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NATIONAL DEFAMATION LAW : YES OR NO?

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REFORMING DEFAMATION LAWS

Defamation actions show up Australian law at its worst. The substantive law is complex. The procedures are dilatory. The remedies are elusive and problematical. When obtained, they are generally not apt for the wrong that has been done. Above all, there are eight systems of law operating in a nation where modern mass communication media render fine local distinctions confusing and on occasions mischevious.

It is not surprising, then, that shortly after the establishment of the national Law Reform Commission, the Attorney-General of the day Senator Murphy, proposed that its first programme would include the preparation of a national defamation law. His successor, Mr. Enderby, took up the same theme. In an address on 30 June 1975 he indicated that he would shortly be giving a Reference to the Law Reform Commission to consider the law of defamation and to produce a draft Bill.[1] The programme which Mr. Enderby announced in November 1975 included the reform of defamat laws as its major Reference.

During the 1975 election campaign, the Prime Minister undertook in his policy speech that if the Coalition Parties were returned to Governme they would refer the protection of privacy to the Law Reform Commission. Newspaper comments pointed to the inadequacy of a reform of privacy laws in isolation from a re-examination of defamation law in Australia. The two were perceived to be inextricably mixed. This view must have been shared by the Government. Shortly after a Reference was given to the Commission o 9 April 1976 to review the protections of privacy, on 23 June 1976 the Attorney-General, Mr. Ellicott, signed a Reference requiring review of defamation laws.[2] The Commission's general warrant is to:

> "Review the law of defamation (both libel and slander) in the Territories and in relation to other areas of Commonwealth responsibility, including radio and television... 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. This is a reference to section 6(1)(d) of the *Law Reform Commission Act* 1973. It is also required to note the need to strike a balance between the right to freedom of expression and the right of a person not to be exposed to unjustifiable attacks on his honour and reputation.

Why should there be such a bipartisan concern about reform of defamation laws in Australia? This is not the occasion to review the intricacies of defamation law and practice that cry out for simplification and rennovation. Unanimous support, at a Commonwealth level, for reform in this area of the law does not necessarily promise unanimous support for the reforms, once proposed. There are two features which, above all, I believe freed the conviction that something should be done to reform Australian defamation laws. The first is a growing conviction that defamation actions are no longer an efficient instrument to remedy the wrong complained of. The second is the growing belief that lack of uniformity of laws in this area operates unfairly and ought to be corrected by a national approach, if at all possible. I address myself to these two issues. I will say nothing about the other important questions of defamation law reform. In due course they will be thoroughly canvassed in the publications of the Law Reform Commission.

IS DEFAMATION AN EFFICIENT MODEL?

Why do we have defamation actions? What is the wrong they are seeking to right and could the job be done more effectively in a different way? Broadly stated, defamation exists as a means to permit the law to right the wrongful damage caused to a person's honour or reputation by a published statement or imputation about him.

There is nothing new in a legal system's prohibiting defamatory statements. The Mosaic code included the injunction:

> "Thou shalt not go up and down as a talebearer among they people".[3]

It is rare indeed for an organized society not to provide a means of redress against the making of false and derogatory statements about a person to another. In this, English society, and those who have taken their legal systems from England, place a high value upon a man's reputation, dignity and honour. It is, at heart, an attribute of the respect demanded for the individual. It is bound up in the dignity of being human. English literature abounds in statements of the value which our culture assigns to reputation. None is more exquisite than the language Shakespeare attributes to Thomas Mowbray, Duke of Norfolk in the opening scene of *King Richard II*

> *"The purist treasure mortal times afford,*
> *is spotless reputation; that away,*
> *men are but guilded loam, or painted clay.*
> *A jewel in a ten times barr'd up chest*
> *is a bold spirit in a loyal breast*
> *Mine honour is my life; both grow in one;*
> *take honour from me and my life is done".*[4]

Parliaments, publishers and law reformers will ignore this aspect of our civilization at their peril.

Sometimes defamation actions involve a contest between values which our society would uphold. True it is, we assert a "right" of privacy and of integrity of the reputation, on the one hand. But we also assert a "right" of freedom of speech and of the free press on the other. But if a publication has occurred, the free speech "right" has been asserted. The only possible "wrong" to be righted is the restoration of an injured honour or damaged reputation. It is in this respect that the tort of defamation as presently operating in Australia, is not proving apt for the social problem which it ostensibly seeks to redress. There are a number of difficulties. Delays, some of which involve years rather than months, occur between the publication and completion of defamation litigation. Some of these delays arise from a loss of enthusiasm on the part of the plaintiff when the first flush of anger has diminished. Others arise from interlocutory proceedings. Others arise from appeals. Still others arise because the plaintiff had not the slightest intention of pursuing his claim and issued proceedings in the hope of stiffling expose in the media which he found unpalatable. Whatever the reason, the available figures from a number of Australian jurisdictions make it plain that a prompt resolution of defamation proceedings is the exception rather than the rule. 5.

