Preparing for a Full-Scale Invasion? Truth, Privacy and Defamation

David Rolph discusses the intersection between defamation law and privacy protection following the introduction of Uniform Defamation Legislation.

Introduction

Last year saw perhaps the most important event in the history of Australian defamation law: the introduction of uniform, national defamation legislation.[1] Prior to 1 January 2006, Australia had eight different defamation jurisdictions. The differences between them should not be underestimated. They were real and substantial and led, on occasion, to different outcomes in respect of the publication of the same matter.[2] The introduction of uniform, national defamation laws may be properly viewed as a significant victory for commonsense and efficiency.

This is not to say their introduction has been without controversy. One of the contentious aspects of the recent defamation law reforms is the nationwide adoption of truth alone as a complete defence to defamation. Prior to 1 January 2006, four Australian jurisdictions required proof of a public interest or a public benefit in addition to proof of the substantial truth of a defamatory matter before the defence of justification could be established. Some commentators have suggested the removal of the element of public interest or benefit will allow the media to invade privacy with greater impunity. Other commentators have been swift to reject this predicted consequence of the reform.

This article seeks to examine this debate. It argues that the removal of the requirement of public interest or benefit will not lead to a more invasive media for a number of reasons. Ultimately, it suggests that defamation law should not be used as a *de facto* privacy protection; that defamation and privacy protect conceptually distinct interests; and that the time has come to address directly the need for effective privacy protection in Australian law.

The Defence of Justification at Common Law and under Statute

At common law, truth is a complete defence to defamation. The rationale for this legal principle is explained by Street ACJ (as his Honour then was) in *Rofe v Smith's Newspapers Ltd*:

> *…[A]s the object of civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it.*[3]

As Patrick George has recently observed, '[a] truthful statement defines reputation rather than damages it.'[4] Prior to 1 January 2006, the common law defence of justification applied in the Northern Territory, South Australia, Victoria and Western Australia.

The uniform, national defamation legislation provides a statutory form of the common law defence of truth alone. Under the new laws, a defendant need only demonstrate that the defamatory matter is substantially true in order to establish the defence of justification.[5] The introduction of the statutory defence of truth therefore did not bring about a substantive change to the applicable law in the Northern Territory, South Australia, Victoria and Western Australia.

It did, however, bring about a substantive change in the law of the remaining four jurisdictions. Prior to 1 January 2006, the statutory defence of justification in New South Wales required that a defendant prove that a defamatory imputation was not only substantially true but that it also related to a matter of public interest or was published on an occasion of qualified privilege.[6] Likewise, in the Australian Capital Territory, Queensland and Tasmania, a defendant needed to prove that a defamatory matter was substantially true and was published for the public benefit.[7] The introduction of the uniform provision in these jurisdictions appeared to make it easier for defendants to establish a defence of justification, requiring as it did one less element to be proven.

The Current Controversy

In an episode of *Media Watch* broadcast in mid-April 2006, presenter, Monica Attard, analysed the potential impact of the abandonment of a public interest or benefit element of the defence of justification. She suggested that this element ensured a level of privacy protection for individuals, citing cricketer, Greg Chappell's defamation litigation against Channel Nine in the 1980s[8] and the more recent proceedings brought by socialite, Shari-Lea Hitchcock, against John Fairfax Publications Pty Ltd as examples.[9] Attard further suggested that the loss of this element could lead to an increasingly intrusive media in Australia with a concomitant decline in journalistic standards. The potential nadir was represented by the recent exposé by *The News of the World* of the love life of British Conservative parliamentarian and former editor of *The Spectator* magazine, Boris Johnson. Attard expressed the view that the statutory defence of justification allows privacy protection '[to go] by the board' and that the new defamation laws overall favour media organisations at the expense of individuals' privacy.[10] Attard has recently repeated her views in an interview with *The Australian* newspaper.[11]

Attard's views provoked responses from two newspaper columnists. In his regular column in the 'Media' section of *The Australian* newspaper, Mark Day argued that, under the previous defamation laws, the public interest or benefit element was a 'hurdle to justice'. However, according to Day, the real difficulty was not proving public interest or benefit but proving, in a courtroom, the substantial truth of the defamatory matter. He also took issue with Attard's characterisation of the new defamation laws as too favourable to the media. According to Day, the new defamation laws had the effect of correcting the balance which, for too long, had unduly favoured the protection of plaintiffs' reputations. He also disagreed with Attard's prediction, as paraphrased by Day, that 'newspapers and television programs would soon be filled with the antics of bonking politicians and…naughty vicars'.[12]

