SOCIETY OF LABOR LAWYERS

7th NATIONAL CONFERENCE

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FREEDOM OF SPEECH AND DEFAMATION

MELANCHOLOY REFLECTIONS ON THE FAILURE OF A REFORM

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The Hon. Justice Michael Kirby,
President, Court of Appeal, Sydney

TO TREAD A FINE LINE

Those of you who know me will realise how relieved I am that I am confined to making a few innocuous comments in contribution to this Conference. Controversy is anathema to me. Publicity, I have always disdained. This is the first reason for the modesty of my contribution.

The second is that a return to judicial office imposes certain constraints. One of these is that I must not, by evidencing my predelictions, disqualify myself from sitting in the important cases that come before the Court of Appeal concerning defamation, free speech, the media and the citizen. Having prejudices, attitudes, philosophies and even a world view is no necessary reason for disqualification for in our theory these may quite readily be put out of the judicial mind . But if these inclinations are publicly hinted at, the holder of them may be constrained to leave relevant judicial tasks to those who have been more discreet and silent, so that there will be no appearance of bias.

The third reason for the modesty of these remarks is that the one item, relevant to freedom of expression, that will be on the minds of everyone at this Conference cannot be spoken of, at least, by me. I refer to the trial of Justice Lionel Murphy and its media aftermath. There are many reasons why I cannot speak of it, not the least of which is that I gave evidence at the trial concerning my opinion of Lionel Murphy's fame and character.

Accordingly, by my well known habits of personal modesty, acceptance of the judicial mantle and restraints peculiar to recent events, I am painted into a corner where I must speak in generalities - something that you realise does not come at all easily to the judiciary!

Given the time constraint, the general exhaustion of this good humoured audience, struggling to the end of a three day Conference, I do well to make a few simple points and then to retreat into the congenial cocoon of the judicial world. In fact it is not as a judge that I speak but rather from the standpoint of nearly ten years service as Chairman of the Australian Law Reform Commission. To that service I was appointed in February, 1975 on the recommendation of Attorney-General Murphy. I served under eight Ministers. As I saw them come and go, bringing and taking their varying but undeniable personal qualities, attitudes and inclinations, I reflected, often, upon the transiency of political life and the relative permanency of the judicial.

So I am going to speak of the much assailed and now apparently abandoned report of the Australian Law Reform Commission on defamation law reform. I will endeavour to sketch its main proposals. I will bring you up to date with my

understanding of its current fate. I will respond to some of the more ill-considered criticisms of it - including by my commentator Robert Pullan. And then, in that spirit of practicality which infects reformers, I will make a few general ruminations and a proposal. These are modest contributions. From a modest participant.

THE ALRC PROPOSALS

The Law Reform Commission's report on defamation is a substantial document. It covers a body of law which, of its nature, is inescapably complex, as Justice Hunt has recently commented.[1] The basic reform ideas of the report were fairly simple. This was because, traced to their common origin, the defamation laws of the Australian States and Territories shared many common features and common defects. The main proposals were:

* The provision of a single, uniform law on unfair publication, applicable throughout Australia;
* Codification of that law, to avoid needless resort to the great bulk of earlier cases and to help in the process of simplification;
* Simplification of the current law, by stating it in a single Act which would be available for the instruction of journalists and the edification of lawyers and the community;
* Major reforms of procedure particularly to provide redress more speedy and more relevant to the wrong complained of; and
* Provision of new and more effective remedies,

including correction orders and facilities for a right of reply in certain circumstances.

