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DEFAMATION REFORM : NEW ZEALAND AND AUSTRALIAN STYLE

The Hon. Mr. Justice M.D. Kirby

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Recent proposals for reform of defamation law and procedu in Australia and New Zealand are compared and contrasted in this paper. After stating a number of reservations which arise from the fact that the Australian exercise is not yet complete, that the publishing environment in each country is different and that a principal theme of the Australian project is to secure a uniform law, Mr. Justice Kirby proceeds to identify the points of similarity and difference in the two reform proposals.

Each starts with a common theme. Defamation law must strike a balance between protection of reputation and the free flow of information. It is agreed that the current law is unsati factory, particularly in the balance it strikes. A number of approaches are rejected : e.g. the introduction of a "public figure" category and remitting complaints to the Press Council. A major innovation in each scheme is an expanded defence for the publishing media but at a price of the media allowing, for the first time, a statutory "right of reply". In each proposal it is suggested that the defence of justification should be truth alone

The approaches differ in the Australian emphasis upon reform of procedures. All defamation actions will be returned before the court within fourteen days of issue. In this way it is hoped to tackle the "stop writ" or "gagging writ" problem. It is also suggested that courts should have power to make correction orders where facts are found to be false. Furthermore, the Australian proposals develop a concept of "wrongful publication". This will embrace not only defamation but protection against publication of certain specified "private facts". The approaches to unintentional defamation, punitive damages and criminal libel are also different in each case.

The New Zealand and Australian reformers are equally divided on the retention of jury trial in defamation cases. The adoption of new court ordered correction procedures creates a special problem for retaining jury trial in the Australian scheme

Many points of similarity and difference are identified in the paper. The author suggests that a comparison of the two reports should assist the respective Parliaments to modernise and simplify this area of the law and, in the Australian federation, to replace eight different laws with a single uniform code.

The Australian Commission sees its exercise, particularly in the happy coincidence of its defamation and privacy references, as an opportunity, rarely afforded, to escape from the toils of legal history and to deal in a harmonious way with a new legal concept, that of wrongful publication.

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The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

INTRODUCTION

Recently in Sri Lanka an editor's nightmare occurred. Almost 1,000 copies of the Monday edition of the *Observer* went on the street in Colombo before a mistaken caption to a photograph on page 1 was discovered. The photograph portrayed Hollywood actors Peter Fonda and Susan St. John sporting on a pleasure yacht off the coast of Texas. The caption said that the photograph showed the Foreign Minister of Sri Lanka, the Hon. Shahul Hameed inspecting an industrial complex in South Korea. The hapless editors of Sri Lanka's oldest English language newspaper were summoned before the National Assembly. They pleaded mistake and were fined more than $1,000. Later the President reduced this to about $400 and ordered a front page apology to the Honourable the Foreign Minister.[1] Life for editors was not meant to be easy. Those who would reform the law of defamation are inclined to agree but to ask whether it was meant to be so hard.

In mid 1975 the then Minister of Justice of New Zealand, Dr. Finlay, appointed a Committee to "study and make recommendations on the law of defamation".[2] Subsequently, the present Minister in mid 1976 extended the terms of reference to include an examination of the law of contempt of court.[3] In June 1976 the Commonwealth Attorney-General in Australia gave the Australian Law Reform Commission a reference to review the law of defamation in areas of the Commonwealth's responsibilities.[4] This reference came shortly after an earlier

comprehensive reference requiring the Commission to report on a review of the law relating to privacy in Australia.[5] The New Zealand Committee's report has recently become available. The Australian Law Reform Commission's discussion papers sketch our thinking.[6] The purpose of this paper is to outline some points of similarity and others of difference in the approaches being taken for defamation reform in our respective countries.

RESERVATIONS

Before embarking on the tasks of comparison and contrast I must note a number of reservations. Although the New Zealand report has been published, the final report of the Australian Commission has not yet been completed. That report should be delivered to the Attorney-General by mid-1978. At the time of writing, a number of critical decisions have still to be made. Any views stated are therefore tentative and personal, at this stage. The Commission has developed its thinking in this and other projects in the open. We have had public sittings at which expert groups and members of the general public have been encouraged to state their experience and views. We have held seminars involving especially representatives of the media, lawyers and practising journalists. We have discussed our proposals on radio and television, in talk-back programmes and in national broadcasts. We have put out discussion papers sketching our developing ideas. We have circulated a draft Bill. We have listened closely to the public debate. Needless to say, editors and commentators have had a field day. With this background, it will not be inappropriate to continue the debate. It would be inappropriate and premature to state the final conclusions of the Australian Commission.

The second reservation is one of general applicability to comparative law. Despite the identical legal tradition and similar social histories of Australia and New Zealand there are plain dangers in the transplantation of legal ideas from one country to another. In essence, this is the point made on the second page of the New Zealand Committee's report. The English law of defamation has been substantially inherited in our respective countries but with little modification for the quite

different publishing environment in each.

> "[T]he publishing environment in New Zealand is unique. It cannot be compared directly with that in the United Kingdom which boasts a national press that is better able to resist threats of action, to afford the defence of proceedings, and to pay the damages if found liable ... Although [awards of damages] are not as high as appears to be commonly believed, we nevertheless accept that the smaller newspapers and printers in New Zealand do not have the financial resources to sustain, and therefore risk, even moderate awards of damages".[7]

In Australia, the publishing industry is differently organised. It has a larger market and is generally more prosperous. But it has problems of its own. Each country must design defamation laws suitable to its own legal and social environment. That there are differences between the approaches in New Zealand and Australia may reflect nothing more than the differences between our respective problems and opportunities. What we suggest as suitable for Australia may not necessarily be suitable for New Zealand and vice versa.[8]

The third reservation relates to the focus of our respective inquiries. The defamation reference in Australia was expanded by the concurrent project on privacy protection. In New Zealand it was expanded, at the suggestion of the Committee, by study of the law of contempt of court. The latter was not within our terms of reference. We have accordingly tackled the social problem raised by contempt proceedings in a somewhat different way. Privacy protection, on the other hand, was not within the scope of the New Zealand Committee's terms of reference and so, apart from being noted, has not been dealt with in this context.[9] Connected with this is an important difference which lies at the heart of the effort of the Australian Commission. Australia is a federation. The law of defamation was not assigned, under our Constitution, to the Commonwealth. Accordingly, with one possible exception,[10] the laws and practices governing defamation remain substantially

those of the States and Territories of Australia. There are therefore eight different defamation laws, nine if the Commonwealth's jurisdiction over the broadcasting and television service is counted. These systems may be categorised in three classes :

