Report on the Defamation Bill, 1992

Legislation Committee on the Defamation Bill, 1992

Legislative Assembly
Parliament of New South Wales

October, 1992

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Chairman's Foreword

This Legislation Committee on the Defamation Bill, 1991 was referred the Bill on 14 November 1991 by the then Attorney General, the Hon Peter Collins, MP to examine the Bill and report by 27 February 1992. Since that time the reporting date has been extended to enable the Committee to hear from a wide range of practitioners, academics and media proprietors.

Over 70 submissions have been received and hearings have been held over five days. In the course of its inquiry, the Committee issued a Discussion Paper to raise major issues on those proposals for reform that had been suggested in submissions and hearings.

The importance of defamation law to ordinary citizens should not be underestimated, as defamation law has as much application within the context of a meeting of a Body Corporate committee or a local football club election campaign as it does in the political arena. Even the simple task of writing an accurate reference may well potentially be a defamatory action where, for example, qualified privilege will quickly become more than an academic concern.

During the course of its proceedings, the Committee recognised the complexities of issues raised and came to the view that it was unable to make specific recommendations on the discrete clauses of the Bill. Instead, the Committee is of the firm conviction that the community would be best served by their referring the Bill in its entirety, together with the Committee's recommendations on major issues, to the Law Reform Commission of New South Wales, whose expertise will enable a comprehensive review of defamation law in New South Wales.

The Committee acknowledges that the Standing Committee of Attorneys General seeks uniformity so far as is possible. However, the Bill as introduced had some significant jurisdictional differences. In fact, some of the recommendations of our Committee may lead to greater uniformity between the States.

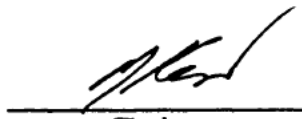
In its recommendations, the Committee has laid major emphases on those areas which have continued to be contentious, such as Qualified Privilege, Justification and Damages.

In its review, the Committee has not only considered the Bill on a clause by clause basis, but has attempted to step backwards and to evaluate its overall effectiveness.

The Committee is aware that defamation reform review is occurring throughout the Western World at this time. For example, the United Kingdom has been involved in a long process towards defamation law reform, with committees such as that chaired by Sir David Calcutt QC, Private Members Bills introduced by Clive Soley, MP or the Bill drafted by Mr Justice Hoffman which was introduced into the House of Lords all aiming at defamation law that is fair to all. The Annenberg Program of Northwestern University in the United States of America has also examined ways and means of simplifying and accelerating procedures for dealing with defamation complaints.

There seems to be a general trend towards the creation of a new tort of invasion of privacy and the introduction of mechanisms to ensure a right to reply to factual inaccuracies or other misstatements. There is also a universal examination of procedural reforms, with a view towards summary or fast-track procedures, greater disclosure, reduction of delay, and judicial control of proceedings. These are measures which will serve the public interest by reducing cost and delivering quicker justice.

Learning from other jurisdictions, the Committee would be wary of recommending over-simplification in this area of the law.



Chairman

Legislation Committee on the Defamation Bill, 1992

Following the introduction of the Defamation Bill, 1991 into the Legislative Assembly of the Parliament of New South Wales in November, 1991, the Bill was referred to a Legislation Committee comprised of Members from both sides of the House.

Members of the Committee

Mr Malcolm Kerr MP (Chairman)

Mr Ivan Petch MP (Vice-Chairman)

Mr William Beckroge MP

Mr Bryce Gaudry MP

Mr John Hatton MP

Mr Bradley Hazzard MP

Dr Terry Metherell MP (14 November, 1991 - 10 April, 1992)

Mr Kevin Moss MP (appointed 7 May, 1992)

Mr Peter Nagle MP

Mr Donald Page MP

Mr John Turner MP

Project Officer

Ms Helen K. Williams

Clerk to the Committee

Ms Ronda Miller

Terms of Reference

On Thursday, 14 November, 1991, following a Notice of Motion by the then Attorney General, the Honourable Peter Collins, MP, the Legislative Assembly resolved:

1. That the Defamation Bill, 1991 be referred to a Legislation Committee.

2. That the Committee consist of 10 Members.

3. That the Committee report to the Legislative Assembly by 27 February, 1992. *

* The Bill was reintroduced in 1992 and re-referred with a reporting date of 30 May, 1992, which was twice extended until 16 October, 1992.

Committee Hearings: Witnesses Appearing

Committee Hearings

Date of Hearing	Name of witness
18.2.1992 - 19.2.1992	Mr Peter **Bartlett** Partner, Minter Ellison, Solicitors (Mr Bartlett also gave evidence on behalf of the Law Council of Australia)
	Mr Norman **Lyall**, representing the Law Society of New South Wales
	Mr Terence **Tobin** QC Barrister-at-Law
	Mr Michael **Sexton** Barrister-at-Law
	(Messrs Tobin and Sexton also gave evidence as representatives of the Bar Association of New South Wales)
	Mr Stuart **Littlemore** Barrister-at-Law
	Mr Alister **Henskens**, Partner, Bilbie, Whitford and Dan, Solicitors
	Mr Kenneth **Gee** QC
	Ms Judith **Gibson** Barrister-at-Law, representing Young Lawyers

27.4.1992	Ms Judith **Walker** Head, Legal and Copyright Department Australian Broadcasting Corporation
	Mr Graham **Bates** Partner, Mallesons Stephen Jacques
	Mr Padraic **McGuinness** Journalist
	Mr Bruce **McClintock** Barrister-at-Law
	Mr Brian **Gallagher** Solicitor, Gallaghers Media & General Law
7.8.1992	The Honourable Thomas **Hughes** AO QC Barrister-at-Law
	Ms Wendy **Bacon** Freelance Journalist
	Mr Michael **Sexton** Barrister-at-Law
	Ms Judith **Walker** Head, Legal and Copyright Department Australian Broadcasting Corporation
8.9.1992	Mr Matthew John Robert **Clarke** Judge of the Court of Appeal Supreme Court

Committee's Recommendations

1. Uniformity

The Committee is of the view that, while uniformity is a desirable aim, this aim should not be allowed to unduly delay the introduction of a new bill in New South Wales. This report sets out a number of recommendations for amendment or review of the Bill. If uniformity is to be achieved, the structure of the Bill will need to be substantially dismantled. Defamation is a highly technical area of law and the dismantling and redrafting is not a task for a committee. The Committee has set out its recommendations on policy herein, and suggests that the matter be referred to the Law Reform Commission of New South Wales to enable a comprehensive review and redrafting of provisions.

The Committee further recommends that, before undertaking the drafting of a new Defamation Bill, the Law Reform Commission undertake an empirical study of defamation matters. Most of the evidence received by the Committee is anecdotal, rather than empirical, for example, in relation to questions such as whether the judge or jury would be in a better position to determine the quantum of damages.

This would enable the necessary expertise to be provided; the suggested draft would then be returned to the public arena for scrutiny.

The Law Reform Commission would be required to report to the Parliament by early March to enable consideration of the recommended provisions drafted by it.

2. Damages: Judge or Jury? - Clause 11

The Committee recommends:

(1) that clause 11 is not supported. Juries should retain responsibility of determining the quantum of damages;

(2) that the section should direct the judge to give guidance to the jury as to matters to be taken into consideration when determining the quantum of damages. This is the direction in which English law is moving. (e.g. in Sutcliffe v. Pressdram Ltd [1991] 1 QB 153 the English Court of Appeal gave very useful guidance to trial judges as to how the jury may be encouraged to keep their feet on the ground in defamation trials. The suggestion is that the jury should

be told to have regard to what might be purchased by the damages awarded - for example, a holiday, a new car or a family home.) No doubt the directions would need to be drafted with some care, but once they are settled they could become as standard as the judge's directions to the jury on other issues such as heads of damage. In certain circumstances, it may be appropriate for a judge to indicate a range of figures for purposes of guidance;

(3) that the Law Reform Commission examine the proposal that the jury should decide on the imputation as a preliminary step before any other evidence is heard; and

(4) that the Law Reform Commission examine the possibility of "capping" damages similarly to the cap on non-economic loss arising from physical injury in motor accidents.

3. Want of Prosecution - Clause 14

The Committee supports giving to the courts the express powers referred to in clause 14. Research suggests that the Court of Appeal has interpreted the existing powers of the courts in such a way as virtually to emasculate them. It is nevertheless important that "stop writs" filed by plaintiffs be struck out, so that such a special provision in defamation litigation is warranted.

The Committee questions why clause 14 is limited to sanctions against the plaintiff. At the present time, the plaintiff has to seek a peremptory order against the defendant in such circumstances. If that order is not complied with by the defendant, its defence is then struck out. So far, the extent of that power has not been tested in the Court of Appeal. It is important that, if defamation litigation is to proceed, it be disposed of quickly. Such a power against defendants is necessary in order to give effect to that principle. The Committee is of the view that it would be wiser to deal with special sanctions in such litigation against both parties.

4. Justification: Truth and Privacy - Clauses 19, 20

The Committee recommends:

(1) that truth alone form the basis of the defence;

(2) that a tort of privacy be introduced in separate legislation; and

(3) that, until such a statute is passed, the public interest and qualified privilege requirements of the defence of truth in s15 of the Defamation Act 1974 be retained.

5. Contextual Truth - Clause 21

The Committee recommends

(1) that the principle of the defence established under s16 of the Act be retained;

(2) that the words "does not further injure the reputation of the plaintiff" be substituted for "does not further harm the plaintiff"; and

(3) that clause 21 of the Bill be amended to delete the word "warranted" from clause 21(2)(b).

For the defence to operate, clause 21 also requires that the publication carrying the imputation not be an unwarranted intrusion on the plaintiff's privacy. Consistent with the recommendation in relation to clause 20 [truth and privacy], the Committee recommends that protection of privacy be covered by separate legislation.

6. Absolute Privilege - Clause 23

It is the view of the Committee that the Australian Securities Commission, as an investigative body, is entitled to a statutory form of privilege as sought, however, the Committee is limited in the recommendations it believes it should make by the evidence put before it. To avoid a charge of "ad hocery" and to ensure the formulation of a comprehensive policy encompassing all who should be entitled to protection, the Committee recommends that a full assessment of the absolute privilege provisions be undertaken by the Law Reform Commission. In that way, public and private bodies will know their relative rights to protection.

The Committee recommends that, in its assessment, the Law Reform Commission examine the position in relation to absolute privilege for exempt proprietary companies and foreign companies where the activities of such private or foreign companies are associated with or relevant to the activities of public companies.

The Committee also recommends the clarification of absolute privilege as it relates to Members of Parliament. The Committee endorses the recommendations made by Mr Russell Grove, Clerk of the Legislative Assembly, in relation to adopting the provision of the Commonwealth Parliamentary Privileges Act 1987.

The Committee does not accept that the claim for absolute privilege for the Police Board should be recommended. It is not analogous to the Police

Tribunal, which is the quasi-judicial arm of the Police Service. Granting the right to a purely administrative body would go beyond anything already granted.

7. Qualified Privilege - Clauses 24-28

The Committee is of the view that Division 4 - Qualified Privilege should be extensively reviewed. The incorporation of some of the existing statutory qualified privilege provisions from New South Wales and Queensland would offer only a piecemeal solution.

The Committee views favourably the recommendations made by the Law Institute of Victoria that the common law defence should be retained and that the New South Wales statutory defence [s22] should form the underlying basis for a uniform defence. The Committee recommends that the Law Reform Commission of New South Wales examine clause 27(1)(c) along the line suggested by the Institute, that the conduct of the publisher be restricted to whether he or she had a reasonable belief in the truth of the matter published.

The Committee also believes that in matters of sufficient public importance, the defence of qualified privilege should also be available without the requirement of good faith, provided that it was 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.

In light of the submissions and particularly in light of our recommendations, clause 28 should be reviewed to clarify questions to be determined by the judge and the jury.

8. Proposal to Simplify the Defence of Qualified Privilege

The Committee is concerned that there may be unperceived consequences of Mr Littlemore's proposed changes; the Committee is not in a position to predict what they might be. However, the Committee is of the view that the proposals are worthy of consideration and recommends that the Law Reform Commission examine ways by which the law of defamation could be simplified.

9. Public Figure Test

The Committee does not support the introduction of a form of "public figure test" into the Bill, unless there is a guarantee that public figures will have

the right to have published a reply to debate the allegations made against them.

10. Shield Laws: Protection of Journalists' Sources

The Committee is of the view that, because of the particular problems faced by journalists required to disclose their sources, the provision of closed courts and suppression orders in defamation actions should be examined by the Law Reform Commission.

The Committee recognises that a journalist may be required to disclose sources in certain circumstances on the grounds of public interest, but is of the view that it may be that protection is more appropriately contained in the laws relating to contempt.

11. Fair Comment

The Committee recommends that the defence contained in Part 7 be re-titled "Comment".

12. Innocent Publication - Clauses 36-45

The Committee agrees that provision should be made for an offer of amends to be made in the circumstances of innocent publication. However, it recommends that clauses 36-45 be reviewed to ensure that the defence is applicable to booksellers, libraries, news dealers and similar distributors.

The Committee does not support any change in the burden of proof or the introduction of "fault" requirements.

13. Correction Orders - Clause 44

The Committee is of the view that the procedures in the Bill will produce problems which need to be addressed if the fast-track mechanism is to be workable. It may be possible to tie this into some institutionalised form of alternative dispute resolution. The Committee recommends review of clauses 44 and consequential clauses.

The principle of fast-track procedures in supported, as it is foreseeable that in some circumstances it could resolve issues with a minimum of expense and delay.

14. Alternative Dispute Resolution

The Committee recommends that compulsory pre-trial conferences before a court-appointed mediator, within a short period (say 7-10 days) of the issue of a writ, at which conference mediation and the issues of accuracy or correction can be explored.

The Committee recommends the introduction of a form of summary procedure, similar to that introduced in the United Kingdom.

Introduction

"Defamation consists in publishing an imputation concerning the plaintiff, whereby his reputation is injured or he is ridiculed, shunned or avoided. The publication must be to a third person and may be made in writing or orally, or even by conduct ... Whether or not a publication is defamatory is a question of fact, although the court is bound to rule whether, as a matter of law, the words are capable of being defamatory."

The Honourable Justice M. H. McHUGH, AC

In Australia today, each state and territory has its own defamation law. Within eight jurisdictions there are three different systems. In Queensland and Tasmania, defamation law has been codified; in Victoria, South Australia and Western Australia defamation law is basically the common law with some (not uniform) statutory amendment; and in New South Wales defamation law leaves the common law to operate, subject to modification by the Defamation Act, 1974.

Each state's or territory's laws are complex; the complexity is aggravated by the variations between legislation. If matter is published in a particular place, it is subject to the laws of that place. If it is published in a number of places, it is subject to a number of different defamation laws.

The need for uniformity is recognised.

In March 1990, the Standing Committee of Attorneys General of New South Wales, Victoria and Queensland announced the intention of re-examining the question of reform of defamation law within their respective jurisdictions. A Discussion Paper on Reform of Defamation Law, which set out their proposals, was released for public discussion. The decision to consider the introduction of uniform defamation laws was seen as a reflection of an increasing concern that defamation law in the Australian States was inadequate.

The Attorneys' objective was "the attainment of uniform laws among the three respective jurisdictions", with the "ultimate aim ... to ... attain uniformity throughout Australia". The 1990 Discussion Paper outlined the Attorneys' aim as producing clarity in the law with an objective of "removing unwarranted restrictions on freedom of speech as a result of unnecessary technicality or uncertainty".

The Attorneys' initial proposal was uniform codification of the law of defamation, thus removing the common law completely; their compromise was a Bill which would contain the reform proposals, but would leave other matters to revert to the common law. Under these proposals, New South Wales would lose its Defamation Act, 1974 and Queensland would lose its defamation Code. Discussions continued.

In October 1991, a proposal was made and provisionally accepted that new Bills would be introduced, adopting many of the provisions of the New South Wales Act. *Reform of Defamation Laws Discussion Paper (No. 2)* was released for public discussion. Subsequently, on 14 November, 1991, the Defamation Bill, 1991 was introduced into the three Parliaments. The intention was for debate to take place in March 1992.

On 14 November, 1991 in the New South Wales Legislative Assembly, the then Attorney General moved that the Defamation Bill, 1991 be referred to a Legislation Committee, which would report its findings by 27 February 1992. However, due to the complexity of issues raised in submissions and evidence, the date for report to the House by the New South Wales Legislation Committee on the Defamation Bill, 1991 was extended three times, first until 31 May, 1992, secondly until 30 September, 1992 and finally until 16 October, 1992. An Issues Paper was released by the Committee on the Defamation Bill, 1991 in December, 1991 and widely distributed within the legal and media communities and to other interested persons.

The Parliament of New South Wales was prorogued in February 1992. When the Parliament resumed, the Legislation Committee on the Defamation Bill, 1992 was reconvened.

Between February and May, 1992, the Committee heard evidence on three separate days of hearings. A Discussion Paper was prepared, tabled and released by the Committee in May, 1992.The Discussion Paper sought further submissions on a number of proposals. Subsequently, the Committee heard evidence on three more days of hearings prior to finalising this report.

Chapter 1

Uniformity

The major rationale for the introduction of the Defamation Bill, 1991 [re-introduced in 1992], at the same time similar defamation bills were introduced into the Parliaments of Victoria and Queensland, was to achieve uniformity in defamation law between the three states.

It must be recognised that, although the process goes some of the way to achieving this, there are a number of technical differences in the three bills. These differences mean that full uniformity will not be achieved and there may be a continuation of the problems the bills aimed to solve.

The Communications Law Centre highlighted the problems which the differences in the three Bills create, drawing the Committee's attention especially to the question of "forum shopping":

> Subject to the place of publication, there is no control over where a plaintiff may commence his/her cause of action. It has frequently been argued that this situation encourages the practice of forum shopping whereby the plaintiff choses (sic) to commence an action in the jurisdiction which is perceived to provide the highest award of damages and the least likelihood of a successful defence. To some extent state crossvesting legislation may overcome the problems of forum shopping by referring cases back to the most appropriate jurisdiction, although the validity of this legislation is, to date, untested.
>
> Under the existing law publishers must consider up to eight different sets of defamation laws. It is difficult, if not impossible, for a publisher of a television program or newspaper, which may be published nationally, to quickly and accurately assess the effect of the laws of different jurisdictions in which the material may be published. This may result in either unnecessary self censorship, or the publication of material which is in effect the lowest common denominator of eight different sets of laws. The risk of contravening those laws is outweighed by the pressures of deadlines and a decision is made on a commercial rather than legal basis. This is undesirable from the point of view of the publisher, the public and an individual who may be the subject of the published material.
>
> The Centre believes that there is an overwhelming need to provide uniformity particularly in the area of defences to defamation actions. It is the differences between these defences that are most likely to promote forum shopping and it is in the area of defences that the balance is found between the often competing public interest of free speech and an individual's interest in protection of reputation. ... Uniformity is an imperative of law reform but should not be its only aim, particularly if the result is to enact uniformly unsatisfactory legislation. ...

> There are numerous other drafting differences which are unexplained (see for example, clauses 20(2), 34-40, 41, 55(5), 56, 65(4) and 69 and their Victorian counterparts). If the result of the reforms is to enact further or **different substantive inconsistencies in the legislation, the reform of the existing law is greatly diminished.**

The Communications Law Centre went on to argue:

> Clearly there is a need for further consultation between the various jurisdictions to ensure uniformity of both substantive matters and terminology.

Submissions received have noted the value in other jurisdictions introducing provisions currently operating in New South Wales e.g. Victoria has no equivalent to the "contextual truth" provisions of clause 21(1)(b). Similarly, there is currently no uniformity between states in the range of "protected reports" and even in the Bills there are different responsibilities for the award of damages.

Committee's Recommendations:

The Committee is of the view that while uniformity is a desirable aim, this aim should not be allowed to unduly delay the introduction of a new bill in New South Wales. This report sets out a number of recommendations for amendment or review of the Bill. If uniformity is to be achieved, the structure of the Bill will need to be substantially dismantled. Defamation is a highly technical area of law and the dismantling and redrafting is not a task for a committee. The Committee has set out its recommendations on policy herein, and suggests that the matter be referred to the Law Reform Commission of New South Wales to enable a comprehensive review and redrafting of provisions.

The Committee further recommends that, before undertaking the drafting of a new Defamation Bill, the Law Reform Commission undertakes an empirical study of defamation matters. Most of the evidence received by the Committee is anecdotal, rather than empirical, for example, in relation to questions such as whether the judge or jury would be in a better position to determine the quantum of damages.

This would enable the necessary expertise to be provided; the suggested draft would then be returned to the public arena for scrutiny.

The Law Reform Commission would be required to report to the Parliament by early March to enable consideration of the recommended provisions drafted by them.

Chapter 2

Part 2 - General Principles - Clause 11

Damages - Judge or Jury?

There will not be uniformity between the three jurisdictions in this area.

Two former judges, in the submissions made to the Committee, raised problems relating to the functions of the judge and the jury in a defamation trial.

The Honourable Athol Moffitt, CMG, QC, submitted a detailed discussion of the functions of judges and juries in defamation action. He examined two provisions of the Bill which separate the functions of the judge and the jury in a trial held before a jury. One relates to the assessment of damages and the other to the privacy defence.

In relation to the question of the assessment of damages, The Honourable Athol Moffitt, CMG, QC, made the following comments:

> The traditional view of the past has been that proceedings for defamation, malicious prosecution and false imprisonment are the proper province of juries. The defamation law represents a compromise between damage to reputations and freedom of speech. The law concerning malicious prosecution and false imprisonment represents a compromise between the need of the criminal law to intrude into the rights of persons who may be innocent and damage to individuals by its unacceptable use.
>
> Juries in the compromise involved in the trial of these cases are treated as holders of the public conscience and the preferred adjudicators of the facts. Reverence for juries in these cases has acquired a somewhat "holy cow" place in our legal system. However, the faith accorded to juries by the law in these cases is somewhat equivocal. Somewhat inconsistently juries are not trusted with a half of the case and indeed the essence of these cases, namely the compromise the law makes in favour of free speech or in favour of the necessary operation of the criminal law. Decision on these elements is withdrawn from their decision. Basically, the apprehension is that when an identified person, the plaintiff, suffers damage when his reputation is damaged by an untrue innuendo or when he is subjected to the criminal process and is found not guilty, the lay inclination is to compensate him and either not comprehend or ignore the more subtle and public considerations concerning free speech and the necessary operations of the criminal law. In consequence factual issues such as public interest, privilege and "reasonable cause" are withdrawn from the jury and decided by the judge.

A great deal of the complexity in trials for defamation is due to this necessary split of functions between judge and jury. If the compromise between individual rights and the public interest is to be appropriate and fair, detailed refinements of some nicety are unavoidable. Not only must they be so detailed, but the detail must be truly and fairly applied to the facts properly found. This not easy task is gravely complicated when decision on the facts is divided between judge and jury on some stated formula. It adds length and cost to the trial. Judicial control of the division of function is difficult. The summing up must be more intricate and detailed.

These problems enhance the ever present chance of error leading to the disaster of a new trial ordered on appeal. It is mostly a new trial generally and twice as long. In a trial by a judge alone, there are no problems of division of functions. He gives his reasons and is open more simply to be corrected on appeal, if he errs in some aspect of the trial. His error will be apparent, so usually the appeal court will be able to substitute the correct judgement without the need for a further trial.

When changes in NSW to have judges try personal injury cases were mooted, the alleged dangers of so doing were loudly proclaimed under the head "your right to a jury". No complaint on this issue is now heard. Decisions are more consistent, trials more structured, shorter and less expensive. Erratic decisions are far less, such as a jury verdict for the defendant against an overcomplaining migrant with a good cause of action. The day when e.g. a Newcastle jury would give twice the damages as that by a Lismore jury are gone.

The present Bill extends the past process of splitting the trial, indeed enlarging the province assigned to the judge. The problem, as I see it, is that this itself produces its own complexities, despite that the modern aim and that of the Bill is to simplify the law and its administration.

Politically, in view of the reverence for juries in this area, as earlier stated, the question of judges trying the whole case is probably not now examinable. On the history leading to the 1991 Bill, I accept it is really outside the province of the present Committee.

However, an understanding of the division of function between judge and jury and how it worked is necessary in order to evaluate what the Bill does in this regard. ... It provides a background to my warning of added complications to these trials and to what can be done to simplify them.

I should add I have no philosophy against jury trials. Indeed I strongly support their use in criminal trials. The question of their use in these three types of civil action is quite different, because of potential problems with their use.

The Honourable R.G. Reynolds AO QC raised his concerns about the division of function between judge and jury:

Whilst I accept that the amounts awarded by juries may be seen by some to be extravagant and excessive, there is the difficulty that a finding of liability and the amount of damages are inextricably linked.

The Judge, if awarding damages following a jury's finding of liability, will not always know what facts were the foundation of that verdict. Sometimes the issue will be clear-cut but if not will he decide on the basis of the worst or best view of the conduct of the defendant, or some intermediate view or, indeed, his own view? The control by appellate courts is costly and time-consuming and may involve a re-trial.

If a judge's verdict is challenged, an Appeal Court may substitute the verdict it considered appropriate.

I do not think the division of function is a solution to what is perceived by some as an evil requiring removal.

Mr Malcolm Kerr, Chairman of the Legislation Committee on the Defamation Bill, 1991, asked the Honourable Justice Clarke whether juries should be abolished in defamation trials; the Committee considers the reply a valuable one, as it highlights a range of issues which need examination:

The Hon Justice CLARKE: I would like, if I could, to have a little time with this question because I do not think there is a simple answer. It provokes a number of thoughts. By introduction I should say that my particular interest in being here today is to alert the Committee, to the extent it is not already alerted, to the enormous difficulties that defamation trials seem to cause the courts. I noticed during my homework a quote which I think applies not only to judges from outside New South Wales but also to judges in New South Wales. I thought it worth reading. Mr Justice Blackburn, in the case of Renouf, was quoted as saying:

> As to publication in New South Wales, I am far from confident that I have succeeded in finding my way through labyrinthine complexities of the defamation law of that State. It is an unpleasant feeling to know that one is lost; I am not sure that it is not equally unpleasant to be unsure whether one is lost or not.

I think that is fair comment. The law as it is presently practised is highly complex and it may be easier if the court could give one or two of the expert defamation judges to each case. But that is simply not possible or practicable. So we have to bear in mind a law that is going to be administered by judges, some of whom are expert in defamation, some of whom are much more all-rounders or perhaps experts in criminal law. The recent history of defamation cases does not lead one to have great confidence that the law is either relatively simple or easy to administer. Nearly every large case that has come before the court recently has had two, if not three, trials. Two that spring to mind, both of which I was involved in at one stage or the other, are Morgan's case—which interestingly enough was decided this year—and Mergen's case, which was quite a small defamation case. But that had three trials, and in the end a verdict was given because the parties dispensed with the jury. When one looks to find the reasons for the difficulties in having a trial that proceeds to finality without appellable error one is confronted I think in two areas. One is, simply, the complexity and difficulty involved in the various principles, and really in the verbiage in the Act itself. The second is the division of function that takes place in most defamation trials.

When we talk about trial by jury we are talking relatively inaccurately. In most defamation cases a number of issues are tried by the jury and a number of issues are tried by the judge. In respect of those issues which the judge tries, there may be questions relating to primary facts which are in dispute. If there are those questions, they have to be decided by the jury. In Morgan No. 2, I think it was—it is the first of the reported cases—the jury could not agree after a lengthy trial and the judge took a general verdict, which means that the jury finds for the plaintiff or the defendant and in what amount. I think the verdict was $150,000; I cannot remember precisely. Then she proceeded to deal with qualified privilege under section 22. There was an issue as to a number of matters and in particular as to honest belief and the jury had not given answers to the questions. So the judge was left in a difficult position and she proceeded to answer the questions herself. She found, I think I am correct in saying, for the defendant on qualified privilege. That decision was set aside because she did not have any authority to decide the questions herself.

She would have had authority if the parties had agreed, but they did not agree. In a case that we heard last week in the Court of Appeal, and about which I should say nothing as to detail, difficulties arose in relation to statutory qualified privilege under section 22 because of the fact that some questions which were thought possibly had arisen were not submitted for consideration by the jury. They are the two most recent examples. But while you have this duality of system I think you are going to have enormous and growing problems, particularly when it is in a complex area of law.

When we ask should these cases be different from other cases and tried by a jury, we usually receive the answer that there are two conflicting rights involved, about both of which the public is greatly concerned, and it is appropriate that the public be involved in the decision-making process. When I try to analyse this argument, and I recently tried to, I find that it is a little difficult to support as a generality, although there are areas in a defamation case where one could argue strongly for the retention of public involvement. The first area is on the meaning of the material and whether it is defamatory. We are all familiar—I have seen this from your writings—with the reasonable reader or reasonable listener test. It is appropriate in broad terms, I would think, for members of the public to decide whether the reasonable reader thought the meaning was conveyed and whether it was defamatory. So I can see a powerful argument for juries being involved at that stage. I noted in the bill that originally emerged that it was decided that juries would not be involved in the damages stage. I am not sure, but my impression is that the Committee sees problems in relation to that. As I see it, damages is another area in which, if you are going to involve the public at all, it is appropriate that it be involved, because there it is putting its measure upon the damage and the amount necessary to vindicate the reputation of the person defamed.

Having said that, I have difficulty in seeing why a jury should be involved in any other area. There are questions of fact, the same types of questions as are decided by judges every day, in a number of areas. There are questions as to belief, which is a question of fact, and the question of truth et cetera. When one comes down to a balancing type of question, which in theory perhaps the public should be involved in, one looks at qualified privilege and there the balancing question is for the judge. So I am left in a situation that in an ideal world I would think a jury was a good idea for the initial questions of imputation and defamation and for damages, but I can see little justification or little argument in support of retaining a jury for anything else, particularly as so many of the other areas involve this combined fact-finding process—a judge finding some things and the jury finding others. To me it would be a much more workable system to have one or other deciding them all. In view of the history and in view of a number of other factors which I have mentioned, I would have thought the judge was appropriate.

That leads me then to say I would think it almost totally impracticable to leave a damages question to a jury when the judge was going to decide all the defence questions. It may, if nothing else, lead to a situation where conflicting answers could in theory be given on the same evidence. When I think about the law of defamation in the context of a system of justice, I think not about a law that is great in theory but about one which works and works efficiently. In that regard I have in mind the cost involved to each of the parties and the community, not only directly in the cost of the trial but in the effect of one, two or three lengthy trials upon a system of justice that is groaning at the seams. Might I add, to give you some idea of the dimension of the problem, this most recent case we are deciding involved a radio broadcast by Alan Jones, an interview, which lasted six minutes. The trial lasted five weeks. The evidence lasted nine days. There were two to three days of hearing—I think it was three days—before counsel opened to the jury. Then there was another occasion when the jury was absent for five days while argument continued. Then they came back. I forget the precise detail but I think the time spent in argument was well over the total time spent in evidence.

There is one word for that. It is appalling. If we cannot do better than that, there is something terribly wrong. Given that, and accepting that my preference in an ideal world would be for juries to deal with the initial question and the damages question, I think that one or two things have to be done at the outset. They do not really go to the principles of defamation, but if either of them are done they would certainly lead to a greater certainty that the first trial would be the final one or, even if it was not, that the errors could be corrected on appeal so that there was no new trial. There are two alternatives. I have no particular preference. One is to abolish juries. Mr Hughes has appeared in the Australian Capital Territory and Western Australia and he is confident that judge trials work well. Years ago I appeared in the Australian Capital Territory and I thought they were reasonably effective, but I have not enough experience to know how well they would go. But there is absolutely no doubt that an enormous amount of the time wasted would be removed and, I think, the complexity if trial by judge alone was adopted. The Court of Appeal would certainly be given the opportunity to correct the error and enter the appropriate verdict rather than setting the whole train of trial in motion again.

The other alternative, which may be thought to be more appealing, is to have a jury empanelled to decide the first question, and that is the one in which the public's involvement is really greatest—that is, imputation and defamation. If that were done, and if one assumes simply a false innuendo in the sense that one looked at the article or broadcast alone and determined what meaning that conveyed and whether the meaning conveyed was defamatory, the jury could be struck, there could be a short opening, and the article or whatever it is put in front of them. Then there could be short addresses, a short summing up and they could give their decision. If they found for the defendant, that would be the end of the case. If they found for the plaintiff, then the judge would take over from there. I do not think that would create any great problems and I think it would make the system a much effective one.

While I am talking about that, could I say something else, though on a slightly different tangent. Even if one retained the present system of jury trial, I think there is a case for having the jury decide this initial question first before hearing a lot of evidence, not only because if the result is one way that is the end of the trial, but more particularly because the jury's vision of what the article says or the broadcast conveys must undoubtedly be affected by the evidence that they hear. I will give you an example: if the plaintiff is, for instance, an alderman and he says that the article conveys an imputation that he is a dishonest alderman, and you look at the article and see that it conveys clearly that he is dishonest but does not say a word or give the slightest suggestion that he is an alderman, it is difficult to see how you could say, in the case of a false innuendo, that the article conveyed that he was a dishonest alderman. Yet, if the jury hears days and days of evidence that he is an alderman, and what a good alderman he is, that clouds their vision. Without going to detail, I have seen this in the result in a case. It clouds their vision and they are no longer interpreting simply the written or spoken word; they are doing it in a context which, if you rely only on the written or spoken word, is not permissible.

If you plead a true innuendo, that is, a special meaning conveyed to someone who knows the particular facts, that might be a slightly different situation, but I do not myself see why it would not be a good idea to have the jury give its verdict on imputation and defamation at the outset. This question was put by the court recently to counsel and they had not thought about it and their answers were not particularly enlightening one way or the other. In summary, I would say on balance that, while I have always been a supporter of juries, I wonder whether we can afford the system in the community today, quite apart from whether people who are unfortunate enough to get involved in litigation can afford it. I would advocate either that juries be retained for the initial issues of defamation and imputation only, or that they be not retained at all.

Mr GAUDRY: There was quite a deal of evidence given to us that the difficulty of just having judges is that they are far too removed from ordinary, everyday life and,

therefore, if you remove the jury, perhaps you look for a determination that is not in keeping with present day mores. I do not know whether that would apply to the general profession of judges but that was something put to the Committee. Do you see that as a complication?

The Hon Justice CLARKE: I can understand the statement and I would have to say that when you become a judge you have to change your behaviour to a degree. Perhaps you do not enter the public area quite as vigorously as you once might have. But I would like to think that most judges keep amongst their friends a large number of friends who have nothing to do with the law at all. Having said that I find it difficult to know where that would impact on a defamation case—perhaps on meanings. Apart from that, all the questions under defences are, as I have sought to point out, fact-finding questions of the very type that judges consider and decide every day of their lives. The only one that is different from the original questions is damages. I would tend to think that if you are going to keep juries for anything, subject to what I have said earlier, damages is quite a sensible area.

Of course, judges decide damages in just about every other area, perhaps with more guidance than you can get in defamation. I mean, there are more structured rules than there are in defamation, but they do decide damages. I tend to think—and this is more instinct than anything else—that in relation to some of the evidence given to you, that if judges decided these issues you would probably find that there would be a more even set of results, and although it might be true that the average might be higher than with juries, I think you might find more even results. I accept the criticism that juries might be better in damages but I do not think they are on the other questions. For a workable system, if you get rid of them for the other questions, it is totally impractical for them to deal with damages too. That is where I stand.

Mr HAZZARD: It seems you are honing in on two areas, the initial imputation stage and the damages stage. If I could just address the imputation stage, the law itself is complex and lawyers have difficulty with it. I think you said at the outset that perhaps judges, who have different expertise, have difficulty with it. Would you not agree that the average person who might be brought to court as a jury member in a defamation case would be pushing it uphill to try to come to grips with the basics, with what he is looking for in terms of imputation? Would you agree that he is going to have a difficult time?

The Hon Justice CLARKE: I agree with everything you said about it being a difficult area and judges in particular finding it difficult, especially if they have not practised there. Juries must have enormous difficulty when confronted with 17 or 25 questions to answer. They have to keep them in their minds and understand them and answer them correctly. I do not myself see the difficulty with imputations. The jury should be told that an imputation is nothing more than a charge or a statement: I charge you; I make this statement about you. The question is, reading between the lines and using the loose thinking tests that they should be instructed in simply, whether they think a particular set of words conveys this meaning. I do not myself see that as a very complex task. The second task, whether they think, if the meaning is conveyed, that it is defamatory, I think they would be well placed to consider and should not find it too difficult to see whether a particular statement lowered an individual in the eyes of the community. I cannot quite see the danger or difficulty there.

Mr HAZZARD: But you do see that in some instances a judge would probably be as well placed, if not marginally better placed to make the decision?

The Hon Justice CLARKE: Yes, although that is probably one area that Mr Gaudry has referred to. I do not want to be too specific but I remember one instance of a judge ruling on a phrase "industrial espionage", and the ruling was that it was not capable of conveying a defamatory meaning. I was at the bar when I saw that but my view has not changed since I have been a judge. I thought it was wrong. I thought any member of the public would think, if it was said that someone was

involved in industrial espionage that that was something that was damaging or could be damaging to them, which was the question. I think it is probably line ball. I think in some areas judges would be better and in some areas perhaps juries would be better. I find myself really forced, not by this Committee, into a situation where I think our system of justice generally cannot afford juries.

Mr HAZZARD: I understand that. Looking at the other area, the question of damages reminds me of a number of clients I have had in my legal practice over the years who have been unfortunate enough to be called up as jurors. I well remember a couple of them saying that they had to attend on juries in compensation matters and they had the greatest difficulty in understanding how they should be vested with some magic ability to determine what were reasonable damages, bearing in mind that they had never served on juries before. I was told there was great dissension among the jury members as they sat outside trying to work out what damages were appropriate for the poor soul who found himself before the court. Would you not agree that the question of damages, in many instances, would be more adequately dealt with by a judge and with the result that there would certainly be a greater level of consistency?

The Hon Justice CLARKE: Yes, I think that is right. I sympathise with your clients. It is often stated to me how well juries do in compensation cases, in general damages, when they are given absolutely no guidance at all. I have reached the point, though I do not think I have said so publicly, that I think that we should now give juries in ordinary compensation cases a range of general damages. That has never been done traditionally but I think we should, and I can see no reason not to do so. It might be difficult in some cases but I think it should be done. Likewise, in defamation I think we have to stop what someone called the namby-pamby business of saying, "It is a matter for you" and giving no guidance at all. However, I am not entirely attracted to the English type of guidance where they talk about a house or a car or, as one rather colourful judge did, as he told me out here, about a meal at the local Chinese restaurant. I think we perhaps should elevate our guidance beyond that. But I agree with you; frankly, I can see no reason why there should be a problem. Reading some of the evidence given to you I have been intrigued by the answers to this question by journalists and other people. Though many of them prefer juries, they were a bit lukewarm. Most of them said they did not have a strong view. For myself, for all the reasons I have given, I think we have to reappraise it.

Mr HAZZARD: Just pressing on with this jury issue, you said that with a jury it could take up to twice the amount of time for the legal argument to be presented as for the jury to determine the facts of the case. Obviously that addresses the matter of where the time is spent. How much time would be spent in empanelling a jury and having the judge explain to them what their issues are, what factual matters they have to consider, and so on? As a percentage, how much extra time is involved in having a jury as opposed to not having a jury?

The Hon Justice CLARKE: Well, having a jury in a defamation case particularly, I would have thought it would be modest to say double the time. I myself, depending on the judge, think it could be treble or quadruple.

Mr HAZZARD: I suspected that it might be something like that.

The Hon Justice CLARKE: I was a bit concerned when I read some of the material given to you that the lawyers will talk from their perspective and the journalists will talk from theirs. But I did not think there had been enough emphasis given that this is just not working. It is literally not working. Of the two most recent examples, to have three trials—and I am not sure but I think an appeal has been lodged in the case of Morgan—heaven knows what would happen.

Mr HAZZARD: And if you marry that with other court delays, you would wonder how much judge time would be released for use in a more pragmatic way?

The Hon Justice CLARKE: You fasten on a point which I think I mentioned. Defamation is practised by a specialist bar. There are not many judges who have

done much defamation and it is very, very difficult for them. Mr Justice Blackburn's comment is absolutely apt.

Mr PAGE: The Committee has heard evidence from a number of distinguished witnesses on a range of issues. In relation to questions such as whether the judge or the jury would be better positioned to determined the quantum of damages and a number of other issues, the thing that strikes me most about the evidence given is that most of it is anecdotal rather than empirical. I believe this Committee ought to be in a better position, when determining these matters, to have more empirical evidence to try to reach a conclusion as to whether a judge is more likely to determine damages which are appropriate, whether juries give excessive damages, and that type of issue. First, do you agree that we ought to seek more empirical evidence, find out what the facts are in terms of costs and the damages that are awarded in particular cases and analyse that? If you agree with that, could you make any suggestions to the Committee as to how we would go about finding that evidence?

The Hon Justice CLARKE: Yes. It seems to me to be a feature of reform in this area—and I am not talking about recently mooted reform—that views are taken from a lot of people involved in the process. A great deal of what could be described accurately as anecdotal material emerges, together with the opinions of people who may know something about the subject. But, so far as I know, there has not been any really comprehensive, empirical study to determine the time defamation cases take, judge only and judge and jury and to determine the range of damages in successful trials, judge only and judge and jury. It is important, if we are to reform defamation law, to do all we can to get it right. It is much more important to do that than to rush something through either for the sake of doing something or for the sake of uniformity. I would be very much in support of the notion that we should put someone into the field to carry out an empirical study. I can tell you how we do that in the Australian Institute of Judicial Administration, of which I am a councillor. Usually we retain an academic who is interested in the field. At present I am seeking out an academic for another media law-related topic—nothing to do with defamation. We have our own advisory council and we work together with a researcher who has gone into the field and got together all the cases that have occurred in Western Australia, the Australian Capital Territory, Victoria, New South Wales and Queensland over the past 10 years. He examines them to ascertain those facts which we regard as relevant to our inquiry. I think that is a good idea. Even if it goes to the Law Reform Commission, an empirical study should be carried to determine the facts.

Many of the submissions argued strongly against the quantum of damages being decided by the judge. Many expressed concern that there were problems in having different tribunals deciding liability and damages, because there are so many interlocking issues; the present proposals produce more and unwarranted complication in an already complicated area. If juries are to be kept in defamation, the removal from them of this function, which is seen by the public generally as one which juries have always been said to be the appropriate tribunal, will produce the unfortunate perception that the law no longer trusts juries to perform that particular function.

It has also been argued that there is no justification for a cap to be placed on damages. If a judge is to assess them, the cap should not be needed; if a jury is to assess damages, a cap is inappropriate.

Mr Alister Henskens is

> ... not convinced that juries have been making excessive awards of damages. A minimum defamation trial is five days, even on a simple case where there is virtually no evidence, where the defendant just stands up and says, "it was not defamatory", or, "We did not mean to convey that". Without calling any evidence for the defence, a defamation trial will take about five days and that is $100,000 to a defamation plaintiff, $70,000 of which is not recoverable on a taxation. So before you even get into the pluses a plaintiff has to get $70,000 or more. Defamation actions are very complex. They inevitably involve senior counsel. There are a number of procedural steps along the way. That is why they are so expensive. It is not like a motor vehicle accident. There are a lot more legal expenses involved in a defamation action. I think people have been unfair to defamation plaintiffs by equating damages and comparing the two different types of action. Implicit within a defamation award are those extra legal costs.

Mr Peter Bartlett, in his submission to the Committee, commented,

> I would have thought the preferable course is to allow the jury to continue to assess damages, with the judge providing some guidance. Without wanting to run over all the arguments for the retention of the juries, it is still widely accepted that a jury has the capacity to reflect wide sectional community values.

and in his evidence to the committee said

> ... I believe the jury is more aware of social values and change from time to time than a judge who has been in a privileged position for a long time.

He also commented that it was difficult to know what the result of judges determining damages would be.

> I would have thought it would mean that the more excessive judgments would not be there but I would not be surprised if the average verdicts were higher than they presently are before juries. If you look at the list of verdicts in New South Wales you see that not all that many are very high. So if the judges were assessing damages you would lose some of those high figures but I think the average would be higher and that is why I think it is preferable that it be left to juries.

