"THE PUREST TREASURE?"* NATIONAL DEFAMATION LAW REFORM IN AUSTRALIA

BY THE HONOURABLE MR JUSTICE M. D. KIRBY**

In this article, Mr Justice Kirby surveys two major issues which are before the Australian Law Reform Commission in its Reference to reform defamation laws. First, he suggests that any reform requires revision of procedures to deliver remedies that are apt for damage to reputation. Unless the judicial system can produce speedier redress and more relevant remedies, it is suggested that administrative or other regulation will replace court procedures. Secondly, the article explores the problems arising in the age of mass communications from Australia's eight different systems of defamation law. After weighing the arguments for and against a uniform code, it is suggested that the present disparity promotes confusion, uncertainty, self-censorship and forum shopping. Four methods of achieving a uniform code are explored. These include a return to the common law, reference of power to the Commonwealth by the States, an attempt to secure agreement with the States on uniform laws and the use of a number of Commonwealth powers to support a national Act. As the vehicle chosen will affect the law proposed, it is suggested that the choice can not be delayed.

I. REFORMING DEFAMATION LAWS

Defamation actions show up Australian law at its worst. The substantive law is complex. The procedures are dilatory. The remedies are elusive and problematical. When obtained, they are generally not apt for the wrong that has been done. Above all, there are eight systems of law operating in a nation where modern mass communications media render fine local distinctions confusing and on occasions mischievous.

It is not surprising, then, that shortly after the establishment of the national Law Reform Commission, the Attorney-General of the day, Senator Murphy, proposed that its first programme would include the preparation of a national defamation law. His successor, Mr Enderby,

---

* "The purest treasure mortal times afford,
Is spotless reputation; that away,
Men are but gilded loam, or painted clay."
Shakespeare, *King Richard II*, Act 1, sc. 1.

** Chairman of the Law Reform Commission of Australia, Deputy President of the Australian Conciliation and Arbitration Commission.

This article is an edited and updated version of an address delivered by Mr Justice Kirby to a conference organised by the Law Society of New South Wales at Thredbo, N.S.W. on 3 October 1976.

took up the same theme.[1] The programme which Mr Enderby announced in November 1975 included the reform of defamation laws as its major Reference.

During the 1975 election campaign, the Prime Minister (Mr Fraser) undertook in his policy speech that if the Coalition Parties were returned to Government, they would refer the protection of privacy to the Law Reform Commission. Newspaper comments pointed to the inadequacy of a reform of privacy laws in isolation from a re-examination of defamation laws in Australia. The two were perceived to be inextricably mixed.[2] This view must have been shared by the Government. Shortly after, a Reference was given to the Commission, on 9 April 1976, to review the protection of privacy; on 23 June 1976 the Attorney-General, Mr Ellicott, signed a Reference requiring review of defamation laws.[3] The Commission's warrant is to:

> Review the law of defamation (both libel and slander) in the Territories and in relation to other areas of Commonwealth responsibility, including radio and television. . . . And to report on desirable changes to the existing law, practice and procedure relating to defamation and actions for defamation.

The Commission is required to have regard to its functions under the Act to consider proposals for uniformity between the laws of the Territories and laws of the States.[4] The Commission is also required to note the need to strike a balance between the right to freedom of expression and the right of a person not to be exposed to unjustifiable attacks on his honour and reputation.

Why should there be such a bipartisan concern about reform of defamation laws in Australia? This is not the occasion to review the intricacies of defamation law and practice that cry out for simplification and renovation. Unanimous support, at Commonwealth level, for reform in this area of the law does not necessarily promise unanimous support for the reforms, once proposed. Nor does it ensure support for reform within the States. Two considerations especially feed the conviction that something should be done to reform Australian defamation laws. The first is a growing conviction that defamation actions are no longer an efficient instrument to remedy the wrong complained of. The second is the growing belief that lack of uniformity of laws in this area operates unfairly and ought to be corrected by a national approach, if at all possible. I address myself to these two issues. I will say nothing about the other important questions

---

[1] Enderby, "Expansion of Federal Laws" (1975) 1 Australian Government Weekly Digest 489, 492; see also at 551.

[2] *E.g.* The Australian Financial Review, 9 February 1976, 2.