* Those jurisdictions which substantially retain the common law of defamation.[11]
* Those jurisdictions which have adopted a defamation code.[12]
* Those jurisdictions in a mixed position where the law is partly governed by statute and partly by the common law.[13]

The publication industry in Australia is now substantially organised on a national basis. Broadcasts of radio and television are reticulated across State borders, frequently, on a national grid. Some publications are even reproduced simultaneously in different States. The confusion and uncertainty of so many differing defamation standards is a major blight on free speech and free press in our country. It is a problem which does not confront the reformer in Britain or New Zealand. It must be seen as a principal problem of the reformer in Australia. The Constitutional Conventions have lately agreed to the urgency of a national defamation law.[14] Achieving it, is not without difficulty in view of the sensitive nature of the issue, the different legal and historical traditions in the various jurisdictions of the country and the absence of clear constitutional power in the Commonwealth, outside the Territories. The principal aim of the Australian Commission's project is to secure a uniform defamation law in Australia. Much else flows from this unique, urgent domestic necessity.

POINTS OF SIMILARITY

The Problem of Balance. Defamation laws affect the balance that is struck in society between the flow of information and the proper protection of honour and reputation. Different jurisdictions strike the balance at different points. In the United States, as a result of the American tradition of "rights", enshrined in the Bill of Rights (and particularly Article 1),

there is a firmly entrenched and legally protected prohibition upon the abridgement of freedom of speech or of the press.[15] The result of this constitutional guarantee, and the attitudes which it nurtures, is the striking of a balance which is weighted heavily in favour of the free flow of information at some cost to protections for reputation and honour. One result is seen in the development of the "public figure" rule. A "public official" or "public figure" may not succeed in an action for defamation relating to his conduct, unless it is proved that the defendant made the statement complained of knowing that it was false or with reckless disregard as to whether it was true or false.[16]

Neither Australia nor New Zealand has developed such an approach. Doubtless as a result of our different legal and constitutional traditions (and possibly as a consequence of our Parliamentary system of government), we have never embraced the "public official" rule in the name of free speech and the free flow of information. Our lawmakers, and probably the majority of our respective communities, are content with a different approach. Even a "public figure" is entitled to protection against false defamatory statements.

The fundamental issue facing those who draft a defamation law is, therefore, where the balance should lie. This issue is plainly acknowledged in the first pages of the New Zealand report.[17] We both accept as a basic principle that damage to reputation can cause financial and social hurt as well as distress and outrage. Likewise we both accept that our kind of society ought to enjoy general free speech and a free press which provides the necessary information for "a full life, informed decision-making and effective democratic government".[18] Our starting points are therefore identical. The recognition of the tension between competing values is common. So is the recognition that the present standard is unsatisfactory, principally because it strikes a mean which is, generally speaking, insufficiently sensitive to the community's right to accurate information.[19] The New Zealand report, in common with the Australian proposals, expresses concern about the problems of the "gagging writ"[20] and the "chilling effect" which defamatio

law has, particularly upon the small media publisher.

The scrutiny of the Australian and New Zealand approaches can therefore be made upon the assumption that our fundamentals are the same and that the general object (with the special Australian problem of uniformity to one side) is identical. It is the adjustment of the law and procedure of defamation actions, so that a new balance is struck which is somewhat more favourable to free speech and a free press. In doing so we have both been careful to preserve reasonable protection for reputation and "not to give licence to the careless or vindictive".[21]

Approaches Rejected. Two approaches for this new balance are rejected by each of us. The first is the "public figure" category of the United States, just described. Each proposal rejects this approach.[22]

A proposal that, as an alternative to actions against media defendants, such matters should be handled by the Press Council was also rejected.[23] In the view of both reform bodies, the Press Councils were an unsatisfactory alternative to the courts, both in terms of their current composition and in terms of principle:

> "The idea is novel. However, we do not consider that the Press Council is constituted as a suitable body for this purpose ... We could not agree to the placing of individuals' reputations in the hands of a non-judicial authority especially when there is no facility for cross examination".[24]

An early proposal of the Australian Commission for an expanded defence of reasonable inquiry drew some criticism from the New Zealand Committee.[25] It provided, in essence, for a defence where the defendant in fact believed the truth of all statements of fact contained in the matter published and did so on reasonable grounds and after making all inquiries reasonably open to him in the circumstances. The price of this expanded defence was an obligation upon the defendant to afford

the person defamed a "full and adequate right of reply" at the earliest opportunity following a request to do so.

The New Zealand Committee (and the Australian Commission on reflection) considered this defence to have tipped the balance too far against the proper protection of reputation.[26] The extension of general qualified privilege to newspapers and other media with their wide and indiscriminate circulation was resisted by the common law,[27] and by earlier reviews of the law of defamation in England.[28]

Expanded Defences for the Media: The Right of Reply. The most novel proposal of the New Zealand report is clearly the suggestio of a special, limited qualified privilege for the media. The Australian scheme, even as reconsidered, contains an expanded defence of fair report for general publishers (i.e. those publishing beyond particular persons). Each approach expands protection for the publication of material later held to be defamatory and untrue. The price of this defence includes, in each case, proof that the defendant offered the complainant an adequate and prompt right of reply. True it is, the proposals are hedged about by different limitations. The New Zealand scheme is limited to the media. The Australian proposal makes no distinction between different defendants.[29] The New Zealand proposal requires that the subject matter should be one of public interest at the time of publication, and that the publisher should have acted "with reasonable care ... and believ[on reasonable grounds" the truth of statements of fact.[30] The Australian proposal requires attribution of a statement to a particular person, who has not been influenced by the publisher where the defendant's publication "having regard to its nature ar the circumstances surrounding its making, was reasonable". The machinery of the right of reply is also different. The Australian proposal requires the defendant to publish the reply "at the earliest reasonable opportunity available after a request by the plaintiff". The New Zealand scheme fixes a specific time limit of 30 days and imposes specific obligation to pay costs and expenses.[31] The New Zealand proposal contents itself with an obligation to publish "with adequate prominence". The Australian draft expands this to oblige publication "in such form and manner as is likely to reach the same

