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**Defamation Law Reform
Revisited**

by

Gareth Griffith

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ISSN 1325-5142

ISBN 0 7313 1719

September 2002

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EXECUTIVE SUMMARY

Defamation Taskforce Report: This paper presents a background to the most recent proposal for defamation law reform in NSW, namely, the report of the Attorney General's Taskforce on Defamation Law Reform titled, *Defamation Law: Proposals for Reform in NSW*.

Main recommendations: As outlined in a speech by the Premier on 9 July 2002 the Report's main recommendations are to: (a) make greater provision for the resolution of disputes without litigation; (b) provide greater incentives for parties, particularly publishers, to use corrections and apologies to avoid litigation; (c) introduce more onerous cost penalties against parties who unreasonably fail to resolve matters by the above means; (d) reduce the limitation period for actions in defamation to one year (from 6 years at present); (e) provide that compensation for non-economic loss will not exceed payouts in personal injury cases – that is, \$350,000; and (f) prevent corporations and statutory bodies from bringing actions in defamation (p 1).

Strong views: Defamation law gives rise to strong views, notably concerning the technicalities it involves, as well as the costs arising from lengthy trials (pp 3-5).

Money and reputation: The usual remedy in defamation is an award of monetary damages. A long-standing issue in the defamation debate is how does an award of money vindicate reputation? If defaming a person alters the perception others have of that person, thereby damaging their reputation, how in a theoretical sense is that reputation restored by an award of money? (p 5)

Out of court settlements: From a practical standpoint, often settlements are reached out of court and the award of damages is not made public. According to the NSW Law Reform Commission, a confidential deed is often used in these circumstances, which prohibits the public release or discussion of the terms of settlement. One result is that 'the defamation remains uncontradicted in the public mind'; another is that such arrangements make it very hard to compile reliable empirical data on defamation cases (p 6).

Three Australian defamation regimes: Broadly, there are three varieties of defamation law in Australia: (a) that of the 'common law States' of Victoria, South Australia and Western Australian; (b) that of the Code States, Queensland and Tasmania,; and (c) that of the 'common law with statutory modifications' jurisdictions – NSW under the *Defamation Act 1974*, the ACT under the *Defamation Act 2001* and the Northern Territory under its Defamation Act. The push towards national uniform defamation law appears to have stalled (p 15).

Imputations as cause of action: Unlike at common law, under section 9 (2) of the NSW *Defamation Act* there is a separate cause of action for the publication of each defamatory imputation to each recipient. This means that in NSW a cause of action for defamation arises from the publication of defamatory imputations themselves, rather than from the defamatory matter they are embodied within. This has resulted in a sophisticated and unique pleading regime in which 'each substantially different imputation conveyed by the

matter complained of gives rise to a separate cause of action' (p 16).

1994 reforms: The *Defamation (Amendment) Act 1994*, which came into effect on 1 January 1995, introduced the following major changes to defamation law in NSW: (a) under section 7A (4) the trial judge and not the jury should determine whether any defence was established and the amount of damages (if any) that should be awarded to the plaintiff; (b) under section 46A, in the assessment of damages the trial judge should ensure that any damages awarded have an appropriate relationship to the injury suffered and take account of the general range of damages for non-economic loss in personal injury awards in NSW (including awards made under any relevant statute) (p 24).

Section 7A trials: Section 7A trials are the single most controversial aspect of the present defamation regime in NSW. A continuing theme in the current debate is that section 7A jury findings are often perverse or unpredictable, and that the section has increased the costs involved. It is probably fair to say that the one thing most practitioners would have wanted to emerge from the current reform process is for the section 7A trial to be disbanded. The Defamation Taskforce Report recommended that section 7A trials be retained (p 24 and pp 30-35).

Amending section 22: The defence of qualified privilege under section 22 of the *Defamation Act* has rarely been relied upon successfully by a mass media defendant in NSW. This is owing to the restrictive interpretation of the section which requires publishers to prove that they believed in the truth of what was published. The Defamation Taskforce Report recommended that this requirement be omitted. To this end the Taskforce unanimously recommended that section 22 should be amended to include a set of factors for courts to consider when assessing reasonableness. Recommendation 13 make no mention of the publisher's belief in the truth of the publication (pp 45-46).

Government and political matters: The inter-relationship between the implied constitutional freedom of political communication, common law qualified privilege and the statutory defence of qualified privilege under section 22 is complex. Section 22 is said to overcome the restrictions of the duty/interest requirement at common law and to focus attention instead on reasonableness in all the circumstances. This proved influential in the reformulation by the High Court in *Lange* (1997) 189 CLR 520 of the constitutional freedom of political communication. One problem raised by *Lange* is just how broadly or narrowly the concept of the 'political' is to be construed. Recommendation 15 is one response to that question. Thus, an additional proposal supported by 2 of the 4 members of the Taskforce was for the insertion of a new section 22A to elucidate the defence of qualified privilege as this relates to 'government and political matters' (pp 49-52).

1. INTRODUCTION

Defamation law reform is back on the political agenda. In an address to the Sydney Institute on 9 July 2002 the Premier, Bob Carr, announced that in the Spring Session of Parliament his Government would make 'further reforms to the law of defamation'. According to the Premier, the problems with the current law include its complexity, the length and expense of defamation litigation, plus the excessive damages which can be awarded for loss of reputation (non-economic loss). He proposed reforms to:

- make greater provision for the resolution of disputes without litigation;
- provide greater incentives for parties, particularly publishers, to use corrections and apologies to avoid litigation;
- introduce more onerous cost penalties against parties who unreasonably fail to resolve matters by the above means;
- reduce the limitation period for actions in defamation to one year (from 6 years at present);
- provide that compensation for non-economic loss will not exceed payouts in personal injury cases – that is, \$350,000; and
- prevent corporations and statutory bodies from bringing actions in defamation.¹

In an accompanying Media Release the Premier commented:

For years, journalists, businesses or individuals have fought out often long and hugely expensive defamation cases in the courts. These cases have clogged up the judicial system and cost millions of dollars. The reforms are part of the State Government's push to drive down legal fees, free up the courts and reform laws relating to insurance, personal responsibility and civil payouts. This is the next stage of micro-economic reform in Australia.²

The proposals outlined by the Premier are based on the findings of the report of the Attorney General's Taskforce on Defamation Law Reform titled, *Defamation Law: Proposals for Reform in NSW* (the *Defamation Taskforce Report*). The Taskforce comprised: Professor Regulation Graycar, Professor of Law at Sydney University and NSW Law Reform Commissioner; Professor Ken McKinnon, Chair, Australian Press Council; Michael Sexton QC, Solicitor General; and Maureen Tangey, Director, Legislation and Policy Division, Attorney General's Department. It reported in July 2002.

¹ Premier of NSW Wales, Bob Carr, 'A new agenda for government', *Address to the Sydney Institute*, 9 July 2002. Mr Carr is reported to have said that he 'was yet to consider whether small business would be entitled to sue for defamation' – 'NSW Government to cap payouts, bar corporations from defamation', AAP, 9 July 2002 -<http://bulletin/prod/aap/fn-p31.nsf/e26f3c55470833fbca25693b001f7baa/adb6f65d818a18c14a256bf1003874f9>

² Premier of NSW, Bob Carr, 'Premier Carr flags major reforms to the law of defamation', *Media Release*, 9 July 2002.

This paper presents a background to the current debate. First, it looks at the general issues in defamation law. A defamation timeline is then presented, followed by an outline of the NSW *Defamation Act 1974*. The paper ends with a discussion of the present proposals for reform, as set out in the Defamation Taskforce Report of July 2002.

2. ISSUES IN DEFAMATION LAW

2.1 *Defamation defined*

In his 1998 study of *The Law of Defamation in Australia and New Zealand* Michael Gillooly defined defamation broadly as the ‘unlawful publication by one person of matter that is defamatory of another’. To this he added the following ingredients:

- ‘matter’ consists of anything by which meaning is conveyed, including spoken or written words, signs, gestures or pictures;
- matter is ‘defamatory of another’ if it tends to injure that person’s reputation and/or lead to their social ostracism;
- ‘publication’ denotes the communication of the defamatory matter by any means to a person other than the person defamed, including by speaking, distributing printed material, or broadcasting on TV or radio; and
- a publication is ‘unlawful’ if it is ‘not justified, protected or excused by any of the various defences of the publication of defamatory matter’.³

2.2 *Competing public interests*

The law of defamation must take account of the conflict between the interest of freedom of speech and information on the one hand and the right to protection from attacks on reputation on the other. It is a conflict between competing public interests.⁴ According to the High Court in *Lange v Australian Broadcasting Corporation*:

The purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech. It is not to be supposed that the protection of reputation is a purpose that is incompatible with the requirement of freedom of communication imposed by the Constitution. The protection of the reputation of those who take part in the government and political life of this country from false and defamatory statements is conducive to the public good.⁵

In different jurisdictions worldwide a different balance is struck between the competing

³ M Gillooly, *The Law of Defamation in Australia and New Zealand*, The Federation Press 1992, p 2.

⁴ NSW Law Reform Commission, *Defamation, Report No 75*, 1995, p 16.

⁵ (1997) 189 CLR 520 at 568.

public interests at issue. In the UK, where defamation law operates alongside the *Human Right Act 1998*, that balance appears to be moving further towards freedom of expression. The leading case is *Reynolds v Times Newspapers* where Lord Nicholls observed:

Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public has no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.⁶

In NSW recently the Defamation List Judge of the Supreme Court, Justice David Levine, posed the question ‘does our defamation law strike the right balance between the protection of reputation and free speech?’. In answer he said:

The ‘balance’ as I have hinted, in my opinion, does exist in our law as a matter of principle (or in theory). Is the ‘balance’ sustained as a matter of practice? The answer is ‘no’; not so much by reasons of the legal principles creating the mechanism for the achievement of the remedy or the attainment of a ‘balance’, but by reason of the complexities and thus costs of litigating an action for defamation....My overall answer to the question in the paper’s topic as to whether the balance has been struck is: ‘yes’ as to matters of principle but essentially ‘no’ by reason of expensive complexities in practice.⁷

2.3 *Strong views*

Defamation law invites controversy. As the NSW Law Reform Commission (the *NSWLRC*) reported in 1971, ‘It is a subject on which much has been written and spoken and on which strong views are held’.⁸ Nothing has changed. Following the Premier’s announcement, an in-house solicitor at Fairfax, Richard Coleman, wrote that if defamation law is ‘not exactly a basket case’, it ‘is an inefficient, expensive and wasteful form of litigation, both for litigants and the courts’. He added:

⁶ [1999] 4 All ER 609 at 626. For an application of the *Reynolds* doctrine see, for example, *Loutchansky v Times Newspapers (No 2)* [2002] 1 All ER 652 at 666 (Lord Phillips). The ‘vital importance’ of the public’s interest in free expression and ‘the promotion of a free and vigorous press’ was affirmed. Also stated was the corresponding duty of a journalist to act responsibly.

⁷ Justice D Levine, ‘Does our defamation law strike the right balance?’, *Supreme Court Annual Conference*, 16-18 August 2002, para 52 and para 65.

⁸ NSW Law Reform Commission, *Defamation, Report No 11*, 1971, p 7.

Even the defamation list judge, Justice David Levine, has complained about defamation's 'excruciating and sterile technicalities' and warned that it had 'virtually come about that there can be no longer be seen to be a remedy' for defamation in any sensible, reasonable or practical way.⁹

In a recent speech the editor of *The Australian*, Michael Stutchbury, spoke of the contribution made by Australia's 'shambolic defamation laws' to what he called 'the rising culture of secrecy'. These laws, he said, 'pose one of the great institutionalised barriers to free speech and an open society': He continued:

Defamation laws have a chilling effect of the public's right to be informed and the media's ability to vigorously probe controversies in the church, the boardroom, the accountancy firms, the police forces, the law firms, the defence forces and the government...By and large, defamation law does not protect the general public. It enriches the well-off and powerful who know how to work the system and who mostly have the means to publicly rebut slurs upon their reputations.¹⁰

In 1999 Justice Levine is reported to have called for the repeal of section 9 of the NSW *Defamation Act 1974* so as to remove the requirement in NSW that the imputation is the cause of action. He said the development of this provision had 'adversely affected' the rights of litigants: 'Unless this is done the tort of defamation will be dead, the remedy will be dead, the rights will be dead...'.¹¹

On the other hand, Fred Hilmer, CEO of Fairfax is reported to have said that defamation laws were not a 'major issue':

We think some of the reforms that have been made in the defamation area are working reasonably well, and from a straight publisher's point of view you could say 'well, wouldn't it be great not to have any restrictions', but we're quite happy to live with the legal framework fairly broadly as it exists today.¹²

Likewise, in a recent High Court case Justice Callinan took the opportunity to comment on

⁹ R Coleman, 'Change for change's sake will not serve the defamed', *The Sydney Morning Herald*, 15 July 2002.

¹⁰ M Stutchbury, 'The rising culture of suppression', Speech delivered to the International Media Ethics Conference, Canberra, 4 July 2002 – <http://www.crikey.com.au/media/hugodefo.html>

¹¹ R Ackland, 'The nonsense must end', *Gazette of Law and Journalism*, 1 September 1999.

¹² 'Cost penalties: big stick in defamation reform plot', *Gazette of Law and Journalism*, 24 June 2002.

both the wrong-headedness of the constitutional implication of freedom of political discussion and on the general adequacy of defamation law. He pointed to the availability in modern times of such things as FOI legislation and the expansion of remedies for the review of administrative action as the basis for his case against ‘tilting any further of the balance in favour of publishers’. According to Justice Callinan:

The fact is that publishers who act honestly and with ordinary diligence in the compilation and dissemination of matter of public interest have nothing to fear from the law of defamation as it existed before the discovery of the constitutional implication. It is not as if there is anything remarkable or novel about the, usually futile, attempts of politicians and officials to manipulate the media. In the middle of the nineteenth century, Lord Palmerston was famous for it.¹³

2.4 Money or the truth

Another strong view was presented by the former independent MP, John Hatton, who said during the debate for the *Defamation (Amendment) Act 1994*:

Defamation as it is now is not about truth and it is not about reputation; it is about money. It is about a process that has become so convoluted, complex and specialised that it is mystical. Is there any Member in the Chamber who understands defamation law?¹⁴

2.5 Money and reputation

The usual remedy in defamation is an award of monetary damages. A long-standing issue in the defamation debate is how does an award of money vindicate reputation? If defaming a person alters the perception others have of that person, thereby damaging their reputation, how in a theoretical sense is that reputation restored by an award of money?¹⁵ From a practical standpoint, often settlements are reached out of court and the award of damages is not made public. According to the NSWLRC, a confidential deed is often used in these circumstances, which prohibits the public release or discussion of the terms of settlement. One result is that ‘the defamation remains uncontradicted in the public mind’;¹⁶ another is

¹³ *ABC v Lenah Game Meats* (2002) 185 ALR 1 at 99 (para 342).

¹⁴ *NSWPD*, 2 December 1994, p 6252.

¹⁵ For a general discussion of this issue see – A Kenyon, ‘Problems with defamation damages?’ (1998) 24 *Monash University Law Review* 70. Kenyon commented that the role of compensatory damages is to ‘console a defamed plaintiff and to vindicate the plaintiff’s reputation. Consolation itself can be divided into two elements: consolation for personal distress and reparation for harm to reputation’ (at 72). Aggravated damages are also available. Exemplary damages have been abolished in NSW.