Among the procedural reforms suggested by the Law Reform Commission were many copied from developments studied in the European legal systems, to which Australia should be more willing in the future, than it has been in the past, to look for instruction and leadership. The ideas included one which has been substantially adopted at an administrative level in New South Wales and two that await implementation. These were:

* The rapid return of defamation cases before a judge, treating the nature of the claim made (and the avoidance of abuse of such claims) as reasons for special and urgent attention;
* Provision of a power for a judge to order, as one of the remedies for a successful plaintiff, publication of a correction of facts found to be false; and
* Provision of a right of reply, encouraged by a defence afforded to defendants who have offered prompt and fair opportunities to the person defamed to put the other point of view.[2]

The most important and novel proposal was that a single uniform law should be enacted. The Commission called attention to the possible constitutional bases for federal legislation enacting such a single law. This would be based on a "basket" of constitutional powers (including post and telegraphs, interstate traders, trading and financial corporations, external affairs and the territories).[3] However, the Commission concluded that,

although such federal legislation might be so enacted, the decision whether to do so or not was a political one. Uniformity was, in the Commission's opinion desirable. If it was not to be obtained by federal laws, an endeavour should be made to obtain it by negotiation among the States for uniform legislation along the lines proposed by the Commission.[4] Decisions of the High Court of Australia since the Commission delivered its report appear to strengthen, rather than weaken, the case of the Commission that the Federal Parliament has the power to enact a handsome, comprehensive, reformed and general defamation law.[5]

However that may be, the decision was made by the then Government to proceed to the Standing Committee of Attorneys-General. That was to prove the "kiss of death" for the report. For within the Standing Committee, despite heroic efforts by successive Federal officials and Ministers, the differences remained. And in some respects they were substantial.

Ultimately, the decision was taken by Attorney-General Bowen to abandon the uniformity enterprise. This decision was reached at the end of nearly seven years of negotiation, elaboration, revision, give and take. All of that effort (and the Defamation Bill 1984 which was the product of it) went down the drain when, on 2 May 1985 the Standing Committee of Attorneys-General, in Hobart, decided to remove the topic from its agenda. As reported to me, Ministers were not able to reach agreement on a number of matters of policy considered "fundamental to defamation law". Foremost of these was the nature of the defence of justification. Ministers were of the view that agreement on such matters was essential to a satisfactory conclusion to the exercise. And as there seemed little likelihood of agreement

eventuating, the Attorneys-General decided that the Standing Committee had "no option but to abandon the exercise".

Mr. Bowen explained his stand in a letter to the Sydney Morning Herald responding to an invitation, contained in its Editorial, for a statement of the reasons for this decision. He listed as the "contentious matters" the following:[6]

* The draft bill allowed for recovery of damages where publication attributed some act, or condition, which was likely to injure a person in his trade, business or profession. The Queensland law currently allows for recovery in such cases. The media "naturally and understandably strongly opposed it". The media wished to hold the line at imputations which affected a person's reputation.

* Opposition of the media to the proposal for a court-ordered correction remedy, the media being "only satisfied" if the remedy could be granted with their consent - a consequence which would "greatly reduce the availability of any remedy".

* The draft Bill also provided a right of action for defamation of a deceased person up to three years after publication. Upon this proposal there were divergences of view among the States. The media opposed any remedy at all, arguing that "something as personal as reputation" should not be subject to legal action after a person's death.

* Thirdly, there was "wide disagreement" as to the defence of justification. There were three options. The first was truth alone (the current law in Victoria and South Australia). The second was "truth plus public benefit" (the current law, with local variation which I will not tarry to elaborate, in New South Wales, ACT, Queensland and Tasmania). A third option was presented which had been devised (with Machiavellian skill) by the former Attorney-General Evans in the hope of securing a compromise. This was that truth alone should be the normal defence save for cases of the publication of 'sensitive private facts' as defined. This proposal adapted and salvaged certain proposals of the Law Reform Commission for the protection of privacy. However, according to Attorney-General Bowen's letter to the Herald, at the end of the day, two of the eight members of the Standing Committee favoured Option 1; three favoured Option 2; and two supported Option 3. The Attorney-General concluded:

"The inflexibility related directly to the existing law applying in each instance, as well as the support of public opinion in the State or Territory. It was unanimously decided that because agreement could not be reached on this fundamental matter, this

exercise should be abandoned. ... This could hardly be described as an impatient action, as the matter has been on the agenda for six years. The above facts also illustrate that the media have fundamental objections to all these proposals."