TABLE

PROGRESS IN DEFAMATION ACTIONS

	Victoria	Queensland	A.C.T.	N.T.
Number of defamation actions instituted in the Supreme Court between 1.1.72 & 30.6.76	271	379	77	4
Number of actions set down for trial in same period.	17	13	5	NIL
Number of actions resolved by hearing, settlement, or default judgement for plaintiff in same period.	10	6	5	NIL
Number of actions formally discontinued in same period.	26	55	6	2
Number of actions dismissed for default by plaintiff in same period.	N/A	8	NIL	NIL

It is recognized that these statistics are not entirely satisfactory. Included in the figures for actions set down and disposed of will be writs issues before 1972. Furthermore, included in the number of writs issued will be actions only recently commenced where it would not be reasonable, on any system of procedure, to expect trial before 30 June 1976. Furthermore, there would probably be some actions in which the parties have settled by release or by some informal means without any order of the court. Some cases would have been commenced without any serious intention of bringing the matter on to trial. Perhaps the most serious defect in the figures is the absence of statistics from the State of New South Wales, where defamation actions are far more prevalent than in any other part of the Commonwealth. Statistics could not be produc from other States for mechanical reasons. However, there is no reason to doubt that the overall position would be very different. It is a sobering picutre. It demonstrates that in the four jurisdictions reviewed, 831 proceedings were commenced and in the same period 21 hearings came to court Because the table lacks the large numbers of settled actions typical of oth areas of litigation, we can take no sure comfort from the fact that our system of justice is providing resolution of these actions away from court rooms. The more probable conclusions to be drawn are that many proceedings are commenced which never had any real intention to advance to trial and many other proceedings are commenced which become enmeshed in the toils of dilatory procedures. Neither conlcusion is one with which we can be satisfied.

Now, writers have been complaining about the laws delays for centuries. Defamation actions are not unique in having to join the court queues. But in judging the significance of delay on a particular course of action, one must continually revert to the nature of the wrong complaine of. On occasions, delay to some extent may be desirable in litigation. It may permit the assembly of evidence and the crystalization of damage, perhaps even the cooling of tempers. But in the case of defamation, delay often militates against the effective writing of this particular wrong.

Plaintiffs assert that interlocutory proceedings in defamation actions are used as part of a positive strategy by which publishers seek to exhaust the patience or pockets of a complainant. Certainly, the annotations to the Statute Book of New South Wales bear witness to the myriad of interlocutory decisions secured on successive defamation Acts. They do much credit to the ingenuity of lawyers but they also raise the contention (however unjustified) that procrastination is used as a conscious device of delay. Conscious or not, the fact remains that it takes a very long time to bring a defamation action to the barrier in most parts of Australia. Few even get so far.

There would appear to be special reasons why defamation actions should, of their nature, have a speedy resolution. General considerations applicable to almost all court proceedings apply to them. There is the problem of fading memory. There is the difficulty of securing necessary witnesses. The wronged plaintiff or justified defendant have the claim hanging over them for a time. But to these general considerations must be added factors special to the claim of damaged reputation. Unless a person's honour and reputation are vindicated forthwith, it will often be impossible, in the nature of things, to remedy the wrong months or years later. The passage of time makes it almost impossible for a judge or a jury accurately to place themselves in the context of the statement complained of. If a statement is made during discussion of a topical matter as is often the case, there will be a certain atmosphere conditioned by contemporaneous events. The statements of other people and current public attitudes are frequently relevant considerations in judging the statement of imputation in its context. Furthermore, the right of public discussion is a precious one. It should be inhibited to the minimum possible extent. Litigation which may restrict public discussion should therefore be disposed of as quickly as possible. The competition between sustained reputation and free speech requires speedy resolution. A damages verdict in favour of a wronged plaintiff years after the event will often do precious little to restore his reputation. There is no obligation to give publicity to the verdict. The position may be quite irretrievable by the time the verdict is secured. The compensation of money, especially if paid over silently between the parties' solicitors may be cold comfort indeed for the damage that has been sustained. In the field of wronged reputations, justice delayed may be justice defeated.

But the problems of defamation are not only plaintiff's problems. Publishers equally face acute problems in the present system. They must be concerned about the possibility of large vereicts with exemplary damages that can make a mark in the pocket even of a propsperous newspaper. In a small provincial country or suburban journal, a large verdict of this kind could prove fatal. Government instrumentalities, such as broadcasters and those licensed to broadcast must be especially sensitive to their obligations to obey the law of the land. Early investigation suggests that uncertainty and doubts about the scope of the law of defamation breeds self-censorship. Such self-censorship is often based upon an extremely cautious view of the law. In view of the variety of Australian defamation laws, misconceptions of this kind can scarcely cause surprise. In the result, many programmes as articles are "killed" on the editor's desk. The public is deprived of information which, perhaps, ought legitimately to be before it. The victime is the "right" of free speech.

The above table also demonstrates that publishers in this country face a special difficulty. This is the use of "stop writs" to stifle debate of issues. It is an abuse of the administration of justice that takes on a special relevance in Australia. We can have no appeal here the constitutional guarantees of freedom of speech. We have a *tradition* of free speech. But we do not have a legally protected and enforceable *right* of free speech. The Queensland figures, included in the above table, moved the then Queensland Attorney-General, Mr. Knox, to point up the use of defamation writs to inhibit discussion.[6]

But enough has been said to suggest that defamation actions are not working effectively. The tort of defamation has been treated as just another civil wrong to be tried in much the same way as a running down case or a claim for breach of contract. This has no doubt occurred for historical reasons and out of habit. Nobody has stopped to ask whether trial procedures developed to resolve other issues are apt to resolve the special issues that arise in a defamation case. If we remove the law's blinkers what other models are available to balance more effectively the interests that are at stake here?

ALTERNATIVE PROCEDURES

Self-Discipline: The Press Council

In April 1970, a committee was established in Britain to consider whether legislation was needed to give further protection under English law against intrusions into privacy. The report of this committee, known as the Younger Committee, was presented in May 1972. It is a major contribution to the discussion of the legal aspects of privacy. The report discloses the committee's finding that the largest number of complaints concerning privacy intrusion related to complaints against the press.[7] The complaints were as vigorous as they were numerous and led the committee to say this in its report[8] -

> "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."

