its discretion permit). The remedy will be granted in the court's discretion. Affirmative defences cannot be raised in opposition to the action since they do not traverse the issue of falsity. A successful plaintiff will be entitled to costs (prima facie, indemnity costs) and to an appropriate publication of the terms of the declaration. The reputation of plaintiffs who successfully obtain this remedy will be vindicated soon after the publication of the defamatory matter, the time at which such empirical evidence as is available suggests that plaintiffs are most likely to be satisfied with non-monetary relief.[11]

The Commission also proposed a separate corrections process to replace the offer of amends procedure.[12] As is well known, the Commission's report has not been implemented. While the emphasis on correction rather than monetary damages is obviously an advantage, the problem of the proposal is that despite mentioning the need for speed, it in fact requires there to be an extensive court process, which, even if expedited, nonetheless has a lot in common with a full trial.

The Press Council proposal: The submission acknowledges the frequency with which publishers voluntarily correct errors, apologise etc and does not intend to replace or inhibit those arrangements. What is proposed is addressed at the stage after proceedings have been initiated. This involves a revised offer of amends process; and failure to make the offer, or to accept the offer, would trigger independent mediation. If ultimately a reasonable offer by the defendant is not accepted and an action is

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[11] The proposal is discussed in detail in chapter 6 of the commission's report. See also Michael Chesterman, "The Money or the Truth? Defamation Reform in Australia and the US" (1995) 18 *USNWLJ* 300; See also Chesterman, *Freedom of Speech in Australian Law*, 2000, chapter 4.

[12] See NSW Law Reform Commission, *Defamation,* Report No 75, 1995, chapter 8.

brought, the court should have the power to impose cost penalties and would also be able to take that into account in choosing what damages, if any, should be awarded in the event liability is ultimately found to be established. The Council also proposed that it should be a defence to an action that an offer was made as soon as practicable, the defendant was willing to perform the terms and the offer was reasonable. This latter draws upon the new ACT provisions (s 10).

The ACT legislation: The new ACT legislation places considerable weight on 'timely correction'. Part 2 is headed **Resolution of Disputes Without Litigation.** The main aspect of this part is an offer of amends process. While it has some similarities with the current NSW law, it is available even where the publisher was not "innocent". Under s 6, a publisher may offer to make amends if they do so within 14 days of being told by the aggrieved person that the publication is or may be defamatory, or before service of a defence, whichever is the earlier. It must be in writing and include an offer to publish a 'reasonable correction (if any) and a reasonable apology (if any), to pay the aggrieved person's expenses, and where relevant, can include an offer to pay compensation for economic loss, or for harm to reputation "only if the matter in question imputes criminal behaviour". If accepted (and the publisher performs the amends agreement), a plaintiff cannot bring an action. If an offer is made and not accepted, it is a defence to an action if it was made as soon as practicable, and the publisher remains willing to perform the terms of the offer (and the offer is reasonable). If no offer is made, an aggrieved person may apply to the Supreme Court for an order 'to vindicate his or her reputation'. This does not preclude the person bringing an action (s 11).

Various aspects of this process have been criticised, particularly the limitation on compensation for harm to reputation to matters that impute criminal behaviour.[13]

Nonetheless, it does seem a good idea to draw on the less problematic aspects of this procedure and establish a clear statutory preference for a pre-trial, non-litigious process for dispute-resolution.

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[13] See Matt Collins, "New Defamation Law for the ACT" (2001) 6 *Media & Arts Law Review* 335.

- ***Recommendation 2*: There should be a new part of the Act headed *Resolution of Disputes without Litigation.* This should constitute the first substantive part of the Act**

- ***Recommendation 3:* The part headed *Resolution of Disputes without Litigation* should provide for a detailed process for corrections and apologies and, where appropriate, monetary compensation, to be available before proceedings are issued.**

- ***Recommendation 4:* Where proceedings have been issued, mediation should be encouraged wherever possible as an aid to resolution of disputes. Such mediation should be conducted by an outside dispute resolution process, and a practice direction should contain a list of accredited/authorised mediators.**

- ***Recommendation 5:* Costs penalties (more onerous than simply costs following the event) should attach to unreasonable failure to resolve the matter (eg for a plaintiff, not accepting an offer of correction or apology where the offer is considered to have been reasonable; for a defendant, not making such an offer where it seemed appropriate to do so).**

- ***Recommendation 6:* It should be a defence (where an action proceeds to that stage) that an offer was made as soon as practicable, the defendant remained ready and willing to perform the terms of the offer, and the offer was reasonable in the circumstances.**

CASE MANAGEMENT, THE ROLE OF JURIES AND THE SECTION 7A TRIAL

The Press Council submitted that juries should be reintroduced to the defamation trial beyond their current role in deciding only the issue, at what has become known as the "Section 7A trial", of whether the imputations contended by the plaintiff actually arise (ie, the 'meaning' of the publication for these purposes). While the Council does not want juries involved in the assessment of damages, it has proposed that they be involved in the issue of defences. The current procedure is that after the s 7A trial has been concluded, if the matter is to proceed (because there has been a decision wholly or partly in favour of the plaintiff), there is usually a period of time that elapses before the second part of the case proceeds, when a judge without a jury considers the question of whether any defences arise and if the matter is not successfully defended, what, if any damages are to be paid.

The Council's submission on these questions therefore raises a number of related issues:

- Should there be one trial, or two?
- Should there be juries for all aspects of defamation trials, or for the 7A trial only, or for either or both of the defences and damages aspects of the case (whether determined in two parts or continuously)?
- Are there other issues arising out of current processes that are affecting the number of cases, and the costs of those proceedings?

Some sections of the media have argued (via the Council) that costs have increased substantially since the introduction (or at least, the flow through in practice) of the s 7A trial as a distinct procedure. An argument that has been put to the contrary is that the cost to defendants should, at least in principle, have declined because instead of having to prepare all aspects of the case in advance, a defendant can wait till the end of a s 7A trial before having to prepare (assuming the 7A trial has gone against them) for the defences and damages part of a case.

Because of the unique nature of NSW's s 7A procedure, there is a particular emphasis on the 'meaning' part of the trial. Richard Ackland, the editor of the *Gazette of Law and Journalism,* publishes a regularly updated list of the outcomes of s 7A trials.