The legal affairs editor of *The Australian* newspaper, Chris Merritt, was equally critical of Attard's views on truth, defamation

and privacy. His principal criticisms were that Attard's analysis was superficial and provided only partial solutions. Attard claimed views expressed by the retired Defamation List judge of the Supreme Court of New South Wales, David Levine, supported her position. However, Merritt reproduced previously unpublished remarks by Levine, in which Levine stated that the public interest element of the defence of justification was a largely irrelevant and ineffective form of privacy protection. Merritt also criticised Attard's endorsement of 'British-style privacy laws', noting that, in the United Kingdom, the introduction of a statutory right of privacy was accompanied by the introduction of a countervailing statutory right of freedom of expression, about which Attard had expressed no view. He further suggested that Attard had overlooked important common law and law reform developments in Australia in relation to privacy protection.[13]

Does Truth Alone Jeopardise Privacy?

There are a number of ways in which one can test the proposition that the removal of the public interest or benefit element from the defence of justification in defamation allows the media to invade privacy with impunity.

Whether the public interest or benefit element of the defence of justification ever operated as an effective privacy protection is questionable. Few cases in practice turned on whether or not a publication concerned a matter of public interest or was for the public benefit, as Levine observed.[14] In many cases, public interest or benefit was conceded by plaintiffs.[15] In cases where it was contested, courts did not adopt an unduly narrow approach to the characterisation of the public interest or benefit.[16]

Grech v Illawarra Newspaper Holdings Pty Ltd and *Hitchcock v John Fairfax Publications Pty Ltd* are two recent, and rare, examples of cases in which the defence of justification turned not upon proof of substantial truth but proof of a matter of public interest. In *Grech v Illawarra Newspaper Holdings*, a Dapto man sued *The Illawarra Mercury* for reporting that he had been admitted to Wollongong Hospital following the explosion of a firecracker 'between the cheeks of his buttocks'. The article detailed the consequences of what it surmised was a *Jackass*-style stunt gone wrong, being a fractured pelvis, burnt genitals, sexual dysfunction and the need for a colostomy and a catheter.[17] It is understood that the plaintiff's objection to the article was not that it was not substantially true, but rather that there was no public interest in the publication of such matter.[18]

In *Hitchcock v Fairfax*, Nicholas J found that the reporting in *The Sun-Herald* of 'impromptu solo dirty dancing' by Sydney socialite, Shari-Lea Hitchcock, followed by 'a nauseating display' with a married television executive, at the launch of the reality television programme, *Rock Star: INXS*, did not relate to a matter of public interest, with the result that Fairfax's pleaded defences of justification, contextual truth and comment all failed on this ground.[19] The fact that proof of public interest or benefit was rarely the major obstacle confronted by media defendants in establishing a defence of justification suggests that the public interest or benefit element was not, in and of itself, an effective privacy protection for plaintiffs.

The real difficulty with the defence of justification has always been the proof of substantial truth, rather than the proof of any public interest or benefit in publication. Two recent cases amply demonstrate this point. In *Craftsman Homes Australia Pty Ltd v TCN Channel Nine Pty Ltd*, Smart AJ had to traverse a vast amount of evidence in relation to four residential building contracts in order to establish the truth of the imputations of shoddy building practices and unfitness to conduct a building business levelled against the plaintiff builders.[20] His Honour's judgment was in excess of a thousand paragraphs. Likewise, in *Li v Herald & Weekly Times Pty Ltd*, Gillard J took almost four hundred paragraphs to find that eight newspaper articles, reporting allegations that the plaintiff conducted an illegal brothel under the guise of a legitimate Chinese herbal medicine practice and issued false receipts to allow her clients to make claims from their private health insurance providers, was completely justified.[21]

In both of these cases, the defendants ultimately succeeded with their defences of justification. These cases illustrate an important point about the defence of justification. The proof of substantial truth can be complex and, as a consequence, costly. Moreover, this complexity and cost is common to jurisdictions with and without a public interest or benefit element in the defence of justification.

