THE LAW SOCIETY OF NEW SOUTH WALES

YOUNG LAWYERS' COMMITTEE

THREDBO LAW CONFERENCE, 3 OCTOBER 1976

LAW REFORM AND DEFAMATION

Hon Justice M D Kirby

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Mr. Justice M.D. Kirby, B.A., LL.M., B.Ec.
Chairman of the Law Reform Commission

> "Slander-mongers and those who listen to slander, if I had my way, would all be strung up, the talkers by the tongue, the listeners by the ears"
>
> Plautus, circa 189 B.C.

THE LAW REFORM COMMISSION

1. The Australian Law Reform Commission has received an important reference from the Commonwealth Attorney-General, Mr. Ellicott. It requires a review of the law of Defamation. It is a reference that will command the fullest support of the legal profession. To put this task in its context, I propose to outline something of the history and functions of the Commission. I will then mention the methods by which we work for it is our methodology that brings me to this law conference today.

2. The Commission is established by *Law Reform Commission Act 1973* (Cth). When the Bill to establish the Commission was passing through the Parliament, it received the support of all Parties. It was sponsored by Senator Murphy, as he then was. Important amendments were proposed by Senator I.J. Greenwood, Q.C., and accepted by the then Government. The task of the Commission, put briefly is to reform modernize and simplify th laws of the Commonwealth. [1] The first appointments were not made until 1975. I was appointed full-time Chairman in February 1975. There are now four full-time Commissioners, seven part-time Commissioners and a significant staff. The Commission is established in Sydney. A number of N.S.W. lawyers are amongst our ranks. We look to the N.S.W. profession for support, assistance and ideas.

3. The Commission has already completed four reports and is busily at work on a programme, one item only of which is the reference on Defamation

Last year, the Commission delivered two reports on vexed issues that require law reform. These are *Complaints Against Police*[2] and *Criminal Investigation*.[3] Last month a report *Alcohol, Drugs and Driving*[4] was delivered. All of these Reports have been prepared to strict deadlines fixed by successive Attorneys-General. In each case substantial recent material has been assembled, top experts gathered together, public hearings held, legislation drafted and a report prepared within six months or less. The Commission feels strongly that, in appropriate areas, law reform should not be a tardy business. The needs of modern government in Australia are such that a Commission such as ours ought to be able to bring together some of the best talent in the country and suggest reforms which will be thoroughly reasoned and properly presented in statutory form, if legislation is appropriate. The first report was followed by the Australia Police Bill,1975. This implemented the Commission's proposals. However, with the change of Government that Bill is not to proceed. It may be that some aspects of that report will require reconsideration, in view of the decision to abandon the Australia Police concept. One thing is sure. The introduction of an independent element into the receipt, investigation and determination of complaints against police cannot long be delayed. Within the last few weeks the Royal Assent was given to the *Police Act 1976 (G.B.)*. This introduces such an independent element in England. Likewise, the Commission's Report on *Criminal Investigation* sought to modernize this delicate area of the law. We sought to bring police procedures into the Twentieth Century: recognizing the value of tape recorders, telephones, telex and so on for police and accused alike. I have read reports that the Government Committee scrutinizing this report has decided to recommend its implementation. This recommendation is under study of the Government. It is, of course, an area of law reform in which it will never be possible to secure everybody's agreement. It is noteworthy, however, that the recent N.S.W. Committee of Enquiry on *Bail Law Reform* has recommended adoption of a large number of the Commission's recommendations in that area. I am confident that we will see legislative action to implement the Commission's proposals. The Report on the A.C.T. Breathalyzer Laws delivered last month rejects random tests but makes positive proposals to modernize and simplify this area of the law. It is often necessary for lawyers to stand guard by important common law principles of our system of justice. Laymen are often ready

to abandon time honoured rules that have been worked out over many years. must always, as lawyers,remember our special responsibility to explain and justify rules of law that go to the nature of our society. So much for th reports already delivered.

4. The Commission has a busy programme. It acts as clearing house for large number of State law reform bodies in Australia. It is working at pr on references involving reform of the *Bankruptcy Act,* Insurance contract l and human tissue transplant law. The major task before the Commission is undoubtedly the reference on Privacy. To this has now been added a complementary reference on Defamation law reform. I want to talk to you briefly about the scope and objects of the reference.

THE DEFAMATION REFERENCE

5. Omitting the preamble, which calls attention to the functions of the Commission and the International Covenant on Civil and Political Rights, the Commission's warrant is to -

> "Review the law of defamation (by both libel and slander) in the Territories and in relation to other areas of Commonwealth responsibility, including radio and television, but excluding enquiries on matters falling within the reference made to the Commission on privacy. And to report on desirable changes to the existing law, practice and procedure relating to defamation and actions for defamation."