When giving evidence to the Committee, Ms Judith Gibson, representing Young Lawyers, also argued for juries deciding the quantum of damages:

> If you divide the functions between judge and jury you will end up with two trials. You cannot have a situation in which a plaintiff is giving evidence of hurt feelings of a kind that only a judge ought to listen to because you will get terrible objections from counsel for the defendant not wanting the jury to hear this, because they are there only to decide liability. You will end up with two trials. You will end up having to run it like one of those infants' personal injury settlements in which you have the liability decided and the quantum later. That is very undesirable in a defamation case, to end up having two separate trials. I think that there is nothing wrong with the present system. The advantage of the jury is that they often think that a smallish sum is a great deal of money whereas a judge might regard

> it as fairly piffling. I keep drawing these personal injury analogies ... but I do not see any evidence in personal injury cases of judges being mean with money. I do not know that it is necessarily the case that they will give smaller verdicts. They may give wiser verdicts but those verdicts may be larger.

and

> ... I think that juries give smaller verdicts and they reflect community values on what a reputation is worth.

The Bar Association of New South Wales presented a strong argument in favour of the jury determining the quantum of damages:

> Under Clause 11(1) it is provided that the amount of damages to be awarded to a successful Plaintiff is to be assessed by the Judge, whether or not the proceedings are tried before a jury. Therefore, in a trial before a jury, the function of the jury ends upon its determination of the issue of liability.
>
> Thus the situation arises wherein Parliament imposes upon the jury the responsibility of resolving (often) difficult questions as to meaning, imputations, defamatory or not defamatory, and the elements of defences such as truth and comment. It doing so Parliament demonstrates its confidence in the willingness and ability of the jury to comprehend and follow the Judge's directions on these matters. Yet, at the same time, the implication in the Bill is that the same jury cannot be trusted to quantify damages having regard to the Judge's directions concerning the relevant matters to be taken into account.
>
> To give effect to the proposal there will be two trials. One on the issue of liability before one court, the other, on the issue of damages, before a court differently constituted. The consequential inconvenience, cost and uncertainty are obvious.
>
> Furthermore, it is likely that the finalisation of the trial will be delayed well beyond the time at which a jury might have been expected to return its verdict on questions of liability and damages. This is so because it may be expected that the Judge will reserve his judgment following evidence and submissions on damages, to enable the preparation of reasons for the assessment.
>
> As far as the Bar Association is aware the situation contemplated by the Bill is without precedent. There can be no rational basis for creating such a situation. As we are reminded by Kirby, P. in John Fairfax & Sons Limited v. Carson (18th July, 1991) defamation is one cause of action where the New South Wales Parliament has expressly provided for jury trial (Supreme Court Act, 1970, Section 88). At page 21 he observed:
>
> > It may be inferred that this special provision derives from the particular advantage perceived by parliament in having jury actions, determined by a cross-section of the community rather than by judges whose background and experience is necessarily more limited.
>
> Further, in Coyne v. Citizen Finance Limited (1991) 67 ALJR 314 at 326, McHugh, J. observed:
>
> > By reason of its composition, a jury is ordinarily in a better position than a Court to divine the community's view as to what is a reasonable award of damages in a defamation action.

As far as the Bar Association is aware there is no statistical or other basis upon which it can be established that, in the interests of justice, a Judge's assessment is preferable to that of a jury or that Section 88 of the Supreme Court Act requires amendment.

As in all other cases where damages in tort are assessed by a jury, the trial Judge offers guidance and gives directions. There is no basis for the assumption that juries in defamation cases will disregard these or otherwise misconduct themselves. In any event, of course, the Court of Appeal is protection against assessments excessive or inadequate, whether by Judge or jury. Indeed, if there is genuine demand for reform it may be well met by amending Section 107 Supreme Court Act, 1970 to enable the Court of Appeal to substitute its award for that of the Court below in the appropriate case.

Where reputation and honour are damaged it is the community's view of its value, represented by a jury verdict that should compensate the victim.

In the Young Lawyers' submission, Ms Gibson stated:

This reform is based on the assumption that judges are less generous than juries in awarding damages. The only State or Territory in New South Wales (sic) where judges regularly hear defamation cases without juries is the ACT. Verdicts there are higher, on average, than everywhere else in Australia and it is a notorious fact that there has never been a verdict for the defendant in the ACT. Juries can, and do, find for defendants. Juries do occasionally get carried away and award substantial damages, e.g. the Carson and Pillon cases, but both these verdicts were overturned on appeal. Much more common are verdicts of $10,000 - $50,000. Judicial assessments of damages will not only be higher, but more difficult to appeal from, so there will be no saving of costs or reduction of verdicts for defendants.

The procedural problems of having a judge decide quantum and a jury liability are colossal. If the jury is to determine liability, any evidence of hurt to feeling etc, would have to be excluded as likely to prejudice the jury's findings. This means two trials, in effect. As the plaintiff would not have to give evidence about hurt to feelings etc, he could in some (perhaps many) cases tender the matter complained of and sit-down, leaving the defendant the onus of proving defences. The plaintiff then has the procedural advantage of giving evidence in reply, and cannot be taken by surprise. The beneficiary in such a scheme is the "shonky" plaintiff, who can avoid cross-examination until after he has heard the defendant's evidence. This robs the defendant of the "surprise" factor.

The drafters seem to have assumed jury trials would proceed in the same way as before, with the judges deciding quantum after the jury finding. However, the jury would have to be sent out for long periods of evidence when "hurt to feelings" evidence is given, or have very careful directions put to them about disregarding evidence as to damage, when considering liability (assuming the trial is not split in two as set out above). Cases would probably end up being run like infant injury cases, with liability and quantum heard entirely separately. Nor would it be possible for a judge to ask the jury whether a nominal or actual sum of damages should be awarded, as such a direction would contravene s.11(1). This opinion may not be shared by the drafters of the bill, but it is certain to be raised on appeal as a cross-over of judge/jury functions.

Messrs Terence Tobin QC and Michael Sexton's submission also highlighted the problems which the Bill creates in relation to the judge deciding the quantum of damages:

... The majority of defamation cases involve the conduct of public figures or the conduct of media organisations (or both). These are broadly political questions on which views within the Australian community are on occasions likely to differ sharply. A jury of four, without the requirement of giving reasons for their assessment, is likely to provide a better synthesis of community views than a judge.

The fact that a judge would be required to give reasons for his assessment of damages would inevitably narrow the options open to him or her in coming to a decision on quantum. For example, a plaintiff whose conduct overall would merit strong community disapproval but who obtained a technical verdict on one or more imputations might expect to fare poorly with the jury on the question of damages. But it is likely that in those circumstances a judge would feel obliged to award reasonably substantial damages.

In other circumstances a plaintiff who has been seriously defamed by a mass media publisher, such as "60 Minutes", may receive a high award of damages because of the jury's appreciation of the penetration of such a program in the general community. A judge may however be reluctant to award similarly generous damages. What media defendants could find, if damages were taken from the jury is that judges would award regularly more middle-of-the-range damages which overall would prove much more expensive to the media. (By way of parallel, and as a generalisation, the experience of personal injury litigation has been that in the past decade or so judges have appeared to be more favourable to plaintiffs on both liability and quantum than juries.) But this is not the real issue. The important point is the role of the jury as a body that reflects current community views and values in an area of the law where issues of considerable public controversy are often canvassed.

It should be noted that the judges of the Court of Appeal provide a safeguard against an unreasonably high award of damages by a jury in New South Wales. It is always open to a defendant to appeal against an award of damages to a plaintiff on the ground that no reasonable jury could have awarded the sum in question. The Court of Appeal has upheld such appeals on a number of occasions in recent years (see e.g. John Fairfax & Sons Pty Limited -v- Carson, unreported, 18 July 1991). It is however, unsatisfactory that under the Supreme Court Rules the Court of Appeal is unable to substitute an award of damages that it considers appropriate (unless the parties agree to this course). The Court is required, if it considers an award to be unreasonably high, to order a new trial of the action (either on the question of damages or on all issues).

It should be added that none of the foregoing is intended to suggest that there should not be active consideration of the kind of guidelines that a judge may give the jury on the range of damages in a particular case. An appropriate set of guidelines would obviously be a beneficial reform, although the discussion of possible guidelines by the English Court of Appeal in Sutcliffe -v- Pressdram Ltd. [1990] 2 WLR 271 indicates that such guidelines would not be simple.

Max Keogh also argued strongly for the jury to determine the quantum of damages:

The arguments made in the earlier discussion papers in support of eliminating the role of the jury in determining extent of damages were not, for me, convincing. There is a tendency in enlightened legal systems today to give wider participation to juries, even to the extent, in criminal cases, of having them contribute to determination of appropriate sentence. Not only does the present bill deprive the jury of its important function in determining the extend of money damages, it places with arguably the most remote participant in the action - the judge - responsibility to decide whether or not a matter is one of public interest. I believe that the jury, each of whom is a

member of the public, is best of all placed to decide the question of public interest after having heard argument on the point from both sides. No less so is the jury best able to conclude from the evidence the seriousness of damage to reputation of one of their peers and then place upon their conclusion an appropriate monetary value.

By proposing to place both these very important decisions with the judge, the dangers I see are first, the possibility of less realism in the judicial decisions arising from a less close involvement by the judiciary with (a) the real and constantly shifting boundaries of "the public interest" and (b) the value of money that one would expect from people who are, on a daily basis, participants in "the public". Secondly - and no less importantly - there is a real danger, in my view, of the public itself perceiving removal of its two roles to the judges as an attempt to regulate and restrain (mostly to the advantage of defendants) the range of freely determined assessments which, we can only assume, having been made by representative members of the public, reflect public values. It is a moot question whether members of the judiciary always are seen to reflect the values of the public and, indeed, cannot where those values have ceased to be expressed by legislation current on a subject. There will be those, too, who will see these proposals in the bill as reflecting a covert desire by the government to reduce frequency of defamation actions and reduce the level of some damages awarded in recent cases. I see this reduced role of the jury, overall, as harmful to public perception of justice in NSW.

The Law Council of Australia put its case against the changes proposed in clause 11 thus:

The most radical proposal however is that emanating from New South Wales, namely for the abolition of the jury's right to assess damages.

It should be stated at the outset that the factors involved in assessing damages in defamation actions are (in routine cases) limited to damages for injury to reputation and damages for injury to feelings. No special complexity is introduced where special damages are proved in slander or a limited number of libel actions. The process of computing damages in defamation actions does not entail the intricacies of assessment in personal injury cases which may make the task of the jury simply too difficult

The real complaint against juries in assessing damages is that they have put too high a value upon injury to reputation and feelings arising out of the publication of defamatory matter. The value judgments involved in making that assessment are, it is suggested, very much within the province of "community attitudes" as embodied in the jury system. The consequences of high verdicts in defamation are not to be confused with those which may arise where verdicts in personal injury cases carry with them immediate consequences for a large number of people in the community: the increase in premiums for compulsory third party insurance under the relevant motor vehicle legislation being an obvious case in point.

In the case of defamation however, the interests which are at risk from the expression of community values on the issue of quantum are limited: newspaper and other media proprietors being to the fore.

The proposal to abolish the jury's role in assessing damage is, therefore, a vote of no confidence in the jury system as a vehicle for expressing community values. This would appear to be a misconceived view of the performance of juries in defamation trials over the years. It would be most unfortunate if the jury institution were to be abandoned on the question of quantum in response to a very small number of high verdicts against defendants.

There were dissenting views.

The Law Society of New South Wales commented in its submission:

> The Law Society supports the proposal that judges should have the responsibility for determining the quantity of damages. Although judges are as diverse as juries, experience in personal injuries litigation has shown that judge awarded damages creates a certainty in the award of damages which is not now the case with defamation.
>
> We respectfully support the maintenance of a role for juries in the area of liability. As representatives of the community, juries are better placed than judges to assess whether words contain a defamatory meaning.
>
> The proposal that juries having determined liability should declare whether damages should be either nominal or actual is also supported. This function enables the jury to reflect community values particularly in regard to free speech.

The Australian Press Council favoured the judge determining the quantum of damages:

> The Council prefers the proposals of New South Wales and Queensland Attorneys-General, that is that the question of liability be put to the jury and that the quantum of damages be determined by the judge.

In its response to the Discussion Paper, the Australian Press Council elaborated on its position:

> The Council had previously indicated a preference for damages to be determined by the judge; this was not intended as a strong preference. The Council believes that whichever method is preferred, it is desirable to have uniformity throughout Australia. Nevertheless, the Council sees advantage in judges being able to, and, in fact, giving guidance to juries in relation to the range of damages which may be awarded. However, this could be seen by juries as an indication that the judge had recommended that the jury find in favour of the plaintiff, and some precautions would be necessary to obviate this.
>
> One of the difficulties for juries in the present procedure is in the large number of imputations pleaded and the consequent number of complicated questions which a jury is requested to determine, particularly in matters relating to qualified privilege. The Council believes these problems could be corrected by the new defence of qualified privilege proposed above and our proposal concerning certain amendments referred to below.

Mr Kenneth Gee QC is of the belief that

> ... on the whole, it is better to leave the quantum of damages to the judge. It is not at all an unusual division of functions between judge and jury. For example, in the criminal field the jury decides the question of guilt and the judge decides the question of penalty. So it is not a novel proposition. I do not agree with the media proposition that juries are totally lost when it comes to the question of quantum of damages in defamation actions. I think that juries are more sophisticated than the media would have us believe. The mistake that they probably have made is in moving around the bar against exemplary damages by giving, presumably under the guise of aggravated damages, very large sums of money which I think are

clearly punitive. That is something that one would hope that directions from the judge and so on will remove in future. So I do not accept the media proposition that juries are not competent at all because they know nothing at all about how to assess damages.

I think the advantage of a judge is that he does understand where damages in defamation would fit into the general pattern of damages in the community. Damages are given in all sorts of fields—breach of contract, running down cases, industrial accident cases and so on. A judge has been at the bar, has had experience at the bar sufficient to be appointed to the judiciary, and has worked out in his mind a fairly good pattern of the sort of damages that are appropriate for each sort of breach of the civil law, so that he can compare fairly readily damages even for hurt feelings with the sort of damages that ought to follow physical injury. Juries would have great difficulty about that. A judge does or should understand, and I think normally would understand, the general pattern of damages in the community. A jury cannot be expected to understand that; they have not had the experience of damages in other types of litigation.

... Again, judges are used to mitigating factors and the whole idea of damages.

... Though I feel a personal reluctance to see juries move out of any particular field, nevertheless I think in the field of defamation, in view of the difficulty in assessing non-economic damages in defamation, that is non-economic damages or loss—and economic damages may be easy enough—judges are generally far more competent and that could be safely left to judges.

Mr Brian Gallagher submitted that News Limited also favours judges determining the quantum of damages:

> We are in agreement with the proposal for the reason that judges will be guided by precedent. It is likely that bizarre verdicts will cease and a more rational system of assessment will result.

Mr Evan Whitton, in his submission to the Committee, expressed the belief that the question of damages should be removed from both judge and jury by applying the "Brill formula". Mr Whitton explained the formula in an article written by him, which he attached for the Committee's information.

> A journalist lawyer, Steven Brill, editor of The American Lawyer put forward useful suggestions in the September 1984 issue of his organ.
>
> Brill cautions at once that the test which currently protects US media so long as mistakes about public figures were made without "actual malice", has two pernicious effects: it condones sloppy reporting and it enables agile lawyers to spend months and years rummaging around in the brains of the journalists involved. This sharply increases the emolument to the starving poor of the legal profession, and the journalist's grief and aggravation.
>
> Brill says the First Amendment appears to prohibit punishing speech, and that where a person's reputation is wrongly damaged, the emphasis should be on rapid restoration of reputation, rather than on punishment. In Australia, 90 per cent of actions arise from inadvertent mistakes, a condition not unknown among judges or in fact anybody else.

Brill says the offending publication should be able, if it chooses, to prevent a possible suit by printing a prompt and prominent correction. It is difficult to distinguish between fact and opinion; Brill suggests anything the plaintiff cannot prove false beyond a reasonable doubt should be protected as opinion.

Perhaps the most creative suggestion is that damages be restricted to actual pecuniary loss, plus a maximum of three times the cost of a full page advertisement (or two minute advertisement on radio or television) in the offending organ for compensatory (not punitive) damages for his pain and suffering from choking on the All Bran.

Brill's idea here is that the plaintiff might care to use a third of his damages to take an advertisement to announce to the world that the organ got it wrong. If it refused the advertisement, as is its right under the First Amendment, the plaintiff could be awarded a sum equal to three times the cost of reaching the organ's audience through another selected medium.

The Honourable Gordon Samuels, AC QC recommended the total abolition of jury trial in defamation actions, with the proviso that, if they are to be retained for any reasons, they should be the ones to determine the quantum of damages:

Of course, defamation cases have been decided in the Australian Capital Territory and in South Australia for many years without the assistance of juries and, so far as I know, without any public harm. Furthermore, the principle that questions of fact relating to reputation must be determined by juries has been greatly eroded by, for example, provisions such as those in the current Bill which reserve for decision by the judge, the issues of public interest (cl 9, qualified privilege (cl 28) and falsity for the purposes of cl 25(5)). A further inroad into the perceived primacy of jury trial would be made if the assessment of damages were reserved to the judge as cl 11 of the Bill proposes.

These restrictions upon the jury's function are generally regarded as rendered necessary by the need to preserve a balance in the trial process which a jury's assumed partiality for the plaintiff would otherwise disturb.

However, there remains the assumption that the fundamental question of defamation or no defamation must be decided by a jury, and cannot be left to a judge, because a judge is likely to possess only an imperfect understanding of the factors which lead to the conclusion that the defamatory nature of the imputation alleged has been established. If this is so, there is scant logic in reserving to the judge the task of assessing the degree of damage which a defamatory imputation (whose quality the judge, it is assumed, may be unable to perceive) has produced. There is a great deal more to be said upon this topic, but at this stage I wish only to signal the point.

... if juries are to be retained they should also be permitted to assess the damages. Here again, there are many reasons which might be marshalled in support of that proposition. I offer only two - although they might really be conflated into the one contention that the overlapping between the facts concerned in the two issues of liability and damages required determination by the same tribunal.

The question of the plaintiff's credit may arise under both issues. It is certainly likely to be relevant to questions of damage, particularly if a claim for special damage is made. Who is to find the facts upon which the assessment of damages will be based? Ordinarily, in actions for defamation, a judge decides

the ultimate fact of, for example, privilege, upon primary facts found by the jury. It is necessary therefore for the judge to put a series of questions to the jury in order to elicit the findings which are necessary. Although the Bill is not explicit upon the point, I would assume that the same practice would be intended as a means of establishing relevant facts for the assessment of damages. If a different approach is proposed - for example, for the judge to make findings of fact without any regard to the jury's function, the Act ought to say so in the clearest possible terms. If, however, what I might call the ordinary practice is contemplated, then the judge's summing-up will be greatly lengthened and increased in complexity.

The reason for assigning the assessment of damages to the judge is, presumably, because it is thought that judges are less generous than juries; or, at least, that judges will be aware of other comparable awards and may therefore be relied upon to maintain not only reasonable proportion but reasonable parity. The second point certainly has some substance; but it must be remembered that of all awards of damages, those made to plaintiffs in defamation cases most readily defy constructive comparison.

As to the first point, it is generally considered that in awarding damages for personal injury judges tend to produce larger verdicts, because they do not compromise and are, in any case, more familiar with dealing with numbers which might seem extremely high to the average jury. Although the evidence is largely anecdotal, the reason why in actions for personal injury, where juries are still available, jury trial is generally sought by defendants (ie insurance companies) rather than plaintiffs is an indication of this view; although there is, of course, one other potent reason which is not relevant for present purposes.

Ms Judith Gibson of Young Lawyers, raised two matters which are relevant to the issue at hand. First, Ms Gibson looked at the possibility of a "cap" on damages:

> The "cap" on damages is a reform which Professor Chesterman of the University of NSW has told us he supports. The problems caused by having a "cap" on damages are:
>
> (a) As the $60,000 crime victims compensation ceiling illustrates, damages awards would be near the top of what is available, and smaller awards would be rare.
>
> (b) It is hard to see how any "cap" could be put on special damages for loss of business, health problems, loss of future earnings and the like. The general practice in NSW is to claim general damages; claims for special damages are rare although evidence of ill health or loss of business is often given from the witness box. Practitioners would just get around a "cap" on damages by claiming special damages, calling medical evidence on stress and the like.
>
> (c) The amount of the "cap" would need to be regularly reviewed, although this is a minor administrative problem."

Secondly, Ms Gibson argued that:

> ... juries should receive directions on quantum from the judge.

The Committee sought Ms Wendy Bacon's ideas on the "capping" of damages when she gave evidence before the Committee:

> **CHAIRMAN**: I think you have mentioned the capping of damages: you believe there should be a capping. If you have juries deciding damages, what you are really doing is putting a cap on ordinary citizens.
> **Ms BACON:** Yes. Why I think that in some cases is appropriate is that in one case I can think of all sorts of professional people came in and said what a terrible—
> **CHAIRMAN**: Once you put a cap in you are putting it on all cases.
> **Ms BACON:** Yes, that is all right. Why is that inappropriate?
> **CHAIRMAN**: You are a putting a limitation on the right of ordinary citizens to determine what they think is a suitable damage amount, which may be above the cap. Secondly, once the word gets around on what the cap is they may think that it is a minimum or that it is the general amount of damages that should be awarded.
> **Ms BACON:** Whatever those dangers, the harm that is done by those huge defamation awards is much more than any of those problems. I also think that juries see people who come in and say that so and so's practice was wrecked by this and really there is no way of assessing it. I also want to say that while I want juries involved with defamation trials, I have no strong views about whether it should be a judge or a jury that assesses the damages. What I am concerned about with the damages is that there should be a cap. So I am not saying I think juries should necessarily assess damages. In fact, I think there are some arguments why they should not, because if it is a person who is outside their sphere of operations they may be overimpressed by the damage to that person's reputation.
> **Mr HAZZARD**: What was the justification for capping? If a journalist defames somebody who is a professional person and his professional practice is substantially diminished, whilst I acknowledge that you said there may be some difficulty in proving the quantum of damages, why should they be capped? Why should they not lose a couple of million dollars over it? Why should the journalists have the benefit of a cap?
> **Ms BACON:** I do not think it is so much a matter of whether the journalist should have the benefit of a cap but whether the public should. It is a matter of weighing up the public good in this situation. If in the process certain publications can be wiped out and the press can be intimidated, as undoubtedly it has been the case, one might consider putting a cap on it. As you said, it is difficult to prove the quantum of the damages. I have yet to see the person whose practice was wrecked by an article in the press. I have been defamed in the press as a person. I do not think I actually suffered any economic loss. There is one well known case I know of in which a restauranteur actually flourished despite the harm done to his reputation. I suppose one can argue that he would have flourished even more. I do not think the evidence in these cases actually reflects what is going on in the lives of the people who have sued.
> **CHAIRMAN:** In Andrew's case there was evidence of a fall-off, in his architectural practice which was able to be quantified.
> **Ms BACON**: I agree with that but I am saying that nevertheless there should be a cap on damages. Before you think just of that and the harm that could be done—I am not saying I do not think there should be any damages—you should think of the vulnerability and fragility of a free press in this country and think of what might be happening in this process. In Andrew's case and Carson's case—was the damage done to Carson such as that huge settlement which sent a chill throughout the media in Australia? Is that really what we want out of the defamation law?

The Committee is of the view that there is much to be said for judges being permitted - indeed encouraged - to tell juries considerably more about damages than they may presently. The Committee questions the reasoning behind the ruling that judges have

not been permitted to tell juries about the range of damages in personal injury cases. Whilst recognising that it would be quite difficult to direct juries as to the range in a defamation case, the Committee believes that the process of directing jurors on damages could be made much more meaningful than it is at present.

Committee's recommendations:

(1) That clause 11 is not supported. Juries should retain responsibility of determining the quantum of damages.

(2) That the section should direct the judge to give guidance to the jury as to matters to be taken into consideration when determining the quantum of damages. This is the direction in which English law is moving. (e.g. in Sutcliffe v. Pressdram Ltd [1991] 1 QB 153 the English Court of Appeal gave very useful guidance to trial judges as to how the jury may be encouraged to keep their feet on the ground in defamation trials. The suggestion is that the jury should be told to have regard to what might be purchassed by the damages awarded; for example, a holiday, a new car or a family home.) No doubt the directions would need to be drafted with some care, but once they are settled they could become as standard as the judge's directions to the jury on other issues such as heads of damage. In certain circumstances, it may be appropriate for a judge to indicate a range of figures for purposes of guidance.

(3) That the Law Reform Commission examine the proposal that the jury should decide on the imputation as a preliminary step before any other evidence is heard.

(4) That the Law Reform Commission examine the possibility of "capping" damages similarly to the cap on non-economic loss arising from physical injury in motor accidents.

Chapter 3

Part 2 - General Principles - Clause 14

Want of Prosecution

Under clause 14 of the Defamation Bill, 1992, if a plaintiff takes no action to prosecute a claim for 12 months, the defendant can seek leave of the court to strike out the action.

When giving evidence before the Committee, Mr Peter Bartlett, of Minter Ellison, gave the following explanation:

> In earlier submissions we argued that because defamation action was for damage to reputation, it would be in the interests of the plaintiff to prosecute that claim as quickly as possible, and if the plaintiff took no action for a continuous period of 12 months, then that showed little interest in the damage that that person had suffered. So we believed that it would be preferable for the action to be automatically struck out if the plaintiff takes no action for 12 months.

The Committee went on to question Mr Bartlett about the "want of prosecution" provisions in the Bill, focussing particularly on reasons why, or why not, sanction should be extended to a defendant in a defamation action:

> **CHAIRMAN:** Do you think that sanction should be limited against the plaintiff, or should sanctions be extended to the defendant?
> **Mr BARTLETT**: It would be difficult to extend it to the defendant, because the defendant in reality has a claim for damages against it and so the defendant would not wish to bring the case on for hearing. If the plaintiff loses interest, in most cases the defendant would be quite happy for that file to remain in the filing cabinet and never see the light of day.
> **CHAIRMAN:** Sometimes there are cross-actions or orders sought by defendants?
> **Mr BARTLETT:** Yes, reasonably rarely and only where individuals are concerned. Obviously the media organisation is not going to have a cross-claim, so those sorts of claims are fairly rare. But in those sorts of claims, in relation to the cross-claim the defendant would be the plaintiff and so the provision may well be extended to cover that situation.

The Committee asked similar questions of Mr Michael Sexton, barrister-at-law:

> **Mr SEXTON**: I think 12 months without any movement, it would be my feeling, that it is about the right period. I suppose it will not prevent a plaintiff who, as it were, wants to keep the ball rolling but not very fast from doing just enough to avoid being struck out because, as a general proposition, the courts are very reluctant to

strike out a case for want of prosecution. Whatever the terms of the clause, it still ultimately leaves the meaning of "want of prosecution" up to the court in question. But, the notion of 12 months would focus the parties' minds on the case. There are many cases at the moment that sleep, as it were, in the Defamation Registry in New South Wales.

CHAIRMAN: Having regard to the reference to interlocutory proceedings, is there any reason why the sanction should be limited to the plaintiff?

Mr SEXTON: Not so far as we can see. The sanctions would of course—

CHAIRMAN: You do not need primary application to a plaintiff; he is the moving party.

Mr SEXTON: Yes, that is so. But, in terms of compliance with court orders, there is a sense at the moment in the way in which sanctions apply that if, for example, to take a media organisation, it is the defendant and it, as it were, refuses or delays interminably in filing its defence, or in doing some other step which will progress the action towards trial, then a peremptory order can be made so that its defence will be struck out or its claim will be struck out if it does not comply within seven or 14 days. There is that mechanism at present and, to that extent, a section providing for sanctions against a defendant, I suppose, for not complying within 12 months is probably artificial, in the sense that if the plaintiff wishes to have compliance, he can obtain it well within that time.

Ms Judith Gibson was also asked her opinion on the the matter of sanction being extended to the defendant:

CHAIRMAN: The sanctions relating to clause 14 refer only to the plaintiff.

Ms GIBSON: That is the other problem. I see that as the principal problem. Of course, delays are something that defendants are very fond of. It is because of defendants' delays that Mr Justice Hunt promulgated the announcement in the defamation list which was handed down in October 1988. He set down special costs penalties for defendants who show up on the day of the hearing waving amended defences; who let matters go and then suddenly add on an extra claim and have someone else publish it; or who show up at a hearing claiming that some third party was responsible. Defendants delay just as much—in fact, more.

The Australian Press Council supports the want of prosecution provisions, as does the Australian Broadcasting Commission. However, most submissions argued that the provisions will not have the required result.

For example, Young Lawyers commented on the want of prosecution provision in the following way:

(a) The first problem with this section is its vagueness. "Want of prosecution" means complete failure to act (i.e. not even to write a letter), which will be difficult to establish in all but the most extreme cases. All this section will do in its present form is encourage plaintiffs to keep up with actions they might otherwise drop.

(b) s.14(b) effectively makes every timetable or direction a peremptory order, which is outrageous, and only against the plaintiff, which is iniquitous. Delays in defamation actions in practice are often caused by defendants who delay on purpose: see Hunt J's Announcement (28.10.89) which specifically deals with defendants' delays. As this section presently stands, a party filing a document a day out of time is in breach and the cause of action can be struck out. In fact, merely appearing unwilling (e.g. opposing an order to do something) appear to have this same fatal result.

This is completely contrary to received law on delays in litigation.

(c) The main problem with this section is that it should not be contained in the Bill but in the Supreme (or District) Court Rules, set out in the appropriate parts (i.e. Part 67 and Part 13 5CR). One of the greatest flaws in the Bill is that whoever has drafted it has made no attempt to review and recast the necessary provisions in Part 67 5CR. We assume that this very onerous task will be left up to the respective Rules Committees for each of the State and Territory Courts - a certain recipe for inconsistency and confusion of major proportions.

The question asked in the Issues Paper is: "Will the Courts, in fact, strike out actions even in the light of this reform? Will the provision be used?"

The fact that this question has been asked at all indicates that the drafters are unfamiliar with the large number of cases in the areas of commercial and defamation law where applications are made to strike out pleadings or for summary judgment. The well-known rules and principles have been set out in a number of defamation cases seeking such orders: e.g. Hanrahan v. Ainsworth (1985) 1 NSW LR 370; Jones v. Amalgamated Television Services (1991) 23 NSW LR 364. The practice is referred to by Spencer Bower in "Actionable Defamation" (1923), where he refers to the procedure being used to strike out defective pleadings or misconceived clauses for several hundred years. The relevant procedure, set out in Part 13 5CR, needs amendment to streamline the procedure to overcome problems raised in recent Court of Appeal judgments, as Young Lawyers pointed out in their submission to the Attorneys General.

There is probably more vexatious litigation in the field of defamation than in many other areas of the law. Some examples encountered by our members where strike-out applications are appropriate include:

(a) attempts to strike out persons clearly not a party to the defamation (e.g. the Pope, the Queen, the distributor or newspaper printer (as opposed to the publisher). These are usually brought on the basis that they are misconceived and an abuse of process. Where they are clearly misconceived, there is no difficulty, but the problems faced by distributors claiming abuse of process are rarely dealt with on such a basis: see Goldsmith v. Sperrings [1977] 1 WLR 478;

(b) misconceived defences e.g. reliance on the wrong Act, unavailable or wrongly pleaded defences. These are usually struck out as pleading errors, and such use of summary procedure is rarely controversial;

(c) misconceived or hopeless causes of actions e.g. for statements made in Parliament, or statute-barred actions. Striking out on such a basis may be controversial; see the remarks of Kirby JA in Rajski v. Carson [1988] 15 NSWLR 84;

(d) novel causes of action (for examples, see the cases referred to above); this use should be encouraged or extended;

(e) inadequate pleading - by far the most common application, and usually relating to peer drafting of the Statement of Claim. For an example of a Statement of Claim struck out as wholly bad see Harris v. Perkins (Hunt J, 13.12.91, urep.)

What is the present procedure for summary judgment and disposal of frivolous actions?

> In Bullen & Leake (1975) 12th ed at p 143 n. 55, the authors give as an example a statement of claim which disclose on its face a defence of absolute privilege is one suitable for an appreciation for summary judgment and cites Lilley v. Roney (1892) 61 LJ QB 727; Hodson v. Pare [1899] 1 QB 455, Law v. Llewellyn [1906] 1 KB 487, Bottomley v. Brougham [1908] 1 KB 584, Burr v. Smith & Ors [1909] 2 KB 306, Beresford v. White (1914) 30 TLR 591.
>
> See also Vacher & Sons v. London Society of Compositors [1913] AC 107 (claim against trade union for defamation barred by s.41 Trades Disputes Act 1906), Addis v. Crocker [1961] 1 QB 11 (findings of Disciplinary Committee for solicitors absolutely privileged - confirmed on appeal in Addis v. Crocker [1961] 1 QB 11).
>
> ...The existence of this provision, and the fact that it is regularly used, is not in doubt. The question is whether its use should be extended. One case which caused us particular concern was Rajski v. Carson (1988) 15 NSW LR 84, which overturned Hunt J's earlier decision (reported at (1986) 4 NSW LR 735). The decision of the Court of Appeal turned on the "purpose" for which the Defendant's letter was written to the Legal Aid Commission. The great concern expressed by the Court of Appeal concerning the need to limit the extensions of the defence of absolute privilege (p. 91-92) suggests that the Court of Appeal may reject similar applications for summary judgment based on other provisions of the Defamation Act relating to absolute privilege. This is regrettable, as a defence of absolute privilege is often ideally suited to a separate finding of this kind, as the question of whether the occasion was a privileged one if often a question in law (e.g. whether a particular tribunal is a "court", whether a document laid on the table in Parliament constitutes part of the parliament's protected proceedings, etc. If a procedure can be set up to enable certain limited issues of law to be dealt with without the expense and delay of a jury trial, it should be included either in the Defamation Bill or the Supreme Court Act, 1970.
>
> The use of separate trials generally is an invaluable interlocutory tool, as it saves time at the trial by defining the issues and ensuring they are dealt with thoroughly: Keays v. Murdoch Newspapers (1991) 1 WLR. It is regrettable that this step in NSW, which has been applauded and now imitated in the United Kingdom, has not been made greater use of the in (sic) Defamation Bill.

The Law Society of New South Wales supports the Young Lawyers' submission.

The Bar Association of New South Wales is of the view that the existing Supreme Court Rules afford adequate power to the Judge to dismiss, strike out, or otherwise deal with matter the conduct of which demonstrates tardiness or other failure on the part of either party.

The Law Council of Australia feels that the application should be struck out automatically without the necessity for an appearance before the court.

The Law Institute of Victoria highlighted a potential problem and offered a solution:

> Unfortunately section 14 of the New South Wales Bill will be, in practice, unworkable.
>
> The section as drafted will not prevent "stop writs". Where the plaintiff has taken no action for a period of 12 months and the defendant gives notice that it will seek to

strike out the action, the plaintiff will simply take one more step in the litigation. Even if no such action is taken, the court has a discretion not to strike the action out. The Law Reports illustrate just how difficult it is to strike out an action for want of prosecution.

The preferable course would be to have a section as follows:

> "if a person brings proceedings for Defamation and takes no further action to prosecute the claim for 12 months, the action is struck out."

The plaintiff could then apply, in very restricted circumstances, to have the claim reinstated.

The Law Institute of Victoria again commented on the "want of prosection" provision when responding to the Discussion Papers issued by the Attorneys-General.

> The Discussion Paper does not deal with the problem caused to defendants by plaintiffs in defamation actions who simply allow their actions to lay dormant.
>
> A large number of defamation actions are "stop writs" commenced to prevent discussion of a person's affairs, rather than to compensate them for damage to their reputation. For as long as the action remains "alive", no matter how dormant it may be, the defendant risks committing a sub-judice contempt if it publishes further material relating to the person.
>
> The difficulty of having dormant actions struck out encourages the use of "stop writs". The law should recognise the difference between a genuinely aggrieved plaintiff, pursuing his or her action, and the plaintiff who merely wishes to prevent the public discussion of their affairs.
>
> The Institute recommends that a defendant in a defamation action should be allowed to apply to have the action automatically struck out for want of prosecution if no steps have been taken by the plaintiff for a period of twelve months.

Ms Judith Walker, representing the Australian Broadcasting Commission raised the matter of want of prosection provisions in relation to criminal defamation actions:

> ... we do not agree that an action for criminal defamation should be retained even if a certificate is required to be obtained from the Director of Public Prosecutions before a prosecution can be commenced. It is our view that reputation is more than adequately protected by the civil tort of defamation.

In the submission and in evidence, Ms Judith Gibson, representing Young Lawyers, discussed the abuse of "stop writs" in connection with the public figure test:

> **CHAIRMAN:** I wish first to deal with prosecutions. In your submission you link the abuse of stop writs with the public figure test.
> **Ms GIBSON:** Not quite. The public figure test has a general relevance which would help shift the onus in a number of the defences. This would make it easier for media defendants to cope with actions—not so much of the stop writ variety—which are designed to discourage or silence media reports.

CHAIRMAN: The remedy for that could well be clause 14 of the bill which refers to the 12-month limitation period.
Ms GIBSON: No. If you look at cases such as Calvert v. Stollznow, a case reported at the back of the report of the Supreme Court practice, you see that you have to do absolutely nothing. Basically, if you write a letter or restore it to the list once a year that is enough to get by. It will be a very difficult test.
CHAIRMAN: Even clause 73 does not assist?
Ms GIBSON: It would be very difficult because the courts have shown extreme reluctance. The case which inspired us to raise this problem was a decision of the Court of Appeal where someone who had been inactive for five years. The Court of Appeal overturned the decision of Mr Justice Hunt in which he dismissed a case for want of prosecution. The Court of Appeal indicated that it would always be sympathetic to someone who said that he really wanted to get on with his case; someone who was having trouble with the law; and someone who was having trouble in obtaining proper representation or the like. That is the trouble. The courts will always be kind-hearted. Although a 12-month period may look good on paper, in practice the courts will see whether they can find a way around it. So just writing a letter would probably be enough and that clause would become fairly meaningless.

Several submissions/witnesses have pointed out that the consequences provided by clause 14, where a plaintiff fails to take a step within twelve months, are easily avoided by taking at least one step every eleven and a half months. Perhaps clause 14(a) does not provide adequate protection, but such a complaint ignores the strength of clause 14(b). A plaintiff who sues only as a "stop" writ will not want to incur the expense of preparation for trial when forced on by the defendant, and it is at a much earlier stage than twelve months that the Court will be able to take action pursuant to clause 14(b). However, clause 14 should deal also with the disregard of and unwillingness to comply promptly with interlocutory orders shown by defendants.

It could be argued that defendants are unwilling to give up the benefit to them where a plaintiff allows his claim to die through inaction. Many might prefer some cast-iron provision which they can invoke when they have already obtained that benefit. The relief provided by clause 14(b) will, however, depend to some extent upon the defendant pressing the plaintiff to continue. This provision should seek to strengthen the hand of first instance judges to act where such disregard or unwillingness is shown by either party - at present, the law proclaimed by the Court of Appeal obliges the available powers to stay proceedings or to strike them out for want of prosecution to be exercised with too greater degree of merciful weakness.

The Young Lawyers (Ms Gibson) have linked the abuse of "stop" writs with the public figure test. There is indeed a link, in that most such writs are issued by "public" figures. The Committee believes that the want of prosecution provisions of clause 14 of the Bill will be valuable in this situation. The shortened limitation period provided in clause 73 is essential to the success of such a procedural device. If the limitation period is any longer, the disposal of the action for want of prosecution will have little practical effect, as the plaintiff can always start again.

Committee's Recommendations:

The Committee supports giving to the courts the express powers referred to in clause 14. Research suggests that the Court of Appeal has interpreted the existing powers of the courts in such a way as virtually to emasculate them. It is nevertheless important that "stop writs" filed by plaintiffs be struck out, so that such a special provision in defamation litigation is warranted.

The Committee questions why clause 14 is limited to sanctions against the plaintiff. At the present time, the plaintiff has to seek a peremptory order against the defendant in such circumstances. If that order is not complied with by the defendant, its defence is then struck out. So far, the extent of that power has not been tested in the Court of Appeal. It is important that, if defamation litigation is to proceed, it be disposed of quickly. Such a power against defendants is necessary in order to give effect to that principle. The Committee is of the view that it would be wiser to deal with special sanctions in such litigation against both parties.

Chapter 4

Part 3 - Defences

Division 2 - Truth - Clauses 19, 20

Justification - Truth and Privacy

In their joint submission to the Committee on the Defamation Bill, 1992, Messrs Terence Tobin QC and Michael Sexton, barristers-at-law, discussed the question of justification in relation to defamation law in New South Wales:

> The common law principle that truth of itself is a complete defence to an action for defamation presently applies in Victoria, Western Australia, South Australia and the Northern Territory. In the other jurisdictions (including New South Wales) this defence has been modified by statute.
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> The Defamation Act, 1974 did not adopt the common law position with regard to justification. The defence of justification in New South Wales is found in Section 15(2) which provides that it is a defence to any imputation complained of that the imputation is a matter of substantial truth and either relates to a matter of public interest or is published under qualified privilege. (It should be noted that the public interest requirement has been on the statute books in New South Wales - in one form or another - since last century). In normal circumstances, the defendant will be seeking to show that the imputation relates to a matter of public interest (rather than the more difficult alternative concerning qualified privilege). This concept of public interest is not novel to the law of defamation: it has been the subject of consideration in relation to other defences such as the common law defence of fair comment which protects statements of opinion on a matter of public interest.
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> The concept of public interest in defamation law is quite broad. There is, for example, no doubt that the private activities of a person holding public office or participating in public affairs will be a matter of public interest to the extent that these private activities relate to his or her fitness to hold the office in question or to take part in affairs that affect the general community. It is also possible for a person to introduce what would otherwise be a private matter into the public domain and so make it a matter of public interest. By inviting public attention to what would normally be a private affair, he can be said to have invited public discussion of this matter.
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> Nevertheless, the statute does not protect defamatory imputations simply because they are true if, for example, they concern purely private matters with no element involving the public interest. The common law, on the other hand, has always protected the defendant who publishes such statements if true, no matter how private the conduct.

Similar restrictions on the common law apply in Queensland, Tasmania and the Australian Capital Territory. In those jurisdictions, the relevant statutes protect the publisher of defamatory matter if the matter is true and if it is for the public benefit that the publication complained of should be made.

Messrs Tobin and Sexton then went on to discuss the justification provisions in the Bill and the general notion of "truth and privacy":

Clause 20 of the Bill provides that a defence of justification based on substantial truth is not available if the publication "concerns the plaintiff's private affairs" unless the publisher establishes that the publication was "warranted in the public interest" or was published in circumstances that would attract the defence of common law qualified privilege and was reasonable in the circumstances. Given that the defence of common law qualified privilege has been held overwhelmingly by the authorities to be unavailable to a mass media publication, it is almost certain that a publication concerning a person's "private affairs" (whatever might be meant by this term) will not be able to be defended on the basis of truth unless it was "warranted in the public interest".

Clause 22 sets out a number of examples of situations where publication concerning a person's private affairs is "warranted in the public interest". It is far from clear, however, from these examples whether this phrase is designed to be a more stringent test than the requirement under the Act that publication "relates to a matter of public interest". On the face of it the test is a more stringent one.

It is arguable that no legislative change was necessary to introduce an element of privacy protection into the defence of justification under the Act. In Chappel v.TCN Channel Nine Pty. Limited (1988) 14 NSWLR 153, the Court restrained the publication of the alleged sexual adventures of a well-known sportsman, despite the defendant's assurance that it intended to plead justification in any subsequent defamation action. The Court did so on the basis that the publication in question could not be said to relate to a matter of public interest. It is clear that a private person does not become a public figure simply by being exposed to unwanted media attention. It has often been said that a matter does not relate to the public interest simply because the public is "interested" in it. To publish a matter of public interest is not to be confused with catering to public curiosity or salaciousness.

If the element of privacy protection set out in the Bill goes beyond that apparently contained in the Act, it is likely to place new restrictions on reporting by the media. In the normal course of events, the media have no interest in the private affairs of private persons, properly so described. It is likely, therefore, that any privacy reservation to the defence of truth would be chiefly (but not exclusively) employed by public figures to restrain publications about what they consider to be their private lives. In cases where a public figure has pursued a career of assiduous self-exposure and self-promotion, it may seem curious that this person should be able to prevent publication of one aspect of his or her character or conduct. For example, the fame and success of an entertainer or actor may be built on exploiting the public taste for scandals and exposés. There is a further question of how genuinely separate are the private and public lives of persons who influence the exercise of public or private power. How private can the life of a Wallis Simpson really be?

It might be argued that the test should depend on whether or not the individual in question has previously invited reporting and comment on their so-called private life, although this would obviously be a difficult criterion to apply. May the media assume that the plaintiff's gratified but silent acquiescence in one intrusion into

privacy is to be taken as an invitation for a later, less gratifying invasion? Under the Act this aspect of the law did not provoke a great deal of litigation but it may be that the reference to a person's "private affairs" in the Bill will add an issue of some complexity to an already difficult area of law.