¹⁶ NSW Law Reform Commission, *Defamation, Discussion Paper No 32*, 1993, p 12.

that such arrangements make it very hard to compile reliable empirical data on defamation cases.

Alternatively, damages may also come a long time after publication and, where the award is publicised, it may only serve to revive the defamatory matter rather than vindicate the plaintiff's reputation. It is said that actual restoration of reputation is 'rarely accomplished'¹⁷

In its 1995 Report the NSWLRC had much to say about the role monetary damages are intended to serve in defamation suits, for purposes of compensation and vindication. Of the purpose of vindication, it said: 'As a demonstrable mark of the wrong done to the plaintiff, vindication "sets the record straight", restores the plaintiff's standing in the community, and, ideally, assuages any desire for revenge'.¹⁸ The limitations of monetary damages in achieving these goals were also discussed, as were possible alternative remedies, including the declaration of falsity.

Money concerns, notably the costs involved in defamation litigation, are important to the current reform proposals, especially to those procedural recommendations designed to avoid extended litigation. The views of the Defamation Taskforce on this issue are discussed later in this paper (pages 27-30 below).

2.6 *Truth and reputation*

One argument put forward by the NSWLRC in its 1995 Report was that, as the law stands, there is no necessary connection between reputation and truth in this jurisdiction.¹⁹ A finding that a publication is defamatory does not necessarily imply that it is false. It follows that it is *mere* reputation which is protected, not a person's actual character or a person's *well-founded* reputation.²⁰ Character, it is said, refers to a person's 'inherent moral qualities', whereas reputation refers 'to the public estimation or repute of a person, irrespective of the inherent moral qualities of that person'.²¹

In effect the 1995 NSWLRC Report attempted to shift the philosophical emphasis of defamation law, making it concentrate on the question of the falsity of the defamatory imputation concerned. The abandoned Defamation Bill 1996 was based on that Report. Falsity was to be an ingredient of the cause of action in defamation, the effect of which would have been to place the onus of proving falsity on the plaintiff.

¹⁷ NSWLRC, n 16, p 11.

¹⁸ NSWLRC, n 4, pp 18-19.

¹⁹ NSWLRC, n 4, p 18.

²⁰ DJ Brennan, 'The defence of truth and defamation law reform' (1994) 20 *Monash University Law Review* 151 at 157-60.

²¹ *Melbourne v The Queen* (1999) 198 CLR 1 at 15 (McHugh J).

This and other aspects of both the Report and subsequent Bill were the subject of extensive criticism by practitioners in the field of defamation law.²² For example, Mark O'Brien questioned the assumption that the issue of truth or falsity rarely arises under the present law in NSW. O'Brien commented in this regard: 'In most contested matters ... truth is the principal defence upon which the media relies. Surprisingly, members of the Law Reform Commission have acted on the assumption that a truth defence is rarely pleaded, a false premise which undermines the effect of the second major reform, the declaration of falsity procedure'.²³

2.7 *Who can sue?*

Individuals can pursue a claim for defamation, as long as they are sufficiently identified in the material in question. A reference to someone as part of a group may be sufficient provided that the group is small enough. This means that even where a body or institution, such as a local government council,²⁴ is barred from suing for defamation, individual councillors may do so in appropriate circumstances.

It is established that corporations can be defamed by material which harms their trading reputation. This issue is discussed further in relation to the Defamation Taskforce Report (pages 37-40 below).

2.8 *Forum shopping*

There are broadly three varieties of defamation law in Australia, ranging from common law jurisdictions to the Code States. The differences between these various regimes results in what is called 'forum shopping'. This is because a plaintiff may get a different result in a defamation case depending on where they bring the action, with the result that plaintiffs shop around to choose the jurisdiction which seems most favourable to them.

2.9 *Uniform national defamation law*

The established practice of forum shopping has resulted in a long campaign for such a national defamation regime. In 1980 the Standing Committee of Attorneys General (SCAG) began discussing a uniform national defamation law based on the Australian Law Reform Commission's 1979 report, *Unfair Publication: Defamation and Privacy*. Speaking in May 2000 the then Attorney General, JW Shaw, commented:

²² G Griffith, *Defamation Law Reform: Declarations of Falsity and Other Issues*, NSW Parliamentary Library Briefing paper No 24/1996, pp 22-26.

²³ *Gazette of Law and Journalism*, No 35, November 1995 at 7.

²⁴ *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680. A local government entity may sue for injurious falsehood.

The push for uniform national defamation laws appears to have stalled. However, we should not abandon the project of uniformity whilst making incremental changes to the NSW model.²⁵

In the latest reform debate in NSW the case for uniform law was put by the Australian Press Council on the grounds that ‘State and Territory borders have become increasingly irrelevant to publishers. Even national borders are becoming less relevant’.²⁶

That view was reflected in the Taskforce Report which recommended that its report ‘should form the basis of discussion with the States and Territories aimed at achieving national reform’.²⁷

Commenting on the Report, Mark Richardson, Chief Executive officer of the Law Society of NSW, said the Society ‘believes a national approach to defamation law is a preferable means of bringing about effective and fair change’. Without such a national approach, he said, plaintiffs will go ‘forum shopping’.²⁸

2.10 Choice of law

Forum shopping also raises ‘choice of law’ questions, that is, which jurisdiction’s law is to be applied in any particular case. A feature of this debate has been the distinction which has been drawn between procedural and substantive legal matters. Such technicalities need not be considered here. It is enough to note that in *Pfeiffer v Rogerson*²⁹ the High Court held that torts committed within Australia, but which have an interstate element, must be commenced and defended in accordance with the law of the place of the tort (the *lex loci delicti*).³⁰

That said, the Court recognised that, in defamation and other matters, the ‘place of the tort may be ambiguous and diverse’. On this point, Judith Gibson commented that it resulted in the High Court ‘expressing some startling views about reframing traditional actions such as defamations as some other cause of action’.³¹ According to the joint judgment:

²⁵ JW Shaw, ‘Defamation law reform back on the agenda’, *Gazette of Law and Journalism*, 10 May 2000.

²⁶ Australian Press Council, *Submission of the Australian Press Council to the NSW Attorney General on possible reforms to the NSW Defamation Law*, 10 October 2001, p 2.

²⁷ Attorney General’s Taskforce on Defamation Law Reform, *Defamation Law: Proposals for Reform in NSW*, July 2002, p 38.

²⁸ The Law Society of NSW, ‘Law Society calls for national defamation laws’, *Media Release*, 10 July 2002.

²⁹ (2000) 203 CLR 503.

³⁰ For a commentary on the availability of ‘interstate’ defences, notably the ‘Polly Peck’ 7, para 54.

³¹ J Gibson, Recent Developments in Defamation, Paper presented by NSW Young Lawyers, 14 March 2001, p 9.

The tort of libel may be committed in many States when a national publication publishes an article that defames a person. These difficulties may lead to litigants seeking to frame claims in contract rather than tort (as the NSW Compensation Act anticipated (S 151E)) or for breach of s 52 of the *Trades Practices Act* (Cth) or some similar provision. Characterising such actions may be difficult and may raise questions whether the private international law rules about tort or some other rules are to be applied.³²

2.11 Choice of law and the Internet

Defamation on the Internet lends another dimension to the choice of law issue. It concerns the application of what is called private international law to defamation, as seen in the ongoing *Dow Jones v Gutnick*³³ case for which special leave to appeal to the High Court was granted on 14 December 2001. In the case a prominent Melbourne businessman commenced proceedings in Victoria in relation to an article in a US financial journal *Barron's Magazine* which was placed on a subscription website. At first instance it was held that material placed on the Internet in the US and read in Victoria was published, and is therefore actionable, in Victoria. Hedigan J applied an orthodox common law approach to a range of issues, including that of *forum non conveniens*,³⁴ whereas the defendant, Dow Jones, argued that publication on the Internet should be treated as a special case.³⁵

Another example of the kinds of jurisdictional issues which can arise is the NSW case of *Macquarie Bank Ltd v Berg*³⁶ in which the bank commenced proceedings in this State to restrain the publication of material on a website by a disgruntled ex-employee from an undisclosed location in the US. Following Rolph's discussion of the case, it can be said that Simpson J refused to grant an injunction restraining the Internet publication on two grounds: first, that the defendant (Berg) was not within the jurisdiction and, therefore, could not be restrained personally; secondly, on the basis of 'the fundamental public interest in freedom of speech and freedom of information' the courts in NSW have traditionally been reluctant to issue injunctions to restrain allegedly defamatory publications.³⁷

³² (2000) 203 CLR 503 at 539 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

³³ [2001] VSC 305.

³⁴ This refers to the private international law doctrine that courts have a discretionary power to decline jurisdiction when the convenience of the parties and justice would be better achieved by resolving the dispute in another forum. In *Gutnick* Hedigan J found that Victoria was an appropriate forum on the basis that the plaintiff lived and worked in that State and was suing 'only in respect of publication in Victoria and declines suit anywhere else' (at para 124).

³⁵ D Rolph, 'The message, not the medium: defamation, publication and the Internet in *Dow Jones & Co Including v Gutnick*' (2002) 24 *Sydney Law Review* 263.

³⁶ (1999) Australian Defamation Report 53,035.

³⁷ D Rolph, n 35, pp 273-4.

2.12 *Internet Service Providers (ISPs) and defamation*

Until quite recently it was assumed in Australia that ISPs would have to rely primarily on the common law defence of innocent dissemination, a defence which protects those involved in publishing who have no control or knowledge of the content of material.

In *Thompson v Australian Capital Television*,³⁸ the High Court suggested that the innocent dissemination defence may be open to ISPs, with Brennan CJ, Dawson and Toohey JJ saying that 'There is no reason why in principle a mere distributor of electronic material would not be able to rely upon the defence of innocent dissemination if the circumstances so permit'. But complicating the operation of the defence in Australia, in *Thompson* it was found that where a publisher has the ability to control and supervise material (in that case a television broadcast which was disseminated by another television company) then the defence is not available. The High Court considered the company to be a 'primary publisher' because it retained the ability to control and supervise an instantaneous relay transmission of a live current affairs program. Of the defence, the NSWLRC explained in its 1995 report that it is only available to those who have taken a 'subordinate part' in disseminating the defamatory material and added: 'The defence has been successfully maintained in only a few instances, since it is often difficult for the subordinate publisher to prove an absence of negligence in publishing'.³⁹

Quite what this implies for ISPs is unclear. If they are found in the circumstances to have no control over the content of the material they distribute, then the innocent dissemination defence may apply to them – although even then they will have to demonstrate they were not negligent and that they had no grounds for supposing that the material was likely to contain defamatory material. On the other hand, if they exercise any editorial control over the material, for instance by offering a 'filtered Internet carriage service' as contemplated under the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth), then it may be that an ISP will be looked upon as a 'primary publisher', with the result that the common law defence will not apply to it. Liability would depend therefore on the extent of involvement and control the particular ISP has in relation to the defamatory material concerned. To date, no Australian case seems to have dealt directly with this issue.⁴⁰

Since the passing of the *Online Services Act 1999* (Cth) an alternative to the defence of innocent dissemination exists. This was pointed out by a number of contributors to a University of NSW Forum on Internet Content Control, most thoroughly by Julie Eisenberg, then a media lawyer based at the Communications Law Centre in Sydney. Her view was that the position of ISPs in relation to defamation has been transformed for all Australian jurisdictions by section 91(1) of the Commonwealth *Online Services Act 1999*.⁴¹

³⁸ (1996) 71 ALJR 131 at 138.

³⁹ NSWLRC, n 4, p 149.

⁴⁰ G Heaton, 'Punishing the gatekeeper: ISP liability for defamation in cyberspace' (August 2000) 3 *Internet Law Bulletin* 70 at 73. Heaton comments, 'To date, there are no Australian precedents for the common law defence of innocent dissemination as it applies to ISPs'.

⁴¹ J Eisenberg, 'Safely out of sight: the impact of the new online content regulation on defence

Section 91(1) provides that a law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it would: (a) subject an Internet Content Host (ICH) or ISP to civil or criminal liability for hosting or carrying material *where it was not aware of its nature*; and (b) require an ICH or ISP to monitor, make enquires about or keep records of content which it hosts or carries. In other words, in an Act which otherwise deals with the regulation of ‘offensive’ online content there exists a provision which seems to grant, perhaps inadvertently, a very broad immunity to ISPs, including an immunity from the operation of State defamation laws. Eisenberg stated: ‘there is no apparent limitation on the subject matter of the laws which might be overridden by section 91(1), nor is there a limitation on the type of content applicable’. She discounted the possibility that its operation may be restricted to ‘prohibited content’ or ‘potentially prohibited content’ and argued that, even if its interpretation could be limited by its context – the regulation of ‘offensive’ online content – ‘it should still apply where the outcome is broadly consistent with the stated objectives of the legislation’. According to the Revised Explanatory Memorandum, the purpose of section 91(1) is:

to give practical effect to the principle that, in general, the Commonwealth will provide a nationally consistent framework for the regulation of the activities of Internet service providers and Internet content hosts, while the States and Territories will continue to carry primary responsibility for regulating content providers and users.

The Commonwealth law refers specifically to circumstances where an ISP ‘*was not aware of the nature of the Internet content*’ it carried. Does this mean that any ISP who ‘filters’ the Internet content it carries, or claims to edit it in any way, may be held liable for publishing defamatory material? Eisenberg thinks not. She says that section 91(1) ‘removes from ISPs and ICHs any obligation to screen for defamatory content and protects them from liability if they are filtering content for other purposes but are unaware of defamatory content’. On the other hand, it can be assumed that an ISP who carries defamatory material and is put on notice via a complaint would not find protection against liability under section 91(1). Further to the interpretation of the section, Greg Heaton has commented:

It remains uncertain whether being ‘aware of the nature of the Internet content’ means simply being aware that it exists, or being aware of its illegality (for example, that it meets the legal definition of defamatory material).⁴²

For the purposes of section 91(1) it is the ISP who must prove an absence of knowledge, but the Act is not explicit on this point. Unlike the common law defence of innocent dissemination, section 91(1) does not require an ISP to prove, in addition, an absence of negligence in carrying the defamatory material. Indeed, Eisenberg has suggested that the provision will even protect ‘reckless’ ISPs ‘who can show that they did not know they were

law’ (2000) 23 *University of New South Wales Law Journal* 232-237.

⁴² (August 2000) 3 *Internet Law Bulletin* 70 at 71. A copy of the article is attached.

carrying or hosting objectionable content'.⁴³ Another commentator on this complex subject, Matt Collins, has argued:

Actual knowledge on the part of the host or provider is required before the defence ceases to be available. The defence will continue to be available where the host or provider merely ought to be aware of the nature of the content, or is not aware of the nature of the content due to its own negligence.⁴⁴

Collins concluded that 'there are a number of significant difficulties' with the application of the section 91(1) defence to defamatory material published on the Internet: 'The liability of ISPs and content hosts under the ordinary rules of civil defamation law will in many cases remain a question of vital importance'.⁴⁵

3. DEFAMATION TIME LINE

- The *Defamation Act 1958* partially codified defamation law in NSW.⁴⁶
- In 1971 the NSWLRC Report on *Defamation* was released. The Report noted that the 1958 Act had 'not been a satisfactory attempt at codification. In the minds of lawyers, the Act is held to be the source of formidable difficulties, both in substantive law and in procedure'.⁴⁷ The Report went on to say that the common law is a 'more serviceable for the law of defamation' and recommended a return to the common law with statutory⁴⁸
- *Defamation Act 1974* enacted based on the 1971 NSWLRC Report;
- In 1976, the Australian Law Reform Commission (ALRC) was given two separate references dealing respectively with defamation and privacy. Certain aspects of invasion of privacy caused by publication were dealt with as part of the defamation reference. In 1979 the ALRC released its Report on *Unfair Publication: Defamation and Privacy*.
- In July 1980, the Standing Committee of Attorneys General (SCAG) began discussing a uniform national defamation law based on the ALRC Report. Draft Bills were released for public comment in 1983 and 1984.
- None of the recommendations of the ALRC were ever implemented. Agreement could

⁴³ This is different to the situation in the UK where an ISP must take 'reasonable care and did not know...he contributed to the publication of a defamatory statement' (section 1 of the *Defamation Act 1996* (UK)).