The Commission is required to have regard to its functions under the Act to consider proposals for uniformity between the laws of the Territories and laws of the States. It is also commanded to note the need to strike a balance between the right to freedom of expression and the right of the person not to be exposed to unjustifiable attacks on his honour and reputation. [5]

6. I am glad to say that the reference is a bipartisan matter. Law reform has greater chance of success where no party political issue intrudes in the exercise. When Senator Murphy was Attorney-General, he proposed that the first programme of the Commission would include a reference designed to secure a national Act on Defamation. His successor Mr. Enderby took the same view. The programme he announced for the

Commission in November 1976 included defamation as its major reference. The Constitutional Convention during 1975 (as again in 1976) has been considering proposals for a reference of power to the Commonwealth on this subject. Senator Greenwood, then Shadow Attorney-General, told me many times of his concern about intrusions into privacy. These intrusions come, of course, from many quarters. But they include government, business and the media. The Younger Committee in England (to which I will return) found that the largest number of complaints concerning privacy intrusion related to complaints against the press.[6]

7. During the election campaign 1975, the Prime Minister undertook in his policy speech that if returned the Government would refer the protection of privacy to the Commission. This possible reference was taken up by me in speeches early in 1976. I was taken to task by one newspaper at least for envisaging a privacy exercise devoid of reform of defamation laws.[7] That newspaper believed that review of defamation laws was a prerequisite for any proper reconsideration of privacy protection in Australia. There was much merit in the argument. The Privacy reference was received by the Commission on 9 April 1976. It is in the widest possible terms. Subsequently, after discussing the matter at a meeting of the Standing Committee of Commonwealth and State Attorneys-General, the Attorney-General, Mr. Ellicott, on 23 June 1976 signed the Terms of Reference that have been outlined above. In accordance with the Act I have assigned one of the full-time Commissioners, Mr. Murray Wilcox as Commissioner in charge of the project. He has already had extensive discussions in all parts of Australia with State Ministers, media representatives, law reformers, academics and others. A number of in-house publications have already been prepared. Issues are beginning to emerge.

THE ISSUES

8. Obviously, in a short talk such as this, it is not possible to deal at any length with the multitude of issues which this reference throws up. Can I suggest that there are three questions to which we could usefully direct attention today? They are:

(i) Is the tort of defamation still an efficient model to do the social task expected of it?

(ii) Assuming that it is, is a national Act possible or desirable in Australia?

(iii) If so, what should such an Act contain and how should it approach the problems?

IS DEFAMATION AN EFFICIENT MODEL?

9. The nature of the wrong which defamation actions seek to right is the restoration of a reputation allegedly damaged by a publication. There is, of course, a competition between rights. There is the "right" of freedom of speech, on the one hand, and the "right" of privacy and integrity of the reputation, on the other. But if a publication has occurred, and the free speech "right" has been asserted, the only possible "wrong" to be "righted" is the restoration of a damaged reputation. It is in this respect, it seems to me, that the tort of defamation is not proving entirely apt for the social problem it seeks to grapple with. There are a number of difficulties. We all know of delays, some of which involve years rather than months, between the publication and the completion of defamation litigation. Some of these delays arise from interlocutory proceedings. Others arise from appeals. Certainly, the law is extremely complex and the consequence is delay, frustration and expense. I am not, of course, the first to complain about *the law's delays*. Nor is defamation unique in this. The point I must continually revert to is the nature of the wrong. Delay militates against effective righting of this particular wrong. It has been suggested (I do not know with what justification) that interlocutory proceedings in defamation actions are the means whereby publishers exhaust the patience or pockets of a Plaintiff. Certainly, the N.S.W. statute book is scattered with a myriad of interlocutory decisions in this area that do much credit to the ingenuity of lawyers. I look to an audience such as this, practising solicitors who know this problem, to tell the Law Reform Commission whether it is a conscious device of procrastination and delay by Plaintiffs or Defendants. But conscious or not, the fact remains that, as any practitioner knows, it takes a very long time to bring a defamation action to the barrier. Few even get so far.

10. Nor should this mislead you into thinking that all of the problems for defamation law reform lie on the side of the person who alleges he has been defamed. Publishers face, as I shall show, acute problems

in the present system. They must be concerned about the possibility of large verdicts with exemplary damages that can make a mark in the pocket even of a prosperous newspaper. Government instrumentalities, such as broadcasters must be especially sensitive as to their obligations to obey the law of the land. The uncertainties and doubts that abound surely result in self censorship. I am informed that even preliminary investigations in this field suggest that often such self censorship is based upon a cautious view of the law or perhaps a misconception of it that can be excused. The result, however, is that programmes or articles are "killed". The public is deprived of information that legitimately ought, perhaps, to be before it. The victim is obviously the right of free speech.