These, then, were the craggy rocks upon which years of effort by the Law Reform Commissioners under Mr. (now Justice) Murray Wilcox and efforts by the Attorneys-General, foundered.

OTHER CRITICS

Of course the problems disclosed by Attorney-General Bowen were not the only ones. There were critics sniping from the side lines who disliked other aspects of the law reform "package" put forward by the Law Reform Commissioners.

* The media certainly did not like the proposals for privacy protection. The Sydney Morning Herald which had conducted an unremitting campaign against the notion of a new concept of "unfair publication" returned to the attack in its validictory for the Law Reform Commission's proposals on 6 May, 1985. "A large part of the reason why the drive for uniformity took so long to get anywhere - and perhaps why it ended up getting nowhere - was the attempt by the Australian Law Reform Commission to graft on to defamation law concepts of privacy protection. The Commission's review of defamation laws was coloured by its preoccupation with privacy,

which Mr. Ellicott had already asked it to examine. But the problem of privacy protection has less to do with the media than with intrusions or interferences by governments and commercial and other bodies. The somewhat artificial attempt to reconcile, as far as possible, concepts of privacy and defamation led the commission to invent and suggest a new offence of unfair publication. And even after it became clear to most that the problem, such as it exists, is not appropriately dealt with by laws whose effect overall is to restrict further the already heavily circumscribed freedom of the press, privacy remained a pre-occupation with the commission's work on defamation." (ibid, 10)

* Other commentators questioned the desirability of uniform legislation. My former colleague, Justice Hutley wrote to Reform, the publication of the Law Reform Commission, suggesting that uniform defamation law was "of great benefit to media magnates who publish throughout Australia" but not to the aggregation of freedom of expression: "[F]reedom of the mind is aided by legal untidiness. Uniformity is not usually compatible with intellectual progress and in no field is that clearer than in literature". ([1985] Reform 52)

The Sydney Morning Herald, on the other hand, in its obituary for the proposal affirmed that in an age of mass communication, material which is claimed to be defamatory is "rarely confined to one State". It urged the continuing need of the attainment of the "goal of uniformity"[7] but only uniformity which was acceptable to it and which was fashioned in its image of freedom and of the striking of the right balances, congenial to it.

* And as if that were not enough, my commentator, Mr. Robert Pullan in his interesting book, Guilty Secrets[8] listed his critique in the chapter on "The Future". In florid style he described Senator Evans' valiant efforts to secure a Uniform Defamation Bill (largely as inherited from Senator Durack) as "in the tradition of General Darling who sent Edward Smith Hall to jail." Singled out for criticism by Mr.Pullan was:

(a) the provision for recovery in the case of certain instances of defamation of the dead;

(b) the power of correction given to judges (unfairly personalised by reference to what a judge might do in the unlikely event that the Age libelled Senator Evans);

(c) the provision, as in the majority of the States, of reference to "public benefit" in the defence of justification;

(d) the survival of a circumscribed provision for criminal libel; and

(e) the rejection by the Law Reform Commission of the American notion that a "public figure" (however that expression may be defined) is in a special class deserving of no protection from defamation law, save where it can be shown that the defamer was malicious.[9]

IN DEFENCE OF ALRC 11

A basic question of balance:

It would be tedious, and apparently academic for me to proceed to defend the various proposals of the Law Reform Commission. The justifications are there in the report for those who bother with facts and detail. There are catelogued the arguments for those who wish to rise above the ruck of generalised gung-ho appeals to the notion of an unrestrained media, unrestricted by laws which reflect community values which sometimes compete with freedom of expression. This is just a matter of social philosophy. Some people believe that they should be entitled to say and print anything whatsoever:without any restriction at all. I assume that Mr. Pullan holds to this view. The closing paragraph of his essay enjoins us;