⁴⁴ M Collins, 'Communications: new twist to liability for defamation on the Internet', *Law Society Journal*, July 2000, p 71.

⁴⁵ M Collins, n 44, p 71.

⁴⁶ This timeline is based on and updates NSWLRC, n 16, pp 2-4.

⁴⁷ NSWLRC, n 8, p 8.

⁴⁸ NSWLRC, n 8, p 9.

not be reached in such key areas as the defence of justification and the definition of defamatory matter. Defamation law reform was removed from SCAG's agenda in May 1985.

- In March 1990, SCAG considered reinstating defamation law reform as an active project on their agenda. In June 1990, the Attorneys General of Queensland, Victoria and NSW decided to proceed with a review of the law in their respective jurisdictions, with the ultimate aim of achieving uniformity throughout Australia. A joint Discussion Paper was released by the three Attorneys General in August 1990. A second joint Discussion Paper was released in January 1991.
- On 14 November 1991, *Defamation Bills* were introduced in the Parliaments of Queensland, Victoria and New South Wales. Essentially the Bills reproduced the current *Defamation Act 1974* (NSW). There were significant changes in some areas, including justification, qualified privilege, court-recommended corrections and limitation periods. The Bills were not uniform: for example, in NSW damages were to be assessed by the judge, whereas in Victoria they were to be assessed by the jury.
- On 14 November 1991, the *Defamation Bill 1991* (NSW) was referred to a Legislation Committee of the Legislative Assembly for a full consideration of its provisions. The Bill was reintroduced in 1992 and re-referred. The Committee's Report was issued in October 1992. The major recommendation of the Report was that the Bill should be referred to the NSWLRC for a comprehensive review and redrafting of its provisions.
- In the early 1990s a series of defamation cases involved large awards of damages, resulting in the perception that such awards were excessive and out of step with awards in personal injury cases. These cases included the high profile *Ettinghausen* case⁴⁹, the *Carson*⁵⁰ litigation and *Hartley v Nationwide News*⁵¹ in which an alderman of Fairfield Council was awarded \$935,000 damages (exclusive of interest and costs).
- The *Defamation (Amendment) Act 1994*, which came into effect on 1 January 1995, introduced the following major changes to defamation law in NSW: (a) under section 7A (4) the trial judge and not the jury should determine whether any defence was established and the amount of damages (if any) that should be awarded to the plaintiff; and (b) under section 46A, in the assessment of damages the trial judge should ensure that any damages awarded have an appropriate relationship to the injury suffered and take account of the general range of damages for non-economic loss in personal injury awards in NSW (including awards made under any relevant statute). The 1994 Act was

⁴⁹ *Ettinghausen v Australian Consolidated Press* (NSW Court of Appeal, 13 October 1993); (1991) 23 NSWLR 443. The Court of Appeal held that the jury award of \$350,000 in compensatory damages was excessive. Comparing defamation awards with those in medical negligence cases, Kirby P commented: 'It is simply impossible to suggest that compensation for harm done to the reputation of Mr Ettinghausen required or permitted general damages greater in magnitude than those awarded to persons suffering profound quadriplegia'. The case is discussed in A Kenyon, n 15, p 82.

⁵⁰ *Fairfax v Carson* (1991) 24 NSWLR 259; *Carson v Fairfax* (1993) 178 CLR 44; *Carson v Fairfax* (1994) 34 NSWLR 72.

⁵¹ *Australian Defamation Reporter*, 52, 035. A case in which the plaintiff sued over adverse references to him in a suburban newspaper as a migration agent and local government councillor. In 1996 the jury verdict was set aside by the NSW Court of Appeal which ordered a new trial limited to the question of damages

passed further to the Memorandum of Understanding signed originally between the Greiner Government on 31 October 1991 and the three Independent Members holding the balance of power in the Legislative Assembly.⁵²

- In September 1995 the NSWLRC released its Report on *Defamation*. Its key recommendations were: (a) that falsity should be an ingredient of the cause of action in defamation, with the burden of proof resting on the plaintiff; and (b) that the declaration of falsity be introduced as an alternative to damages.
- On 18 September 1996 the Defamation Bill 1996, based on the NSWLRC Report, was introduced into the Legislative Council by the then Attorney General, Jeff Shaw. After much criticism from defamation lawyers it did not proceed beyond its Second Reading.
- On 10 May 2000 the then Attorney General, Jeff Shaw, re-opened the debate on defamation law reform at a forum held at NSW Parliament House.
- Later in 2000 the present Attorney General, Bob Debus, raised the issue of defamation law reform again and called for submissions, notably on the declaration of falsity proposal and section 7A trials.
- As part of its case management program the Supreme Court introduced specialist lists, including a Defamation List. The new procedures were introduced on 1 September 2000 with the aim of ensuring that defamation actions can be heard and decided within 18 months of the offending publication.
- High profile, costly and lengthy defamation cases continued to make the news, including the long-running *Marsden* litigation against Channel 7 for allegations of paedophilia. In other defamation proceedings a rugby league referee, Bill Harrigan, sued broadcaster Alan Jones who had claimed Harrigan was biased (Harrigan was awarded a total of \$90,000 damages), while former Deputy Police Commissioner Jeff Jarratt sued Fairfax over imputations that he was involved in the corrupt award of a contract to Motorola (Jarratt was awarded a total of \$420,000 damages).⁵³
- The availability of juries in civil proceedings was limited by the *Courts Amendment (Civil Juries) Act 2001*. The Act amends the *District Court Act 1973* to provide that civil proceedings in the District Court are to be tried without a jury, unless the Court otherwise orders. It also amends the *Supreme Court Act 1970* but in such a way as to preserve juries for defamation trials in the Supreme Court.
- On 28 May 2002 the *Civil Liability Act 2002* was introduced into Parliament and assented to on 18 June 2002. It commenced operation (retrospectively) on 20 March 2002. This general tort law reform Act applies to barristers and solicitors acting in defamation cases. Under Schedule 2, Division 5C of the Act there are disciplinary and cost penalties where proceedings are commenced ‘without reasonable prospect of
- In July 2002 the Attorney General released the Report of the Defamation Taskforce and announced that defamation law reform will proceed in the Spring session of Parliament. The Premier confirmed this intention in a speech on 9 July and set out the broad case for defamation law reform.

⁵² The Memorandum was reaffirmed by Premier Fahey on 15 July 1992.

⁵³ A comprehensive ‘Defamation Table of Quantum: NSW’ is published by *The Gazette of Law and Journalism*.

4. THE NSW DEFAMATION ACT 1974

4.1 *Three Australian defamation regimes*

Broadly, there are three varieties of defamation law in Australia:

- that of the ‘common law States’ of Victoria, South Australia and Western Australian;
- that of the Code States, Queensland and Tasmania, whose defamation laws are based on Sir Samuel Griffith’s reworking of the Indian Penal Code of 1860; and
- that of the ‘common law with statutory modifications’ jurisdictions – NSW under the *Defamation Act 1974*, the ACT under the *Defamation Act 2001* and the Northern Territory under its Defamation Act.⁵⁴

4.2 *The common law and the NSW Defamation Act*

In respect to defamation, NSW is a ‘common law with statutory modifications’ jurisdiction. Defamation is not defined under the NSW *Defamation Act 1974*. Instead, by section 4(2), the Act expressly builds on and reinstates the operation of common law.⁵⁵

It is also the case that the common law defences are preserved in the main by section 11 of the NSW Act. For example, the common law defence of qualified privilege continues in force alongside the statutory defence of qualified privilege.⁵⁶

Further, as at common law an objective test applies to determine whether the publication is defamatory:

It is not determined by the fact that the plaintiff understood the publication to be defamatory of him. Nor is it determined by whether the persons to whom it is published understood it innocently or in a defamatory sense. The test is whether the publication would have been likely to cause the ordinary reasonable man or woman to have thought less of the plaintiff.⁵⁷

More specific to NSW, the principles which apply in determining whether material conveys

⁵⁴ The statute embodies the Defamation Act 1980 and the Defamation Amendment Act 1989 – TK Tobin and MG Sexton, *Australian Defamation Law and Practice*, Butterworths 1999, at paras 1020-1065.

⁵⁵ Section 4 (2) provides: ‘The law relating to defamation, in respect of matter published after the commencement of this Act, shall be as if the *Defamation Act 1958* had not been passed and the common law and the enacted law (except this Act and any enactments repealed by that Act) shall have effect accordingly’. From the outset, it is clear that we are not dealing here with a plain English statute.

⁵⁶ Tobin and Sexton, n 54, at para 1045.

⁵⁷ Tobin and Sexton, n 54, at para 3120.

a pleaded imputation were summarised in *Amalgamated Television Services Pty Ltd v Marsden* where Hunt CJ at CL said:

The ordinary meaning of the matter complained of may be either the literal meaning of the published matter, or what is implied by that matter, or what is inferred from it...In deciding whether any particular imputation is capable of being conveyed, the question is whether it is *reasonably* so capable (*Defamation Act*, s 7A, reflecting the common law...), and any strained or forced or utterly unreasonable interpretation must be rejected...The ordinary reasonable reader (or listener or viewer) is a person of fair average intelligence..., who is neither perverse..., nor morbid or suspicious of mind..., nor avid for scandal...That person does not live in an ivory tower but can and does read between the lines in the light of that person's general knowledge and experience of worldly

⁵⁸

His Honour went on to say that 'The mode or manner of publication is a material matter in determining what imputation is capable of being conveyed' and emphasised that it is the 'test of reasonableness' which guides the court.

4.3 Section 9 – imputations as cause of action

The *Defamation Act 1974* does alter the common law in important respects. For example, consistent with the common law the cause of action only arises if the defendant publishes a 'disparaging imputation' about the plaintiff.⁵⁹ Unlike at common law, however, under section 9 (2) of the *Defamation Act* there is a separate cause of action for the publication of each defamatory imputation to each recipient. This means that in NSW a cause of action for defamation arises from the publication of defamatory imputations themselves, rather than from the defamatory matter they are embodied within.⁶⁰ As Gillooly explained, this has resulted in a sophisticated and unique pleading regime in which 'each substantially different imputation conveyed by the matter complained of gives rise to a separate cause of action'.⁶¹ Under this scheme, a plaintiff must set out in their statement of claim the

⁵⁸ (1998) 43 NSWLR 158 at 165 (Hunt CJ at CL; Mason P and Handley JA agreeing).

⁵⁹ This is in contrast to the broader approach taken by the Code States and, formally, in NSW under the *Defamation Act 1958*, section 5 of which provided: 'Any imputation concerning any person, or any member of his family, whether living or dead, by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise him, is called defamatory, and the matter of the imputation is called defamatory matter'. The cause of action in defamation was extended therefore to an imputation against a relative, living or dead, by which the plaintiff's reputation was damaged.

⁶⁰ RS Magnusson, 'Freedom of speech in Australian defamation law: ridicule, satire and other challenges' (2001) 9 *Torts Law Journal* 269 at 292.

⁶¹ M Gillooly, n 3, p 53.

imputations which allegedly arise and the plaintiff is then bound by those imputations.⁶²

Justice Levine's views on the need to repeal section 9 have been noted (page 4 above). Repeal was not the subject of a specific recommendation in the Defamation Taskforce Report. However, in the interests of moving towards a national regime, the Taskforce did propose 'that NSW rethink that singular position, and move towards a situation that is common in other States and Territories'. The Report concluded:

In order to achieve that outcome, it may be appropriate for NSW to act so as to amend s 9 by removing the focus on the imputation as the cause of action.⁶³

4.4 *Modifications to the common law*

Statutory modifications in NSW to the common law set out by Tobin and Sexton are as follows:

- the distinction between libel and slander has been abolished;⁶⁴
- truth is only a defence for the publication of defamatory imputations relating to a matter of 'public interest';
- a new defence of contextual truth has been introduced as a complete defence, rather than as a 'partial justification' at common law;
- the defendant may raise as a defence an 'offer of amends' made to the plaintiff;
- proceedings of many tribunals are protected by absolute privilege, as are matters relating to such bodies as the Ombudsman and the ICAC;
- the malice of the defendant sounds in damages only if it adds to the actual harm suffered by the plaintiff; and
- exemplary damages have been abolished.⁶⁵

⁶² In *Greek Herald Pty Ltd v Nikolopoulos* [2002] NSWCA 41 the Court of Appeal reaffirmed, by majority, that imputations are to be considered in the context of the matter complained of, not in their own terms – 'NSW juries need to consider context when pondering *The Gazette of Law and Journalism*, 26 March 2002.

⁶³ Defamation Taskforce Report, n 27, p 37.

⁶⁴ Traditionally at common law, a distinction has been made between slander (defamation by means of spoken words or gesture) and libel (defamation by means of writing, print, or some permanent form). Section 8 of the *Defamation Act* provides: 'Slander is actionable without special damage in the same way and to the same extent as libel is actionable without special damage'.

⁶⁵ Tobin and Sexton, n 54, at para 1050.

4.5 *Principal defences in NSW*

The principal defences in operation in NSW are as follows:

- defence of justification based on truth in respect of a matter that is related to a matter of public interest or an occasion of qualified privilege (Division 2, section 15, *Defamation Act*);
- contextual truth (Division 2, section 16, *Defamation Act*);
- fair comment on a matter relating to the public interest (Division 7, *Defamation Act*);
- fair report of parliamentary and similar proceedings (protected reports) (Division 5, *Defamation Act*);
- statutory defence of qualified privilege (Division 4, section 22, *Defamation Act*);
- common law qualified privilege;
- absolute privilege (Division 3, sections 17-19, *Defamation Act*). This provides protection regardless of the publisher's motive for publishing the material. A wide and ever expanding range of material is covered under the NSW Act, everything from parliamentary papers to matters arising under the *Harness Racing NSW Act 1977*; and
- offer of amends (Division 8, *Defamation Act*).

4.6 *Truth at common law*

At common law, it is a defence that the imputation complained of was true in substance and in fact; and this defence is available whether or not the defendant was actuated by malice.⁶⁶ In Victoria, South Australia and Western Australia where this defence applies the defendant must prove the truth of all material statements in the published matter. The plaintiff will succeed if any distinct allegations arising from the matter is not proved. However, it is sufficient that the 'sting' of the allegation complained of is proved true, and this can be done by proving the truth of other allegations with a common sting.⁶⁷

At common law, too, the falsity of a defamatory imputation is presumed. In other words, once a plaintiff has proved the imputation to be defamatory, it is presumed to be false.