11. In addition to these problems, the media in this country face a special difficulty that I have averted to before[8]. This is the use of "stop writs". It is an abuse of the administration of justice that takes on a special relevance in Australia. There is no appeal here to constitutional guarantees of freedom of speech. We have a tradition but not a legally enforced and protected *right* of free speech. In this regard we are to be distinguished from the United States of America. The distinction is seen, at least in part, in the practice of "stop writs". The former Queensland Attorney-General, Mr. Knox, illustrated the problem in that State in a speech delivered in August 1975. Between January, 1972 and August 1975 there have been 248 writs for defamation issued in Queensland. In that time, one only came to trial. Four judgments were entered by default. Delay in the courts could not be the sole explanation for such a statistic. The use of defamation writs to inhibit discussion on matters of public interest is a serious problem in Australia. Although our terms of reference do not embrace reform of the law of contempt of court, it will plainly be necessary for us to consider what can be done about this special and acute problem. Already we are securing up-to-date information from all States of Australia to examine the magnitude and nature of this problem throughout the country. The above brief examination will be sufficient to suggest that the tort of defamation, as it works today in the Australian legal system is less than perfect. What can be done about it?

ALTERNATIVE MODELS

12. *Self discipline: the Press Council.* The Younger Committee was established in April 1970 to consider whether legislation was needed in Britain to give further protection against intrusions into privacy. The report was presented in May 1972. Unlike the reference to the Australian Commission, successive Home Secretaries refused the suggestion that the Committee should be permitted to enquire into intrusions by government. The Committee's report is a major contribution to the discussion of the legal aspects of privacy. As I have said, more complaints were received about press intrusions than about any other aspect of privacy invasion. This is what the report had to say on the subject -

> "In acquiring news, some of the press are said to have obtained entry to private premises and to have conducted interviews by deception; and to have pestered and otherwise harassed people in private places, which was all the more objectionable when the news itself was distressing to those harassed. In publishing news and comment, they are said to have made known, mainly to satisfy idle curiosity, facts which would otherwise be generally unknown, about private misfortunes, calamities and other incidents, so aggravating the distress or embarrassment; or to have published, with critical innuendo, stories about unusual but lawful private activities and behaviour which are judged to be objectionable to current conventional opinion; and in all these situations to have identified directly or indirectly individuals concerned. These practices, it is claimed in the critical evidence presented to us, can do grave damage to private individuals, out of proportion to any general benefit derived from the dissemination of the news." [9]

The Committee outlined the then composition and operations of the Press Council of Great Britain. It quoted statistics for the year 1970-71 in which 370 complaints were received by the Press Council's Secretariat. Of the total complaints received only 38 (about 10%) were considered by the Council itself. Of these 13 were upheld and 25 rejected.[10] Thus only 3.5% of those who took the trouble to put a written complaint to the Press Council were held to be justified. The report quotes examples

of published material which press representatives, in their evidence, defended as proper.[11] The defences advanced at least raise concern about the standards applied by those who justified the publication. For example, photographs of distressed and anguished children taken at the moment of delivery from foster parents to their natural parents were justified as conveying to the public the real depth of emotions involved and stimulating public interest in the social issue of importance. The publication of the names of donors and recipients in organ transplant cases (particularly heart transplants) was also sought to be justified. It was said that the suppression of identities would have removed the sense of immediacy and personal involvement of the public in such a matter of grave concern.

13. In the end the majority of the Younger Committee did not favour the creation of a tort of privacy to handle these cases. Although conceding the deficiencies of a Press Council the majority sought to have it re-constituted so to improve is effectiveness and to reduce the number of press representatives upon it.

14. As you know, we now have a Press Council in Australia. It is under the distinguished Chairmanship of Sir Frank Kitto. Sir Frank has discussed the Commission's Reference with the Commissioners. There will be close consultation with the Press Council. We will be carefully observing what they do and how effective is their work. Issues that are relevant in this regard will be at least the following:

(i) The absence from the Press Council of one of Australia's major newspaper interests.

(ii) The composition of the Press Council i.e. whether it should comprise a majority of media representatives.

(iii) The willingness of those who are criticized to publish the findings when adverse to the press involved.

(iv) The speed and apparent fairness of the determinations made.

The Council is obviously in an experimental stage. It is plainly a healthy, if somewhat belated innovation. It must be said that the reported refusal of one newspaper to publish criticism of it by the Press Council does not inspire confidence about the operation of this model. However, these are early days and we will, of course, closely watch the operation of this experiment in self discipline. Lawyers prize the degree of self discipline left to them. However, in the United Kingdom there has now

been appointed a Lay Observer to infuse an independent element.[12] A recent Report from New Zealand suggests a similar development there.[13] New South Wales may, in its inquiry into the legal profession, come to the same conclusion. The point is that some matters are just too important and sensitive to be left entirely to bodies comprising colleague of those under fire.

15. *Press Ombudsman.* A second alternative model has been suggested of late in England. It follows the Scandanavian procedure of appointing a Press Ombudsman. Rather than provide damages years later, a special Ombudsman is appointed with powers of rapid action. He can require immediate and equal redress in the media.[14] It has been said recently that we are suffering from Ombudsmania. This Commission is under a duty to ensure that its proposals do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions.[15] Neverthleless, the merit of such a procedure would be the swiftness of correction: the opportunity for an equal say (not necessarily exploring the merits). In a law reform commission we should not be blinkered by the fact that a cause of action in defamation has been around for at least four Centuries. The modern dissemination of news may require a modern approach to the problem. However, the approach must be consistent with freedom of speech. Not only does our reference require that. The current values of Australian society would plainly accept nothing less.

