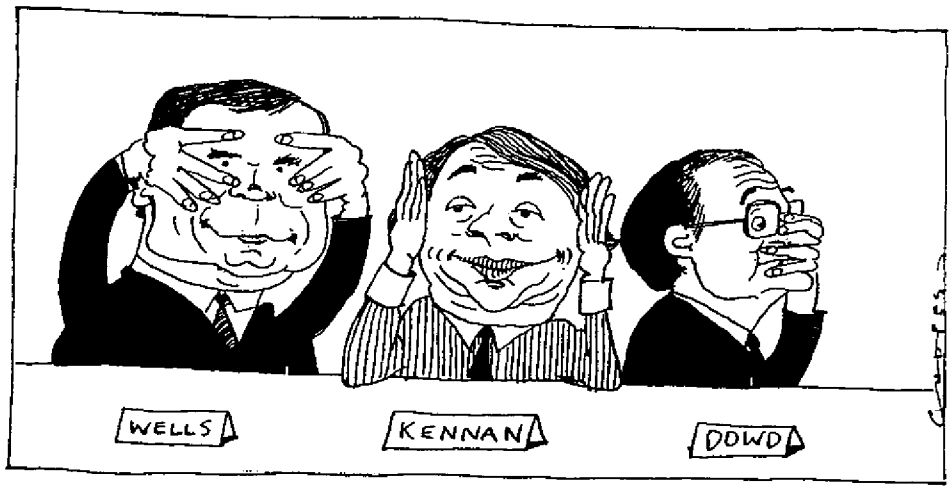
Forum 2:

Defamation law reform

Sally Walker of Melbourne University examines two aspects of the reforms proposed by the Attorneys-General of three states



The process of reforming Australia's defamation laws should involve an appraisal of the policies justifying defamation law and a critical evaluation of the present law. The recent proposals of the Attorneys-General of New South Wales, Queensland and Victoria for reforming our defamation laws are characterized by a failure to show the kind of understanding of defamation law which is necessary to ensure that only appropriate reforms are enacted. The deficiencies of the approach taken by the attorneys in their first *Discussion Paper* and developed at the Free Speech Committee's Seminar held in Sydney in October 1990 can be illustrated by the manner in which they have dealt with two significant areas: justification and the public figure concept.

Justification

At the Free Speech Committee's Seminar, the Attorneys indicated that they had reached agreement that the defence of justification should be one of 'truth plus privacy'; the defence should not be available in respect of material relating to the "health, private behaviour, home life or personal or family relationships" of the plaintiff unless:

(a) the matter was the subject of government or judicial record available for public inspection;
(b) the publication was made reasonably for the purpose of preserving the personal safety, or protecting the property of any person; or protecting the property of any person; or
(c) the matter was relevant to a topic of public interest.

An assertion made by the Queensland Attorney General that this is a "very major concession for Queensland and New South Wales" is fallacious. If this formulation were adopted, the impact on the law as it now operates in New South Wales and Queensland would be minimal; the real impact would be felt in Victoria where publishers would no longer be able to rely on truth as an absolute defence when publishing persona information, but would have to satisfy the additional hurdle constituted by paragraph (a), (b) or (c).

The Attorneys seem to be of the opinion that the 'truth plus privacy' concept will protect against invasions of privacy. At the Seminar, Victorian Attorney-General Kennan said:

"The Australian media, and in particular the electronic media, has a propensity to impose on people's homes and private lives, often using heavy-handed tactics. A law of defamation that permits the media to justify intrusions of privacy on the basis of truth alone is no longer an appropriate law".

In fact, the proposal would do little to protect privacy. It must be remembered that 'truth plus privacy' would be raised only as a possible defence to an action for defamation. In many cases an invasion of privacy does not involve any issue relating to defamation law. Even if the invasion of privacy involves the publication of material, not all statements regarding private matters are defamatory.

At one point in the Victorian Attorney-General's paper, he said that the three States had agreed on the option of "truth alone as the defence *plus the provision of a remedy for breaches of privacy*". Later in his paper it became clear that the Attorney's proposal would not give a remedy for invasion of privacy, but merely add a privacy hurdle to the defence of justification in the terms outlined above. It is little wonder that press reports of the Seminar were somewhat confused.