4.7 *Truth in NSW – section 15 and the defence of justification*

By contrast, in NSW there is no presumption that defamatory matter is either true or false.⁶⁸ That is not to suggest that truth and falsity are irrelevant to NSW defamation law. Far from it. For example, truth is relevant to the defence of justification, as this has been modified

⁶⁶ NSWLRC, n 8, p 92.

⁶⁷ NSWLRC, n 16, p 109. The principle behind the *Polly Peck* defence at common law is that where there are two or more imputations arising from a publication which are not separate and distinct, the defendant will have a complete defence where the common sting can be proven as true – even if all the specific imputations cannot be proven.

⁶⁸ NSWLRC, n 4, p 19. Query if the defence of political communication is an exception to that rule.

by successive statutes, most recently the *Defamation Act 1974*. Unlike at common law, in NSW truth alone is not and, since 1847, has not been a defence.⁶⁹ Before 1974, if justification was pleaded, it also had to be shown that the publication complained of was for the ‘public benefit’. Since 1974 the law has been that truth – ‘substantial truth’⁷⁰ - is only a defence for the publication of defamatory imputations relating to a matter of ‘public interest’ (or where it is published under qualified privilege).⁷¹

Behind the ‘public interest’ requirement lies the rationale that ‘gratuitous destruction of reputation is wrong, even if the matter published is true’.⁷² A person who has led an otherwise exemplary life should not, for example, have their reputation damaged by reference to some youthful indiscretion. On the other side, a journalist planning to publish an article is required to second guess if a revelation would be judged to be in ‘the public

In its original version the Defamation (Amendment) Bill 1994 proposed to amend the defence of justification so that truth alone was a defence to a defamatory imputation. The proposal was defeated by an amendment moved by Ms Clover Moore MP who said that without the ‘public interest’ requirement:

the media would be able to publish details of people’s private lives as long as these details are true: a newspaper would be able to publish facts about a person’s sexuality or anything in his or her early life as long as it was true. By making truth the only defence, the last vestige of privacy under the law is removed.⁷³

In any event, as the law currently stands the truth of an imputation does become relevant when the defence of justification is raised. In these circumstances the onus is on the defendant to establish truth (and that publication was in the public interest or protected by qualified privilege). Falsity of the defamatory matter may also be a factor relevant in the assessment of damages, which it can aggravate.⁷⁴ The plaintiff is in any case entitled to lead evidence of falsity, and so achieve some restoration of reputation.⁷⁵

⁶⁹ 11 Vic No 13, section 4. The NSWLRC suggested that one reason for the enactment ‘may have been the recognition of the feelings of transported convicts and of emancipists...’ – NSWLRC, n 8, p 92.

⁷⁰ This is defined to mean ‘in substance it is true or in substance it is not materially different from the truth’ - *Defamation Act 1974*, section 7 (2).

⁷¹ *Defamation Act 1974*, section 15. As to the interpretation of ‘public interest’ see Tobin and Sexton, n 54, at para 11,110.

⁷² NSWLRC, n 8, p 92.

⁷³ *NSWPD*, 2 December 1994, p 6250.

⁷⁴ NSWLRC, n 4, p 18.

⁷⁵ NSWLRC, n 16, p 116.

4.8 *The defence of contextual truth – section 16*

Also relevant to the truth/falsity debate is the defence of contextual truth under section 16 of the *Defamation Act*. The idea behind this provision is that: (a) the question of damage to reputation should have regard to the total factual situation in which an imputation was made; (b) a contextual imputation is one arising from the same publication as the imputation which is the subject of complaint; (c) there is then the particular imputation complained of by the plaintiff and, in the same publication, a separate and different imputation – the contextual imputation - which the defendant may be able to rely upon; (d) the plaintiff's imputation and the contextual imputation must both arise from the same publication and differ, in substance, from each other; (e) the imputation complained of by the plaintiff is found to be false and therefore *prima facie* defamatory; (f) for the defendant, a section 15 defence (of truth plus public interest or qualified privilege) cannot be relied upon; (g) however, a substantively different imputation – the contextual imputation - in the same publication is found to be true; (h) this contextual imputation must, in addition, be found to be either in the public interest or published under qualified privilege; and (i) because of the truth of this contextual imputation, the imputation complained of is found not to further injure the reputation of the plaintiff.

Not surprisingly, this provision has 'not proved easy to construe'.⁷⁶ Various examples of the defence in operation were set out by Hunt J in *Jackson v John Fairfax & Sons Ltd.*⁷⁷ The most straightforward is that of a publication which: (a) describes the plaintiff (falsely) with having been charged with a criminal offence; and (b) by reason of additional material also imputes (truly) that the plaintiff is guilty of such offence. Assuming the contextual imputation could also satisfy the public interest or qualified privilege test, then it may form the basis of a complete defence. In recommending the defence the NSW Law Reform Commission offered the following hypothetical example:

Suppose that the defendant has published an imputation that the plaintiff has been convicted of simple larceny and an imputation that the plaintiff has been convicted of fraudulently converting trust property to his own use. Suppose that the first imputation is false but the second is true.⁷⁸

The idea therefore is that the second, true imputation would prevent a plaintiff from suing successfully in respect to the first imputation which was found to be false.

4.9 *Qualified privilege- section 22*

The common law and statutory defence of qualified privilege are discussed in the context of the Defamation Taskforce Report (see pages 41-42 below). The statutory defence is

⁷⁶ Tobin and Sexton, n 54, at para 11,120.

⁷⁷ (1981) 1 NSWLR 36 at 39-40.

⁷⁸ NSWLRC, n 8, p 94.

found under section 22 of the *Defamation Act*. Its formulation is said to overcome the restrictions of the duty/interest requirement at common law and to focus attention instead on reasonableness in all the circumstances.⁷⁹ This has proved influential in the reformulation by the High Court in *Lange* of the constitutional defence of freedom of political communication.⁸⁰

4.10 Defence of fair protected reports - sections 24-28

Division 5 of the *Defamation Act 1974* (NSW) provides a defence for the publication of a fair protected report, where ‘protected report’ is one of numerous ‘Proceedings of Public Concern’ specified in clause 2 of Schedule 2. Documents specified in clause 3 of Schedule 2 (and fair extracts, abstracts or summaries of them) are similarly protected. As at common law, the defence of protected report is a qualified privilege.⁸¹ Section 24 (3) provides:

Where a protected report is published by any person, there is a defence for a later publication by another person of the protected report or a copy of the protected report, or of a fair extract or fair abstract from, or fair summary of, the protected report, if the second person does not, at the time of the later publication, have knowledge which should make him aware that the protected report is not fair.

Section 26 of the *Defamation Act* further provides that where the defence is established, it can only be defeated ‘if it is shown that the publication complained of was not in good faith for public information or the advancement of education’.

Protected under clause 2 of Schedule 2 are a wide range of proceedings of public concern. These include parliamentary, court, tribunal and related proceedings (already covered under absolute privilege), plus the proceedings of such things as sporting, cultural and business associations. The proceedings of public meetings are also covered, at least where these relate to ‘a matter of public interest’. The relevant recommendations of the Defamation Taskforce Report are discussed in a later part of this paper.

A recent example of the operation of the defence is found in *Nationwide News Pty Ltd v Rogers*.⁸² It concerned a report in a newspaper, *The Daily Telegraph*, on 22 August 1996 about the decision of the Tax Office to treat as income interest accrued on a compensation payout in a landmark medical negligence case.⁸³ In that 1992 landmark case an eye surgeon, Dr Rogers, failed to warn a Mrs Whitaker of the possibility that an operation on

⁷⁹ NSWLRC, n 4, p 154.

⁸⁰ (1997) 189 CLR 520.

⁸¹ NSWLRC, n 4, p 190.

⁸² [2002] NSWCA 71 (15 March 2002) (Stein JA and Grove J; Mason P dissenting).

⁸³ *Rogers v Whitaker* (1992) 175 CLR 479.

her sightless right eye could result in the loss of sight in her good left eye. The newspaper's coverage of the judgment carried a banner headline 'Blind Justice'.

In the District Court the single imputation claimed by Dr Rogers to be defamatory of him was that: *'The plaintiff blinded Mrs Whitaker by negligently and carelessly carrying out an eye operation on her'*. It was conceded by the newspaper that the material was defamatory. However, the defence of fair protected report was raised but rejected on the basis that the defamatory statements were not accurate reports of the initial judgment. This was because the newspaper statements give the impression that Mrs Whitaker became blind because the surgeon carried out the operation negligently, when the judgment does not give this impression. Damages of \$250,000 were awarded, including aggravated damages which the newspaper appealed against on the grounds that the defence of fair protected report should have been established.

A majority of the NSW Court of Appeal agreed with the newspaper. Stein JA (Grove J agreeing; Mason P Dissenting) found that the defence was established and that direct attribution to the court judgment in question is not required for this purpose. According to Stein JA and Grove J the court must consider what a 'fair minded reasonable member of the public...would ordinarily and reasonably have understood' by the judgment. To be a fair and accurate report, the report need not be a complete report of the judgment, nor need it be accurate in every respect. It must, however, be substantially accurate. That question is one of fact. Grove J said:

The protection offered by the statute is not lost if a publisher chooses language which is sensational, or even lacking in good taste, provided the report retains substantial accuracy.⁸⁴

As for section 26 considerations, it was held that Rogers had not established an absence of good faith by the newspaper and the article was for 'public information'. The damages of \$250,000 were found to be excessive and should be substituted by a verdict of between \$75,000 and \$100,000.

4.11 The defence of fair comment – sections 29-35

In NSW the common law defence of fair comment has been replaced by a statutory defence of comment on a matter of public interest. This is said to adopt the principles of the common law and to expand slightly the boundaries of the defence.⁸⁵ At common law, the defence of fair comment is available if: the comment is fair; the comment is on a matter of public interest; the comment is based on facts which are stated or indicated in the material; and the facts on which the comment is based are true or absolutely privileged. Fair comment is said to be the 'primary protection' available to critics in defamation actions.⁸⁶

⁸⁴ [2002] NSWCA 71 (15 March 2002) at para 137.

⁸⁵ Tobin and Sexton, n 54 at para 13,115.

⁸⁶ A Kenyon, 'Defamation, artistic criticism and fair comment' (1996) 18 *Sydney Law Review* 193.

For a defendant to plead the statutory defence of comment in NSW it must be established that the ‘comment’ represents the opinion of the defendant. It is for the plaintiff to show that the comment is not an honest expression of the defendant’s opinion, or that of the defendant’s servant or agent. Section 30 provides that ‘proper material for comment’ includes ‘a statement of fact which is a matter of substantial truth’, even where that statement does not relate ‘to a matter of public interest’. Section 35 adds that the statutory defence is only available in respect to the ‘comment’ itself. The statement of fact(s) upon which the comment is based could still be vulnerable to a claim for defamation if it contains a defamatory imputation and if one of the other defences (such as qualified privilege) cannot be made out under the Act or at common law.

Certain technical complications await a defendant seeking to rely on the defence of comment. One complication relates to the issue of whether fair comment protects, as comment, material in total, or only the individual meanings which are conveyed by the material. Another is the question of what honest belief a critic need have in his or her comment.⁸⁷

Certain complications are peculiar to NSW. In particular, owing to the NSW pleading regime there must be congruence between the defamatory imputation pleaded by the plaintiff, on one side, and the ‘comment’ which the defendant held as a matter of opinion. Where incongruence arises the defence fails, as in *Meskenas v Capon*.⁸⁸ There the jury found that remarks made by the Director of the Art Gallery of NSW, Edward Capon, about a portrait painting conveyed the imputation that Meskenas was an inferior artist. Capon, on the other hand, had only commented that the particular painting was not a good one. According to Roger Magnusson, Senior Lecturer in Law at the University of Sydney: ‘Ironically, Capon would have won the case had he *intended* to criticise the artist, provided that the comment was “fair”’.⁸⁹ It could be argued that the requirement of ‘congruence’ illustrates how defamation law in NSW has become overly technical, with the potential this has for inhibiting freedom of speech.⁹⁰

4.12 Offer of amends - sections 36-45

By way of an alternative to litigation, the current *Defamation Act* provides, in sections 36-45, the alternative process of ‘Offer of amends where the publication is innocent’.⁹¹ If such

⁸⁷ A Kenyon, n 86, p 193.

⁸⁸ (unreported, DC NSW, No 2136/1991, Christie DCJ, 28 September 1993).

⁸⁹ RS Magnusson, ‘Freedom of speech in Australian defamation law: ridicule, satire and other challenges’ (2001) 9 *Torts Law Journal* 269 at 293.

⁹⁰ M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*, Ashgate 2000, pp 148-152. Chesterman discusses the operation of the common law and statutory defences in the various Australian jurisdictions in relation to political and other satire, giving examples of where the defence has and has not succeeded.

⁹¹ Under section 36 a publisher will be taken to have published ‘innocently’ where: (a) they have exercised reasonable care in relation to the matter and its publication; (b) did not intend it to be defamatory of the plaintiff; and (c) did not know of circumstances by reason

an offer is made, it must include an offer to publish a correction and apology and must, where relevant, include an offer to take steps as to notify others that it is defamatory. Section 40 provides that where an offer of amends is accepted and the agreement is performed, the plaintiff (the offeree) is precluded from commencing or continuing any proceedings against defendant (the offeror) for damages for defamation in respect of the matter in question. If the offer is not accepted, section 43 provides that it is a defence to proceedings by the plaintiff that: the offer was made ‘as soon as practicable’ after the publisher became aware that it was defamatory; the offer remains open; and, if the offeror is not the author of the matter in question, that the author was not actuated by ill will to the offeree.

The Defamation Taskforce Report discussed the ‘Offer of amends’ process in the context of its argument on behalf of resolving disputes without litigation. It commented:

Anecdotally, it is believed that this process is very little used. It has been described as cumbersome and has been criticised for requiring that the publication be ‘innocent’. It has also been pointed out that there is a tension between requiring it to be made ‘as soon as practicable’, and requiring detailed information to be included which, in practice, takes some time to put together.⁹²

4.13 *The role of judge and jury – damages and section 7A trials*

The *Defamation (Amendment) Act 1994*, which came into effect on 1 January 1995, introduced the following major changes to defamation law in NSW:

- under section 7A (4) the trial judge and not the jury should determine whether any defence (including all issues of fact and law relating to that defence) was established and the amount of damages (if any) that should be awarded to the plaintiff;
- under section 46A, in the assessment of damages the trial judge should ensure that any damages awarded have an appropriate relationship to the injury suffered and take account of the general range of damages for non-economic loss in personal injury awards in NSW (including awards made under any relevant statute).

The 1994 Act responded to concerns that in some cases juries were awarding anomalously large damages. Without a doubt, it changed profoundly the role played by juries in defamation cases in NSW. It has also split the trial process in two. There is the ‘section 7A trial’ where the jury determines: (a) if the imputations have been published by the defendant; (b) if imputations contended by the plaintiff are conveyed; and (c) if they are defamatory. As explained by Damian Ward, Senior Associate with Abbott Tout Commercial Litigation:

of which it may be defamatory.

⁹² Defamation Taskforce Report, n 27, p 4.