16. *A Tort of Privacy.* A third possibility would be to broaden the present remedies either in lieu of or addition to the remedy of defamation. Despite the Younger Committee and Professor Morrison's Report[16] it might be appropriate to create a tort of privacy that would give redress in those areas not currently served by the defamation action. This proposal was advanced in South Australia by the then Attorney-General, Mr. King. It came in for much criticism. The crticism came not only from the media. Representatives of the Council for Civil Liberties criticized the proposal on the basis that it unduly infringed freedom of speech. Without a constitutional guarantee of such freedom, it was feared that the addition of a tort of privacy would simply put another nail in the coffin of vigorou reporting and critical news dissemination in this country.[17] I make no

comment on these views, except to say that it must surely not be beyond the ingenuity of man to devise proper qualifications upon a right of privacy which judges and courts could enforce. Difficult it may be to devise the formula and language to be used. In the end, the important question will always be the person or tribunal that decides where the balance is to be struck. A consideration of the Younger Committee's examples, and others that spring to mind from recent media excesses in Australia, indicate that there are wrongs in our society that the present tort of defamation is proving incompetent to right.

17. *Defamation: Speeded up.* A fourth possibility is the provision of compulsory procedures that would give special expedition to defamation actions. It may be argued that this cannot be justified against the urgency of competing litigation. But if the nature of the damage to be redressed is borne in mind, there may be a special reason for compulsory expedition of defamation cases. There are, of course, problems in this suggestion -

* How do you circumvent interlocutory proceedings in complicated matters of law?
* How are appeals, which are equally causes of great delay, to be expedited?
* How are the competing merits of other urgent cases to be judged?
* Is there, in any case, constitutional power, should a Federal Act be agreed, to discipline the procedures and discretions of State courts administering the Federal Act?[18]

As I have said before, the Commission is coming increasingly to the view that the major problem in defamation law reform lies in the area of procedure. Delays, complexity and expense frustrate the purpose which the tort of defamation was designed to serve: the provision of a vehicle to restore a damaged reputation, whilst the damage is still fresh in mind.

NEED FOR A NATIONAL ACT?

18. *The Present Position.* Australia as a federation, enjoys much diversity of law that has promoted experimentation and legal progress.

The tort of defamation may be in a special class that warrants the creation of a federal Act. Consideration of this argument starts with an appreciation of the present vexed position. Putting it broadly, there are three approaches to defamation law in Australia and eight different laws: one for each State and one each in the two mainland Territories. The three approaches are to leave the source of the law to the Common Law, to provide for it in a code which is a complete repository of the principles of actionable defamation and to have a mixed situation in which the law of defamation is partly judge-made and partly statutory in origin. Queensland, under the influence of Sir Samuel Griffith is a code State. Tasmania, with its *Defamation Act 1957* also adopted the code. Western Australia basically adopted the code, although primarily in connection with the criminal law and only partly in connection with civil defamation.[19] New South Wales was basically a code State following the introduction of the 1958 Act. This Act has now been repealed and its replacement in 1974 restores that State to the mixed position. The Common Law, with some minor modifications still holds sway in Victoria and South Australia. The Capital Territory is in a mixed position. It enjoys the 1901 New South Wales Act, as amended in 1909. That was the law it inherited in 1911. The Northern Territory is governed by the Common Law as modified by a 1938 Ordinance.[20] Put shortly, then, the Common Law governs defamation actions in Victoria and South Australia. Queensland, Tasmania and to a great extent Western Australia are code States. N.S.W. and the two Territories are in a mixed position, although generally speaking the Common Law principles still play a great part in defamation law there. These are not just academic differences. They are, as I shall show, differences that affect vitally the defences that are available and the success or otherwise of litigation commenced upon the same publication in the several jurisdictions.

19. *Is a National Act Possible?* The terms of reference require the Commission to review the law in relation to areas of Commonwealth responsibility "including radio and television". This invokes a reference to heads of power that might ground Commonwealth laws dealing with defamation. There is, at the moment, one section only in the *Broadcasting and Television Act* that represents a limited purported use of federal power in respect of defamation -

> "124. For the purposes of the law of defamation, the transmission of words or other matter by a broadcasting

station or a television station shall be deemed to be publication in permanent form".

The power presumably relied upon for this Section is *placitum (v)* of Section 51 of the Constitution. This confers power on the Commonwealth to make laws with respect to -

"51(v) Postal, telegraphic, telephonic and other like services".