general audience as the attributed statement reached".[32] So, there are differences. But there is a common theme here and a common rationale for it. It is that the public has a legitimate interest to have reported to it, in certain circumstances, allegations that are made about particular persons and an equal interest to hear both sides of the story.[33] The English law of defamation, in common with the English law of torts generally, has relied substantially on the carrot of awarded damages. There has been inadequate use in the law of t stick of voluntary or court-encouraged recompense.[34] This is not the case in civil law systems. As the New Zealand report points out, the "right of reply" is an important and long-standing remedy in France, Germany and other European countries for the injury done by untruthful or inaccurate statements.[35] The research done by the Commission indicates that it is far the most usual remedy for this complaint throughout continental Europe. It usually has a compulsory element which the proposed Australian and New Zealand defences mentioned above would not involve. Each of them depends upon the voluntary initiative of the publisher to afford a person who claims to have been wronged, the opportunity of putting forward his version of the facts. Naturally, most news outlets already do this as a matter of course both because it is right to do so and because it promotes news and public discussion. The provision of a statutory endorsement for this procedure should encourage publication of replies in *all* appropriate cases and ensure that they are published promptly and in an adequate form. It is interesting to note that the Supreme Court of the United States has struck down as unconstitutional a statute in Florida which said, essentially, that where a personal attack was made upon an individual in a newspaper, that individual had a right to equal space for a reply.[36] But that is not the proposal here. Nor are we in Australia or New Zealand impeded by absolutist constitutional guarantees in favour of free speech and the free press.[37]

Defamatory Matter. Without elaborating the matter, the Australian and New Zealand proposals are basically at one in their treatment of defamatory matter. The criterion for deciding the natural and ordinary meaning of the words complained of is proposed to

be the meaning which the "ordinary reader" or "ordinary persons"[38] would place upon the words in their context. Each proposal obliges the plaintiff to give particulars of defamatory imputations relied upon and of any extrinsic facts relied upon to establish a legal innuendo.[39] The same approach is taken to identification of the plaintiff. Each proposal contents itself with the law as expressed in *Hulton v. Jones*.[40]

Justification : Truth Alone. The proposals also agree that a defence to a defamation action should be established if the defendant can prove that the defamatory imputations are true. Each proposes a minor extension of "truth" to include matter which is in substance true or not materially different from the truth.[41] Each proposal rejects the additional requirement that the defendant should prove that his publication was made "for the public benefit" or "in the public interest". Such an additional requirement, in its differing forms, has never been a feature of the civil law of defamation in the United Kingdom or in New Zealand.[42]

Here the superficial similarity between the two approaches ends. In several jurisdictions in Australia, the defence of justification requires, and has long required, proof by the defendant of an additional public interest or benefit, in order to justify the publication of defamatory matter. The history of this is clear. In 1843 a Select Committee of the House of Lords recommended that in both civil and criminal proceedings truth should be a defence if, but only if, the publication was for the public benefit.[43] This proposal was embodied in Lord Campbell's Libel Bill of 1843. In respect to civil actions, the proposal was rejected by the House of Commons. In New South Wales, however, the Committee's full recommendations were adopted in 1847 thus transplanting in Australia the English proposal that made "public benefit" as well as truth essential to the plea of justification. The English Commitee's suggestion was also adopted, via the Indian Criminal Code, in the defamation codes of Queensland and Tasmania. It was inherited in the Australian

Capital Territory. Its adoption in England has been rejected by successive recent committees.[44] In New South Wales the *Defamation Act* 1974 was modified to drop the requirement of "public benefit" and to substitute for it the requirement that the subject matter should be one of "public interest",[45] the latter to be determined by the judge, not the jury.

The Law Reform Commission took the view that the legitimate operation of the "public benefit" requirement was the provision of some degree of privacy protection against "muck-raking", such as the revival of a "true but unfortunate and damaging event in the person's past".[46]

> "These are really privacy protections first introduced into Australian law in 1847 and designed to guard people against the publication of even true statements of purely private concern, details of their family life, sexual relationships, personal friendships or distant criminal history".[47]

Both the New Zealand Committee and the Australian Commission took the same view that defamation law was not the appropriate vehicle to protect privacy. Each condemned the vagueness of the notion of "public benefit" and the difficulty it posed for publishers having to make a decision, often to a strict deadline, as to whether a matter that was undoubtedly defamatory should be published or not. If truth alone is the defence, the decision is easier. Can the matter be proved, if necessary? If the additional component of "public benefit" or "public interest" is required, the decision is difficult because of the more nebulous test and the uncertainty of the view that will be taken of it by the ultimate trial tribunal, judge or jury. Each proposal therefore suggests truth alone as the requirement for justification. However, whilst noting the Australian Commission's conclusion that public benefit was essentially "a privacy protection and should be treated as a separate matter"[48] the New Zealand Committee (doubtless because of its terms of reference and a different historical and constitutional background) did not go on, as the Australian Commission has, to try to plug the gap which would be left, in the law of Australia, by

simply dropping the "public benefit" notion altogether out of defamation law. That notion has endured in a good part of Australia for more than a century. It is probably considered the correct approach by a great number of practitioners, brought up in its tradition. No attempt to strike a uniform law in Australia, without dealing with this issue, could, in my view, hope to secure the unanimous support of the States. Equally, any attempt to impose the "public" element on those jurisdictions which did not have it, would be bound to fail. It is for this reason that the Australian Commission has proposed a co-ordinate protection against the publication of "private facts" which is not to be found in the New Zealand Committee's scheme. With our different legal history and constitutional problems, it would be wrong to assume that our suggestion should necessarily be considered as appropriate for New Zealand. Similarly, it would be wrong to take in isolation the Australian Commission's proposal that truth alone should be the defence of justification in defamation. That proposal was put forward only in the context of a limited but definite protection of the private realm. This is intellectually acceptable if we release ourselves from the common law's category of "defamation" and consider the remedies that should be available for a more general tort of wrongful publication. It may be wrong to publish matter on a person which damages his reputation and is false. It may equally be wrong to publish facts which, though true, invade a person's private realm and are of no legitimate concern to the public. The Australian Commission sees its exercise, particularly in the happy coincidence of its defamation and privacy references, as an opportunity, rarely afforded, to escape from the toils of differing legal history and to deal in a harmonious way with a new legal concept, viz. wrongful publication. Needless to say we have our supporters, including some among the media who are much concerned about the problems of discomformity in Australia's defamation laws and the needs for, and requirements of, a uniform law.[49] We also have our critics.[50]