It is debatable whether the inclusion of a public interest or benefit element in the defence of justification in at least four jurisdictions affected media practices so as to operate as an effective check on an intrusive media prior to 1 January 2006. Prior to the introduction of the national, uniform defamation laws, the media, on occasion, engaged in conduct that could reasonably be viewed as an invasion of privacy. For example, in mid-April 2005, *The Daily Telegraph* published an article which itemised the contents of former NRMA president, Ross Turnbull's rooms at two Sydney motels. The motel operators retained Turnbull's personal property as security for his unpaid accommodation bills.[22] In the same month, *The Daily Telegraph* also published photographs of Rodney and Lyndi Adler going for their morning walk, taken by photographers who had followed them for the purpose of obtaining such photographs. The photographs were accompanied by a story alleging that Rodney Adler offered to consent to having his photograph taken in return for a favourable editorial position being adopted by the newspaper prior to his sentencing on four criminal charges arising out of his involvement with failed company, HIH Insurance.[23] The presence of a public interest requirement in the defence of justification did not stop *The Daily Telegraph* from publishing either of these stories. It would be difficult to demonstrate, quantitatively or qualitatively, that the media has become more invasive in their practices before and after the introduction of the national, uniform defamation laws.

If the public interest or benefit requirement were an effective privacy protection, one might have expected to find a more invasive media in those jurisdictions without it. However, the media in those jurisdictions have not been noticeably more intrusive than the media in jurisdictions with a public interest or benefit requirement. It would be difficult to argue that, prior to 1 January 2006, the media in Victoria, for instance, were more invasive of personal privacy than the media in New South Wales. Moreover, the absence of such an element in four jurisdictions has not been the stimulus for increased privacy protection in those jurisdictions that might have been expected to combat the more intrusive media that the absence of such an element is supposed to create. Australian courts and legislatures have been uniformly slow to identify and address the need for direct privacy protection.

Reputation and Privacy

There is a more fundamental reason why it is flawed to suggest that the removal of the public interest element of the defence of justification in defamation law might allow more intrusive media practices to occur. It is axiomatic that the principal legal interest

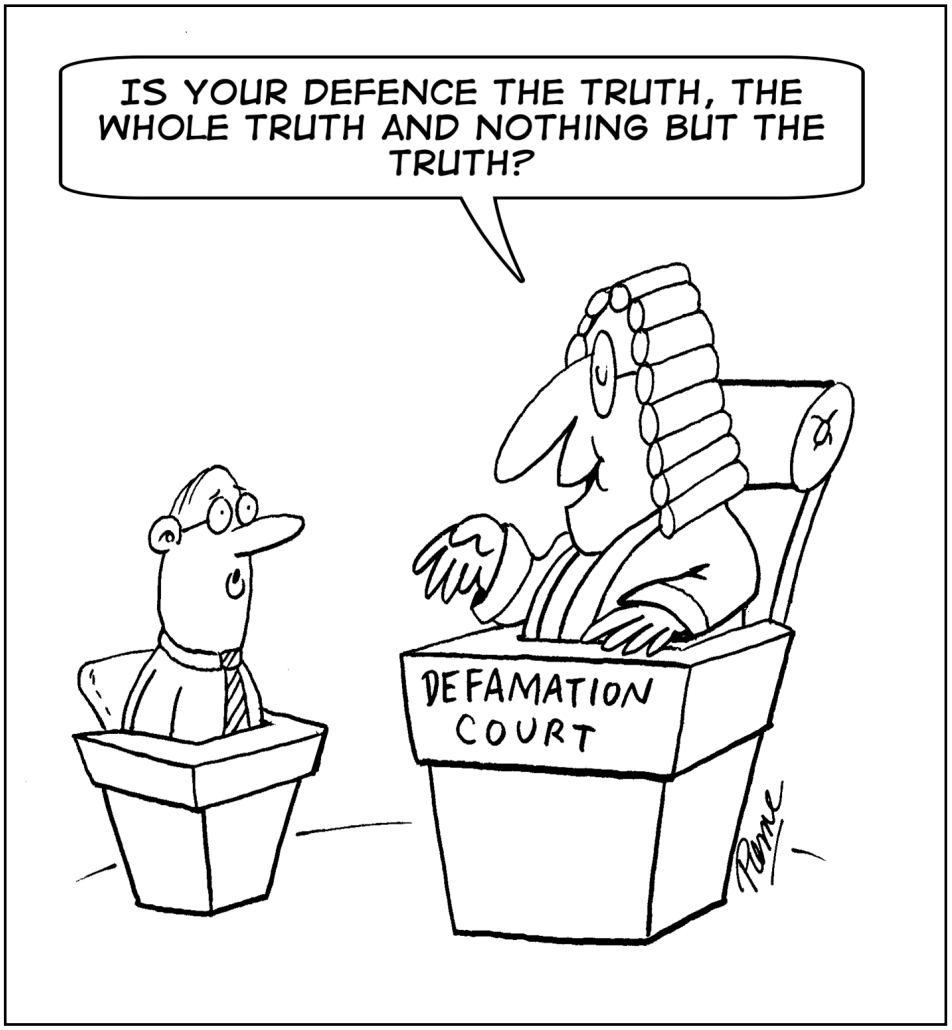
protected by defamation law is reputation, not privacy.[24] To the extent that defamation law defines reputation – a concept comparatively undertheorised in defamation jurisprudence – it is taken to mean 'what other people think [the plaintiff] is' and is contrasted with character, being 'what [the plaintiff] in fact is'.[25] Consequently, reputation is inherently public. Defamation law is therefore principally concerned with the protection of the plaintiff's public face. This understanding of the purpose of defamation law underpins Street ACJ's statement of the rationale of the common law defence of justification. Unsurprisingly, in contrast to reputation, privacy is inherently private. Although they are both founded upon the personality of the plaintiff, reputation and privacy are conceptually distinct legal interests.