Whether the scope of this power would support a Commonwealth law on defamation in respect of the electronic media is discussed in an article by Mr. R.H. Miller *The Commonwealth Broadcasting Power and Defamation by Radio or Television*.[21] The author reviews the "characterization issue", the scope of the power in Section 51(v) and the support it secures from Section 51(xxxix) (the incidental power). With some hesitation he concludes that Section 124 is valid and that the Commonwealth has power to legislate in respect of defamation in radio and television broadcasting The conclusion is, of course, by no means certain. However, it appears to me to be the likely view that the High Court would take of the practical implications of the Commonwealth's responsibility for a modern broadcasting service.

20. Other possible heads of Commonwealth power spring to mind. There is, of course, the Commonwealth's plenary power in the Territories. Plainly however, the terms of reference envisage a much greater exercise. There are undoubtedly problems for the characterization of a law in respect of defamation as a law with respect to"postal, telegraph, telephonic and other like services"or otherwise within the available *placita* mentioned in the Constitution. Clearly the Commonwealth would never have power, under the Constitution, to enact general legislation on defamation, the Territories apart. Plainly there would be no power to deal with an entirely intrastat over-the-back-fence dispute, unless by some means the Commonwealth were to acquire a general power with respect to defamation law. Such a cession of power to the Commonwealth may not be beyond the realm of possibilities. However past history dictates caution on such a subject. At a meeting of the Standing Committee of Attorneys-General on 2 July 1973 the Attorneys accepted an undertaking from the Commonwealth Attorney-General that the Australian Law Reform Commission, when it was established, would "have an early look at the question of defamation". The undertaking was secured

by the Minister of Justice of Western Australia. It has now been fulfilled by Mr. Ellicott and was raised at a meeting of the Standing Committee in June 1976. There is no political opposition on a national level to such legislation. There may even be support within the States for the reasons I shall now outline.

A NATIONAL DEFAMATION ACT: IS IT DESIRABLE?

21. *The Arguments Against.* What are the arguments against a national Act. I would rehearse four. First it might be said, the Constitution is a compact which was not lightly made and should not lightly be interfered in. The general private law affecting citizens was conferred upon the States There should not be a drift to Commonwealth power in a matter such as this, especially because State communities may have different approaches and different standards in publications that can be mirrored in State laws. Secondly, it is often pointed out that diversity of laws can cause experimentation. It is said that the very diversity of Australia's censorship laws led to progress and liberalization. A uniform defamation Act might impose the harsh hand of unimaginative conformity over the whole country: robbing the separate State communities of the opportunity to do legally imaginative things. Thirdly, it is urged that if the balance of legal power is to be changed, it should not be done illicitly by an irregular use of Commonwealth powers that were plainly not intended to embrace defamation law reform. The record of attempts to amend the Australian Constitution formally indicates satisfaction with the present balance. It should not, so goes the argument, be thrown over by stealth. Only if the people approve an amended compact should the Commonwealth intrude, the Territories apart, into the law of defamation. It is no business of the Commonwealth's. It is the business of the States. Fourthly, and to my mind most powerfully, there is a practical argument. The figures collected by the Commission appear to demonstrate that defamation litigation is a comparative rarity outside the Eastern States. It is even comparatively unusual outside New South Wales. The Queensland figures have already been mentioned. But the numbers of actions coming to trial in Victoria and South Australia are also remarkably few. Only in New South Wales is defamation "big business". Outside New South Wales, defamation law reform may be an academic business. Within that State, it is of vital importance to practitioners, the media and public alike.

22. *What are the Arguments for a National Act?* Giving all due weight to these consideration, and especially the last, I am convinced that this is one area of the law in which national legislation is required. I say "national" to avoid identifying the vehicle that should be used. Whether by exhausting Commonwealth power or by securing uniform laws, it seems to me that the problems presented by the present disparate situation are such as to warrant a national approach to this area of the law. The first, and most powerful argument is that advanced by Mr. Ellicott himself. It arises from the very nature of news and information dissemination today. Just before giving this reference to the Commission, the Federal Attorney-General said this -

> "I shall also be discussing with the Attorneys-General of the States in South Australia next week the referring of the question of defamation to the [Law Reform Commission] for examination. This is one branch of the law where there should be uniformity. For instance, television programmes are shown nationally. There are now numbers of national newspapers and magazines. These facts stress the need for uniform law on defamation. A reference of power to the Commonwealth on this matter will be considered at the next meeting of the Constitutional Convention".[22]

The Attorney-General returned to the theme in another speech a few days later -

> "The development of the media and of other means of communication on a national basis has made urgent the task of tackling the reform of defamation laws on a basis that will produce uniformity throughout Australia. Newspapers are published for circulation on a national basis, or at least for circulation in several States. Television and radio programmes are broadcast simultaneously or are signalled to television and radio stations in all or a number of States. Yet there are great differences in the laws of defamation. These differences are so great as to produce the result that in adjoining States plaintiffs may succeed in an action for defamation in one State and fail in an adjoining State in respect of the publication of the same material".[23]