> "We can escape from the prison of the past. If we carry a referendum by a majority of voters in four states to write a protection of free speech into the constitution, if we repeal all the laws of obscenity and sedition and defamation - then we can begin."[10]

I would ask you to mark the reference to four States. By this I infer a certain indifference to the views of the other two

States or of the Territories, if the people of Australia in those parts happen to disagree with the Pullan vision of the Millenium. Freedom as we practice it in a liberal democracy generally pays attention to the views of minorities, particularly in matters such as free expression. Apparently this resoect is something Mr. Pullan demands but does not necessarily feel obliged to accord. The repeal of all laws of defamation would leave the protection of reputation solely to the decency, honour, integrity, diligence and accuracy of journalists, media people, writers, indeed all. Mr. Pullan's ringing peroration is not a unique call. It reflects the self same attitude that exists in some of the writing of the Sydney Morning Herald Editorial on 17 April, 1985 about the proposal for a right of reply. As Attorney-General Bowen said tartly, representatives of the media were content with the proposal for a right of reply. But only to the extent that the reply and the circumstances of its publication was acceptable to them. The notion of adjusting interests and considering that there just might - ever so slight a chance as it may be - be others with legitimate claims which our community is prepared to respect against the publisher, are brushed aside. Listen to the Herald:

> "The idea [of corrections] received something of an airing during debate on the now moribund Uniform Defamation Bill, but in an unsatisfactory way. The Bill contemplated corrections and retractions, but not as restitutions of reputation to be freely made by newspapers or broadcasters, but as impositions of the courts; and not necessarily to be in substitution for damages but merely to be taken in consideration in

mitigation of them. It was one of the several points on which the attemmpt to draft an Australia-wide defamation code struck such resistance that the whole exercise stalled."[11]

Reply and Correction

Ignored in these comments is the fact that in distinguished legal systems, at least as sophisticated as our own, in the continent of Europe (and in the many countries that derive their law from the civil law tradition), the notion of court ordered corrections is long established and accepted. The common law's obsession with money damages has distorted the social utility of defamation law. A lump sum of money, many years later, given perhaps in secrecy, leaves uncorrected the false publication of false facts. The public's interest in having those corrections known to it is put at nought. The private "deal" between the person defamed and his defamer attends to but one social interest. It is less tender to the concern of freedom to speak the truth. It may, on occasion, merely reinforce freedom to speak lies, to publish falsehoods and cruelly and unfairly to invade the private realm of individuals.

The notion that court ordered corrections is unacceptable, and that 'voluntary' correction (such as Mr. Wran's secured in the ABC News broadcast is a "salutory" development) depends on the eye of the beholder. We have all seen the little correction hidden away, where the sub-editor can find a space in the back pages. The Law Reform Commission's report (and the draft bill) did not envisage precise publication of corrections with exactly the same space and prominence of the defamation complained of. But it also did not envisage that the manner,

prominence and timing of the publication should be left exclusively to those who had been held to have defamed another. The notion that corrections should substitute for and not supplement the right to damages is likewise understandable, from the perspective of the media. But the truth will sometimes not catch the lie. Accordingly, there may sometimes be a need to provide for compensation, in addition to the correction the latter of which is, in any case directed in part to the public's interest. The loss of this most beneficial remedial reform is, in my view, something of a tragedy. I adhere to the view that the road to reform of defamation, like most other laws, runs through the path of procedural reforms designed to make the law more accessible, more efficient and more apt for the wrong complained of.

Privacy protection.

The proposal for the protection of sensitive private facts may not be congenial to the leader writer of the Sydney Morning Herald or Mr. Pullan. But the need for some protection of the private zone, even of public officials, is not a bizarre idea in Australia. It is one which, I am convinced, would be likely to command the support of many Australians. Unless their conduct in some way relates to their fitness for public office (one of the considerations that could be taken into account by way of defence) it is not immediately apparent why the respect for privacy should depend solely upon the good taste and good sense of those who have the enormous power to publish data damaging of persons and intrusive into their personal lives.