Delay reduction imperative: The combination of events: the introduction of a stand-alone s 7A procedure, at a time when there is an increasing emphasis on reducing waiting times and backlogs in courts, may have had a counterproductive effect in relation to the overall aim of reducing litigation. One consequence is that a s 7A trial now comes on much more quickly than a full defamation trial did previously. Under the pre-s 7A regime, someone who had lodged a statement of claim might have then sat back and either lost interest or momentum; or reconsidered and not felt as strongly about the case as they did straight after the publication, having ensured that their friends/family/colleagues knew they 'were suing'. They might then have decided that they did not need to go further; or simply decided that the costs involved in preparing for a full trial were too high. Since s 7A, and since the move to speeding up the way matters proceed through the courts, it may no longer be as easy to let the matter slide. Parties who have filed are now being contacted and called in for directions hearings and being set down within a much shorter time. The speed with which s 7A trials come on for hearing might be counterproductive to any attempt to resolve a case quickly, and in particular, to do so without litigation.

The key to resolving the problem lies far more in changes of process than in substantive law reform. The following hypotheses are prima facie valid:

- That it is easier for plaintiffs to proceed if they have only to prepare for a s 7A trial; if they win that, then it becomes the responsibility of the defendant to put on substantive defences;

- Conversely, that plaintiffs would face considerable increased cost if the full trial were reinstituted;

- That for a variety of reasons, if the plaintiff and defendant were left 'undisturbed' by court processes, a significant proportion of cases (it is not clear how many) would 'go away'; ie, go into abeyance/not proceed/lapse etc;

- That in theory, defendants who have only to prepare for a s 7A trial before undertaking any work on damages or defences should find their costs reduced at that stage. However, if costs have increased, as is claimed, this may be because cases are not only not going away, but are in fact being revived by the courts themselves through efforts to clear the backlogs of cases.

There is considerable attraction in having a procedural context or framework that encourages litigation to 'disappear'. However, it is clear that allowing cases to lie around without proceeding is unsustainable if that then leads to a perception that there are significant delays and backlogs in NSW courts.

Therefore it is proposed that there should be a process whereby it is up to a plaintiff to take the necessary steps to bring a matter on for trial. In order to ensure that cases do not linger and add to backlog, there should be a default process where if no action is taken after what is considered a suitable time (12 months), the matter lapses and the action is struck out automatically (cf Order 32A of Supreme Court Rules). There should be no order as to costs, though a defendant could make such an application, in which event, a plaintiff could apply for the matter to be reinstated. If the hypotheses set out above are correct, the Task Force believes that such a process may have more impact on reducing the number of cases that proceed to trial and in reducing the costs to the parties, than whether or not the jury is brought back, or the two parts of the trial are put together.

The Task Force understands that it would be very difficult to reintroduce a jury to consider defences when juries have been all but abolished for all other aspects of civil trials in NSW.[14]

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[14] See *Courts Legislation Amendment (Civil Juries) Act* 2001 (NSW)

The practice that resulted in what is the current statutory s 7A process was initiated by the Court of Appeal in *Radio 2UE v Parker.*[15] In that case, Clarke and Handley JJA both proposed that it would be helpful, in cases such as the one before them, for the jury to decide at the start of a trial whether the imputations pleaded were conveyed and were defamatory. As Handley JA explained, by the time the entire trial has been held, it is no longer possible for a jury to evaluate a publication or broadcast as a 'matter of impression', but rather, as was the case in *Parker*, the jury had heard some twenty six days of evidence and had far more background and context than the ordinary listener hearing only the actual broadcast.

> Since these are questions of impression the procedures at the trial must be moulded to enable the jury to decide them as matters of impression. It seems to me that to ask the jury to decide these questions at the end of a twenty six day trial and after consideration of extensive oral and written evidence practically guaranteed that they would not be decided according to law.[16]

For exactly opposite reasons, **Professor McKinnon** sees re-introduction of juries as essential. In his view, lawyers and/or judges see defences as involving essentially legal issues, whereas the real justification is essentially the same as it is for other trials where juries are used (eg, murder). The people comprising juries are more likely to be able to assess defences in the context of the defamatory imputations than those relying on literalism or legal technicalities. They are more likely to be able to assess the reasonableness of the publisher's actions. In short, a jury will more often achieve just results consistent with community standards and expectations.

- ***Recommendation 7*: The plaintiff should be required to take the necessary steps to bring a matter on for trial. In order to ensure that cases do not linger and add to backlog, there should be a default process where if no action is taken after 12 months the matter lapses and the action is struck out automatically (cf Order 32A of Supreme Court Rules).**

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15 (1992) 29 NSWLR 449

16 (1992) 29 NSWLR 449 at 474

- ***Recommendation 8:*** **Where an action lapses for want of prosecution, there should be no order for costs. A defendant may, however, apply for costs in which event, a plaintiff can also apply for the matter to be reinstated. In other cases, the court should have a discretion as to whether the plaintiff should be given leave to reinstate their application once it had lapsed.**

- ***Recommendation 9 (Professor McKinnon dissenting):*** **There should be no change to the current process under which the s 7A trial is heard by a judge with a jury, and the defences and damages hearing takes place separately before a judge alone.**

LIMITATION PERIODS

The NSWLRC recommended in its 1995 report that the limitation period for defamation should be reduced from the current six years provided for in the *Limitation Act* (s 14) to one year. The Commission put a number of arguments for this, focussing in particular on the fact that people whose reputations have been harmed should attempt to vindicate their reputations at the earliest possible opportunity. Defamation actions were distinguished from situations involving personal injury or damage to property: in the latter cases, the consequences of an injury or the extent of damage might not be immediately apparent. In defamation, the damage has occurred once something is published. Yet under the *Limitation Act*, the general limitation period for personal injury (s 18A) is three years (subject to the provisions permitting extensions of time in limited situations), while the period for defamation is six years. In its 1995 report, the NSWLRC also referred to empirical research (unpublished) by Tania Sourdin that shows that over 80% of actions were commenced within six months of the publication; only some 7.9% of proceedings were commenced more than 12 months after the matter complained of was published. While the Commission's recommendation was not adopted, since the publication of that report the law in England has been amended to provide for a one year limitation period: see *Defamation Act* 1996.