Once these questions have been answered advantageously for the plaintiff the jury is discharged and a judge then considers whether the defendant has any defence to the defamatory publication. If it does not, the judge also determines the amount of damage the plaintiff is to receive. The jury determines the first part of the trial, and a judge decides these final elements.⁹³

The policy goals behind their introduction were to increase efficiency, reduce cost and complexity and the number of appeals. According to Judith Gibson: ‘Regrettably it would appear that none of these events has occurred, and that Mr Shaw QC’s warning that this amendment was “an ill-conceived hybrid” has come true’.⁹⁴

The relevant issues are discussed in the context of the Defamation Taskforce Report (pages 30-35). The Report came down on the side of retaining that system.

4.14 The availability of juries in civil proceedings in NSW

This was limited by the *Courts Amendment (Civil Juries) Act 2001*. The Act amends the *District Court Act 1973* to provide that civil proceedings in the District Court are to be tried without a jury, unless the Court otherwise orders. It also amends the *Supreme Court Act 1970* but in such a way as to preserve juries for defamation trials in the Supreme Court. The apparently inconsistent position as between the Supreme and District Courts was noted by Judith Gibson who commented:

No specific provision is made for defamation actions conducted in the District Court, where a party seeking to requisition a jury is apparently in no better position than any other litigant.⁹⁵

It seems that an increasing number of defamation cases are now commenced in the District Court, probably due in part to that Court’s increase in jurisdictional limit in 1997 from \$250,000 to \$750,000.⁹⁶ Sandy Dawson, a Senior Associate at Freehills, has remarked that the rationale behind the more restrictive arrangements in place in the District Court for the summoning of juries in defamation cases is ‘difficult to understand’.⁹⁷

Gibson also commented on the potential for inconsistency as between the provision for jury

⁹³ D Ward, ‘Defamation law: selective protection? The lessons in Rene Rivkin’s case’ (2001) 39 (8) *The Law Society Journal* 36.

⁹⁴ J Gibson, n 31, pp 13-15.

⁹⁵ JC Gibson, ‘Introduction’, *Australian Defamation Law and Practice*, Bulletin 26, March 2002, p 2.

⁹⁶ S Dawson, *Section 7A of the Defamation Act: Is the jury becoming an endangered species?*, UNSW Faculty of Law CLE Seminar, 15 March 2002, para 3.

⁹⁷ S Dawson, n 96, para 39.

trials for defamation actions in the Supreme Court under the *Courts Amendment (Civil Juries) Act 2001*, on one side, and under section 7A of the Defamation Act, on the other. This is because the right to trial by jury under the former is ‘not restricted to s 7A issues and (by reference to complex evidence) appear to extend the jury’s role to disputed issues of

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4.15 *The Supreme Court’s defamation list*

The problem of court delays and the corresponding need for the courts to better manage their caseload are subjects of long term interest in NSW. Reducing the availability of juries in civil proceedings generally is a part of that debate about reducing court delays. Another aspect to it is the introduction of specialist list in the Supreme Court to provide case management procedures appropriate to different types of cases, as a means of facilitating the speedy resolution of cases.⁹⁹ For this purpose, several specialist lists have been introduced into the Supreme Court’s Common Law Division, including a Defamation List. In July 2001 Practice Note 114 was issued in respect to that List.¹⁰⁰

As reported in the *NSW Law Society Journal* the new procedures were introduced on 1 September 2000 with the aim of ensuring that defamation actions can be heard and decided within 18 months of the offending publication. The report continued:

The changes came about as a result of observing the generally unsatisfactory trends in the conduct of defamation litigation since the 1994 amendments to the Defamation Act, according to Defamation List Judge, the Hon Justice David Levine.¹⁰¹

Under the new case management scheme there is to be prompt identification of all issues to be tried by the jury to enable the jury to decide whether the plaintiff has a case and if so what case the defendant has to meet. Justice Levine’s wry observation in respect to the reform of defence practice was that, ‘depending on whom you ask’, it ‘has had varying

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⁹⁸ JC Gibson, n 95, p 15.

⁹⁹ R Callinan, *Court Delays in NSW – Issues and Developments*, NSW Parliamentary Library Briefing Paper, No 1/2002, p 45.

¹⁰⁰ *Australian Defamation Law and Practice*, Bulletin 21, August 2000, pp 10-12. Also reproduced is Supreme Court Rules (Amendment No 341) 2000 which introduced a new rule in Part 67, rule 12A, which contemplates the section 7A trial taking place as soon as any argument about the form and capacity of the imputations has been determined. For a comment on this process see – S Dawson, n 96, para 17.

¹⁰¹ ‘Supreme Court: moves to cut delays in hearing defamation cases’, *Law Society Journal*, September 2000, p 32.

¹⁰² Levine, n 7, para 56.

5. THE DEFAMATION TASKFORCE REPORT

5.1 *Objects and principles*

Recommendation 1 of the Defamation Taskforce Report is for a statement of objects and principles to be inserted into the *Defamation Act*. These should provide that the purposes of the Act are:

- To provide effective and appropriate remedies for those whose reputations are harmed by publications not protected by this law while ensuring that unreasonable limits are not placed upon the publication and discussion of matters of public interest and importance;
- To promote speedy and non-litigious methods of resolving disputes wherever possible;
- To ensure, so far as practicable, that claims of defamation are resolved in a timely manner and that protracted litigation is avoided wherever possible.

The first principle is a statement of the competing public interests at stake in defamation law. Note that it does not define the purpose of defamation law, from the plaintiff's side, in terms of the public vindication of reputation, but opts instead for a rationale based on the availability of appropriate remedies. The two are by no means mutually exclusive. An appropriate remedy may for example be the pre-trial publication of a correction or apology, as suggested under Recommendation 3 (discussed below). As at present, however, an appropriate remedy may also be the payment of damages which remain undisclosed to the public.

The second limb of the first principle - 'while ensuring that unreasonable limits are not placed upon the publication and discussion of matters of public interest and importance' - is stated in the negative and, as such, is an expression of the fact that no general, positive right to freedom of speech exists in Australia. Even the implied constitutional freedom of political communication 'does not confer private rights. It confines legislative power'.¹⁰³

Taking up the theme of cost efficiency, the second and third principles relate to the largely procedural reforms recommended by the Report for the resolution of disputes without litigation. The third principle might be said to affirm by implication that litigation may be necessary in some instances.

5.2 *Resolution of disputes without litigation*

Recommendations 2 to 6 of the Taskforce Report are all concerned with the speedy resolution of disputes. Recommendation 2 proposes the insertion of a new Part into the *Defamation Act* headed 'Resolution of Disputes without Litigation'.

Recommendations 3 and 4 are procedural and largely self-explanatory.

¹⁰³ *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 154 ALR 67 at 79 (French J).

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

Recommendation 3 draws upon Part 2 of the ACT's *Defamation Act 2001*, which introduced a new 'offer of amends' regime. As pointed out by the Taskforce, the main difference between the ACT model and the 'offer of amends' process under current NSW law is that the ACT corrections model is available when the publisher was not 'innocent'. In other words, it is intended to operate more flexibly and efficiently than the rarely used 'offer of amends' process.

For the Law Society of NSW, its Chief Executive Officer, Mark Richardson, commented that the Society 'has always supported the use of "corrections and apologies" as a means

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

One comment on this, from Richard Ackland, is that while the Taskforce Report talks of 'a clear statutory preference for a pre-trial process', it does 'not make clear the extent to which this pre-trial process is mandatory'.¹⁰⁵

An assumption made in a later part of the Defamation Taskforce Report is that, for a variety of reason, 'if the plaintiff and defendant were left "undisturbed" by court processes, a significant proportion of cases (it is not clear how many) would "go away"', ie, go into

¹⁰⁶ What effect would the institution of a formal mediation process, compulsory or otherwise, have on this tendency? If, as a general rule, cases were dealt with in future via a streamlined mediation process would this not tend to result in a greater number of matters being proceeded with, at least to the point where they arrive at a pre-trial conclusion? Would the parties not find themselves on the mediation conveyor belt and, once locked into the process, be less likely to simply 'go away'? The issue is not dealt with directly in the Taskforce Report, although it does suggest that the advent of the section 7A trial has probably already made significant in-roads into the tendency for defamation matters to 'go away'.

Substantive changes to the law are proposed under Recommendations 5 and 6. Clearly, Recommendation 5 is the sting in the tail of the proposals aiming to resolve disputes

¹⁰⁴ The Law Society of NSW, 'Law Society calls for national defamation laws', *Media Release*, 10 July 2002.

¹⁰⁵ 'Cost penalties: big stick in defamation reform plot', *Gazette of Law and Journalism*, 24 June 2002.

¹⁰⁶ Defamation Taskforce Report, n 27, p 10.

without litigation.

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

It will be interesting to see how practitioners in the field of defamation law react to this proposal. Some may argue that it comes close to coercing plaintiffs and defendants alike into settling prior to trial. The cost penalty would only apply if either party was judged to have acted unreasonably. That said, plaintiffs and defendants alike would be required to second guess what the court would consider to be unreasonable in the circumstances of each case. Litigation might be discouraged even when it is warranted.

Picking up on remarks made in connection with Recommendation 1, if this proposal results in more pre-trial settlements, the outcome of which are not made known to the world at large, then it could be said to favour utilitarian considerations of efficiency over the goal of the public vindication of reputation. Conversely, by encouraging corrections and apologies the result may indeed serve that broader goal of defamation law.

Of course the effectiveness of corrections and apologies will depend to a large extent on the motivations of plaintiff parties in defamation cases. Is it public vindication of reputation they are after, or money, or revenge? The Premier has commented hopefully in this respect that 'Not enough opportunity is given to people to set the record straight and expeditiously ¹⁰⁷ More hard-headed views were expressed in 1995, in response to the NSWLRC's declaration of falsity proposal. For example, Clive Evatt said that 'Pervading the report is a misunderstanding of the psychology of most defamed plaintiffs. They want blood and vengeance'. Henric Nicholas QC echoed the remark: 'Most plaintiffs with whom one has to deal with have been quite genuine in their hurt and their complaint about harm, and regard damages as the only real means by which reputation and good name will be vindicated or restored'. ¹⁰⁸ It may be that the coercive cost penalty regime would serve to alter such attitudes.

The regime proposed under Recommendation 5 is backed up in Recommendation 6 by the provision of a defence in circumstances where a reasonable offer of amends was not accepted. The proposal is modelled directly on section 10 of the ACT's *Defamation Act 2001*.

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

¹⁰⁷ 'NSW government to cap payouts, bar corporations from defamation', *AAP*, 9 July 2002.

¹⁰⁸ Quoted in G Griffith, n 22, p 22.

5.3 *Case management*

Recommendations 7 and 8 are important for the speedy resolution of defamation cases and the general avoidance of court delays. Recommendation 7 is based on the proposition that, while litigation should not be encouraged, where it does occur backlogs should be avoided by requiring plaintiffs to take the necessary steps to bring the matter on for trial. Where a matter had lapsed under this proposed scheme, it would be for the court to decide whether it should be reinstated.

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

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

In support of these recommendations the Taskforce argued:

such a process may have more impact on reducing the number of cases that proceed to trial and in reducing the costs to the parties, than whether or not the jury is brought back, or the two parts of the trial are put together.¹⁰⁹

5.4 *The role of juries and section 7A trials*

These case management recommendations preface the discussion of Recommendation 9, the subject of which is the single most controversial issue in present day defamation law in NSW.

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

The dissatisfaction of most defamation lawyers with the section 7A trial regime has been indicated. According to Judith Gibson:

there can be little doubt that the Section 7A trial has added considerably to the expense and delay factors in defamation, and there is no evidence of the number of appeals being reduced. Although there is anecdotal evidence of a higher rate of settlement,

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Defamation Taskforce Report, n 27, p 10.

this may be because the system is so unfair and arbitrary that the parties prefer to cut their losses. This may be seen as satisfactory to the courts, but whether these settlements represent the kind of result the parties could or should have expected as reasonable is another matter.¹¹⁰

The Fairfax solicitor, Richard Coleman, has also argued that, instead of making defamation cases less time consuming and costly for all concerned, 'the opposite has happened'. In his view:

The reason for this is simple. Before the 1994 changes, very few of the defamation cases commenced – perhaps 2 per cent – went before a jury. A good proportion went away because the plaintiff lost interest. Most of the rest were settled before going to court. Now virtually every case commenced will go before a jury for the preliminary trial about meaning.

Admittedly defamation trials before 1994 were considerably longer than the shortened jury trials afterwards, which usually take about two days. But because there were so few of the former and so many of the latter, my estimation is that the number of jury days involved in defamation cases in the Supreme Court would have at least doubled as a result of the 1994 changes. To this figure you have to add the extra weeks many of these cases will involve arguing the defences before a judge.

The result has been, as you would expect, a major blow-out in the cost of defending actions. The beneficiaries of this blow-out have been the relatively small group of lawyers who specialise in defamation.¹¹¹

A continuing theme in the current debate is that section 7A jury findings are often perverse or unpredictable.¹¹² The March 2002 issue of the *Australian Defamation Law and Practice Bulletin* reflected the prevailing view of practitioners when it said that 'Section 7A jury trials on imputations in New South Wales continue to result in appeals from perverse jury findings'. In a similar vein, in September 2001 Damian Ward commented:

¹¹⁰ J Gibson, n 31, pp 13-15.

¹¹¹ R Coleman, n 9.

¹¹² See, for example, *Charlwood Industries Pty Ltd v Brent* [2002] NSWCA 201 in which the Court of Appeal set aside a section 7A jury verdict on the ground of perversity. It found that the imputation that a business lied to its customers was plainly defamatory and that the jury's finding to the contrary was unsupported – 'Court of Appeal uncovers rampant perversity in the jury', *The Gazette of Law and Journalism*, 25 July 2002.

Defamation lawyers have often expressed surprise not only about win/loss results of jury trials but also about the nature of the findings made. Defamatory meanings contended by plaintiffs which their lawyers consider weaker or less likely to be found are often upheld while others which (from a lawyer's perspective) appear more manifestly present are denied.¹¹³

In his recent speech to the Supreme Court Conference, Justice Levine commented on this issue at some length. He noted that '7A trials have given rise to a series of appeals to the Court of Appeal on the question of "perversity" of jury verdicts'.¹¹⁴ He continued:

One explanation for these curious and varying results may well be the extraordinary artificiality of the 7A trial. It seems that despite the best endeavours of the trial judge to place the discrete jury function in some sort of context, jurors go their own way.¹¹⁵

Justice Levine then offered an alternative explanation, one which has nothing to do with either the law or the jury's performance of its constitutional function:

It may have everything to do with the way the media has operated in the community. The jury decides whether or not it is defamatory possibly by reference (notwithstanding an injunction not to do so), to their view as to the imputation's truth or falsity and/or by reference to whether or not they 'like' the plaintiff....Whatever the explanation and however exquisitely the principles as to perversity are applied, the 'lottery' in terms of outcomes of 7A trials (unless it is a complete win for the defendant) just adds to costs and wastes much of the court's resources.¹¹⁶

Whether the problem is with lawyers, juries, or the media (or a combination of all three) is hard to say. What can be said with some certainty is that the one thing most practitioners

¹¹³ D Ward, n 93. Ward suggested that this is, in part, due to the nature of the section 7A trial in which 'Often no evidence will be called and the jury will not have the opportunity to hear and see the plaintiff in the witness box. All it observes are submissions of lawyers seeking to contort the imputations pleaded either for or against the plaintiff in order to sell their version of what the defamatory material means'.