Examples of invasions of privacy, unprotected in the case of public figures by any relevant legal restraint, can be

seen in local and overseas instances. One recent example in the United States was the publication given to the dispute between Mr. John M. Fedders, head of the enforcement division of the Securities and Exchange Commission and his wife. The case was discussed in The New York Times of 27 February, 1985. Under the headline "Life in the Spotlight: Agony of Getting Burned", Stuart Taylor wrote:

> "One of the most vexing, recurring problems for official Washington, and for the national press, is how to deal with reports of private misdeeds or failings of public officials. An episode of this genre began and ended this week with disclosures about the personal and financial troubles of the nation's top securities law enforcer, prompting his resignation today. Among other things, the reports disclosed that the official, John M. Fedders, head of the enforcement division ...had admitted beating his wife repeatedly causing injuries. Was this misconduct so serious as to warrant a resignation? Was it news? In official and journalistic Washington, a strong feeling that officials as well as others should be able to live their private lives in peace is constantly tugging against a countervailing force, the strong public and journalistic interest in anything that might cast doubt on an official's fitness to discharge a public trust. Most of the time, the heavy drinking of Senator so-and-so, the homosexuality of this or that member of Congress, the casual drug use or philandering or marital discord or financial wheeling and dealing of other officials, are discreetly ignored

by their colleagues, their superiors and the press. But periodically a kind of dam bursts and an official finds himself or herself pinned and wriggling in the national spotlight, watching the most painful personal travails unfold on the evening news, with professional survival hanging in the balance. Sometimes this happens because somebody whispers something into a reporter's ear and has evidence to back it up. Sometimes it happens because an allegation comes out on the public record in an official court or legislative proceeding.

The latter was the case with Mr. Fedders." ...

The Executive Editor of the New York Times said: "Generally speaking, we try to avoid stories that have to do with marital problems of public officials. But sometimes these problems, or others such as alcoholism, cannot and should not be avoided. That happens when they become matters of public record or when the official's work is seriously affected, when laws are broken or when an obvious scandal is taking place. ... That was certainly the case in the unhappy case of Mr. and Mrs. Fedders."

Mr. Benjamin Bradlee, executive editor of the Washington Post said: "It's a sensitive issue but I think the fact is that when the private life of a public person intrudes on his performance of his duties, it's news."[12]

Public figure defence

This last statement appeared to accept the principle adopted by the Law Reform Commission. If the private zone affects the public conduct, there may be a legitimate public interest.

But should that be left exclusively to the evaluation of those whose great power can destroy people "wriggling" (as it was vividly described), under the spotlight of the evening television news? Normally in our type of society, where there is great power, we place it under checks and balances. We do not leave the application of those checks and balances exclusively to those who enjoy the great power. We put power in harness in order to ensure that it is not abused. It can be abused by self-righteous people who are "onto a story" which will capture a headline or two but do enormous, unnecessary and destructive pain to individuals without any equivalent countervailing public benefit being secured. I can understand those, particularly in the media, who would like to have a "public figure" defence, so that it would be even more than it already is a "fair game" against anyone in public life. But I do not believe that this principle is in tune with the Australian expectation of its public officials. In the tradition of the "fair go", I believe that most Australians are willing to accord their fellow citizens, and public officials a private zone. If so, the only issue is whether that zone should be defined and protected by the law or left to the tender mercies of those who have great power largely unrestrained by legal protections for their victims. True it is, there are dangers in excessive (and especially imprecise) limitations on free speech and the free press. But equally it must be recognised that there are dangers in leaving substantially defenceless in the law, the zone of privacy of citizens to which most of us would accord respect yet to which, at the crunch, the law provides but limited protection. Even in the United States, recent decisions of the courts suggest a wider ambit of redress for public figures who,

until now, have sometimes appeared the lepers of the legal system - cast out, without the benefit of ordinary legal protection.