[3] The full Terms of Reference are to be found in (1976) 50 A.L.J. 542.

[4] This is a reference to s. 6(1)(d) of the Law Reform Commission Act 1973 (Cth).

of defamation law reform.[5] These will be thoroughly canvassed in the publications of the Law Reform Commission, discharging its reference.

II. IS DEFAMATION AN EFFICIENT MODEL?

Why do we have defamation actions? What is the wrong they are seeking to right? Could the job be done more effectively in a different way? Broadly stated, defamation actions exist as a means by which the law seeks to right the wrongful damage caused to a person's honour or reputation by a published statement or imputation about him.

There is nothing new in a legal system's prohibiting defamatory statements. The Mosaic code included the injunction: "Thou shalt not go up and down as a talebearer among thy people."[6]

It is rare indeed for an organized society not to provide a means of redress against the making of false and derogatory statements about one person to another.[7] In this, English society, and those which have taken their legal systems from England, place a high value upon a man's reputation, dignity and honour. It is, in essence, an attribute of the respect demanded for the individual. It is bound up in the dignity of being human. English literature and English law abounds in statements asserting the value which our culture assigns to reputation. Parliaments, publishers and law reformers will ignore this aspect of our civilization at their peril.

Usually defamation actions involve a contest between values which our society would uphold. We assert a "right" of privacy and of integrity of reputation on the one hand. But we also assert a "right" of freedom of speech and of the free press on the other. If a publication has occurred, the free speech "right" has been asserted. The only possible "wrong" to be righted is the restoration of an injured honour or damaged reputation. It is in this respect especially that the tort of defamation, as presently operating in Australia, is not proving apt for the social task which it seeks to perform. There are a number of

---

[5] Among the recent reviews of defamation law are the *Report on Defamation* (L.R.C. 11) (1971) of the Law Reform Commission of New South Wales; the Fifteenth Report of the Law Reform Committee of South Australia *Relating to the Reform of the Law of Libel and Slander* (1972); the *Report* of the Committee on Defamation (Chairman, Mr Justice Faulks) Cmnd. 5909 (1975). A review is current in New Zealand, Kelsey, "Defamation in New Zealand—An Alternative Approach" (1976) 8 Victoria University of Wellington Law Review 130. The Australian Law Reform Commission has published its *Working Paper on Defamation* (1977) and also its Discussion Paper No. 1, *Defamation—Options for Reform* (1977). It is beyond the scope of this article to consider whether the cause of action in defamation is itself inapt *i.e.* whether a larger and more comprehensive tort (*e.g.* intentional infliction of mental suffering) should not be developed. *Cf.* Wade, "Defamation and the Right of Privacy" (1962) 15 Vanderbilt Law Review 1093.

[6] *Leviticus*, XIX, 16.

[7] A useful conspectus of the variety and similarity of the law of defamation in other countries is found in Carter-Ruck, *Libel & Slander* (1972) 230-354.

difficulties. Delays, some of which involve years rather than months, occur between the publication of a statement and completion of defamation litigation. Some of these delays arise from a loss of enthusiasm on the part of the plaintiff when the first flush of anger has diminished. Others arise from interlocutory proceedings. Others arise from appeals. Still others arise because the plaintiff had not the slightest intention of pursuing his claim and issued proceedings in the hope of stifling exposure in the media which he found unpalatable. Whatever the reason, the available figures from a number of Australian jurisdictions make it plain that a prompt resolution of defamation proceedings is the exception rather than the rule.

TABLE[8]

PROGRESS IN DEFAMATION ACTIONS

	Vic.	*Qld*	*Tas.*	*A.C.T.*	*N.T.*	*Total*
Number of defamation actions instituted in the Supreme Court between January 1972 and June 1976.	271	379	46	77	4	777
Number of actions set down for trial in same period.	17	13	7	5	NIL	42
Number of actions resolved by hearing, settlement, or default judgment for plaintiff in same period.	10	6	4	5	NIL	25
Number of actions formally discontinued in same period.	26	55	8	6	2	97
Number of actions dismissed for default by plaintiff in same period.	N/A	8	3	NIL	NIL	11

It is recognized that these statistics are not entirely satisfactory.[9] However, they present a sobering picture. They demonstrate that in the five jurisdictions reviewed, 777 actions were commenced and in the same period 25 hearings came to court. Because the table lacks the large numbers of settled actions typical of other areas of litigation, we

[8] Information supplied by the respective Supreme Courts. This Table, omitting the Tasmanian figures, appears in the Law Reform Commission's *Working Paper on Defamation* (1977) 165 (with further elaboration).