Defamation of The Dead and Limitations. The two proposals strike much the same standard in relation to any other points of detail. For example it is proposed that a limited cause of action should be introduced to redress defamation of a dead person. In New Zealand it is proposed that there should be a limitation period of six years from the date of death (in addition to a general limitation period of two years from the date of publication, to obtain in all cases).[51] The Australian proposal would limit the period after death when defamatory matter may not be published to three years only.[52] It limits the cause of action to the same members of the intimate family of the deceased, whilst including siblings, who are not included in the New Zealand suggestion.[53]

Each proposal is firm on the need to reduce the general period of limitation within which a defamation action must be brought.[54] In some parts of Australia this is still six years, with provision for extension in circumstances including discovery of new "material facts". The Australian Commission's suggestion is for a severe limitation to the expiration of six months after the date on which the plaintiff first learnt of the publication or three years after the date of the publication, whichever is earlier.[55] The New Zealand proposal is that the limitation period should be reduced to a period of two years. Each proposal envisages extensions of time in certain circumstances.[56] This reduction from the norm is justified by reference to principle and practicalities. The major effort of a law of defamation must be to restore a reputation wrongfully damaged. It ought not to be just the provision of compensatory verdicts, though often this may be all that can be done. If a plaintiff does not move with speed, it will normally signal not only a lack of hurt but an unconcern with the basic social evils which the law is seeking to remedy, viz. damage to his reputation not personal enrichment. Additionally, the practicalities of the electronic media and the difficulties of keeping stored vast quantities of recorded broadcasts of radio and television necessitate a reduction of potential liability and the provision, in the normal case, of an early and final bar against belated action.

POINTS OF DIFFERENCE

Privacy Protection. The major points of difference between the results of the New Zealand and Australian exercises are two. The first is the decision in the Australian proposal to develop a new concept which includes provision of limited protection for the publication of "private facts" as defined. The second arises from the different approaches to a matter of common concern, viz. the "gagging writ" or "stop writ" as it is called in Australia. The New Zealand approach is to tackle the law of contempt of court. The Australian approach has been to lay emphasis upon the reform of defamation procedures and to provide for the obligatory early return of a case before the court. The former difference has already been noted and its origins, in Australia, explained. The provision of certain protections for privacy already exists, however conceptually uncomfortable, in the defamation laws of several of the jurisdictions of Australia. There is no such history or problem in New Zealand. The matter was probably beyond the terms of reference to the Committee. Whether limited protection against the publication of private facts should be provided in New Zealand is, I can well imagine, a matter upon which there would be differences of view and a vigorous debate. The fact remains that this is a major point of difference in the two proposals. It is one which New Zealanders, released from the thrall of federalism, may simply ascribe to the constitutional eccentricities and legal history of Australia. It is one which we would hope to justify by reference to the development of new legal concepts which are inherently desirable.

Remedies and the Stop Writ. The Australian Commission came to an early view that defamation reform required reform of defamation procedures. To some extent a similar view in New Zealand is reflected by a number of proposals :

* The provision of a simple procedure for the establishment of the defence of unintentional defamation[57]
* The introduction of clear entitlement to bring an action for a declaration alone in defamation proceedings[58]

* The enlargement of the court's general power to dismiss an action by the provision that a defamation action not set down and in which no step has been taken by either party for one year shall, on the option of the defendant, be dismissed unless the court otherwise orders.[59]
* The prohibition upon the specification of an amount of damages claim where the defendant is a member of the news media,[60] and the enactment of a provision entitling the judge to award solicitor and client costs to the defendant where, in his opinion the amount claimed in a defamation action is "grossly out of proportion to the amount recovered or the damage caused".[61]

The Australian approach is different. It rests upon the rapid return of defamation actions before the court. It has seemed to us from the outset that the law has made the mistake of treating defamation actions as simply another variety of tort proceedings. Complaints about the law's delay are endemic and not confined to defamation cases. In the case of defamation, however, where the "wrong" complained of is a wrong to a person's reputation, there must be an element of urgency in the delivery of relief or the law fails to achieve its social purpose. If reputation is ever to be restored following an alleged defamation, it is probable that it can only be restored within a very short time after publication of the defamatory matter. If time is allowed to pass, the chances of actually restoring a hurt reputation diminish. All that the law can do is to provide a solatium in the form of money damages or, in some jurisdictions, punishment. Given this view of the problem, the Australian Commission's attention has been riveted from the first upon improvements in defamation procedures. The draft Bill already includes certain principles to which regard must be had in proceedings under the Act. These include the principle that :

> "reputation and privacy are valued private rights, delay in the vindication of which tends to exacerbate the original damage".

Correction Orders. The draft Bill already published (and even more the final draft upon which we are presently working) contains provisions for the prompt return of defamation proceedings before the court. The rules which are scheduled to the Draft Bill include a provision which reflects the urgency to be attached to the despatch of defamation cases. For example, the return date to be stated on a summons shall, unless fixed by the court, be a date "not later than fourteen days after the date of filing of the summons".[62] Upon return of the summons before the court a number of remedies are to be available. Most of them are common to both the Australian and New Zealand schemes. One, however, is not. The Australian proposals permit in both defamation and privacy actions the making by a court of "an order for correction". This will permit the court, facts having been found to be untrue, to order a defendant to correct the untrue fact and to do so publicly. Once the element of "public interest" or "public benefit" is removed from the notion of justification and the principal issue is simply the truth or otherwise of a statement made, it seemed to us apt to provide for an order for correction and particularly apt in the case of media defendants. The draft Bill empowers the court to specify the content of the correction and to give directions concerning the time, form, extent and manner of its publication. Unless the plaintiff otherwise requests, the court is to be empowered to so give its directions as to ensure that the correction "will, as far as practicable, be brought to the notice of persons who were recipients of the matter".[63] The object of this provision is to afford the court a new remedy and one which, whilst not replacing damages entirely, will often be the most appropriate means of remedying a false and damaging statement.

Experience in industrial cases in Australia and, in certain jurisdictions, in equity cases, suggests that many parties, faced with litigation, need little more than the provision of a venue and a mechanism for saving face. It may well be so in the area of defamation. If we consider the Sri Lanka mistake which opened this paper, there is little doubt that had

a person less august than the Foreign Minister been involved (and the rapid intervention of the National Assembly not been available) the most appropriate remedy for the wrong done would be a prompt public correction, suitably worded and well placed. A damages verdict two years later, when everybody had forgotten the wrong (and where there was no guarantee of its public statement and correction) would be, so it seems to us, less apt.