Defamation of the dead

The recommendations on a short and strictly limited protection for the dead, who may be still warm in their graves, is justified in the report.[13] It can, I believe, be justified in principle. The proposal was, after all, strictly limited. It was available only for a period of three years from death. It was to be permitted only by certain nominated people, essentially close relatives. No special provision was made for de facto or like relationships. The award of damages was not to be permitted. A limit was to be placed upon the number of such actions that might be brought. The purpose was to permit relatives to seek corrections of false facts which presently must simply be borne with fortitude, however cruel they may be to the fresh memory of a loved one. As so limited, I do not believe that this proposal was so wide of the mark or deserves the lamentations of the media anxious to preserve the right to assail the reputation of the recently dead with total impunity.

Criminal defamation

Likewise the proposal for a highly circumscribed offence of criminal defamation was justifiable, including as a legitimate price for securing a uniform law. Upon this matter the Commissioners divided. But a majority felt that a closely defined criminal sanction was necessary to deter cases where the civil remedy would not be adequate. One such case could be where a publisher is bankrupt and had no means at all to meet verdicts for persistent wrongful defamation. The Commission proposed the strengthening of the limitations on criminal defamation which now

survive this failure of reform unreconstructed. For example, it was proposed that it should be made clear that the accused would be entitled to an acquittal if the prosecutor failed to show either that the accused intended harm or knew of its probability or that he knew of the falsity of his statements or was indifferent to them.[14]

THREE LESSONS:

There are three major lessons which I draw from the history of the efforts at defamation law reform. None of them brings particular credit to the law making and law reforming processes of our country.

The first is the melancholy fact that a major effort to secure reform has come to nothing. Of course, law reformers propose. The elected representatives of the people dispose. Their decision must be loyally accepted. But it is a wasteful enterprise to engage in a major national inquiry in a delicate and intricate area of the law, if the result is a total failure of progress, despite common consent in most knowledgeable circles that the need for certain reforms had been demonstrated - and despite the established need for particular reforms about which there was complete agreement. If law reform in Australia is to be more than a thing of shreds and patches - more than band-aid proposals on minor matters of inconsequential technical or trivial concern, we can take no comfort from the failure of the defamation reform enterprise. Nor is self righteous criticism of the Law Reform Commission warranted. The Commission acts as a catalyst. It presents its proposals with reasons and with a draft Bill. It is then over to the Ministers and their officials. The failure, and the cause of it, must be placed where it belongs. It

does not belong in the Law Reform Commission with its detailed report and careful proposals. It belongs in the political process to which, at the end of the day, the Commission's report is addressed. This is not a party political observation. The defamation reference was first mentioned by the Whitlam Government. It was commissioned by the Fraser Government. It was reported to Attorney-General Durack. It was processed in part by him and in part by Attorneys-General Evans and Bowen. The result of a great deal of effort, of the work of hundreds of citizens, including the most remarkable team of consultants ever assembled on this topic in Australia, of public hearings, professional seminars, not to say the countless hours of discussion in the Standing Committee - is nothing. Nothing has been achieved. The report is simply an academic work. It is a footnote to the history of our law. - Yet another tombstone on the landscape of Australian law reform, scattered with the record of so many failures. Where technology forces the need for change and where there is so much agreement on so many matters, such a failure can be ill-afforded by our country. Such neglectful extravagance in the use of scarce, talented resources can bring no-one much joy. Blame is not in point. What is important is the consideration of our institutions which produce this lamentable result.