In his submission to the Committee, Mr Peter Bartlett, solicitor, of Minter Ellison, also looked at the different concepts of justification in the different Australian jurisdications.

Inconsistency in the formation and application of law is inevitable in a federation such as Australia. Disagreement as to the content of a uniform law on justification was in fact one of the major reasons for the abandonment of discussions over the 1979, 1983 and 1984 Uniform Defamation Bills.

At present, truth alone is a defence in South Australia, Western Australia, Northern Territory and Victoria. Defamatory statements can be defended so long as the truth of the matter complained of can be established.

Queensland, Tasmania and the Australian Capital Territory provide a defence of truth and public benefit. Defending a defamation action in New South Wales requires proof that the matter complained of was substantially true and that its publication was in the public interest. The addition of the term "public interest" has been criticised for creating an ambiguous defence.

Mr Bartlett drew the Committee's attention to the difference between subject matter that is in the public interest and that which is of interest to the public. He then went on to examine clause 22 of the Bill, which lists examples of situations in which the publication of a person's private affairs may be warranted in the public interest:

The Attorneys of Queensland, New South Wales and Victoria have agreed to introduce a "hybrid truth and privacy" defence. The defence will be available if the publication is substantially true. The defence of truth alone will not be available where the publication relates to the health, private behaviour, homelife or personal or family relationships of the person concerned. The Bill then takes the unusual step of providing some examples of situations in which the publication of a persons private affairs may be warranted in the public interest. They are:

(a) publication is made reasonably to preserve a persons safety or to protect a persons property;

(b) the matter is relevant to a topic of public interest, examples of such topics being:

(i) the public, commercial or professional activities of a person, or;
(ii) the suitability or candidature of the person for a public, commercial or professional office; or
(iii) a decision taken or likely to be taken, in relation to a public, commercial or professional matter, by any person who occupies or is a candidate for election or appointment to, a public, commercial or professional office; or
(iv) any property or service offered to the public; or
(v) public administration; or
(vi) the administration of justice, but only if the matter is of legitimate concern to the public or a sufficiently wide section of the public.

(c) The imputation contradicts a claim made publicly by the plaintiff concerning the plaintiff's private affairs and that claim is directly relevant to a public issue in which the plaintiff is involved (this covers the moral crusader who is perhaps not so moral).

(d) Information to the same effect as the published matter was recorded in a document that was:

(i) kept by a statutory authority, or a court, of the Commonwealth or other State or Territory, or

(ii) kept by a foreign statutory authority or a foreign court, or

(iii) kept pursuant to or in accordance with a law of the Commonwealth of a State or Territory or a foreign law, and that was generally available for public inspection and there was no relevant limitation on the use to which the document may be put.

These paragraphs are simply examples which appear in the legislation as situations in which an intrusion on a person's privacy is warranted.

Mr Bartlett made the following general comments on the truth and privacy provisions:

A "hybrid truth and privacy defence", assumes that reputation and privacy are inextricably linked. The Victorian Attorney General has asserted that the "proposal for truth plus privacy derives from the intermingling and balancing of protection of reputation, free speech, and privacy." However the recent disclosure in a Melbourne Sunday newspaper of the HIV positive status of an acclaimed ballet dancer illustrates the definitional difference between the concepts of privacy and reputation. In this example the person's real grievance is that their privacy has been invaded. But in order to obtain a remedy under this hybrid defence, the person is forced to bring an action in defamation which inevitably focuses on reputation, when reputation is irrelevant to the grievance sought.

The difficulty in this area was clearly set out in the Law Council of Australia's second submission.

...What is clear is that unwarranted intrusions into a person's privacy may not always be defamatory. Thus it may be more appropriate to focus on the issue of hurt associated with the invasion of privacy rather than having to emphasise damage to reputation.

Mr Bartlett argues in favour of a defence of truth alone with a separate tort of privacy:

If the Attorneys are concerned with the protection of privacy then it would be logical to create a new tort. By fusing privacy into defamation law, the protection of reputation which defamation law is designed to protect is complicated. More so the fused aims may also not be adequately protected.

The retired New South Wales Attorney General Dowd criticised truth as an absolute defence for empowering the media to abuse sensitive, embarrassing and controversial issues.

Statements which are true, but unnecessary and cruel, have exposed people such as the intellectually and physically disabled, people of non-English

speaking backgrounds, and other minority groups. (J R Dowd, Speech to the Australian Press Council (1989) p12.)

As already mentioned, if there is a concern with the abuse of minority groups then legislation targeting these areas would be more appropriate.

On the other hand Street ACJ was of the opinion that truth alone was an adequate defence. "No wrong is done by telling the truth . . . By telling the truth . . . reputation is not lowered beyond its proper level, but is merely brought down to it." (Rofe v Smith's Newspapers Ltd (1925) 25 SR NSW 4 per Street ACT at 21-22)

This quotation proposes that a person should be able to defend a defamatory statement by asserting its truth. It is argued that if a defamatory statement is true then the law of defamation should not protect undeserved reputations. The reason being that the damage suffered is justified by reducing the reputation to its proper level.

Truth alone is not only consistent with the purposes of defamation law, it also is simpler, clearer and easier to apply than truth plus privacy. When advising as to publication, lawyers are able to narrow the issues at hand to the truth of the matter. Similarly journalists and editors can rest assured that they can defend a claim if the statement was true. But the defence of truth plus privacy complicates the decision making process. Legal advisers and the media will need to continually second guess juries. They will need to determine if particular statements would be interpreted by juries as a breach of privacy. This task is made all the more difficult by the vagueness of the term privacy.

Mr Bartlett was questioned about his submission when he was called to give evidence before the Committee:

CHAIRMAN: Dealing with truth and privacy, the bill restricts qualified privilege to the common law variety whereas the 1974 Act did not. Do you think the change is necessary?
Mr BARTLETT: Yes, I do. What the bill does is in fact leave the common law in place. It leaves the New South Wales section 22 in place, it leaves the Queensland statutory defence in place and introduces a new defence. If you read section 22 of the New South Wales Defamation Act, you would say that is a very very good defence. Unfortunately the courts have interpreted it so restrictively that I think only twice have defendants succeeded on the defence of qualified privilege in this State. So what is needed I think is an indication to the courts that their interpretation has been too restrictive and Parliament wants to open up a defence of qualified privilege in appropriate circumstances.
CHAIRMAN: My understanding is that very few defendants seek to raise truth as an issue, but there has been a recommendation that all plaintiffs should bear the onus of proving falsity. Is this practical or necessary?
Mr BARTLETT: I think that that would be an advantage. I would strongly favour truth alone as a defence. I think that defamation actions are damage to reputation and if the allegations are true, then the injured party or the plaintiff should not recover. Once you raise these issues of privacy, then you are in a position where it is very difficult to define that term, and it will be a goldmine for lawyers—there is little doubt about that—and it is so difficult in pre-publication advice to decide what is a breach of privacy and what is not.
CHAIRMAN: While we are on the subject of privacy, is an invasion of privacy the same thing as an invasion or attack upon reputation, or are they different?

Mr BARTLETT: I think totally different. For example, there was an article in the Melbourne Herald-Sun late last year relating to a well-known Australian ballet dancer who was said in the Melbourne Herald-Sun to be HIV positive. That ballet dancer did not want it disclosed that he was HIV positive. He was very annoyed about that, but under this bill he would need to sue for defamation which is damage to reputation but in fact his complaint was not damage to his reputation; it was damage to his right to privacy.

CHAIRMAN: Having regard to the distinction you have drawn, is the relief to be afforded for each type of invasion of a different rationale and is the goal to be achieved differently?

Mr BARTLETT: I would have thought that if Parliament believes, and there is a strong argument for it, that people have a right to privacy and that should be protected, then they should take it on squarely and look at separate legislation relating to privacy and not try to bring it in through defamation laws which really have a different aim.

CHAIRMAN: Will the privacy provisions of this bill as drafted be effective in your view?

Mr BARTLETT: I think they will be effective because I think people will conservatively interpret what is private. I think that will lead to a significant invasion of rights to free speech because I think it is very difficult to decide today whether something is an invasion of someone's privacy and then the court will decide it in three or four years. Things are changing. Our interpretations of things are changing so quickly that what we think is not an invasion of privacy today could well be an invasion of privacy in three years' time.

CHAIRMAN: Having regard to the distinction you have drawn between an attack on somebody's privacy and their reputation and the need for different remedies, Parliament has set up the parliamentary privacy committee so it obviously believes it is important. Do you think there should be a tort of invasion of privacy and subject to separate legislation?

Mr BARTLETT: I think there is a very strong argument for it and I think the HIV positive example is a very good one. If someone is in that situation and does not want it disclosed then it should not be disclosed.

CHAIRMAN: If such a statute were to be introduced, obviously there would be drafting problems. What would be the position of defamation reform in the meantime; whether, for instance, we might be best served by retaining the public interest qualified privilege requirements of the 1974 Act?

Mr BARTLETT: In fact I see that Mr Tobin and Mr Sexton are coming before you later in the day and certainly they are of the view that there is basically little difference between truth and privacy and the New South Wales defence of truth and public interest. If that is the case then it may well be preferable to retain the New South Wales provision which has had a lot of court interpretation rather than getting into this new area which really will lead to a lot of court appeals trying to interpret what is an invasion of privacy. There is one interesting example that occurred in Victoria where the chairman of the National Crime Authority was detained by the police outside a brothel. If you try and put yourself in the position of an editor deciding should that be published you would say, well in the normal course it is an invasion of someone's privacy to say that they are picked up outside a brothel. Now that chairman said that he was on National Crime Authority business at the time and the police had some doubts about that. In those circumstances you would say, well if the chairman is making those sorts of allegations, therefore it is a matter of public interest and therefore the right to privacy ceases, but it is just one example of the types of interpretation you would need to go through, the exercise you would need to go through prior to publication. It would be a difficult exercise.

Mr Bartlett was also asked about the possible costs involved in litigation should the Bill be passed:

CHAIRMAN: This question may be highly subjective, but what would be the time frame and cost difference between the current and the proposed provisions?
Mr BARTLETT: I do not think the time frame would be any shorter. The costs could be greater because of the increased technicality. Certainly there would be increased costs because of correction orders. If there is a defence of truth and privacy, that may lead to various appeals to the Court of Appeal at the High Court and new trials, which itself is unfortunate.

Mr Bartlett was then questioned about the possible need to define "truth and privacy":

Mr D. L. PAGE: You said earlier it would be better to have truth and public interest than truth and privacy. In your view is it necessary and would it be wise for the Committee to have the definition of public interest included in the bill? I know it has been suggested in a couple of other submissions but at this stage it is a matter for determination by the judge. Is that the preferred course?
Mr BARTLETT: I think it would be preferable to have it defined in the bill. If we are to move to truth and public interest, it would be preferable that people can look at a section in the bill and see the definition.
CHAIRMAN: Suppose that one night you are working for the Age on the subject of truth and public interest and the story is that the Deputy Prime Minister resigns from Cabinet and gives as his reason for doing so his belief that the Prime Minister has acted corruptly, but there is no way of proving the truth or otherwise of that allegation. Does the Age publish it?
Mr BARTLETT: That would be a very very difficult situation and it is a situation that has arisen quite often—not the specific example, of course, but a situation where a very senior parliamentarian has made a comment which cannot be substantiated. There was one recently, I think made by the Victorian Attorney General. You decide whether the Age publishes it, recognising that the newspaper cannot substantiate it, or does the Age censor the comments made by the Deputy Prime Minister? In that situation, and that is an extreme situation, I would have thought there is a very strong argument for the Age to publish the material because it is made by the Deputy Prime Minister and he has thought so seriously about it that he has resigned from his position. It is not the position of the Age to censor but it would be a difficult situation.
CHAIRMAN: I appreciate that but you can see where the public interest is?

Finally, Mr Bartlett was questioned about what he considers might be the overall impact of the "truth and privacy" provisions:

Mr HAZZARD: I have some problems with the proposed legislation. They come primarily from advising a daily newspaper in New South Wales over a number of years and having journalists consistently ask the question, as Mr Petch mentioned before, "is this okay and how far can we go?" I am sure you are familiar with that question. I have some problem with that from the other side. I must say that I had no problem when I was particularly advising the journalists and the media outlet, but I do have some problems now that I am in a broader position. Do you think this legislation will assist the journalists with that decision? Will it make it easier for them if truth is primarily their defence?
Mr BARTLETT: I think it is going to make it far harder for them because I think the truth and privacy will be so much more difficult to assess pre-publication. There will be so many areas—
Mr HAZZARD: Well, truth is common to both so it is only privacy versus public interest. Why the difference? Why do you think it is going to be far harder?

Mr BARTLETT: I am talking as a Victorian. We have truth and truth alone. So from a Victorian perspective, it will be far harder because we will now need to look at the privacy issues.
Mr HAZZARD: Perhaps as New South Wales legislators we need to distinguish that you are talking from a Victorian perspective where truth is the only defence.
Mr BARTLETT: If we look at the New South Wales provision, I think Mr Tobin and Mr Sexton say that in fact there is little difference between truth and privacy, and truth and public interest. If that is right, I do not think there will be a vast amount of difference in pre-publication advice.
Mr HAZZARD: Although if you are probably right on that point, I suppose the consequence will be, as you indicated earlier, that it is going to open up a legal pandora's box.
Mr BARTLETT: Yes, it will. I think there clearly will be many many cases about what is covered by privacy.

Ms Judith Walker, representing the Australian Broadcasting Commission, highlighted their belief in truth alone as a defence and their concerns about the provisions in the Bill:

> The proposed "truth and privacy" defence is open to criticism on a number of grounds. First, it is a step backwards and not an improvement likely to enhance freedom of speech in the public interest. Far from the Bill moving towards the expressed policy aim of establishing truth alone as a defence in the three jurisdictions (as is the case in Victoria), the new proposal is likely to be even more restrictive of publishers than the present NSW truth/public interest and Queensland truth/public benefit defences (for Victoria it is without any doubt a major reversal). The reason is that the Bill begins with a presumption that the defence is not available where the publication deals with any person's private affairs. This presumption then needs to be rebutted where the publication is warranted in the public interest - a whole new concept in defamation law and one bound to create a higher threshold of proof for a publisher than the previous public interest test.
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> Secondly, there is a very real likelihood that the proposed "truth and privacy" defence will lead to increased litigation with the parties to a defamation action being involved in various interlocutory applications over whether or not the defamatory imputation concerned the plaintiff's private affairs and, if so, whether or not the publication of the matter was warranted in the public interest. We leave aside the defendant's alternative argument, namely that at common law the defence of qualified privilege would be available, given that this defence is rarely available to a media defendant. Thirdly, the proposed defence assumes that reputation and privacy are inextricably linked. However, as pointed out by Peter Bartlett in a paper he presented to a defamation law seminar organised by the Free Speech Committee and held in Sydney on 30 October, 1991, this is not necessarily true.
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> We reiterate our view that truth alone should be a defence to a defamation action. It is simple and easy to apply. The addition of privacy complicates the prepublication decision making process and the court proceedings following publication.

When called to give evidence before the Committee, Ms Walker and Mr Graham Bates, solicitor, were questioned about their views on the "truth and privacy" provisions:

> **Mr GAUDRY:** ... you made some fairly strong points on the truth and privacy aspects that are in the present bill and the fact that if they are invoked they would in

fact make it much more complex, in your view? Could you give some examples?

Ms WALKER: I think it would increase the costs. I think you would have a number of interlocutory applications to test whether it was related to someone's private affairs and if it did, was it warranted? I think you would have more of those sorts of proceedings. It would increase the time of the proceedings and increase the costs involved. I would have thought that the defence that is currently in the New South Wales Act is perfectly adequate to deal with the problems that may be involved in cases like the Chappell case which was injunctive because the proposed publication was held not to be in the public interest. I just do not see any need for the sort of reform that has been proposed.

Mr BATES: I agree with that. The media's preferred view is that truth alone should be a defence, and that is the view which the responsible media in the country always puts, and puts with some very considerable force. But you do have a fringe of irresponsible media that have to be considered too and one has to wonder whether a newspaper such as the Toorak Times could have existed in New South Wales as it did in Victoria. I think it would have had a much more difficult time in New South Wales because of the public interest requirement. I have a great deal of difficulty in seeing that when you have a defence of truth and public interest, that in practical terms and on a day-to-day basis you do not cover the same situations that you are intending to cover under a truth except for sensitive private facts type of proposition.

Mr GAUDRY: The difficulty, of course, for public figures such as politicians, I think as Mr Hatton said, is that there is always a high level of public interest in any of their dealings, whether private or public because of the fact that not only are you a figure of some responsibility but whether it be at the local media level or a much higher standard of media, it is very much a seller of media information, stories about politicians, and so often they are subject to invasion of some of their privacy. If it is just a truth alone, that can be quite damning in a way.

Mr Padraic McGuinness, journalist, in giving evidence before the Committee, commented on the "truth and privacy" provisions in the Bill:

Mr GAUDRY: Working as a journalist and the truth and privacy aspects, will that seriously complicate the issue where you have to prove that it is warranted in the public interest?

Mr McGUINNESS: It depends how the public interest is defined. This is why I have talked about the desirability of some presumption of a right of free speech. There are many things that are in the public interest, as I would interpret it or as an ordinary citizen, not as a journalist, which a judge might say is not in the public interest. It is, I think, in the public interest to know, for example, something about the behaviour of a senior bureaucrat if that bureaucrat's behaviour in certain policy respects ought to be criticised. It is relevant to know of the past of the person, political loyalties—not necessarily political loyalties—their behaviour, their record as a bureaucrat et cetera. Normally it would not be relevant to raise this. I do not care about the career history of, say, the head of the department of social services, but if that person is behaving in a way that needs to be criticised, then their past behaviour might be relevant. Their record in employment, for example, or their record in the bureaucracy might be relevant. It is a very difficult line to establish. I think it is ridiculous that the sex lives of politicians should be brought into debate or whether they smoked marijuana when they were students, 20 years ago. That is the kind of stuff that goes on in American politics and I think it is political nonsense. However, many people in the United States of America think that it is very relevant when judging the quality of a candidate. Is it private behaviour, when you are standing for public office and people think your morality is relevant to your performance in public office? It is very difficult.

Mr GAUDRY: That is the whole problem, is it not, when does public become private? Do you think that is the problem?

Mr McGUINNESS: I think there are very few things concerned with the character of a politician which are purely private. What happens between a politician and his or her spouse and, indeed, their private sexual behaviour is totally irrelevant to the public judgment—but that is my preference. If I were a fundamentalist Christian or Muslim I may think it were highly relevant.

Mr GAUDRY: It is also the context in which it is used. As someone said earlier, if that is a matter brought before the public in the climate of an election campaign then it certainly does have an enormous capacity to influence because by the time it goes through a defamation hearing it is well past the time—as someone said previously—that the jury, who in that case are 37,000 people, have made their decision.

Mr McGUINNESS: That would generally be the case. If, in the heat of an election campaign, someone was accused of being excessively promiscuous and this was untrue, defamatory, or whatever it would still be months or even years before that was settled by the courts and the election would be long over. What you are really talking about is the problem of instant or very rapid redress and quite clearly the defamation law is no use for that.

Mr GAUDRY: He would have some difficulty as a result of the article, increasing his majority.

Mr McGUINNESS: I suspect in Australia that might often be the case, if not in America.

CHAIRMAN: It happened to Paddy Ashdown, his ratings went up.

Mr McGUINNESS: It was not because of his peccadilloes but because of the honesty and frankness with which he faced the accusations and also the smack of dirty tricks about the way the information came out.

Mr HAZZARD: You are a journalist of some considerable experience and stature in the journalistic field and you have difficulty and would have difficulty in determining when is a private matter a public matter. My experience is that the vast bulk of journalists are aged between 18 and 28 with not the same sort of experience and certainly not the same sort of ability to determine what is a private and public matter that you have. Does that not mean that we are leaving ourselves wide open to that group?

Mr McGUINNESS: No, because the vast bulk of journalists are not editors or senior section editors, almost by definition. If you are the editor of a newspaper you are a journalist of very considerable experience and usually well above average ability and intelligence.

Mr HAZZARD: Are you saying that every article that appears in the newspaper has been vetted to that degree, by an editor?

Mr McGUINNESS: Not every article, but the criterion of a good subeditor, one of the many criteria, is that they look out for stuff that might be questionable. We have a company solicitor who, quite often, is actually in the office. Quite often things about which we are doubtful or about which the editor is doubtful or about which the subeditor is doubtful will be referred to him. There is a very recent example—Brian Gallagher is here—a few days ago I wrote a piece. A subeditor rang me and said, "I think this might be defamatory" and I said: "It might be. I assume, if you are not going to, you should refer it to Brian Gallagher". I also rang the acting editor at the time, the guy who was in the chair, and I said: "Will you have a look at this? The sub has doubts about it. I will accept any revision that is necessary to make sure it is not defamatory".

Mr HAZZARD: That happens with the present system. What we are talking about is opening the floodgates on the public figure test. It is going to be happening far more often in terms of: what are we doing here?

The Communications Law Centre argues that the title of "Division 2 - Truth" is a misnomer:

> Division 2 of the Bill is inaccurately called "Truth" where in fact truth is not of itself a defence. The Centre believes that this misnomer is confusing and that the Division should be called "Justification".
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> The substantive matters raised in the division are also of concern to the Centre. The defence appears to be a hybrid defence which incorporates elements of privacy protection as well as protection of reputation. It is similar in effect to the current New South Wales statutory defence of truth and public interest, and it is difficult to understand the rationale for the modifications in this State.
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> Of particular concern to the Centre is the raising of the threshold for defendants to establish this defence in New South Wales. Under section 15 of the existing Act, the defendant needs to establish that the matter was true and in the public interest (or on an occasion of qualified privilege). Clause 20(2) of the Bill requires the defendant to now prove that the matter was true and "warranted" in the public interest. This will make the defence of "truth" much harder for media organisations to prove. This is arguably a much higher threshold test and a counterweight to the underlying protection of free speech currently provided for by the existing defence. In our view this additional threshold test should not be introduced.
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> The terminology in the Bill will in our view open the way for much litigation. Terms such as "inappropriate" should be avoided. For example, clause 20 refers to what is "reasonable in the circumstances". Clause 22 refers to "candidature for ... professional office". These phrases are not further defined and no doubt will be the subject of considerable legal debate.
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> We are also concerned about the categories of exemptions to the privacy principles incorporated into the defence. Arguably, they will provide less protection for an individual's privacy than under the existing public interest test in New South Wales. For example, the exemption found in clause 22, Example 4 may mean that a person is asked in the street by a journalist in the street about their medical condition e.g. "do you have AIDS?" If they reply "No," when in fact they do, their privacy protection will be lost," if the claim is directly relevant to a public issue in which the plaintiff is involved. It is yet to be resolved, for example, whether the fact that a practicing doctor has AIDS is a "public issue". The Centre recognises that there may be many instances where a persons medical condition for history is relevant to their ability to perform public duties, or affects the public at large, however, we are concerned that the ramifications of the exemptions have not been fully considered.

The Law Society of New South Wales made the following comments:

> The agreed position of all three jurisdictions is that truth alone would be a defence ~~provided that appropriate measures are introduced to ensure that individuals are~~ protected from unjustifiable revelations about a limited number of essentially private matters.
>
> It is submitted that the current New South Wales position is the optimum position in that only publications directed purely to private matters with no nexus to any issue of public interest is precluded. The "public interest" requirement is at least as effective as any countervailing privacy measures could be if the "public interest" requirement was abolished.

It is noted that no precise definition of what constitutes private matters is given in the Discussion Paper, although it is indicated that serious consideration is being given to alternative clause 11 of the ALRC Uniform Draft Bill.

In view of the agreed position of all three jurisdictions, the Litigation Law and Practice Committee supports the introduction of alternative clause 11 as the most appropriate means of dealing with this issue.

In the Young Lawyers' submission, Ms Judith Gibson expressed some concern about the "truth and privacy" defence:

In NSW truth alone is an insufficient defence; a public interest test must also be satisfied. This is one of the easiest elements to satisfy, as even greyhound racing has been held to be in the public interest. The main area where problems arise is in the family or sex life of a person for such matters are rarely likely to be published in the public interest. The proposed amendment of "truth alone" plus privacy is a reworking to achieve this result which accidentally, through sloppy draftsmanship, actually makes the test more difficult for a defendant by calling it "warranted in the public interest" which appears to veer towards the more restrictive "public benefit." There are many things which are public interest which may not be for the public benefit.

The "examples" given in the Act of warranted publications concerning private affairs "overlook or overlap" the provisions preventing publication or the issue of a subpoena contained in a number of Acts such as s.120 Family Law Act, provisions in the Venereal Diseases Act, the Social Security Act, the Income Tax Assessment Act and the Ombudsman Act, land tax provisions, privacy legislation and so on. It is irrelevant that information is kept by a Court or statutory authority; if the publication of information contravenes a statutory provision, how can that possibly be a matter for public interest: Baltinos v. ACP (Sully J, 14.12.89, unrep).

The particular kind of exceptions referred to in the examples veer away from the 'privacy' concept and come close to introducing a kind of "public figure" test, but in such strict circumstances ("warranted in the public interest") that it may not succeed, it is moreover limited to the defence of truth. A simpler method would be to leave the truth defence as it is and introduce instead a limited "public figure" test (see paragraph 11 for a discussion of this test).

The example usually given concerning truth and the "public interest" factor is the moral crusader who is not so moral. His sexual peccadilloes may fall within the public interest or they may not, depending on the facts in each case. However, if the emphasis is shifted away from the conduct he is guilty of and attached to his status as a public figure, the publisher's task will be easier.

We submit that it is morally repugnant for the media to demand the right to publish matters not in the public interest. There is no tort for breach of privacy in NSW, and private citizens should not have to face the public humiliation of having their private affairs exposed.

Finally, Tobin & Sexton have pointed out that the proposed truth and privacy defence makes no change whatever from the present defence; if anything, it will make it harder to prove (see Bulletin No. 1, Defamation Law and Practice, Butterworths).

The Law Council of Australia supports the proposition that, in the interest of simplicity, clarity and ease of application, and to ensure that the law of defamation maintains its focus on the protection of reputation, truth alone should be the uniform defence and that, if protection for privacy is considered necessary, separate privacy legislation should be enacted. Their two submissions to the Committee were submissions already made as critiques on the discussion papers released by the Attorneys General of New South Wales, Victoria and Queensland.

> The Law Council is greatly disappointed that the Attorneys have committed themselves to the introduction of a hybrid truth plus privacy defence. In the hope that it may not be too late to avert what would be, in the Law Council's view, a significant increase in technicalities in a very technical area, the Law Council wishes to explore further the reasons why it considers such a defence to be wrong both in principle and in practice.
>
> Objections from Principle
> The purpose of the tort of defamation is to allow a person to protect their reputation. The rationale for the defence of truth alone is well expressed in the passage from the judgment of Street ACJ quoted by the Attorneys in paragraph 4.5 of their Discussion Paper. The validity of this passage is enhanced by the addition of the words contained in square brackets below:
>
> > No wrong is done [to a person's reputation] by telling the truth ... By telling the truth ... [a person's] reputation is not lowered beyond its proper level, but is merely brought down to it.
>
> The addition of the words contained in the square brackets above is necessary because the original words of Street ACJ obscure the fact that wrong can be done to a person by telling the truth about them; the point, however, is that the wrong which is done to a person by telling the truth about them does not relate to their reputation but to their "right to privacy".
>
> If the Attorneys genuinely believe that the community supports the notion that people have a right to privacy, and also believe that that right is breached frequently enough to justify the creation of a new tort, then the Attorneys should fully confront this issue and introduce such a tort. Using the law of defamation to protect this interest, however, will not only muddy the waters of defamation, it will probably fail to effectively protect the right to privacy.
>
> The reason for this is simple: not all publications which invade privacy are defamatory, but it is only in respect of those publications which are defamatory that any remedy will be provided. Furthermore, a person whose real grievance is that their privacy has been invaded will be forced to undertake proceedings which will inevitably focus upon their reputation, when their reputation is quite irrelevant to their grievance.
>
> It is easy to invent examples which show the problems which will be associated with the proposed defence.
>
> Imagine, for instance, a prominent female politician of whom it is published that she had once terminated a pregnancy. She would rightly feel that such publication was an invasion of her privacy. To get a remedy for this, however, she would be forced to bring an action in defamation; fortunately for her, it may well be defamatory of someone to say that they have had an abortion. This means that she has a remedy.

Unfortunately for her, in pursuing her remedy she will inevitably be forced to focus on the damage which the statement may have caused her reputation, rather than the hurt which the invasion of privacy caused her.

Furthermore, the publisher may well attempt to deny that the matter was private, or the publisher may attempt to allege that it related to a topic of public interest: for instance, the politician might be the Minister for Health and the publisher may claim that her earlier abortion had affected her attitudes towards abortion and that this was a factor in the decisions she made within her portfolio. The publisher would in any case be able to plead truth and bring evidence to prove the truth of the allegation: this would simply lead to further invasions of the politician's privacy. If the action were for invasion of privacy, of course, then the truth of the allegation would be irrelevant.

The first hypothetical plaintiff is, however, fortunate compared to our next. Imagine a politician of whom it is published that his or her child is or was a drug addict. The politician would rightly feel that this was an unwarranted intrusion on his or her privacy. This hypothetical plaintiff would have no remedy, however, because it is probably not defamatory of a person to say that their child is a drug addict. Why should the first plaintiff have a remedy but not the second, when both are complaining of exactly the same wrong?

Finally, the decision as to whether the publication of a particular matter would be a warranted or unwarranted intrusion on privacy is a decision which is properly within the hands of editors. The introduction of a defence of truth plus privacy will remove this decision from the hands of editors and place it in the hands of lawyers instead. Lawyers will be asked to assess questions of privacy and public interest, and it must be questionable whether they have the capacity or inclination to do so. These matters should be left to editorial judgment as to what the public thinks is appropriate, rather than codified in law.

Practical Objections

It is almost as important that the law be certain as that it be just. The defence of truth alone has the admirable advantage of simplicity, clarity and certainty. A publisher and its advisers know that if something is true then it can be published without fear of defamation proceedings being successful. Equally, a person about whom something defamatory is published knows with certainty that they will not be successful if the publication can be proven to be true.

The introduction of a defence of truth plus privacy would completely destroy the certainty which currently exists in the law. Both the concepts of privacy and of public interest are inherently vague, and whether a matter is "private" or "relates to a topic of public interest" is one as to which reasonable opinion may greatly differ.

Every time that a publisher wishes to publish material which conceivably impinges on the privacy of another person, the publishers' legal advisers will be forced to second guess how a jury might characterise the publication. Not only will the advisers have to consider whether the matter conveys a defamatory imputation and whether the truth of that imputation can be proven, but also whether the matter is an intrusion on a person's privacy, and finally, whether it relates to a topic of public interest. It will be almost impossible for any lawyer to have any confidence that their opinion will be shared by that of a jury which might ultimately hear a defamation action arising out of the publication. This will inevitably lead to timidity on the part of publishers with a reduction in freedom of speech in Australia.

The meanings of the terms privacy and public interest will only become clear after a great deal of litigation revolving around those terms. Even after the Supreme Courts of the various States and the High Court have pronounced upon the meaning of these terms (which could take some years) they will still remain a matter for the jury, and it will still, therefore, be virtually impossible to predict how they will be applied. The uncertainty of meaning of the terms may encourage parties to proceed to judgment, and will certainly encourage unsuccessful parties to seek to have decisions reversed upon appeal. It seems to the Law Council that the consequence of introducing a defence of truth plus privacy will be an increase in litigation, and particularly in appeals, and that the expense of this litigation will be disproportionately borne by the media.

Conclusion

The Attorneys are probably right that the law should provide a remedy for those whose privacy is unjustifiably invaded; but they are wrong to use defamation as a vehicle for that protection. They are wrong in principle because invasion of privacy is irrelevant to reputation and it is reputation which the law of defamation is concerned with. Furthermore, the protection to privacy which will be afforded by a truth plus privacy defence to a defamation action is only partial and would force a person whose actual grievance was invasion of privacy to focus their action on damage to reputation. Finally, the Attorneys are wrong to use the law of defamation as a means to protect privacy because the practical problems which will be associated with this defence are enormous.

The Law Council submits, therefore, that the Attorneys should introduce a uniform defence of truth alone, and that protection for privacy should be provided by a separate tort contained in separate legislation.

The Law Institute of Victoria made the following submission:

The Law Institute in its Submission dated 28th September 1990 on the Attorney General's Discussion Paper Number 1 commented at length upon the subject of truth as a defence. The Institute recommended that truth alone should be the prime defence in defamation. The Institute indicated clearly that it regarded the protection of privacy and the protection of reputation as being completely different issues and requiring separate laws and that the combination of the two laws would be unwieldy and would lead to uncertainty and to complex and time consuming litigation.

The Institute was mindful that the three Attorneys were interested in adding some element to the truth defence, for example privacy, public interest or public benefit. In those circumstances the Institute expressed the opinion that truth together with privacy was preferable. It explained its reasons at page 11, paragraph 2.1.2 of the submission. The Institute believes that the reasons stated there were correct and are still correct.

The Institute affirms its original opinion that truth alone should be the prime defence in defamation cases. This recommendation has unfortunately not been accepted by the Attorneys in their second Discussion Paper issued in January 1991.

The Institute referred to the privacy provisions of the 1984 Defamation Draft Bill and stated that it preferred the alternative or longer version of clause 11 because it spelt out in some detail what was meant by "private". It accepted that private facts should include information concerning a person's health, private behaviour, home life or personal or family relationships. It expressed the opinion that the shorter

version of clause 11 in the Draft Bill was uncertain, unclear and would lead to costly and perhaps conflicting judicial decisions over a number of years before its meaning was fully clarified.

The Institute believed at the time of the 1990 Submission (and still believes) that the law of defamation should as far as possible be expressed in clear and certain terms. It would support a "plain English" statute. The media, their legal advisors and the public are entitled to have such legislation. The Institute further believes that there is a better chance of obtaining uniform defamation laws throughout all of the States and Territories of Australia (not just Victoria, NSW and Queensland) if a plain English bill was prepared for discussion and consideration.. The introduction of a plain English bill into Victoria and simply an amendment to the New South Wales Defamation Act would be a recipe for a further move away from uniformity.

The Institute pointed out in the 1990 submission that the defence of truth plus privacy would in fact create two defences, that is:

(a) in respect of publications of a private nature, and
(b) in respect of publications of a public nature.

The Institute said, and now repeats, that in respect of publications of a private nature, that truth plus public interest should be the defence, and in respect of publications of a public nature truth alone should be the defence. It is obvious that the two defences will create unnecessary complexity in the law. The terms used must be clearly defined.

In New South Wales the present law requires that truth plus public interest must be shown to establish the defence. There has been much criticism of the addition of the concept of public interest. The Institute thinks that the use of the term "interest" creates an additional problem because there is some ambiguity in its meaning.

[In the judgement, Lim Laboratories Ltd v. Evans (1984) 2 All ER 417, at 435, Court of Appeal per Griffiths L J] "There is a world of difference between what is in the public interest and what is of interest to the public".

The onus of establishing truth and public benefit of course rests upon the defendant. The Institute has no doubt that if this concept is imported into the new draft bill there will be substantial and costly litigation in all three States to test the meaning and extent of the new defences even with statutory definitions.

In the 1990 Submission, in paragraph 2.1.2, the Institute suggested that there should be further additions to the "long draft" of clause 11 of the 1984 Draft Bill to extend the defence to cases where:

- the plaintiff has consented to the publication; where the private matter was contained in a record available for public inspection;
- where the publisher did not know and had no reason to believe that the publication would cause distress, annoyance, or embarrassment to the complainant.

The Institute also suggested that the defence should be automatically available when the publication was on a topic of public interest or benefit and when the publication was made to preserve a person's safety or property.

The Institute puts forward the following draft section (based on the 1984 draft bill) for consideration:

Defence of Justification

(1) Subject to sub-section (2) it is a defence to an action in respect of the publication of a defamation if it is proved that the defamatory imputation was in substance true, or not materially different from the truth.

(2) The defence referred to in sub-section (1) is not available in respect of a defamation of and concerning a person where the plaintiff proves that the published matter relates to:

(a) that person's health, or
(b) that person's private behaviour, or
(c) that person's home life or personal or family relationships.

Unless it is proved by the defendant that:

(a)the information or similar information as published was contained in a record or document available for inspection by the public, or
(b)the information was published reasonably for the purpose of preserving the personal safety or protecting the property of the person, or
(c)the matter was relevant to a topic of public benefit, or
(d)the person referred to in the defamation consented to the publication, or
(e)the publisher did not know and had no reason to believe that the publication would cause distress annoyance or embarrassment to that person.

(3) The defence referred to in sub-section (1) is not available in respect of a defamation concerning a person relating to a conviction of that person for an offence:

(a) if a punishment was imposed on the person in respect of the conviction, and
(b) immediately before the publication the fact that the person had been so convicted of the offence was not notorious, unless it is proved that the publication of the defamation was for the public benefit.

The Attorneys General Discussion Paper (No. 2) now sets out the position in respect of the three States. The Institute prefers a simple defence of truth alone. If the Attorneys persist with the proposed new defence great care will have to be taken by the drafters of the uniform legislation to ensure that precise definitions are given to the terms relating to "privacy" and "public benefit" or "interest". The definition as to what constitutes "a private matter" must be clear, concise and free from ambiguity.

The Institute should make it clear that it will require a considerable period of time in which to fully analyse and provide an opinion upon any proposed draft legislation.

The Institute also wishes to restate its position on substantial truth. In paragraph 2.1.3 of the September 1990 submission the Institute pointed out that:

> "however uniformity is achieved, any Bill should specify that an imputation need only be established as substantially true or in substance not materially different from the truth. This should be assessed having regard to the whole of the article in question, not just the words complained of".

By use of the word "article" the Institute, of course, refers to any defamatory publication, be it in the print or the electronic media.

The Institute is concerned to ensure that the proposed legislation achieves its stated aims. It must be clear and concise and set out in plain English. It must be uniform in the three participating states. Legal practitioners must be able to advise the public and the media as to the meaning and extent of the law with certainty. The

legislation must ensure that the risks presently involved in costly defamation litigation are minimised in the future.

Not all submissions supported the defence of truth alone.

The Honourable R. G. Reynolds AO QC is unable to justify truth alone as a defence:

> I am unable to accept that, whatever is the social context in England and Victoria, truth alone should justify a defamatory imputation under the law of N.S.W. If the price of uniformity is the adoption of such a provision then it is a political decision that must be taken as to whether such a price should be paid.
>
> Clause 20(2) is redolent of a compromise which I consider will lead to confusion and difficulty. "Private" and "Privacy" have, so far, defied satisfactory definition and so will "private affairs".
>
> Clause 4 uses the device of extending whatever the words may mean by using the word "includes". It is not a true definition. What is private and what is not is often a most subjective matter.
>
> Clause 20 accepts that truth alone is not a justification in the full sense. In a jury trial presumably the jury would decide whether the imputation concerned the plaintiff's "private affairs" under Clause 20 and if this was decided in the affirmative, the Judge would have to decide the question in Clause 20(2) (a). Who decides the question under Clause 20(2)(b)? Is it the jury? Clause 28 would not apply.
>
> Perhaps I am wrong but, if not, there is an extremely complex problem introduced into the trial process which will swell the lists of the Court of Appeal.
>
> In my opinion Clause 22 is of a type that should not be found in an Act of Parliament. "Public interest", as a matter for the Judge, is a well-known simple English phrase which any attempt at definition would only cause confusion.
>
> Clause 22 would invite arguments that the nature of the examples shows that the public interest is wider or narrower in scope than would otherwise be the case.
>
> In my opinion, Clause 22 should, beyond question, be omitted from the Bill.

Mr Stuart Littlemore, barrister-at-law and journalist, commented on clauses 20 and 22:

> Clause 20: the defence of truth is defeated if the matter concerned invades the private affairs of the plaintiff, unless the publication was warranted in the public interest; or the matter was published in circumstances that would attract the common law defence of qualified privilege.
>
> It is hard to imagine a more complex structure than this: there is, for a start, the contradiction in terms of the disclosure of private affairs in the public interest. The examples set out in Clause 22 hardly help: if the plaintiff is a candidate for public office, does an appraisal of his attributes which muckrakes over the fact that his mother died in a mental institution, or that he was convicted for shoplifting 25 years ago, qualify as a matter of legitimate public interest? Still further there is the problem that a substantially true imputation, buried in a wider report dealing with matters of legitimate public interest (where the imputation itself invades the privacy

of the plaintiff) may not offend: Clause 20(2) requires the plaintiff to establish that the matter "concerns the plaintiff's private affairs". What is the journalist to make of that? Does "concern" mean "has as its topic"? or "touches upon"? or "has as its dominant concern"?

Let me take as an example the 25-year-old conviction for shoplifting: Is the journalist entitled to say it reflects upon "the suitability of a person for a public office"? Is the fact that the balance of the matter (a proper discussion of a candidate's suitability) is warranted in the public interest something that, by itself, renders invasions of privacy in respect of matters of no legitimate public interest, inoffensive in terms of Clause 20? Is some defamatory invasion of privacy permissible in an otherwise legitimate report? Any journalist can understand that he or she is entitled to publish an imputation which is true but which concerns the private affairs of the plaintiff where that imputation is made to contradict a self-serving (and, necessarily, dishonest) claim by the plaintiff in order, for example, to enhance his candidacy. That, alone, is a manageable provision.

... The structure of this clause is that the defence of justification is defeated if the matter carrying the imputation concerns the plaintiff's private affairs and:

(a) the matter itself does not meet the public interest test; or

(b) the matter was not published in the classical duty interest correlative; and - I think this is what it means - even the grossest malice (not just restricted to the invasion of privacy itself) will be immaterial.

Try explaining that to a hard-pressed journalist, rushing to meet a deadline or to beat the competition to a scoop!

I, for one, fail to understand why subclause (2) should not require:

(a) that the publication of the matter be warranted in the public interest; and

(b) that the matter be published in good faith and after all appropriate enquiries have been made.

The importation of the common law concept of qualified privilege is unnecessarily complex - and inconsistent, in any event, with the Clause 25 defence, which appears to be the most obviously comparable provision in the Bill. Clause 18 would further reinforce this view, in my opinion.

Many individuals and organisations argued in their submissions and in evidence against the listing of examples in clause 22.

The Committee found the views of Mr Bartlett and the Law Council of Australia very persuasive. The Committee is convinced that the privacy provisions as drafted are unlikely to be effective. They are (necessarily) complicated, and difficult to define. It is difficult to conceive how the drafting could be improved to overcome the problems in defining privacy in such a statute. More importantly, an invasion of privacy is really quite different from, and unrelated to, an invasion or an attack upon reputation. The relief to be afforded for each type of invasion is a product of a quite different rationale. The goal to be achieved is different for each.

In the Committee's view, a tort of invasion of privacy should be the subject of separate legislation. Most responsible parties appear now to accept such a course.

Defamation reform, however, should not await that statute, which may not be within the Committee's terms of reference, but which will in any event be equally difficult to formulate. Until such a statute does come into operation, the public interest and qualified privilege requirements of the defence of truth in s 15 of the Defamation Act 1974 should be retained.

The Committee agrees with the criticisms of the word "warranted" in cls 20(2) (a) and 21(2) (a). Although cl 22 suggests, by way of example, that a matter is warranted in the public interest when it is relevant to a topic of public interest, that example does not define the term "warranted in the public interest", and hence does not limit its meaning.

The drafters of the Bill no doubt intended it to mean only "justifiable", but the word "warranted" has had an unfortunate history in the law of defamation. Until s 39(4) of the 1974 Act (very correctly) removed the concept, a defence of comment would fail where an imputation of corrupt or dishonourable motives was conveyed unless such an inference was not only the honest opinion of the author but also one which was warranted - that is, one which a fair minded person might reasonably draw from the facts. The concept of "warranted" as expressed in the common law produced an extraordinarily difficult test to be satisfied.

There is a very real fear that a similar approach will be adopted in relation to cls 20(2) (a) and 21(2) (a). Therefore, if cls 20(2) (a) and 21(2) (a) were retained, each of the two subsections in question should follow the terminology of ss 15 and 16 of the 1974 Act.

Committee's Recommendations:

(1) That truth alone form the basis of the defence;

(2) That a tort of privacy be introduced in separate legislation;

(3) That, until such a statute is passed, the public interest and qualified privilege requirements of the defence of truth in s 15 of the Defamation Act 1974 be retained.