Much evidence has been given to the Australian Commission by its expert consultants and in public sittings and seminars to the effect that a majority of defamation cases fall either into the category of frank mistake or into the class of case where the plaintiff might have been satisfied if his point of view could have been promptly and fairly published. For the former class of case, the Australian Commission has proposed orders for correction which may, in the ultimate, be settled by the court. In the latter class of case, the Commission has proposed a defence which will be available in certain circumstances if an adequate right of reply is promptly afforded to the plaintiff. The New Zealand approach embraces the latter suggestion but the notion of compuls inherent in court ordered corrections, did not find favour. Some correction orders under the Australian scheme would follow the failure of a defence in a contested case. Some would be consensu It is envisaged that in many cases, the court will simply inquire whilst the issue is still alive and the hurt is still fresh, as t whether the matter can be resolved, either in whole or in part, b an appropriate correction, apology or reply. In many cases one c imagine that counsel will, between them, work to assist the court in reducing to agreement the form and content of the correction. some cases the defendant, acknowledging the mistake, may invite the prompt resolution of differences as to content and form by th court itself. This machinery has worked in other areas of the la operation in Australia. Time will tell whether it will work in t area. Much will depend, as we recognise, upon the initiative and imagination of the judges. It must be emphasised that there is no provision for the summary resolution in a contested case of disputed questions of fact in order that they can be

rapidly corrected. But machinery will be provided for the prompt return of matters before the court and an opportunity, which may be reinforced by a statutory duty on the judge, to explore and exhaust the possibilities of correction, in an appropriate way, of incorrect or mistaken facts.

One consequence of this procedure may also be the diminution in the number of "gagging writs", and vexatious or trivial proceedings. The remedial effect of promptly returning all defamation cases before the court ought not, we think, to be under-estimated. It may be appropriate, as an inducement to the frank acknowledgement of publishing mistaken facts or carelessly reporting or editing material, to provide that where the defendant acknowledges that there is no defence, the court, consisting of a judge only, could proceed at once to order a correction and provide for the damages, if any, that will be suffered by the plaintiff, notwithstanding the correction ordered. This is a matter which the Australian Commission is still debating.

Codification and Definition. Passing from the important differences, there are many other issues upon which the New Zealand and Australian reformers would appear to differ. The New Zealand draft Bill does not, for example, purport to codify the law of defamation, whilst the Australian draft Bill does.[64] This is not the occasion to debate the merits of codification. Obviously, with such a diversity of approach in Australia, the only safe way of achieving a truly uniform defamation law is by way of codification. As is pointed out "New Zealand has always had a national and uniform law of defamation".[65] With nine or more jurisdictions in Australia, the opportunities for diversity of approach are reduced by the adoption of a uniform code (and uniform procedures) which will be evenly applied throughout the country. That is why the New Zealand decision to reject codification cannot be adopted in the context of the Australian exercise.[66] Likewise, the decision not to recommend a definition of defamation[67] and not to codify the categories of absolute privilege are entirely understandable in the New Zealand context but unacceptable in

an Australian uniform law. We copied from New Zealand the live broadcast of proceedings in Parliament, although we have the added pleasure of hearing our Senate on Wednesdays and at other odd times. Whereas the New Zealand proposal is to attach absolute privilege to live radio and television broadcasts of parliamentary proceedings[68] no such extension is proposed in the Commission's draft. The actual proceedings of a Parliament itself are, of course, absolutely privileged.[69] The broadcast would, however, fall to be dealt with under the proposed defence of fair report. If accepted, this would provide a plaintiff, identified in a defamatory broadcast of parliamentary proceedings, with the opportunity to give a "full and adequate reply". The Commission received a great number of complaints by citizens alleging the abuse of parliamentary privilege, its repetition in printed and electronic form and the total absence of any *right* to respond and have their version put before the same public. Views on this matter will no doubt differ. Some may suggest that the provision of a right for reply is itself an inhibition upon the absolute privilege of Parliament. Others see it as the only means of ensuring proper public debate of issues of general importance raised in the Parliament.

Qualified Privilege. A fundamental difference emerges in the treatment of qualified privilege. Put shortly, the New Zealand scheme is to identify certain specified occasions and reports to which qualified privilege attaches, such privilege being lost where it is proved that the defendant was actuated by spite or ill-will or otherwise took improper advantage of the occasion.[70] Because of the constant expansion of the categories to which it is considered appropriate to attach qualified privilege and its desire to get away from the concept of "malice" which is critically analysed in the New Zealand report, the Australian Commission has adopted a different approach. It has proposed limiting this defence to communication to particular persons or groups (thereby excluding the media) and providing the privilege where :

(a) The defendant believed on reasonable grounds that the recipient had an interest or duty to receive the information

(b) The publication was made in the course of giving the recipient information of the kind which he had an interest to receive, and

(c) The matter represented the genuine belief of the defendant or, in all the circumstances, the conduct of the defendant in publishing it was reasonable.[71]

The approach to publication by the media is, as already noted, different. The New Zealand approach is the provision of a new statutory defence of qualified privilege subject to the following four requirements :

(1) that the subject matter of the publication was one of public interest;

(2) that the publisher acted with reasonable care in relation to the facts he published and believed them to be true;

(3) any comment was capable of being supported by the facts as stated or other known facts and was the genuine opinion of the person who made it; and

(4) the publisher gave the person claiming to be defamed the right to have a reasonable statement of explanation and/or rebuttal published in the same medium with adequate prominence and without undue delay.[72]

The Australian Commission's approach is also to give the media a special new protection but not in the form of qualified privilege. Instead, the media are given the right to publish an attributed statement so long as it was uninfluenced and "reasonable" in the circumstances to do so and an opportunity of reply was given to the complainant "at the earliest opportunity reasonably available" after a request.

This difference of approach has already been noted. Some of the differences have already been described. The

ssential difference is that the Australian scheme is limited to fair reportage of certain classified proceedings[73] and attributed statements which have not been manufactured by the defendant. The New Zealand approach is not limited to attributed reports but may include any statement of the class mentioned published in the media. In practical terms, in many cases, the difference may be more apparent than real. There are common features, most importantly the obligation to act reasonably and to afford a prompt opportunity of reply to an aggrieved complainant. The advantage of our proposal as we see it is the requirement of attribution of statements to identified persons. This way the public can know and assess the source of the defamatory matter. Unattributed smears ought not to be permitted.

