# Defamation law reform

**Peter Collins, NSW Attorney-General, summarises the planned reforms to defamation law**

Like all areas of the law that entail some restriction of freedom, the law of defamation is the result of a balance of competing interests. On the one hand is the public interest in freedom of speech and access to full information. Against that right must be balanced the right of the individual to reputation and privacy.

Society's values are the result of dynamic processes. The accepted point of that balance must be adjusted from time to time to reflect any shifts.

Essential to the measurement of such shifts is the review process. My predecessor John Dowd and the Queensland and Victorian Attorneys-General initiated an examination of the adequacy of the defamation laws.

The resultant discussion papers generated a great deal of debate amongst interested parties and led to some changes which are reflected in the proposals that I have taken to Cabinet.

I will now briefly summarise what the changes will achieve, apart from the obvious one of cost saving brought about by uniformity, and the most significant relates to the defences available.

## Truth and qualified privilege

First has been a consideration of the defence of truth. This has focussed upon whether any requirement of public interest or benefit needs to be established. It has been decided that justification will be shown where a defendant shows a publication to have been true.

However, that will not be sufficient where publication relates to private matters such as a person's health, home life, private behaviour or personal or family relationships. In those cases, proof that the matter relates to a question of public interest must be shown unless the person complaining of the imputation has made the matter public.

Queensland and Victoria will also adopt the existing New South Wales' defence of contextual truth.

It is in this area that perhaps the greatest progress towards uniformity has been achieved. It is now recognised by all jurisdictions, that there needs to be statutory provisions to ensure that in certain circumstances, society's interest in open communications will outweigh the value placed on the protection of the individual's reputation. It is agreed that the defence should be available where information is responsibly, carefully and fairly obtained and reported and not motivated by ill will or other improper motives. However, the following provisos will operate.

**Peter Collins**

In order to establish that a publication is made in 'good faith' a willingness to allow a right of reply should be evident.

For publishers to establish that reasonable inquiries were made, they must show that the person complaining of the imputation had the matter put to them prior to publication (unless it was inappropriate to do so), thus giving them a chance to confirm or deny it.

Where, notwithstanding the fact that the defence is established, the imputation is shown to be false, the court will have a discretion to order a right of reply.

Malice will defeat the defence, the onus being upon the plaintiff to prove it. The bill will reflect the need for the publisher's conduct, as well as the extent and manner of the publication, to have been reasonable in order to obtain the benefit of the defence.

A special short limitation period will apply. A defamation action must be brought within six months of the date on which a plaintiff learned of publication, with an absolute limitation of three years from publication. A related development is the recognition that a proceeding which has been commenced but then laid dormant for a period exceeding 12 months should not proceed.

## Remedies

Monetary damages in addition to compensation for economic loss are the most appropriate means of compensating for harm and showing a plaintiff's complaint to be vindicated. No statutory limitation or cap will apply to the amounts awarded for non-economic loss.

Nevertheless, the unprecedented damages awards in New South Wales have been questioned as failing to correctly reflect the aim of compensating a person for injury to their reputation. Judges are considered to be better placed than juries to assess where a particular case falls in the spectrum of civil damages. Mitigating factors, such as the appropriateness of any action taken, or any refusal to publish a correction or apology are also better assessed by judges. A judge would be able to have regard to any opinion of a jury on the question of whether damages should be nominal or actual.

The issue of court recommended correction statements is a related one. It is proposed that early action by a defendant to publish a retraction or apology or other corrective material in terms and a form prescribed by a court, and to thereby restore a plaintiff's reputation in some measure, should be reflected in any ultimate award of damages. This step may also lead to an early assessment of the relative merits of the case and settlement may well result.

While acknowledging that criminal defamation proceedings are extremely rare, it has been recognised that the necessity for a criminal sanction exists where grossly unwarranted defamatory attacks occur.

Prosecutions will only be warranted when community interests need to be protected as in the case where the statement threatens to create a breach of the peace. Prosecutorial discretion will be exercised by the director of public prosecutions.

As a former journalist, I am especially keen to see greater rationality introduced in defamation law within and between the different Australian States but I believe that a system of court recommended correction will allow for an efficient system of restoring reputation, without lengthy and expensive court battles. The defence of truth alone, with a public interest test for private matters, is a good compromise which balances the public's right to know with an individual's right to privacy.

*This is the edited text of an address to CAMPLA on 1 August 1991.*