Chapter 5

Clause 21

Contextual Truth

This is one area where there was strong support for uniformity between jurisdications.

Mr Peter Bartlett summarised the policy underlying this statutory defence, saying:

> If the defendant can prove various imputations, that significantly damage the plaintiff, it is in the interest of justice that the plaintiff should fail in his or her action if the defendant merely fails in proving the truth of lesser imputations.

Clause 21(1)(b) of the Defamation Bill, 1992, is similar to the current section 16, which provides for a defence which has come to be known as "centextual truth".

In his evidence given before the Committee, Mr Peter Bartlett, solicitor, Minter Ellision, pointed to defects in clause 21:

> It is a provision that is presently in section 16 of the New South Wales Defamation Act 1974, but clause 21 of the New South Wales bill contains a very significant defect. It moves away from the wording of the New South Wales Act and no longer requires an injury to reputation. It removes the reference to reputation and refers to not further harming the plaintiff. Defamation actions relate to damage to reputation, not damage to feelings; and so we believe that the contextual truth provision in the Defamation Bill should revert to the wording in the New South Wales Defamation Act.

The Law Institute of Victoria shares Mr Bartlett's view that clause 21 contains a serious defect:

> Section 16(2)(c) of the New South Wales Defamation Act 1974 refers to not further injuring the reputation of the plaintiff. Clause 21 of the Bill takes away the effectiveness of section 16 by omitting the reference to "reputation". Clause 21(1)(b) refers to further harming the plaintiff. That harm can of course be harm to feelings, which is not relevant under Section 16.

In its submission to the Committee, the Bar Association of New South Wales also foresees problems arising from the provisions relating to contextual truth:

> Clause 21 contains a critical variation from the present position: the proposed defence is not restricted to damage to reputation but would also comprehend additional hurt to a plaintiff's feelings. In defamation law, harm to the plaintiff has two components, damage to reputation and hurt to feelings.

> Under the new clause, if a plaintiff suffers further hurt to his feelings only the defence will not apply. That would probably be the case in every claim (or at least plaintiffs will allege that it is).

The Bar Association and the majority of individuals and organisations which have made submissions to the Committee recommend against changing the present law:

> The words of section 16 were chosen deliberately and with some care and the words "injure the reputation" were inserted to prevent this consequence. The effect of the change is probably to remove the efficacy of this defence entirely and deprive defendants of an important protection.
>
> No change is warranted to the present position.

The submission from Young Lawyers argued strongly against the proposed provisions:

> The amendments to the defence of contextual truth (s.21) destroy this defence completely and are the most serious errors in the Bill. The reference to "reputation of the plaintiff" in s.16(2)(c) is replaced by the words "the plaintiff" (not his "reputation"). There are two elements to damages: damage to reputation and hurt to feelings. Under the new section the Plaintiff is not prevented from still claiming these. The "public interest" (again "warranted") is a test no media defendant can ever satisfy, because for some reason they have to satisfy the common law qualified privilege test; s.22 of the present Act was specifically enacted because media defendants (with their large circulations) can never establish the common law requirement of "interest" of each recipient in reading the publication complained of. Other terminology problems in this section include "legitimate concern", "sufficiently wide section of the public".
>
> This section was severely criticised by Mr McClintock and Mr Evatt of the NSW Bar Association at the Free Speech Committee seminar on 22.11.91, and we adopt their objections to these unnecessary amendments. The section should be left as it was.

Ms Judith Walker, for the Australian Broadcasting Corporation expressed concern about clause 21:

> We oppose the addition that the defence will only be available where the publication carrying the imputation was not an unwarranted intrusion upon the plaintiff's privacy.

John Fairfax Pty Limited are concerned about the use of the word "warranted" as used in clauses 20 and 21:

> If the committee supports the retention of the privacy provisions, then Fairfax recommends that the words "the matter was warranted in the public interest" as appearing in clauses 20 and 21 should be deleted and the words "relates to a matter of public interest" be substituted.
>
> The use of the word "warrant" creates a far higher threshold of proof and introduces a new concept into defamation law. It is a higher threshold than the "public benefit" as is now used in the Code States.

Our comments apply equally to the contextual truth defence as set out in clause 21.

The Honourable Athol Moffitt CMG QC raises questions about the different functions of judge and jury as they relate to the contextual truth provision:

> Parallel difficulties arise in respect of a defence of contextual truth (cl 21). Such a defence only arises where the matter published gives rise to two (or more) innuendoes, one true and one false. Defence under cl 21 in respect of the one not shown to be substantially true, depends on the jury finding that its presence did no "further harm" because of the context of the innuendo which was substantially true. For the question of damages to arise the jury must have been unsatisfied that there was no further harm from the innuendo which was false. Again, in such a case, what does the judge do, as asked in (i) above? Technically the issue before the jury and that before the judge, although on the same subject matter, are different, because of the different onus of proof. Under (cl 21) the onus is on the defendant to prove an absence of "further harm" and on damages the onus is on the plaintiff to prove the harm. However, in a practical sense a negative can only be determined by evaluating the positive and on each issue the whole of the evidence must be evaluated to determine the harm done by the innuendo. What does the judge do, if his own view is that the innuendo which was false did the plaintiff no further harm in the context? Does he award nominal damages of $1 on the basis he is bound by the jury's verdict on liability but that on the basis of a different onus he is not satisfied of any damage. To do so may appear to be inconsistent with or overruling the jury's verdict and, on this basis, an unsatisfactory trial. Alternatively does he make a guess of what may have been the jury conclusion or should he explore it by questions? In the latter event, why consistently should he not do so in all cases in relation to further harm or degrees of truth?
>
> Similar, but possibly more complex questions could arise where there is an unsuccessful defence of contextual truth and a "private affairs" issue under cl 21(2).
>
> ... Another case, and one where a jury finding of malice may be concealed, is where in a defence of contextual truth under cl 21, a jury in rejecting the no further harm claim does so on the basis that the innuendo which was false was actuated by malice adding to the harm.
>
> In giving examples where there may be an overlapping of judge and jury decision and internal inconsistency in the court's decision as a whole I do not profess to be exhaustive.

Committee's Recommendations:

(1) the principle of the defence established under s16 of the Act be retained;

(2) the words "does not further injure the reputation of the plaintiff be substituted for "does not further harm the plaintiff";

(3) clause 21 of the bill be amended to delete the word "warranted" from clause 21(2)(b).

For the defence to operate, clause 21 also requires that the publication carrying the imputation not be an unwarranted intrusion on the plaintiff's privacy. Consistent with the recommendation in relation to clause 20 [truth and privacy], the Committee recommends that protection of privacy be covered by separate legislation.

Chapter 6

Division 3 - Clause 23

Absolute Privilege

Many submissions sought clarification of the absolute privilege provisions of the Bill.

Young Lawyers drew the Committee's attention to the English Supreme Court Procedure Report on Practice and Procedure in Defamation (July 1991). The Report made the following point at p. 104:

> There is sometimes uncertainty as to whether the proceedings of a particular tribunal are protected, for the purposes of defamation, by absolute privilege. We think it highly desirably that the answer to this question should always be readily ascertainable. Accordingly, we recommend that there should be a definite list laid down by statute (which would no doubt have to be supplemented from time to time by subordinate legislation).

In New South Wales, Division 3 with Schedule 2 form such a list. The jurisdiction's current provisions are far from uniform and the new bill attempts to remedy this by expanded coverage.

Young Lawyers went on to comment that the opportunity was not taken in Britain to bring certainty into this area of the law.

> Lengthy and complex questions as to whether or not some tribunal is covered or not could be avoided. Disputes of this kind have occurred over rating valuation tribunals (Attorney-General v. The British Broadcasting Corporation [1981] AC 303), mental health tribunals (Pickering v. Liverpool Daily Post and Echo Newspapers PLC [1991] 1 ALL ER 622.

In relation to the Defamation Bill, 1992, Young Lawyers recommended that New South Wales learn from the British experience by taking note that:

> The new Defamation Bill needs to remedy the following defects in this area:
>
> Although answering the problems arising from the uncertainty of the fate of the expanded defences, ... no attempt has been made to include statutes which confer absolute privilege such as s.25 Commissioner of Public Complaints Act 1984, s.64(l) Freedom of Information Act 1989, ss.16,53 Pure Food Act 1908, s.10(4) Special Commissions of Enquiry Act 1983, s.48(2) Judicial Officers Act 1986 and s.68 Victims Compensation Act 1987.

Cl.7 of Schedule 2 (local government) is otiose: see cl.9...

The Legal Profession Act 1987 appears to have been omitted from Schedule 2, and the Medical Practitioners Act 1988 appears to have been omitted from Schedule 3.

S.18 Tribunals (there are six in all) need to be considered. Is there any plan or intention to revoke the relevant sections of these Acts conferring s.18 benefits? If s.18 is retained, an examination of which Tribunals will be covered will be necessary. Why is the Mental Health Review Tribunal (s.6 Mental Health Act 1983) protected, and not the Psychosurgery Review Board (s.155 of the same Act)? This is not as nit-picking as it sounds, for the Mental Health Act 1983 was the result of an enquiry into psychosurgery practices which was sparked by a Channel 10 News report on Rozelle Psychiatric Centre, a report which itself led to defamation litigation.

The Victorian "Official Notices" section introduces an unnecessary complication here, and is capable of misuse, particularly insofar as it may relate to recall of products, statements by police or government department imbroglios with private citizens. This really is an attack on free speech - imagine if such notices had been used in the Harry Blackburn case. The insertion of a blanket "official note" section may overlap the existing provisions. Will official notices for product fault give rise to a defence to injurious falsehood, and what if the notice is issued on the basis of false information? This whole issue needs more careful consideration.

The recommendation of the 1971 NSW Law Reform Commission on the extension of qualified privilege should be read with caution as it was prepared at a time when the disastrously inadequate 1958 Act was in force (the qualified privilege sections of this Act were the most vilified parts of the legislation - see Fleming on Torts 5th Edition 1987 at p. 500ff.).

It its submission, the Communications Law Centre gave support for the extension of the defence of privilege to local councils, currently areas of uncertainty in New South Wales, but went on to argue:

> We note that the intended Victorian legislation does not refer to specific Acts but has an all encompassing provision giving protection for any tribunal or committee, etc constituted under an Act. This appears to the Centre to be a more sensible way to go, in the event that any specific tribunal is not specified. Again, it is preferable to have uniformity between the States, particularly as the differences are not great, and we urge the Committee to consider adopting the Victorian provision for the sake of uniformity.

In its submission, News Limited raised some concerns about the absolute privilege provisions:

> Section 29 protects a "fair" report of "proceedings of a kind specified in Schedule 2". Section 30 protects the publication of "a document of a kind specified in Schedule 3 or a copy of such a document" and "a fair extract, abstract of summary of such document". Such publications will nevertheless lose protection if it is shown that they are not "in good faith for public information or the advancement of education". (Sec tion 31)
>
> The draft Bill's Schedules widen the present NSW protection in that they include Company meetings (Schedule 2 Section 9) and Local Council proceedings (Sch 2

Section 7). They also protect "proceedings" as distinct from merely "findings" of various associations etc.

The requirement that a publication must be made in "good faith" in addition to being "fair" has been dropped.

However, protection is specifically denied to reports of the proceedings of "exempt proprietary companies" and "foreign companies". This is unfortunate because the activities of many such companies are frequently associated with the activities of public companies e.g. recently in connection with various Bond and Skase companies. Such companies, as the law is proposed, can thus be used to screen illegal activities associated with public companies. The matter could be cured by providing for protection where the activities of such private or foreign companies are associated with or relevant to the activities of public companies.

The Law Society of New South Wales argued that provisions be expanded to include the various proof stages of parliamentary debates, recommending that absolute privilege be extended to all publications and papers lodged with any Parliament of Australia, Courts, Public Inquiries etc. similar to the affairs of those bodies covered by s. 25 and Schedule 2 of the New South Wales Act.

The Committee is of the view that extending absolute privilege to all publications and papers lodged with any Parliament of Australia, Court, Public Inquiries etc could be too broad, as it would include any material produced in relation to a subpeona, even if not produced or referred to in court. The "Metherell Diaries" could be included in this wide provision.

The Australian Press Council also suggested that the term "Proceedings of Parliament" be widely defined to cover doubtful areas, and requested that proceedings of the Press Council be specifically added to Schedule 2, Protected Reports of Proceedings.

Mr Russell Grove, Clerk of the Legislative Assembly, briefed the Committee on his concern that the new Bill did not eradicate the uncertainties regarding protection of all aspects of a Parliamentarian's work in representing constituents or when taking part in Parliamentary committee proceedings.

Anything said in Parliament by a member is protected against action in defamation by absolute privilege, based on the principle that they should be able to speak absolutely freely, without fear of court action. However, this privilege has been tightly restricted to the actual proceedings in Parliament, including the evidence of a witness before a House of Parliament or a Parliamentary committee. Excerpts, or reports of parliamentary proceedings only attract qualified privilege, as provided under Division 5 and clause 2 of Schedule 2 of the 1974 Act, which is largely restated in Division 5 and Schedule 2 of the Bill.

Clause 23 of the Bill in conjunction with Schedule 1 gives protection against action in defamation to publication of a document by order or under the authority of a parliamentary body. Whereas section 17 of the 1974 Act gives a defence of absolute privilege for the publication and republication of "debates and proceedings of either House or both Houses of Parliament", the new Bill specifies that the protection extends to reports of the debates and proceedings of the House or any committee of the

House, or of a joint sitting or of a joint committee, and reports of individual complete speeches of members (provided that they are certified and authorised by the Presiding Officer), proofs of reports of debates and proceedings, and audio recording or transcripts of audio recordings.

Clause 23, and Schedule 1, also purports to give a defence of absolute privilege for a publication "in the course of an inquiry made under the authority of either House or both Houses of Parliament.

The Bill is thus an improvement on the former Act in that it clearly protects Hansard galley proofs and copies of Members' speeches which are authorised extracts of Hansard reports.

However, the Bill is ineffective in that it fails to define what constitutes a "proceeding" of Parliament, or how far the "course of an inquiry" extends with the result that members taking part in committee work are unable to properly investigate matters before them free from the fear of potential action in defamation. By contrast, the Parliamentary Privileges Act 1987 (Commonwealth) provides in section 17 that for the purposes of the Act, the Presiding Officers may certify as to whether any of the following are proceedings:

(a) a particular document prepared for the purpose of submission, and submitted to a House or a committee;

(b) a particular document directed by a House or a committee to be treated as evidence taken in camera;

(c) certain oral evidence taken by a committee in camera; and

(d) a document not published or authorised to be published by a House or a committee;

In New South Wales, if one of the committees having a statutory function to monitor and review the exercise by a body such as the I.C.A.C. of its functions, or of the Office of the Ombudsman, receives a submission and wishes to refer it to either of those bodies for comment, neither the Act nor the Bill extends absolute privilege to the Committees' action in referring the document. This impedes the Committees' ability to properly fulfil their statutory duties, and should be rectified.

The Clerk recommended that the Bill should more clearly define the scope of Parliamentary proceedings and the "course of Parliamentary inquiries".

One means of doing this might be to adopt the provision contained in the Commonwealth Parliamentary Privileges Act 1987:

> 'that, for the purposes of that Act, "the submission of a written statement by a person to a House or committee shall, if so ordered by the House or the committee, be deemed to be the giving of evidence in accordance with the statement by that person before that House or committee" (s3(3))'.

The Law Council of Australia takes the view that the absolute privilege of parliamentary proceedings is a fundamental requirement of a democratic society, but submitted:

> ... that it is desirable that it be made clear that the defence of absolute privilege in respect of defamatory matter published in the course of parliamentary proceedings be strictly confined to statements or other matter published during the course of those proceedings. Members of Parliament should, in referring outside a chamber or committee of the Parliament to matter published in the course of parliamentary proceedings, be taken to be republishing in circumstances in which absolute privilege is not available.

The Law Council went on to argue that the term "proceedings in Parliament" should be defined. It does not support the adoption of the definition of "proceedings in Parliament" contained in Section 16(2) of the Parliamentary Privileges Act 1987, which it considers to be open to interpretation.

The Australian Securities Commission also recommended that the Bill be amended to include the Commission as a specified body in Part 2, Schedule 2.

> In relation to documents publicly available for inspection kept by the Commission in pursuance of legislation, the Commission would presumably fall within the provisions of Schedule 3 of the Bill providing it with the defence of qualified privilege for "official and public documents".

Mr Thorley, Chairman of the Police Board, asked why protection was limited to documents which are open to inspection to the public. He argued:

> This Board operates under secrecy provisions and would claim that its documents are exempt from discovery under the Freedom of Information Act. However, its documents must have a wider circulation. It is possible that there could be said to be defamatory matter in some of them, e.g. suggestions of a lack of integrity. I wonder why this Board is not given an absolute defence.

Committee's Recommendations:

It is the view of the Committee that the Australian Securities Commission, as an investigative body, is entitled to a statutory form of privilege as sought, however, the Committee is limited in the recommendations it believes it should make by the evidence put before it. To avoid a charge of "ad hocery" and to ensure the formulation of a comprehensive policy encompassing all who should be entitled to protection, the Committee recommends that a full assessment of the absolute privilege provisions be undertaken by the Law Reform Commission. In that way, public and private bodies will know their relative rights to protection.

The Committee recommends that, in its assessment, the Law Reform Commission examine the position in relation to absolute privilege for exempt proprietary companies and foreign companies where the activities of such private or foreign companies are associated with or relevant to the activities of public companies.

The Committee also recommends the clarification of absolute privilege as it relates to Members of Parliament. The Committee endorses the recommendations made by Mr Russell Grove, Clerk of the Legislative Assembly, in relation to adopting the provision of the Commonwealth Parliamentary Privileges Act 1987.

The Committee does not accept that the claim for absolute privilege for the Police Board should be recommended. They are not analogous to the Police Tribunal, which is the quasi-judicial arm of the Police Service. Granting the right to a purely administrative body would go beyond anything already granted.

Chapter 7

Part 3 - Defences

Division 4- Clauses 24 - 28

Qualified Privilege

> The common law of qualified privilege gives effect to a policy that there are certain circumstance or situations in which the public interest requires that people should be able to speak or write freely and given protection by the law if in doing so they make defamatory statements. The privilege conferred on such statements is "qualified" because of the requirement that the person who makes them must act honestly and without any indirect or improper motive.
>
> Under the common law a statement attracts qualified privilege if it is made in the performance of any legal, moral or social duty, to a person having a corresponding interest or duty to receive it. The courts have declined to recognise a duty-interest relationship between a newspaper and its readers sufficient to support qualified privilege, even on matters pertaining to the public interest, except in very limited cases such as a reply to a public attack.
>
> Special statutory forms of qualified privilege have been enacted to extend protection to publication of material on a matter of genuine public interest.

Discussion Paper on Reform of Defamation Law - Attorneys General of New South Wales, Queensland and Victoria

Qualified Privilege and the Question of Uniformity

If the primary aim of the Defamation Bill, 1992 is to introduce uniform defamation legislation in New South Wales, Victoria and Queensland, the Committee is concerned that uniformity will not be possible as far as the defence of qualified privilege is concerned.

Assistant Professor Mark Pearson, Co-ordinator of Journalism Programs, Bond University, described the qualified privilege provisions as the "smorgasbord of qualified privilege provisions" and concern was expressed that "Inter-jurisdictional variations in the interpretation of the section could render the defence even more complex than it is now".

The submission also drew to the Committee's attention:

> The defence of qualified privilege presented the Attorneys with their greatest challenge and resulted in three different solutions in New South Wales, Queensland and Victoria.

> ... Victoria retains the common law defence plus the new section, New South Wales offers the common law defence as well as a revamp of its old s. 22 defence plus the new section, while Queensland boasts the common law defence, a repeat of its former s. 377 defence and its new s. 27.

Qualified Privilege under the Defamation Act, 1974

The Committee is also concerned that the qualified privilege provisions in the Defamation Bill, 1992 will not fulfil the aims as agreed to by the Attorneys General of New South Wales, Queensland and Victoria.

In its submission, the Bar Association of New South Wales made the following points on the defence of qualified privilege as it applies under the present law governed by the Defamation Act (1974) and as it is proposed under the Defamation Bill, 1992.

> The defence of qualified privilege as set out in the Bill retains the present defences of:
>
> (a)common law qualified privilege, and
>
> (b)statutory qualified privilege for publishing certain information.
>
> For example, Clause 27 ("Information") preserves the present statutory defence under Section 22 of the Defamation Act.
>
> As experience has shown, section 22 has not achieved the extent of protection to a publisher originally contemplated by the legislature. In general, the difficulty of the media defendant at present is that if it publishes a defamatory imputation unintentionally and, presumably, without belief in its truth, the Courts have held that such conduct in publishing the matter was not "reasonable in the circumstances" as required by Section 22 (1) (c).

The Law Council of Australia expressed the following concerns about the present s22:

> The statutory defence provided in s.22 of the New South Wales Defamation Act, 1974 has received much judicial consideration. The Discussion Paper claims that as interpreted by the courts, s.22 places equal emphasis on the defendant's state of mind as on the nature of the material, and that the defence provides a means whereby the public interest in being informed can be promoted, while avoiding injustice by ensuring that the defence only applies when the conduct of the publisher is careful and honest.
>
> At first sight, the statutory defence appears to provide real flexibility and wide protection to the media. As was noted in the Privy Council decision of Austin v. Mirror Newspapers Limited (1985) 3 NSWLR 354 at 360:
>
> > ... in considering whether the conduct of the publisher is reasonable the court must consider all the circumstances leading up to and surrounding the publication. These circumstances will vary infinitely from case to case and it would be impossible and most unwise to attempt any comprehensive definition of what they might be.
>
> Yet, in the same decision and on the same page as the above, the Privy Council exposed the weakness of the statutory defence which has been highlighted in subsequent decisions. The Privy Council stated:

> A newspaper with a wide circulation that publishes defamatory comments on untrue facts will in the ordinary course of events have no light task to satisfy the judge that it was reasonable to do so.

At this level, it would seem that a publisher would almost be required to establish the truth of its publication in order to prove reasonableness.

Similarly, judicial interpretation has required a publisher to make extensive enquiries prior to publication, and as Queensland observes in the Discussion Paper, this requirement in some cases has come close to requiring a publisher to establish the truth of its publication in order to prove reasonableness.

Most significantly, because of the onus of proof placed upon the publisher under the statutory defence, the publisher has generally been required to establish that it (honestly) believed in the truth of what it published. The courts have consistently held that, except in an unusual case, a newspaper is very unlikely to succeed with the statutory defence unless it calls its journalist to reveal both the nature of the information which he or she possessed at the time of the publication and its source and in most cases to assert his or her belief in the truth of what was published: see Coguangco (No. 2) unreported judgment dated 6 January 1989 (Hunt J), and Barbaro v. Amalgamated Television Services Pty Limited unreported judgment dated 21 July 1989 (NSW Court of Appeal). Of course, it has been said that there is no inflexible rule that a publisher must call evidence of honest belief but as can be observed from the cases, it would be extraordinary if the defence was established without this happening.

The criticism, that there is an over emphasis placed upon truth in relation to the statutory defence, is one not so much of the wording of the defence but more the interpretation by judges who seem wedded to the common law notion of malice in determining whether a publication is reasonable. As presently interpreted, the defence requires the publisher not merely to show that it has acted reasonably but also that it has acted without recklessness or deceit.

In an attempt to overcome these restrictions and suggest a modification to the defence, some have proposed that the current test of reasonableness be replaced with a requirement that the publisher have a reasonable belief in the truth of the matter published. The Law Council queries whether this would provide any improvement upon the existing situation and indeed submits that it may even impose a harsher requirement. At present a journalist may honestly believe in the truth of the matter published and may be entitled to protection; but under the proposed requirement, his or her honest belief would not be sufficient unless it was also reasonable.

The difference between a belief which might honestly be held and that which might reasonably be held may be substantial. This difference has been recognised in relation to the common law defence of fair comment and in the statutory defence of comment in New South Wales: Sims v. Wran (1984) 1 NSWLR 317 at 325, and Turner v. Metro-Goldwyn-Mayer Pictures Limited (1950) 1 All ER 449 at 461. It was there observed that the introduction of the concept of reasonableness in place of that of honesty imposes a far greater burden upon the defendant in establishing a defence of comment. In any case, the Law Council makes the same criticism in relation to reasonable belief in the truth as it has made above in relation to honest belief in the truth.

The majority of submissions argued that s22 of the current Act is ineffective, but expressed concern about **Division 4 - Qualified Privilege** and particularly about

clauses 25 and 27 of the Defamation Bill, 1992. Many advised that clause 25 would need significant redrafting to make it workable.

Ms Judith Walker, representing the Australian Broadcasting Commission, wrote in her submission:

> [Current] qualified privilege defence... has not, in practice, increased protection for the media, given the narrow interpretation by the courts of the requirement of "reasonableness".
>
> It is doubtful if the proposed new qualified privilege defence will improve the position for a media defendant. The requirement that the defence is only available if the defendant establishes, inter alia, that the publication was made "after appropriate inquiries"probably means that, as for s22, a defendant will only be able to rely on this defence if it is prepared to disclose its sources. More serious for a defamation defendant is the provision that, even if the defence is made out but the court decides that "any statement" is false, the court may order the defendant to publish a reply approved by the court or by a mediator appointed by the court. ...It is unclear if it includes opinion as distinct from a statement of fact and apparently applies even if one "statement" amongst many is held by the court to be false. The public perception of such a reply will be that the defendant generally "got it wrong".

In her evidence before the Committee, she stated:

> As you are probably aware, there has only been one successful action in New South Wales under the current provisions—and that was very unusual to say the least.

In his submission, Mr Peter Bartlett, solicitor, examined the effectiveness of s22 of the current New South Wales Defamation Act:

> The New South Wales provision was aimed at improving the common law. In theory, s22 increased the protection afforded to the media by the insertion of a "reasonableness" test instead of the duty and interest requirement of the common law.
>
> Narrow interpretation by the courts of the "reasonableness" requirement has effectively denied the availability of qualified privilege as a defence for the media. This tight interpretation was openly articulated by the Privy Council in Austin v Mirror Newspapers Limited (1985) 3 NSW LR 354 at p.360:
>
> > A newspaper with a wide circulation that publishes defamatory comments on untrue facts will in the ordinary course of events have no light task to satisfy the judge that it was reasonable to do so.
>
> Publishers have the onerous responsibility of proving the reasonableness of the publication. In certain circumstances the courts have made a publisher's honest belief in the truth of the statement a necessary component of the defence. Not surprisingly, only two cases since the introduction of this Act in 1974 have successfully pleaded this defence.
>
> ...Though touted as a significant move towards freedom of speech and for the first time opening up qualified privilege to the media, I doubt that in reality the defence will make very much difference to the present interpretation of s22 of the New South

Wales Act. The defence will only succeed if it is shown that the reporter has made appropriate inquiries. As for s22 (to prove that the reporter acted reasonably), it is difficult to see that the media can succeed in the new defence, unless they are prepared to disclose their sources. The defence will however be useful where sources are not at issue.

The Law Institute of Victoria made the following comments on s22 of the current New South Wales Act and set out their recommendations for uniform qualified privilege provisions:

> The outstanding problem with the common law defence has been the refusal by the courts to recognise that there can exist between a media outlet and the public a relationship sufficient to provide an occasion of qualified privilege.
>
> Unfortunately, this problem has not been overcome by the statutory defence in NSW. The way the "reasonableness" requirement has been interpreted has effectively denied the defence to the media. Although the defence was successfully relied upon by a newspaper in [Morgan's] case, this case goes against the trend of decisions in NSW, and has not, in any case, survived appeal.
>
> In the Institute's view, the NSW statutory defence, with appropriate modifications, could form the basis for a uniform defence. The major modification required is that the "reasonableness" test should be made less onerous on publishers.
>
> A suggested means of doing so is to replace the current test with a requirement that the publisher must have a "reasonable belief in the truth of the matter published". The question... is adequately covered by section 20(3) of the NSW Act.
>
> A "reasonable belief in the truth" test would still protect the public against unreasonable behaviour by the media. It would, however, make it easier for the media to predict whether a publication would be covered by qualified privilege, and, it is submitted, allow freer public debate on issues of importance than does the current law.
>
> The Institute is aware of the possibility, alluded to by the ALRC in paragraph 142 of its report, that rare cases may arise where qualified privilege should protect the communication of information which a person actually believes to be untrue. It may be, therefore, that the best solution is not to substitute a "reasonable belief in the truth" test for a "reasonableness in the circumstances" test, but to make the former an alternative to the latter.
>
> The Institute believes that the NSW Act's failure to define "interest" is the correct approach.

Clause 25, Defamation Bill, 1992

The Honourable R.G. Reynolds, AO QC, expressed concerns about the proposed clause 25:

> As to clause 25, I do not think sub-clauses (2) and (3) should remain in the Bill and that the Bill would be better without the use of the phrase "appropriate enquiries". What is relevant (apart from any exclusionary rule of evidence) is a question of whether it is logically probative of a fact in issue. If a fact or circumstance is logically probative, the sub-clauses have no operation and are unnecessary. If not, the tribunal of fact has to engage in a mental exercise uncontrolled by reason.

Again, the submsission from the Communications Law Centre, argued:

> It is difficult to see what, if any, practical effect the proposed reforms will have on the current position in New South Wales. A further problem with the defence is the circular wording of clause 25 of the Bill. For example, sub clause 25(3) provides that a relevant factor in deciding whether the matter was published after appropriate inquiries is whether the relevant person was given an opportunity to comment, unless such a course of action was inappropriate.

The Bar Association of New South Wales made the following observations:

> The major change to qualified privilege is the addition of a new statutory defence (Clause 25) for a publication related to a matter of public interest, made in good faith, and made after appropriate inquiries. In cases where the defendant makes out the defence it may be ordered to publish a reply where the matter (but not any imputation conveyed by it) is determined by the Judge (not the jury) to be false. This new defence may be seen as intended to overcome some of the problems for media defendants encountered when relying upon a defence under the present Section 22.
>
> The inclusion of a requirement in the Bill for appropriate inquiries to be an element in making out the defence, and any false statement (not any false imputation) conveyed by the matter to be subject to a right of reply at the Court's discretion is obviously intended to extend the protection available to defendants, and in particular to the media. Thus the clause may protect false defamatory statements in circumstances where (in addition to the public interest and good faith requirements) the publisher has made a conscientious effort to ascertain the facts prior to publication.
>
> Much is said about the need to protect "investigative journalism". Presumably this means the publication of matters of public interest which have been seriously researched, and which are presented bona fide by the publisher (eg. newspaper or television licensee) to its public. Usually such reporting canvasses both sides of an issue. Even in cases where it offers no concluded view, there is usually an imputation which will arise against one or other of the persons criticised in the report. Clause 25 might protect a defendant in a situation where a defamatory imputation arises in such circumstances, although it proves to be false and the publisher, acting in good faith, did not intend to convey that imputation.
>
> The Bar Association takes the view that Clause 25 attempts to introduce a new defence of qualified privilege of particular relevance to the mass media. It appears to be directed to protect the publication of false defamatory matter, and to provide a remedy (the right of reply) for untrue statements where the defence is made out. However, the clause as drafted is so confusing that it may not achieve its purpose. This confusion arises from the failure to clarify what is meant by each of the words "matter", "imputation", and "statement" where appearing.
>
> It follows that it fails to give a right of reply to false imputations as well as to false statements. Such a result may be assumed to be unintended but is one which is likely to undermine its purpose.
>
> In addition, the Bar Association is of the view that the jury, rather than the Judge should decide whether the statement and any imputation is false in order to avoid inconsistencies between jury findings (such as in a defence of justification) and a Judge's findings of fact. An issue of this kind, of course, is one entirely appropriate for determination by the jury and should be left to it.

Clause 27, Defamation Bill, 1992

Most submissions received argued that clause 27 of the Bill would cause confusion. Both the common law and clause 27 require the plaintiff to establish that the publication was actuated by malice. There is a belief that defendants will inevitably plead both statutory defences relating to qualified privilege (i.e.clauses 25 and 27) together and that the different terminology, the different onus and the different functions are all certain to produce confusion at the trial. The wisdom of changing terminology (unless a different meaning is intended) and having different onuses upon the same issue have been questioned.

A number of submissions commented on the difficulties media organisations would experience in relation to failure to disclose confidential sources of information.

In its submission, the Law Society of New South Wales highlighted the problems:

> An important issue which has not been addressed in the bill relates to the media defendant's confidential sources of information. It was submitted by the Society that harm to the plaintiff is caused by media publication and not by a confidential source communicating with the media - vide the Society's submissions on Discussion Paper No 1, page 10, paragraphs 4 and 5. The practical effect of the High Court's decision in Coguangco's case [1988] 82 ALR is that the media defendants who have confidential sources may be denied claiming the defence of qualified privilege because to do so would ethically compromise the defendant by exposing its confidential sources to litigation. This is an issue which requires careful consideration.

The submission from John Fairfax Group Limited expressed similar concerns:

> The defence under clause 25 and clause 27 will inevitably fail if a defendant is unable to name its sources. We recommend that legislation be considered to protect defendants or witnesses from being forced to disclose their sources, even though the court considers that the naming of the sources is relevant to the issues before the court. Failure to disclose the sources would be taken into consideration by the judge in considering the effectiveness of the defences under clauses 25 and 27, but would not open the witness to proceedings for contempt of court.
>
> Clause 27 repeats the present s22 of the NSW Defamation Act. This defence has rarely been successful, partly because of the difficulty relating to sources, but also because of the difficulty of proving that the publication of defamatory imputations was reasonable in the circumstances. (The defence only comes into effect if a jury has found that the imputations pleaded arise and are defamatory of the plaintiff.)
>
> We recommend that the clause be amended to ensure that the judge, in considering clause 27(a) (c), should take into consideration the reasonableness of publishing the matter carrying the imputations, not the imputations found to have arisen.

Mr Alister Henskens, solicitor, in his submission to the Committee also discussed the problems relating to disclosure of confidential sources:

> A further amendment is necessary to this section (clause 27) to address the High Court decision in John Fairfax & Sons v Coguangco (1988) 82 ALR. In Coguangco's Case, the media defendant pleaded a defence identical to section 27 of the Bill. Because the Plaintiff considered that the Defendant may succeed under (clause) 27 (that is, the Statutory Defence achieved the intended result of Parliament, which is to allow the media to freely publish material in a reasonable manner), the Plaintiff then sought an Order of the Court to demand that the media defendant disclose its confidential sources so that the Plaintiff could commence an action against the Defendant's sources. This circumvention of (clause) 27 was ultimately approved by the High Court of Australia,
>
> The practical result of Coguangco's Case is that media defendants who have confidential sources may be denied from claiming the [clause 27] defence because to do so would ethically compromise the journalists of the Defendant by exposing their confidential sources to litigation contrary to their assurances to their sources. Harm to a Plaintiff is caused by media publication and not by a confidential source communicating with the media. Some provision should be inserted in the uniform law to prevent Plaintiffs commencing actions against the confidential sources of the media, purely in respect of publications made by a media defendant. The law should circumvent Coguangco's Case by forcing the Plaintiff to sue the appropriate Defendant which, in the case of mass distributions, is the media publisher.

Ms Wendy Bacon, lecturer in law, also drew the Committee's attention to the question of confidential sources:

> There is no provision which would allow journalists who cannot name their sources to go into the witness box without risking contempt of court. In my experience this is the single most important reason why publishers who have acted reasonably do not pursue actions. This is also an important reason why publishers do not use the Section 22 defence of qualified privilege more frequently. Tinkering around with that defence will not help this fundamental weakness in the current position. Why not have the situation which exists in some jurisdictions in the United States in which a journalist can refuse to name a source. It is then up to a jury to assess the reasonableness of their conduct.

A related key factor to be determined is whether or not the statutory defence of qualified privilege should require the defendant to prove an "honest belief" in the truth of what he or she published.

In examining the proposed clause 27, the Committee's attention was drawn to S377(5) of the Queensland Criminal Code (which existed as s17(e) of the New South Wales Defamation Act 1958). This section provides a statutory qualified privilege for a publication made in good faith (the absence of which the plaintiff must establish) for the purposes of giving information with respect to which the persons to whom it was ~~published had (or were believed by the defendant on reasonable grounds to have had)~~ such an interest in knowing the truth as to make the defendant's conduct reasonable under the circumstances.

Section 17(e) read as follows:

> It is a lawful excuse for the publication of defamatory matter if the publication is made in good faith -

> for the purpose of giving information to the person to whom it is made with respect to some subjects as to which that person has, or is believed, on reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make his conduct in making the publication reasonable under the circumstances;

In New South Wales the defence was not often used by defendants because it was generally believed that a defendant had to establish the truth. In Calwell v. Ipec Australia Ltd (1975) 135 CLR 321, the defendant succeeded upon such a defence and attention was given to the possibilities of this defence; however, the 1974 Act had, by that time, come into effect.

Under s377(5) of the Queensland Criminal Code (s17(e) of the New South Wales Defamation Act 1958), the defendant does not have to establish a belief in the truth of what he published, as he does under s22 of the 1974 Act. The common law concept of malice would be applicable to this defence (rather than the definition of absence of good faith in the Queensland Code, which produced problems in practice when part of the 1958 Act), and the plaintiff must generally establish the absence of such a belief. There is accordingly no obligation upon a media defendant to call the journalist (when he will usually be required to reveal his sources) - although, of course, if the plaintiff has given evidence tending to establish such an absence of belief on the part of the journalist, unfavourable inferences may be drawn from the defendant's failure to call the journalist. That, however, is only reasonable where the defendant wishes to avoid disclosing sources. The important distinction between s 377(5) and s22 is that the reasonableness of the defendant's conduct in the former is directed only to the extent of the reader's interest; it is not, as it is in the latter, directed to the journalist's belief in the truth. The journalist is, accordingly, not obliged to disclose his or her sources. The strength of the defence is shown by the way that the High Court construed it in Calwell's Case.

The Law Council of Australia commented on the codified defence of qualified privilege as it applies in Queensland:

> The Queensland Code defence provides a number of specific categories to which the defence applies. The benefit provided by specific categories is that the media has a check list of relevant criteria which it can readily identify for the purposes of protection. The objections to the Code defence are that it does not provide the flexibility required to meet changing circumstances and that it is an unknown quantity in that it has not had the same extent of judicial consideration as the common law defence or the New South Wales statutory defence. For example, the meaning of 'public benefit' may be more restrictive than 'public interest'. Nonetheless, the High Court decision in Calwell v. Ipec (1975) 135 CLR 321, in which the publication on a matter of public interest was protected, leads the Law Council to the conclusion that the Code defence should be retained at least by Queensland.

At the hearings of 27 April, 1992, the Chairman sought the opinions of Ms Judith Walker, Australian Broadcasting Commission, and Mr Graham Bates to suggestions that s377 of the Queensland Code (s17(e) of the 1958 New South Wales Act) be incorporated in proposed new defamation legislation.

CHAIRMAN: I address a question on the old qualified privilege section to both of you. When looking at the reporting of public interest matters, we have received some submissions that point to the value of the old section 17(e) of the 1958 Act, which has been retained in Queensland as section 377 of their Criminal Code. That section gives a "defence by reference to the test of 'good faith, public interest and public benefit'". Prior to the introduction of the new Act, this defence was effective in Calwell's case. Ms Walker, do you consider that this type of defence would be valuable in the new Bill?

Ms WALKER: Yes, indeed. We would certainly prefer section 377 of the Queensland code to either the current qualified privilege defence in New South Wales or the proposed defence.

CHAIRMAN: Mr Bates, what is your opinion?

Mr BATES: I have had experience of these sections of the 1958 Act, and I found them to be very useful and effective.

CHAIRMAN: Ms Walker, are you familiar with the old section 17(h)?

Ms WALKER: I am familiar with the Queensland code.

CHAIRMAN: You might look at that section. It is probably similar to the Queensland code.

Ms WALKER: Yes.

CHAIRMAN: I understand that under the old section 17(h) the journalist did not have to disclose his sources, the onus being on the plaintiff to establish absence of belief in the truth. Could you comment on the effectiveness of that section and whether it might be incorporated in the new legislation?

(Section 17(h) read:

> "It is a lawful excuse for the publication of defamatory matter 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 and if, so far as the defamatory matter consists of comment, the comment is fair.")

Ms WALKER: That section would be much more effective than the current defence. As you are probably aware, there has only been one successful action in New South Wales under the current provisions—and that was very unusual to say the least. There has been a fairly recent decision in Queensland, namely Purvan v. North Queensland Newspapers. I do not know whether it has been reported yet. It was decided by the Supreme Court on 22nd July last year. It upheld the provisions of section 377(8), which under the old New South Wales legislation would have been section 17(h). I am sure that the Australian Broadcasting Corporation would welcome any addition to the legislation such as that, particularly the onus being on the plaintiff to prove a lack of good faith and there being a protection of sources.

CHAIRMAN: Mr Bates, do you have any comments on that?

Mr BATES: I support what Ms Walker says. Under section 18 of the 1958 Act, the burden of establishing a lack of good faith was clearly placed on the plaintiff in a defamation action. That allowed the defence to succeed without it being necessary for the journalist to get into the witness box or give evidence as to his sources. If the plaintiff succeeded in raising a prima facie case of lack of good faith, it may be that the journalist would have to consider whether he would get into the box to rebut that evidence, but that decision was entirely for him. The section was still there to protect him.

In his evidence to the Committee, Mr Bruce McClintock used examples to illustrate concerns he felt with the adoption of "tests" such as those used in s377 of the Queensland Code.

Mr McClintock: The first one related to the reference to section 377 of the Queensland Criminal Code and the suggestion that there be adopted what is really a good faith test, I presume in substitution for the reasonableness test that exists now under section 22 of the current Act. While I was waiting I in fact drafted an amendment to section 22(1)(c) of the current Defamation Act to incorporate that, which if you are interested I can give you.

CHAIRMAN: Yes, certainly.

Mr McCLINTOCK: One can simply do it by substituting for what is now in section 22(1)(c) the words "the publisher, in publishing that matter, acted in good faith". That would achieve, given what is already in the rest of section 22, what is in section 377 of the Queensland code and used to be in the 1958 Defamation Act. But having said that, as I have listened, I think I would be opposed to the adoption of any such test. I shall give an example to illustrate why. I will try and make the example as anonymous as possible. Obviously you realise it comes from my professional practice but some time ago I acted for a media organisation which accused a man from the western suburbs of murdering a two-and-a-half-year-old child and a one-and-a-half-year-old child. There was no doubt in my mind at the time that the particular media organisation, the responsible employees, believed that that man had murdered the two small children. However, the relevant journalist relied upon the word of the man's de facto wife, who was retarded, and also upon the word of two very eccentric people to whom the man had said something. What he had actually said is that he felt responsible for the deaths of the two children in the particular circumstances, not that he had murdered them but that had been interpreted by the journalist as an admission of murder.

I find it hard to imagine a greater example of journalistic carelessness than to rely upon the word of a retarded person without checking with the person in question and to then publish an allegation as serious as that, which obviously caused a great deal of personal distress to the man in question because the two children were his own children and, also, I have no doubt did unbelievable damage to his reputation in the community where he lived. If one adopted a good faith test the media organisation in question would have been able to defend that case because good faith only means that you act honestly and there was no doubt they acted honestly, even though, as I said, they acted with what I would regard as gross carelessness in the circumstances. It seems to me that there is a very large number of cases where ordinary citizens ought to be protected from media excesses such as that, even though the media is in fact acting in good faith, as the Queensland section says.

I can think of another example that readily comes to mind also of a journalist in a small trade magazine circulating amongst a particular section. It probably does not matter if I describe the group. It was a trade journal directed towards pharmacies where a journalist published an allegation of perjury against the head of a company that sold materials to pharmacies, a particular product, without checking with the subject of the remarks. Again, no doubt the journalist in question believed the allegation of perjury and so was acting in good faith, but again I would have thought to make an allegation such as that without giving the particular person the right to respond is a good example of carelessness that could do a great deal of damage to the person, given the specificity of the circulation of the journal in question.

For those reasons I would be very concerned and probably very opposed to the adoption of a test such as that. It seems to me to give the media far too much undeserved protection. I do not know if there are any questions arising out of what I have said about that, but if not I will move on to the public figure test which, having had some experience of practice in the United States, once again I would be opposed to—

CHAIRMAN: Perhaps before you move on I might put this to you: I guess what was behind that question was that consideration be given to reintroducing a defence provided by section 377 of the Queensland Criminal Code or what was the old section 17(e) under the 1958 Act, and that was in lieu of the much-criticised clause 25 of the draft bill. Correct me if I am wrong, but that defence was not used, mainly because of an erroneous assumption on the part of those who

advised the media that defendants would have to establish truth. But it was not until Calwell's case that it received more serious attention, by which time the 1974 Act had come along.