Unintentional Defamation. Section 6 of the *Defamation Act* 1954 (N.Z.) was designed to mitigate the hardship on defendants who did not intend to hurt the plaintiff or did not know of circumstances which would make words not defamatory on the face of them, defamatory of the plaintiff.[74] The new New Zealand report proposes repeal of that section, the provision of an "offer of apology" in the place of the "offer of amends" and machinery provision designed to encourage the use of the procedure. One provision recommended is that an unaccepted offer of apology should not constitute an admission of liability and should not be referred to in evidence except by consent of the defendant.[75] No reference was made in the draft Australian Bill to procedures for apology or amends. Although this matter is under reconsideration, the reasons for omitting such provisions can be briefly stated. They are three. In the first place, apology machinery already available is rarely, if ever, used in Australia. In the second place, it is always open to parties to resolve their differences by settlement. Much defamation litigation is disposed of in this way. Thirdly, the Commission's hope was that the prompt return of proceedings before the court would provide the venue and the opportunity to explore this question, in conjunction with consent orders for correction and/or rights of reply. The matter will be reviewed in the light of the New Zealand report.

Damages. It is perhaps inevitable that a different approach has been taken to "exemplary damages". The High Court of Australia[76] adopted an approach to exemplary damages different

South Wales Law Reform Commission recommended that exemplary damages be abolished by statute.[78] This recommendation was implemented by s.46(3) of the N.S.W. Act. Alone of the Australian jurisdictions, N.S.W. has done away with exemplary damages. Of course, aggravated damages can still be awarded. Generally damages are compensatory. The Australian Commission was persuaded by the N.S.W. Law Reform Commission's argument and those of the Faulks Committee.[79] The latter did not "like the idea of fining a defendant in a civil action and presenting the fine not to the State but to the plaintiff who has already received aggravated compensatory damages".[80]

The New Zealand Committee, however, felt that there was a place for punitive damages in the law of defamation "where one person has deliberately defamed another". Nevertheless, it was considered more appropriate for the award of punitive damages to be left "to the experience and knowlege of a judge" rather than to the jury.[81] It was noted that punitive damages have never been awarded in an action for defamation in New Zealand and have only received judicial consideration in one reported case which was concerned with a different matter.[82] Punitive damages have been awarded in Australia and the Australian Commission's approach is to leave punishment to a narrow class of criminal defamation. Civil defamation is to be restricted to compensatory damages, in the knowledge that these will include "aggravated compensatory damages".

Criminal Defamation. It is appropriate to mention here the New Zealand proposal for the abolition of offences involving criminal libel in New Zealand.[83] Many reasons are advanced. First among these is the fact that prosecutions for criminal defamation are rare in New Zealand. There have been only seven reported decisions, the most recent of which was in 1951.[84] This branch of New Zealand law is to be taken to have fallen into desuetude. It is not so in Australia.

The Australian Commission has had urged upon it the ill-defined and repressive potential of criminal defamation. We live, it is said, in a more resilient age when criminal

penalties for utterances are anachronistic.[85]

Although criminal libel actions are rare in Australia, it cannot be said that the offence has fallen into disuse. As recently as 1977, a number of persons who were alleged to have made false and defamatory complaints against police in Western Australia were convicted by juries and received lengthy terms of imprisonment.[86] Representatives of a number of States have drawn attention to the futility and inadequacy of civil defamation remedies where the defamer is a man of straw and bent upon the repeated malicious public assault upon another citizen's reputation.

The Australian Commission's solution to this dilemma is the preservation of a redefined and circumscribed species of criminal defamation. The scheme proposes the repeal of existing laws of criminal libel. The ingredients in the proposed substitute offence include knowledge that the matter published was false (or reckless indifference to its truth or falsity) and intent to cause serious harm or the knowledge of the probability that it would cause such harm to a living person.[87]

The abolition of criminal libel is a robust move which commands much sympathy. In the circumstances of the recent use of the offence in Australia and the arguments advanced against its abolition, it is possible that uniform legislation should still provide for it. Otherwise it is likely that the present wide ranging offence will survive in the criminal law of the States, despite reforms in the civil law effected by a uniform Act.

A POINT OF INDECISION : JUDGE OR JURIES?

Upon one point the New Zealand Committee was unable to agree. The Australian Commission will most likely be in exactly the same position. This point relates to the mode of trial of defamation proceedings. The arguments for and against juries in defamation cases are nowhere more clearly and succinctly catalogued than in the New Zealand report.[88] The Faulks Committee

recommended that juries should be retained in defamation cases. Their role in the assessment of damages should, however, be restricted to the categorisation of awards as "substantial", "moderate", "nominal" or "contemptuous". It would then be up to the judge alone to fix the actual amount.[89] Three members of the New Zealand Committee favoured complete abolition of juries in defamation cases. Three were equally strongly of the view that they should be retained, including to assess damages. The remaining member was against the retention of civil juries. However, he believed that so long as they were generally available in civil actions, they should be retained in defamation cases. No artificial distinction should be drawn.[90]

Particular problems face the Australian Commission in dealing with this question. Some of them relate to the history of civil procedure in the various Australian jurisdictions. In at least one State, there has never been a jury trial of a civil defamation case. In other States, not only is it usual to have a civil jury of four. It is quite common to have summoned a special jury of twelve, particularly where the plaintiff is a public figure.[91] One approach in the quest for a uniform law is simply to leave the mode of trial to the election of the plaintiff. In this way the uniform law will not usurp differing practices that have been developed in the scattered Australian communities. It will respect the different traditions that have developed and be consistent with modern notions of "co-operative Federalism".

There is, however, a special difficulty which arises from the proposed machinery for court-ordered corrections. It will be recalled that a major element of the Australian Commission's scheme is a provision of a facility by which the court, finding facts to be false, can order their correction in an appropriate way. It is difficult to imagine a jury, even one specially instructed, being able to settle the form of a correction and the manner and prominence of its publication. Yet any damages that may be awarded must obviously take into account the form of the correction, the currency given to it and the likelihood that it will reach the same audience.

The easy way around this problem (and one consistent with the effort of the Australian Commission to promote promptness in all defamation proceedings) is the abolition of jury trial. If the whole defamation action is passed to the judge, it would be a relatively simple matter for him to fix the orders for correction and then, perhaps later, assess appropriate damages. Some members of the Commission, however, share the view of those in New Zealand who would keep jury trials, if at all, in defamation cases. It may be necessary to leave the mode of trial to the parties but provide that it is for the judge alone to settle the form of a correction when it is found that the matters complained of are defamatory, containing false facts. In these circumstances, where a jury tried the matter, the judge would have to instruct the jury to assess any monetary damages upon the hypothesis that the correction was published at the time and in the "form, extent and manner" ordered by him and shown to the jury.