The Younger Committee outlined the then composition and operations of the Press Council of Great Britain. It quoted statistics for the years 1970-71 In that time 370 complaints were received by the Press Council's Secretariat Of the total complaints received only 38 (about 10 per cent) were considered by the Council itself. Of these 13 were upheld. Twenty-five were rejected. Thus only 3.5 per cent of those who took the trouble to put a written complaint to the Press Council were held to be justified. The Younger Report quotes examples of published material which press representatives in their evidence defended as proper.[10] The defences advanced at least raised 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 involve 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) were also sought to be justified. It was said that suppression of identities would have removed the sense of immediacy and personal involvement of the public in such a matter of grave concern. These complaints and the justifications which followed them have a familiar quality. Australia is not immune from this problem.

In the end, the majority of the Younger Committee did not favour the creation of a tort of privacy to provide legal address in cases such as this. Although conceeding the deficiencies of defamation law and of the Press Council, the majority sought to have the Press Council reconstitut so as to improve its effectiveness. Principally, it was recommended that the number of press representatives upon it should be reduced.

We now have a Press Council in Australia. Its first chairman is Sir Frank Kitto, a former Justice of the High Court of Australia. The Council is obviously in an experimental stage. It is plainly a healthy, if somewhat belated innovation. It would be idle to ignore the criticisms that have been made of the Press Council of Australia since its establishmen One major newspaper interest in Australia (the Fairfax Group) has eschewed membership of the Council. Its scattered publications are not subject to the Council's discipline. It has published criticism of other newspapers in its columns but refuses to submit itself to like scrutiny. The absence of this major chain of publishers, reduces significantly the universality

of the Press Council's effectiveness. But this is not all. The composition of the Press Council has been criticised along lines rehearsed in the Younger Report. It comprises, at present, of a majority of press representatives. This consideration takes on a special importance when it appears that members of the Council employed by a particular interest are not obliged to disqualify themselves when considering complaints agains their newspaper. A third criticism tests this experiment against the willingness of those who are criticised to publish the finding of the Council when adverse to the interests involved. The refusal of one newspaper in the early stages of the Council to publish criticisms made of it by the Press Council did not inspire confidence. Other criticisms have been voiced concerning the results of particular determinations, the publicity given to findings made against newspapers and the adequacy of this form of redress as well as of the absence of coverage of broadcasting and television interests.

For all this, the Press Council is clearly a healthy development. Those who are concerned about a free press which respects individual honour and privacy will be closely watching the operation of this experiment in institutionalized self-discipline. In other areas whwere public sensitivit: are involved, there is a growing conviction that some matters are just too important to be left to the discipline of bodies comprising mainly or exclusively colleagues of those under fire.[12] The media may be in this class. Whether institutionalized or not, self-discipline will clearly have an abiding role to play in balancing the interests at stake here. Most wrongs to reputation will continue to end up on the editor's cutting floor. Means of redress, legal and extra legal will continue to be needed for the exceptional, aggravated cases.

A Media Ombudsman

The universal delay and expense of judicial proceedings has resulted in the development of administrative means of resolving disputes. Is this a possibility that must be considered to resolve competing claims of free speech and damaged reputation? Sweeden established a Press Council as long ago as 1916. But in 1969, it took the procedure a step further. The Press Council was re-constituted so that the majority come otherwise from the press. But in addition, the 1969 reform established the office of Press Ombudsman for the general public. This Ombudsman's office is directly modelled on the Sweedish Parliamentary Ombudsman. But unlike the latter, he is appointed on the initiative of the press organizations themselves as part of the self-discipline system. He has no legal powers. All complaints against newspapers and magazines go to him. The possibility of satisfying the complainant by securing a correction or a right of rejoin are explored. Where this fails, the Press Ombudsman may either reject the

complaint as not sufficiently well founded or refer it to the Press Council together with his opinion. In 1974 the functions of the Press Ombudsman were expanded to permit him to decide a case by his own verdict in "mild cases of clear divergence from good journalistic practice".[13]

The power of the Ombudsman to move rapidly and to secure, by negotiation, a right of reply or a correction has attracted much approbatio in England of late.[14] Although it has been said recently that we are suffering from Ombudsmania, the merit of the Sweedish system is clear. It allows swiftness of correction and the opportunity for an equal say, without necessarily exploring to determining the merits of a particular controversy. The modern dissemination of news may require a modern approach to the mistakes and error that will inevitably arise in an industry of this magnitude. We ought not to be hide bound to a cause of action which is proving useful to a limited number of persons only and then after procedures that are fraught with technical snares. But the Ombudsman approach is not without its own problems. It reposes vital decisions that affect important values in our society in the hands of administrators who may or may not adequately represent community standards.[15] It might be dangerous to create an office that even dimly resembled that of a national censor. Sometimes diversity and inefficiency have merits of their own. The passage of the Commonwealth's *Ombudsman Act* and the enactment in nearly all of the States of Australia of like legislation will probably lead to more and more demands for Ombudsman-like remedies to cure social wrongs. If judicial procedures fail adequately to respond to complaints against the media, there is little doubt that demand for Ombudsman-like redress will grow.

Defamation: Expedited Procedures

A third possibility is to modernize defamation procedure by the provision of compulsory curial means that will give special expedition to defamation actions. For example, if defamation actions were to be instituted by summons returnable before a Judge or Master within days of issue, this would ensure that in every case the parties were brought before the court at a time when the damage to reputation and the justificat of publication were still fresh. It may be objected that such expedition a special treatment cannot be justified, at least in every case, when measure against the urgency of competing litigation. But if the nature of the alleged damaged damage to be redressed is borne in mind, there may be a special reason for compulsory expedition of defamation cases or some of them. A procedure of this kind might immediately take hold of the large numbers of unlitigated writs which presently clog the court lists and never come on for trial. Those who issue stop writs and those who persist with

meritless defences would be obliged to face a court. I cannot but believe that this would have a salutory effect on each. Any scrutiny of defamation law reform inevitably requires consideration of defamation procedure. Dela complexity and expense frustrate the purpose which the tort of defamation was designed to serve. That purpose is the provision by the law of a means to restore as far as possible a damaged reputation, whilst the damage is still fresh in mind. This purpose is the guiding star for those who would reform defamation law. It is the reason that reformers look increasingly to informal bodies such as the Press Council and administrative agencies such as an Ombudsman. Those who would prefer to keep this social disciplin within the judicial process will only succeed in the long run if judicial machinery can prove capable of delivering remedies that are appropriate to the wrong alleged.