Mr McCLINTOCK: Yes. This might horrify Committee members, but I was still at law school when the 1974 Act was passed, so I never had any personal experience of practising under the old Act. I do know that there were some misconceptions about that Act and I think what the Chairman has said is an example of that.

CHAIRMAN: An example of misconception?

Mr McCLINTOCK: Yes, an example of misconception existing prior to Calwell's case.

CHAIRMAN: Not my misconception.

Mr McCLINTOCK: No, and I was not suggesting that. I am not sure I have answered your question.

CHAIRMAN: Yes, and you have explained why you do not think that would be an appropriate compromise.

Mr McCLINTOCK: Yes. That is not to say, though, that section 22 of the current Act does not need some addressing. I am very much in two minds about what needs to be done with it. The problem comes about not so much because of the drafting of the section but because of judicial interpretation. In the course of the last week, in a defamation case I am currently involved in which is continuing in the Supreme Court, I have had to look at that again. I am really quite unable to say what the section now means and I am quite unable to understand how any working journalist could operate so as to fit within it, given what happened in Morgan v. John Fairfax, which Mr McGuinness would remember well, being referred to without being named.

Messrs T. K.Tobin QC and M. G. Sexton, Barristers-at-law, provided the Committee with their views on s22 of the present Act and clause 25 of the proposed legislation in relation to s377 of the Queensland code:

> This section may be compared with section 377(5) of the Queensland Code which provides protection for publications made in good faith for the purposes of giving information to persons having such interest in knowing the truth as to make the defendant's conduct in publishing reasonable in the circumstances; and Section 377(8) which provides qualified protection for publication 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 interest. It should be noted, however, that a publication is only made "in good faith" under the Queensland Code if a number of requirements are satisfied, including the requirement that the publisher does not believe the defamatory matter to be untrue. Clause 25 of the Bill, provides there is a defence of qualified privilege for a publication if it is established that the publication:
>
> (a) related to a matter of public interest;
> (b) was made in good faith;
> (c) was made after appropriate enquiries.
>
> ...One relevant factor on the issue of appropriate enquiries is whether the publisher gave the plaintiff an opportunity to confirm or deny the truth of any statement made or imputations carried by the publication prior to the publication (unless this course would have been inappropriate).
>
> It must be doubted whether this proposed provision will significantly alter the position of plaintiffs or defendants as they exist under Section 22 of the Act.

Section 22 has been interpreted as generally requiring a defendant to establish an honest belief in the truth of the material published. It has already been noted that the Queensland requirement of good faith entails essentially the same element. (This is to leave to one side cases where the publisher has a duty to report defamatory matter without the need to form a belief either way as to its truth, or even believing it to be false. Thus a teacher may pass on to a headmaster an allegation made against a pupil by the parent of another child. The teacher may not believe the allegation, indeed may even believe it to be false, but remains under a duty to report it. In such circumstances the belief of the teacher does not really diminish the reasonableness of his conduct.)

It might be expected that the requirement of "good faith" in the bill would also entail an honest belief in the truth of the material published. It does not seem unreasonable to require the publisher of false and defamatory material to establish, as part of a defence of statutory qualified privilege, that he or she had an honest belief in the truth of what was published. Media organisations refer on occasion to the notion of "balanced reporting", under which it is not necessary to form a belief one way or the other as to the truth or falsity of contending views or warring versions. Whatever validity such a philosophy may have, it certainly caters for less rigorous analysis of stories before they are reported. A requirement of actual belief in the truth of what is published provides an important restraint on the publication of unproven allegations (with the allegations being "balanced" only by the insertion of a few words recording the denials of the victim).

So far as the question of appropriate enquiries is concerned, it has always been assumed that this is included in the requirement under Section 22 of the act that the conduct of the publisher be reasonable in the circumstances. In cases where Section 22 is pleaded as a defence, detailed interrogatories as to the nature and extent of the publisher's investigations are invariably directed to the defendant, including interrogatories as to what opportunity (if any) was given to the plaintiff to confirm or deny the publication in question before its publication.

In its submission to the Committee, the Law Institute of Victoria made the following comments on the Queensland qualified privilege defence as a basis for a uniform provision:

...The Queensland code defence does not, it is submitted, provide a good basis for the proposed uniform defence. If the defence of qualified privilege is to have the capacity to evolve to meet changing circumstances then it should be defined in broad and general terms, rather than as a list of specific situations in which the defence applies. Nevertheless, the code has been successfully relied upon by the media [in Calwell's case] and it would seem sensible to retain those parts of the defence which have a proven capacity to promote the flow of information about public affairs.

Accordingly, the Institute makes the following recommendations:

(1) The common law defence should be retained.

(2) The NSW statutory defence [s22 of the 1974 Act] should form the basis for a uniform defence.

(3) It should be sufficient that the publisher can prove that it possessed a "reasonable belief in the truth of the matter published".

(4) The meaning of "interest" should not be specified in the Act.

(5) The defence of qualified privilege should also be available if the publication was made -

- to give information to the public on a matter of public importance.

- 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.

Clause 28, Defamation Bill, 1992

Clause 28 restates s23 of the 1974 Act which ensures that, in applying s22, the judge determines whether an occasion is one of qualified privilege.

Many of the submissions argued that with the explicit incorporation of the element of good there is an added disadvantage in that, under clause 28 of the Bill, the judge will have to determine whether a publication was made in good faith, and the jury will have to decide whether it was actuated by malice.

The Honourable R.G. Reynolds AO QC raised the following concern:

> If it is a trial by jury and a fact is made relevant by Statute alone, how is the Judge to explain to the jury how the fact bears upon the finding it is being asked to make?

Committee's Recommendations:

The Committee is of the view that Division 4 - Qualified Privilege should be extensively reviewed. The incorporation of some of the existing statutory qualified privilege provisions from New South Wales and Queensland would offer only a piecemeal solution.

The Committee views favourably the recommendations made by the Law Institute of Victoria that the common law defence should be retained and that the New South Wales statutory defence [s22] should form the underlying basis for a uniform defence. The Committee recommends that the

Law Reform Commission of New South Wales examine clause 27(1)(c) along the line suggested by the Institute, that the conduct of the publisher be restricted to whether they had a reasonable belief in the truth of the matter published.

The Committee also believes that in matters of sufficient public importance, the defence of qualified privilege should also be available without the requirement of good faith, provided that it was 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.

In light of the submissions and particularly in light of our recommendations, clause 28 should be reviewed to clarify questions to be determined by the judge and the jury.

Chapter 8

Proposal to Simplify the Defence of Qualified Privilege

In his first submission to the Committee on the Defamation Bill, 1992, Mr Stuart Littlemore expressed his concern that the community and the media find difficulty in understanding the present and proposed law of defamation;

> It is not just a matter of journalists finding it hard to understand. The community ought to be able to understand any law that grants it rights and gives it responsibilities. No member of the community, and I include the legal community, could be confident about this bill. You could not read this bill and say: "I was going to publish a news sheet because I am concerned about the affairs of my local council. I have read the bill and I know what my duties are and what my rights are." You could not do that and one tends to forget that the community is the most keenly concerned with what a law takes away from them and grants them.
>
> There seems little point in tinkering with a law that is already all but incomprehensible to those whose duty it is to observe it. A primary objective must be simplification of the defences: truth and public interest is readily understood; comment, also; but qualified privilege can be simplified to the Donoghue v. Stevenson standard of negligence - defeated by a failure to meet that duty of care - and further defeated by simplified statements of express malice.

In his oral evidence before the Committee, Mr Stuart Littlemore commented upon this proposition at greater depth:

> The clearest area of law that the community understands is the law of negligence. I have included in my submission a reference to having a law where ... the tort is negligent publication causing harm. I think that is worth looking at.
>
> ... every factory owner knows that he has a duty of care to his workers to fence dangerous machinery and to provide safe plant and equipment. If somebody loses his arm, his leg or fingers in a machine, there is no employer who does not know that he will be liable for damages... The community understands that and juries have no difficulty with it. The judge can express it to the jury simply. He tells the jury that the standard of care is to conduct oneself, whether one is a factory owner, car owner, the owner of public premises or whatever, as a reasonably prudent person would in those circumstances, to take such care as a reasonably prudent person would in the circumstances or to make the premises as safe as reasonable skill and care can make them.
>
> Why cannot this tort look at the same sort of standard? If harm to reputation is caused by a publication, why is not the liability of the publisher in the broadest

sense measured by that standard? We have to get conceptually different about this. Defences are so complicated now and nobody understands them. People will tell you they do and lawyers will charge enormous amount of money for advices on it but I have been doing this work for over 12 years ... but I do not pretend to understand it as well as I think somebody must. Somebody must know more about this. Somebody must be able to simplify this. I do not see why we cannot look at a standard which is what the lawyers refer to as Donoghue v. Stevenson, the duty to a neighbour to take all reasonable care. Let us think about it. If somebody publishes a false thing about me ... accusing me of dishonesty on a particular occasion ... the reality is that had they asked me, I could have put them straight - or had they asked somebody who could speak for me or had they looked at the records of a certain court, had they contacted a solicitor who acted for me ...

Let us say that I was charged with something and beat it and was found not guilty but they published that I had been convicted. Why is that not easily referable to an ordinary standard of care if they had taken the reasonable steps that any proper journalist would have taken, that is, checking? They would not have published it. It seems to me an answer is there about making a uniform standard throughout the community of the duty of care of a journalist. Why should it be different to a duty of care of a surgeon, a lawyer, or dentist or factory owner or car driver? Why should we not have one standard of care where harm is caused?

... The best thing about the common law is its adaptability and Donoghue v. Stevenson is the common law in action. There is no Act of Parliament to which you can refer which spells out what negligence is. The common law says that when you can foresee that your conduct may adversely harm another - you must be able to foresee that if you are a publisher of a newspaper or if you are somebody speaking over the back fence. If it is foreseeable harm, you have a duty to take care to avoid that risk of harm to another and to conduct yourself reasonably in respect of what you do.

The Committee requested of Mr Stuart Littlemore that he deliberate and expand upon his proposition. In a further submission to the Committee, Mr Littlemore wrote:

There seem to be two approaches that can be taken to the characterisation of libel: that it involves both intentional and unintentional torts; and that the centuries of development of defences to tortious conduct can readily be re-established for libel in a way that greatly simplifies the law for the purposes of the community and, in particular, for those who wish to publish matter that may involve injury to reputation.

[Proposal 1. That the defence be simplified to the Donoghue v. Stevenson standard of care.]

It would involve these elements:

a. Intentional defamations:
   *~~defined as those publications made with the intention of imputing a~~ defamatory act or condition to a person;

b. The sole defence to intentional defamation: privilege embracing;
   *absolute privilege
   *fair and accurate reports of absolutely privileged occasions
   *truth and public interest
   *fair comment on an appropriate factual basis
   *statutory privileges (reports to/by the Ombudsman, etc)

c. Unintentional defamations:

*defined as those where the publisher asserts it did not intend to make the/any defamatory imputation.

d. The sole defence to unintentional defamation: due care

*the defence defined as non-negligent publication; and
*negligence to include - for mass media - breach of the industry code (whether enacted or not) as the equivalent of statutory breach.

e. Damages:

*aggravated for intentional defamations
*aggravated by failure to apologise/correct/retract at the first opportunity
*aggravated by malicious publication.

[Proposal 2.] An alternate structure would be to treat all defamations as a single class, not distinguishing between intentional and unintentional, but giving defendants a choice of defences, thus:

a. a single category of defamation;

b. defence of privilege; [public interest]

c. further defence of due care;

d. damages aggravated by failure to apologise/correct/retract at first opportunity; aggravated by malice.

Mr Littlemore submitted that this structure is entirely consistent with the development of the common law, and that its main effect is to remove the confusion of the competing qualified privilege defences, replacing them with a concept of negligent publication as the basis for liability.

A number of individuals and groups responded to Mr Littlemore's proposals.

The Honourable Michael Helsham QC agreed with the submissions of Mr Stuart Littlemore in para 1.7 of the Discussion Paper.

What I think he is saying I would endorse in this way.

English law has achieved its status and durability because it has not attempted to cover particular situations. By laying down general principles it has enabled the law to be moulded, adjusted and changed to meet different conditions, social, economic, political and so on. It also enables different situations to be dealt with in a way that allows justice to be done between the parties, and after all the notion of justice lies behind the principles. No two cases are ever alike, and the application of general principles permits the courts to decide each case in a way that, while applying the law, a just result is achieved. The more you try and lay down the way in which particular things are to be done the more you lead to uncertainty, the divorce of law and justice and, perhaps worst of all, proliferation of curial disputes in this litigious day and age. I really think this is only saying the same thing as Mr Littlemore.

Perhaps I should qualify this by saying that in my opinion the principle of negligence is not working in relation to modern traffic conditions. Perhaps "truth and

public benefit" and "fair comment on a matter of public interest" is no longer suitable to our present media.

The New South Wales Council of Churches submitted that the law should be simplified so that the community can readily understand the rights and duties imposed.

> The alternate structure on page 6 of the Discussion Paper would seem to have a great deal of merit:
>
> > (i) a single category of defamation including both intentional defamation and negligent publication;
> > (ii) defences of privilege; truth and public interest; and due care.
> > (iii) damages aggravated by malice; and by failure to apologise/correct/retract at first opportunity.

Ms Wendy Bacon, Lecturer, supported Mr Littlemore's proposals:

> The witness that I think has made the most useful comments is, interestingly, a lawyer and a journalist, Stuart Littlemore. I like his idea of due care. Like people in other professions, journalists should share with others the onus on them to have due care for those whose lives they can affect. This should be the central concept. I like the proposal in its simplified form, that there should be no distinction between intentional and unintentional defamations. That would wipe out the need for this complex qualified privilege defence and could put the defamation law on a sensible footing.

Mr Patrick George of Minter Ellison agrees with Mr Littlemore's approach, but points to areas of potential difficulty :

> I agree with Mr Stuart Littlemore's view that the standard of negligence could form the basis of a new defence of qualified privilege. This, incidentally, was the view which Mr J Sackar QC and I put forward in a joint submission to the Law Council of Australia in relation to the Defamation Bill.
>
> The term 'unintentional defamation', defined as non-negligent publication, may require further definition. A defendant:
>
> > (i) may not intend to defame the plaintiff specifically or at all;
> > (ii) may not intend to defame the plaintiff at the level of meaning in fact conveyed or alleged to be conveyed by the plaintiff;
> > (iii) may rely upon another person's statements and not form any intention to defame the plaintiff;
> > (iv) may intend to defame the plaintiff at the level of meaning conveyed but cannot prove the truth of it.
>
> Only the intentional conduct in paragraph (iv) would be outside the protection of the proposed defence. There is wide scope then for defending an unintentional defamation.
>
> The non-negligence aspect of the proposed defence also has a practical difficulty, namely, that once a jury has found that the publication is defamatory of the plaintiff, thereby causing harm, it is unlikely to accept that the defendant acted with reasonable care or was not negligent.

Under s.22 of the NSW Defamation Act 1974, for example, it is essential to consider not only whether the defendant believed in the truth of the imputation that he intended to impute about the plaintiff (which really goes to the issue of malice) but also whether the defendant anticipated that the publication imputed the precise defamation complained of by the plaintiff (and if not, whether the defendant should reasonably have anticipated it). This question of foreseeability is well recognised in the law of negligence and presumably would apply to the test of non-negligent publication.

In a defamation trial, the defence would only be considered by the jury once it finds that the plaintiff's defamatory imputations have been conveyed. There have been few cases where a defendant has shown that he has acted reasonably (or without negligence) under s.22 if he did not foresee, and take steps to avoid, the plaintiff's defamatory imputations (which the jury has already found to have been conveyed).

I suggest that in order to ease this difficulty, an additional element might be considered for the defence of reasonable care: that the defence may be available in circumstances where the defamation is 'incidental' to the subject matter of the publication. For example if the subject matter is one of serious public concern and the defamation is incidental to the subject matter, the defence would still be available even though the defendant has not anticipated that the publication might defame the plaintiff. If, however, the defamation is itself one of the subject matters of concern, the standard of negligence would dictate that the more serious the defamatory imputation, the more care should be taken by the defendant prior to publication.

The Bar Association expressed some concern, arguing that the proposals seem to be fraught with difficulties.

The Bar Association is of the view that the skeletal proposal requires a great deal more flesh before any comment would be of any value. Suffice it to say that it does not agree with the submission attributed to Mr. Littlemore in the [Discussion Paper] that -

> "... the centuries of development of defences to tortious conduct can readily be re-established for libel in a way that greatly simplifies the law for the purposes of the community and, in particular, for those who wish to publish matter that may involve injury to reputation."

It seems that the matter may be much more complicated.

Mr. Littlemore propounds that the criterion for qualified privilege to be established is satisfaction of the test in negligence. The discussion paper raises the possibility of dividing the defences between intentional and unintentional defamation. This proposal seems to the Bar Association to be fraught with difficulties. It invites a new question to be addressed, namely, whether the defamation was intentional or unintentional. The jury would have to decide that question first. However, in address and the summing up, they would also have to be taken to all of the possible permutations of defences applicable to intentional, as well as unintentional, defamations.

Moreover, such a categorisation would seem to defeat the purpose of the defence of qualified privilege at common law. The defence entitles people to make defamatory statements so long as they have an honest belief in the truth of what they are saying or speak pursuant to a moral or social duty whether or not they believe in the truth

of what they are saying. For example, a person who gave defamatory information to the police about a plaintiff in the belief that it would assist the investigation of a crime, but where the speaker did not know if it were true, would have no defence under the proposal for discussion since the defamation would be intentional but not fall within any of the proposed categories of defence in par. 1.8(b) in the event that what was said was untrue. Moreover, the purposes for which the defence of qualified privilege are provided would really be undermined by such an approach: cp. Horrocks v. Lowe [1975] AC 135.

The alternative [Proposal 2] of the Discussion Paper is a little unclear. What is meant by "ii. defence of privilege; [public interest]"? Does this simply revive the old common law defence?

Is the suggested "iii. further defence of due care;" intended to replace or retain the present s.22 of the Defamation Act, 1974? It seems to the Bar Association that the s.22 defence is unsatisfactory as a means of broadening the scope of qualified privilege (which appears to have been intended by the Law Reform Commission in suggesting its introduction), because it has been interpreted as a defence requiring an absence of negligence by the defendant: see, e.g. Austin v. Mirror Newspapers Limited [1986] AC 299; (1985) 3 NSWLR 354.

What is of considerable concern is the addition of the fourth element of the alternate structure: "iv. damages aggravated by failure to apologise/correct/retract at first opportunity; aggravated by malice".

That suggestion would really attack one of the bases of having a defence of qualified privilege altogether. What it would mean would be that a publisher who honestly believed in the truth of what he published or did so in pursuit of a social or moral obligation would suddenly become exposed to having the damages aggravated because he believed or continued to believe that what he did at the time was proper.

Traditionally, such conduct is not sufficient of itself to warrant the award of aggravated damages unless the conduct of the defendant was in some way unjustifiable, improper or lacking in bona fides: see Waterhouse v. Broadcasting Station 2GB Pty Limited [1985] 1 NSWLR 58 at p.78C.

It is worth reminding the Committee that the existing statutory defence of qualified privilege under s.22 of the 1974 Act requires proof by the publisher that the publication was reasonable, and that Part III, Division 8 "Offer of Amends" operates to provide a defence in respect of unintentional, non-negligent publications.

Prima facie the proposal requires consideration of the question whether the tort should be re-defined altogether and, if so, whether defences available to the publisher (large or small) under the present law should remain or whether some or all should also be reviewed.

The Committee sought the views of the Honourable Tom Hughes AO QC to Mr Littlemore's proposals, when he gave evidence on 7 August, 1992:

CHAIRMAN: What is your response to its proposition that qualified privilege can be simplified to the Donoghue v. Stevenson standard?
Mr HUGHES: I find the proposition a little difficult—with respect to my colleague who is also a member of my floor—to grapple with. The Donoghue v. Stevenson principle, which has been much discussed in the High Court in a number of recent cases, as it has been worked out since 1932, the year that the House of Lords

decided Donoghue v. Stevenson, governs the position as between people in the community where one who is in a relationship of proximity to another and who ought in the circumstances to foresee the possibility of injury from his acts or omissions will be rendered liable, in those circumstances of proximity and foreseeability, for those acts or omissions.

The question I must ask myself is, "Why is it necessary to import the principles from the law of negligence into the law of defamation?". When one is dealing with defamation one is necessarily, it seems to me, dealing with a facts situation in which the defendant, for example the newspaper or the television station, is in a relationship of proximity to the prospective plaintiff because the media organisation is writing about or speaking about the prospective plaintiff. In those circumstances we are trapped with section 22 where reasonableness of conduct is an essential ingredient in the statutory defence of qualified privilege. I do not think it is really necessary to draw, by analogy, from Donoghue v. Stevenson the test of reasonableness in relation to qualified privilege as an essential ingredient. Forseeability is obvious if a media organisation is going to say something ill of another. Proximity is clear. The question relates to qualified privilege only. I was going to say something about comment, but I think to say that would be irrelevant. That is my reaction.

Mr NAGLE: Would it not bring it into an area where, going back to the view of inefficiency, it would, because of the concept of negligence, ensure that journalists are efficient and research their articles properly before they publish them?

Mr HUGHES: They ought to be under the law as it stands, because if the journalist does not act reasonably the section 22 defence does not run. If the journalist does not act reasonably part of his unreasonable conduct will probably be misstating the facts so that a defence of justification would be difficult. When you come to comment, the test for comment is whether the plaintiff can show that the journalist did not honestly believe in the expressions of opinion to which he gave vent. The onus to establish lack of honest belief in that case is on the plaintiff.

Messrs Terence Tobin QC and Michael Sexton, in response to Mr Littlemore's proposals, wrote:

> The Discussion Paper raises the question of whether a distinction should be drawn between "intentional" and "unintentional" defamations, the latter being those where the publisher asserts that he or she did not intend to make the, or any, defamatory imputations. Given that a finding in a defamation action by the tribunal of fact (the jury in New South Wales) that a particular defamatory imputation has been conveyed by the matter complained of necessarily involves the conclusion that the publication carried this meaning for the ordinary reasonable reader or viewer, it is difficult to see how it can ever be said, in a legal sense, that such a defamation is unintentional.
>
> Moreover, there is nothing to be gained, in our view, by adopting such a distinction. If it is desired, as a matter of policy, to introduce a statutory defence of due care or diligence to the publication of false and defamatory material, that can be done by drafting the appropriate provision. We have previously suggested in our submission to the Committee that the courts have not so construed the existing Section 22 of the Defamation Act 1974 (Clause 27 of the Bill) and might well take the same restrictive approach to Clause 25 of the Bill which refers to publication in good faith after appropriate enquiries.

Mr Brian Gallagher for News Limited argues that the topic does not need simplification, going on to say that there are no "competing qualified privilege defences" in any basis sense:

There has merely been an emphasis on different matters, by courts and legislative enactment, in reviewing the four factors noted in Submission 1 [News Limited]. These factors are all well understood.

As submitted separately, that law in our view is deficient in that it has been interpreted to require belief on the part of the publisher. It is not unclear.

Each week hundreds of decisions to publish or not to publish are made on the basis of the existing law of qualified privilege as it is well understood by practitioners.

The proposed "simplifications" will not simplify anything.

Calling 5 separate defences " privilege" is not a simplification but an added confusion.

Negligence

Negligence in relation to defamation would be merely a question-begging device as it raises the obvious question of "what constitutes negligence." It is one word but many concepts.

Any analysis of that question will inevitably, it is submitted, come back to an examination of the four factors specified in Submission 1 [News Limited]. In a sense what the court and the legislatures have been doing all along in relation to qualified privilege is examining negligence. The Forsyth illustration is an example. Giving the process a new name is not going to assist anyone. No fresh result is likely to arise from calling the concept "negligence".

Negligence in relation to activities other than publication of defamatory matter is not a simple matter, either. Any examination of a text book on negligence or of the case decisions on what is negligence in particular circumstances (relating say to the driving of a motor car) will illustrate that fact.

The term qualified privilege is well known and understood. A fresh term for the same process would be confusing.

Mr Col Cole of the Police Service raises difficulties which the proposals, if implemented, might cause for the Police.

I note the submission of Mr Littlemore that qualified privilege can be simplified to the "Donoghue v. Stevenson standard of negligence" - defeated by a failure to meet that duty of care - and further defeated by implied statements of express malice.

The difficulty with that submission, insofar as Police are concerned, is that in the course of investigating offences they frequently rely on information which, of its nature, is either erroneous to the point of negligence, or indeed malicious. However, the veracity or otherwise of the information cannot be verified until after further statements or reports based on the original information are "published" by the Police Officer. When investigating the commission of criminal offences, "publication" may take the form of repeating an allegation by a person to a bystander, or to a suspect within earshot of bystanders. It may be that the Police Officer, himself not a witness to the commission of an alleged offence, cannot or does not have an "honest belief" in the truth of the allegation.

Notwithstanding any subjective views a Police Officer may have regarding the commission of an offence, his or her duty to investigate is clear. It is set out in

section 6 of the Police Service Act, 1990, which describes the mission and functions of the Police Service, viz.,

> 6(1) The mission of the Police Service is to have the police and the community working together to establish a safer environment by reducing violence, crime and fear.
> (2) The Police Service has the following functions:
> (a) to provide police services for New South Wales; ....
> (3) In this section:
>
> "Police services:" includes:
> (a) service by way of prevention and detection of crime, and
> (b) the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way;"

Section 6(1) is reinforced by Commissioner's Instructions, 36.01 and 37.14, which respectively provide as follows

Responsibilities

Police generally:

The prevention of crime and protection of life and property are fundamental to all Officers.

Investigating a crime - questioning people

Investigating Officer:

When investigating a crime or suspected crime, you are entitled to question any person about the crime, whether suspect or not, from whom you believe useful information can be received.

These provisions impose a clear duty on Police Officers to detect crime and arrest offenders. Pursuant to that duty reports are written and statements made which are prima facie defamatory. However, as the law currently stands, a Police Officer is protected against actions for defamation provided such reports or statements are made bona fide, irrespective of the truth of such reports or statements and regardless of whether such reports or statements are made "negligently". Any reduction of the protection of the current defence to principles of negligence may unduly inhibit the investigative process.

At the public hearings of the Committee held on 27 April, 1992, Mr Graham Bates and Ms Judith Walker were questioned on their response to Mr Stuart Littlemore's proposals:

> **Mr NAGLE:** What do you think about a system, not having defamation law, but having a system of negligence as the basis upon which a person can sue?
> **CHAIRMAN:** What was suggested by Stuart Littlemore was a Donoghue v. Stevenson test of due care.
> **Mr BATES:** That is a difficult one. I could see it raising some considerable problems for journalists who had source difficulties because I fail to see how they could establish they have taken reasonable care unless they were prepared to get into the witness box and explain precisely what the nature of that care was. My initial impression is that it would leave media defendants more open than they are

at present. Looking at it from the plaintiff's point of view, he would have to accept a burden of proof which is considerably higher than the burden of proof he has to establish now. In order to succeed in a defamation claim he only has to prove that a publication has been made about him which gives rise to a defamatory imputation of and concerning him, then the burden passes back to the defendant, whereas establishing negligence is a much more complicated process.

Ms WALKER: Speaking for once in my life from a plaintiff's point of view, I do not think many plaintiffs would welcome it.

CHAIRMAN: Because it imposes a burden of proof on them initially which is higher than the current standard of proof?

Ms WALKER: Yes.

The Committee also sought responses from Mr Bruce McClintock, barrister-at-law.

Mr NAGLE: . . . what about this concept that has been mentioned, the Donoghue v. Stevenson test as opposed to the current defamation law?

Mr McCLINTOCK: I find it difficult to work out what precisely Stuart Littlemore was talking about when, as I understand it, he raised that defence. If he is talking about some form of test that would require the media, as part of the defence, not to act negligently, really that was the intention behind the current section 22. Whether it in fact works like that, I do not know. The other issue would be who had to prove the negligence. I must say I can see a good deal of force in the argument for one change in the defamation law, which would be to reverse the onus of proof in the present section 22 and put it on the plaintiff, rather than being on the defendant as it is now. As things now stand, the defendant—the media organisation—has to prove that it acted reasonably. I can understand a change which imposed a burden on the plaintiff to prove that the media acted unreasonably or negligently. The difficulty is I am not sure whether it would be a more workable test than it is now.

It is very easy for a lawyer to say that someone who drives a car at 120 kilometres per hour in a 60 kilometre zone has been negligent, and therefore to compensate some pedestrian that he runs over. I am not sure how the same concepts apply in journalism. Would it lead to the parties in defamation cases calling a list of expert journalists to give evidence about what they do? I do not know. I am very much in two minds about it. I only heard the suggestion this morning, Mr Nagle, and I am reluctant to reject it out of hand without giving it a lot more thought—if only because it comes from someone who is an experienced journalist and an experienced media lawyer.

The Law Society of New South Wales expressed concern about

... believes that the vast majority of publications with respect to which a qualified privilege defence would be raised would be deliberate defamation in the sense in which this term is used in the Discussion Paper. Given this, there seems to be little to be gained and (in terms of additional complication) much to be lost by importing non-intentional tort-concepts into the area.

The Honourable R. G. Reynolds AO QC cannot accept that no one understands defences to a proceeding for defamation:

The concept of Donoghue v. Stevenson has little, if anything, to do with what is being dealt with in the Bill. There is no analogy. Any attempt to overturn the wisdom and genius of our common law, which has evolved over the centuries, is fraught with difficulty.

The necessary discipline is to frame the legislative provisions designed to achieve this. I venture to suggest such an exercise as this would demonstrate that a concept of negligent publication as a basis for liability is neither feasible nor realistic.

The Australian Press Council noted with interest the views expressed by Mr Stuart Littlemore and went on to say:

> The Committee asks for comment on two alternatives, referred to in ... the Discussion Paper. The first, the division of defamation into intentional defamations, where the sole defence would be privilege, and unintentional defamations, where the sole defence would be due care, is attractive. So is the alternative, that is a single category of defamation with two alternative defences, one of privilege on the one hand, and the other of due care.
>
> The Council in its previous submission raised the issues of new defences in its submission on introducing the concept of fault... We noted the important and distinguishing feature of the tort of defamation that the concept of fault is absent. We referred to one American reform proposal which provided that in all defamation actions for damages, at minimum the plaintiff should bear the burden of proving through clear and convincing evidence that the defendant failed to act as a reasonable person.
>
> The Council still inclines to the view that fault should be an ingredient in all defamation actions. The level of fault required should, in the Council's view, vary in relation to the public interest in the action. The Council's preference is:-
>
> (a) where the public interest is high, the level of fault required should be "actual malice", as defined in Times v. Sullivan 376 US 254 (1964).
>
> (b) in other cases, purely private actions, negligence would be the appropriate level.

These proposals are developed in the following paragraphs.

It is a clearly established proposition of American law that the First Amendment requires the plaintiff to prove fault, strict liability having been removed from the tort as a result of decisions in Times v. Sullivan and Gertz v. Robert Welch Inc. 418 US 323 (1974). The standard of "actual malice", a technical and somewhat misleading term applied to speech of the highest importance, applies where the plaintiff is a public figure or where the matter is of public concern. This involves a plaintiff proving first that the alleged defamatory matter is false. Then the plaintiff must prove either:

> (a) the defendant published the matter knowing it to be false; or
>
> (b) with reckless disregard of its truth or falsity. Each state may determine its own burden of proof for actions by private individuals not involving a matter of public concern, provided that publishers and editors are not automatically liable for damages for printing defamatory language. Twenty nine states, Washington DC and Puerto Rico have chosen negligence as the appropriate standard. Four states have required the same standard for private plaintiffs, as applies for public figure plaintiffs.

The Committee notes that, under the common law, an important element of negligence is "foreseeability"; in defamation, the "effect" of the defamatory statement is the predominent concern. A publication may carry an unforeseeable disparaging imputation and still permit a plaintiff to take action for damages.

Committee's Recommendations:

The Committee is concerned that there may be unperceived consequences of Mr Littlemore's proposed changes; the Committee is not in a position to predict what they might be. However, the Committee is of the view that the proposals are worthy of consideration and recommends that the Law Reform Commission examine ways by which the law of defamation could be simplified.

Chapter 9

Public Figure Test

The Defamation Bill, 1992, does not contain provisions for a "public figure" test but many submissions raised the issue of the introduction of a public figure test to defamation law in New South Wales. The Committee is of the opinion that those views should be publically aired. Some submissions, generally from media representatives, expressed strong support for such a test; others argued forcefully against it.

Arguments in Favour of a Public Figure Test

In its submission, the Law Institute of Victoria stated that it was important to understand the differences between defamation laws in the United States and Australia, and the rationale for those differences. Using the law of defamation in Victoria as the example of Australian defamation law, the Institute argued:

> In Victoria, the truth of the defamatory words is a defence regardless of the defendant's motives. The burden of proving the truth is the responsibility of the defendant. Accordingly, in Victoria a parliamentarian who wants to sue merely has to demonstrate that the words were defamatory, and were published about that parliamentarian. The burden of proving that the words were either true or fair comment lies with the defendant. In this way, the plaintiff parliamentarian is in no different position than any ordinary citizen who wants to issue defamation proceedings.
>
> Prior to 1964, the law of defamation in England, Australia and the United States was very similar. After New York Times Co v. Sullivan major differences became apparent between the United States and Australia.
>
> When the plaintiff is a "public figure", American courts confer a qualified privilege upon the defendant which protects both untruthful statements of fact as well as damaging opinions, provided they were made without malice - that is, without knowledge that they are false or with reckless disregard of the truth. American Courts thus are more concerned about free debate in society and a discussion of ideas than the reputations of "public figures" who may be damaged by innocent defamatory statements.
>
> Accordingly, after Sullivan's case a "public figure" could not recover without proving that
>
> (a) a defamatory statement was made about him or her which was false; and
>
> (b) it was published either with knowledge of falsity or in reckless disregard of whether it was true or false.

It is significant to note that the burden to prove the falsity of the defamatory statement moved from the defendant to the plaintiff.

"Reckless disregard" has been held to mean that the defendant had a "high degree of awareness" of the falsehood or that the defendant entertained serious doubts as to the truth of the defamatory statement.

Of course, out of this decision grew many cases relating to who or what is a "public official" or "public figure". By and large, individuals holding public office whose activities could and do affect the public were held to be public figures. It also made reference to public figures who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved".

In justifying the distinction between the rights of public and private plaintiffs, the United States Supreme Court was of the view that private plaintiffs are more susceptible to defamatory remarks because they lack the opportunity to counteract a defamatory statement which "public figures" have as a result of their constant access to the media. Thus the "private" plaintiff is entitled to more protection. Furthermore, private citizens, unlike "public figures" have not voluntarily exposed themselves to public scrutiny and the risk of defamatory remarks.

At the heart of Sullivan's case is the recognition of the importance of the free flow of opinions on matters of public interest. Therefore debate is encouraged to produce speech that scrutinises the activity of public figures who are "intimately involved in the resolution of important public questions or by reason of their fame shape events in areas of concern to society at large".

This does not mean that in the United States any statement about a public figure is immune from an action for defamation. A public figure may claim damages for defamation provided that he or she can establish both that the statement was incorrect and that it was made with knowledge that it was false or with reckless disregard of whether it was false or not.

The Americans recognise that incorrect statements are inevitable in free debate. Any rule that imposes strict liability on a publisher for false factual assertions diminishes freedom of speech in matters of vital public concern.

In the past, proposals to adopt the American test have been criticised in Australia because of difficulties in providing a satisfactory definition of "public figure". It is true that there has been much debate in America and many cases over who or what constitutes a "public figure".

The Law Institute of Victoria argued that freedom of expression in Australia would be enhanced if all Commonwealth, State and Territory parliamentarians were deemed to be "public figures", with a restricted right to sue for defamation. They set out their reasons for distinguishing between parliamentarians and ordinary citizens and argue that those reasons make it unfair that a parliamentarian has exactly the same rights as an ordinary citizen to sue for defamation:

(a) In a democracy, free speech should be encouraged.

(b) This has to be balanced with a need to protect an individual's reputation from an unjustified attack.

(c) Parliamentarians are elected as representatives of the people to govern on their behalf.

(d) Parliamentarians are ultimately responsible to the electorate.

(e) Their actions and decisions impact upon the people and as a result it is in the interests of a democracy that they come under public scrutiny.

(f) They are not like other citizens of the country in that:

(i) Ordinary citizens are not involved in the government of the State and the country. They are not making decisions that affect everyone.

(ii) Ordinary citizens have not accepted the risk of the public scrutiny in the way a parliamentarian has. Ordinary citizens have not asked for the public's trust.

(iii) Parliamentarians are in constant touch with the media. Indeed, parliamentarians usually want as much exposure as possible. They are in a position to express their views to the media, to counter any attacks upon their credibility and to launch attacks upon the credibility of others.

(iv) Parliamentarians have the right to say in Parliament whatever they like with complete immunity. Parliamentarians cannot be sued for what they say in Parliament. They do not even have to believe in the truth of what they are saying. The ordinary citizen is not in this position. In other words, the present laws allow our parliamentarians to say whatever they like about the ordinary citizen but the ordinary citizen is governed by the laws of defamation when he wishes to express an opinion about his elected representative. As the Americans say, the censorial power should be in the people over the government and not in the government of the people.

The following proposals were then made:

Nobody can seriously argue, however, that a parliamentarian should not fall into the category of "public figure". To avoid the problems experienced in the United States, therefore, the Institute suggests that at this stage a different legal standard should only be applied to parliamentarians in this country. The "public figure" category could, if necessary, be extended at a later date.

Accordingly, it is recommended that parliamentarians be treated differently from ordinary citizens in the following respects:

(a) A parliamentarian in Australia should only be able to sue for defamation if he or she can show the following:

(i) that the statement was false; and

(ii) that the publisher of the statement was malicious in that the publisher knew it was false when it was published or alternatively published it with a reckless disregard for the truth.

(b)The burden of proving these two matters should lie on the parliamentarian.

If Australia is not prepared to go as far as the United States has done in order to enhance free speech an alternative is suggested.

A parliamentarian in order to be successful in a defamation action must be able to prove that the statement was false. The burden of proving this would lie with the plaintiff parliamentarian. The media, even if the plaintiff parliamentarian can prove this, will have a defence of "reasonable belief" available to it.

In other words, if the media defendant can satisfy a judge or jury that even though what was said about the plaintiff parliamentarian was false it was nevertheless published with a reasonable belief as to the truth of the statement, then that defence will be enough to defeat the action.

Finally, the requirement that the parliamentarian prove that the publication was false could be removed. The parliamentarian would be in the same position as any other plaintiff and would simply have to prove that the matter was defamatory. But the defendant, in addition to the usual defences, could defend the action on the basis that it had a reasonable belief in the truth of the matter.

A refinement could be that the extra defence should only be available with regard to matters falling within the "public" rather than the "private" sphere... This would mean that the privacy of parliamentarians received the same protection as the privacy of the rest of the community, while at the same time, debate about matters of public concern would be less restricted.

The Australian Press Council put forward a submission in favour of the introduction of a public figure test to defamation law in New South Wales, again arguing that, where a plaintiff is a public figure, different considerations must apply in determining the balance between public interest and the protection of his or her reputation.

The Australian Press Council recognised the problems in defamation law in the United States, especially in relation to the determinations of "who is a public figure" and the high cost of defending cases; however, it argued that it would be possible to define a public figure in such a way that its impact would not be too wide.

It cited the Lingens Case [Eur. Court HR], Lingens judgement of 8 July, 1986, Series a No. 163] to show that the United States is not unique in its public figure approach. The Press Council quoted from the judgement, drawing the Committee's attention to the Courts' statement,

... the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 δ2 enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.

The Press Council supports a public figure test, and

> ... stresses its firm conviction that no reform of defamation law can be effective until it ensures that the level of public knowledge and of debate of public matters, including public figures, rises to that attained in other comparable democracies. Anything less will not provide the public with the checks and balances so essential to the smoother functioning of the more liberal, open democratic society that is surely the hope of all Australians, and the way in which effective checks and balances on the activities of government can be put in place.

The Young Lawyers seemed to be more equivocal in their argument for a public figure test than the organisations discussed above.

They recognised the problems which might arise with the introduction of a public figure test. They highlighted areas of concern, for example, "Who is a public figure?", "When does a person start or stop being a public figure?" and "What does actual malice mean?" and noted that these issues have been the subject of millions of dollars of legal fees in the United States.

The Young Lawyers' submission put forward good arguments for the rejection of a public figure test, concluding that:

> The public figure test sounds convincing in theory, largely because of its catchy name. Its introduction in Australia would probably only further complicate an already complex area of law.

The submission then went on, however, to suggesting that there is force in the argument put forward that journalists do not feel free to tell the truth about corruption and mismanagement because they fear being the target of so-called "stop-writs".

> 'Stop-writs' do not prevent publication of further material, but they do have what is called a 'chilling' factor. If a politician is known to be quick-writted, journalists may be reluctant to publish articles critical of him.
>
> ... The main problem with the American public figure test is that it has gone too far. A person thrust into the public eye by ill-fortune or personal tragedy ought not to suffer the additional humiliation of being unable to rectify the situation of seeking legal redress.
>
> However, if the test could be limited to public officials such as politicians, senior public servants and the like, and be restricted to comments made about their fitness for office (in matters of public interest), the test may give journalists in the political sphere a greater degree of latitude. The argument that public servants (above a certain level) should be accountable without fear of suit has some moral basis; whether amateur sportsmen, small-time actresses, closet homosexuals and the Prime Minister's children should lose their right to sue is another matter.

In hearings before the Committee, Ms Judith Walker, Australian Broadcasting Commission, and Mr Graham Bates, Solicitor, were questioned on who they considered should make up the class, "public figures".

Mr PETCH: Finally, who should be in the class of public figures?
Mr HATTON: Careful what you say—defamation barristers, for a start?
Mr NAGLE: Journalists?
Ms WALKER: Well, why not.
Mr BATES: Journalists who write under a byline certainly would be public figures insofar as their writings are concerned. It would not just be politicians.
Ms WALKER: Certainly not.
Mr BATES: It would certainly be people who sought the attention of the media as part of self-promotion—performers and artists. I guess a back-door way of looking at it would be that it is anyone whose activities are subject to public comment under present law.
Ms WALKER: It could be candidates for public office, corporate figures and people in some professional offices who would be covered. Certainly I agree that it is much wider than just politicians. I agree it would be journalists who have a byline or who are in the electronic media who present a program regularly.
Mr NAGLE: There are two points. The first is the reason why it should only be politicians, as argued before this Committee and elsewhere, is that politicians have access to absolute privilege in the House as to what we want to say about anyone else, within the confines of our own privilege. That is one of the reasons why politicians should have the public figure test. Have you heard that argument?
Ms WALKER: Yes.
Mr NAGLE: Do you accept that argument?
Mr BATES: It depends. Politicians certainly have a response open to them in the House which is not open to other people, but whether what they say in a grievance debate is necessarily going to be picked up and reported the next day is a separate question.
Mr NAGLE: The second aspect of a public figure test is that it is not on the basis of truth and public interest, or truth alone, but malice has to be proved as the basis on which the article was written. By definition, an article about a public figure in fact may be untrue and hurtful and harmful, but unless malice can be proved difficulties may arise. Of course, articles and stories may be changed by subeditors and film editors so that an article or story is not the same as was written originally by the journalist. By the time it is published one would have difficulty ascertaining who wrote the article or story and who was involved in changing it to make it defamatory.
Ms WALKER: Normally you would be suing the publisher in a matter like that, rather than the individual, particularly if you are after money. You would not sue an individual journalist or producer. You may join them but you would not sue them alone, and you may ascertain certain information through interrogatories during the process.
Mr HAZZARD: People tend not to defame to any great extent private individuals. A local schoolteacher might be defamed but in the real world, the world we are talking about, it is public figures who are defamed. Without a public figure test you could almost forget the defamation law. Anything could be said, as long as it is not malicious, about a public figure. It seems to go a long way to ensuring that the journalists' side of the fence is looked after but not the public figure. Do you have any comment on that?
Mr BATES: I think there must be a fair amount of force in that. It is true that the mass media tends to talk about people who are in the public arena and who by and large would tend to be public figures.