Australian experience suggests that those who call loudest for the abolition of jury trial in defamation cases are invariably the news media who feel they have suffered unfairly and been punished unjustly by successive defamation juries. Those who defend the jury system most vocally are frequently the judges "conscious of the manifest defaults of each other".

SUMMARY

A common concern about the inhibiting effects of our inherited defamation law caused the New Zealand and Australian Law Ministers to initiate reviews of that law and to invite suggestions for reform. The New Zealand report is now before us. The Australian report shortly will be. We have some notion already of the points of similarity and difference in their respective approaches.

Each starts with a concern that the present laws and practices in defamation may strike a balance which unduly favours the protection of reputation and unreasonably inhibits

the free flow of information, freedom of speech and the free press. Neither of our countries has a constitutional guarantee of free speech. Both of our countries count this as an important part of our legal tradition. There is a general recognition that a new balance must be struck. It must provide slightly greater freedom for the publication of some matter which is currently suppressed.

The thrust of the two proposals is somewhat different. A major aim in Australia is to secure a uniform law. Furthermore the Law Reform Commission had a relevant concurrent reference on privacy protection. The major thrust of the New Zealand report, expansion of the defences of the media aside, is the clarification and limitation of the inhibiting effect of the rules governing contempt of court.

Each report suggests that the principal defence to defamation actions, that of justification, should be truth alone. But this involves no real change in New Zealand. In the context of a quest for a uniform law in Australia, it amounts to the abandonment of a "public benefit" or "public interest" component which for more than a century has endured in half of the jurisdictions. That "public" component in the defence of justification has hitherto provided certain protection against the publication of private facts which are not of general public concern. These include matters relating to a person's private behavour, home life, personal or family relationships, health and spent criminal offences.[92] For this reason, and as part of its endeavour to develop a new concept of "wrongful publication" the Australian Commission has suggested dealing in the one Act with the wrong of defamation and the wrong of publishing private facts, as defined. Defamation deals with honour and reputation. To it, truth is a defence. The private realm is different. Publication of intimate facts here is not properly met by a defence of truth. The offence is in the publication itself, without adequate and public justification.

The New Zealand Committee did not deal with the

publication of private facts. It acknowledged that "the question of a remedy for the publication of true statements involving the invasion of privacy is a separate issue".[93]

Many points of similarity have been identified, notably the introduction for the first time of a right of reply, the provision of a qualified action for defamation of a dead person, the rejection of the Press Council as a viable alternative to provision of legal remedies and the significant reduction in limitation periods in all defamation cases.

The Australian Commission's papers have laid greater emphasis upon the need for reform of defamation procedures. Rightly or wrongly, great reliance is placed upon getting this class of action promptly before the courts. Not only is this necessary to work the new machinery of correction orders (suggested in the Australian proposals), it is also hoped that it will provide an inhibition upon stop writs, the abuse of court procedures and the professional litigant who tries to turn defamation cases into a second source of income.

Different approaches are taken with respect to multiple publications, innocent dissemination, the preservation of punitive damages and the abolition of criminal libel.

Upon the one matter in respect of which the New Zealand Committee was divided (the retention of juries) the Australian Commission is also divided. For the Australian Commission there are particular difficulties in the retention of juries, notably the different traditions of the several jurisdictions of Australia and the operation of the court-ordered correction procedures, an innovation not contained in the New Zealand proposals.

I cannot leave this paper without a special word of commendation for one aspect of the New Zealand report which may otherwise go unnoted. Appended to the report is not only the draft Bill which has become the indispensable weapon of the law reformer seeking to combat parliamentary pigeon-holes. There is also in Appendix II and III a detailed analysis of

actual defamation litigation in New Zealand during this decade. True law reform, if it is to be more than a thing of shreds and patches; must be based not only upon well thought out principles publicly ventilated. It must have available to it empirical and evaluative data which identifies the problem areas in the current operation of the law. The New Zealand Committee set out to collect this information and to list it. Those who have the ultimate responsibility of passing on the proposals can only be advantaged by the consideration of surveys of this kind.[94] The Australian Law Reform Commision will learn much from the deliberations of the New Zealand Committee. Ultimately the law of Australia may, by the processes of legal osmosis, take advantage of the comprehensive and clearly presented material contained in the New Zealand report.

FOOTNOTES

1. Reported in *The Australian*, 4 February 1978, 2.

2. The Committee on Defamation (N.Z.) (Mr. I.L. McKay, Chairman). *Report : Recommendations on the Law of Defamation*, Dec. 1977, 5. The report is hereafter referred to as "N.Z. report".

3. *Id.* 6.

4. For the terms of reference and some discussion (1976) 50 *A.L.J.* 541.

5. Jarvis (1976) 50 *A.L.J.* 201.

6. Australian Law Reform Commission, Discn.P. 1, *Defamation - Options for Reform*, 1976 (hereafter A.L.D.P.1); Discn.P. 2, *Privacy and Publication - Proposals for Protection*, 1977 (hereafter A.L.D.P.2); Discn.P. 3, *Defamation and Publication Privacy - A Draft Uniform Bill*, 1977 (hereafter A.L.D.P.3).

7. N.Z. report, 8. The order of the sentences has been transposed.

8. *Cf.* O. Kahn-Freund "On Uses and Misuses of Comparative Law" (1974) 37 *Mod.L.Rev.* 1.

9. N.Z. report, 35.

10. *Broadcasting and Television Act*, 1942 (Cth.), s.124.

11. Victoria, South Australia and the Northern Territory of Australia.

12. Queensland and Tasmania.

13. New South Wales, The Australian Capital Territory and (in criminal libel) Western Australia. Some of the inconveniences are outlined in A.L.D.P.1, 5. They are well illustrated in *Gorton v. Australian Broadcasting Commission* (1973) 22 *F.L.R.* 181, a case involving a former Prime Minister.

14. Australian Constitutional Convention, *Minutes of Proceedings and Official Record of Debate*, Hobart, 1976, xvii-xx (Minutes); 19ff (Official Record).

15. *The Constitution* (U.S.A.), Article One of the Amendments.

16. *New York Times v. Sullivan*, 376 *U.S.* 254 (1964); *Gertz v. Robert Welch Inc.*, 418 *U.S.* 323 (1974). See also A.L.D.P.2, 15-16.

17. N.Z. report, 7-9.

18. *Ibid.*, 7.

19. A.L.D.P.1, 4; N.Z. report, 8.

20. N.Z. report, 8. *Cf.* A.L.D.P.1, 14. See also the fuller discussion in Australian Law Reform Commission, Background Paper, *Defamation*, 1977, 164-180.