Because its principles are designed to protect a fundamentally different legal interest, reputation, defamation law does not readily accommodate privacy protection as one of its aims or rationales. Defamation law should prevent people making false and disparaging statements about others in public; privacy law should allow individuals to control what true, but private, information about themselves is disseminated in public and what remains private. Any privacy protection afforded by defamation law has been or should be incidental or indirect at best. The fact that recent reforms have arguably reduced or removed privacy protections from defamation law does not mean that the principles of defamation law as they now stand under the national, uniform defamation laws are somehow deficient. Properly understood, it is not the function of defamation law to protect a plaintiff's privacy.

Australian Developments in Direct Privacy Protection

If there is a deficiency in Australian law in relation to privacy protection, it is preferable to address that deficiency by engaging with privacy as an interest worthy of direct legal protection, rather than seeking to deploy defamation law to provide an indirect remedy. Until recently, Australian courts and legislatures have been unwilling to engage with this complex issue.

For several decades, it was assumed that the High Court's decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[26] prevented the recognition of a common law cause of action for invasion of privacy. However, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[27] Gummow and Hayne JJ stated that, properly understood, this case did not act as an obstacle to the development of direct privacy protection.[28] A number of judges in *ABC v Lenah Game Meats* expressed the view that a tort of invasion of privacy might be recognised as part of the common law of Australia, but such a cause of action, if recognised, would not be for the benefit of artificial entities, such as Lenah Game Meats Pty Ltd, privacy being an incident of the innate dignity of natural persons.[29] In *Grosse v Purvis*, Skoein DCJ of the District Court of Queensland awarded damages to the plaintiff for invasion of privacy, following *dicta* from *ABC v Lenah Game Meats* to fashion a new tort.[30] However, the correctness of this decision was doubted in the Supreme Court of Victoria in *Giller v Procopets*[31] and by the Full Federal Court in *Kalaba v Commonwealth*.[32] Until recently, it appeared the process of developing direct privacy protection as part of the Australian common law had stalled.



The seemingly arrested development of direct privacy protection in Australian law may be usefully contrasted with the significant developments in New Zealand and the United Kingdom. In New Zealand, the New Zealand Court of Appeal has recognised a limited form of the tort of invasion of privacy, being confined to the public disclosure of private facts.[33] This decision was the culmination of a judicial trend, represented by a series of first-instance judgments, towards the recognition of this tort.[34] In the United Kingdom, the equitable cause of action for breach of confidence has been fashioned to provide a remedy for the misuse of private information. The case law is already substantial – and growing.[35] Direct privacy protection in New Zealand and United Kingdom law is therefore more advanced than that in Australian law.