In its submission, the Law Council of Australia pointed out that some members of the Council were opposed to the introduction of a public figure test but that some supported its introduction. In its arguments in support of a public figure test, the Law Council of Australia stressed the need for public interest in the free and wide debate of issues of public concern.

Without this debate, government, corporations and individuals involved in public issues are less likely to be scrutinised. Such scrutiny is essential in an open society and for the preservation of democratic processes.

As the law of defamation currently exists, the media and other potential critics of those making important decisions, are discouraged from filling their vital role in safeguarding the democratic process because they can afford only to publish those matters which, generally speaking, they know they can prove to be true.

In order to successfully plead justification, defendants must not only prove the truth of what they intended to say, but must also the truth of those things which a "reasonable reader" would have taken it to mean. In addition, in New South Wales, they must prove that the publication related to a matter of public interest, and in Queensland that it was for the public benefit. In order to succeed on the defence of fair comment, the media must prove the truth of the facts upon which the opinion is based. It is generally impossible for the media to succeed on the defence of qualified privilege.

Yet in free and vigorous debate it is inevitable that statements will be made which do not conform to the facts as they are subsequently proven to be. In order to ensure that this kind of free debate occurs, the law of defamation must sometimes protect statements which are untrue as well as those which are true.

Thus, the report of the Fitzgerald Inquiry argued that:

Those in public life must accept the risk of criticism even if it is at times unfair, unfounded or even mischievous and couched in unflattering or abusive language.

The recent political history of Queensland is a grim reminder of what can happen when a government is able to prevent criticism of its performance through the use of the laws of defamation.

Mr Peter Bartlett, in evidence given before the Committee, put the majority position of the Law Council of Australia:

MR BARTLETT: We also support a public figure test, and it is probably a little controversial in this sort of environment, but we believe that in the United States the public figure test has been extended far too far. It is almost as wide as saying that the wife of a local government councillor is a public figure. That is a ludicrous situation in our view. But we believe that because parliamentarians have an advantage over and above the general public, there is an argument for testing the public figure in Australia by a limited definition, and maybe limiting it to a definition of Commonwealth, State and Territorian parliamentarian. That would then allow them to sue, first of all if the statement was false and the publisher was malicious, in that the publisher knew that it was false when it was published; or second and alternatively published it with a reckless disregard for the truth. That would still allow a large number of claims to be taken where there was a reckless disregard for the truth.

CHAIRMAN: Taking you back to the public figure test, it has been suggested that the proper basis for rejection of a public figure test is the failure by the media here in Australia to provide a forum for public figures to reply to and debate the allegations made against them. Do you have any comment on that opinion?

Mr BARTLETT: If the public figure was limited to parliamentarians, then they do have the forum of Parliament to reply to any criticism from the media and can reply quite forcibly. In the normal course you would expect the media to take up that

criticism and publish it.
CHAIRMAN: But if the public figure was, say, the Commissioner of Police, he does not have that forum. Are you arguing that the public figure should simply be parliamentarians?
Mr BARTLETT: Right, because I think that if you simply put the term "public figure" into a defamation bill, it is very difficult to define the extent of that. How wide is it? In America I think it has been defined far too widely.
CHAIRMAN: So if the definition is parliamentarian in the bill—
Mr BARTLETT: Then the parliamentarian has a right to respond.
CHAIRMAN: He has access to a forum.
Mr GAUDRY: There seems to be an opinion that a parliamentarian has reasonable access to the media, and yet in terms of a statement that may defame it still is to a degree limited by the fact that he is not presenting his own view; it is sieved through the particular reporter or editorial statement that that particular paper or media outlet may have, so it is not unfettered in any way.
Mr BARTLETT: No, it is certainly not unfettered but I would have thought that the parliamentarian would have greater access to the media than the vast majority of people, so there is an advantage there.
CHAIRMAN: If the Age publishes a front page statement about a parliamentarian who then gets up during private members' statements and speaks for five minutes and the media chooses to ignore his explanation, he has exercised his right to have access to a forum but it has done him no good in terms of communicating the message.
Mr BARTLETT: I think if the Age had criticised a parliamentarian and the parliamentarian had then answered the criticism in Parliament and had himself or herself criticised the Age, it would be surprising if the Age did not run it. But if the Age did not run it, I am sure it would be taken up by the opposition, the Herald-Sun.
CHAIRMAN: It might be surprising but it would not be compulsory for them to run it.
Mr BARTLETT: No, it would not.

Mr Padraic McGuiness, in his evidence before the Committee, gave qualified support for a public figure test:

Mr McGUINNESS: ... I tend to be sympathetic to the public figure test, but it certainly has been abused in the United States quite widely, to make politicians in particular the targets of what is often quite scurrilous attack. I do not think malice is an adequate defence - to say that express malice makes a statement defamatory - because it is quite clear that on occasions, there is a general malice in an attack on politicians. ... It is used as an example against which that general malice is turned. There is no legal way by which that problem can be dealt with. It is a matter of political and social prejudice. But there clearly are cases where public figures should be treated as specially subject to comment, and that comment should be able to be fairly wide and fairly strong. Of course, privacy should come into this as well.
Politicians, to the extent that they are acting on matters of policy as distinct from their personal affairs, and judges are protected. I mention judges specifically because they have the other protection of contempt of court. Effectively, in my experience judges have used the threat of legal action for defamation as a way of silencing critics individually. Members of tribunals have done the same. A couple of examples of that have been directed against me when I have been a newspaper editor or commentator. That is using a double defence. Members of the Industrial Relations Commission, for example, are protected by section 299 of the Act far more than the members of any court, yet they also resort to threats of defamation action. That is a clear example of public figures having more protection than is justified and more protection than private individuals.

You could say that politicians also have more protection because they have the extreme power to punish individuals by a parliamentary vote. The classic case in Australia is that of Fitzpatrick, who was called to the bar of the House of Representatives for an alleged breach of privilege. In that case, politicians have great powers, and therefore the protections for them should be diminished. They should be public figures in that sense. You could say the same about quite a few other occupations, certainly senior bureaucrats—not necessarily ordinary bureaucrats, but people at the under-secretary or head of department level, the heads of statutory authorities and so on. That said, I realise that the public figure defence can be grossly abused, as it has been in the United States.

Mr HAZZARD: Would you agree that essentially it is public figures which are defamed more frequently and to a much greater extent and that, once a public figure test has been introduced, the group of people which is likely to be defamed is removed?

Mr McGUINNESS: Indeed. A public figure, almost by definition, should be subject to criticism that he or she will think is defamatory. Otherwise, people with enormous power or influence are protected from criticism of the way they exercise that power or influence. That comes back to the first of Mr Hatton's general questions: what is the purpose of defamation law? Is it to protect the rich, powerful and privileged against criticism, or is to protect the reputation of ordinary citizens? In some circumstances the rich and powerful are ordinary citizens, for example, in their private lives. If the defamation law protects the powerful, by definition, it is a bad law.

CHAIRMAN: That is, if it protects the powerful only.

Mr McGuiness was questioned by the Committee on the defence of malice:

Mr NAGLE: Regarding the public figure test, if there was such a thing, you say malice is too tough a defence. What defence would you say would be appropriate?

Mr McGUINNESS: No, I do not say malice is too tough, but if there is genuine malice involved of course that defamation should be punishable. If there is no malice involved, and I find the proposal about some kind of duty of care attractive, but that is really the proposal in section 22 of the present Act and section 27 of the draft Act, if the journalist or the newspaper behave reasonably in the circumstances. I have been through that in some detail and it is clear that the interpretation placed on that by judges in most cases is far too strict. They place a requirement of reasonable or non-negligent behaviour on journalists which they could not meet in their professional work. I know that, having known many lawyers. Indeed, not so many years ago in New South Wales a few magistrates got into the witness box and gave evidence. They were not notably better witnesses than ordinary people without legal training.

Mr GAUDRY: ... the "truth and privacy" aspects, will that seriously complicate the issue where you have to prove that it is warranted in the public interest?

Mr McGUINNESS: It depends how the public interest is defined. This is why I have talked about the desirability of some presumption of a right of free speech. There are many things that are in the public interest, as I would interpret it or as an ordinary citizen, not as a journalist, which a judge might say is not in the public interest. It is, I think, in the public interest to know, for example, something about the behaviour of a senior bureaucrat if that bureaucrat's behaviour in certain policy respects ought to be criticised. It is relevant to know of the past of the person, political loyalties—not necessarily political loyalties—their behaviour, their record as a bureaucrat et cetera. Normally it would not be relevant to raise this. I do not care about the career history of, say, the head of the department of social services, but if that person is behaving in a way that needs to be criticised, then their past behaviour might be relevant. Their record in employment, for example, or their

record in the bureaucracy might be relevant. It is a very difficult line to establish. I think it is ridiculous that the sex lives of politicians should be brought into debate or whether they smoked marijuana when they were students, 20 years ago. That is the kind of stuff that goes on in American politics and I think it is political nonsense. However, many people in the United States of America think that it is very relevant when judging the quality of a candidate. Is it private behaviour, when you are standing for public office and people think your morality is relevant to your performance in public office? It is very difficult.

Mr GAUDRY: That is the whole problem, is it not, when does public become private? Do you think that is the problem?

Mr McGUINNESS: I think there are very few things concerned with the character of a politician which are purely private. What happens between a politician and his or her spouse and, indeed, their private sexual behaviour is totally irrelevant to the public judgment—but that is my preference. If I were a fundamentalist Christian or Muslim I may think it were highly relevant.

The Committee questioned Mr McGuinness about his attitude to the use of a Public figure test in the United States of America:

Mr McGUINNESS: I agree. The public figure test in the United States has become too wide. This again is the concept of section 22 or section 27, reasonable behaviour defence. I do not think it is reasonable to write without checking the facts on anything, which does not always mean ringing the person involved but it does mean making some serious effort to find out what is correct and having done some research. It is quite clear that in the United States virtually anything can be said about a candidate or a public figure without proper research, provided it is done without malice which, in a sense, makes it worse because it is done out of sheer sloppiness, carelessness, stupidity, as you say. This is quite correct. There is, however, a problem in defamation law, if I can change the subject very slightly, of the honest, genuine mistake which can often be totally indefensible. I can give a specific example of this. There is a solicitor in Australia called Jack Maitland Graham, who was subject to some proceedings a few years ago. The AAP put out its news summary in which it referred to the solicitor as Jack Maitland. The Australian Financial Review, which I was then editing, published this news summary; it did not mean anything to the sub. In fact, if I had seen it I would have picked it up but you do not necessarily see all the little pieces like that. A solicitor from the country named Jack Maitland said, "I have been defamed". Nobody had ever heard of this person or had any intention of defaming him. It was a simple, innocent mistake and it cost $17,000. The lawyers said: "Settle straight away. There is no defence". I think there should be a defence for honest mistakes.

Mr NAGLE: That presupposes we should have a higher standard of competency of people who write stories, present company excluded.

Mr McGUINNESS: Of course, but everybody gets careless occasionally. But everybody makes genuine mistakes and this was a pure production mistake, probably a cadet. It is a classic mistake where you can accidentally drop off half a name or a word and it goes through because it is so unimportant.

Mr GAUDRY: In relation to publication and appropriate inquiries, you were saying that not always do they go to the person that may be defamed by the article. Would it be a normal procedure, within most media areas, that an attempt is made to contact the person who is in fact the focal point of the article?

Mr McGUINNESS: Not necessarily. This is one of the great myths that tends to be propagated. Somebody says, "Well, you did not check with me". It is often quite pointless to check with the person about whom you are writing because you effectively know what the answer will be either, "It is not true" or, "How dare you write that", or they threaten to take action if you write anything against them. If it

is a question of confirming something which needs to be in principle confirmed with that person there is a case for saying it should be done, but in general it does not make any sense at all. If, for example, I want to say something extremely critical about the Prime Minister I do not ring him up and say, "Am I justified in saying this?" because I know what his answer will be, if he even answers. He will say, "No". But, should I check with him? I think it is an absurd proposition.

Mr GAUDRY: And yet it is here under section 25(3). It does say that a relevant factor in deciding whether a matter was published after appropriate inquiries is whether before publication any of the involved persons gave the person it may defame an opportunity to confirm or deny the truth of any statement made in the matter or any imputations carried by the matter.

Mr McGUINNESS: It may be relevant, but I do not think it is a necessary criterion. In fact, I would be very critical of that provision because it suggests—it is really a popular myth that it is always necessary to check with the person about whom the comment or the fact is published. It often is wise to do that. You would normally say, particularly to a young journalist, "Have you asked the person whether this is the case?" but it depends on the circumstances.

Mr NAGLE: In fact, a denial of a serious allegation can be equal to the seriousness of the allegation itself.

Mr McGUINNESS: That is the ABC technique. "Have you stopped beating your wife?" is the classic ABC question.

Arguments against a public figure test

Mr Kenneth Gee, Q.C. discussed the application and effect of the public figure test in the United States context.

The "public figure" test had its origin in the United States Supreme Court in New York Times v. Sullivan 376 US 254. It stemmed, so the Court held, from the "Free Speech" amendment to the US Constitution, which of course has no counterpart in our own Constitution or laws.

The Court held, in substance, that statements about "a public figure" were not defamatory unless made with actual malice, i.e. "with knowledge that they were false or with reckless disregard" of their truth. This virtual immunity from suit extended even to imputations which were false or made with negligence. The practical effect has been that a "public figure" plaintiff finds it almost impossible to succeed in a defamation suit in that country, and if he does succeed, and obtains substantial damages from a jury, the verdict will usually be overthrown on appeal, under the Sullivan principle.

Originally it was "public officials" whose rights were circumscribed (as in the Sullivan case), but its ambit was soon extended to all "public figures" and later to virtually all persons making public statements on matters of public interest, even if they held no public office. However, so gross has been the unfairness of the operation of the test that the courts have recently tried to impose some restraints, leaving the position in the US in considerable confusion. There is no question, however, that members of parliament would fall within the present scope of the definition.

The effect of the "public figure" test in the US has been to upset the necessary balance between the concepts of freedom of speech on the one hand and the preservation of a citizen's reputation and good name on the other. So much is this so, that the test has come under forceful criticism from members of the judiciary,

academic lawyers, the "public figures" themselves; - indeed from almost all commentators - except of course the media. The "public figure" test presents a plaintiff who falls within the definition with the almost impossible task of satisfying a jury on a "preponderance of evidence" that his defamer was actuated by malice since this requires proof of the mental attitude of the author or the reportorial procedures of the publisher, a formidable task.

Mr Gee cited cases which demonstrate the effect of the public figure test in the United States:

> ... the case of Miss Wyoming, who found herself classified as a "public figure", and failed to have redress against Penthouse magazine after allegations of sexual queerness. Another woman who had picketed a pornography store was described in Hustler magazine as "Asshole Of The Month" and her face was superimposed over the rectum of a man. (Details of these cases, and others, can be found in the American Bar Association Journal of March 1989.)
>
> Two other examples of the problems facing defamed plaintiffs are dealt with by the American lawyer/journalist Renata Adler in her book "Reckless Disregard" a devastating critique of the "public figure" concept. General Westmoreland found himself without remedy against a television programme by CBS, suggesting that he had deliberately falsified certain important figures relating to the Vietnam War, in a programme put together by shameful methods. Similarly, the Israeli General Sharon, alleged by Time Newspaper to have incited the massacre of defenceless civilians in Lebanon, was unable to prove malice, although the jury found the allegations to be false, and added a rider to its verdict (favour of Time) rebuking the paper for its gross carelessness. General Westmoreland and General Sharon were both, of course, "public figures".

Mr Kenneth Gee QC, went on to describe what the effect would be if a public figure test became part of the defamation law of New South Wales:

> The practical effect of an adoption of the "public figure" test would be to remove legitimate restraints against falsehood and negligence where "public figures" were concerned. As Mr Hayden put it in his article: "it would work fairly much as an open-all-season licence for fishing expeditions". It would grant an unfair element of immunity not only for the best journalist, against whom protection is rarely needed, but against the worst, about whose existence there can be no argument.
>
> This would put two groups in the community into special categories. The first, would be "public figures". As the former Attorney-General, Mr John Dowd, QC put it in a speech to the Australian Press Council on 27 October, 1989: "... a diminution in the ability of public figures to seek redress for defamatory statements carried the very serious risk of adding yet to another disincentive to good people becoming involved in public affairs at whatever level." "Has not a politician eyes?" asked Mr Dowd, "has not a politician hands, organs, dimensions, senses, affections, passions?"
>
> The test would subvert, for "public figures", the legal principle: "Where is a wrong, there is a remedy". It would place one section of the community in legal stocks, helpless against irresponsible or even malicious word-mongers.
>
> Another class of people; - those concerned with the public presentation of news and views, mainly members of the media, would obtain a virtual immunity from falsehood or negligence, at a time when their words are disseminated to millions of people.

> The "public figure" test moves beyond the legitimate province of the media to advance robust criticism, and to ferret out wrongdoing, and the abuse of power. The test is unnecessary and discriminatory, and should form no part of our law of defamation.

The Law Society of New South Wales also submitted that the American public figure/official jurisprudence should not be introduced into Australia:

> This jurisprudence has largely been a failure in the United States as it has produced uncertain results, has not deterred plaintiffs from commencing defamation litigation (as was the intention of the Court in New York Times v. Sullivan) and it seems to have pushed the damages in defamation even higher as a result of the malice requirements.
>
> The agitation for Australia to adopt the American law (often by the media) is the result of a common misunderstanding that the Watergate expose could not have occurred in Australia due to its restrictive defamation regime. Recent pieces of major investigative journalism (such as the allegations last year that Sir Joh Bjelke-Peterson had received bribes from a prominent Queensland businessman, Sir Leslie Thiess) suggest that investigative journalism in Australia is not inhibited to a greater degree than in the United States.
>
> The American public official/public figure jurisprudence requires malice to defeat it. This has entailed American defendants allocating enormous resources in the form of legal cost to defend such actions (an ABC action cost US$7 million and a CBS action has cost US$3-4 million).
>
> Finally, also, it is to be remembered that, in the United States, punitive damages are available for defamation plaintiffs which is not the case in New South Wales. Punitive damages in the United States have resulted in some astronomical awards of damages (in some cases in excess of US$20 million) which in themselves deter American free speech to a larger degree than in Australia.

Conclusions

> **Mr NAGLE:** In the United States you have a public figure test. A statement can be made about you: Mr Hazzard robbed a bank 10 years ago. He did not rob a bank, but the article deals with him robbing a bank. Unless you can prove that there was malice behind the article, instead of incompetent, stupid journalism—present company excluded from that comment—the reality is that unless you can prove that malice, and the plaintiff has to prove the malice, you do not get any damages, you do not get an apology and that is what we would be opening up here.
> **Mr McGUINNESS:** I agree. The public figure test in the United States has become too wide. ... It is quite clear that in the United States virtually anything can be said about a candidate or a public figure without proper research, provided it is done without malice which, in a sense, makes it worse because it is done out of sheer sloppiness, carelessness, stupidity, as you say. This is quite correct.

The basis of the Sullivan decision in the United States was that in that country, freedom of speech is guaranteed by the First Amendment of the constitution, and public officials have readily available to them a forum (access to the media) in which to reply to attacks upon their reputation. The extension of that decision to cover public figures was made with insufficient regard being paid to that justification. The

absence of an available forum to many who had been held to be public figures has now caused a contraction of the category. People such as unwitting victims of crime, defendants to litigation and even judges have no such access, even in the United States.

The Committee noted with interest a passage from an article entitled "The Coming Battle over Free Speech" by Ronald Dworkin, which appeared in the New York Review of 11 June, 1992:

> The Sullivan rule has not proved as effective a protection of the press's freedom to report on politics as commentators initially expected. As Lewis says, celebrations stopped when lawyers and the press realised that the rule gave well-financed public-figure plaintiffs an opportunity to inflict great damage on the press by claiming that it was, indeed malicious or reckless. the much-publicised suits by Ariel Sharon against Time and General William Westmoreland against CBS in 1984 illustrate the difficulty: though Time won a qualified jury victory, and Westmoreland finally abandoned his suit, both time and CBS were seriously damaged by the publicity, cost, and dislocations of long trials in which their honesty and competence were the chief topics of investigation.

In Australia, there can be no such basis put forward as a justification for a public figure test. One submission argued that the public figure category in the United States is restricted to those who "thrust themselves forward into the limelight", but that is a misconception. Such persons form only one of the groups that make up "public figures". The submission went on to argue that such people have their own access to a forum in which to reply to allegations against them. That simply is not so in Australia. Even in the United States, it is only a meagre access. An article in the Missouri Journal of Dispute Resolution gives a graphic description of their difficulties. Here in Australia, there is no access at all, except with the goodwill of the original publisher. Often, a complainant is told to write a letter to the editor for publication; a reading of the Australian Press Council decisions over the years reveals that even such a letter will not always be published.

None of the submissions made in favour of a public figure test dealt with a general failure by the media to provide a forum for public figures to reply to and to debate allegations made against them. The ideal of a free debate, which would permit some latitude for the publication of accidentally erroneous statements, is a good one; but it will not flourish unless the debate is free, rather than circumscribed by what the media itself is prepared to publish.

A number of submissions argued that there should be a special category of "politicians". The Committee has heard evidence that there is a widespread refusal by original publishers to report replies in Parliament to attacks made upon Members of Parliament in the media.

The Committee accepts the argument that the right not to publish is as important as the right to publish in a free society. The undoubted right which the media claims to publish an allegation on a particular issue may well, however, occasion an injustice,

unless there is an acceptance of the right of the person about whom the allegation is published to use the same medium to debate the issue.

The interpretation placed by the Australian Press Council upon Article 10 of the European Convention of Human Rights as adopting the public figure test is not persuasive. Certainly, it recognises that a politician (as a public figure) must be more tolerant to criticism of what he does (that is already one of the foundations of the defence of comment), but it does not suggest the extraordinary burden which Sullivan places upon such a plaintiff, and, by restricting the category to politicians the submission betrays a recognition of the impossibility of defining a public figure.

Committee's Recommendation:

The Committee does not support the introduction of a form of "public figure test" into the Bill, unless there is a guarantee that public figures will have the right to have published a reply to debate the allegations made against them.

Chapter 10

Shield Laws:

Protection of Journalists' Sources

The Press Council of Australia has publically called for a forum of shield Law in the wake of recent decisions in Queensland (Budd), Western Australia (Barass) and New South Wales (Cojuangco). While not included within the Bill, the Committee has reviewed the issues of the protection of sources, Shield Laws and the so-called newspaper rule in view of the public debate on these issues.

The question of protection of a journalist's sources usually arises in relation to a qualified privileges defence. In seeking to rely on a defence of qualified privilege, it would be extremely difficult to prove that a belief in the matter published was reasonable, without revealing the nature of the source of the information.

The Press Council has requested that legislation be introduced to ensure that there is reasonable protection of sources unless there are overwhelming reasons of public interest for disclosure.

Ms Wendy Bacon, senior lecturer in journalism, raised the question of "shield laws" in her evidence before the Committee on 7 August, 1992.

> The second thing I would like you to discuss at this late stage is the question of whether some sort of shield law could be imported into the defamation law at least, the ability of journalists to claim the protection of their sources. The inability of them to do that is the single biggest problem for us in the defamation law as journalists. There have been cases when I not only believed the truth of what I wrote but I could have demonstrated it to a jury, I think, sufficiently where there was one, perhaps only one of a number of sources I had used who had to remain confidential. There is no doubt that lawyers will be very unwilling to put you in a witness box in that situation so that you can prove the reasonableness of your conduct.
>
> I do not care what you do to the qualified privilege defence unless there is a possibility for journalists to demonstrate to juries the reasonableness of their conduct - to claim the privilege of their sources and to have juries then attach such weight to that as they consider fit. I am not saying it should be just carte blanche but juries should hear the story, hear the claim of privilege and then attach what weight they think to it as they should. Then I think any idea of due care, reasonableness or anything is really not much help to us. I think the Queensland

Government is now considering shield laws. I do not know exactly what stage it has reached here but I am amazed the lawyers have not pushed this more strongly.

When giving evidence before the Committee, Mr Padraic McGuinness commented on the problems journalists face in protecting their sources:

Mr HAZZARD: One final thing. It is not really in regard to the bill but you started off by discussing the code of ethics and talked about whether or not journalists should be protected in regard to revealing their sources. I happen to think that perhaps we should be moving, as much as it may seem surprising because of my earlier comments, but journalists should perhaps be protected in regard to their sources to some degree. How would you see us best going about that, keeping in mind that it is not in the bill at the moment but is open slather, how would you see about us going about best protecting journalists with their sources without diminishing others' rights?

Mr McGUINNESS: There are the two cases—first of all, in the context of defamation law and secondly, in a more general context. In the context of defamation law it is difficult to say that because if I say that I know that Joe Blow did something because I was told by a person, a good source, it is very easy for me to say that if I do not have to name the source. I can make it up. So really there the problem is that under current situations you would have to abandon any kind of defence based on truth if you did not name your source. I think perhaps that should be relaxed to the extent of allowing the jury to make a judgment as to whether they believe you, or you might be cross-examined on the circumstances in which you spoke to the source, the kind of information you got, how you knew the source or whatever, to give some impression of the veracity of the journalist. I think that would be the solution there, to allow a jury to judge whether the anonymous or the unnamed source could be trusted, that is, the journalist was telling the truth. Of course, the problem there is that the journalist might make up a totally fabricated story, but again the jury would have to judge the extent to which that was fabricated or whether it was true.

In the more general case of protection of sources, I find it very difficult to talk about absolute journalistic privilege, which is the common claim, because I do not think journalists do have absolute privilege. One can say that priests in the confessional, as the classic case, have absolute privilege but they do not go around saying, "Somebody told me that a murder was committed". They do not say anything. If a journalist does not pass on the information from the source, then in a sense it is privileged, but of course then it is of no use to the journalist. But nevertheless it is fairly clear that in many cases judges can demand the naming of sources for reasons that are not justifiable, that is, they are asking for too much unnecessarily. There was a case in Britain a few years ago in relation to the securities markets—I cannot remember the precise circumstances—where it was quite clear that the court was demanding information about the sources of a journalist for telling the truth, which everybody agreed was the truth, which was quite unnecessary in the circumstances of the case. That is a problem, of how do you limit the behaviour of judges where judges overstep, and I do not know the answer to that.

The Western Australian Law Reform Commission will soon report on the issue of professional privilege, including journalists, accountants, clergymen and medical workers.

It is probable that greater protection to journalists' ability to shield their sources will come as a result of review of the law in relation to contempt of court.

The Queensland Attorney General has proposed that each State's and the Commonwealth's contempt laws be amended to the effect that no court may require a person to disclose the source of information contained in a publication for which he is responsible unless it can be established to the satisfaction of the court that disclosure is necessary in the interests of justice. The proposal will be considered by the Standing Committee of Attorneys-General at their October meeting.

Committee's Recommendations:

The Committee is of the view that, because of the particular problems faced by journalists required to disclose their sources, the provision of closed courts and suppression orders in defamation actions should be examined by the Law Reform Commission.

The Committee recognises that a journalist may be required to disclose sources in certain circumstances on the grounds of public interest, but is of the view that it may be that protection is more appropriately contained in the laws relating to contempt.

Chapter 11

Division 7

Fair Comment

Most submissions have criticised the re-introduction of the title "Fair Comment" to the defence set out in Division 7 of the Bill.

Clause 35 largely follows the structure and terms of the 1974 Act in relation to this defence.

To refer to the defence as "fair comment" rather than "comment" produces a wholly erroneous view of what is involved. The opinion must be honestly held, it need not be objectively fair.

The Hon Justice Clarke, in evidence he gave to the Committee, expressed his concern about the defence of Comment:

> I think there is a problem with comment that has not been faced up to, and that is when the imputation involves or is drawn from fact and expression of opinion. The comment only answers that part of the imputation which is drawn from opinion. That was done deliberately, whereas in the old days there was a rolled up plea, which was mentioned in the case we have already discussed of Orr v. Isles, which answered both aspects. If, for instance, this matter is going to be referred to a Law Reform Commission, I think it should look at comment. In a case where an imputation is drawn from quite a large amount of material, it is a difficult defence.

Committee's Recommendation:

That the defence contained in Part 7 be re-titled "Comment".

Chapter 12

Clauses 36 - 45

Innocent Publication

Clauses 36 to 45 of the Defamation Bill, 1992 relate to innocent publication. They duplicate the provisions in the Defamation Act 1974.

Mr Peter Bartlett, solicitor, of Minter Ellison, wrote in his submission:

> [Under the present law,] generally speaking, the intention of the publisher to defame, is irrelevant in a defamation action. Tobin & Sexton note in their text, [Australian Defamation Law and Practice, at paragraph 1635,] that "although the general principle is that all persons who participate in a publication share any liability for that publication, including the author, editor, printer, publisher and retailer, a defence of "innocent dissemination" is available at common law for that distributor or vendor of a book or newspaper containing defamatory material if he is able to demonstrate that -
>
> (i) he did not know that the publication contained a libel;
>
> (ii) the ignorance was not due to negligence on his part;
>
> (iii) he had no ground for supposing that the publication was likely to contain defamatory material."
>
> Cassidy v. Daily Mirror Newspapers Limited [1929] 2 KB 331, E. Hulton & Co v. Jones [1910] AC 20 (The Artemus Jones case) and Lee v Wilson [1934] 51 CLR 276 all suggest that there is no common law defence of innocent publication.
>
> There has been some attempt to protect publishers in these circumstances in New South Wales (ss 36-45 of the Defamation Act) ... where the material was published innocently and the publisher made an offer of amends which was refused...
>
> The Bill adopts the offer of amends provisions of the New South Wales Defamation Act (ss 36-45).
>
> ... The draftsperson of this Bill has included the offer of amends procedure even though it has been the subject of much criticism and it is basically never used.
>
> The ALRC (No.11 paragraph 87) set out some of the problems with the New South Wales provisions:
>
> The essential problem is that only the defendant will know the circumstances surrounding the publication. He is given a complete defence, under certain

> circumstance, against an innocent plaintiff. The plaintiff has to determine whether the circumstances are such that the defence will succeed but he generally lacks the information necessary for an informed decision. The legislation therefore requires the defendant to furnish to the plaintiff an affidavit setting out the circumstances on which he will rely to show that the defamation was unintentional. In fairness to the plaintiff the defendant has to be restricted to the matters thus disclosed but also the offer often needs to be made promptly. A publisher is in a dilemma - if he omits to collect all available evidence he may not use evidence subsequently obtained, if he leaves no stone unturned he may be held not to have made the offer as soon as practicable.
>
> It is beyond my comprehension why these provisions would be placed in the 1991 Bill.

In his oral evidence to the Committee, Mr Bartlett, solicitor, continued, saying that Clauses 36 to 45 are

> ... totally and utterly useless. They are never used, so it seems to me that even though there is an argument in favour of a defence of innocent publication, the provisions as they presently stand in the New South Wales Defamation Act are unworkable and there is no point at all in putting them into the Bill.

Mr Stuart Littlemore, barrister-at-law, does not go so far as to say the provisions are useless, but he does believe that they require further definition.

> ... otherwise, to the journalist, it appears to offer a more generous version of qualified privilege. The problem would appear to be with the concept of "publisher" which, it seems, is intended to refer to a non-author publisher.

The Law Council of Australia believes there to be certain advantages in Division 8 of the New South Wales Defamation Act relating to "offer of amends", but

> the provision is overly technical.

The Law Society of New South Wales argues:

> The protection provided in New South Wales to innocent publishers is an important development in defamation law and it is submitted that in the interests of uniformity Queensland and Victoria should introduce similar provisions to Division 8 of the NSW Act.
>
> The Litigation Law Committee is not in favour of exempting all works of fiction from the application of the law of defamation. It is self-evident that if such exemption is given it is open to abuse and works of fiction may become the medium of defaming any person whose reputation the author wishes to damage.
>
> Concerning book sellers, libraries, news dealers and similar distributors, it is submitted that the common law defence of innocent dissemination is insufficient. It is submitted that there is great force in the submissions made by the ALRC regarding the "without negligence" requirement. It is, therefore, submitted that legislation should be introduced to protect such organisations and persons,

providing that such organisation or person did not know the publication contained defamatory material even if the publication was likely to contain such material.

The Communications Law Centre raised further problems:

> One further concern of the Centre in this area is the difference in effect of offers of amends in respect of innocent publications and offers for correction for other publications under Divisions 3 and 2 respectively of Part 4. The Centre is of the view that the provisions in clause 49 of the Bill should apply to performance of mutually agreed corrections under Division 2 with the proviso that in the latter case the plaintiff could apply to the court for permission to institute or continue proceedings where s/he adduced evidence of special damages.

The Australian Press Council raises questions about the concept of "fault" in defamation law:

> The Defamation Bill contains a definition of "innocent publication" in clause 45. This is for the regulation of offers of amends, or apologies. Although the New South Wales provisions on which this is based do not seem to have been effective in encouraging offers of amends, the Council is not opposed to their incorporation into the Bill.
>
> The concept of innocent publication points to an important and distinguished feature of the tort of defamation that, subject to certain minimal statutory ameliorations, the concept of fault is absent. (In addition, as Crispin Hull, editor of the Canberra Times, has observed, another unusual aspect of defamation law is that the essential onus of proving the truth of the alleged defamatory matter is on the defendant.)
>
> There is a need to consider whether fault should now be a necessary ingredient in a successful defamation action. In Gertz v. Robert Welch Inc 418 US 323 (1974) the Supreme Court of the United States decided that defamation law could no longer impose liability without fault except for actual loss. Justice Powell argued that "... punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedom of speech and press." (at page 340)
>
> Gertz is an important development, for it applies to private individuals, that is, those who are neither public officials nor public figures. While there is an attempt in the legislation to give some protection to defendants who are not at fault by, for example, the defence of qualified privilege in Clause 24, it should be recalled that plaintiffs, particularly public figures, are usually in command of the relevant information. Quite often, the publication of matters which are not correct results from the refusal of the public figure to reveal information relating to public interest. Hence there is a danger of error, exacerbated by action of the plaintiff. In such a case, where other inquiries are made, there may be no fault attributable to the journalist. In the light of this, the Council proposes a consideration of two clauses proposed by American law reformers in their Proposal for the Reform of Libel Law, The Annenberg Washington Program, Northwestern University, 1988:-

Section 6 Truth or Falsity

> (a) Burden of Proof:
>
> In any action for defamation, whether for declaratory judgment or damages, the plaintiff shall bear the burden of proving by clear and convincing evidence that the defamatory statements of and concerning the plaintiff are false.

Section 7 Minimum Fault Requirements

> In all defamation actions for damages, at minimum the plaintiff shall bear the burden of proving, through clear and convincing evidence, that the defendant failed to act as a reasonable person under the circumstances.

The Law Institute of Victoria commented:

> The uniform Act should include a plain English version of Division 8 of the New South Wales Defamation Act which deals with offers of amends.

Committee's Recommendations:

The Committee agrees that provision should be made for an offer of amends to be made in the circumstances of innocent publication. However, it recommends that clauses 36-45 be reviewed to ensure that the defence is applicable to booksellers, libraries, news dealers and similar distributors.

The Committee does not support any change in the burden of proof or the introduction of "fault" requirements.

Chapter13

Part 4 - Corrections - Clause 44

Correction Orders

Messrs Terence Tobin QC and Michael Sexton, Barristers-at-Law, provided the Committee with their assessment of the provisions of the Defamation Bill, 1992 which relate to correction statements.

> Clause 44 of the Bill provides that a party or prospective party to defamation proceedings that have been started or threatened may apply to the Court for an order recommending that the defendant or prospective defendant publish a correction or apology in the form approved by the Court or by a mediator appointed by the Court. Such an application must be made within fourteen days after service on the defendant of a Statement of Claim. It is obvious that the defendant is not obliged to publish any correction or apology recommended by the Court or the Court-appointed mediator.
>
> Clause 55 provides for the appointment (at the request of a party or of a prospective party or on its own motion) by the Court of a mediator to advise on the contents of a correction statement and the time, form, extent and manner of its publication. The mediator may give this advice in circumstances where the parties cannot agree on the details of a correction statement. The mediator may approve the form of the correction statement if the parties do agree on its details. A mediator may be appointed to advise on a correction statement in the absence of an application for an order under Clause 44.
>
> Clause 59 provides that in assessing damages or awarding costs the Court is to take into account:
>
> > (a) whether a correction statement was published (whether or not it was sought):
> > (b) whether a correction statement was applied for with what promptness;
> > (c) the promptness with which any correction statement was published together with its contents, position and prominence;
> > (d) the reasonableness of adopting any recommendation made by the Court or a mediator to the extent to which it was adopted;
> > (e) ~~any unreasonable rejection by the plaintiff of the defendant's~~ willingness to publish a correction statement recommended by the Court or a mediator and the terms of the statement in question

The proposed system, therefore, envisages that a plaintiff's unwillingness to participate in the scheme would necessarily be a major factor when determining whether he or she attempted to mitigate loss and that, if a defendant elected to publish a reasonable correction statement, this would result in a reduction of any

damages awarded to the plaintiff.
An application under Clause 44 is to be dealt with on an interlocutory basis if defamation proceedings have been commenced. Presumably this would mean that the plaintiff would file an affidavit setting out exactly the allegation and the defendant would be entitled to justify the publication in the same manner. At this stage, the plaintiff would be required also to file particulars of and give notice to the defendant of the desired nature, extent, form, manner, and time of publication of any proposed correction statement. The defendant's affidavit will also confirm or object to the form etc. of the correction statement proposed by the plaintiff.

The submission received from Young Lawyers looked at the situations where correction statements might be sought:

> Defamations where corrections may be sought tend to fall into two groups. On the one hand, there is the person who is wrongly identified, or about whom some similar mistake is made. Mistakes of this kind are quite common; Chris Anderson, in May, 1990, claimed Adrian Deamer believed 75% of Fairfax writs "arise from error of fact or a negligent misrepresentation of the facts" (address to the Australian Suburban Newspaper Association Conference, 10.5.90, reprinted in "Media Watch" No.13, p.15). The other group is made up of persons (sometimes famous, sometimes not) who come into conflict with the national media over stories of an "investigative" or "human interest" nature.
>
> In the present legal system, it is a wise plaintiff who asks for an apology, partly because it creates such an impact at the trial, partly because such apologies usually destroy any defence of comment and, finally, because newspapers are usually unwise enough not to publish apologies, even in the most obvious of cases. The bitter battle to extract an apology in Carson v. John Fairfax Group Pty Ltd (one was finally published 11 months later) is a case in point. When apologies are published, they are not always satisfactory: see example, Singleton & Anor v. Ffrench & Ors (1986) 5 NSWLR 425, where the plaintiffs sued over a defamatory apology.

The overall impression gained from a reading of the submissions is that most believe that the provisions relating to correction statements are an excellent idea, but are beset with problems which the Bill has not addressed.

The Discussion Paper tabled by the Committee in May 1992 raised the following points in paragraphs 2.1.2 - 2.1.7:

> The general feeling was that publication should only be recommended and that the failure to comply with the recommendation should be taken into account upon the issue of damages once liability has been established.
>
> As noted in the discussion on qualified privilege, the defendant's state of mind towards the plaintiff is an important element of the current law and is directly relevant to issues such as malice. If the defendant does comply with the recommendation, it could be seen as unfair that it should not be permitted (because of s. 44(6)) to prove that fact in order to show bona fides. Similarly, if the defendant

unreasonably does not comply with the recommendation, it may, again, be seen as unfair that the plaintiff should not be permitted to prove that fact in order to show mala fides.

If the correction was sufficiently prominent, or the plaintiff was sufficiently well known, jurors would be likely to recall the correction, and s. 44(5) would be of no effect. Consideration must also be given to reports of applications for correction statements. Other members of media may freely report the proceedings when the application is made (if only to discomfort the defendant) and again, jurors may recall those reports.

Many of the submissions have pointed out that the fact that, once defamation proceedings have commenced, the proceedings are interlocutory in nature will also present problems.

All of the media submissions lay great stress upon the difficulties which they may face in having evidence available for this procedure if it is to take place as soon as possible after publication.

Again, the general feeling was that there is a preference for some institutionalised form of alternative dispute resolution to attempt to deal quickly with the problems, with a minimum of procedural rules and associated legal expense.

The Bar Association of New South Wales considers that correction statements are desirable in principle, but raised concerns that

> ... the circumstances in which and the time at which a party may apply for a recommended correction order are too limited. There is no reason why the time for an application should be limited to 14 days after service on the defendant of the initiating process for defamation proceedings. If a party desires a correction statement, then that may well suffice to put an end to proceedings, in a number of cases. Furthermore many parties consider an important element of vindication of reputation for defamation lies in the securing of an appropriate retraction and apology.
>
> The Bar Association considers that a party should be entitled to apply for a correction statement, before trial, at any time up to the trial of the proceedings. Any delay in the application, or burden or unfairness to the defendant, can be taken into account by the court when determining whether or not to recommend a correction statement. Evidence concerning pre-trial correction statements would not be admissible, before verdict, in accordance with the present sub-clause (6) of Clause 44 of the Bill. The Bar Association agrees that correction statements pre-trial should not be mandatory, but should be available to be taken into account in an award of damages, as provided in Clause 59.
>
> The Bar Association, however, takes the view that a correction statement should be available as final relief and that either party should be entitled to make an application for the same at any time during the trial.
>
> The Sub-Clause of section 44 of the Bill which requires a Court to determine an application for a correction order on an interlocutory basis should be clarified.

It is not clear whether "interlocutory basis" refers to the legal tests to be applied in formulating the order, or whether it is merely intended to indicate that the application should be brought in proceedings which have been commenced and in the court in which those proceeding have been commenced. The Bar Association assumes that the latter was the intention. It would not be appropriate to limit the criterion for the determination of whether or not a correction order should be made to the requirements for the grant of interlocutory relief, especially in view of the novel nature of the correction order and the variety of matters to be taken into account.

In its submission to the Committee, the Law Council of Australia supports the concept of correction statements but not the proposal that they be court-ordered.

The proposal to introduce court ordered correction statements is essentially a recognition that monetary damages are not a particularly effective means of restoring the reputation of a person who has been defamed. The Law Council accepts this observation, and agrees that the law of defamation, as it currently exists, does not provide plaintiffs with the remedy that would restore their reputation: the publication of an apology or correction statement by the defendant.

The Law Council however, unlike the Attorneys, believes that the answer to this problem is not to give the courts the power to order a correction, but to give the defendant sufficient incentive to publish an apology of its own volition. Accordingly the Law Council recommends the introduction of a new defence for publishers, and recommends against the introduction of a facility to allow plaintiffs to apply for an interlocutory court-ordered or court recommended correction statement.

The reasons against the introduction of such a facility, discussed below, do not apply to orders to publish correction statements at the time of judgment, and, accordingly, the Law Council has no objection to the granting of such a power to the courts.

The Law Council goes on to argue:

The Law Council believes that the law should encourage the publication of corrections or apologies as an alternative to damages. Division 8 of the New South Wales Defamation Act and Section 7 of the Victorian Wrongs Act are intended to facilitate this goal. For different reasons, neither works.

The problems with the offer of amends provision in the New South Wales Act include the following:

(i) It is only available in the case of "innocent" publications. To be innocent, the facts relating to a defamation would probably have to be similar to the facts in either Artemus or Cassidy: the procedure is not available, therefore, in the vast majority of cases.
(ii) The provision is overly technical.

The problems with section 7 of the Victorian Wrongs Act include the following:

(i) It is poorly drafted.
(ii) It is not available to negligent publishers; the publication of a defamatory statement will often result from a mistake or error on the part of the

journalist; to deny the provision to negligent publishers is therefore probably to exclude most defamations from its ambit.
(iii) It refers to "payment into court" where "offer of compromise" would be more appropriate.
(iv) It is not clear what conditions must be satisfied before the defence will succeed.
(v) The provision is not available to the electronic media.

Nevertheless, it is a sensible idea to provide the media with a defence, where it acts reasonably following the publication of a defamatory statement. The provision must be such that it encourages the media to make an apology however, rather than setting out to restrict the circumstances in which the defence can be pleaded.

An appropriately worded provision would encourage the media, when it has published a defamatory statement which it knows it cannot defend, to publish an apology quickly and promptly and make, if appropriate, an offer of a sum of money as compensation. The publisher would know that if it did not do so it would have no defence to any action by the plaintiff, but that if it did, its behaviour would provide a complete defence to the action.

The elements of the defence should be that:

(i) The defendant has published, or offered to publish, an apology when requested to do so by the plaintiff.
(ii) The wording and timing of the apology have either been agreed to by the plaintiff, or are reasonable in all the circumstances.
(iii) If appropriate, a suitable sum of money has been offered as compensation.