¹¹⁴ For example: *Mularczyk v John Fairfax Publications Pty Ltd* [2001] NSWCA 467; *Buck & Ors v Jones & Ors* [2002] NSWCA 8; *Rivkin v John Fairfax Publications Pty Ltd* [2002] NSWCA 87; *Sarma v Federal Capital Press* [2002] NSWCA 93; *Charlwood Industries Pty Ltd v Brent* [2002] NSWCA 201.

¹¹⁵ Levine, n 7, para 57.

¹¹⁶ Levine, n 7, para 57. Justice Levine added (para 63) that he had only presided over one trial from the 7A stage to the determination of post-7A issues. That process took two and a half years and the matter is now before the Court of Appeal. Justice Levine concluded: 'Save for that limitation I think I fairly could observe that the 7A procedure has worked moderately well as has the post-7A trial after management'.

would have wanted to emerge from the current reform process is for the section 7A trial to be disbanded. It seems the NSW Bar Association favours a return to the pre-1995 position where juries would again determine damages.¹¹⁷ The Australian Press Council would not go so far. Its submission was to this effect:

The jury should be involved in the whole case except the final assessment of damages. There is no need for a separate section 7A trial. Decisions on imputations should come at the start of the trial. The jury should hear the input on those matters, retire and decide and then come back immediately and hear evidence if there are any matter that require defences.

The situation in which the jury first addresses the alleged defamatory material at present is artificial and strained. The need is for the jury, prior to any address by counsel, to have the opportunity to read the matter complained of before being addressed by counsel, whether for the plaintiff or the defendant.¹¹⁸

Richard Ackland has reported in this respect that, as part of the Taskforce review process the Australian Press Council ‘sat down with media lawyers from Fairfax, News, Australian Consolidated Press and the ABC’. According to Ackland: ‘The group’s most earnest desire is to see an end to s. 7A, but this is rejected by the other members of the AG’s

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The only voice on the Taskforce in favour of the repeal of section 7A was that of Professor McKinnon, Chair of the Australian Press Council:

In his view, lawyers and/or judges see defences as involving essentially legal issues, whereas the real justification is essentially the same as it is for other trials where juries are used (eg. murder). The people comprising juries are more likely to be able to assess defences in the context of the defamatory imputations than those relying on literalism or legal technicalities. They are more likely to be able to assess the reasonableness of the publisher’s actions. In short, a jury will more often achieve just results consistent with community standards and expectations.¹²⁰

¹¹⁷ S Dawson, n 96, para 43.

¹¹⁸ Australian Press Council, n 26, p 4.

¹¹⁹ ‘Cost penalties: big stick in defamation reform plot’, *Gazette of Law and Journalism*, 24 June 2002.

¹²⁰ Defamation Taskforce Report, n 27, p 11.

Against this the Taskforce Report presented several arguments, notably:

- Contrary to the case made by the Press Council and others, the ‘cost to defendants should, at least in principle, have declined because instead of having to prepare all aspects of the case in advance, a defendant can wait till the end of a s. 7A trial before having to prepare (assuming the 7A trial has gone against them) for the defences and damages part of a case’;
- because section 7A trials come on ‘much more quickly than a full defamation trial did previously’, this has tended to frustrate the ‘overall aim of reducing litigation’. The Report went to say that the parties are less likely now to ‘go away’: According to the
Since s 7A, and since the move to speeding up the way matters proceed through the courts, it may no longer be as easy to let the matter slide. Parties who have filed are now being contacted and called in for directions hearings and being set down within a much shorter time. The speed with which s 7A trials come on for hearing might be counterproductive to any attempt to resolve a case quickly, and in particular, to do so without litigation’;
- it would be ‘very difficult to reintroduce a jury to consider defences when juries have been all but abolished for all other aspects of civil trials in NSW’; and
- citing the views of Handley JA in *Radio 2UE v Parker*,¹²¹ from which the section 7A trial originated, under the former single jury trial system it was no longer possible at the close of a trial for a jury to evaluate a publication as a ‘matter of impression’. This is because after many days of evidence the jury had far more background and context than the ordinary reader or listener.

Whether practitioners are persuaded by this reasoning remains to be seen. Empirically, it is hard to gauge just where matters stand at present in respect to the effect section 7A trials have on the court process. On the one side, the Taskforce is convinced that section 7A has speeded up the process. On the other, as discussed earlier in this paper, the apparent reason for introducing the Defamation List in September 2000 was precisely because of the generally unsatisfactory trends in the conduct of defamation litigation since the introduction of section 7A.

The most detailed and perhaps even-handed assessment of section 7A trials since the introduction of these procedural reforms is the paper Sandy Dawson delivered to the Continuing Legal Education program of the University of NSW Faculty of Law in March 2002. On the positive side, Dawson reported that section 7A trials ‘rarely take more than one or two days, which the Court can usually quite comfortably accommodate without undue delay’. Dawson was also of the view that ‘the s. 7A jury is in a much better position to determine questions of meaning than were juries under the pre-1995 regime’ and concluded that ‘anecdotal evidence suggests that the outcomes of s 7A trials are far more favourable to defendants than were old system full jury trial outcomes, at least on the question of the determination of the imputations issue’. On the negative side, Dawson acknowledged the ‘inherent tension in having different tribunals of fact determining different parts of the case’ as where, for example, the trial judge disagrees with the juries

¹²¹ (1992) 29 NSWLR 449. At 474.

earlier findings.¹²² There is no easy answer to the section 7A conundrum. At any rate, if the recommendations designed to avoid litigation prove successful then section 7A trials should decrease in number.

On a comparative note and following Gillooly's 1998 commentary, it can be added that in South Australia civil juries have been abolished, and that in all other Australian jurisdictions (NSW excepted) the trial of defamation proceedings is by judge alone unless some election or order to the contrary is made.¹²³

The argument on behalf of jury trial in civil proceedings generally was made recently by Justices Kirby and Callinan, admittedly in the context of a personal injury matter. They took issue with the remarks of Christie DCJ of the NSW District Court who, in expressing a 'personal view' about civil juries, referred to the 'enormous cost of litigation', thereby suggesting that jury trial contributed unreasonably to such costs. Kirby and Callinan JJ continued:

It is true that there are some inefficiencies in civil jury trials. But there are also countervailing advantages. Precisely because their verdicts are unpredictable juries tend to promote settlement. Jury verdicts in civil actions also tend to promote finality. The practical necessities of jury trials also tend to discourage undue length of proceedings which has lately become a feature of much civil litigation.¹²⁴

This defence of jury trial in civil proceedings does not address the peculiar difficulties attending section 7A trials. It is certainly not an argument in support of such trials. On the contrary, it may lend indirect support to Professor McKinnon's views.

5.5 Damages

The other recommendation which is likely to prove contentious is the proposal to cap damages available in defamation. At present, under section 46A of the *Defamation Act* damages are assessed by the trial judge who must: (a) ensure that any damages awarded have an appropriate relationship to the injury suffered; and (b) take account of the general range of damages for non-economic loss in personal injury awards in NSW (including awards made under any relevant statute). These statutory schemes include the *Motor Accidents Act 1988*, the *Workers Compensation Act 1987* and the *Health Care Liability Act 2001*.¹²⁵

¹²² S Dawson, n 96, paras 20-27.

¹²³ M Gillooly, n 3, p 17.

¹²⁴ *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22 (30 May 2002) (Kirby and Callinan JJ dissenting) at para81.

¹²⁵ Another statutory scheme is found under the *Victims Support and Rehabilitation Act 1996* where the maximum amount payable for any kind of injury is \$50,000.

It was explained by the then Attorney General, the Hon JP Hannaford, that the reform was not intended to fetter judicial discretion: ‘All it requires is that, in assessing non-economic damages, the judge will take into consideration awards made in other types of cases. Such awards are an important factor, but they are by no means the only factor legitimately to exercise a judge’s mind’.¹²⁶ As the Taskforce noted:

While under the current s 46A, the court is directed to take those matters into account, there is no actual cap or direction that they not exceed those awards.¹²⁷

Recommendation 17 reads:

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

As pointed out by the Premier, pay-outs would be limited to \$350,000 which, presumably, would relate to damages for all imputations proved in a particular case, not for each imputation separately. This would be consistent with the cap in damages for non-economic loss (commonly known as general damages or damages for pain and suffering)¹²⁸ under section 16(2) of the *Civil Liability Act 2002* (NSW). Under that section, the maximum amount may only be awarded in ‘a most extreme case’. The cap is made subject to annual indexation.

As noted, the Premier commented that bringing defamation into line with the Government’s reform of civil payouts belonged to ‘the next stage of micro-economic reform’ in Australia. For its part, the NSW Law Society said this was one aspect of the Taskforce Report it could not endorse, stating:

The Society opposes the cap on damages (non-economic loss) because a relatively minor defamation may go close to the ‘cap’ and a serious defamation may be awarded a similar amount. That will not deliver justice to people who are defamed. Also, the current system of no capping on damages provides an incentive for the media to research its facts thoroughly prior to publication.¹²⁹

¹²⁶ NSWPD, 22 November 1994, p 5472.

¹²⁷ Defamation Taskforce Report, n 27, p 37.

¹²⁸ Non-economic loss is defined under the *Civil Liability Act 2002* to include: pain and suffering; loss of amenities of life; loss of expectation of life; and disfigurement. The non-economic loss at issue in defamation is harm to reputation.

¹²⁹ NSW Law Society, ‘Law Society calls for national defamation laws’, *Media Release*, 10 July 2002.

From the other side, the Australian Press Council had submitted:

The judge alone should decide the damages payable to a successful plaintiff guided by clauses within the legislation comparable with amounts possible under other legislation/court guidelines.¹³⁰

5.6 *Limitation periods*

Consistent with the recommendation of the NSWLRC in its 1995 Report¹³¹ and the UK *Defamation Act 1996*, the Taskforce recommended that the limitation period for defamation should be reduced from the current 6 years provided for in the *Limitation Act 1969* (section 14) to one year. Many would say that the proposed amendment is long overdue. As a matter of policy, a situation where defamation cases are settled many years after the alleged injury to reputation has occurred cannot be sustained.

It may be an extreme example, but the case of *John Fairfax v Vilo*¹³² suggests just how much time can elapse between publication of an offending article and the resolution of litigation. The case concerned an article published in the 13-19 August 1983 edition of the *Business Review Weekly*. The matter only came on for trial in November 1999, with the trial judge finally rejecting the defences of qualified privilege in October 2000.¹³³ The subsequent judgment of the NSW Court of Appeal was reported in 2001, a full 17 years after the publication of the offending article.

Recommendation 10: There should be a one year limitation period for actions in defamation, with a discretion to extend the period where appropriate. It may be appropriate to amend both the *Defamation Act 1974* and the *Limitation Act 1969*.

5.7 *Corporations and government bodies*

The question of who can sue for defamation has already been touched upon. The present situation is that local government bodies cannot sue for defamation, although, as the Taskforce noted, they may sue for injurious falsehood. The landmark case is *Ballina Shire Council v Ringland* where Gleeson CJ explained the rationale behind the defamation/injurious falsehood distinction as follows:

The tort of defamation protects reputation, and it does so in a manner that involves a balancing of various considerations including the right of free speech. The tort of injurious falsehood protects against provable economic loss resulting from false and

¹³⁰ Australian Press Council, n 26, p 2.

¹³¹ NSWLRC, n 4, p 204.

¹³² (2001) 52 NSWLR 373.

¹³³ The trial was conducted under the system in place prior to the introduction of the section 7A of the *Defamation Act* in 1994.

malicious statements. It is one thing to say that freedom of political debate in a democracy is incompatible with allowing elected government bodies to invoke the law of defamation to vindicate their governmental reputation. It is another thing to say that such bodies can, with impunity, be made the targets of false and malicious statements aimed at causing, and causing, financial harm.¹³⁴

The decision in *Ringland* was followed in *NSW Aboriginal Land Council v Jones*¹³⁵ where it was held that the Land Council, a statutory corporation, is an elected local government body and cannot sue in defamation to protect its 'governing reputation'.

The Taskforce also explained that 'individual council members are not estopped from suing if they claim that their reputations are harmed by something published about the council'. The point is made in support of the Taskforce's view that 'statutory bodies' should be precluded from bringing actions for defamation. It also supported the further recommendation that corporations should be similarly precluded.

This related recommendation, in respect to corporations, would constitute a major legal departure. As Tobin and Sexton commented: 'It is long established that a trading corporation may bring proceedings on the basis of a publication which has the capacity to injure its trading or business reputation'.¹³⁶ Recommendation 11 reads.

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

The relevant law relating to corporations was reviewed by Handley JA in *NSW Aboriginal Land Council v Jones*¹³⁷ who quoted the observation of Lord Reid in *Lewis v Daily Telegraph Ltd* that:

A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury

¹³⁴ (1994) 33 NSWLR 680 at 694. Ballina Shire Council sued Bill Ringland, the Chair of the NSW North Coast Clean Seas Coalition, for defamation after he issued a press release criticising the Council's sewage practices at a local ocean outfall. The Court of Appeal of the Supreme Court held that a local government authority physical force popularly elected members could not sue for defamation in relation to material reflecting on the performance of its functions. The Council also claimed, in the alternative, injurious falsehood. This claim was sent back to the Supreme Court for determination. There, Hidden J held that the expenses of the Council, in having to convene a special council meeting, did not amount to actual damage of the kind to give rise to an action for injurious falsehood: *Ballina Shire Council v Ringland* [1999] NSWSC 11 at 38.

¹³⁵ (1998) 43 NSWLR 300 (Handley and Powell JA; Meagher JA dissenting).

¹³⁶ Tobin and Sexton, n 54, para 307.

¹³⁷ (1998) 43 NSWLR 300 at 305-6..

must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured.¹³⁸

Handley JA went on to explain that ‘The courts have not taken a narrow view if the defamatory imputations which are capable of injuring the reputation of a trading corporation’. He offered the early example of *South Hetton Coal Co v North Eastern News Association*¹³⁹ where the court found in favour of a coal mining company in respect of imputations that the housing it provided for its employees was insanitary and unfit for habitation. It seems the libel was found to injure the plaintiff in its business by preventing men entering its employment. Handley JA added that ‘No narrow view has been taken of the type of corporation which may be injured in its pocket’; citing the example of a trade union which, as a result of a defamatory statement to the effect that it was a willing tool of reactionary employers, was likely to lose membership and membership income.¹⁴⁰

For the Taskforce, the basic reasoning behind its recommendation was that: (a) the reputations of corporations are not really comparable to those of individuals and that it is with the latter that defamation is principally concerned; (b) alternative remedies are available to corporations, including the tort of injurious falsehood, and those remedies available under the *Trade Practices Act 1974* (Cth); (c) anecdotal evidence suggests that corporations use defamation proceedings against individuals/community groups as a silencing mechanism (known as ‘SLAPP’ suits in the US);¹⁴¹ and (d) as with individual local councillors, directors of small corporations will not be estopped from suing if they claim that their reputations are harmed by something published about the corporation.

Speaking on 9 July 2002 the Premier confirmed his intention to bar corporations and statutory bodies from bringing actions – ‘because we believe defamation should be about loss of individual reputation’. When asked in an interview with Laurie Oakes, ‘why aren’t they [corporations] entitled to protect their reputations’, the Premier commented:

Well, big corporations have got enough power as it is in our society. The head of BHP, or an insurance company, can convene a press conference, buy a one page advertisement in *The Financial Review*. They’ve got enough clout in our society and the capacity

¹³⁸ [1964] AC 234 at 262.