There have, however, been indications that Australian law might also address the need for privacy protection directly. In late January 2006, the Commonwealth Attorney-General, Philip Ruddock, provided the Australian Law Reform Commission with terms of reference to inquire into privacy protection in Australian law. Thus far, the ALRC has produced an issues paper and, under its terms of reference, is due to report at the end of March 2008.[36] Similarly, in mid-April 2006, the then New South Wales

Attorney-General, Bob Debus, provided the New South Wales Law Reform Commission with terms of reference to inquire broadly into the same matter.[37] Finally, in early April 2007, Judge Hampel of the County Court of Victoria awarded damages to a sexual assault victim who had been named in media reports in breach of the statutory prohibition protecting the anonymity of such victims, in part on the express basis of a tort of invasion of privacy.[38] This decision may be subject to an appeal. Nevertheless, cumulatively, these three recent developments suggest that Australian courts and legislatures alike are renewing their interest in direct privacy protection – without the need for reference to defamation law.

Conclusion

It should not be a matter of concern that public interest or benefit element has been removed from defence of justification in defamation law. Because defamation law is designed to protect reputation, in essence the public self of the plaintiff, not privacy, it has always been difficult to accommodate both reputation and privacy satisfactorily within the principles of defamation law. What should be a matter of greater concern is the lack of progress towards developing direct privacy protection in Australian law. Indeed, it will be a desirable outcome of this narrow, but crucial, aspect of the recent defamation law reforms if it provides further stimulus for the development of some form of direct privacy protection, whether it be a statutory cause of action or a judicially recognised tort.

David Rolph lectures in Media Law and in Intellectual Property at the Faculty of Law, University of Sydney.
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(Footnotes)

[1] For an overview of the new, national, uniform defamation laws, see David Rolph, 'Uniform At Last? An overview of uniform, national defamation laws' (2006) 76 *Precedent* 35.

[2] See, for example, *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6; *Cawley v Australian Consolidated Press Ltd* [1981] 1 NSWLR 225.

[3] (1924) 25 SR(NSW) 4 at 21-22.

[4] Patrick George, *Defamation Law in Australia*, LexisNexis Butterworths, Chatswood (NSW), 2006, [19.1].

[5] *Civil Law (Wrongs) Act* 2002 (ACT) s 135; *Defamation Act* 2005 (NSW) s 25; *Defamation Act* 2006 (NT) s 22; *Defamation Act* 2005 (Qld) s 25; *Defamation Act* 2005 (SA) s 23; *Defamation Act* 2005 (Tas) s 25; *Defamation Act* 2005 (Vic) s 25; *Defamation Act* 2005 (WA) s 25.

[6] *Defamation Act* 1974 (NSW) s 15(2)(b) (repealed).

[7] *Civil Law (Wrongs) Act* 2002 (ACT) s 127 (repealed); *Defamation Act* 1889 (Qld) s 15 (repealed); *Defamation Act* 1957 (Tas) s 15 (repealed).

[8] *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153.

[9] *Hitchcock v John Fairfax Publications Pty Ltd* [2007] NSWSC 7.

[10] For the transcript of the relevant *Media Watch* episode, see http:///www,abc.net.au/mediawatch/transcripts/s1613045.htm (last visited 2 May 2007). Attard's arguments were foreshadowed by an article by the legal affairs editor of *The Sydney Morning Herald*, Michael Pelly. See Michael Pelly, 'If the truth be told…', *The Sydney Morning Herald,* 20 January 2006, 13.

[11] Chris Merritt, 'Privacy law to hit press freedom', 'Media', *The Australian*, 22 March 2007, 13 at 14.

[12] Mark Day, 'Freedom of speech undefined', 'Media', *The Australian*, 12 April 2006, 12.

[13] Chris Merritt, 'Complete picture about a little matter of privacy', *The Australian*, 20 April 2006, 16.

[14] Chris Merritt, 'Complete picture about a little matter of privacy', *The Australian*, 20 April 2006, 16.