23. The sheer complexity of defamation laws, and in particular in considering possible liability for the same publication in the eight different systems in operation in the Commonwealth, inevitably leads, in many cases, to results that are unsatisfactory from society's point of view. Either the publisher, being in doubt, decides to take the commercial risk presented by the balance of legal opinion or the balance of legal entitlements or he may opt for the lowest common denominator. This latter response may produce either significant"watering down" of the item in question or its entire deletion from the publication. The result in either case is an unhappy one. A system which allows decisions to be made in ignorance in the vital field of freedom of speech and public discussion is open to serious objection. Clearly difficulties in the electronic media field are greater than for newspapers. Many radio and television transmissions cross State borders. Some programmes are designed for nationwide broadcast. Newspapers have to be compiled and printed within hours. Radio and television programmes, particularly in the field of news and current affairs are produced to much more stringent time limits. Often the station has only minutes before recording an transmission to make vital decisions as to defamation liability. To require a producer to know or obtain advice in such circumstances upon the defamation laws of eight different jurisdictions is to require the impossible. It is not surprising, therefore, that media representatives have complained strongly to the Commission about the lack of uniformity. At least one major newspaper employs a full-time solicitor to check its copy for compliance with the laws of the various States in which it is distributed. The burdens cast upon publishers and their lawyers alike are unreasonable. To calculate the various possibilities of liability (having regard to the permutations of available defences) may be a logistician's dream. However, it represents a great puzzle to those involved in the dissemination of information. It is a dilemma to lawyers. It bewilders an confuses juries charged to try defamation actions. It shames the law.

24. To the above, I would add this consideration. Technical advances are likely to increase rather than diminish the capacity for national distribution of information. Already we have the development of telefacsimile. Telex and S.T.D. telephones expedite and improve the distributior of information in all parts of the continent. Developments of ethnic radio,

"talk back" broadcast programmes, university and other special broadcasts and so on all pose new problems for the law of defamation. The presssures for a straight-forward, single national Act are likely to prove irresistible for the simple reason that people engaged in these new social activities will demand guidance about the conduct that is permissible and that which is not. Contentions about the present market in defamation actions miss this point. Citizens ought to know the law, not only for fear that if they disobey it they will face the consequences in a court. Most citizens seek to know the law in order that they can comply with it. This is particularly true in the case of government instrumentalities and bodies licensed by the government They are surely entitled to clear guidance, hopefully in simple terms, about the resolution of the tension between freedom of speech and the right to privacy and the protection of one's reputation. The difficulty of the present disparate eight headed hydra is that it does not provide such guidance. Instead it promotes strange results that call out for reform.

25. *The Defence of Justification.* I instance the defence of justification to illustrate the problems thrown up by the eight differing laws presently in force in Australia. By the Common Law truth is a defence to a libel action. This is still the position in the United Kingdom. It also remains the position in Victoria, South Australia, Western Australia and in the Northern Territory. In Queensland, Tasmania and the Australian Capital Territory, the defendant must prove, to justify a libel, not only that the publication was true but that it was "for the public benefit". In New South Wales, truth alone is not a defence. The additional requirement cast upon the defendant is to establish "public interest". In a jury trial "public benefit" is determined by the jury. "Public interest" is determined by the judge. The consequence of such diversity arises at two stages: at publication and at the trial of the action. Suppose a Melbourne newspaper wishes to publish an article which is defamatory but true. By Victorian law it is permitted to do this. Proof of truth will be a defence. If, however, even one copy of the newspaper is sold in New South Wales, the publisher will be liable to be sued in Sydney. In such an event, to escape liability to the plaintiff defamed, the newspaper will have to establish not only truth but the additional ingredient of public interest. If the newspaper is sold in the Capital Territory, the publisher will be liable to be sued there. There he must establish the additional ingredient of public benefit. In the case of any major newspaper in Australia, some sales in New South Wales and the Capital Territory are

inevitable. Accordingly, in practice, the management decision is likely to be (exceptional newsworthy stories apart) not to print the material unless satisfied that the New South Wales and Capital Territory requirements can be met. Thus, the Victorian editor, despite the legal situation in Victoria, may have to forego his rights under Victorian law, notwithstanding the fact that few of his sales are outside that State. The legal tail wags the dog. The lowest denominator tends to prevail.

26. At the trial stage, the problems are even greater. In the situation just cited the person defamed may sue in Sydney before a jury, making a separate claim in respect of the publication in other jurisdictions where publication has occurred.[24] In respect of the New South Wales claim truth will be alleged, together with public interest. In respect of the Capital Territory claim, truth will be alleged together with public benefit. The jury will be instructed that if they should find the article untrue, a verdict may be entered for the plaintiff in respect of publication in each of the three jurisdictions. If, however, it be true the jury must find for the defendant in respect of the Victorian sales but consider whether, in relation to those sales which occurred in the Capital Territory "public benefit" is proved. In respect of the New South Wales sales, it will be for the judge to decide the somewhat similar issue of "public interest". Should the jury find truth but not public benefit, their duty will be to assess damages on the basis of the sales in the Capital Territory, putting entirely out of their minds the much more extensive publication in Victoria. To ask such logical contortions of a jury may well be unreasonable.