NATIONAL LEGISLATION? THE PRESENT POSITION

Australia as a federation enjoys much diversity of law. This has promoted experimentation. It sometimes encourages legal progress. If it is assumed that a legally enforceable remedy in the nature of defamation is desirable as an alternative to or in addition to the informal or administrative redress that has been discussed, the issue arises as to whether there is any special need for a national approach to this class of action. Consideration of this issue must start with an appreciation of the present position. There are eight different laws in Australia governing defamation: one for each State and Territory. Putting it broadly, there are three significantly different systems in operation. The first is a common law system. The second is a code system which provides a complete repository of the principles of actionable defamation. The third is a mixed situation in which the law of defamation is partly statutory in origin and partly judge made. Under the influence of Sir Samuel Griffith, Queensland adopted a code at the end of the 19th Century. Tasmania originally adopted the code in 1895 this is now encorpor: in its own *Defamation Act 1957*. Western Australia basically adopted the code in 1902, although primarily in connection with criminal defamation and only partly in connection with civil defamation.[16] New South Wales was a code State between 1958 and 1974. In 1974 the *Defamation Act 1958* was repealed upon the basis of the report of the New South Wales Law Reform Commission.[17] It was replaced by a new Act which returned the law, in many respects, to the common law whilst making several modifications, some of them quite major.[18] Accordingly New South Wales is at present an amalgamation of the common law and statutory law. With minor modifications the common law alone still holds sway in Victoria and South Australia. The two main land Territories of the Commonwealth are in a somewhat mixed position. In the Australian Capital Territory, the law is still governed

by the New South Wales Act of 1901, as it was amended in 1909. This was the law which the Capital Territory inherited upon its establishment in 1911.[19] 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. New South Wales 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, especially in New South Wales.

These are not just academic differences, of interest to scholars only. They are differences which affect defamation actions, especialy the defences that are available to publishers. They can determine the success or otherwise of litigation commenced even upon the same publication which has been distributed in the several jurisdictions.

IS A NATIONAL APPROACH DESIRABLE?

The Arguments Against

What are the arguments against national legislation I would rehearse four. First, it might be said, the Constitution is a contract which was not lightly made and should not lightly be interfered with. Depending upon the view one takes of the Constitution, it either left to or conferred upon the States the general private law affecting citizens, including defamation law. State communities have different histories and have developed different approaches and standards in publications that can be and are mirrored in their laws. Defamation laws touch a matter close to the heart of liberty in any community: namely the balance it strikes between individual privacy and the public's "right to know". This is not a matter upon which uniform approaches are called for throughou Australia. Rather, we should encourage each community scattered around this large continent to establish its own standards and strike its own balances.

Secondly, it is urged that if the balance of legal power is to be changed, so that the Commonwealth intrudes into an area which since federation has been regarded as the province of the States, this change should not be done illicitly. It should not be done by an irregular use of Commonwealth powers which were plainly not intended to embrace defamatio law reform. The record of attempts to amend the Australian Constitution formally indicates a fair degree of public satisfaction with the present balance of legal power struck between the Commonwealth and the States. According to this argument, the initial compact should not be overthrown by stealth. Only if the people approve an amended constitutional contract, in the way laid down in the Constitution, should the Commonwealth intrude, the Territories apart, into the law of defamation. It is not the business

of the Commonwealth. It is the business of the States.

Thirdly, it is often pointed out that diversity of laws can lead to useful experimentation. Each State can be a laboratory for change and innovation, the nation's legal systems progressing unevenly but under the impetus of imaginative changes introduced in different State legislatures. It is said that the very diversity of Australia's censorship laws has led to progress and liberalization in this area.[21] A national Defamation Act or uniform defamation laws might impose, in a vital area, the harsh hand of unimaginative conformity over the whole country: robbing the separate State communities of the opportunity to do legally imaginative things.

Fourthly, and to my mind most powerfully, there is a practical argument. Defamation litigation is a comparative rarity outside the Eastern States. Indeed it is comparatively unusual outside New South Wales The Victorian and Queensland figures have already been mentioned. The numbers of actions coming on for trial in South Australia, Western Australi and Tasmania and in the two Territories are remarkably few. Only in New South Wales is defamation "big business". Outside New South Wales, defamat law reform may be a scholarly business. Within that State it is of vital importance to practitioners, the media and the public alike.

Arguments for One Law

Giving all due weight to these considerations some form of national legislation would still appear to be required. I say "national" to avoid identifying the vehicle that should be used. Several possibilitie exist. One would be to exhaust such Commonwealth power as exists under the Constitution. The other would be to seek references by the States in accordance with the rarely used procedure envisaged by section 51 (xxxvii) of the Constitution. Another means would be to secure uniform laws which could be enacted by each of the States. I imagine that a fourth theoretica possibility would be the repeal of all legislation and a return to the exclusive discipline of the common law throughout Australia. There seems little likelihood of this fourth possibility recommending itself otherwise than in Victoria or South Australia. If a single law of defamation is to be found in Australia it must be found within the Constitution by a reference of power or by negotiations leading to a uniform Act.