- ***Recommendation 10*: There should be a one year limitation period for actions in defamation, with a discretion to extend the period where appropriate. It may be appropriate to amend both the *Defamation Act* 1994 and the *Limitation Act* 1969.**

CORPORATIONS AND GOVERNMENT BODIES

Do corporations have 'reputations'? The law of defamation is centrally concerned with 'reputation'. While it is possible for corporations to have 'reputations' (witness the campaign against Nike and other such corporations for its alleged employment practices in Asia), generally, reputation is something that is quite personal and individual.[17] When corporate bodies are 'defamed', or allegations analogous to defamation are made, there are other possible remedies such as, at common law, the torts of injurious falsehood (previously described as 'slander of title') or passing off; as well as remedies under the *Trade Practices Act 1974* (Cth) for misleading and deceptive, or unconscionable, conduct. It has certainly been the case for many years that a corporation can sue for defamation and there has been little serious attention to challenging this. But it may well be appropriate to legislate to return the law of defamation to its 'human' origins. After all, defamation law predates the modern development of corporate personality.

What are 'corporations'? An issue often raised in relation to the 'corporate' plaintiffs debate is that the vast majority of Australian corporate bodies are small (often 2 person) companies.[18] This is a matter also expressly recognised in a recent House of Lords decision where Lord Nicholls made the point that 95% of all businesses in England have fewer than 10 employees and are responsible for nearly one third of employment.[19] There are two possible responses to this. One is to say that policy should not be made by focussing on the small number of business entities

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17 See the discussion by US First Amendment scholar Robert Post of the different types of 'reputation' interest the law has, at various times, recognised: ie, reputation as property; reputation as honour, and reputation as dignity: "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 *California Law Review* 691.

18 ABS, *Small Business in Australia*, Product No 1321.0.40.001 (2001)

19 *Royal Bank of Scotland v Etridge* [2001] UKHL 44, at para 34

that are large (and powerful). However, another way to look at the overrepresentation of small businesses is to acknowledge that if such an entity is defamed, it is far more likely that an individual will be identifiably defamed as well, and therefore that individual will be an appropriate person to seek a personal remedy for defamation.

How widespread is the current use of defamation law by corporations? While there is no clearly available data on the proportion of defamation cases that involve corporations, there is some anecdotal evidence that the practice of corporate plaintiffs using such proceedings against individuals/community groups as a silencing mechanism (these are known as "SLAPP" suits in the US) is widespread. Some examples of such actions were discussed by ABC Radio National's *Law Report* on 6 March 2001.[20] More recently, Melbourne's Age Newspaper prominently featured another defamation case involving developers.[21]

Government bodies: On the issue of government bodies, it seems fairly well established that at least local government entities cannot sue for defamation (though they may sue for injurious falsehood).[22] Just as with people identified with corporations, individual council members are not estopped from suing if they claim that their reputations are harmed by something published about the council.

- ***Recommendation 11:*** **The *Defamation Act 1994* should be amended to preclude corporations and statutory bodies from bringing actions**

PUBLIC FIGURES AND THE EFFICACY OF A 'PUBLIC FIGURE DEFENCE'

In its submission, the Press Council argued for the inclusion of special provisions in the Act for public figures. They proposed as follows:

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20 http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s255552.htm

21 "Developers: Fear over Free Speech", The Age, 2 February 2002.

22 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 (CA).

Action required	Redraft 15(2)(b), 16(2)(a) and 16(2)(b)(i) *'…relates to a matter of public interest, a person of public prominence, or is published under qualified privilege.'*
	Redraft Section 31.
and/or	Define *persons of public prominence* in the Definitions or the Schedules of the Act.

The proposal to have a distinct process for 'public figures' or 'public officials' has its origins in the 1964 decision of the Supreme Court of the United States in *New York Times v Sullivan.*[23] In that decision, the Supreme Court invoked the First Amendment to the US Constitution, which, as is well known, provides protection against state incursions into freedom of speech, or freedom of religion. Although *Sullivan* was originally welcomed, there is a considerable body of commentary and critique about how the 'Sullivan rule' has worked in practice. However, before going on to consider the 'Sullivan rule', it is necessary to briefly review the High Court of Australia's consideration of defamation law in the 1990s in the context of their creation of an 'implied freedom of political communication' as this is sometimes seen as an indication that Australian law is moving toward some analogous 'public figure' doctrine.

The High Court's implied freedom of political communication

In two cases often referred to as the "1992 free speech cases",[24] a majority of the High Court decided that the provisions in the Australian Constitution referring to representative government gave rise to an implied freedom of political communication which therefore imposed limits on restrictive legislative barriers to certain forms of speech. These cases were followed shortly afterwards by two other cases specifically involving defamation law: *Theophanous v Herald and Weekly*

23 376 US 254 (1964)

24 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

Times[25] and *Stephens v West Australian Newspapers*.[26] In those decisions, a narrow 4-3 majority (Brennan, Dawson and McHugh JJ dissenting) held that in a case involving a matter of political discussion protected by the Constitution, a defendant who could establish that it was unaware of the falsity of material published, who did not publish the material recklessly, and who established that the publication was reasonable, was protected by a defence based on this implied freedom of political communication. However, in 1997, a differently constituted High Court in *Lange v ABC,*[27] while reaffirming that defamation laws are subject to an implied freedom of communication, took a narrower approach to the issue of constitutional protection for political speech.

The test, as the court put it in *Lange,* involves 2 questions:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of … "the system of government prescribed by the Constitution"? If the first question is answered "yes" and the second is answered "no", the law is invalid.[28]

Lange, which still remains the leading authority on this issue, is discussed in more detail in the discussion of qualified privilege below.

What is the Sullivan rule? In order to succeed in a claim of defamation in the United States, the 1964 decision in *NYT v Sullivan* requires that public officials or public figures leap over a higher burden than others: "there must be clear and convincing" proof of known or reckless falsehood on the part of the defendant if they are to make out their case.

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25 (1994) 182 CLR 104

26 (1994) 182 CLR 211.

27 (1997) 189 CLR 520.