27. *Protected Reports.* But justification is only one of the many variations that can arise by the differing defences available in the eight jurisdictions, in all of which there may have been publication. Take the defence of protected reports. The Common Law developed protection for persons publishing fair and accurate reports of parliamentary, judicial and other public proceedings. In most Australian States, even the Common Law States, this privilege is to a considerable extent embodied in statute. However, there are substantial differences, from jurisdiction to jurisdiction in the extent of the protection accorded. In some States qualified privilege is attached to reports of the proceedings of public meetings. In others, such as Victoria and the Capital Territory no such qualified privilege attaches.

Furthermore, with the exception of New South Wales, the protection accorded to public reports may be strictly territorial. For example, where the Western Australian Act provides that it is lawful to publish in good faith a fair report of the proceedings of "either House of Parliament or of a court of justice", the reference in the statute is plainly to proceedings only of the Western Australian Parliament and courts. The position in the Common Law States is much the same.[25] On the other hand, the 1974 Act in New South Wales considerably widens the categories of protected reports. It relaxes the geographical limits so as to apply protection to proceedings under the laws of the other States. Anomolies can arise as a result of this diversity. For example, directors of a Western Australian corporation may be prosecuted in Western Australian courts for various offences. The proceedings may be reported in the Melbourne *"Age"* and the *"Sydney Morning Herald"*. These reports are certainly protected in Sydney. They may not be protected in Melbourne. The Sydney Morning Herald may decide to publish the report because the protection given by New South Wales law is adequate. However, it may find itself sued in Victoria, despite a relative small distribution of the newspaper there, because no such protection is afforded in that State. The problems faced by a national newspaper which circulates throughout Australia are obvious. The consequences are equally obvious. They are uncertainty of liability, a natural tendency to conservatism and caution on the part of publishers and an open invitation to an intelligent plaintiff to choose his jurisdiction with care: shopping to find the best forum amongst the eight provided by Australian defamation laws.

28. *An Actual Case: Gorton's Case.* Lest it be objected that these are academic criticisms, several cases illustrate that diversity of defamation laws give rise to practical problems. In *Gorton v. Australian Broadcasting Commission,*[26] the plaintiff complained that the defendants had published a defamatory television programme. The programme was broadcast simultaneously from the same video tape to the Australian Capital Territory, Victoria and New South Wales. The interview took place in March 1971. Mr. Gorton, who was at the time of the interview Prime Minister complained that he was seriously damaged by it. Between March 1971 and the final judgment in July 1973, not only did Mr. Gorton lose office but his Party was in Opposition. The result was a strange one. In respect of the same subject matter the plaintiff recovered damages in two cases but not the third.

Putting it shortly, a defence available under the 1958 New South Wales Act (s.17(h)) allowed the defendants to escape liability in respect of publication of certain of the matters complained of in that State, whilst remaining liable in respect of the same publication in Victoria and the Capital Territory where the defence was not available. Who can disagree with the observations Fox J then made -

> "That the same matter, published simultaneously, in three jurisdictions from the same video tape should be the basis for recovery of damages in two but not in the third, is doubtless a strange and unsatisfactory result, but it is one which flows from the differences in the laws of those places". [27]

29. There are other cases [28] but the point is really obvious. If we lived in a time where publications (printed and broadcast) were limited to the territory of the eight several jurisdictions in Australia, the divergencies would cause university disputation, but little more. As it is, the increasingly national organization of news and other information dissemination makes the problem an urgent one. Unless we are prepared to accept confusion and uncertainty with its inevitable tendency to the lowest common denominator in free speech, the argument for some resolution of this diversity seems irresistible. If ever there was a case for a uniform national law, this would seem to be it.

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30. This is not the occasion to deal with what such a national law should contain. There are obvious difficulties. The resolution of the differing defences of justification is one, but an important one. Proof of the additional element of "public interest" or "public benefit" has deep roots in the legal system of New South Wales and other States. Resolution of the code and Common Law approach poses like difficulties. But beyond these there are a multitude of problems upon which reasonable men can differ. All of them are complex. A recent scrutiny of some of them took Lord Faulks and his Committee almost five years. [29]

31. By way of illustration I mention just a few. There are many more.

* Should the notion of defamation be broader than injury to reputation?