It may be that rather than providing a complete defence to an action, the provision would only provide a defence to an action for general damages, i.e. the plaintiff could still show that he or she had suffered special damage for which the sum offered was insufficient compensation.

In order to facilitate this procedure, both the publisher and plaintiff should have the right to approach the court for a determination of the manner and form of the correction which should be published. Such a facility would enable a publisher to be certain that the manner and form of the publication of the apology was sufficient to bring it within the terms of the defence.

The Law Council submits that the granting of a right to a plaintiff to apply at an interlocutory stage for a court ordered or court recommended correction would be unfair to defendants in defamation actions.

The purpose of granting such a right is, as already acknowledged, to allow the plaintiff to seek a remedy which will actually lead to the restoration of his or her reputation, rather than simply providing him or her with a monetary solatium. If the correction statement is to be effective in undoing the damage to a defamed person's reputation then it must be published as soon as possible after the publication of the defamatory statement itself. One would therefore expect that if such a facility is introduced, a plaintiff would be able to reply to the court for a correction statement immediately after the publication of the defamatory statement, and that the application would be heard as soon as is practicable.

In order to establish a case, all that the plaintiff in a defamation action need prove is that a statement was published, that the plaintiff was identified in the statement, and that the statement was defamatory. It is not necessary for the plaintiff to prove

that the statement was untrue. Furthermore, a statement is defamatory if it has a tendency to damage reputation: it would not therefore be necessary for the plaintiff to show that any damage to reputation had actually resulted from the publication of the statement. It would therefore be extremely easy for the applicant to make out a prima facie case that he or she had been defamed, and therefore had a right to a correction statement.

The defendant, and such defendants are usually media organisations, would be in a completely different position. It is far easier to prove that a statement is defamatory, than that it is defensible. For the media, the essential question will be whether or not the publication is true, or if it contains expressions of opinion, whether the facts upon which the opinion is based are true. In many cases, it is extremely difficult for a media organisation to determine whether or not it will be able to prove that a matter is true. This is so, even where the media may be absolutely convinced that the matter is true, simply because the evidence available to it may not be admissible in a court of law, or because it may wish to protect the confidentiality of its sources.

In order to resist the application for a correction statement, the media would no doubt have to swear on affidavit that it had a defence available to it, and specify what that defence was. Because the application may be heard at short notice (in order to ensure that the correction statement was published as soon as possible), the media may be forced into the position of swearing that it has a defence available to it, when it is not sure whether it will be able to successfully plead that defence at the hearing of the action. Yet, it would be extremely risky for a defendant to plead justification for instance, because the failure of the plea may lead to aggravated damages being awarded to the plaintiff.

The media will therefore be forced into a position of choosing between swearing that it has a defence which it may not be sure it can successfully prove, at the risk of facing aggravated damages; or, on the other hand, failing to swear that it has a defence which it may in fact have, and thereby increasing the likelihood that the correction statement will be ordered.

In short, the introduction of this facility will force defendants, at short notice, to make a tactical choice which may have a significant impact on the ultimate outcome of the case. Although these objections apply particularly strongly against the granting of a power to the court to order the publication of correction statements, the introduction of a power for the courts to recommend correction statements is also objectionable, although to a lesser extent.

If a court recommends that a correction statement should be published, this will again force the defendant into deciding whether or not it can successfully defend the publication at a far too early stage in the proceedings. Whilst its investigative processes may still be incomplete, it will face the choice of publishing a correction statement which it may not believe to be warranted, and which indeed may not be warranted, or not publishing the statement at the risk of facing increased damages in the event of the plaintiff being successful in the ultimate hearing of the matter.

The Law Council therefore submits that the Attorneys should not consider the introduction of any facilities to allow a plaintiff in a defamation action to apply for a court ordered or court recommended correction statement. Rather, they should adopt the course suggested in paragraph 2.1.1 and provide an incentive to publishers to publish apologies by making available a defence to them if they do so.

(Paragraph 2.1.1 suggested, as follows:

> (1) The defendant has published, or offered to publish, an apology when requested to do so by the plaintiff.
> (2) The wording and timing of the apology have either been agreed to by the plaintiff, or are reasonable in all circumstances.
> (3) If appropriate, a suitable sum of money has been offered as compensation.)

In their submission, Young Lawyers expressed their concerns about the draft provisions:

> Defendants' representatives have complained that all the proposed new section for corrections will do is discourage defendants from using the present informal system of negotiated apology. Being more cynical, the cumbersome nature of the statutory request for an apology is such that a wily defendant could probably delay apologising until the story ceased to be newsworthy, thereby robbing the plaintiff of a remedy. The essence of a correction remedy is speed. The proposed reform here is cumbersome, capable of misuse and offers no comfort to plaintiffs who genuinely seek an alternative to proceedings for damages. Short of reintroducing punitive damages to punish defendants, who refuse to publish apologies, it is hard to see how defendants could be induced to comply. How such an apology could be achieved where the offending publication was a painting, [or] a piece of graffiti, or a cartoon, is hard to imagine.

Messrs Tobin and Sexton also highlighted the need for speed in this area and expressed other concerns:

> It was noted in the second Discussion Paper published by the Attorneys General that, if this system was to be effective, it was imperative that it be a fast track procedure. It is important to appreciate the Court resources that may be necessary to implement this system. Whatever the position may be in Melbourne or Brisbane, it is quite possible in Sydney that the introduction of such a system would result in a flood of applications capable of occupying a judge of the Supreme Court on a nearly full-time basis. Over the last decade the Defamation List has been conducted on one day of every second week during term. It appears that this may no longer be the case from the commencement of the first term of 1992. If this is so, it will not even be possible to test whether the applications for correction statements envisaged by the Bill could be accommodated within the framework of the Defamation List as it existed until the end of 1991. There can be little doubt that media defendants would strongly resist applications for corrections by plaintiffs in normal circumstances and that many applications would not be disposed of quickly...
>
> One of the greatest difficulties inherent in this proposed system is the need for the Court or a mediator to determine (at least in some form) the facts concerning the allegations made in the publication. If a defendant states that it intends to rely on a defence of justification, it would seem that an apology or correction should only be ordered if this defence appears likely to fail at the trial.It may, however,be extremely difficult to make an assessment of the prospects of the defence if the allegations arise out of, for example, complex financial transactions or if the defendant insists that it expects to have available more detailed evidence on some aspects of the allegations by the time of any trial. There is the additional problem that the rules of evidence do not apply in their full stringency to interlocutory proceedings so that evidence relied on by a defendant in relation to a proposed defence of justification at this stage might not necessarily be admissible at a later trial.

Max Keogh, Teacher of Media Law, sees the provisions as a "complex cosmetic, of little practical value".

> ... it will require yet another bureaucratic infrastructure to be "put in place". This entire section of the bill should be abandoned. A compelling argument against the aim of the proposal is that it assumes that damage arising from first publication of defamatory matter will be assuaged or reduced to any meaningful extent by publication of a correction of the first publication.
>
> This belief itself would appear to arise from an assumption that the public has constant exposure to the same publication. Obviously not every reader of today's Sydney Morning Herald or viewer of tonight's "A Current Affair" will read or view the same publication, day after day. A 'correction' published some days or a week following the original matter may well reach only some of those exposed to the defamatory matter.

However, he argues that:

> Whatever small value the corrections may offer, corrections should form a mandatory part of all damages judgements and the correction should be required to be the same length and prominence as the offending publication.

The Australian Society of Authors believes

> ... there is no reason for any defendant to publish a correction where he or she would not do so now. Accordingly, the value of the reform, from the perspective of freedom of expression, is zero.

John Fairfax Group Pty Limited expressed the view that the proposals change, rather than reform, the law of defamation, arguing that the Bill, whilst paying lip-service to correction statements and retractions, retains the historical emphasis on damages as the proper remedy for defamation actions. Their submission went on to enunciate their beliefs regarding when general damages should be awarded and then stated:

> Fairfax believes that the emphasis in defamation law should be placed on the quick publication of corrections, either by agreement between the parties as to wording and placement, or through mediation.
>
> Fairfax believes, however, that the court should be given no power to order the publication of corrections or replies. The court's role is to adjudicate on disputes between the parties. It has no role in forcing anybody, newspapers included, to publish material of any sort. The common law doctrine of freedom of speech will be severely damaged if publishers are forced to publish by order of the court. The right not to publish is as important in the doctrine of free speech as is the right to publish.
>
> Publication of corrections should be as a result of:
>
> (a) agreement between the parties; or
>
> (b) the decision of a non-legal mediator appointed by the Attorney-General who has the authority to suggest the wording and placement of corrections and replies after hearing from both the complainant and

publisher. But the publisher must maintain the right to refuse to publish the mediated correction or reply. If the publisher so refuses, the complainant will then and only then have the right to sue for general damages.

If the correction is published as agreed upon or as mediated, the complainant can sue for economic loss only, unless actual malice can be proved.

The Fairfax submission then drew the Committee's attention to the Annenberg Program, Northwestern University, Washington, 1988, which states:

(a) No action for defamation may be brought against any defendant, unless the plaintiff shall allege either:

(1) That the plaintiff made a timely and sufficient request for a retraction and the defendant failed to make a timely and conspicuous retraction; or

(2) That the plaintiff made a timely and sufficient request for an opportunity to reply, and the defendant failed to provide the plaintiff with a timely and conspicuous opportunity to reply or to make a timely and conspicuous retraction; or

(3) That the plaintiff made a timely and sufficient request in the alternative for either a retraction or an opportunity to reply, and the defendant failed to make either a conspicuous retraction or provide the plaintiff with a conspicuous and timely opportunity to reply.

(b) A retraction is a good faith publication of the facts, withdrawing and repudiating the prior defamatory statements.

(c) A reply is the publication of the plaintiff's statement of the facts.

(d) A timely request for retraction or reply is a request made within 30 days of the publication of the defamatory statement.

(e) A request for a retraction or reply must be made in writing and signed by the plaintiff or his authorised attorney or agent. It must specify the statements claimed to be false and defamatory and must set forth the plaintiff's version of the facts.

(f) A conspicuous retraction is a retraction published in substantially the same place and manner as the defamatory statements being retracted. The placement and timing of the retraction must be reasonably calculated to reach the same audience as the prior defamatory statements being retracted.

(g)A conspicuous reply is a reply written by the plaintiff and published in substantially the same place and manner as the defamatory statements to which the reply is directed. In the case of a broadcast, the defendant may read the reply or permit the plaintiff or his designate to read it. The defendant may require that the reply not exceed the length of the material in which the defamatory statements of and concerning the plaintiff were published, and that its form reasonably accommodate the nature of the medium in which it is to be published. The reply must be concise and limited to rebuttal of the defamatory statements.

(h) When the defendant customarily publishes retractions, corrections or opportunities to reply in a designated place, publication of a retraction or reply in that place shall be deemed conspicuous if notice of the retraction or reply is published in substantially the

same place and manner as the statements to which the reply or retraction is directed.
(i) Upon receipt of a request for a retraction, the defendant may satisfy the requirements of this Section only by publishing a retraction. Upon receipt of a request for an opportunity to reply, or upon receipt of a request in the alternative for either a retraction or opportunity to reply, the defendant may satisfy the requirements of this Section by electing either to publish a retraction or to provide the plaintiff with an opportunity to reply.

(j) To be timely, the publication of a retraction or reply must be made within 30 days of the request. In the case of a false and defamatory statement about a candidate for public office, however, the retraction or reply shall not be deemed timely unless it is published within a reasonable time under the circumstances prior to the election.

The Australian Press Council sees great advantage in the provision for correction statements, provided that these are seen as restoring, in whole or part, damage to reputation.

> The Council believes that this cannot be achieved by the court merely being required to take into account in assessing damages whether or not a Correction Statement was published; there should be an incentive to both plaintiffs and defendants to use the procedure.
>
> There is a danger that the new provision could involve parties in the costs and delays of an additional interlocutory stage with no guarantee that the action will not continue to its conclusion. The proposed reform may well increase delays and costs, a result opposite to that intended. Without there being some specific consequences on the award of damages as a result of the publication of a correction statement, the facility could encourage additional litigation.

The Press Council also drew to the Committee's attention the suggestion in the Annenberg Washington Program Proposal for the Reform of Libel Law.

Australian Book Publishers highlighted the special problems they would have in complying with the provisions for court-recommended correction statements:

> Unlike newspapers and magazines, the nature of book publishing would not allow for correction statements to be printed in subsequent editions as more often than not there is no subsequent edition.
>
> However, should a subsequent edition be published, this could occur any number of years after the alleged defamation thus offering the plaintiff very little in the way of restoration of reputation. It is also very unlikely that a person who bought the first edition of a book would also buy a subsequent edition, once again denying the plaintiff an effective means of restitution of reputation. Such necessary delays in book publishing may also allow for the imposition of greater damages than had a correction statement been immediately published.
>
> The proposal for correction statements could therefore work against both the plaintiff and the defendant just because of the nature of the book publishing process.
>
> The only way that a book publisher could effectively make a correction statement is by placing a newspaper or magazine advertisement. This placed an additional burden on book publishers that would not have to be borne by magazine or newspaper publishers, given their ownership of the media.

Brian Gallagher, for News Limited, argues that "there is already in place an effective and low-cost informal system whereby publishers regularly retract and apologise for improper or incorrect publication". Mr Gallagher went on to say:

> That system avoids litigation. Aggrieved parties complain to the publisher personally or through their solicitors. Frequently, the publication of a retraction is associated with payment of the legal costs of the party aggrieved. News Limited has some hundreds of files which attest to the effectiveness of this system which will be gladly made available for perusal.
>
> The Bill's provisions will encourage expensive and time-wasting applications to the court for correction orders. They will be in addition not in substitution for litigation.
>
> As the law now stands, a publisher will frequently retract. He will retract no more frequently under the bill's provisions for his legal position will remain unchanged. Under the existing law, publication of a retraction will mitigate damages.
>
> There are substantial difficulties with the procedure whereby a mediator will determine whether to recommend a correction before the matter comes to trial. To decide the issue he is going to have to decide complex points of law and difficult matters of fact which will require evidence by witnesses. Neither party should be subjected to determination of these issues without a proper trial.

David Bennett Q.C. of Freehill Hollingdale & Page, raised concerns about the correction statements and defamation trials:

> In practice, this provision seems likely to cause trouble. What if a correction statement was seen by a member or members of the jury at the same time it was published? Are they to be asked whether they did so and then told to ignore it? What are they to make of it if there is not mention of the subject during the trial? Further, it may well be that a defendant wishes to adduce evidence of making a correction statement in order to establish its bona fides for a purpose relevant to liability. I suggest, if it is desired to retain this provision at all, it should not go further than requiring leave of the judge before introducing the evidence.

In its response to the Committee's Discussion Paper, The Law Society of New South Wales made the following points:

> In paragraph 2.1.3 (of the Discussion Paper) it is suggested that the parties to subsequent defamation hearings should have the right to give evidence of clause 44 hearings and the implementation of any recommendations made as a result of them. The [Law Society] Committee's view is that the procedure will operate far more effectively if the parties are uninhibited by this evidence being admissible.
>
> In paragraph 2.1.4, concern is expressed that apologies to the less well known will have less impact than those to the well known. The [Law Society] Committee makes two points in response:
>
> > The first is that, to some extent, this is a self-correcting problem, as there is a tendency for the better known to suffer greater damage as a result of defamation.
> >
> > Secondly, the Court's powers to make recommendations with respect to "form"

in section 44(1)(a) would include an ability to make recommendations as to prominence.

The matters referred to in paragraphs 2.1.5-2.1.7 are all, in the [Law Society] Committee's view, valid enough but, once regard is had to the fact that the Court's power is only a recommendational one, it believes that these difficulties are outweighed by the benefits of the procedure approved.

Mr Justice Hoffman's bill referred to in paragraph 2.1.8 is an alternative approach. While the approach has much to recommend it, the Committee believes that section 44, in its present form is likely, as a matter of practice, to lead to many of the benefits of His Honour's proposal, while at the same time, avoiding the inevitable deficiencies of summary determinations.

The Law Institute of Victoria

welcomes the intention behind the proposed reforms relating to correction statements, but believes that the system proposed is complex and unpredictable. It will also be too expensive because any litigant who seeks this remedy must apply to the Supreme Court. In the Institute's view, compulsory pre-trial conferences shortly after the issuing of proceedings would have a far greater prospect of success whereby the complainant sat across the table from an Editor, Director of News etc and discussed his or her grievance.

The Communications Law Centre welcomes court-recommended correction statements as, in principle, "a long overdue reform of remedies available to an aggrieved plaintiff", and goes on to say:

In general, the Centre supports this type of remedy, and any procedures designed to provide, and encourage the use of, mechanisms for promptly obtaining the remedies of retractions, apologies and/or "right of reply". However, the Centre has a number of concerns about the specific proposal, and what it sees as some of its possible consequences.

... Our concern is that the procedure provided for under the Bill may prove cumbersome. For example, the defendant may immediately after publication of the defamatory matter publish a correction/apology. If the plaintiff is not satisfied with the terms of the correction he can approach the court, who may then appoint a mediator, the mediator will then consider the matter, there is then a further approach to the court to approve any agreement to publish the correction/apology. We note that there is no indication in the Bill as to what procedures mediators will adopt, or indeed who will be qualified to be a mediator.

From the plaintiffs point of view, this is a considerable gain, although there is nothing to force the defendant to publish the correction/apology, other than the possibility that the refusal will be taken into consideration in the event that damages are awarded. Additionally the procedure is only available for 14 days from the time of initiation of the proceedings. This may unnecessarily limit the usefulness of the procedure and the Centre is of the view that there should be not time limit in which this procedure can be invoked. However, the length of time before which a plaintiff seeks to avail himself of the procedure should be a relevant factor in assessing any award of damages or the question of costs.

From the defendant's point of view, there are a number of disadvantages. There is the cost

of going through this potentially lengthy and costly procedure, there is no mechanism whereby the defendant can initiate the procedure and there is no guarantee that the plaintiff will discontinue proceedings for damages. This is of practical importance where the defendant media company is aware it has made a mistake and wishes to apologise.

We also note that Part 4 of the Bill refers only to a 'correction'. A right of reply is distinctly more appropriate than a retraction or correction when the defamatory matter takes the form of comment. It also has the advantage that it can be brought into play without the truth or falsity of a defamatory allegation having to be finally resolved. Similarly the correction may be more effective if it takes the form of an apology, which goes further than a mere correction of facts.

A further problem with the procedure is that there is no provision for a mediator to apply to the Court for a correction order.

The Centre is of the opinion that a more useful procedure would be provision for compulsory pre-trial conferences held shortly after the issue of proceedings, whereby all parties are required to meet with a judge in chambers, or other mediator, to discuss the appropriateness of a correction, retraction, apology, or right of reply, and resolve procedural timetables.

In her first submission to the Committee, Judith Walker, representing the Australian Broadcasting Corporation, made the following comments:

Although a defendant will not be obliged to publish a correction statement, a court in assessing damages or awarding costs is required to take into account whether or not a correction was published even if no correction order was applied for by the plaintiff and whether or not the plaintiff availed itself of an opportunity to reply as provided in the Bill.

It is not proposed that a correction statement will provide a complete remedy and, if such a statement does not end the matter, it will not shorten the litigation process but rather add to it. Correction statements and the associated procedural rules will impose additional legal expenses on the parties.

More importantly, there are numerous occasions when a publisher knows what it published is true in substance, but would be unable to prove the truth of the imputations alleged by the plaintiff in the short time allowed before the hearing before the mediator.

The form of the hearing before a mediator is yet to be determined. For example, what is the nature of the evidence upon which the court will make its decision? If only affidavit evidence is admissible it will be difficult to assess its reliability. If a defendant swears it has a defence, will it be required to provide details?

We remain of the view that a fast non-legal mediation system, along the lines set out in our earlier submissions to the Attorney General, is preferable to court-recommended correction statements. If a complainant and a publisher can agree on the wording of such a statement and if it is published as soon as possible after publication of the matter complained of and with equal prominence to the matter complained of, a complainant should be limited to recovering damages for actual economic loss.

The A.B.C., in its submission of August, 1992, made the following final comments:

We do not believe that the involvement of courts in drafting and ordering corrections, or even in drafting and recommending corrections which are not binding in any legal sense, will assist to resolve defamation actions.

> In our view, this will only create another judicial jurisdiction overlaid on defamation involving large amounts of court time and giving rise to significant evidentiary problems. The parties are the people to attempt to thrash out apologies, corrections and replies.
>
> It is for this reason that we favour a mediation process that must be used prior to any party suing. The mediator as outlined in our proposal should not be a lawyer. Both parties should be present. They should be permitted, if they wish, to bring their lawyers and the mediation process should be entirely without prejudice and confidential, not to be taken into account in any subsequent legal proceedings except as a necessary precondition to their commencement.

The Committee concurs with the majority view that the provisions relating to correction statements are an excellent idea, but are beset with problems. It is of the opinion that publication should only be recommended, and that failure to comply with the recommendation should be taken into account upon the issue of damages, once the liability has been established.

The fact that, once defamation proceedings have commenced, the proposed proceedings seekings the correction statement are interlocutory in nature, will also present problems. The question, must be asked, "Do the findings constitute an issue estoppel? Even those of a mediator?" Clause 44(6) would appear to suggest that.

There is some confusion about whether clause 44(7) refers to clause 44(6). It is suggested that the proceedings should always be brought in the Supreme Court which has the facilities to deal with such things which the District Court does not; and certainly, they should not be interlocutory in nature.

<u>Committee's Recommendations:</u>

The Committee is of the view that the procedures in the Bill will produce problems which need to be addressed if the fast-track mechanism is to be workable. It may be possible to tie this into some institutionalised form of alternative dispute resolution. The Committee recommends review of clauses 44 and consequential clauses.

The principle of fast-track procedures is supported, as it is foreseeable that in some circumstances it could resolve issues with a minimum of expense and delay.

Chapter14

Alternative Methods of Dispute Resolution

In a paper delivered at the Free Speech Committee's 1990 Defamation Law Seminar and submitted as part of Australian Broadcasting Corporation's submission, Judith Walker discussed alternative methods of dispute resolution generally and in relation to defamation law:

> Many cultures, in particular Asian and Oceanic cultures, have a tradition of the use of alternative dispute resolution in preference to courts of law. These cultures place great emphasis on settlement by agreement or consensus rather than by the imposition of a decision by a third party. Western cultures, on the other hand, traditionally adopt a confrontational approach by an adversarial or inquisitional process.
>
> ... It is really only in the last two decades or so that Western countries have begun to apply alternative dispute resolution outside certain specified areas. The increasing awareness of the value of the processes of alternative dispute resolution is reflected in a recent proposal put by the Law Council of Australia to the Commonwealth Attorney General. The proposal is for the resolution of disputes by agreement under a uniform system of mediation in all federal and state courts, both before and after legal proceedings have been initiated.
>
> The term "alternative dispute resolution", or ADR, can be used to describe any organised dispute resolution outside the courts. It may encompass both court initiated processes for example, the Law Council's proposal and the recent amendments to the Federal Court rules which provide for "assisted dispute resolution" within the framework of Federal Court proceedings - and processes used independently of court action, whether or not litigation has commenced. The process may involve an arbitrator where an independent third party makes a decision binding on the parties or it may involve negotiation between the parties in which the parties reach their own solution and the role of the third party is limited to assisting the parties in reaching their solution.
>
> ADR has a number of advantages over litigation particularly in the areas of costs, delay and exclusion of poorer people. In the words of the Law Council, resolution of disputes by agreement is "cheaper and quicker and it is more likely to satisfy both parties". As in the case of defamation, the outcome of litigation is often unpredictable and a plaintiff must obtain a substantial damages award if he or she is to benefit financially. Where litigation is resorted to, there can only be one winner and one loser or two losers. If the processes of ADR are utilised there can, however, be two winners. In addition, it is recognised that the majority of cases involving litigation are settled just prior to or during the course of a trial, after much time, effort and money has been expended by the parties.

Resolution of disputes by mediation has a particular attraction in the area of defamation. It is said that the purpose of defamation proceedings is to right harmed reputation. However, given the length of time till trial and given the fact that no apology is forthcoming even if a plaintiff does succeed in an action for defamation, this objective is not really achieved by litigating.

The Paper went on to make proposals for alternative methods of dispute resolution in the area of defamation law.

What is proposed in this paper is that consideration be given to the introduction into defamation law of an alternative dispute resolution process in the form of mediation. It does not propose a system of arbitration where a third party can impose a decision on the parties in dispute. Rather, the process that is recommended is one in which the parties can hopefully resolve their dispute themselves with the assistance of a third party. In making this recommendation, it is recognised that some plaintiffs in defamation actions seek an award of damages rather than an apology. Some defamation actions are commenced against the ABC without warning, by the service of a writ or statement of claim and certainly with no request for an apology. During the litigation process there is no request for an apology. Mediation will not resolve a dispute in which the complainant has no intention of settling short of an award of damages. However, under this proposal, even this sort of complainant would be forced to mediate before litigating.

The outline of the proposed mediation system would be along the following lines:

(a) a panel of independent non-lawyer mediators would be appointed by say the Attorney General in each state or territory for a fixed term, drawn from persons unconnected with the media, after public advertisement;

(b) at any time an adequate number of mediators must be available to participate in the attempt to resolve a dispute, whether by telephone or in person;

(c) the system would be funded by publishers on a levy basis loosely related to output and/or circulation. Like the Australian Press Council, there would be no cost to a complainant;

(d) the mediators would receive a set fee for their services together with reasonable out-of-pocket expenses;

(e) all mediators would be indemnified against any liability incurred in the discharge of their duties;

(f) a complainant would first complain directly to the publisher. At this stage it may be possible for the parties to resolve the matter without recourse to mediation and every effort should be made to do so. However, if this is not possible, the publisher would be obliged to advise the complainant that the mediation process was available and at any time either party could call in the services of a mediator who must be acceptable to both parties;

(g) the limitation period for the referring of complaints to a mediator would be the same as that applicable for the commencement of litigation in a particular state or territory;

(h) the role of the mediator could range from minimal to active but would not involve the imposition of a decision. This is for the parties in dispute;

(i) a complainant could not proceed to litigation unless the complainant had previously referred an unresolved negotiation with the publisher to a mediator;

(j) the mediator would hear the complaint and consider any response and/or material presented voluntarily by the complainant or the publisher (all of which material or response would be placed before the other party);

(k) no lawyers would represent parties in discussion with the mediator and the proceedings would be confidential and informal, that is the rules of evidence would not apply;

(l) the mediator would be entitled to make recommendations with no binding force to the parties either as to how they might further debate the matter, or as to a right of reply to the complainant, or a correction or an apology by the publisher;

(m) the thrust of the system would be speedy resolution of disputes via timely verification by the publisher to a complainant of the substance of the story or, on the other hand, by an agreed correction, apology or reply;

(n) a mediated settlement would end the matter completely;

(o) only if mediation failed could a complainant then proceed to litigation with the usual remedies;

(p) if the mediation process did fail, and the complainant proceeded to litigation, anything said or done or any information obtained during the course of the mediation process would be inadmissible in court proceedings.

The Australian Broadcasting Corporation submission included a proposed new Part 3 - Mediation:

Division 1 - Preliminary

16 A person may not commence defamation proceedings in respect of any publication unless that person has complied with the provisions of this Part.

17(1) Any person who believes that published matter contains an imputation or imputations defamatory of that person (the complainant) may at any time within a period of six weeks from the date of publication give written notice to the publisher of the matter.

(2) If written notice is received by a publisher pursuant to subsection (1) the complainant and the publisher shall attempt to resolve the dispute between themselves.

(3) If a dispute is not resolved within fourteen days of receipt by the publisher of a written notice pursuant to subsection (1) (or within such further period as may be agreed between the parties) the publisher shall advise the complainant that a mediation process is available and at any time during the period set out in section 57 either party may submit the dispute for mediation as provided for in this Part.

Division 2 - Mediators

18 The Attorney General may after public advertisement accredit persons as mediators for the purpose of this Act.

19 Mediators shall be accredited for a term of # years and may be re-accredited.

20 Mediators shall be paid such remuneration as may be determined by the Attorney General.

Division 3 - Conduct of Mediation Sessions

21(1) Mediation sessions shall be conducted by one or more mediators with as little formality and technicality and with as much expedition as possible.

(2) The rules of evidence do not apply to mediation sessions.

(3) A dispute may not be adjudicated or arbitrated upon at a mediation session.

(4) A mediation session shall be conducted in private.

(5) A party to a mediation session is not entitled to legal representation.

(6) A mediation session may only be terminated by a mediator if, in the absolute discretion of the mediator, the dispute is incapable of resolution.

(7) If a mediation session is terminated by a mediator the complainant may then commence court proceedings relating to the dispute, the subject of the mediation session.

(8) If a dispute is resolved by agreement at or pursuant to a mediation session such agreement is enforceable at law and the complainant is estopped from commencing court proceedings relating to the dispute, the subject of the mediation session.

Division 5 - Miscellaneous

Exoneration from Liability

22 No matter or thing done or omitted to be done by a mediator shall, if the matter or thing was done in good faith for the purposes of this Act, subject any mediator to any action, liability, claim or demand.

Privilege

23(1) In this section, "mediation session" includes any steps taken in the course of making arrangements for a mediation session or in the course of the follow-up of a mediation session.

(2) Subject to subsection (3), the like privilege with respect to defamation exists with respect to -

(a) a mediation session; or

(b) a document or other material sent to, or produced for the purpose of enabling a mediation session to be arranged,

as exists with respect to judicial proceedings and a document produced in judicial proceedings.

(3) The privilege conferred by subsection (2) does not extend to a publication made otherwise than-

(a) at a mediation session; or

(b) as provided by subsection (2)(b).

(4) Evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court, tribunal or body.

(5) A document prepared for the purposes of, or in the course, of, or pursuant to, a mediation session, or any copy thereof is not admissible in evidence in any proceedings before any court, tribunal or body.

(6) Subsections (4) and (5) do not apply with respect to any agreement referred to in subsection 21(8) or with respect to any evidence or document where the persons in attendance at, or named during, the mediation session and, in the case of a document, all persons named in the document, consent to admission of the evidence or document;

(7) A mediator or a party to a mediation session is not liable to be proceeded against for misprision of felony in respect of any information obtained in connection with this Act.

Secrecy

24 A mediator shall not commence to exercise the functions of a mediator without first taking an oath before a justice of the peace in or to the effect of the form set out in Schedule # or making an affirmation in or to the effect of the form set out in Schedule #

Peter Bartlett, solicitor, of Minter Ellison, was also supportive of an alternative form of dispute resolution. He wrote:

> It is generally accepted that the law of defamation has been overly preoccupied with damages as its main remedy. The Australian Law Reform Commission reported that 'not merely are damages inappropriate to vindicate reputation, the link between liability and damages has prejudiced plaintiffs'. A retraction or apology published soon after the defamatory publication is often the most appropriate way of restoring or vindicating a reputation. However, the proposal submitted by the attorneys contains numerous practical and administrative problems.
>
> ... It is thought that a form of informal pretrial conference within a day or two of publication would be a far quicker and cheaper procedure with a greater prospect of resolving the complaint.

When giving oral evidence before the Committee, Mr Bartlett further explained:

> ... there is merit in the suggestion put forward that you have some sort of compulsory pre-trial conference in which you sit across the table from the Editor, the News Director or whoever and are able to debate out the issue with him or her and show that in fact you have been wronged. If you are able to do that, to sit across the

table and put a good argument and the editor does not have an answer to it, hopefully you would get an apology, a correction order and perhaps damages. That would be done within a week or a couple of weeks of publication and you would not be up for these unlimited costs.

The Law Institute of Victoria supported pre-trial conferences in preference to court-recommended correction statements:

> The Institute welcomes the intention behind the proposed reforms relating to correction statements, but believes that the system proposed is complex and unpredictable. It will also be too expensive because any litigant who seeks this remedy must apply to the Supreme Court. In the Institute's view compulsory pre-trial conferences shortly after the issuing of proceedings would have a far greater prospect of success whereby the complainant sat across the table from an Editor, Director of News etc and discussed his or her grievance.
>
> Many complaints are settled prior to the institution of proceedings. Such a procedure should be encouraged. The Bill should not give any encouragement to complainants approaching courts without first attempting to resolve the complaint, directly with the publishers.

Mr Norman Lyall, representing The Law Society of New South Wales, told the Committee

> ... the Society is very much in favour of mediation and dispute resolution as soon as it can be brought into effect for any case. Our role is to encourage this, and we do encourage it.

Mr Lyall commented on the qualifications and qualities which might be expected of a mediator:

> I do not think mediators should be legally qualified if they are going to mediate in a matter like this. The people who are involved will probably be legally represented and it may well be better to have someone who is skilled in mediation and dispute resolution and who is not necessarily a lawyer. I do not think it should necessarily be a lawyer. It should be someone who has the skills. There are a lot of people who become skilled in arbitration and dispute resolution matters and who are not lawyers. The need is for someone who is skilled.

When giving evidence before the Committee, Mr Stuart Littlemore, barrister-at-law, tabled an American book called Beyond the Courtroom - Alternatives for Resolving Disputes, edited by Richard T. Kaplar, which discusses the Annenberg Program conducted by Northwestern University. Mr Littlemore commented:

> **Mr LITTLEMORE:** That is work that is performed as a totally alternative approach by what is called the Annenberg Washington program at Northwestern University.
> **Mr BECKROGE:** The Fairfax group drew attention to it.
> **Mr LITTLEMORE:** Perhaps they did not go to the original material. I am very happy to make that available because it is the most interesting discussion there is about real alternatives. I have given a paper on this on one occasion in South Australia. I personally am not all that enthusiastic about it because there is no sanction in it. I mean I blow back and forth; I have to be frank about this.

Sometimes I think that we are getting nowhere with the law of libel and it is taking three or four years to get cases on by which time the sting has gone anyway. Then at other times I think, as Mr Tobin said, if you take the money out of it they will go mad. That is the reality if you just say, "All you have got to do is run an apology."

It is all very well for us to think as we all do about the Sydney Morning Herald, that it will do the right thing and so on, but that is not where the real harm is done. The harm is done in the tabloids, the harm is done in the local papers, the harm is done on the cheap television programs. They will say: "Well, all we have to do is say we are sorry every three weeks. That is terrific. We can destroy someone as long as all we have to do is say sorry, we got it wrong", and it becomes a kind of culture in itself. I do not know about you but when I read something in the paper, that there has been a settlement, if I had the paper available to me that said, "On 14th July, 1989, we said so and so", I would read it. If I had it available I would go back and read the defamation to find out what it was they were apologising for.

I am always very careful in my settlements of defamation cases, when I am appearing for plaintiffs and we get an apology, to include no reference to what the sting of the defamation was because I think that defeats the whole purpose of settling the case. Some people will say to you, "I want an apology that says on 15th August, 1989, this newspaper alleged that Mr Smith was guilty of the following". It takes me a while to explain to them that that is not a terrifically good idea in my opinion. I think what Mr Tobin says is absolutely right as a reality. If you take the money out of it, then they will go mad. We have seen it in other areas where people feel they are protected, where there is absolute privilege. Where things are said in Parliament and things are said in court, they really enjoy that stuff.

Mr HATTON: I accept that, but the process I am worried about is that defamation has become so complex that most lawyers, judges and magistrates do not understand it and will be quite happy to say so, and so you get a highly qualified specialist group of people who cost you the earth and somehow I think we as parliamentarians owe it to the community to cut through that process. That is really what I am looking for, some guidance as to how we can cut through that because that expensive interrogatory process and the technicality of the argument is terrifying and extraordinarily costly and it leaves the ordinary citizen completely exposed.

Mr HAZZARD: And this bill also does not ameliorate that position, it makes it far worse?

Mr LITTLEMORE: I think there is this about it, and this recommends itself to me in terms of simplification.

Mr Alister Henskins is of the opinion that alternative methods of dispute resolution will increase costs to the plaintiff. In his evidence to the Committee, he said:

Mr HENSKENS: Briefly, my only point on mediation is that my experience has been that probably few defendants will seriously get involved in mediation. There are essentially two types of defamation: one that is effectively intended and researched by a media outlet; and one that may be accidental. The accidental ones, which are a very small percentage of the Channel 9 work, say, when I was doing it, might be amenable to mediation. But in the overwhelming majority of them Channel 9 will stand by its story because they will believe that they have properly researched it. They are not going to get involved in mediation. All mediation, probably in 98 per cent of those cases, will do is increase the costs to the plaintiff.

CHAIRMAN: In regard to mediation and alternative dispute resolution, what should be the position about compulsory conferences in a defamation action?

Mr HENSKENS: ... if you are a plaintiff and you bring a defamation action, usually you are a pretty angry person. I suppose sometimes you are not; maybe you are only after $400,000 payment. I do not know. From the media's point of view I do not think it will work from what I have seen, unless it is a genuine accident. If it is an accident, you could go under the offer of amends provision.

Mr HAZZARD: The media are not the only ones who get involved in defaming people.
Mr HENSKENS: That is true. For other defendants it would be more of an assistance.
Mr HAZZARD: You cannot give us any logical arguments against it?
Mr HENSKENS: Perhaps it should be at the election of the plaintiff, because the plaintiff might know whether they are wasting money and time in going to mediation. They would have a flavour of the action. You would already have a flavour of how the defence was running, if they are justified or have put on a serious sort of defence, whether mediation is just hopeless.

The Australian Press Council discussed alternative dispute resolution in its initial submission:

> The Council has previously indicated to the Attorneys a willingness to play an enhanced role in the alternative resolution of disputes. The Council believes that the needs of plaintiffs more interested in restoring reputation which has been perceived to have been damaged, rather than in gaining monetary awards, should be accommodated. The proposals on requests for retraction and opportunity to reply, and for a declaratory judgement with the possibility of arbitration (paragraphs 7 and 9 above) could in part fulfil these needs. The Council already provides a facility for, and has a long expertise in, the efficient and inexpensive hearing of complaints against newspapers. Consisting of journalists, editors, members of the public and representatives of publishers, it brings together professional judgement and community values. With its simple procedures, and disdain of formality, it would be increasingly attractive to complainants and newspapers were the balance in our defamation law between public interest and the protection of reputation especially of public figures to reflect the situation in other comparable democracies.
>
> The Council believes that the facilities it offers should be flexible, and not limited to the adjudication process which has hitherto dominated its procedures. A less highly publicised but important role of the Council has been in the mediation of potential disputes which are satisfactorily mediated without being formally adjudicated. Under this procedure, the Executive Secretary acts in the role of a national press ombudsman. The Council is willing to play an enhanced role in the speedy settlement of defamation cases, and where both parties agree, whether in advance or on an ad hoc basis, the Council would be most willing to assist.
>
> In the event that the Council's procedures were to be used by parties already involved in litigation, the Council would obviously need to provide for a derogation from its normal rule contained in paragraph 5 of its complaints procedure. This procedure provides for the waiving of legal rights where the Executive Secretary considers a complaint could be the basis for a legal action against a publication. The Council sees no difficulty in providing for such a derogation in appropriate cases if it were the wish of both parties.
>
> At the same time, the Council does not see itself as the exclusive forum for complaints, and encourages direct complaints to newspapers and the use of readers' representatives, ombudsmen and the like. It also has no objection to and encourages, in appropriate cases, references to the Judiciary Committees of the AJA, the Advertising Standards Council and similar bodies.

Ms Penelope Layton-Caisley, a potential litigant unable to pursue a defamation action because of the costs involved, made these remarks:

The employment of mediator in legal matters of any kind, but particularly with regard to the present proposals to appoint "mediators to advise on correction statements or replies" is to be commended vociferously.

The employment of mediators should be extended to provide for a compulsory meeting (chaired by a mediator) between plaintiff and defendant before the matter goes to court.

Every effort should be made to reduce court costs, particularly where a plaintiff is much less financial and powerful than the defendant.

Any defamation laws enacted should carry with them the implication the it is more important for an adjudged wronged party to be compensated than the wrongdoers be treated leniently because they - or their smart lawyers - have found some loophole in the legislation.

Young Lawyers' second submission provided the Committee with background information on the United Kingdom Defamation Bill, 1988, which establishes a fast-track summary procedure for matters in which a plaintiff seeks a correction and/or limited damages:

The Bill does not touch the substantive law but introduces a new remedy and procedure. Its purpose is three-fold: first, to provide a cheap and speedy remedy for plaintiffs who want no more than a published correction and modest damages; secondly, to provide defendants with a cheap and speedy procedure for dealing with relatively trivial claims; and thirdly, to encourage settlement of all defamation actions by requiring the parties to state their cases fully on affidavit at an early stage.

Because of the involvement of the media, defamation is an area of law which attracts attention. The long delays, arcane interlocutory procedures and high legal costs are a matter of frequent comment. There is no legal aid, nor is there likely to be. This leads to complaint by both plaintiffs and defendants.

First, plaintiffs who are not rich or supported by trade unions complain that however strong their case, they cannot afford to litigate. Secondly, what most plaintiffs want is the immediate publication of a correction, with or without some modest compensation.What they get is three or four years of anxious and obsessional waiting, followed by a trial which, even if it ends in success, may reopen injuries everyone else had forgotten and stamp them indelibly on the public mind.

Defendants complain that however unmeritorious or trivial the claim, the costs of defending force them to make an offer to settle. This pressure feeds upon itself and has been increased by recent large jury awards.

Under the provisions of the Bill, a plaintiff who is willing to confine his claim to an order for a correction and damages less than £5,000 may apply for summary relief (clauses 1(1)(a) and 2(1)(a)). The judge will then have to decide whether to dispose of the action summarily, i.e. on affidavit evidence and without a jury, or whether to send it for trial. If the defendant wants the action to go to trial so that he can plead justification or fair comment and his affidavits show a good arguable defence, the judge must certify the claim as fit to be tried (clause 2(2)(a)). This clause is essential to the freedom of the press: it gives newspapers who have published "exposures" the right to justify themselves at a trial at which the plaintiff can be cross-examined and they can adduce oral evidence. The judge also has a discretion to certify for trial in

any other case in which he thinks the case is unsuitable for summary hearing (clause 2(2)(b)). There are no limits to the case in which this discretion may be exercised but one example may be when a newspaper wants to plead justification without disclosing an arguable case on affidavit and the judge thinks that in all the circumstances the case should nevertheless go to trial.

The other side of the coin is that in a case in which the plaintiff does not wish to limit his claim or submit to the summary procedure, the defendant may ask the judge to deal with the action by summary hearing and the judge will ordinarily do so if he considers that a published correction and payment of £5,000 or less would be adequate compensation for the plaintiff even if he won (clause 2(1)(b)). This enables the defendant to secure a disposal of relatively trivial cases without the risk of incurring the enormous costs of a full trial. On the other hand if the judge thinks that the plaintiff has a good arguable case and that summary relief would be inadequate to compensate him if he won, he will certify for trial. The defendant's right to a summary hearing in such cases is also subject to the judge's discretion to certify the action for trial if he thinks that it is for any reason unsuitable for summary hearing.

If the judge decided to dispose of the case at a summary hearing, it will be heard as if it were an interlocutory application which the parties had agreed to treat as the trial of the action. This is a form of procedure with which judges are well acquainted. The material is not as full as at a trial with oral evidence and cross-examination but in many cases is sufficient to enable the court to reach a confident decision. The Bill attempts to select for this kind of treatment those cases which are suitable and to leave the rest to full trial. The judge will decide the summary hearing on the ordinary civil burden of proof: is the plaintiff more likely than not to succeed at trial? (clause 1(1)(a)). If he thinks he would, he will award summary relief. If not, he will dismiss the action. Either way, subject to appeal, the summary procedure will dispose finally of the action.

Even in those cases which are not summarily disposed of, the procedure of certification for trial will still serve a purpose. At present, many libel actions settle almost immediately, with publication of an apology and payment of some damages. Many others settle at the door of the court two or three years later. Few settle in between. The main reason is that once the action is launched, neither side is obliged by the rules of pleading to disclose its hand to the other and will try to keep it secret as long as possible. I quote from a memorandum by David Mackie, senior litigation partner at Allen & Overy:

> The summary procedure will fill what, to someone with a wider practice, seems the strange void in libel cases between the issue of the writ and trial. This leads to settlements taking place either shortly after the row starts or only when trial is imminent...Pleadings in libel cases tell the parties very little because the informative ones (e.g. particulars of justification in support of such a defence) customarily arrive only by amendment after discovery. There is a fine art in making these amendments as late as possible...The "holding" defence has a sacred place in libel actions.
>
> [The summary procedure] does something about the odd balance of advantage in libel cases. At the start the defendant holds all the cards because nothing nasty is going to happen to him for eighteen months or so and he will take a tough line knowing that a plaintiff may desperately want a swift correction. The plaintiff is in a poor position knowing that if he does not take whatever is offered at that stage he must risk a lot of

time, money and worry and will lose the chance of a swift retraction. There is then a long dormant period and the case re-emerges, this time with the balance reversed. The newspaper defendant knows that the jury will reward the plaintiff for his persistence (judicial statistics bear this out) and the real issue is going to be 'how much ?'. At each end of the case therefore the balance is unfair and so the system works against the encouragement of a just solution."