28 (1997) 189 CLR 520 at 567-568

What is its potential role in Australian defamation law? The views of commentators

In the many debates about defamation law reform in Australia, it has been common to refer to the *Sullivan* rule and the US First Amendment. It might be expected that the First Amendment and the *Sullivan* decision have had the effect of deterring a large number of defamation actions. However, Michael Chesterman has outlined what he claims are problems that have been identified with the operation of the decision.[29]

Complex Categories of Plaintiff: The rule was first said to apply to 'public officials'; then it was extended to 'public figures'; then to a 'person in the public eye' (sporting celebrity, movie star etc). However, it **does not** include very influential private figures, particularly corporate identities who may not be known to the public until some dramatic event (such as a corporate collapse) that brings them to public attention.

The key philosophical concern raised by Chesterman and other commentators is that the *Sullivan rule* is based on a very old fashioned view of the notions of 'public' and 'private' (ie, who is more powerful, a local council member in a small community or a wealthy private entrepreneur). Chesterman also points out that people with high profiles are assumed to have 'access to the media'; but he argues that this fails to take account of the high concentration of media ownership. He also mentions the view that has been put that the *Sullivan* rule is claimed to 'deter people of high quality and integrity from entering public life'.[30]

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[29] See Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant,* Dartmouth, Ashgate, 2000. In that discussion, at pp 159-191, he canvasses the views of a number of commentators including Anthony Lewis, *Make No Law: The Sullivan Rule and the First Amendment*, NY, Random House, 1991; Lucas A Powe Jr, *The Fourth Estate and the Constitution: Freedom of the Press in America*, Berkeley, U California Press, 1991; the authors who contributed to John Soloski and Randall Bezanson (eds), *Reforming Libel Law*, NY, Guildford, 1992; and Frederick Schauer, "Public Figures" (1985) 25 *William and Mary Law Review* 90

[30] Chesterman, at 161.

Problems of litigating fault: In the US, a public official must prove not only that the publication was false but also that the defendant had knowledge of, or reckless indifference to, the falsity. Therefore there have to be complex inquiries into the state of mind of the journalist, the editor and all those down the publication line. Pre-trial processes (discovery etc) can be hugely complex and expensive when they are used to show motive.

Overruling of journalists' privilege: Even though generally US state law protects journalists' sources, Chesterman suggests that in cases under the *Sullivan* rule, it will often be difficult for a journalist to resist an order for disclosure because the information upon which they based the story is likely to be considered important evidence in determining what the journalist knew. (Most statutes protecting sources leave a judge a residual discretion to order disclosure).

Very few defamation cases go to trial in US and in a high proportion of those that do, the jury verdict does not survive appeal.[31] Chesterman claims that the average annual number of cases is 18 per annum in the US (with a 60% success rate);[32] by contrast, in NSW, from 1980 to 2001, the *Gazette of Law and Journalism* notes 84 cases in which plaintiffs succeeded at trial[33] and were awarded amounts varying from a mere one hundred dollars[34] to $2.5 million.[35]

Chesterman concluded that the *Sullivan* rule has combined with enduring American traditions of tort law to 'stifle the development of alternative defamation remedies that would promote ascertainment of the truth'.[36]

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31 Chesterman, at 165.

32 Chesterman, at 164.

33 *Gazette of Law and Journalisn* (September 19, 2001)

34 *Meskensas v Capon* (1993): the imputation was that the plaintiff was an inferior artist; the dispute arose out of an entry in the Archibald Prize competition.

35 *Erskine v Faifax* (1998). The Gazette notes that this was a record award of damages (with a jury) and that the matter was subsequently settled prior to the commencement of an appeal.

36 Chesterman, at 308. He argues that remedies aimed at correction are far more important than those that involve damages.

Another article published in the UNSW Law Journal in 1994, prior to the High Court decisions in *Theophanous and Stephens,* also reviewed some of the arguments suggesting that it has not worked effectively in the US.[37] These include its apparent ambiguity: the test is considered 'excessively vague' – eg, what/who is a public figure? And what is a matter of public concern? Tobin claims that lower courts in the US now hold that any government employee, no matter what their position, is held to be 'public figure'. There is also said to be uncertainty about whether there is a distinction between media and non-media defendants, and about the burden of proof.

Tobin also refers to the problem that arises when something is published about the private affairs of a person who is a high profile public figure.[38] Like other commentators, he notes that there is a disjunction between the focus on the plaintiff, and the protection of speech; that is, confusion between the subject matter and the person. The rule developed by the US Supreme Court is based on the proposition that 'speech is a matter of public concern'. Therefore, he argues, it is the nature of the speech, not of the person, that should be the focus of attention.

Tobin claims that the post *NYT v Sullivan* approach tips the balance, when it is otherwise finely weighed, in favour of 'free speech', and avails greater protection to speech on matters of public concern than private concern, since a plaintiff must prove both that a matter was false and that a defendant was motivated by actual malice. However he concludes by recommending that s 22 should be reworked and expanded, claiming that this would be more effective than introducing a 'public figure' defence into Australian law.[39]

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37 John T Tobin, "The US Public Figure Test: Should it be Introduced in Australia?" (1994) 17 *UNSWLJ* 383.

38 For a clear example of such a case see *Chappell v TCN Nine* (1988) 14 NSWLR 153.

39 In Tobin's view, s 22 of the NSW *Defamation Act* (the qualified privilege provision) potentially gives more scope to 'free speech' than the 'public figure defence' because it is not focussed on individuals, and it also encourages accurate reporting, by reference to the 'reasonableness' of D's conduct. For another discussion of the potential of s 22, and the fact that the case law has served to limit its operation, see Alister Henskens, "Defamation and Investigative Journalism in NSW: The Evolution of Statutory Qualified Privilege" (1990) 6 *Australian Bar Review* 267.

Also writing prior to the decision in *Lange,* Vicki Mullen suggests that the main difference between the approach in the US, and the approach then being developed by the High Court (cf *Theophanous*[40] and *Stephens*[41]) is the focus on the **content** of the speech (Australia) rather than on the **identity** of the speaker (US).[42] Mullen refers to Deane J's critique of the *Sullivan* standard in his judgment in *Theophanous*, where Justice Deane said: "the investigation of subjective motivation is one of the areas in which our legal procedures are most likely to be found wanting".[43]

The most recent discussion of this issue is in a review essay by Andrew Kenyon, editor of the *Media and Arts Law Review*, reviewing 3 recent monographs on defamation law.[44] Kenyon discusses the difficulties of relying on what is now a quite outmoded way of dividing the world between the public and the private and draws on developments in areas such as international law (and more broadly, feminist and critical approaches to law) to draw attention to changes in regulatory models and structures that make it difficult to resort to the type of 'public/private distinction' that might have been seen as clear in the 1960s, when *Sullivan* was decided.