Secondly, we see demonstrated once again the special weaknesses of the Australian Federation as we practice it. The give and take that seems to exist in the United States Federation and even in Canada in the achievement of uniform laws seems to strike a congenital incapacity on the part of Australians. We have simply not devised the means to develop and maintain uniform laws. Because things have been done for so long one way, no-one

will yield. How fortunate we were in that small band of determined and imaginative Founding Fathers at the turn of the Century. Had they not achieved Australian Federation when they did, it is scarcely conceivable that the modern generation of Australian leaders would have agreed upon anything - let alone anything of the slightest controversy. The capacity to sink differences and to reconcile differing view points or to search for acceptable consensus seems to be asking too much.

It cannot be said, as Attorney-General Bowen declared, that the Standing Committee actually rushed this job. The defamation report went from meetings of that body (held frequently in holiday resorts from Cooktown to Perth and even Queenstown, New Zealand.) The languid hours that were spent pouring over it were thrown away. In the end obstacles remained and the enterprise, just one of many that requires uniform treatment, came to nothing. It is little wonder to me that Federal Governments, of differing political persuasion, react to this incapacity of our political process to deliver uniform laws by looking at the Constitution to find lawful bases by which the Federal Parliament, without more ado, can proceed to develop national laws to deal uniformly with common problems. Diversity may be, on occasion, a protectress of freedom. But some concessions must be made to technology and efficiency, to reality and to economics. The failure of the Uniform Defamation Bill carries a message of discouragement for those who would like to see more development of uniform law: with the possibility of minor local variants, short of the heavy handed and sometimes artificial and challengeable Federal legislation enacted out of despair of agreement whenever the slightest difference or

controversy is raised.

The third implication is that seemingly, reform in an area such as defamation cannot be achieved so long as the media withhold their imprimatur. In Australia, the most potent of the media being in relatively few hands, this means a significant power to an interested party naturally determined to protect and preserve its position. It is not as if our media can be seen as a disinterested, valiant and always liberal guardian of fundamental rights such as free speech and the free press. The indifference to privacy is reflected, (at least in my view), in the extremely vigorous campaigns of many sections of the media in support of the proposal for a national identity card. The media's idea of a liberal society and of liberal freedoms to be defended, tends to be myopic. It often appears to be a concern that the media should be able to do what it pleases with no legal interference or as little as possible. Whilst this stand-point is commercially and politically understandable, it does not thereby become more palatable or intellectually convincing. If our media were more sensitive to competing public rights - to reputation, to fair trial, to individual privacy, the criticisms of the defamation reforms (and the objections to some of the proposals) would have been more convincing. For many in the media the only freedom they are interested in is freedom to write or speak as they please. This is a dangerous and myopic concept of freedom. There are other values in competition which a just, tolerant and liberal society will seek to defend. We have seen evidence in recent days of the great mischief that can be done when unbridled publicity both makes the public and individual interest in a fair trial difficult, or impossible, to maintain. Giving the media a veto on

the legitimate community demands for defamation reform can amount to the protection of entrenched interests. It may ensure still further enhancement of the already significant concentration of power over information which exists in relatively few hands as we survey the scene of the Australian media.

The assertion that a right of correction may be accepted - but only where agreed to by the media, might strike a dispassionate observer as demonstrating the arrogance of those long used to wielding great power and resistant to the notion that other people have rights and that those rights are not necessarily in competition with free speech but may even involve the defence of the freedom to have the truth said and to have lies corrected even when told by the powerful and opinionated.

A PROPOSAL

All of this brings me to my proposal. I make it upon the basis of four assumptions. The first is that uniform defamation is dead. The second is that the Federal Government and Parliament would not presently find congenial the idea of a Federal defamation law, despite the decisions of the High Court of Australia which would seem to enhance the prospects of the constitutional viability of such a law, properly framed. Thirdly, I assume that there was much in the defamation package which was totally agreed and much which, by common consent represented important improvements of defamation law and practice - improvements which should not be lost for despair as a result of the failure of the uniform bill. Fourthly, I assume that there may sometimes be advantage in a Federation, in demonstrating the merits of reform in one jurisdiction. Once demonstrated, these can then be adopted elsewhere. Many of the reforms introduced by

the Dunstan Government in South Australia, once proved in that State, were adopted elsewhere throughout the Commonwealth to the general benefit.