¹³⁹ [1894] 1 QB 133.

¹⁴⁰ *National Union of General and Municipal Workers v Gillian* [1945] All ER 593.

¹⁴¹ ‘SLAPP’ stands for Strategic Lawsuits Against Public Participation. The McDonalds libel case in the UK has been categorised as a SLAPP case. McDonalds sued two activists for distributing a pamphlet claiming that the fast food corporation produced unhealthy food, that the company exploited its workers and that it contributed to pollution and rainforest destruction. In 1997, after a trial lasting two and a half years, the trial judge found that the pamphlet was libellous because some of the claims were not true and ordered the defendants to pay damages: S Beder, *Global Spin*, Scribe Publications, 1997, pp 68-69. The incidence of SLAPP suits in Australia is hard to gauge. *Ballina Shire Council v Ringland* may be one example, albeit involving a local government, not corporate, entity.

of the media to report corporate shenanigans has got to be just about uninhibited.¹⁴²

In referring specifically to ‘big corporations’ the Premier appears to have been reflecting his doubts about whether small corporations should still be allowed to sue for defamation. In a report on his 9 July speech it was said that the Premier

Was yet to consider whether small business would be entitled to sue for defamation and he would consult once the draft legislation was released. The test would be whether small business currently used defamation law, how effective it was and whether the sector would accept an apology in lieu of litigation.

The State Chamber of Commerce tonight said it would be concerned if small business was barred from accessing defamation laws the way corporations would be.¹⁴³

As a matter of legal principle, one would think that corporations of all sizes should be treated in the same way. The Taskforce’s argument that individual directors of small corporations may be at an advantage when suing for defamation on their own behalf has merit. Also, the added remedies noted in the Report would be available to all corporations.

5.8 *Qualified privilege and the freedom of political communication*

5.8.1 Providing greater guidance to publishers in the area of qualified privilege: The Taskforce Report included important proposals for changing the substantive law of defamation as this relates to the defence of qualified privilege. The statutory defence is found under section 22 of the *Defamation Act*, in respect to which the Report made four recommendations for reform:

- Recommendation 12 - (unanimous recommendation) There should not be a public figure defence introduced, but instead, the revised statutory qualified privilege should emphasise that the fact that a person is performing public functions or activities is a factor to consider in whether the occasion is one of qualified privilege;
- Recommendation 13 - (unanimous recommendation) Section 22 should be amended to include a set of factors for courts to consider when assessing reasonableness. Consistent with Recommendation 12, one proposed relevant factor to be taken into consideration is: ‘The extent to which the matter complained of concerns the performance of the public functions or activities of the plaintiff’.
- Recommendation 14 – (recommendation of Professor McKinnon) Section 22 is to be amended by adding the italicised phrase: ‘In the determination of whether the conduct of the publisher is reasonable under Subsection (1) *in the light of the duty of the press*

¹⁴² Interview: NSW Premier Bob Carr, Sunday, 14 July 2002 – <http://Sunday.ninemsn.com.au/Sunday/political>

¹⁴³ ‘NSW government to cap payouts, bar corporations from defamation’, AAP, 9 July 2002.

to publish matters of public interest the following matters are relevant’.

- Recommendation 15 - (recommendation of 2 of 4 Taskforce members) new section 22A to be inserted to clarify the operation of the defence of qualified privilege for a publication concerning government and political matters.

To explain the background to these recommendations something must be said of the general operation of common law qualified privilege, its statutory counterpart under section 22, as well as about the constitutional freedom of political communication. As explained later, in 1997 the constitutional freedom was reformulated in such a way by the High Court as to expand the common law defence, but only in relation to ‘government and political matters’.

5.8.2 The common law and statutory defence of qualified privilege: Both operate in NSW, as does the constitutional defence of freedom of political communication. The common law defence is available if the defamatory statement is made in the performance of any legal, moral or social duty or interest, to a person having a corresponding duty or interest to receive it. One example is the giving of a job reference. The protection granted can be defeated if the defendant is found to be motivated by malice. As to the scope of the defence, the Taskforce Report commented:

Because of the requirement of this ‘duty-interest’ relationship, qualified privilege has not generally been a defence that the media can rely on: the media publishes to the world at large, not solely to those who are seen as having a particular interest in the subject matter.¹⁴⁴

Under section 22 of the *Defamation Act*,¹⁴⁵ this is accompanied in NSW by the statutory defence of qualified privilege. This provides a defendant with a defence in circumstances where: (a) the recipient has an interest or apparent interest in having information on some subject; (b) the matter is published to the recipient in the course of giving information to him or her on the subject; and (c) the conduct of the publisher in publishing the matter was reasonable in the circumstances. The effect, it is said, is to overcome the restrictions of the duty/interest requirement at common law and to focus attention instead on reasonableness in all the circumstances.¹⁴⁶

¹⁴⁴ Defamation Taskforce Report, n 27, p 23.

¹⁴⁵ Section 22 provides:
 22 Information
 (1) Where, in respect of matter published to any person:
 (a) the recipient has an interest or apparent interest in having information on some subject;
 (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
 (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances, there is a defence of qualified privilege for that publication.
 (2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that that person has that interest. Section 22 provides:

¹⁴⁶ NSWLRC, n 4, p 154.

As section 22 does not embody the duty/interest requirement it may be thought to offer greater protection for mass media defendants in defamation cases. That has not proved to be the case. Tobin and Sexton comment that section 22 has only been successfully relied upon in one case by such a defendant and then in ‘a very unusual set of circumstances’.¹⁴⁷ The Taskforce Report explained:

Despite the apparent broadening of the defence by this provision, it is widely considered that ‘reasonableness’ has been interpreted so restrictively by the NSW courts that in effect, it requires publishers to prove that they believed in the truth of what was published. Therefore the defence is rarely invoked successfully.¹⁴⁸

5.8.3 Qualified privilege and the constitutional defence of freedom of political communication: Relevant to both the common law and statutory defences of qualified privilege is the constitutional freedom of political communication. This is because, in *Lange v Australian Broadcasting Corporation*,¹⁴⁹ the High Court sought to dispel the uncertainties surrounding the constitutional freedom by bringing it into conformity with an expanded version of the common law defence of qualified privilege. Following Chesterman’s account, it can be said that the High Court sought to establish ‘conformity’ between the constitutional freedom and common law qualified privilege. To achieve this the common law defence was adjusted to take account of the implied freedom of political communication. Specifically, the operation of common law qualified privilege was expanded to include publications made by the media and other publishers to any wide audience ‘on government and political matters’.¹⁵⁰ The High Court stated that the requirement of reciprocity of duty or interest was satisfied by the fact that

each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters.¹⁵¹

¹⁴⁷ Tobin and Sexton, n 54, at para 14,090; M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*, Ashgate 2000, pp 142-3 – Chesterman comments that some recent cases ‘may possibly reflect a more lenient judicial attitude’.

¹⁴⁸ Defamation Taskforce Report, n 27, p 24.

¹⁴⁹ (1997) 189 CLR 520.

¹⁵⁰ M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*, Ashgate 2000, p 96.

¹⁵¹ (1997) CLR 520 at 571.

The Court recognised that, in some respects, the match between common law qualified privilege and the constitutional freedom may not be exact. The freedom of political communication is grounded in the ‘text and structure’ of the Australian Constitution and, as such, a nexus must exist between any communication allegedly protected by the implied freedom and the making of ‘free and informed’ choices by voters in the exercise of their voting rights in federal elections or referenda to change the Constitution.¹⁵² Common law qualified privilege is not so constrained. It may extend, for example, to ‘discussion of matters concerning the United Nations or other countries’.¹⁵³

Much was left open by the High Court. It was adamant, however, that the discussion of government and political matters at all levels of government in Australia – federal, State, Territory or local – would be covered equally by both the constitutional and common law defences:

The existence of national political parties, operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable.¹⁵⁴

Still to be determined was the criterion to be applied for the expanded common law defence. In arriving at its answer the High Court drew on the ‘reasonableness’ requirement in section 22 of the NSW *Defamation Act*:

reasonableness of conduct seems the appropriate criterion to apply when the occasion of the publication of defamatory matter is said to be an occasion of qualified privilege solely by reason of the relevance of the matter published to the discussion of government or political matters.¹⁵⁵

Establishing reasonableness, the High Court said, involves proving, ‘as a general rule’, that the defendant ‘had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the material to be untrue’. This account of reasonableness has close parallels

¹⁵² M Chesterman, n 150, p 51.

¹⁵³ (1997) CLR 520 at 571.

¹⁵⁴ (1997) CLR 520 at 571-2. However, the views expressed in the companion case of *Levy* (1997) 189 CLR 579 at 595-6, 626, 643-4 are not so clear cut. In the more recent case of *ABC v Lenah Game Meats* (2002) 185 ALR 1 at 57 Kirby J expressed the view that the issue remained to be decided. In *Levy* the High Court upheld a Victorian Regulation preventing entry of protesters into a duck shooting area on certain days of the year. The Regulation was held to be reasonably appropriate and adapted to the protection of individual or public safety.

¹⁵⁵ (1997) CLR 520 at 573.

with section 22 of the NSW Act. However, as Chesterman explained, the High Court added an extra requirement, namely that the defendant must also, generally speaking, have ‘sought a response from the person defamed and published the response made (if any)’.¹⁵⁶ As formulated in this way, this reasonableness requirement was said to be appropriate having regard to the greater damage done by mass dissemination compared with the limited publication normally involved on occasions of common law qualified privilege.

5.8.4 Belief in the truth of a publication - mixed message: According to the Taskforce Report the High Court’s formulation for establishing reasonableness contains a ‘mixed message’. This is because, on one side, a defendant must show that they ‘had *reasonable grounds for believing that the imputation was true*, took proper steps, so far as they were reasonably open, to verify the accuracy of the material’, yet on the other, the defendant must *did not believe the imputation to be untrue*’ (emphasis added).

The Taskforce Report commented:

The latter requirement – that a defendant not believe the imputation is untrue – is a much more practical and achievable test than requiring a defendant to verify and believe in the accuracy of the material.¹⁵⁷

5.8.5 The High Court and section 22: The High Court did not suggest any need for legislative reform in NSW. Its view was that, in the absence of section 22, the unmodified common law would ‘impose an undue burden on the required freedom of political communication’. This was on the basis that the common law ‘provides appropriate defence for a person who mistakenly but honestly publishes government or political matter to a large audience’.¹⁵⁸ Such protection is provided under the expanded common law doctrine. Even without this alteration, however, section 22 ensures that NSW defamation law conforms to the constitutional requirement:

That is because s 22 protects matter published to any person where the recipient had an interest or apparent interest in having information on a subject, the matter was published in the course of giving information on that subject to the recipient, and the conduct of the publisher in publishing the matter was reasonable in the circumstances.¹⁵⁹

5.8.6 Reforming section 22: What the High Court did not point out was that, due to the restrictive interpretation of section 22 which requires publishers to prove that they believed in the truth of what was published, the statutory defence has rarely been relied upon

¹⁵⁶ (1997) CLR 520 at 574; Chesterman, n 150, p 97.

¹⁵⁷ Taskforce Report, n 27, pp 26-7.

¹⁵⁸ (1997) CLR 520 at 569-70.

¹⁵⁹ (1997) CLR 520 at 575.

successfully by a mass media defendant in NSW.

The question, then, is whether section 22 itself is in need of reform? The Taskforce Report answered that it is, primarily because it has been interpreted restrictively to require publishers to prove that they believed in the truth of what was published.

5.8.7 Recommendation 13 – a proposed statutory list: To this end the Taskforce unanimously recommended that section 22 of the *Defamation Act* should be amended to include a set of factors for courts to consider when assessing reasonableness. Significantly, these factors would not be restricted to matters concerning political communication but would extend to all matters about which the publisher reasonably believes that those receiving the information have an interest in doing so. It might conceivably cover everything from the sex lives of film stars to high politics. Another significant point is that the proposed factors under Recommendation 13 make no mention of the publisher's belief in the truth of the publication. According to the Taskforce Report:

Such a list ought to make clear to decision makers that it is not necessary for a publisher who wishes to invoke qualified privilege to prove that they had objective grounds for believing in the truth of the matter published.¹⁶⁰

This reflects the concerns expressed in the submission of the Australian Press Council where it said that the *Lange* decision imposed the same standards on the media as for commentary made by individuals – belief in the truth. The Press Council continued:

But the media must deal with debate and controversy, accusation and rebuttal. Requiring the media to believe that third party information is true is too stiff a test. How would a newspaper know where the truth lies in a developing public scandal? The timeframe within which newspapers have to work makes it impracticable to wait when the matter is of public interest (eg, public fraud).¹⁶¹ The Press Council also questioned the practicality of requiring a defamed person to be given the opportunity in most circumstances to respond to an allegation: 'It could prevent the scandal being brought to light if a response of some sort is an essential ingredient. Guilty parties would simply refuse to comment or at best provide a long delayed stonewalling response'.¹⁶²

While considerations of the above sort find expression in Recommendation 13, a requirement to seek a response is not made an 'essential ingredient' of qualified privilege.

¹⁶⁰ Taskforce Report, n 27, p 29.

¹⁶¹ Australian Press Council, n 26, p 4.

¹⁶² Australian Press Council, n 26, p 4.

In full, Recommendation 13 reads as follows:

[insert into section 22]

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

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

By way of an analogy for such a statutory list, the Taskforce drew attention to the 'best *Family Law Act 1975* (Cth), section 68F(2). There it is said that the court 'must consider' the listed factors, which underlines the point that consideration of the proposed section 22 listed factors is intended to be mandatory upon the court. Whether the list can also be said to exclude other potentially relevant factors is another matter. The intention seems to be to direct the court to a set of exclusively relevant factors. To do otherwise would be to leave open the possibility of re-admitting the genie of 'truth' into section 22.

What practical value Recommendation 13 would serve is open to question. Justice Levine has said in this respect:

When one reads Recommendation 13 it cannot be concluded that by statute very much more, if anything, would be added to the law as it presently exists whether founded in *Lange* or indeed *Reynolds*.¹⁶³

5.8.8 The UK comparison: The factors set out by the Taskforce were drawn from a similar list suggested by Lord Nicholls in *Reynolds v Times Newspapers Ltd and others*, a case involving the law of qualified privilege as this operates in England and Wales.¹⁶⁴ These suggested factors were 'illustrative only' and referred to 'matters to be taken into

¹⁶³ Levine, n 7, para 67.

¹⁶⁴ [1999] 4 All ER 609. The defence appears to extend beyond 'political communication' as might be understood in Australia to encompass all matters of public concern.

account'.¹⁶⁵ Consistent with the comment cited above, Justice Levine has said that, as things currently stand, this checklist of factors 'adds nothing to the existing law of this

¹⁶⁶

Another point to make is that the argument made on behalf of the freedom of the press in *Reynolds* by Lord Nicholls must be read in the context of the operation of the *Human Rights Act 1998* (UK). The argument is unlikely to find favour in Australia.¹⁶⁷

5.8.9 Interaction with the constitutional defence: At any rate, Recommendation 13 raises the issue of 'truth' and the part it is, or is not, to play in qualified privilege. Clearly, requiring mass media defendants to prove they had objective grounds for believing in the truth of the matter published is a major stumbling block to reliance on a section 22 defence. It might be said to tip the balance unduly against freedom of expression, in favour of the protection of reputation. On the other hand, in relation to political communication, at least, the High Court sent a message, however mixed, that belief in the truth of what is published is integral to the *Lange* test of reasonableness. What if that limb of the *Lange* test was not dealt with directly by the court under a revised section 22? Could it be argued in such circumstances that section 22 failed to protect reputation to the standard required by the constitutional freedom of political communication, thereby diminishing the protection afforded to the defamed? In short, would a revised section 22 be constitutionally invalid?