I shall seek to demonstrate that the problems presented by the present dispirit situation are such as to warrant a search for a single law of defamation in Australia, despite the considerations mentioned above. The first and most powerful argument arises from the very nature of news and information dissemination today. The Commonwealth Attorney-General, Mr. Ellicott, put it this way in an address in June 1976 to the Women Lawyers Association of New South Wales -

> "[Defamation] 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 a 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]

In a speech delivered a few days later in Launceston, Tasmania, the Commonwealth Attorney-General warmed to this theme -

> "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. Those 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]

These are arguments of convenience and practicality. But there are other reasons. The sheer complexity of defamation laws inevitably leads, in many cases, to results that are unsatisfactory from society's point of view. Every metropolitan daily newspaper in Australia has some distributio across State or Territorial boundaries. At least two newspapers are distributed in substantial numbers in all States. For the purposes of the law of defamation, each sale of a newspaper is a separate publication given rise to a separate right of action.[24] A particular item may give rise to no action whatever in the newspaper's home State. But it may be actionable in another State or Territory. The newspaper management is confronted daily with the task of knowing and complying with the law of every State and Territory in which it makes sales of its journal. Is it surprising in these circumstances that some newspapers employ a full time solicitor to check its copy for compliance with the laws of the various areas of distribution and that all newspapers need constant access to legal advice concerning the complex and varying defences that are available in different jurisdictions of Australia? Difficulties such as this in the newspaper area increase significantly when the electronic media are involve

Many radio and television transmissions cross Stat boundaries. Indeed some programmes are specifically designed for nation wide transmission. More often than not these are programmes with controversial news or comment in them. Whereas newspapers have hours within which to be compiled and printed, many radio and television programmes, especially those in the fields of current affairs or the news, are produced to much more stringent time limits. The broadcasting station may have only minutes between the making of the record and the transmission. In some cases the transmission will be simultaneous. In talk-back programmes, the lapse is little more than a minute or so. In these circumstances, to require a producer or a staff member monitoring the broadcast, to know or obtain advice upon the widely differing defamation laws of eight different jurisdictions in this country is to require the impossible.

In these circumstances it is not surprising that those who have to face these decisions look askance at a legal system that imposes such unreal obligations upon them. The burdens cast upon publishers and even upon their lawyers are unreasonable. To calculate in a given case the various possibilities of liability, having regard to available defences, may be a logician's dream. To those laymen involved, it represents a great puzzle. To the lawyers involved it is a dilema. It bewilders and confuses juries who are charged to try defamation actions. It shames the law.

Now, in some cases, a publication will be confined to a small community or a broadcast transmitted locally only. In such a case, no particular difficulty arises from the present lack of uniformity. Where any element of "interstateness" arises the confusion begins. One of three results will follow. The first is that, ignorant of the versity of the law, the publisher will simply proceed and hope for the best, guided by nothing more than his own sense of ethics. The second possibility is that the item will be published for the programme transmitted on the "commercial risk" philosophy. Being in doubt as to whether the programme ought to be broadcast, it might be decided to "publish and be damned". Some would seek to justify this approach by reference to a "market" in defamation actions. But such arguments are unacceptable. Citizens ought to know the law, not only for fear that if they disobey it they will face the consequences. 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. Guidance is plainly needed about the resolution of the tension between freedom of speech and the right to privacy and the protection of reputation.

A third possibility is that the producer or his management will "play safe". He may opt for the lowest common denominator amongst defamation laws and retreat to caution. This may produce either a sifnificant "watering down" of the item in question. Or it may result in its entire deletion from the programme. The result is either case is an unhappy one. A system of law which allows decisions to be made in ignornace and based upon timidity in matters so vital as freedom of speech and public discussion, is surely open to serious objection.

Nor are these academic considerations. Technical advances will increase rather than diminish the capacity for national distribution of information in Australia. Already we have the development of interstate telephones, telex and telefacsimile which expedites and improves the distribution of information to all parts of the continent. Developments of this kind in the simultaneous printing of newspapers in different parts of the country are sure to expand in sophistication. Furthermore, development of ethnic radio, of "talk-back" and local broadcasting stations, of univers: and other special broadcasts all pose new problems to the law of defamatio: The pressures for a single straightforward law are likely to prove irrestible for the simple reason that those engaged in these vital activities will demand clear guidance from society about the conduct which is permissible and will be upheld by the law and that which is not.

PRACTICAL PROBLEMS

To illustrate the practical problems thrown up by the eight differing laws presently in force in Australia, I instance the defence of justification. 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, since 1974, the additional requirement which the defendant has to prove is "public interest".[25] In a jury trial "public benefit" is determined by the jury. "Public interest" in New South Wales 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 it believes to be defamatory but true. By Victorian law, it is permitted to do this. Proof of truth will be its defence. If, however, even one copy of the newspaper is sold in New South Wales, the publisher will be liable to be sued in that State. In such an event, to escape liability to the plaintiff defamed, the newspaper would have to establish not only truth

but the additional ingredient of public interest. If the newspaper is sold in the Australian Capital Territory, the publisher will also 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 (exceptionally newsworthy stories apart) not to print the material unless satisfied that the New South Wales and Capital Territory requirements can be met. Therefore, the Victorian editor despite the legal situation in Victoria may have to forego his rights to publish under Victorian law. Notwithstanding the fact that few of his sales are outside the State he must decide whether to expose himself to the risk of suit in other jurisdictions. The legal tail wags the dog. The lowest common denominator tends to prevail.