21. N.Z. report, 8.

22. N.Z. report, 9; A.L.D.P.2., 15-16.

23. N.Z. report, 86; A.L.D.P.2., 13-14. A more detailed critique of the Press Council is to be found in the writer's *Defamation and Publication Privacy*, a note on Sir Frank Kitto's paper *The Press Council and the Law*, *mimeo*, 1978.

24. N.Z. report, 86.

25. N.Z. report, 9.

26. N.Z. report, Chapter 10.

27. *Truth (N.Z.) Ltd. v. Holloway* [1960] *N.Z.L.R.* 69; *Dunford Publicity Studies Ltd. v. News Media Ownership Ltd.* [1971] *N.Z.L.R.* 961; *Brooks v. Muldoon* [1973] 1 *N.Z.L.R.*1. In Australia see *Wright v. The Australian Broadcasting Commission, (C.A.)* [1977] 1 *N.S.W.L.R.* 69f.

28. The Committee on Defamation (England) (Mr. Justice Faulks, Chairman) *Report*, 1975, Cmnd. 5909, paras. 202-3. This report is hereafter referred to as "Faulks". See discussion N.Z. report, 57.

29. *Ibid*, A.L.D.P.3, 9.

30. N.Z. report, 58.

31. *Cf.* A.L.D.P.3., 9; N.Z. report, 58-9.

32. *Loc cit.*

33. A.L.D.P.1., 10.

34. J.G. Fleming, Retraction and Reply : Alternative Remedies for Defamation (1978) 12 *Uni.Brit.Columbia L.Rev.*, 15, 30.

35. N.Z. report, 111.

36. *Miami Herald Publishing Co. v. Tornillo*, 418 *U.S.* 241 (1974).

37. J. Kaplan, "Free Press/Fair Trial. Rights in Conflict. Freedom of Press and the Right of the Individual". 29 *Oklahoma L.Rev.* 361, 366ff (1976).

38. N.Z. report, 28; A.L.D.P.3; 6. (clause 6(1)(a)(iii)).

39. N.Z. report, 29; A.L.D.P.3., 24 (Rule 8(e)).

40. [1910] *A.C.* 20; *Cf.* N.Z. report, 30; A.L.D.P.3., 7 (clause 6(3)).

41. N.Z. report, 32; A.L.D.P.3., 8. (clause 12).

42. As pointed out by the N.Z. Committee, it is at present a requirement of criminal libel and slander in New Zealand. *Crimes Act* 1971 (N.Z. s.214.

43. Report of the Select Committee of the House of Lords on the Law of Defamation and Libel, 1843. See Background Paper, 160ff.

44. Faulks, para. 138. *Cf.* the earlier Porter Committee, para. 85.

45. *Defamation Act* 1974 (N.S.W.), s.15.

46. This explanation by the N.Z. Committee (N.Z. Report, 33) is accepted as one reason for the Australian Commission's approach.

47. A.L.D.P.1., 6.

48. A.L.D.P.1., 8. See also A.L.D.P.2., 3-4; A.L.D.P.3., 4. (clauses 20

49. *The Age*, 4 November 1977, 9. ("Towards a sane defamation law).

50. Esp. *Sydney Morning Herald*, 31 January 1978, 6 ("Law reform on the wrong track"); *ibid*, 6 February 1978, 6 ("More privacy").

51. N.Z. report, 99.

52. A.L.D.P.3., clause 7(2). Note that another difference is that in the A.L.R.C. proposals, actions in respect to defamation of the dead do not have available to them the remedy of damages. The principal remedies envisaged are orders for correction or an injunction (clause 7(2)).

53. *Ibid.* *Cf.* N.Z. report, 99.

54. N.Z. report, 108.

55. A.L.D.P.3., 15 (clause 34).

56. N.Z. report, 13, 108; A.L.D.P.3., 15 (clause 34).

57. N.Z. report, 11, 72-3.

58. N.Z. report, 91.

59. N.Z. report, 109.

60. N.Z. report, 95-6.

61. N.Z. report, 96.

62. Rule 7(1)(b) (A.L.D.P.3., 24).

63. See clauses 8(i) (Defamation) and 23(c) (Privacy) and 27 in A.L.D.P.3. *Cf.* Clauses 28 (Comment) and 42 (Appeal).

64. A.L.D.P.3., 4. (Clause 3(2)).

65. N.Z. report, 22.

66. *Id.*

67. *Loc cit.*

68. N.Z. report, 48.

69. A.L.D.P.3., 8 (clause 14(a)).

70. N.Z. report, 124.

71. This is a new approach which is still subject to discussion within the Commission. *Cf.* clause 15(1) in A.L.D.P.3., 9.

72. N.Z. report, 125.

73. A.L.D.P.3., 22 (Schedule 2).

74. N.Z. report, 69.

75. N.Z. report, 73.

76. *Uren v. John Fairfax & Sons Ltd.* (1966) 117 *C.L.R.* 118.

77. *Rookes v. Barnard* [1964] *A.C.* 1129; *Cassell v. Broome* [1972] *A.C.* 1027, 1087.

78. Law Reform Commission (N.S.W.) *Report on Defamation* (L.R.C.11), 13-1

79. Faulks, 94-97.

80. *Ibid.*, 96 (para. 356).

81. N.Z. report, 89.

82. *Fogg v. McKnight* [1968] *N.Z.L.R.* 330 (Damages for assault).

83. N.Z. report, 103.

84. *Edwards v. Barnes* (1951) 46 *M.C.R.* 87; N.Z. report, 100.

85. A.L.D.P.1., 15.

86. Australian Law Reform Commission, *Transcript of Public Sittings*, Perth, 17 May 1977, 26.

87. A.L.D.P.3., 21 (clause 52). This approach is based on the N.S.W.L.R.C. report, 17, 68.

88. N.Z. report, 104-5.

89. Faulks, 143 (para. 513). *Cf.* N.Z. report, 106.

90. N.Z. report, 106.

91. *Jury Act* 1912 (N.S.W, s.30; *McCrane v. Slater* [1965] *N.S.W.R.* 1200.

92. A.L.D.P.3., 10 (clause 20).

93. N.Z. report, 35.

94. *Cf.* Australian Law Reform Commission, *Insolvency : The Regular Payment of Debts* (A.L.R.C.6), 1977, 54-64 (A survey of the operation of the *Bankruptcy Act*.)