To the extent that the summary procedure can be invoked without the other side's consent, the Bill restricts the right to trial by jury. But many plaintiffs will seek summary relief because for them the right to trial by jury is illusory. They cannot afford it. The bill gives them a new and speedy remedy and it is no more than a fair quid pro quo that defendants should have the right to the same speedy procedure in cases which do not, either on grounds of substance or for any other reason, justify a full-scale trial.

After two-days of hearings, on 18 and 19 February, 1992, the Committee on the Defamation Bill, 1992, had the following propositions sent to those persons who made submissions:

Proposals on possible mediation procedures

1. that there be a compulsory conference immediately after the institution of proceedings,

2. that the plaintiff and a representative of the defendant with sufficient authority to negotiate be present,

3. that the conference not be held in open court,

4. that what is said at the conference not be admissible in evidence if the claim subsequently goes to trial,

5. that, at the conference, the plaintiff must show how the matter complained of is false, and

6. that the defendant must reveal the information in its possession, but should not yet be forced to reveal its sources.

Possible role of the mediator:

- to make recommendations.

A mediator may recommend, for example, that a correction be published and that the defendant pay the plaintiff's costs to date. This would avoid the expense of preparation for trial. This procedure would be particularly useful if what was published had been interpreted by the public in a way not intended by the journalist and the journalist had no belief in the truth of what was conveyed.

The mediator might recommend that a correction be accompanied by a statement that the publication was never intended to convey such a meaning and that the error is acknowledged.

Qualifications and qualities of a mediator

In the short term, conferences should be conducted by a lawyer with experience of dealing with the media; in the long term, the mediator need not be a lawyer but a person able to 'sensibly and strongly' help resolve the matter at issue.

The procedure would not entail the publication of any court-ordered correction; it would be mediation only.

Evidence would not be given at such a conference, so that there would be no problem about interlocutory relief.

If mediation fails, then neither party is advantaged or disadvantaged at the subsequent trial.

Answers were sought to the following questions:

To what degree would such a conference resolve complaints cheaply? Would a compulsory conference give reasonable satisfaction or would it at least reduce the issues which are to be litigated?

Comments were also sought on these further propositions:

(a) that because of the complex procedures involved in defamation actions and the costs they entail, such procedures, the financial cost and the lengthy time-frame of an action should be explained to a plaintiff at the compulsory conference, and

(b) that, because the compulsory conference would take place at the very commencement of the procedures when tempers are still running high, there should be a second mediation conference at least six months later. This would give the plaintiff and the defendant a second chance to resolve the matter when tempers had cooled and a more reasoned attitude prevailed.

Whatever the mediation procedure might be, it should obviously take into account honest mistakes, because it could be argued that the current system does not allow for any easy withdrawal from such a situation.

A Discussion Paper, in which those proposals were repeated, was tabled in May.

In response to the Discussion Paper, the Law Society of New South Wales made the following comment:

> ... that provisions should be introduced, with sanctions if necessary, to encourage resolution of disputes directly with the publishers.

The Australian Broadcasting Corporation responded:

> We do not believe that the involvement of courts in drafting and ordering corrections, or even in drafting and recommending corrections which are not binding in any legal sense, will assist to resolve defamation actions.
>
> In our view, this will only create another judicial jurisdiction overlaid on defamation involving large amounts of court time and giving rise to significant evidentiary problems. The parties are the people to attempt to thrash out apologies, corrections and replies.
>
> It is for this reason that we favour a mediation process that must be used prior to any party suing. The mediator, as outlined in our proposal, should not be a lawyer. Both parties should be present. They should be permitted, if they wish, to bring their lawyers and the mediation process should be entirely without prejudice and confidential, not to be taken into account in any subsequent legal proceedings except as a necessary precondition to their commencement.

Australian Book Publishers commended the proposals set out in the Discussion Paper, commenting that:

> It all seems thoroughly useful.

Mr Patrick George, solicitor of Minter Ellison, made the following comments on the proposals:

> I agree generally with the proposals on mediation procedures and in particular that the mediator be a recognised and skilled mediator. In terms of the proposals on page 10 of the Issues Paper, I consider that paragraphs 1 - 4 inclusive are essential but that paragraphs 5 and 6, whilst desirable, cannot be compelled to be given in a mediation (distinct from an arbitration). These matters should be left to the mediator to control.
>
> It is important to observe that mediation will only be effective if both parties are willing to negotiate. If not, there will be no concessions made.

The Honourable R. G. Reynolds AO QC submitted:

> I question the value and effectiveness of the Court appointing a mediator.
>
> If the parties are all of goodwill and a plaintiff is not determined to exact a large pecuniary windfall, they are free to mutually accept mediation as to a corrective statement and invite the services of a trained mediator, e.g. from A.C.D.C.
>
> For similar reasons, I doubt the value of Clause 44 and fear that these provisions will lead to barren interlocutory orders.

Mr Robert Pullan for the Australian Society of Authors replied positively to the Committee's propositions:

> The compulsory conference may facilitate settlements which would otherwise not occur because of the adversarial nature of proceedings and the accompanying psychology. To the extent that it would facilitate such early settlements, saving both plaintiff and defendant time, energy and money, it would from our perspective be a step forward from existing law. We therefore think further to proposition (a), that the procedures and financial cost explained at the compulsory conference, should be adopted.
>
> We see potential gains for authors and publishers, and therefore for freedom of expression, in these proposals. If, for example, a plaintiff complains that a novelist has defamed him because a crooked, sinister or unattractive character in the novel resembles the plaintiff, it is possible the compulsory conference may settle the matter. If it does not, neither side suffers, except that the compulsory conference represents an added cost to the proceedings. Setting off the added cost against the potential savings however, I think on balance that the proposition is worthwhile. It should facilitate the settlement of cases involving honest mistakes.
>
> The representative of the defendant might be the publisher's solicitor, but I think it would be better to have publishers represented by the publishers themselves, or their nominated employee. A face-to-face meeting between plaintiff and defendant would be most likely to facilitate settlement.
>
> The mediator: The mediator need not be a lawyer, in either the short or the long term. Indeed, an experienced defamation lawyer might tend to act out of his or her adversarial expectations and thus defeat the purpose of the compulsory conference. A person able to "sensibly and strongly" help resolve the matter is what is needed.
>
> The second compulsory conference: The fact of a second conference may induce some plaintiffs and defendants not to settle at the first, but I think the risk is worth taking. After six months, not only may tempers have cooled, but also the complexity and expense of the proceedings may be sinking in.

The Australian Press Council's response was:

> The Council remains attracted to the concept of encouraging the alternative dispute resolution of defamation actions. It also believes that certain other procedural and substantive changes could increase the possibility of settling many matters and achieving early remedies satisfactory to the parties, and which would result in savings in both time and costs.
>
> The Council has had the advantage of discussions with the Defamation Sub-Committee advising the Attorney General of the Australian Capital Territory, chaired by the Honourable Mr J. J. A. Kelly, in relation to the concept of court-managed litigation. As the Council understands it, the Committee is considering proposals of a procedural nature which would have considerable advantages in the culling of actions and in ensuring a speedy trial of the issues. The Council respectfully draws the NSW Defamation Committee's attention to this work.
>
> The Council envisages four phases of a defamation action, which would involve a time and quality control of this litigation.

Phase 1: THE PRELIMINARY PHASE - This would involve a mandatory pre-trial request for retraction or reply - A MAXIMUM OF 60 DAYS.

Phase 2: THE MEDIATION PHASE - a maximum of 7 days for agreement on or appointment by the court of a mediator and 14 days for the mediation - A MAXIMUM OF 21 DAYS.

Phase 3: THE INITIAL LITIGATION PHASE - initial litigation and pleadings - A MAXIMUM OF 90 DAYS.

Phase 4: THE COURT-MANAGED LITIGATION PHASE - involving hearing within, say, SIX MONTHS.

The purpose of a time and quality control of litigation would be to avoid locking parties into litigation until certain preliminaries are completed. These would involve the first two phases, that is, the Preliminary Phase involving a mandatory request for retraction or reply, followed by the Mediation Phase. This would involve the appointment of, and a conference presided over by the mediator. It is anticipated that one or both of these two phases would result in the early settlement of some matters, provided both parties are acting in good faith and that only genuine disputes would actually be litigated. Inappropriate actions, for example "stop writs", could be culled. Even then, the third phase, the Initial Litigation Phase, would be subject to court rules in relation to the timing of the pleadings which would culminate, after a maximum of 90 days, in the Court-Managed Litigation Phase. There the court would take control of the litigation where necessary, removing the matters from the list or ordering a hearing.

Phase 1: THE PRELIMINARY PHASE - Phase 1 would involve a pre-trial request for reply or retraction. The Council has previously proposed adoption of the Annenberg Washington Proposal for the Reform of Defamation Law.

Phase 2: THE MEDIATION PHASE - If the first phase were unsuccessful, Council proposes a second phase, which would involve two steps:

(a) the appointment of the mediator from a panel approved by the Court. At the conclusion of the first phase, the plaintiff, if unsatisfied, would make an affidavit setting out particulars which could show that the requirements of Phase 1 had been completed. The plaintiff would apply to the court for the appointment of a mediator. The form would indicate that the Master (or other appropriate person) would appoint a mediator at the conclusion of 7 days, unless the parties indicated in writing in those 7 days that they had themselves agreed to the appointment of a mediator.

(b) During the next 14 days, a Mediation Conference would be called.

In relation to the Mediation Conference, the Council proposes

(a) A transcript of the mediation be made.

(b) In any subsequent trial where the court finds in favour of the plaintiff, that there be no award for damages unless the court be satisfied that the plaintiff had at all times demonstrated good faith in relation to fulfilling his or her obligation.

(c) Where the mediator has made recommendations as to the content and prominence of a retraction or a reply, and this is rejected by the

plaintiff, either no damages would be awarded or alternatively damages should be restricted to economic loss.

(d) The Council stresses that, apart from this, the mediation process and any agreement reached during mediation should not be admissible in court. The Council does, however, believe that to ensure that parties to the process participate in good faith, the court be informed of the mediation after the verdict but before damages are awarded. An analogy, but one certainly not directly applicable, may be seen in other mediation processes. For example, in the Crime Reparation Project of the Oueensland Justice Program there is provision for a court to be informed of the content of any agreement reached at mediation so that this may be taken into account in sentencing.

(M. Herriot, Crime Reparation Project Briefing Paper, Community Justice Program, Brisbane, February 1992.)

These proposals were made to the Defamation Committee in our reply of 23 March 1992.

The mediator should be enpowered to make recommendation for the publication of a correction statement. There would be utility in this power being available prior to litigation rather than after. To repeat, the Council proposes that where a plaintiff rejects a recommendation of the mediator for the publication of a correction statement, damages if awarded be limited to economic loss. Where the defendant rejects a correction statement, the defendant would remain open to an award of damages.

The Council recommends that each party pay his or her own costs in relation to the first two phases.

THE PRELIMINARY LITIGATION PHASE. The third phase would be the preliminary litigation phase where an unsatisfied plaintiff could begin the action, and pleadings would be filed in accordance with the rules. Subject to the rules, the parties would be free to act as advisers.

THE COURT-MANAGED LITIGATION PHASE. After 90 days of pleadings, the parties would appear before a Judge, or Master, where the issues for trial would be determined. Any delay in filing pleadings would be subject to an appropriate order by the Court to ensure that neither party was improperly disadvantaged and that a trial be held within, say, six months. It is believed that, by having the two pre-trial Phases and the final Court-Managed Litigation Phase, settlement would have been encouraged wherever possible, appropriate remedies accepted and costs saved. Inappropriate actions - 'stop writs', for example - could be culled during the process.

The Australian Press Council also sees considerable advantage in an alternative remedy, that of the Declaratory Judgement:

DECLARATORY JUDGEMENTS

The Council sees considerable advantage in an alternative remedy being available, that of the Declaratory Judgment. The Council submits an amended proposal to that earlier made.

(a) Declaratory Judgment Action brought by Plaintiff:

A person who is the subject of any defamation may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication was false and defamatory.

(b) No Damages Permitted: No damages shall be awarded in such an action, and the filing of such an action for declaratory judgment shall forever bar the plaintiff from asserting or recovering for any other claim or cause of action arising out of the publication which is the subject of the action.

(c) Defence: The only defence available shall be the defence of justification that the matter is substantially true, and also the defence of contextual truth as provided in clause 21 of the Bill.

(d) Election of Defendant to Convert Action for Damages to an Action for Declaratory Judgment: A defendant in an action for defamation shall have the right, at the time of the filing of its answer or within 20 days from the commencement of the action, whichever comes first, to designate the action as an action for a declaratory judgment. Any action designated by the defendant as an action for a declaratory judgment pursuant to this provision shall be treated for all purposes as if it had been filed originally as an action for a declaratory judgment by the plaintiff, and the plaintiff shall be forever barred from asserting or recovering for any other claim or cause of action arising out of the publication which is the subject of such action.

(e) Priority: Actions for declaratory judgments in defamation cases shall be granted priority over other civil actions in setting trial dates, and in all cases must be tried within 120 days of the filing of the complaint, unless the court rules that such an expedited trial date is impracticable under the circumstances. The court may issue such orders as to discovery as are consistent with the expedited trial required by this section.

The Hon Tom Hughes AO QC was questioned by the Committee about his views on alternative methods of dispute resolution:

CHAIRMAN: The Committee would be grateful for any comments you might like to make on compulsory mediation and alternative dispute resolution in defamation action.

Mr HUGHES: Much can be said for a requirement that shortly after a case is started and when, for instance, the media organisation has had time to make enquiries as to how the article came to be written or the broadcast put to air, there be a compulsory conference to discuss possible settlement. Beyond that I would not go.

Mr GAUDRY: Would that conference have any bearing whatsoever or be purely outside it?

Mr HUGHES: It would be totally without prejudice as, for example, is the case where parties resort—as they increasingly do in big cases—to the mediation procedures made available by Sir Laurence Street. I am presently in a case where, concurrent with a hearing in court which has gone for about six or seven weeks, nearly eight weeks, Sir Laurence has, for the past three weeks, been trying to mediate a settlement between numerous parties in a very complicated situation. I would not oppose the concept of a compulsory conference at an early stage. I would be against giving the mediator any role in the nature of arbitration. I would not favour legislation which required a media organisation or a defendant to submit to an order for the publication of an apology or correction. I would think the media

would complain that that was an infraction on their freedom, and they would have a point, a very good point. But one go at mediation, yes.

Mr NAGLE: If the mediation were successful, parties agreed and the paper published the apology—

Mr HUGHES: That has been agreed?

Mr NAGLE: That has been agreed between the parties, not between the mediators.

Mr HUGHES: Yes, has been agreed as a result of the mediation process.

Mr NAGLE: But would you not need more than one mediation, maybe a couple, for the parties to get to know each other?

Mr HUGHES: After the first compulsory meeting I really think it should be left to the parties to go their own way by agreement.

CHAIRMAN: You are dealing with consenting adults.

Mr HUGHES: Yes.

Mr GAUDRY: Even if it is without prejudice, once that mediation was completed and agreement reached, that would wipe that out as far as—

Mr HUGHES: Presumably the agreement would be arrived at in satisfaction of the cause of action.

Mr TURNER: Would that not require a change of attitude, about which we spoke earlier?

Mr HUGHES: I think it would.

CHAIRMAN: Does the bar have a part to play in terms of changing that attitude? Attitudes of barristers can have an effect.

Mr HUGHES: Yes, it does. My experience over the years has told me that while the Bar may try to play a part, certain people may not listen to it. I can recall one case I was in—and the names of the parties shall be obviously not mentioned, the plaintiff was a very prominent person. I appeared for the media organisation. It was a very bad libel. It was a newspaper poster. It said, "X in court", naming the person. In one of those little boxes you often see, "Fraud charge". X, this prominent person, had appeared as a witness. X would have settled for a very modest sum of money on the first day of the hearing. The defendant would not listen; would not hear it. It suffered a verdict for $250,000, which was quite high at that time—this goes back some years. Never was a verdict more richly deserved.

Mr NAGLE: Is it not one of the problems with mediation that it can also be viewed as K Mart justice as opposed to D. J. justice in the sense that it really is a cheap way of getting out of true libel?

Mr HUGHES: Yes, but if the parties agree to it, if they agree to shop in the K Mart rather than David Jones, that is their own affair.

Mr NAGLE: They may be shopping in the K Mart because the plaintiff cannot afford to go to D. Js.

Mr HUGHES: That may be so, but it is a good thing that perhaps a plaintiff of modest means should have the opportunity of getting some vindication.

Mr NAGLE: As soon as possible?

Mr HUGHES: As soon as possible and pretty cheaply.

Mr GAUDRY: The general intransigence of the media about which you speak, what would you put that down to in these actions?

Mr HUGHES: Journalistic pride and the instinct that if you put plaintiffs to enough trouble you will wear them out.

Mr GAUDRY: So it is not a defence of the right of freedom of speech as much as, perhaps, defence of the organisation?

Mr HUGHES: It is difficult to generalise. In some cases, yes. There are cases in which a defendant is fully entitled to test the plaintiff's claim but sometimes it is done when the defendant has no flesh to put on the bones.

The Bar Association of New South Wales has no objection to the provision of alternative methods of dispute resolution.

John Fairfax Pty Limited made the following submission in response to the propositions distributed by the Committee:

Item 1. That there be a compulsory conference immediately after the institution of proceedings:

Fairfax agrees that there should be early attempts at mediation. It believes, however, that attempts at reconciliation should be a pre-requisite to the institution of proceedings.

Set out below is a proposition for such mediation:

(a) No proceedings in defamation should be brought unless a complainant has sought the publication of a retraction or a right to reply.
(b) The request must be in writing and must set out the errors alleged to be in the article and the imputations which are said to arise from the article. The request must be within a reasonable time of publication, say within seven days of publication or 30 days after the complainant learns about the publication.
(c) If the publisher agrees to the publication of a retraction or a reply, and the parties agree to the wording and placement of the retraction or reply, and a retraction or reply is published in accordance with this agreement, then the complainant can be paid legal costs, but may take no further action.
(d) If the publisher refuses the request, or the publisher agrees in principle to the request but the parties cannot agree on the wording or placement then the matter must go before a mediator approved by the Attorney General within seven days of the original request.
(e) The mediator would not have the power to order the publication of the retraction or the reply.
(f) If the publisher published a retraction or reply as recommended by the mediator, then the complainant can institute proceedings, but can claim for economic loss only.
(g) If the publisher refuses to publish the retraction as recommended by the mediator, then the complainant can sue for general damages.

Fairfax refers again to the mediation proposals set out in the submission of the Australian Broadcasting Commission . This also proposes mediation as a pre-requisite to the institution of proceedings.

Fairfax believes that a compulsory mediation conference immediately after the institution of proceedings would not improve the present position within New South Wales. It would not be practical to order a compulsory mediation conference as well as hold the defamation list directions hearing now enforced by the Court.

In Fairfax's opinion little would be gained by holding the conference after the institution of proceedings. However, if such a conference was made compulsory by law, then Fairfax comments on the remaining propositions as follows:

Item 2. Agreed

Item 3. Agreed

Item 4. Agreed

Item 5. Agreed, so long as falsity is alleged by the plaintiff

Item 6. Even though what is said at the conference is not to be admissible at law, the defendant should not at this stage be compelled to reveal the information in its possession. Such information may be irrelevant depending on the defences pleaded. Presumably, at this stage of the conference the defendant would not have pleaded. The defendant may reveal its information, but should not be compelled to do so.

It is agreed that the defendant should not be compelled at this conference to reveal its sources.

ROLE OF MEDIATOR

Fairfax agrees that the mediator should have the power to recommend the publication of corrections and retractions only.

QUALIFICATION OF MEDIATOR

There should be no barrier to the appointment of lawyers to the panel of mediators. A chairman of the panel should be appointed by the Attorney-General. The mediator should be allotted to each individual matter by the chairman.

GENERAL COMMENT

In practice, parties are normally open to suggestions of settlement at all times. Plaintiffs normally seek damages as well as apologies in such settlements. It is doubtful if mediation after the event will add anything to solving the disputes. By the time proceedings have been instituted, lawyers would have been engaged. It will be difficult for parties who have sought and relied on legal advice to ignore that advice in any subsequent mediation.

Settlement is more likely without the aid of a mediator at this stage. The compulsory conference would not reduce the issues to be litigated. It will still be up to the court to decide the issues.

FURTHER PROPOSALS

(a) A mediator could only explain the complexities and costs entailed in defamation actions if the mediator himself or herself is experienced in defamation actions. That would mean that the mediator must be an experienced defamation lawyer.

(b) Fairfax doubts the use of a subsequent mediation conference. Six months after the institution of proceedings the issues have been clarified. At this stage it would be more useful for any settlement proposals to be undertaken by lawyers who are conversant with the issues.

Mr Brian Gallagher, for News Limited, wrote in response to the propositions:

There is already in place an effective and low-cost informal and unstructured system whereby publishers regularly retract and apologise for improper or incorrect publications. That system avoids litigation. Aggrieved parties complain to the publisher personally or through their solicitors. Frequently, the publication of a retraction is associated with payment of the legal costs of the party aggrieved. News Limited has many hundreds of files which attest to the effectiveness of this system...

We favour any system which will augment that procedure and reduce the cost and difficulty of litigation.

As previously noted, there are substantial difficulties with the procedure whereby a mediator will determine whether to recommend a correction before the matter comes to trial. To decide the issue he is going to have to decide complex points of law and difficult matters of fact which will require evidence by witnesses.

We are of the view that for the mediation system to have maximum effect, it should occur not as a compulsory conference immediately after the institution of proceedings but before proceedings have been commenced. Plaintiffs after they have commenced proceedings have already expended substantial sums of money and tend to become locked in. If the object of the system is to avoid litigation, it is unlikely to have that effect once proceedings have started. We think that if it happens before proceedings, proceedings are likely to be minimised.

The Honourable Athol Moffitt CMG. QC found the proposals worthy, but also found material problems with the content of what the Committee proposed. He went on to say:

(4) The real difficulty in setting up and managing some imposed conference scheme in the defamation field is to do so in ways which will minimise the considerable potential for misuse of and disadvantages from the scheme. Critical questions include the following: should conferences be compulsory in every case or should there be some discretion to order one in cases considered appropriate; if some only should be compulsory, in what class of case; who must and who may be present at any conference, (ie. parties and lawyers); when and how often should conferences be held; to what extend, if any should there be an obligation to disclose some part of a party's case; whether any such disclosure should be at the conference with the opponent present or only privately to the mediator; is disclosure at the conference is oral, who has to disclose first; what, if any, sanctions are, should or can there be in respect of non or evasive compliance by one party; and who bears the costs of any conferences, if the case goes to trial. Answers to these and similar questions will then lead to more ultimate questions, such as the percentage of cases where the procedure is likely to be the cause of an early compromise of some sort and such as the potential of the particular court imposed procedures for exploitation, unfairness or undue pressure on a party to settle a just case. It may be that many of these questions can only be satisfactorily answered by trial and error. However, they must be faced up to in any initial formulation of any procedures of the type under discussion.

The Honourable Athol Moffitt CMG, QC then commented on the specific propositions made by the Committee:

(2) The proposals do not address the question of the potential of the procedures to be misused or of the likely disadvantages on the lines discussed under I. It seems to assume there will be no problems, as it asserts "If mediation fails, then neither party is advantaged or disadvantaged at the subsequent trial". If this is no more than confirming the conferences are "without prejudice", of course it is correct. If so, it appears to overlook the realities ...

(3) Of course, as provided in paragraph (2) of the letter, the parties should be present. (2) does not state whether lawyers and, if so, what lawyers may be present. Presumably they can, as otherwise the conference could hardly fulfil its intended

purposes and it could be unfair to an inexperienced personal plaintiff. The presence of lawyers, however, will facilitate the use of the conferences for tactical purposes of the types outlined in I, and add, perhaps considerably, to the costs of the proceedings.

(4) Items (5) and (6) in the letter would lend themselves to such tactics, particularly in the hands of those experienced in defamation litigation. Both the terms of (5) and (6) and the timing of the first conference, just after the plaintiff has launched the proceedings, would put the defendant in media cases in a much more favourable position than the plaintiff to use the exploratory tactics in aid of any later trial. The plaintiff, as the first required to comply with (5), would be presumed to be fully aware of the case he has launched. The defendant could then, perhaps with some justification, give little or nothing away under (6), on the claim it was too early for the defendant to know.

(5) As to (5) and(6) what does "must" mean? What sanction will or can there be to compel proper, rather than superficial or evasive, compliance? A stay of proceedings could be used as a sanction against the plaintiff. In stop writ cases it would be no sanction. What sanction would there be against a defendant?

(6) What does "how" in paragraph (5) mean? The plaintiff will already have assigned the innuendo he alleges. Is he compelled to say more than it is false? The onus is on the defendant to allege and prove truth. Does "how" mean the plaintiff is required to disclose his evidence on that issue?

(7) What is the nature of the "information" the defendant is to reveal under (6)? For example, can the defendant's solicitor, with an eye on settlement, say the defendant has "information" that the plaintiff did, Y and Z discredible acts, when all it has is remote hearsay and is unsure whether there is or will be available admissible evidence at the trial? If it is permissible to put further questions to the defendant, cannot the defendant decline to say more, on the basis that to do so would reveal sources or that there has not yet been time to prepare the defendant's case. In any event, if the defendant declines to reveal more, what could be done about it?

(6) The proposals, as they are at present stated, could facilitate undue pressure to be put on a personal plaintiff to settle a just case. This subject is discussed in I (6) above, with the banking industry example. The proposals envisage that the parties at the early conference will be made personally aware of the costs, if the case proceeds to trial. This is a worthy purpose, but involves some dangers, if it appears that a warning is being given by or with the approval of the court and the pressure is in fact unfair for a reason unknown to the court. In media cases, the defendant will need no warning or advice on costs, so the warning will really be directed to the personal plaintiff. I use a hypothetical case to illustrate what could occur under the subject proposals. A plaintiff has a strong case which he is likely to win, while the media defendant's case is the reverse. At the compulsory conference held immediately after the proceedings commence the defendant supplies the "information" that the plaintiff did X, Y and Z and declines to reveal sources (See I (5) above). The mediator then raises the costs question. The defendant indicates a leading Queens Counsel is to be briefed, that the case is estimated to take six weeks and the defendants costs are expected to exceed $200,000. The plaintiffs solicitor cannot personally assess X, Y and Z, which the plaintiff contests or explains. The plaintiff, on advice, discontinues the case or settles it on give away terms. Many variations of this theme could occur as a result of a compulsory court conference. I do not believe the court system should play any part or be seen to play any part in procedures which put possibly unfair cost pressures on the less wealthy unassisted litigants to settle, perhaps just cases, against those with strong financial resources.

(7) Under the proposals, there will have been one, perhaps two, compulsory conferences in every case which proceeds to trial, including those in which conference never had any chance of success. Thus in some, as yet indeterminate, percentage of cases, costs will be increased not saved. Does the loser bear the total costs of the conferences? In cases of compulsory conferences, being a necessary incident of the proceeding, in principle, the conference costs should be part of the costs which the loser should pay.

The Honourable Athol Moffitt CMG, QC raised the question of other methods of dispute settlement which might warrant investigation:

(2) It is possible that some procedure could be established to provide for compulsory conferences of an appropriate kind in selected cases considered appropriate. Then, in other cases machinery could be set up to invite parties voluntarily to participate in such a conference. Each could, as to type of action taken, depend on the discretion of the mediator. The type of case warranting the order of a compulsory conference, with some prospect of utility, could be determined, following some in depth survey of particular defamation proceedings over some past period. For example, a survey could be made of all defamation actions commenced say, in 1989 in NSW, classified as to the nature of parties, relevant characteristics of the case, the interlocutory proceedings and the final outcome, with a view to determining, if possible, and with hindsight, those cases which probably or possibly would have benefited from an early conference. I expect the type of case which would warrant such an order would be proceedings between personal litigants, cases including media cases, where the matter published is unspecific and depends on an innuendo not at first sight apparent or which may have been unintended or, if found to be open, not sought to be justified at the trial. Included in the compulsory conference class could also be cases where obviously there are multiple issues joined which appear to invite some confinement. I suspect the majority of cases may be found not to warrant the order of a compulsory conference with the consequent waste of costs. Cases with a stop writ element and those where there is a direct or deliberate defamation usually would not justify a conference being made compulsory.

(3) It may be that in all cases which do not warrant the order of a compulsory conference, the parties should be invited by the court to attend a conference. There would only be a conference if both parties accept the invitation. It could be directed to compromise and/or confining issues. Because it would be initiated by the court, the relationship of the parties to it would be neutral.

(4) I think it would be absolutely essential to the success and proper use of conferences, compulsory and voluntary, that the mediator have special skills and experience in both the defamation and negotiating fields and have an understanding but firm personality. I doubt whether other than a lawyer, with the above skills, would suffice.

(5) In any conference, compulsory or voluntary, I would be against either party being obliged directly or being induced in the presence of the other to reveal any part of his, her or its case, such as eg. is provided in (5) and (6) of the subject proposals. A preferable course would be to give a mediator a discretion to confer privately with each party separately and at such meeting seek voluntary revelation of matter considered relevant. He would then have a discretion to use his knowledge, acquired privately, at the open conference of the parties, in aid of compromise, to confining the issues or to make recommendations of the kind referred to in the letter of 04 March. Importantly he should not breach a party's confidences or disclose any evidence of a party, except with that party's earlier consent.

(6) I would favour only one such conference, compulsory or voluntary, and usually soon after the defence of the defendant has been filed. By then the formal issues will have emerged and the defendant's legal advisers should be able to assess the issues and the strength of the defendant's case. However, the mediator should have a discretion to set the conference procedures in motion at an earlier or later date. The mediator should have a discretion to adjourn any conference.

(7) My experience at the Bar and on the Bench, each of which extended into the defamation field, leads me to a firm belief that the subject matter raised in the letter of 04 March warrants further investigation and in the end implementation in some form.

The Committee found it very encouraging to find such widespread support for having a compulsory conference immediately after the institution of proceedings. That is where the presence of the plaintiff and a representative of the defendant (with some clout to negotiate) would prove to be of assistance. The Committee understands that the presence of the parties was previously tried at the directions hearings in the Defamation List, but it failed because of the public nature of the hearings. The Committee is of the view that this compulsory conference should not be held in open court, evidence would not be given and what is said there should not be admissible in evidence should the claim subsequently go to trial. However, what is done, or not done, subsequent to the conference, would remain admissible in evidence.

The Committee recognises that there will be times when compulsoy conferences would be of no value: where the attitudes of the parties are such that no good purpose would be served by bringing them together a compulsory conference would be a waste of time and a meaningless gloss on the system. In such cases, compulsory conferences could be dispensed with by the Court.

A conference held early in the piece - in which the plaintiff must show just how the matter complained of is false and the defendant must reveal the information in its possession (but not yet its sources) - could do a lot to resolve complaints cheaply and with reasonable satisfaction, or at least reduce the issues which are to be litigated. Despite the belief of every journalist that he was right in what he wrote, the slightly more realistic representative of his employer may well see the commercial virtue of the publication of a correction and usually the payment of the plaintiff's costs to date in order to avoid the expensive preparation for a trial.

Evidence before the Committee confirms that a majority of disputes arise because what was published has been interpreted by the public in a way which may not have been intended by the journalist. The journalist may have no belief in the truth of what was in fact conveyed. Such a situation would be suitable for a sensible settlement. The mediator could easily recommend that a correction be accompanied by self-serving statements that it was never intended to convey such a meaning, or as to the extent to which the journalist had gone in checking his story in advance - so that there is no more than a slight loss of face but, despite the care taken, the error is acknowledged.

As to the question of mediators, the conferences would need to be conducted by someone with a strong hand. It may be preferable for the procedure to be settled down at first by having the conferences conducted by a lawyer with some experience of dealing with the media, but this should be in the short term only. Provided that the debate is restricted to the issue of truth, rather than any belief in the truth or any legal issue, there would appear to be many people other than lawyers or journalists available who could later on be able sensibly and strongly to resolve that debate, even in the presence of the legal representatives of the parties.

The procedure would not entail the publication of any court ordered correction; it would be mediation only. Evidence would not be given at such a conference, so that there would be no problem about interlocutory (as opposed to final) relief. If mediation fails, then neither party is either advantaged or disadvantaged at the subsequent trial; but, if the mediation succeeds, then both parties should be satisfied - at a great savings of both time and cost.

The Committee does not support a process whereby requests for corrections and replies are to be made before commencing proceedings as a condition precedent to the cause of action. As litigation will have started when the suggested compulsory conference takes place, it is more appropriate to provide that what is said there cannot be used against the parties in the litigation, although of course what is (or is not) done subsequent to (and perhaps as a result of) that conference would remain admissible in evidence.

Committee's Recommendations:

(1) Compulsory pre-trial conferences before a court-appointed mediator, within a short period (say 7 - 10 days) of the issue of a writ, at which conference mediation and the issues of accuracy or correction can be explored.

(2) The introduction of a form of summary procedure, similar to that introduced in the United Kingdom.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

DEFAMATION BILL LEGISLATION COMMITTEE

THURSDAY, 5 DECEMBER, 1991

ROOM 1136, PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Assembly

Mr W. Beckroge
Mr B. Gaudry
Mr B. Hazzard
Mr M. Kerr
Dr T. Metherell
Mr P. Nagle
Mr D. Page
Mr I. Petch
Mr J. Turner

The Clerk to the Committee, in the absence of the Clerk of the Legislative Assembly, opened the meeting at 9.00 a.m. and read the following:

Entry number 6, Votes and Proceedings of the Legislative Assembly, 14 November, 1991.

Suspension of Standing Orders—

Mr Collins moved (by leave), That so much of the Standing and Sessional Orders be suspended as would preclude consideration forthwith of the following motion:

That—

(1) The Defamation Bill be referred to a Legislative Committee;

(2) Such Committee consist of Mr Beckroge, Mr Gaudry, Mr Hatton, Mr Hazzard, Mr Kerr, Dr Metherell, Mr Nagle, Mr D.L. Page, Mr Petch and Mr Turner.

(3) The Committee report by 27 February 1992.

Question put and passed.

Election of Chairman

Resolved, on motion of Mr Petch, seconded by Mr Page, "That Mr Kerr be elected Chairman of the Committee".

Resolved, on motion of Mr Kerr, seconded by Mr Page, "That Mr Petch be Vice-Chairman of the Committee".

Procedural Resolutions

Procedural Resolutions, as appended "A", adopted (in globo) on motion of Mr Turner, seconded by Mr Nagle.

Staffing

The Clerk advised that a Project Officer could either be seconded from within the Legislative Assembly establishment, or temporary assistance sought. The Committee agreed that the matter of staffing could be arranged by the Chairman and the Clerk. The Committee was advised that an officer of the Attorney had already made contact with the Clerk and would be forwarding material.

Advertisement Calling for Submissions

A draft advertisement calling for submissions was circulated and endorsed by the Committee.

Committee Timetable

The Committee noted the reporting date contained in the resolution of the House and agreed that the Committee should seek an extension in the reporting date, possibly mid-May, 1992.

Members would be contacted to ascertain a suitable date in late January-early February for a hearing date.

The Committee deliberated on the need for further background material and the Clerk undertook to prepare a short issues paper outlining the framework for the Committee's review of the legislation.

The Committee discussed inviting various persons to make submissions or appear as witnesses.

The Chairman advised that a Press Release would be prepared for the use of Members announcing the establishment and timetable of the Committee's inquiry.

The Committee adjourned at 9.20 a.m., sine die

Chairman

Clerk

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

COMMITTEE ON THE DEFAMATION BILL, 1991

Proceedings of the Hearing on 18 February, 1992 in Room 814-815

Parliament House

Present:

Mr M. Kerr, MP (Chairman)

Mr W. Beckroge, MP
Mr B Hazzard, MP
Mr P Nagle, MP
Mr I Petch, MP
Mr B Gaudry, MP
Dr T Metherell, MP
Mr D Page, MP
Mr Hatton, MP

Apologies: Mr Turner MP

At 10 am the committee went in camera to hold a short meeting. The committee deliberated and resolved, on the motion of Mr Nagle, seconded by Mr Petch,

THAT a sub-committee comprising Mr Hatton, Mr Petch, Mr Nagle and any other interested committee member be established to examine submissions received and to decide who should be invited to appear before the committee, and the issues to be covered.

The hearing was then opened to the public.

Mr Peter Llewellyn Bartlett, solicitor, was sworn and acknowledged receipt of summons. The witness tabled his submission and was then examined.

Mr Norman Douglas Lyall, solicitor, was sworn and acknowledged receipt of summons. The witness tabled his submission and was then examined.

Mr Terence Kevin Tobin, QC and Mr Michael Gerard Sexton, Barrister were sworn, acknowledged receipt of summons and were examined by the committee.

Mr Stuart Meredith Littlemore, barrister, was sworn, acknowledged receipt of summons and was examined.

The committee adjourned at 4.25pm.

Chairman

Clerk

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

COMMITTEE ON THE DEFAMATION BILL, 1991

Proceedings of the Hearing on 19 February, 1992 in Room 815 Parliament House

Present:

Mr M. Kerr, MP (Chairman)

Mr W. Beckroge, MP
Mr B Hazzard, MP
Mr P Nagle, MP
Mr J Turner, MP
Mr B Gaudry, MP
Dr T Metherell, MP
Mr D Page, MP
Mr Hatton, MP

Apologies: Mr Petch MP

The hearing commenced at 1.50pm

Mr Alister Andrew Henskens, solicitor, was sworn and acknowledged receipt of summons. The witness tabled his submission and was then examined.

Mr Kenneth Grenville Gee, retired Judge, was sworn and acknowledged receipt of summons. The witness tabled his submission and was then examined.

Ms Judith Claire Gibson, solicitor was sworn, acknowledged receipt of summons and was examined by the committee.

Mr Stuart Meredith Littlemore, barrister, was sworn, acknowledged receipt of summons and was examined.

Mr Russell Grove, Clerk of the Legislative Assembly briefed the committee on the Bill's coverage of Parliamentary proceedings.

The committee adjourned at 4.25pm.

Chairman

Clerk

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

COMMITTEE ON THE DEFAMATION BILL 1991

Minutes of the Proceedings held on Monday 27 April at Parliament House

PRESENT

Mr M.J. Kerr (Chairman)

Mr B.J. Gaudry
Mr J.E. Hatton
Mr B.R. Hazzard
Mr P.R. Nagle
Mr I.J. Petch
Mr J.H. Turner

Apologies: Mr D. Page

In attendance: Ms H. Williams (Project Officer) and Ms R. Miller (Clerk to the Committee)

The Committee met in closed session at 11.10 a.m. and discussed the proceedings which were to follow.

At 11.24 a.m. the public were admitted.

Ms Judith Kathryn Walker, Solicitor and Head of Legal and Copyright Department, Australian Broadcasting Corporation, sworn and acknowledged receipt of summons.

Mr Graham Douglas Bates, Partner, Mallesons Stephen Jacques, Solicitors, sworn and acknowledged receipt of summons.

The witnesses were examined by the Committee and then withdrew.

The Committee went in camera for deliberations.

Mr Padraic Pearse McGuinness, Journalist, affirmed and acknowledged receipt of summons.

The witness was examined by the Committee and then withdrew.

Mr Bruce Roland McClintock, Barrister, and Mr Brian Aloysius Gallagher, Solicitor, sworn and acknowledged receipt of summons.

Mr McClintock was examined and then withdrew.

Mr Gallagher was examined and then withdrew.

The Committee adjourned at 1.53 p.m., sine die.

Chairman

Clerk

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

COMMITTEE ON THE DEFAMATION BILL 1992

Proceedings of the Hearing on Friday 7 August 1992 at Parliament House

PRESENT

Mr M.J. Kerr (Chairman)

Mr W.G. Beckroge, MP
Mr B.R. Hazzard, MP
Mr B.J. Gaudry, MP
Mr P.R. Nagle, MP
Mr J.H. Turner, MP

The hearing commenced at 10.30 a.m.

The Hon. Thomas Ayer Forest Hughes, QC was sworn and acknowledged recept of summons. The witness was examined, and then withdrew.

Ms Wendy Bacon, Senior Lecturer, affirmed and acknowledged receipt of summons. The witness was then examined, and then withdrew.

Ms Judith Walker, Head, ABC Legal and Copyright Department and Mr Michael Sexton, Barrister, were on former oaths.

Ms Walker tabled further material. Mr Sexton addressed the Committee, after which the witnesses were examined.

The Committee adjourned 1.10 p.m. sine die.

Chairman

Clerk

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

COMMITTEE ON THE DEFAMATION BILL 1992

Proceedings of the Hearing on Tuesday 8 September 1992 at Parliament House

PRESENT

Mr M.J. Kerr (Chairman)

Mr B.R. Hazzard, MP

Mr B.J. Gaudry, MP

Mr D.L. Page, MP

Apologies: Mr Beckroge, Mr Nagle, Mr Petch, Mr Hatton and Mr Turner.

His Honour Justice Mathew John Robert Clark, of the Court of Appeal, was sworn and acknowledged receipt of summons. The witness addressed the committee and was examined.

The Committee adjourned 1.10 p.m. sine die.

Chairman

Clerk

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

COMMITTEE ON THE DEFAMATION BILL 1992

Minutes of the Meeting held 15 September, 1992

at 6.30pm in Room 1043

MEMBERS PRESENT

Mr M Kerr (Chairman)

Mr B Gaudry, MP
Mr D Page, MP
Mr K Moss, MP
Mr J Hatton, MP

Apologies: Mr Hazzard, Mr Petch, Mr Turner, Mr Beckroge

The Chairman tabled correspondence received from the New South Wales Law Reform Commission.

The Chairman tabled draft recommendations and proposed that the committee examine them and meet again to discuss. It was moved by Mr Hatton, seconded by Mr Page: THAT the draft recommendations and draft report are to be treated as confidential and that leaking of any such material is contrary to the integrity of the committee system.

The Committee agreed that its recommendations on the Bill were to be formulated "in principle" and that the report and recommendations would be referred to the New South Wales Law Reform Commission to advise on drafting.

Meeting adjourned 7.25pm, until 23 September, 1992.

Chairman

Clerk

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

COMMITTEE ON THE DEFAMATION BILL 1992

Minutes of the Proceedings Wednesday 23 September 1992 at Parliament House, Sydney

MEMBERS PRESENT

Mr M.J. Kerr (Chairman)

Mr Gaudry
Mr Turner
Mr Hatton
Mr Page
Mr Moss

Confirmation of the minutes of the meetings held 7 August and 1 September was moved by Mr Gaudry and seconded by Mr Hatton.

The Chairman advised the Committee that the reporting date for the Committee had been extended to Friday 15 October.

The Committee deliberated on the report.

The Committee resolved, on the motion of Mr Kerr, seconded by Mr Hatton, that the Committee Clerk and Mr Hatton prepare a cover letter to the New South Wales Law Reform Commission, to be forwarded with the report, requesting the Commission to examine specific issues discussed in the report.

The draft letter to be circulated to all committee members for consideration prior to 10 October.

The meeting closed at 7.10 p.m.

Chairman

Clerk

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

COMMITTEE ON THE DEFAMATION BILL 1992

Minutes of the Meeting held 13 October, 1992

at 3.30pm in the Museum

MEMBERS PRESENT

Mr M Kerr (Chairman)

Mr B Gaudry, MP
Mr D Page, MP
Mr I Petch, MP
Mr P Nagle, MP
Mr J Turner, MP

The minutes of the meetings held 15 and 23 September, as corrected, were confirmed, on the motion of Mr Turner, seconded by Mr Gaudry.

The Committee resolved, on the motion of Mr Nagle, seconded by Mr Page, that the draft report be the Report of the Committee and that it be signed by the Chairman and presented to the House, together with the minutes of evidence.

The Committee resolved on the motion of Mr Nagle, seconded by Mr Page that the Chairman and Project Officer be permitted to correct stylistic, typographical and grammatical errors.

The Chairman advised the committee that the Report would be tabled on the following day. The Committee discussed a draft press release.

The meeting adjourned at 3.40pm.

Chairman

Clerk