At the trial stage, the problem may be even greater. In the situation just cited, the person defamed may choose to sue in Sydney before a jury making a separate claim in his action in respect of publicati in other jurisdictions. The defendant will plead truth together with public interest in respect of the New South Wales claim. To the Capital Territory claim, truth will be alleged together with public benefit. In respect of the Victoria claim, if asserted, truth alone will be pleaded. The jury will be instructed that if it 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 found true, the jury must find for the defendant in respect of the Victorian sales but consider, in relation to those sales which occurred in the Capital Territory, whether the defendant has established the additional element of "public benefit". In respect of the New South Wales sales, it will be for the judge to decide the somewhat similar issue of "public interest" and to charge the jury accordingly on that issue. 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. They will have to put entirely out of their minds the much more extensive publication that may have taken place in Victoria. To ask such logical contortions of a jury appears unreasonable.

In the claim *McLean v. David Syme and Co. Ltd.*[26] the plaintiff owned a property on the south coast of New South Wales between Bega and the Victorian border. An article appeared in *The Age* newspaper suggesting that the plaintiff had interfered with public water supply passing through his property for his own ends. The newspaper was printed in Victoria, circulated principally in that State but also had a circulation of about 2,000 in New South Wales, fewer than 60 in the area close the plaintiff's property. The trial judge and the New South Wales Court of Appeal found

that the plaintiff's statement of claim alleged a course of action in New South Wales only. Accordingly the question of whether the statement complained of was actionable in Victoria did not arise. The trial judge refused to admit evidence concerning the paper's circulation outside New South Wales. But the Court of Appeal held that this evidence was admissible. It was admissible for the purpose of defeating a defence of qualified privilege. But it was also admissible on the issue of damages.

Might not this conlusion lead to strange results? Assume the defamatory statement was perfectly defenceable in Victoria on the ground that it was true. Assume it was not defeceable in New South Wales because the additional element, be it "public benefit" or, as now, "public interest" was lacking. A New South Wales court would still admit evidence of the wide circulation of the journal in Victoria for the purposes of awarding agravated damages to a plaintiff even though, in that State, the statement complained of would not give rise to a course of action at all.

Simultaneous broadcasts to several jurisdictions pose acutely the problems thrown up by differing laws. In *Gorton v. Australian Broadcasting Commission*[28] the plaintiff, then Prime Minister of Australia, complained that the defendants had published a defamatory television programme concerning him. 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 complained that he was seriously damaged by it. Between March 1971 and final judgment in July 1973, not only did Mr. Gorton loose office, but his Party was in opposition.

The statement of claim alleged three distinct courses of action in relation to the publication in each jurisdiction. The defence raised defences under the laws of the respective jurisdictions in which the publication was alleged. In relation to the publication in Victoria, truth was pleaded. In relation to the publication in New South Wales and the Australian Capital Territory, truth and public benefit were pleaded At the time of the proceedings the relevant New South Wales law was the *Defamation Act, 1958.* With respect to the New South Wales publication, reliance was also placed upon section 17(h) of the New South Wales Act. This accorded qualified privilege to a publication made in good faith of defamatory matter "in the course of or for the purposes of the discussio of some subject of public interest, the public discussion of which is for the public benefit and if, so far as the defamatory matter consists of comment, the comment is fair".

The plaintiff chose to sue in the Supreme Court of the Australian Capital Territory. Fox J, as he then was, found on the fact that the statements complained of were defamatory and were false. Therefore, the course of action was made out in relation to the Victorian publication complained of. Similarly the New South Wales and Capital Territory defences of truth and public benefit fail since, although the element of "public benefit" was present, truth was lacking. However, in relation to the publication in New South Wales, his Honour held that the defamatory statement was protected by section 17(h) of the New South Wales Act. The statement, although defamatory, was made in good faith in the course of and for the purposes of the discussion of a subject of public interest. The plaintiff therefore succeeded in respect of the publication in Victoria and the Capital Territory. He failed in respect of the self-same publication in New South Wales. The result moved Fox J to observe -

> "That the same matter published simultaneously in three jurisdictions from the same videotape should be the basis for the recovery of damges 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".[29]

The development of multiple means of simultaneously transmitting informatio across jurisdictional boundaries promises an increase, not a diminution in problems of this kind.

Unless a unified defamation code can be found, there is little doubt that forum shopping will become a first obligation of plaintiffs entering the defamation lists. Justification is only one of the many variations that can arise from different defences available in the eight jurisdictions of Australia. A recent case illustrates the disadvantages that may acrue from suing in a particular jurisdiction. Senator R.C. Wrigh a Senator to Tasmania sued the Australian Broadcasting Commission in respect of a telecast which dealt with the election for the President of the Australian Senate. The vote made it fairly obvious that one Liberal-Country Party Senator had voted for the Labor Party nominee for this office. Senator Wright responded that the question was insulting. When told that some of his colleagues were saying so the plaintiff showed him the door. No explanation or account was offered to justify the conclusion that it was Senator Wright who had defected or "ratted", to use his expression.

The action was tried in the New South Wales Supreme Court before Yeldham J and a jury. At the close of the plaintiff's case the

defendant successfully moved for a verdict. It relied upon section 22 of the New South Wales Defamation Act which provides for defence of qualified privilege for a publication -

> 22(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 him information on that subject; and
>
> (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances.

Yeldham J upheld the submission. He found that the plaintiff had not proved malice on the part of the defendant. He instructed the jury to return a verdict for the defendant. However, he felt constrained to say this -

> "Before concluding, I would add only this: I have held, albeit with some regret, that although the defendants undoubtedly did publish of the plaintiff matter which was false and which was defamatory of him, nevertheless because it was published upon a privileged occasion, and he has failed to prove malice, he cannot succeed in the present action. That is in no way to say, however, that he has failed to clear his good name from what I regard as a wholly unjustified slur which the defendants put upon him. Whatever the precise legal situation may be, common fairness in my opinion dictated that there should have come from both defendants, once the falicy of their statements was exposed, a retraction and apology to these man whose service in the interests of his country has clearly been demonstrated ... If this case was to be decided upon the merits alone, the plaintiff clearly must have succeeded".