[15] See, for example, *Dennison v Refshauge* [2003] NSWSC 78 at [8] per Cripps AJ; *Cotter v John Fairfax Publications Pty Ltd* [2003] NSWSC 503 at [43] per Simpson J.

[16] See, for example, *Millane v Nationwide News Pty Ltd t/as Cumberland Newspaper Group* [2004] NSWSC 853 at [117]-[124] per Hoeben J; *Craftsman Homes Australia Pty Ltd v TCN Channel Nine Pty Ltd* [2006] NSWSC 519 at [823]-[826] per Smart AJ (television programme concerned building services marketed to public and building standards generally matter of public interest, rather than purely private contractual matters).

[17] Megan Levy, 'Surgeon's grim warning after firecracker tragedy', *The Illawarra Mercury*, 3 September 2003, 1, 5.

[18] As to the facts of the case and the pleaded imputations, see *Grech v Illawarra Newspaper Holdings Pty Ltd t/as Illawarra Mercury* (2005) 2 DCLR(NSW) 69.

[19] *Hitchcock v John Fairfax Publications Pty Ltd* [2007] NSWSC 7 at [18]-[23].

[20] [2006] NSWSC 519.

[21] [2007] VSC 109.

[22] Peter Gosnell, 'Final indignity – He lost his girlfriend, he lost his job. And now Ross Turnbull has lost the shirt off his back…', *The Daily Telegraph*, 12 April 2005, 3.

[23] Peter Gosnell, 'Snaps for comment – Adler offers to pose for photos but wants a good light', *The Daily Telegraph*, 14 April 2005, 1, 9.

[24] See, for example, Ray Watterson, 'What Is Defamatory Today?' (1993) 67 *Australian Law Journal* 811 at 812-13; Eric Barendt, 'What is the Point of Libel Law?' (1999) 52 *Current Legal Problems* 110 at 112-14; Huw Beverley-Smith, *The commercial appropriation of personality*, Cambridge University Press, Cambridge, 2002, 249-50; W.V.H. Rogers, *Winfield & Jolowicz on Tort*, 16th ed., Sweet & Maxwell, London, 2002, [12.1].

[25] This classic statement of the distinction between reputation and character is taken from *Plato Films Ltd v Speidel* [1961] AC 1090 at 1138 per Lord Denning MR.

[26] (1937) 58 CLR 479.

[27] (2001) 208 CLR 199.

[28] Ibid at 248-50. See also ibid at 320-23 per Callinan J.

[29] Ibid at 250, 256-58 per Gummow and Hayne JJ. Gaudron J broadly agreed with the reasons given by Gummow and Hayne JJ. See ibid at 231-33. However, see also ibid at 326-27 per Callinan J.

[30] (2003) Aust Torts Reports ¶81-706 at 64,183-64,187 (as to liability), at 64,189-64,191 (as to assessment of damages).

[31] [2004] VSC 113 at [187]-[189] per Gillard J.

[32] [2004] FCAFC 326 at [6]-[9] per Tamberlin, North and Dowsett JJ, dismissing an application for leave to appeal against the decision of Heerey J at first instance. As to Heerey J's reasoning, see *Kalaba v Commonwealth* [2004] FCA 763 at [6].

[33] *Hosking v Runting* [2005] 1 NZLR 1.

[34] See, for example, *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *P v D* [2000] 2 NZLR 591.

[35] See, for example, a representative selection of the most recent and most significant cases: *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457; *McKennitt v Ash* [2006] EMLR 113; *HRH Prince of Wales v Associated Newspapers Ltd* [2007] 2 All ER 139; *Browne v Associated Newspapers Ltd* [2007] EWHC 202 (QB); [2007] EWCA Civ 295; *Douglas v Hello! Ltd* [2007] UKHL 21.

[36] Australian Law Reform Commission, *Review of Privacy*, Issues Paper 31, http://www.austlii.edu.au/au/other/alrc/publications/issues/31/ (last accessed 5 May 2007).

[37] As to the terms of reference, see http://www.agd.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref113 (last accessed 5 May 2007).

[38] *Jane Doe v Australian Broadcasting Corporation* (unreported, County Court of Victoria, Judge Hampel, Case No Cl-03-07657, 3 April 2007).