Kenyon suggests that the High Court's notion of the 'public' or 'political' also needs enlarging: he is critical of the Court's invocation in *Lange* of an 'earlier world' when it presents the following limited notion of 'government and political matters' as its 'vision of politics':[45]

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40 *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104

41 *Stephens v West Australian Newspapers* (1994) 182 CLR 211.

42 Vicki Mullen, *Defamation of Public Officials and Public Figures: Special Rules and Free Speech in the United States and Australia*, NSW Parliamentary Library Research Service, Occasional Paper No 2, August 1995.

43 (1994) 182 CLR 104 at 185.

44 Andrew Kenyon, "Defamation and Critique: Political Speech and New York Times v Sullivan in Australia and England" (2001) 25 *Melbourne University Law Review* 522. The books he reviews are Chesterman's *Freedom of Speech in Australian Law: A Delicate Plant;* Fiona Donson, *Legal Intimidation: A SLAPP in the Face of Democracy,* London, Free Association Books, 2000; Ian Loveland, *Political Libels: A Comparative Study,* Oxford, Hart Publishing, 2000.

> …[E]ach member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion -- the giving and receiving of information -- about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege.[46]

By contrast, Kenyon draws attention to Lord Cooke's response to the same point in *Reynolds* where he said

> It is doubtful whether the suggested new defence [*of qualified privilege*] could sensibly be confined to political discussion. There are other public figures who exercise great practical power over the lives of people or great influence in the formation of public opinion or as role models. Such power or influence may indeed exceed that of most politicians. The rights and interests of citizens in democracies are not restricted to the casting of votes. Matters other than those pertaining to government and politics may be just as important in the community; and they may have as strong a claim to be free of restraints on freedom of speech.[47]

Kenyon concludes that we need to reconceptualise the notion of the 'political' for the purpose of developing a 'broader vision of politics' within defamation law, and that within the Australian context, this should take place within the framework of the defence of qualified privilege.

A new direction in Bills of Rights: Since the decision in *NYT v Sullivan*, there has been a significant move away from the US approach in the drafting of modern Bills of Rights.[48] A clear example is the use in documents such as the *Canadian Charter of Rights and Freedoms* (1982) of a qualifier like section 1, which provides as follows: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be

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45 Kenyon, at 544.

46 (1997) 189 CLR 520 at 571

47 [1999] 4 All ER 609 at 640.

48 For a thorough exposition of this, see Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights,* UNSW Press, 2002.

demonstrably justified in a free and democratic society'. Section 1 has been used by the Supreme Court of Canada to uphold a harm-based regulatory approach to pornography, notwithstanding a prima facie finding that it violated the provision guaranteeing freedom of speech.[49] It has also been invoked to protect a criminal sanction on 'hate speech'.[50]

A second relevant development has been the move away from the 'state action' or 'government action' notion that has traditionally seen Bills of Rights directed only at government/public activity, while leaving bodies such as private organisations (including in some cases, those that exercise public functions such as providers of education and health services) outside their scope. The best example of this is in the more recent South African Constitution. Both of these developments in constitutional jurisprudence flow from a recognition that the 19th century 'absolute freedom from the state' approach to civil or human rights needs modification to accommodate the changes in our modes of governance.

Proposal: For all these reasons, the Task Force believes that it is unhelpful at this time to develop a defamation law defence or principle based on the identity of the person allegedly defamed. 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 or public concern are protected. An expanded statutory qualified privilege would have the potential to be a valuable defence in this respect, and to serve a role in ensuring that matters of public importance are aired.

A public figure doctrine would bog down in arguments about who fits the description, while the *Lange* constitutional principle is currently seen as limited by a narrow conception of what is 'political communication'.

The most useful thing NSW can do is to recast the statutory defence of qualified privilege so as to elaborate the circumstances in which it is considered appropriate (and defensible) to publish matters of public importance or public concern (including

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49 *R v Butler* [1992] 1 SCR 452.

50 *R v Keegstra* [1990] 3 SCR 697.

those involving private bodies or persons such as corporate collapses). This is considered next.

- ***Recommendation 12:*** **There should not be a public figure defence introduced, but instead, the revised statutory qualified privilege (recommendation 13) should emphasise that the fact that a person is performing public functions or activities is a factor to consider in whether the occasion is one of qualified privilege.**

THE DEFENCE OF QUALIFIED PRIVILEGE

What is qualified privilege? While some forms of communication are considered 'absolutely' privileged (eg comments made in parliament), a 'qualified' form of privilege protects communications in other limited circumstances. At common law, a statement made in the discharge of some private or public duty is conditionally privileged provided it is communicated to someone who has a reciprocal interest in receiving it.[51] Examples include the giving of a job reference; lodging a complaint about behaviour to a person's supervisor etc. Even if the occasion is considered one of qualified privilege, the defence can be defeated by malice.[52]

Because of the requirement of this 'duty-interest' relationship, qualified privilege has not generally been a defence that the media can rely on: the media publishes to the world at large, not solely to those who are seen as having a particular interest in the subject matter.

However, in NSW, the potential scope of qualified privilege for media publications is much broader given the enactment of s 22, which has largely replaced the common law requirements with one of reasonableness.

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51 See Fleming, *Torts,* 9th edition, LBC, 1998, at 623.

52 As to the categories of conduct evidencing malice, see Tobin and Sexton, *Australian Defamation Law and Practice,* Butterworths, [18,010] – [18,046].

Section 22 currently provides:

> **22 Information**
>
> (1) Where, in respect of matter published to any person:
>
> (a) the recipient has an interest or apparent interest in having information on some subject,
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
> (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,
>
> there is a defence of qualified privilege for that publication.
>
> (2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that that person has that interest.
>
> (3) …

Despite the apparent broadening of the defence by this provision, it is widely considered that 'reasonableness' has been interpreted so restrictively by the NSW courts that in effect, it requires publishers to prove that they believed in the truth of what was published.[53] Therefore the defence is rarely invoked successfully.[54]

Balancing the protection of reputation with freedom of speech: *Lange v ABC*: As noted above, in 1997 the High Court in *Lange,*[55] reconsidered the impact of an implied freedom of political communication, inherent in our system of representative

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53 This is Professor Sally Walker's view: see her discussion in "*Lange v ABC: T*he High Court rethinks the 'constitutionalisation' of defamation law" (1998) 6 *Torts Law Journal* 9. She refers in particular to the approach taken by Hunt J in cases such as *Kaiser v George Laurens (NSW) Pty Ltd* [1982] 1 NSWLR 294; *Barbaro v Amalgamated Television Services* (1985) 1NSWLR 30, and especially *Morgan v John Fairfax and Sons Ltd [No 2]* (1991) 23 NSWLR 374 at 385-386. (See Walker, at 21).