A great deal of work was done on the Uniform Defamation Bill by officers of the Federal Attorney-General's Department. They are to be commended for their patience and determination. In my view, all of this effort by successive Attorneys-General, by their officers, by the Standing Committee - not to say by the Law Reform Commission and its consultants - should be rewarded with the enactment of the substance of the Defamation Bill in one or more Australian jurisdictions that were willing to accept it. The most obvious candidate for action would be the Australian Capital Territory. When it is demonstrated that judges are not so foolish as to impose banner corrections on the front page - but use their discretion and good sense in the new procedures; when it was shown that such corrections can substantially reduce "the pot of gold" mentality of defamation and at the same time protect the public interest in knowing the truth; when it was shown that the right of reply could afford an appropriate means of encouraging legitimate controversy whilst at the same time discouraging meritless claims; when it is shown that relatives are not hovering around the grave in the hope of finding someone they can sue for defamation; when it was shown that the protection of privacy caused nothing like the problem which the thundering editorials predicted - perhaps the hope of achieving national defamation law reform might once again be rekindled.

A few weeks ago I was invited to take part, as a member of the Faculty, in the Salzburg Seminar. This meeting, organised by Harvard University has been a regular feature of the

intellectual life of Europe and North America since the War. The session I attended and addressed concerned the development of laws - national and international - to cope with the impact of informatics. The changes of information technology - computers, satellites, telecommunications, broadcasting require rapid changes of our laws, institutions and administration. The participants, leading spokesman from the OECD and developed and developing countries expressed despair in the capacity of our law making institutions to respond to the challenge of technological change and the needs it would demonstrate for law reform and harmonisation of laws. As I thought of the failure of our little project in faraway Australia on the reconciliation of substantially similar defamation laws, I must confess that I too had moments of despair.

But then I went outside. I listened to the music of Gustav Mahler. I looked up at the great moutains where that most Austrian composer received his inspiration and took courage.

So it must be with defamation law reform. There has been a distinct set back. But much work has been done. And there are many good ideas that should be salvaged. Indeed, there was a wide area of consensus. The special pleading of our media, whilst it should be considered, should not be determinative of this subject. Mahler left his Tenth Symphony unfinished at his death. Some say it is his finest work. The achievement of defamation law reform will test at once our country's resolve to translate law reform effort into action; to achieve uniform law reform where this is justified and to pay heed to the competing interests which should be considered in designing reform in sensitive areas.

Isolated in my ivory tower I shall be watching the continuing saga with more than a little interest.

FOOTNOTES

1. See Hunt, J, Foreward to G. Fricke "Libels, Lampoons and Litigants", cited [1985] Reform 52.
2. Australian Law Reform Commission, Unfair Publication: Defamation and Privacy (ALRC 11), 1979.
3. ibid, p 174.
4. ibid, p 190.
5. See, for example, The Commonwealth of Australia v The State of Tasmania & Ors (Tasmanian Dams Case) (1983) 57 ALJR 450.
6. Sydney Morning Herald, 9 May, 1985, 8.
7. ibid.
8. R. Pullan, Guilty Secrets; Free Speech in Australia, Methuen, 1984.
9. ibid, 212.
10. Id, 213.
11. Sydney Morning Herald, 17 April, 1985, 10
12. S. Taylor, "Life in the Spotlight: Agony of Getting Burned". New York Times, 27 February, 1985. See also B. Williams, Book Review, "Privacy: Studies in Social and Cultural History by B. Moore, in "Private Faces in Public Places", New York Review, 25 April, 1985, 36-37. Cf [1985] Reform 52.
13. ALRC 11, p 57.
14. ibid, 106.