Although defences analogist to section 22(1) exist elsewhere in Australia, it is unlikely that, certainly in the common law States, the defence would have barred Senator Wright's recovery, as it did in New South Wales.[31] Had he sued in another State, and had the same view of the merits been taken as expressed by Yeldham J, there is at

least the possibility that he would have succeeded. The result is an unhappy one. The lesson for practitioners is that care must be taken to choose the most advantageous jurisdiction. There are other cases which illustrate this point but it is really an obvious one. 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 injustice or to the lowest common denominator in free speech, the argument for a resolution of this diversity seems irresistible. Make it every full allowance for the advantages of diversity and experimentation, this seems to be a clear case for a single national law. But can it be achieved?

A SINGLE CODE: IS IT POSSIBLE?

Of the four possible ways to achieve uniformity of defamation laws in Australia, the least likely is a spontaneous return by all States to the common law. Even New South Wales, which lately took a partial step backwards to the common law, felt it necessary to do so cautiously, modifying the common law in a number of important respects.[32] It is unlikely, local susceptibilites being as they are, that the code and statute States would suddenly abandon an approach that is endured for the better part of this century. Other means must be found.

The Australian Constitutional Convention has been exploring those other means. The issue was before the Convention in Sydney in September 1973. It was referred to a Standing Committee which reported to the Melbourne Convention in September 1975. The record of the Standing Committee's recommendation is as follows:

> "The Committee agreed to recommend to the Convention that this matter was of national concern and should be transferred to the Commonwealth under the reference power, if all States can agree on the terms of reference. If not, then by amendment to the Constitution, provided that such amendment does not confer power on the Commonwealth to legislate in respect of the questions of defamation as it affects the privileges of State Parliaments and Courts".

The motion was resubmitted to the Convention meeting in Hobart on 27 October 1976 The resolution was initially put in the following terms:

> "That this Convention recommends that -
>
> (a) the matter of defamation shall be the subject of power by all States to the Parliament of the Commonwealth; and
>
> (b) if such references are not made within a reasonable tim the Constituion should

be altered to confer the power to make laws with respect of defamation on the Parliament of the Commonwealth -

but any power so referred or conferred should not extend to the making of laws with respect to the privileges of State Parliaments or State Courts.-

Adopted by the Convention at Melbourne on 25 September 1975

be further considered".

The debate that ensued demonstrated that there was little support for the present diversity of laws. An amendment was moved proposing a differing approach to the matter namely:

> "That the matter of defamation shall be the subject of uniform laws throughout the Commonwealth and that the precise form of uniformity of laws with respect to defamation should be settled by the Commonwealth and State Governments in consultation".

Those who supported this amendment stressed support for the principle of uniform laws but a preference that the single code should be achieved through co-operation between the Commonwealth and the States, arriving together at an acceptable formula.[35] Those who opposed this approach argued that it amounted to nothing more than pushing the problem "back to the Attorneys-General, who proved ineffective" upon this subject. The Convention divided. Thirty-nine delegates supported the amendment. Fourty-two opposed. The amendment was accordingly negative. The Convention then reverted to the original resolution which was put and carried by 54 votes in favour, 32 delegates being against. The Commonwealth Attorney-General, Mr. Ellicott, acknowledged the problem at the end of the debate:

> "The main motion ... First tries to solve the problem by proposing a reference of power. Then, if that reference does not take effect, it suggests a referendum. In the light of the debate here today, neither of these courses appears to be very hopeful. It appears that three State Governments are against the reference and that does not augur well for the success of a referendum. The Commonwealth Government does regard this as an important area for uniformity and the Law Reform Commission is considering the law on defamation with that in mind".

During the discussion at the Hobart Convention, even those who did not much favour the reference of power of amendment of the Constitution, expressed their opposition in cautious terms. For example, the Attorney-General for Victoria, Mr. H. Storey Q.C., said that:

"If the States and the Commonwealth can agree upon uniform laws in this field, it may be that a carefully drawn reference of power could be made to the Commonwealth. I would not exclude that possibility".[37]

Practicalities, as the Commonwealth Attorney-General stressed, suggest that the solution of uniform laws may have to be first explored. There is no point in disguising the problems which this entails. The history of uniform laws in Australia is a discouraging one. There are immense difficulties in securing the agreement of the States upon the form of legislation in the first place. There are then difficulties, not least of machinery, in keeping uniform legislation up to date and consistent.[38] Necessary amendments are made in some States only or not at all. Modernization proceeds at the pace of the tardiest State. Experience teaches that it is difficult to arrange for six States and two Territories to march in step. The current debate about the Commonwealth's corporation power originates, in part at least, from frustration arising from the growing lack of unifomrity in the Uniform Companies Act of 1961.[39]

From the point of view of the reformer, however, there is another and perhaps more significant problem in seeking a national defamation code through uniform State and Territory laws. If it is assumed that the road to reform in defamation law lies in the reform of defamation procedures, special problems may arise unless State courts can be invested with federal jurisdiction, sufficient to support orders having effect throughout the Commonwealth. In several jurisdictions overseas, for example Japan and Quebec court ordered retractions are part of the procedure in defamation trials.[40] Assume this was considered an appropriate part of a modern, effective defamation code. The State courts, operating under State legislation might very well wish to ensure that to be effective, an order for retraction or for a right of reply was obeyed in interstate publication. It is doubtful whether a State Supreme Court, not invested with federal jurisdiction, would be prepared to make an *impersonium* order in respect of something done outside that State.[41] It is even more doubtful whether a State Act could properly empower a State court to do so. Yet, if retraction procedures were confined to operation in a particular State, they might loose much of their effectiveness.