54 Fleming notes that (at least at the time of writing) there had been only five cases since 1974 of which three were in late 1996 or 1997: Fleming, *The Law of Torts*, 9th ed, 1998, at 632.

55 (1997) 189 CLR 520.

government, on the law of defamation (reconsidering the earlier decisions in *Stephens and Theophanous*). At the centre of the High Court's analysis was the need to ensure a balance between maintaining the law of defamation as a means of protecting reputation, and ensuring freedom of speech. So the court proposed its twofold test (extracted earlier): "does the law effectively burden freedom of communication about government or political matters…" and if it does, is it "reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the … system of representative and responsible government".[56]

The case involved a claim brought in NSW and so the High Court went on to consider whether NSW defamation law –both common law and the statutory form – is

> reasonably appropriate and adapted to serving the legitimate end of protecting personal reputation without unnecessarily or unreasonably impairing the freedom of communication about government and political matters protected by the Constitution.[57]

Qualified privilege in NSW: The High Court held that, without the statutory form of qualified privilege (s 22), NSW law would impose an 'undue burden' on freedom of communication, essentially because the common law "arguably provides no appropriate defence for a person who mistakenly but honestly publishes government or political matter to a large audience".[58]

The publisher's conduct must be 'reasonable': As noted above, s 22 is not based around the duty/interest framework. The key element that takes the place of the 'duty' aspect at common law is the behaviour of the publisher, specifically, that the publisher's conduct in publishing the matter is 'reasonable in the circumstances' (s 22(1)(c)). Drawing on the 'reasonableness' requirement in the NSW Act, the High Court held that in relation to the inquiry of whether freedom of communication had been impaired:

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56 *Lange*, at 567.

57 *Lange*, at 568.

58 *Lange* at 569-560.

> reasonableness of conduct seems the appropriate criterion to apply when the occasion of the publication of defamatory matter is said to be an occasion of qualified privilege solely by reason of the relevance of the matter published to the discussion of government or political matters.[59]

What is 'reasonable'? ***Lange*** The High Court stated that whether the making of any particular publication is 'reasonable' will depend on all the circumstances of the case.

> [A]s a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.[60]

The Press Council's concerns and proposal: The Press Council's concern about the *Lange* test is its focus on the publisher being required to have reasonable grounds for believing that an imputation is true and being under an obligation to attempt to verify the accuracy of the material, including by seeking a response from the person where practicable. The Council pointed out that in breaking stories, such as, for example, high profile corporate collapses, the newspaper often has no way of immediately ascertaining the truth, although the matters are patently of public interest.

Belief in the truth of a publication: As noted above, NSW courts have interpreted the reasonableness requirement under s 22, to quote one example, as generally requiring a defendant to "establish his honest belief in the truth of what he has written".[61] In *Lange,* in the passage most frequently referred to in the context of assessing reasonableness, the High Court presents what is, in effect, a mixed message. On the one hand, it is suggested that a defendant must show that they "had reasonable

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59 *Lange* at 573.

60 *Lange* at 574.

61 *Morgan v John Fairfax and Sons Ltd [No 2]* (1991) 23 NSWLR 374 at 386 per Hunt AJA.

grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material", yet on the other, the statement continues that the defendant "did not believe the imputation to be untrue". The latter requirement – that a defendant not believe the imputation is untrue - is a much more practical and achievable test than requiring a defendant to verify and believe in the accuracy of the material. As Walker has suggested: "not knowing that something is false or untrue is quite different from a requirement that the defendant had a positive belief in the truth of the implication".[62]

Other models for qualified privilege

The Code states: The High Court also referred to the approach of the Code States (Qld and Tasmania) to qualified privilege. In Qld, for example, there are eight separate categories of qualified privilege and these include s 16(1)(h)

> (h) if the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit … .[63]

The Codes also do not require a reciprocal duty/interest relationship. So, it has been suggested that a publisher in Qld or Tasmania would be better off relying on the Code defence since they would not have to establish *Lange* reasonableness.[64]

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62 Sally Walker puts this view very persuasively in her article referred to above at 25-26; she also points out that the requirement that a defendant have reasonable grounds for believing that an imputation is true is an objective test and is not the same as requiring a defendant to prove that they actually believed the material was true (at 26). Compare Michael Chesterman in his discussion in *Freedom of Speech in Australia: A Delicate Plant*, where he refers to the failure of a defence of qualified privilege brought under the *Lange* principle in SA: *Brander v Ryan* (12 Jan 2000, unrpted); cited at p102. Note, however, that this decision was overturned on appeal: see *Brander v Ryan & Messenger Press* [2000] SASC 446.

63 *Defamation Act 1889 (*Qld), s 16; *Defamation Act 1957* (Tas), s 16.

64 Walker, at 20; Chesterman, at 143-144. However, there is a requirement of good faith.

UK: The House of Lords decision in *Reynolds* In *Reynolds v Times*[65] the House of Lords canvassed the advantages and disadvantages of modifying/expanding the (English) common law approach, including by adding a new category of "political information" as a new subject matter of qualified privilege. The House of Lords did not see the need to change the common law test, but in his judgment, Lord Nicholls suggested a list of factors (para 54) that might be taken into account by a court. The factors the court referred to are

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

The House of Lords stresses that the weight to be accorded to these factors will vary depending on the circumstances. Note that the list of factors in *Reynolds* does not include any reference to the publisher's belief in the truth of the publication.

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65 [1999] UKHL 45.