Something should be said also about the Queensland Attorney's view regarding the defence of justification. The Attorney General suggested that, in determining what should be the role of qualified privilege, the issue to be addressed is "what damaging and false statements do you wish to allow to be non-defamatory?" According to the Attorney, this is the correct way to go about determining what should be protected by qualified privilege because "true statements" are protected by the defence of justification. This fails to take account of the limited nature of the protection accorded by the defence of justification. First, the defendant must prove the truth of the imputations arising from the published material, not the truth of the *statement*; it is not enough that a statement is literally true, the imputations must be shown to be true. Secondly, the defendant has the burden of proving that the defamatory imputation is true; practical problems may be faced: a witness may have died, or changed his or her mind about giving evidence, before the case comes to trial; there may be a desire to protect a journalist's sources. Finally, the law of evidence may make it difficult to establish the truth because it limits what evidence may be admitted in court proceedings.

Public figure test

The Attorneys agree that Australia should not adopt the America law as developed in *New York Times* v *Sullivan* (1964) under which a public figure cannot recover damages in respect of defamatory material relating to his or her official conduct unless the statement was made with malice.

The reasons given by the attorneys for rejecting the American position include: the American concept is vague and uncertain; the reputation of public figures; litigation is protracted. None of these reasons addresses the role of defamation law. In fact, if regard were had to the policy justifying the law of defamation, there are good reasons for not adopting this part of the American law. The malice requirement concentrates attention on the publisher's state of mind rather than on the nature of the published material; American cases focus on the fault of the defendant rather than upon the truth or falsity of the statement at issue. The problem with this is that the state of mind of a publisher has no relationship to the individual's interest in his or her reputation and it is this interest which justifies the existence of the tort of defamation.

It is worth noting that the attorneys do not address the other aspect of the American

public figure concept, that is, that a public figure plaintiff bears the burden of proving the falsity of the defamatory imputations *Garrison* v *Louisiana* (1964).

Conclusion

The *Discussion Paper* makes it clear that the attorneys' aim is to achieve a uniform defamation law. At the Free Speech Committee's Seminar there were many references to "concessions" made in order to achieve uniformity. While it certainly is in the public interest that Australia should have a uniform defamation law, it is equally important that decisions regarding the content of that law should be made having regard to the policy objectives justifying the civil action for defamation rather than as part of a process more fitting to a bartering transaction than the process of law reform. It would be most unwise to seek uniformity simply for the sake of uniformity or to introduce "reforms" simply to be shown to have tried.

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Gareth Evans of Queensland Newspapers, gives a publisher's perspective

The Pancake Concord - the historic deal on uniform defamation reached by the Attorneys-General from Queensland, New South Wales and Victoria – should, insofar as it goes, be welcomed by Australian publishers.

While there is still a long way to go between the deal worked out over the breakfast table at the Pancake Parlour in Sydney's Rocks and actual legislation, Messrs Wells, Dowd and Kennan have shown that something positive can be done to bring some sort of uniformity to this complex area.

Their efforts to date certainly appear to have gained more ground than those of my namesake when he tried to make progress in the same difficult territory. Senator Evans' efforts were virtually scuttled because of the intractable attitude of one major publisher.

In summary, the Pancake Concord signalled agreement on the following:

- Criminal defamation will be retained in all jurisdictions subject to the discretion of the Director of Prosecutions.
- Truth alone would be a defence with statutory protection for privacy.
- Court recommended corrections will be established.
- There will be a six month limitation period to commence an action with a three year maximum.
- New South Wales and Queensland will allow juries to determine guilt with judges to determine damages. Victoria intends to allow juries to determine both matters.
- Statutory incentives would be provided to encourage the media to play a responsible role in regulations in this area so that, if a matter was arbitrated by the Press Council, that may be taken into account in the determination of quantum of damages.
- All three states will introduce a statutory tort of contempt which would be contained in a separate bill.
- A further *Green Paper* should issue soon summarising other areas to be examined, including qualified privilege, parliamentary privilege and model rules for defamation actions.

Clearly, this *Green Paper* will allow further debate on all issues under consideration, but two of the announced proposals invite critical comment.

Role of Press Council

The role of the Press Council in Australia has come under repeated criticism, mainly by the Australian Journalists' Association (AJA) who were instrumental in its original establishment in 1976. The AJA withdrew its support from the Press Council when the Council, quite correctly, refused to enter the political debate that followed the News Limited takeoever of the Herald & Weekly Times Ltd in January 1987.

Since that time, the AJA has waged a campaign to undermine the Press Council despite the fact that several of the Association's eminent members continue to sit on the Council and adjudicate at complaints committee hearings.