* Should "public figures" be in a different class to those who do not submit themselves to the same obligations of public scrutiny?
* Should intentional defamation be treated differently than negligent defamation?
* Should relatives be entitled to sue for defamation of the dead?
* Should the absolute privilege of the Courts and of Parliament be subject to some means of redress or at least equal reply?
* Should multiple publication warrant only one cause of action for the whole of Australia or should separate causes of action survive in each place of publication?
* Are damages an appropriate remedy for defamation?
* Should punitive damages survive in this area?
* What alternative remedies should be available to courts, appropriate to the wrong complained of? Should there be a right of equal reply? Should courts have the power to order apologies? Can the remedy of injunction be given wider currency?
* Should criminal libel be provided for or should it be abolished?
* What role should the jury have in a defamation trial, if any? Should we restrict the jury to the determination of damages or is defamation a matter of community conscience which, if to be tried in courts, should be tried by a jury?

Above all these questions there remain those that I have touched on lightly. How do we cope with the delays that so often rob a plaintiff, even at the moment of litigious triumph, of the true fruits of victory? How do we deal with the apparent abuse of process and suppression of free speech inherent in the stop writ procedure? All of these are difficult, complex questions. None of them is easy of resolution. It is imperative that practising solicitors should give the Law Reform Commission the benefit of their views and experience. Lawyers have a responsibility to consider not only what the law is but what it *ought to be*. I invite those of you who have opinions upon the matters dealt with today to assist the Commission to produce a thoroughly practical and hopefully simple but above all national solution to the jumble of our defamation laws.

FOOTNOTES

1. *Law Reform Commission Act, 1973 (Cth)* s.6.
2. A.L.R.C.1, A.G.P.S., Canberra 1975.
3. A.L.R.C.2, A.G.P.S., Canberra 1975.
4. A.L.R.C.4, A.G.P.S., Canberra 1976. A.L.R.C.3 was the *Annual Report 1975.*
5. Reference to the Law Reform Commission by the Attorney-General,(Cth) signed 22 June 1976.
6. Report of the Younger Committee on *Privacy,* 1972, Cmnd. Chapter 7
7. *Financial Review,* 9 February 1976, p.2 *"1984 is Only Eight Years Awa*
8. *"Law Reform, Why?"* An address given at a public lecture in Melbourne on 5 August 1976. The address is to be published in the Australian Law Journal, September 1976, Mimeo,p.15.
9. Younger Report, para 122.
10. *Ibid,* para 145.
11. *Ibid,* paras 161-165.
12. *Cf.* "What the Lay Observer Observed" (1976) 126 *N.L.J.* 507.
13. Working Paper of the New Zealand Public and Administrative Law Reform Committee *"The Disciplinary and Complaints Procedure of the Legal Profession",* July 1976.
14. G. Robertson "The Libel Industry", *New Statesman,* 2 July 1976, pp.6-7
15. *Law Reform Commission Act, 1973 (Cth)* s.7(a).
16. Report by Professor W.L. Morrison on *The Law of Privacy,* February 197 Ordered to be printed, N.S.W. 1972-73, 284.
17. Monday Conference *"The Privacy Bill",* the Hon.L. King, Q.C., 7 Octobe 1974, *mimeo* p.16.
18. *Farrelly v. Farrelly* (1976) 9 A.L.R. 108; Cf. Matrimonial Causes Rules, No. 97 of 1960 (Cwth)(as amended).
19. *Cf.* J.G. Flemming*"The Law of Torts",* Fourth Edition, pp. 456-7.
20. Defamation Act 1974 (N.S.W.); Criminal Code 1899 (Qld) ss.370ff; Criminal Code 1913 (W.A.), Ch.35; Defamation Act 1957 (Tas); Defamation Act 1901 (N.S.W.) (A.C.T.); Defamation Ordinance 1938 (N.T.). In Victoria see the Wrongs Act 1958, Part I and in South Australia, the Wrongs Act 1938, Part I.
21. (1971-72) 4 *Tas. Uni L.R.* 1.
22. Hon. R.J. Ellicott, Q.C.,M.P., Speech to the Women Lawyers' Associati of N.S.W., 11 June 1976, *mimeo,* p.4.
23. *Ibid,* Speech at Launceston, Tasmania, 13 June 1976,*mimeo,* p.8.

24. This is a very common procedure. Indeed the courts actively discourage plaintiffs from bringing separate actions in different jurisdictions. *Meckiff v. Simpson* [1968] V.R. 62; *McLean v. David Syme & Co. Limited* (1970) 72 S.R. (N.S.W.) 513; *Maple v. David Syme & Co. Limited* [1975] 1 N.S.W.L.R. 97.

25. *Webb v. Times Publishing Co. Limited* [1960] 2 Q.B. 535.

26. (1973-74) 22 *F.L.R.* 181.

27. *Ibid*, p.196.

28. *McLean v. David Syme & Co. Limited, op cit.*

29. Report of the Committee on Defamation (Lord Faulks, Chairman) 1975 Cmnd. 5909. *Cf. Ibid* (Lord Porter, Chairman) 1948 Cmnd.7536; Fifteenth Report of the Law Reform Committee 1967, Cmnd 3391; Report of the New South Wales Law Reform Commission, (L.R.C.11) 1971 and working paper for the New Zealand Parliamentary Committee on the Defamation Act, 1954 (N.Z.).