The 'negligence' defence in the ACT: The new ACT *Defamation Act* which comes into force on 1 July 2002, provides in relevant part as follows:

> 23(1) It is a defence if the defendant establishes that the published matter (other than any published matter imputing criminal behaviour) was not published negligently.
>
> (2) for subsection (1), it is sufficient if -
>
> (a) the defendant establishes that the defendant took reasonable steps to ensure the accuracy of the published matter; and
>
> (b) the defendant gave the plaintiff a reasonable opportunity to comment on the published matter before it was published

It has sometimes been suggested that a defence of this nature might be introduced in NSW. However, the 'reasonable steps' requirement in the ACT 'negligence' defence is arguably narrower than either the current 'reasonableness' test in s 22, or the *Lange* test.[66] It does not appear that the ACT's negligence approach engages with the concern of the Press Council, which is the onus of establishing the accuracy of the publication. Therefore, there is little point progressing this in the context of rethinking the qualified privilege defence for NSW.

A proposed statutory list: The Task force believes that the 'reasonableness requirement' in s22 should have attached to it a statutory set of factors to be considered by a court in determining whether the publication is protected by qualified privilege. Such a list ought to make clear to decision makers that it is not necessary for a publisher who wishes to invoke qualified privilege to prove that they had objective grounds for believing in the truth of the matter published. A clear Australian analogy for such a statutory list would be the 'best interests' factors in *Family Law Act* 1975 (Cth), s 68F(2)).

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[66] Matt Collins, "Defamation Update: Reform in the ACT" (2000) 5 *Media and Arts Law Review* 97 at 98.

- ***Recommendation 13*: Section 22 should be amended to include a set of factors for courts to consider when assessing reasonableness. That list should provide as follows:**

[insert into section 22]:

In the determination of whether the conduct of the publisher is reasonable under sub-section (1), the following matters are relevant:

- The extent to which the subject matter is a matter of public interest;
- The extent to which the matter complained of concerns the performance of the public functions or activities of the plaintiff;
- The nature of the information;
- The seriousness of the imputations;
- The extent to which the matter distinguishes between proven facts, suspicions and third party allegations;
- The urgency of the publication of the matter;
- The sources of the information and the integrity of those sources;
- Whether the matter complained of contained the gist of the plaintiff's side of the story and, if not, whether a reasonable attempt was made by the publisher to obtain and publish a response from the plaintiff; and
- Any other steps taken to verify the information in the matter complained of.

A further proposal by the Press Council with respect to qualified privilege was that s 22 be further amended by adding a phrase (italicised below) into the beginning of the section. The Council believes that this addition would have the effect of drawing the judiciary's attention to the fact that newspapers have an obligation to keep readers informed and that judgements have to be made about how carefully and comprehensively the newspaper conducted its enquiries in the limited time available before publication.

- ***Recommendation 14 (Professor McKinnon):*** **Section 22 is to be amended by adding the italicised phrase: "In the determination of whether the conduct of the publisher is reasonable under Subsection (1) *in the light of the duty of the press to publish matters of public interest* the following matters are relevant"**

AN ADDITIONAL PROPOSAL

Some members of the Task Force expressed concern that the proposed list to be added to s 22 might not be seen as moving sufficiently far enough away from the current approach and proposed therefore that, in relation to the discussion of political and government matters only, an additional provision in the following terms might be inserted.

- ***Recommendation 15: (2/4 members):*** **Insert new Section 22A**

22A: There is a defence of qualified privilege for a publication concerning government and political matters including, but not confined to,

- The performance of their duties by ministers of the Crown of the Commonwealth, the States and the Territories;
- The performance of their duties by members of the Commonwealth, State and Territorial parliaments;
- The suitability for office of members of the Commonwealth, State or Territorial parliaments and candidates for those legislatures;
- The performance of their duties by statutory officers, ministerial staff, public servants and consultants to governments bodies and instrumentalities;
- The performance of their duties by judicial officers;
- The performance of their duties by elected office holders and municipal officials in local government;

- Conduct designed to influence government decisions or policies;
- Conduct by way of commentary on the political process.

THIRD PARTY STATEMENTS

In the context of qualified privilege, it was pointed out that the reasonableness criterion in s 22 is not believed to have protected publishers who publish reports of what has been said by a third party.[67] In her discussion, Walker refers favourably to the approach taken by Allen J in *Hartley v Nationwide News.*[68] Relying on *Theophanous* in a decision that predated *Lange,* Allen J held that:

> the [Theophanous] defence … requires nothing at all of the publisher as to its belief in whether what has been said by others and reported by it is true. What matters is its belief as to whether what it publishes as having been said by others accurately reports the substance of what has been said. [69]

This issue was also dealt with by Brennan J in his (dissenting) option in *Stephens v WA Newspapers.*[70] He articulated some criteria that might be used to inform a statutory qualified privilege for reports of third party statements, such as the reporting of a press conference, drawing by analogy on the protections that already apply to such matters as fair reports of parliament, courts and other such proceedings (see *Defamation Act* s 24; and Schedule 2). These were:

- 'The subject matter of the defamatory statement must be a matter of relevant public interest. That is to say, the public must have an interest in knowing the truth about the defamatory matter and in knowing that the statement has been made by the third party to whom it is attributed.' (para 28). The most likely category is those matters that relate to government, governmental institutions and politics. Where the matter pertains to a function that only a section of the

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67 Sally Walker (1998) 6 *Torts Law Journal* 9

68 (1995) 119 Fed LR 124.

69 (1995) 119 Fed LR 124 at 126.

70 (1994) 182 CLR 211

public might have to perform, then the breadth of the publication will be relevant

- Secondly, the report of a third party's defamatory statement must be fair and accurate. If publication of a report of the making of a defamatory statement by a third party would serve the welfare of society, inaccuracy in reporting or biased editing of the statement would destroy the capacity of the report to serve that purpose. (para 29)

- "…The public interest in the publication of a report of a third party's defamatory statement requires some assurance of the truth of the defamatory matter. No such assurance can be given when the statement is made ex parte by a third party who has no particular knowledge of the defamatory matter. The only report that might claim the protection of qualified privilege is a report made by a third party who has, or is reasonably believed by the publisher to have, particular knowledge of the defamatory matter contained in the statement. Such a belief on the part of the publisher is essential to repel the inference of malice that would otherwise be drawn from the publication of defamatory matter that is not shown to be true (para 30).