The Queensland Attorney-General, Mr Wells, has spoken of "the possibility of providing a meaningful role for a meaningful Press Council." Publishers would be very wary of any "statutory incentives" which would see a weakening of the role of the Press Council and an increased role for any government in "regulation" of the media.

The proposal, that Press Council arbitrations be taken into account when determining damages, shows an ignorance of the Council's operation or perhaps a desire to bring its operation increasingly under government control.

Complainants to the Press Council may be asked to sign a legal waiver if the Council considers the complaint could be the basis of legal action. This waiver is vital if publishers are to continue to be taken before the Press Council's complaints committee. Without it, publishers would be asked to argue their case before a non-judicial body.

It might even mean that lawyers get to appear at Press Council complaints hearings, an area they are quite sensibly precluded from at the moment.

Such statutory authority would clearly undermine the independence of the Council.

Tort of contempt

The other concern to publishers could be the content of the proposed Bill designed to introduce a new statutory tort of contempt.

Australian newspaper publishers should appreciate the concern of the Attorneys General in relation to the publication of inflammatory or prejudicial material, in particular careless use of photographs or television footage in cases where identity is an issue to be determined by the criminal court.

It's arguable that a new tort is necessary. Electronic media personalities have clearly abused the contempt laws for the sake of notoriety.

However, any problems which have arisen in recent years in this area are the result of unexplained failure by prosecuting authorities to invoke existing laws of contempt, particularly against the electronic media. Further the reform of defamation laws is not an appropriate occasion to consider piecemeal reform to the law of contempt. If a separate bill is designed to consider comprehensive proposals for reform of the law of contempt, the print and other media should be invited to respond to these proposals.

Criminal defamation

Most newspaper publishers could be disappointed that criminal defamation has not been abolished. Many of the supposed functions of criminal defamation, such as avoiding breaches of the peace, are served by other existing provisions which concern the use of threatening, abusive or insulting words in public.

To the extent that existing criminal offences do not follow the same operation of criminal libel, at least in Queensland, civil actions for defamation provide adequate protection against defamatory statements. Criminal proceedings are therefore unnecessary.

The Attorneys General have agreed that the discretion of the Director of Prosecutions should determine if actions for criminal defamation should be implemented. It would seem to make more sense that, if criminal defamation is to be retained, then the requirement of leave of the Supreme Court before proceedings are commenced should be retained.

If the Attorneys are not swayed by this argument, criminal defamation should be clearly and narrowly defined in any new bill.

The agreement that the truth alone should be a defence to an action for

defamation represents a significant breakthrough. There is the rider that statutory protection of privacy should accompany such a defence.

The law of defamation would be a crude and uncertain means to protect personal privacy. Personal privacy should be the subject of separate legislation which directly addresses that issue. If sensitive private facts are to be protected, it should be done by a law relating to privacy.

If the law of defamation is to be used as an uncertain mechanism to protect individual privacy, then the person complaining of the invasion of privacy should carry the burden of establishing this element.

Court ordered retractions

Further debate has been flagged on the hoary matter of court sanctioned corrections. This was the stumbling block encountered by Senator Evans in previous moves for uniform defamation review.

Newspaper publishers should support a system whereby the publication of a retraction within a reasonable time entitles a plaintiff to recover only pecuniary damages when these can be proved, or, alternatively, general damages limited in amount.

The law should provide that evidence of an apology or a correction or an offer to publish or correct shall not be tendered against the defendant as an admission. The defendant, however, should be able to tender that evidence if it seeks to do so on the question of damages.

As to court-ordered or sanctioned retractions, the print media has a legitimate concern that a publisher should not be forced to something which it knows or believes to be false. Several paths may well be open publishers.

The first is that the defendant publisher should not be required to state that it adopts or accepts any statement of fact found by the court. The second would be that the defendant newspaper may accompany the correction or retraction with a statement that it is doing so to abide by a court order. There also need to be safeguards against frivolous plaintiffs. A further protection could be for the defendant publisher to elect not to publish a retraction and to defend proceedings at a considerable risk or increased costs and damages if the defence is unsuccessful.

Evidence of a defendant/publisher's acceptance or non-acceptance or any court-sanctioned correction should not be admissible in later proceedings other than in the judge's assessment of any damages. If a defendant publisher elects to publish a retraction of the defamatory statement or an apology or publish a correction, the plaintiff should be entitled only to damages for proven actual economic loss caused by the publication.