Other examples spring to mind to illustrate the difficulty of endeavouring to cope with this problem by State laws. It would be less easy to prevent forum shopping and to impose a *forum conveniens* principle under uniform State laws than under a federal law administered

by the State courts. But once a decision is made that a single national code is, on balance, desirable, discriminating between the vehicles that can deliver that code requires a careful consideration of the limits which each method necessarily involves. Even if all of the practical considerations that usually stand in the way of achieving uniform State laws can be set to one side in this case, the result of approaching the problem by uniform State laws may dictate acceptance of reform which is less adventurous and less desirable. This is not just a matter of delivering the same product in a different way. The vehicle chosen will inevitably affect the solutions that can be offered.

Considerations such as these have driven those who feel powerfully the argument for a single national approach to this subject. To call, on occasions, for the Commonwealth to exhaust its powers and to cover, so far as it can, those areas of defamation which are within its constitutional grasp. The head of legislative power which is most frequently referred to is that contained in section 51(v) of the Constitution. By this, the Commonwealth is empowered to make laws with respect to "postal, telegraphic, telephonic, and other like services". Other heads of power, frequently suggested for use here include the interstate trade and commerce power, power in respect of copyright, patents and trade marks, the corporations power, the Territories power and the incidental power.

It is the power contained in *placitum* (v) of section 51 that is most frequently referred to as the most likely means by which the Commonwealth could unilaterally take hold of a great area of defamation law, leaving it to the States to consider, under that pressure, the need to adjust their laws. The approach has its own special hazards and inadequacies as the enactment of any law based upon such a hybird mixture of powers necessarily entails. The scope of the Commonwealth's power to do this is a matter of controversy. The problem is the familar one of characterization and least one author has concluded that the Commonwealth would have power to control defamatory material occuring in radio and television broadcasts.[42] Save in one respect, there is nothing much that can added to his exploration of the issues. A recent decision of the High Court of Australia does suggest that his conclusion is the correct one.

In *Ex Parte C.L.M. Holdings Pty. Limited and Anor; re The Judges of the Australian Industrial Court.*[43] The facts of the case are not relevant for present purposes. An issue arose concerning the constitutional validity of section 79 of the *Trade Practices Act 1974*. To answer this question required, in the opinion of Mason J (who wrote the leading judgment) a consideration of what he termed the "direct operation" of the provisions of the Act and as well a consideration

of "the extended operation which the Act is given by the complicated provisions of s. 6(2) and (3).

Section 6(3) of the Act sought to give the Act and extended operation by reference to a number of Heads of constitutional power. Mason J described the technique as follows:

> "Subsection (3) [of s. 6] then provides for Div. 1 of Pt. V having a further additional operation on the footing that it is to have the same effect as it would have if the Division (other than s.55) were confined in its application to engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast (s.6 (3)(a)) and, subject to one other alteration, if a reference to "corporation" included a reference to a person not being a corporation (s. 6 (3)(c)). Thus it appears that sub-s. (3) is designed to give the Act a further operation which can be supported by reference to the power contained in s.51(v) of the Constitution".

Mason J explores this "extended operation" which section 6 (3) aimed to give the relevant provisions of the *Trade Practices Act*. His Honour concluded that section 6(3) afforded quite independent additional operation to the sections of the Trade Practices Act, supported by "the Heads of constitutional power on which s. 6(2) and (3) are based". The decision certainly suggests an expansive scope for the operation of the postal and telegraphic power.

Barwick CJ specifically aligned himself in terms with Mason J's conclusions concerning "the use of s.6 of the Act in producing what is in substance a series of enactments, none of which are inconsistent with each other and each of which is separately supported by a Head or Heads of legislative power". Gibbs J concurred, subject to one reservation which need not be explored. Stephen Jacobs and Murphy J contented themselves with expressing full agreement with the reasons for judgment delivered by Mason J. The High Court has therefore expressed a unanimous opinion on this subject. It is relevant not only to the operation of the postal and telegraphic power. It is also relevant for that style of Commonwealth drafting which seeks to call in aid, in support of a Commonwealth Act, separate Heads of legislative power.

CONCLUSIONS

Any approach to defamation law reform in Australia requires

the reformer to grasp two fundamental and inter-related problems. The first is the inefficiency of the defamation action to correct the wrong which is complained of, namely damage to a person's honour or reputation. It is inefficient because of delays that are involved in treating this as just another tort. It is inapt in the remedies which are provided, years after the event and then only after the numberless technical impediments have been overcome. Unless the judicial process can provide speedier and more relevant remedies, alternative solutions will inevitably call for consideration. These alternatives will include, in the case of media defamation at least, administrative and self-regulating mechanisms which can determine controversies quickly and remedy damaged reputation, whilst it is still possible to do so.

The second issue arises from the disparity of eight separate defamation laws presently operating in Australia. Every due allowance must be made for the arguments in favour of diversity. These range from the preservation of the constitutional compact to the need to uphold experimentation in private law areas and to face the reality that defamation litigation is in fact big business in some parts of the country only.

But even after proper allowance is made for these considerations, the problems which arise, in an age of mass communications go beyond mere inconvenience. They result in confusion and uncertainty on the part of publishers, where there should be clarity and legal guidance. They promote caution and encourage timidity where there should be freedom of speech and of the press. They lead to unfair results and will encourage forum shopping unless a single national code can be achieved.

The ways to secure this code are four. One, the return to the common law, can be put out of account. A reference of power to the Commonwealth is just not the Australian way of constitutionally doing things. Frank amendment of the Constitution seems equally unlikely. The choice is therefore narrowed to a quest for uniform laws or the exhaustion of such Commonwealth power as might support a substantial Commonwealth measure to control defamation. The resolution of this choice will be a matter, ultimately, for Parliaments. But for the good name of the law in Australia, the resolution ought not to be long delayed.