After further consideration, Brennan J concluded:

- If … the publication of a fair and accurate report of a defamatory statement made on a matter of public interest by a third party who is reasonably believed to have particular knowledge of the defamatory matter is accompanied by publication of any reasonable response which the party defamed wishes to make, the report is published on an occasion of qualified privilege. In that event, no inference of malice can be drawn against the publisher from the fact of publication, though the defamatory statement turns out to be false and the publisher had no personal knowledge of (and hence no belief in) its truth (para 32).

In summary, the essential elements of such a protection would be:

- The publication pertains to a matter of public interest;
- The report must be fair and accurate;
- The publisher must have reason to believe that the third party has particular knowledge of the defamatory matter in the statement
- The person defamed must have had an opportunity to respond (where feasible)

It is not clear that there needs to be a specific statutory provision for this. For example, the proposed list of s 22 factors includes a number of items that would be relevant, such as consideration of the public's interest in the issue, and the source of the information. However, for the sake of certainty, we consider that there should be a specific statutorily conferred form of protection for accurately reported third party statements.

- ***Recommendation 16*: there should be a specific statutorily conferred form of protection for publication of certain third party statements. This can be achieved by making the following amendments to the Act:**

  Sections 24 and 25

  Add the following to list of proceedings of public concern in clause 2 of Schedule 2:

  Proceedings of a press conference given by a public official with the authority of a government body or instrumentality (including a minister of the Crown).

  Add the following to the list of official and public documents and records in clause 3 of Schedule 2:

  A press release issued by a public official with the authority of a government body or instrumentality (including a minister of the Crown).

DAMAGES

In its submission, the Press Council argued that some legislative guidance should be provided on sums that can be awarded in damages. The proposal also referred to legislative caps that have been introduced in some contexts.

Section 46A currently provides.

> 46A: Factors relevant in damages assessment
>
> (1) In determining the amount of damages to be awarded in any proceedings for defamation, the court is to ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded.
>
> (2) 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 loss in personal injury awards in the State (including awards made under, or in accordance with, any statute regulating the award of any such damages).

In the context of the assessment of damages for personal injury, while there is increasing public attention to the magnitude of (the very rare) awards in the millions for some people who have been permanently incapacitated, the major part of any such awards is based on the assessment of economic losses, including the costs of treatment and costs of future care.[71] There has developed what is, in effect, a tariff that significantly limits the amount available for non-economic losses, specifically, pain and suffering, loss of amenities and loss of expectation of life.[72] Although it is hard to put a precise figure on this, reference is often made to the decision of the High Court of Australia in *Sharman v Evans*[73] where the Court reduced what had been an assessment of $80,000 to $55,000 (in 1970s dollars) as a benchmark. This is a case

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71 See Harold Luntz, *Assessment of Damages,* 3rd ed, 1990.

72 Luntz, at para 3.1.4.

73 (1977) 138 CLR 563

considered to warrant the 'top of the range' as the plaintiff there was a young woman, as the court put it, "perfectly aware of where she is and what she is doing, and [who] understands what has happened to her". Justice Murphy also referred to her doctor's evidence that she was depressed (understandably) and that Dr. Griffiths had "often seen tears, which she can not mop away, trickling down her face".[74]

The table of comparative verdicts for 2001 from the CCH torts service confirms this. Of the cases included, only 2 were awards exceeding one million dollars, though both were very large (and both were from NSW).[75] The first, for a young man of 21 who was a teacher and tennis coach was an award of $8.8million dollars, of which the amount for 'general damages' (non-economic losses) was $375,000; the second, for a young woman injured at birth through medical negligence was for $14.9million and her award for general damages was $560,000.

It is not surprising that defamation awards (which usually comprise only damages for non-economic loss, ie, loss of reputation) are sometimes considered high by comparison with the amounts available either at common law, or under other statutory schemes that impose caps for non-economic losses such as the *Motor Accidents Act* 1988, the *Workers Compensation Act* 1987 and the *Health Care Liability Act* 2001. Even more significant is the comparison with other statutory compensation schemes, such as the *Victims Support and Rehabilitation Act* 1996 under which the maximum amount payable for any kind of injury, including the most serious sexual assault, is $50,000.

There has been a mixed response to the statutory exhortation to take into account awards for non-economic losses in personal injury cases, both from courts and commentators.[76] The ACT parliament adopted the NSW approach in its 2001

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74 (1977) 138 CLR 563 at 594.

75 By comparison, in the 2000 tables, there were 9 awards of over one million dollars, the largest of which was for a person rendered tetraplegic who received $2.2million, of which an award for $242,696 was for general damages. The next highest was for $1.64 million where the award of general damages was less than $200,000. The next highest award of general damages was for $220,100 out of a total award of $1.45million.

76 For a detailed discussion of the approaches taken by various courts, see Andrew Kenyon, "Problems with Defamation Damages?" (1998) 24 *Monash University Law Review* 70.

legislation, ie, exhorting courts to consider damages for non-economic losses in personal injury cases. More recently, NSW legislated to place a cap on the amounts recoverable in cases involving health care providers under the *Health Care Liability Act* 2001. The maximum amount that can be awarded for non economic loss under the Act is $350,000 subject to annual indexation (section 13). While under the current s46A, the court is directed to take those matters into account, there is no actual cap or direction that they not exceed those awards.

- ***Recommendation 17:*** **Section 46A should be amended to provide specifically that the maximum amount that can be awarded for non economic losses in defamation cases should not exceed the maximum awards, both at common law and under statute, for non-economic losses in personal injury cases.**

CONCLUDING REMARKS: TOWARDS A UNIFORM NATIONAL DEFAMATION LAW

The Press Council's preferred position is the development of a uniform national defamation law. The consequences of the increasing use of the internet and in any event, the widespread syndication of newspaper, radio, TV and other media reports, makes it somewhat anomalous that the law (both substantive and procedural) in the various Australian jurisdictions differs in some respects.

While this report can only have any direct impact on NSW law, it is the view of the Task force that these proposals could form the basis for discussion with the States and Territories, with a view to a further attempt to bring about national reform.

As the only State to have a rule that makes the imputation the cause of action, it is also proposed that NSW rethink that singular position, and move toward a situation that is common in the other States and Territories. In order to achieve that outcome, it may be appropriate for NSW to act so as to amend s 9 by removing the focus on the imputation as the cause of action.

- ***Recommendation 18*: The proposals in this report should form the basis of discussions with the States and Territories aimed at achieving national reform.**