If a fast track procedure of court-sanctioned retractions is to be available to plaintiffs, defendants should also be entitled to press for a summary hearing. Such a summary hearing should be granted unless the court decides that a published apology, retraction or correction and payment of a nominated sum would be an inadequate remedy.

Most Australian publishers should have no difficulty with the provisions forecast for limitation periods and the for role of the jury in defamation actions.

Qualified privilege and the public figure test

Publishers should also welcome the opportunity to contribute submissions concerning qualified privilege and the role of parliamentary privilege.

One concern would be that any redrafting of qualified privilege should cover the existing protection in this area, although these protections vary from State to State. The examination of qualified privilege may also allow for another airing of the so-called "public figure test".

The Attorneys-General have said they consider that the introduction of a "public figure test" would automatically operate to deprive such figures of protection in relation to defamatory remarks about their purely private affairs.

Publishers could argue there is an obvious need to fashion a defence of qualified privilege which promotes public discussion on matters of legitimate public interest, but does not involve the perceived technicality and other disadvantages of the "public figure test".

To the extent which the defence of qualified privilege accords the media protection to discuss the public conduct of public figures, such protection should be retained.

The purpose of the defence of qualified privilege is not to deprive public figures of protection, although this sometimes may be its necessary consequence, it exits so that the public can be informed on matters of legitimate public interest.

The AttorneysGeneral plan to welcome further discussion on all the matters they have raised. If the Pancake Concord was breakfast, it could be quite a while until both government, the media and other interested parties work through the menu.

Gareth Evans is Editorial Manager of Queensland Newspapers Pty Ltd and is a member of the CAMLA executive. Some of the above material is part of Queensland Newspapers' submission to Queensland Attorney-General Wells on the First Green Paper on Defamation Reform.

Michael Hall of Phillips Fox gives a plaintiff's perspective on the proposed reforms

Defamation law will always be controversial. It represents the conflict between two social values, both generally recognised as valid: the protection of free speech pitted against the individual's right to protect her or his good name from intrusive, inaccurate reporting. Whatever the state of the law, those who feel most keenly for one value or the other will consider themselves to be hard done by. The fact there has been since at least the 1950's an almost continuous clamour for defamation law reform is not enough to demonstrate that the present state of the law is seriously defective – whatever reforms are made, someone will continue to lobby for change.

I believe that the present defamation laws of New South Wales do, with a few anomalies, provide a workable and roughly fair balance between the competing interests of media organisations and those upon whom they report. It appears to me that most of the difficulties and inequities of certain classes of plaintiffs (such as politicians who should perhaps be less sensitive to robust criticism) and of defendants, or of the delays and expenses inherent in all types of litigation rather than faults in the law itself. To introduce restrictions on the right of action, with the incidental effect of excluding worthy plaintiffs, is not the proper response to excessive use of the system by some plaintiffs.

I therefore propose to confine my contribution to this forum to comments on two specific aspects of the present proposals.

Truth and privacy

Those calling for reform of Australian defamation law have long complained that truth alone should be a defence, without the additional need for public interest (public benefit in Queensland) or qualified privilege.

The practical consequences of the additional requirement of public interest or qualified privilege in the New South Wales defence have never been great. However, the proposal to move to a "truth alone" defence will simplify the law, and few plaintiffs, I suspect, will object.

While I welcome the move to "truth alone", it seems that the proposed exclusion from the defence of "certain private facts" is a confusion of the purpose of defamation laws. Defamation law is here being used to protect not reputation, but privacy. If there are certain facts which are so private that their protection outweighs free speech, then that example of the problems this can cause is

provided by the proceedings brought last year by actor Gordon Kaye against the British newspaper "Sunday Sport".

Gordon Kaye, a well known television comedy actor, was severely injured during a freak hurricane which struck England in January of 1990. He was placed on a life support machine, and to assist his recovery, notices were placed at the entrance to the hospital ward instructing visitors to see a member of staff before visiting Kaye.

On 13 February 1990 a journalist and photographer from the *Sunday Sport*, a newspaper which the Court of Appeal described as "lurid and sensational" ignored the notices and entered his room, to take photographs. Mr Kaye, perhaps not surprisingly in view of his condition, did not raise any objection, instructed the journalist and photographer to leave, but they refused and were eventually ejected by staff. Kaye, when asked, was entirely unaware of their visit.