The answer is 'no'. In *Lange* the High Court dealt at some length with this very question. It stated clearly that 'the requirement of freedom of communication operates as a restriction on legislative power'. To this it added that 'Statutory regimes cannot trespass upon the constitutionally required freedom'. However, it went on to explain that it is the narrowing of the freedom which attracts unconstitutionality, not its broadening. According to the High Court:

a statute which diminishes the rights or remedies of persons defamed and correspondingly enlarges the freedom to discuss government and political matters is not contrary to the constitutional implication. The common law rights of persons defamed may be diminished by statute but they cannot be enlarged so as to restrict the freedom required by the Constitution.¹⁶⁸

Section 22, as revised, might be said to diminish the rights of the defamed but would not, on that account, be held to be unconstitutional. The High Court continued:

¹⁶⁵ [1999] 4 All ER 609 at 626.

¹⁶⁶ *Marsden v Amalgamated Television Services Pty Ltd* (unreported, NSWSC 27 June 2001, BC200103436) at para 3986; Levine, n 7, para 49.

¹⁶⁷ For an account of how and why Australian law has in this respect developed in a different direction to that in the UK see – *John Fairfax and Sons Ltd v Vilo* [2001] 52 NSWLR 373 at 376-381 (Heydon JA).

¹⁶⁸ (1997) CLR 520 at 566.

Laws made by Commonwealth or State Parliaments or the legislatures of self-governing territories which are otherwise within power may therefore extend a head of privilege, but they cannot derogate from the common law to produce a result which diminishes the extent of the immunity conferred by the Constitution.¹⁶⁹

Another perspective on this is that a revised section 22 would in fact better reflect the spirit of the constitutional defence. This appears to be consistent with Chesterman argument that the *Lange* ‘reasonableness’ test ‘does not really reflect the spirit of, and therefore does not genuinely “conform with”, the implied constitutional freedom because it places unduly heavy burdens on defendant publishers’.¹⁷⁰ By omitting ‘belief in truth’ from section 22 the recommended reform would remove that unduly heavy burden.

5.8.10 Recommendation 12 – rejection of a public figure test: The unanimous recommendation of the Taskforce was that:¹⁷¹

There should not be a public figure defence introduced, but instead, the revised statutory qualified privilege should emphasise that the fact that a person is performing public functions or activities is a factor to consider in whether the occasion is one of qualified privilege.

The issue need not be considered at length.¹⁷² It is enough to say that it was reflected in the inclusion of the following factor in the list proposed under Recommendation 13: ‘*The extent to which the matter complained of concerns the performance of the public functions or activities of the plaintiff.*’

Among other things, the Australian Press Council submitted that ‘Public figures should have to prove malice to be successful in defamation’.¹⁷³ This suggestion, which is similar in approach to the ‘Sullivan rule’ as this operates in the US, was also rejected.¹⁷⁴

¹⁶⁹ (1997) CLR 520 at 566.

¹⁷⁰ Chesterman, n 150, p 100.

¹⁷¹ The Taskforce’s discussion was in response to a proposed recommendation made by the Australian Press Council - see Taskforce Report, n 27, p 15.

¹⁷² For a general discussion see – V Mullen, *Defamation of Public Officials and Public Figures: Special Rules and Free Speech in the United States and Australia*, NSW Parliamentary Library Occasional Paper No2, 1995; A T Kenyon, ‘Defamation and critique: political speech and *New York Times v Sullivan* in Australia and England’ (2001) 25 *Melbourne University Law Review* 522.

¹⁷³ Australian Press Council, n 26, p 5.

¹⁷⁴ In *NYT v Sullivan* (1964) 376 US 254, founding itself on the first and fourteenth amendments to the US Constitution, the Supreme Court held that a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he

5.8.11 Recommendation 14 – the duty of the press: This recommendation was proposed by Professor McKinnon, Chair of the Australian Press Council. The recommendation reads:

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

Recommendation 14 is consistent with a proposal of the Press Council’s which, according to the Taskforce,

believes that this addition would have the effect of drawing the judiciary’s attention to the fact that newspapers have an obligation to keep readers informed and that judgments have to be made about how carefully and comprehensively the newspaper conducted its enquires in the limited time available before publication.¹⁷⁵

The majority of the Taskforce appears to have taken the view that the judiciary does not need to be so reminded.

5.8.12 Recommendation 15 – defining government and political matters: An additional proposal supported by 2 of the 4 members of the Taskforce was for the insertion of a new section 22A to elucidate the defence of qualified privilege as this relates to ‘government

Recommendation 15 reads:

Insert new section 22A
22A:
<p>There is a defence of qualified privilege for a publication concerning government and political matters including, but not confined to,</p> <ul style="list-style-type: none"> • The performance of their duties by ministers of the Crown of the Commonwealth, the States and the Territories; • The performance of their duties by members of the Commonwealth, State and Territorial parliaments; • The suitability for office of members of the Commonwealth, State or Territorial parliaments and candidates for those legislatures; • The performance of their duties by statutory officers, ministerial staff, public servants

proves, with convincing clarity, that the statement was made with knowledge of its falsity or with reckless disregard of whether it was false or not. This principle has since been applied to public figures generally – *Reynolds v Times* [1999] 4 All ER 609 at 620 (Lord Nicholls).

¹⁷⁵

Defamation Taskforce Report, n 27, p 30.

- and consultants to government bodies and instrumentalities;
- The performance of their duties by judicial officers;
 - The performance of their duties by elected office holders and municipal officials in local government;
 - Conduct designed to influence government decisions or policies;
 - Conduct by way of commentary on the political process.

By way of background to Recommendation 15, it can be noted that one issue which has dogged the debate about the constitutional freedom of political discussion, as well as its application in the *Lange* decision to the defence of qualified privilege, is just how broadly or narrowly the concept of the ‘political’ is to be construed. It is argued in this respect that the earlier ‘freedom of political communication’ cases adopted a relatively broad

Lange ‘the scope of political communication appears to have been narrowed along with the apparent shift in its rationale from participation by citizens to information for voters’.¹⁷⁶ In *Lange* the view was that the Commonwealth Constitution gives effect to ‘the institution of “representative government” only to the extent that the text and structure of the Constitution establish it’. From this it was argued: (a) that the freedom of political communication is ‘an implication drawn from ss 7, 24, 64, 128 and related sections of the Constitution’; and (b) the implication can validly extend only so far as is necessary to give effect to these sections’.¹⁷⁷ This is the basis for *Lange*’s narrow view of a protected area of speech limited to communications tending to affect voting choices. It reflects, in Chesterman’s view, an institutional as against a participatory model of democracy.¹⁷⁸

Questions remain. Are the activities of newspaper proprietors and TV station owners ‘political’ in general or specific instances? What about judges, especially as they act in the performance of their official duties? Are trade union officials or representatives of employer groups participants in political matters? Should the ‘political’ be defined broadly in terms of anything that moulds and influences public opinion, or more narrowly as concerning electoral and related issues?

By way of illustration, it has been held that ‘information about fleeing company directors is not governmental or political’.¹⁷⁹ Likewise, nor is a student publication offering practical advice on shoplifting, no matter what its political motivations.¹⁸⁰ On the other hand, a person appointed to the Police Board does come under the *Lange* rubric on the basis that

¹⁷⁶ A T Kenyon, ‘Defamation and critique: political speech and *New York Times v Sullivan* in Australia and England’ (2001) 25 *Melbourne University Law Review* 522 at 535. Kenyon is paraphrasing Chesterman’s argument.

¹⁷⁷ (1997) 189 CLR 520 at 567.

¹⁷⁸ Chesterman, n 150, p 55.

¹⁷⁹ *John Fairfax and Sons Ltd v Vilo* [2001] 52 NSWLR 373 at 381 (Heydon JA).

¹⁸⁰ *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 154 ALR 67.

the ambit of the defence ‘includes the suitability for public office of a person either elected to it or appointed to it by an executive government’.¹⁸¹ The editor of *Australian Defamation Law and Practice*, Judith Gibson, thought this last decision to be ‘indicative of a return to the *Theophanous* defence’.¹⁸² The broad conception of the political set out in *Theophanous* by Mason CJ, Toohey and Gaudron JJ, reads as follows:

For present purposes, it is sufficient to say that ‘political discussion’ includes discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, e.g., trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices.¹⁸³

The joint judgment then quoted Barendt’s comment that:

‘political speech’ refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.¹⁸⁴

At any rate, the background to Recommendation 15 is that there has been considerable uncertainty about what constitutes, as well as what should constitute, ‘government and political matters’. A point worth reiterating is that neither common law qualified privilege nor the statutory defence under section 22 must be defined in as restrictive a way as the constitutional freedom. A new section 22A might therefore incorporate an expansive interpretation of government and political matters.

As for Recommendation 15, it does not set out an exclusive or definitive definition of ‘government and political matters’. The phrase is said to include, but is ‘not confined’ to, the listed factors.

The factors which are listed under the proposed section 22A represent something of a middle-ground between *Theophanous* and *Lange*. It incorporates in its ambit public officials generally as well as those undertaking governmental duties in any capacity. As such, one might say that the listing of such categories of public persons in their undertaking

¹⁸¹ *Marsden v Amalgamated Television Services Pty Ltd* (unreported, NSWSC 27 June 2001, BC200103436, Levine J) at para 3931; *Australian Defamation Law and Practice*, Bulletin 24, July 2001, p 4.

¹⁸² *Australian Defamation Law and Practice*, Bulletin 24, July 2001, p 5.

¹⁸³ (1994) 182 CLR 104 at 124.

¹⁸⁴ (1994) 182 CLR 104 at 124.

of public functions is helpful in setting out the parameters of qualified privilege as this relates to government and political matters. Equally importantly, it also establishes a normative statement about how widely the ambit of political speech is to be drawn: wider than *Lange*; not quite as wide as *Theophanous*.

The list does have its contentious aspects. For instance, it includes the factor relating to judges - 'the performance of their duties by judicial officers'. A recent Victorian case involving the defence of qualified privilege found that the discussion of the conduct of judicial officers and their decisions fell outside the ambit of discussion of government or political matters. According to the trial judge in that case, only the question of the removal of a particular judicial officer by the executive government or Parliament would fall within the protection of the constitutional defence, on the ground that there would be a connection with representative government.¹⁸⁵ In arriving at this view, the trial judge made extensive reference to a NSW Court of Appeal case where Spigelman CJ concluded that 'The conduct of courts is not, of itself, a manifestation of any of the provisions relating to representative government upon which the [constitutional] freedom is based'.¹⁸⁶ The broader view was expressed by Levine J in a pre-*Lange* decision where it was held that a magistrate would come under the ambit of the constitutional defence because he was a holder of high office.¹⁸⁷ It is this pre-*Lange* view which finds expression under Recommendation 15.

Of interest, too, are the last two listed factors. 'Conduct designed to influence government decisions or policies' would include pressure group activity within the ambit of government and political matters. 'Conduct by way of commentary on the political process' is, presumably, intended to assist mass media defendants. Presumably, the term 'political process' is to be interpreted broadly, although probably not as broadly as the *Theophanous* conception of 'the development of public opinion on the whole range of issues which an intelligent citizen should think about'.

5.9 *New categories of protected reports*

This recommendation and the rationale behind it are more or less straightforward. The broad scope and nature of the defence provided under Division 5 of the Defamation Act to 'protected reports' has been explained (pages 21-22 above). As noted, under the NSW *Defamation Act* extensive privilege is granted to what are called 'protected reports'. These include parliamentary, court, tribunal and related proceedings (already covered under absolute privilege), plus the proceedings of such things as sporting, cultural and business associations. The proceedings of public meetings are also covered, at least where these relate to 'a matter of public interest'.

¹⁸⁵ *Popovic v Herald and Weekly Times Ltd*, Australian Defamation Law and Practice [53,095]; *Australian Defamation Law and Practice*, Bulletin 26, June 2002, p 4. Of this case, Levine J has commented that 'an appeal would be unsurprising' – Levine, n 7, para 38.

¹⁸⁶ *John Fairfax Pty Ltd v A-G (NSW)* (2000) 181 ALR 694 at 709.

¹⁸⁷ *Australian Defamation Law and Practice*, Bulletin 24, July 2001, p 5. The reference is to *Williams v John Fairfax Pty Ltd* (1994) Australian Defamation Report [42,087].

Recommendation 16 would add:

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

Protected under clause 3 of Schedule 2 are official and public documents and records, including parliamentary debates. Recommendation 16 would add:

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

As to the source of the recommendation, the Australian Press Council referred in its submission to a recent UK decision, *Turkington and others v Times Newspapers Ltd (Northern Ireland)*,¹⁸⁸ in which the House of Lords held that a press conference constitutes a public meeting for the purposes of a statutory fair report defence. It was also held in that case that a press release distributed at the meeting was protected. In *Turkington* the public meeting in question was called to vindicate a soldier who had been convicted of serious criminal offences allegedly committed while serving in Northern Ireland.

On the other hand, Recommendation 16 is directed to that category of press conference or press release given or issued by a public official with the government's imprimatur. In that sense it is limited and specific. It is similar in scope to the recommendation of the 1975 Report of the Committee on Defamation (the Faulks Committee) from the UK which, among other things, proposed the inclusion of the following category of reports: 'A fair and accurate report of a press conference convened to inform the press or other media of a matter of public concern (including a fair and accurate report of any document circulated at the press conference)'. Inclusion of this category under the NSW Act was canvassed in the NSWLRC's 1993 Discussion Paper on Defamation¹⁸⁹ but not pursued in the subsequent 1995 Report.

Recommendation 16 builds on the already generous privilege for protected reports under the *Defamation Act*, which include public meetings on matters of public interest.

6. CONCLUSION

Defamation law reform, it seems, is always with us. Likewise, the issues it raises are invariably complex and often contentious. Although important substantive changes to defamation law are proposed in the Taskforce Report, its main thrust is procedural, seeking as it does to introduce measures to avoid unnecessary litigation wherever possible. In this respect it is very much a creature of our times, when the push in this and other jurisdictions is towards alternative dispute resolution and away from the costs and delays associated with litigation. As the Premier has said, in relation to tort law reform generally the current proposals are part of a concerted attempt to move away from what he called 'the culture of

¹⁸⁸ [2000] 4 All ER 913.

¹⁸⁹ NSWLRC, n 16, p 146.

litigation’.

That is not to say that litigation does not have a part to play in defamation law. This is clearly so if the goal of the public vindication of reputation is to be realised. Corrections and apologies may go some way towards that, but they are perhaps unlikely to satisfy entirely the underlying purpose of defamation law. That statement assumes that such public vindication, not the mere award of monetary damages as compensation for harm to reputation, is the ultimate rationale behind the law of defamation from the plaintiff’s standpoint. For the defendant, the countervailing purpose is the protection of freedom of speech. To some extent these competing public interests must be reconciled with the need for the efficient administration of justice. What the Taskforce Report represents is one articulation of the appropriate balance between the utilitarian principle of efficiency and the public interests served by defamation law.