inar was the necessity to face up to the facts that the structure of the media is changing, that newspapers in particular are facing increasing competition from other media while at the same time suffering the after-effects of collapse, takeover and re-assortment, and that journalism is becoming increasingly the subject of critical attention.

Media criticism has become almost a flourishing mini-industry. The old school of media critics was represented by David Bowman and Brian Toohey which places all the blame for the deficiencies of the media on proprietors, managements and "conservative" journalists.

The new school which was underrepresented at the seminar (although the members of the Press Council were clearly interested) takes a much more critical approach to editors and journalists, and insists on looking for evidence of systematic bias and prejudice on their side.

(Gerard Henderson who writes in *The Australian* on Mondays and publishes a monthly newsletter *Media Watch* is a leading representative of this new school).

Both schools make a necessary contribution to what should be an ongoing and public debate on the performance of our media whether publicly owned bureaucracies like the ABC, giant international groups like News Ltd or small independent publications.

A strong and independent press as well as television and radio broadcasting industries are an established element of a healthy democracy. No orthodoxy, whether of Left or Right, should be unchallenged — even though too often the prevailing ethos of journalism is unchallenged by practitioners of the craft.

One newspaper, *The Sydney Morning Herald* has embarked on the new for Australia experiment of appointing an in-house ombudsman to consider complaints and criticisms. In the United States this kind of thing has not been notably successful.

But *The Sydney Morning Herald* has chosen George Masterman QC, a man of great independence who proved to be a thorn in the side of the government as NSW Ombudsman. Masterman might just achieve what others have not and add a whole new dimension to journalism and its public responsibility in Australia. •

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The right of free speech is being steadily eroded

by P.P. McGuinness

Whatever lawyers say, the jury verdict against restaurant critic Leo Schofield is a grave blow against freedom of speech in this country. It will do untold harm to the quality of public comment in many areas of public life.

Let me begin by saying that I have no opinion on the facts of this case. But it is not a question of particular facts.

PHOTO COURTESY JOHN FAIRFAX & SONS/PAUL MATHEWS

Paddy McGuinness

(The Sydney restaurant, the Blue Angel, was awarded $100,000 damages by a NSW Supreme Court on Thursday over a review in *The Sydney Morning Herald,* in which Mr Schofield accused the restaurant of being cruel to lobsters and cooking them dry.)

The Schofield verdict is the latest in a string of such verdicts in NSW which have practically established that it is not possible to write, in safety from threat of being sued successfully for defamation, an honestly critical theatre review, book review, comment on building designed by a living architect or restaurant review.

This is most serious with respect to book reviews, since the defamation law has been used not just to threaten fairly insignificant fiction or poetry, but also to penalise the publication of serious and critical reviews on serious subjects.

It is simply not the case that it is a matter of confusion between opinion and comment on the one hand, and fact on the other. The truth is that the standards of truth, accuracy and proof applied to statements made by writers subject to defamation action are far stricter than anyone could meet in ordinary life.

Yet the right of free speech, which is even more fundamental to a democratic society than the rule of law is being steadily eroded by a series of decisions taken by juries which seem to have no awareness of the wider implications of what they are doing.

It has to be remembered, of course, that it is not just a matter of juries. The defamation law allows that certain defamatory statements are privileged and may not be the subject of damages. Absolute privilege applies to statements made in parliaments and

courts — a privilege sometimes abused in both places.

Qualified privilege, which involves the claim that a statement even if defamatory is in the public interest, is supposed to provide some protection to newspapers and other publications. The courts have, however, construed this in an extremely restrictive fashion and in practice it is not an effective defence.

It was to deal with this problem that the NSW Defamation Act in Section 22 provided an additional defence of qualified privilege, which was wider than the common law privilege.

However, the NSW Court of Appeal has effectively interpreted this section up to now in such a manner as to make it of little use. (There is a lot more which should be said on this matter, but since I am involved in a relevant matter which is still sub judice it is perhaps not appropriate now.)

The net effect of the decisions and judgments relating to the law of defamation in Australia is that critical opinion is greatly hampered. What does appear has to be realised to be subject to very considerable risk of defamation action, a risk newspapers have to take every day.

It simply would not be possible to publish honest critical analysis and comment regarding politics and other matters without taking such a risk. As we have seen, politicians who enjoy absolute privilege in Parliament (and we have seen how the Treasurer has used that in the past week) are able, and indeed in some cases eager, to use the defamation law against commentators who enjoy no such privilege.

The law of defamation is unsatisfactory. But those who argue for complete open slather with respect to allegations against public and private individuals are barking up the wrong tree, for there must be some limits to what can be said.

If I were to write, knowing full well that it was not true, that Mr X was a child molester, then he in all justice would have a claim to retribution. If the law does not provide some satisfaction, the danger is that retribution will become a private matter — exactly what the rule of law is intended to prevent.

But you will notice a couple of points about this fictitious example. First, it is said that the statement was known to be false. Second, it would have been made of a private individual — it would be a different matter if Mr X were Chairman of the Childrens Protection Board. Implicit in a deliberate falsehood is a degree of malice.

The United States Supreme Court has achieved through its interpretation of the US Constitution a defamation law that is far more conducive to freedom of speech than anything achieved in the United Kingdom and Australia. This is because the First Amendment to the US Constitution provides that Congress shall, among other things, "make no law . . . abridging the freedom of speech or of the press". In effect, the defamation law in the US (although far from perfect) provides that a statement is culpably defamatory only if it is made of a person other than a public figure, is motivated by malice and is known to be untrue.

All of these are important. It is absurd that politicians, judges, journalists, senior executives of public companies and similar public figures should be able to stifle criticism of their own actions or words. But if the motives for that criticism are malicious, then the defamer should be subject to sanctions.

Most importantly, as is well known to all who have had dealings with defamation law, many cases which are settled out of court arise from mistakes made in good faith, simple human error.

The courts demand diligence in checking facts from journalists (as do editors); but the standards demanded by the courts are far stricter than those they impose on themselves.

One example involved an agency report which accidentally dropped off a part of a name. A person who had no connection whatever with the matters reported, but whose name coincided with the mistaken name, had a cast-iron case in law for damages.

Even worse is the doctrine that a fictitious character named in a book or play can be grounds for defamation action by a person of the same name, and perhaps some other coincidental similarities, because he does not like what is said of the character. This pernicious doctrine has led to the destruction of a number of writers.

(It needs to be added, however, that writers who think that a thin disguise of an identifiable person entitles them to say anything they like, bring that point of view into disrepute.)

The Constitutional Commission in its final report last year recommended an amendment of the Constitution to provide that everyone should have freedom of expression. Such a provision would change the Australian law to something like the American law.

Unfortunately, the winkling out of a few proposals of the commission (not including this one) and their dishonest presentation to the public by the Government discredited this particular path to reform.

There is, however, a crying need for some kind of protection for the right to free speech in Australia. The present law does not provide it, and so far the courts have shown themselves unwilling to do so either. •

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