The Sunday Sport refused an invitation to return the photographs, and indicated its intention to publish them, and to sell them to other newspapers.

Kaye's family brought proceedings to prevent publication of the photographs and an alleged "interview". Their action, framed in defamation, trespass and invasion of privacy, failed. The Appeal Court said, persuasively, that the action was not properly brought in defamation – the photographs could inspire only pity, not ridicule or contempt. There was no separate right to privacy, and therefore Kaye and his family had no means of preventing publication.

This case is an example of the unfortunate consequences of confusing defamation law with the protection of privacy. I therefore do not agree that plaintiffs (or anyone else) will benefit from the proposed exclusion from the defence of truth, of "certain private facts". If privacy is to be protected, it merits its own separate cause of action.

Court ordered apologies

While the Federal Court's power under the *Trade Practices Act* to order corrective advertising has attracted little comment, suggestions that the Supreme Court have an equivalent power to order a correction, when it finds that a defamatory, untrue settlement has been published, meet with howls of protest.

However, the value of such a power, unless the corrective statements can be obtained exceptionally quickly, must be limited. Advocates of defamation law reform on the media side are quick to criticise plaintiffs for seeking monetary damages at all – saying that if it is the restoration of a reputation which is at stake, that can be sufficiently done by an apology.

My own experience, assisting a variety of complainants in relation to alleged defamations, has been that newspaper proprietors in particular expect to be allowed days and even weeks in which to make up their minds to publish the most obliquely worded "clarification" or "correction", and then take umbridge when a complainant suggest that this is not sufficient to totally restore her or his good name.

I do not believe that it is practically possible to adopt a system which will compel newspapers or broadcasters to publish retractions or apologies, by court order, sufficiently quickly for them to have a real effect in restoring a plaintiff's reputation. Seldom can an apology published later than the next edition of the newspaper or program be sufficient to fully correct defamatory material. It can be no surprise therefore that some plaintiff, having gone through the process of trying to persuade a newspaper or broadcaster to correct mistakes, seek to recover monetary damages in addition to an apology.

Conclusion

To read many contributions to the defamation law debate from the media side (I do not include the other contributors to this Forum), is to gain the impression that all plaintiffs in defamation actions are unworthy gold diggers, seeking to gag the press. I do not believe it is so. Very few defamation plaintiffs make a profit from their cases, and those who do pay a great price in the discomfort and indignities of court proceedings. Publishers, meanwhile, are portrayed as martyrs to free debate and the democratic process, struggling to bring unpublishable truths to their readers or viewers. In fact, if we drove motor cars with the reckless disregard to other persons and their property that some reporters and media organisations show for the accuracy of their stories, and for the protection of individual reputations, we would be sued no less often, with equally expensive results and, in addition, would be likely to face criminal prosecution. I do not share the view that defamation laws in Australia should be substantially reined back.

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Rental rights – and the Copyright Act

Stephen Peach argues that the advent of digital technology has opened up new avenues for exploiting musical copyright for which artists should be remunerated

The advent of digital technology in the sound recording industry may, contrary to initial expectations, result in the decimation of that industry unless appropriate amendments are made to the *Copyright Act 1968*.

The acceptance of the compact disc format in Australia, in keeping with the experience of other major markets in the western world, has exceeded all industry expectations. In Australia, vinyl records now account for less than 10 per cent of all records sold each year and that figure is steadily declining. By way of contrast, sales of compact discs now account for more than 50 per cent of the balance.

The advantages of compact discs for the listener are well documented. One of these advantages, which is on the verge of being commercially exploited in Australia on a massive scale, is that a compact disc (or, more importantly, the sound embodied within the compact disc) does not deteriorate with repeated playing. It is, for all practical purposes, indestructible.

Of course, this characteristic also makes the rental of compact discs a commercially viable proposition. Regardless of the quality of the equipment used to play the disc, the disc itself will remain unaffected. This is in stark contrast to vinyl records which will suffer from significant and rapid deterioration depending upon the care taken with the record and the quality of the equipment on which it is played. The susceptibility of vinyl records to such damage has, in the past, acted as an effective barrier to the commercial exploitation of records through rental. The compact disc has eliminated that barrier and, already, compact discs are available for rental on a limited basis through many smaller record stores and video rental stores. However, if the experience of Japan is any indication (where in excess of 6000 rental outlets are currently operating), large scale compact disc rental is just around the corner.