[9] For example, the figures omit defamation actions commenced otherwise than in Supreme Courts. They include, in the figures for actions set down and disposed of, writs issued before 1972. They include in the number of writs issued, actions only recently commenced where it would not be reasonable, in any system of procedure, to expect a completed trial before 30 June 1976. Furthermore, there would probably be some actions in which the parties have settled their dispute by release or by informal means, without any order of the court. Some cases would have been commenced without any serious intention of bringing the matter on to trial. The most serious defect in the figures is the absence of statistics from the State of New South Wales, where defamation actions are far more prevalent than in any other part of the Commonwealth. Statistics could not be produced from New South Wales and South Australia for administrative reasons. However, there is no reason to believe that the overall position would be very different.

can take no sure comfort from the fact that our system of justice is providing resolution of these actions away from court rooms. The more probable conclusions to be drawn are two. First, many proceedings are commenced in which there never was a serious intention to advance to trial. Secondly, many proceedings are commenced which become enmeshed in the toils of dilatory procedures. Neither conclusion is one which gives rise to satisfaction.

Writers have been complaining about the law's delays for centuries. Defamation actions are not unique in having to join the court queues. But in judging the significance of delay on a particular cause of action, one must continually revert to the nature of the wrong complained of. On occasions, delay of some extent may be desirable in litigation. It may permit the gathering of evidence and the crystallization of damage; perhaps even the cooling of tempers. But in the case of defamation, delay often militates against the effective righting of this particular wrong.

Plaintiffs assert that interlocutory proceedings in defamation actions are used as part of a positive strategy by which publishers seek to exhaust the patience or pockets of a complainant. Certainly, the annotations of the statute books of New South Wales bear witness to the myriad of interlocutory decisions secured on successive defamation Acts. They do much credit to the ingenuity of lawyers. But they also raise a suspicion that, to a greater extent than usual, obstruction or procrastination are used as conscious devices of delay. Whether this is a deliberate tactic or not, clearly it takes a very long time to bring a defamation action to the barrier in most parts of Australia. Few even get so far.

There would appear to be special reasons why defamation actions require, of their nature, a speedy resolution. General considerations applicable to almost all court proceedings apply to them. There is the problem of fading memory. There is the difficulty of securing necessary witnesses. The wronged plaintiff or justified defendant has the claim hanging over him for a time. But to these general considerations must be added factors special to the claim of damaged reputation. Unless a person's honour and reputation are vindicated forthwith, it will often be impossible, in the nature of things, to remedy the wrong months or years later. The passage of time, especially a long time, makes it almost impossible for a judge or a jury accurately to place themselves in the context of the statement complained of. If a statement is made during discussion of a topical matter, as is often the case, there will be a relevant atmosphere which is conditioned by contemporaneous events. The statements of other people and current public attitudes are frequently important considerations in judging the statement or imputation in its context. Furthermore, the right of public discussion is itself a precious one. It should be inhibited to the minimum possible

extent. Litigation which may restrict or discourage public discussion should therefore be disposed of as quickly as possible. The competition between sustained reputation and free speech requires speedy resolution. A damages verdict in favour of a wronged plaintiff years after the event will often do precious little to restore his reputation. There is no obligation to give publicity to the verdict. The position may be quite irretrievable by the time the verdict is secured. The compensation of money, especially, if paid over silently between the parties' solicitors may be cold comfort indeed for the damage that has been sustained. In the field of wronged reputations, justice delayed may be justice defeated.

The problems of defamation actions are not only plaintiff's problems. Publishers equally face acute difficulties in the present system. They must be concerned about the possibility of large verdicts with exemplary damages that can make a mark in the pocket even of a prosperous newspaper. In the case of a small provincial country or suburban journal, a large verdict of this kind could prove fatal. Those licensed to broadcast must be especially sensitive to their obligations to obey the law of the land. Uncertainty and doubts about the scope of the law of defamation breed self-censorship. Such self-censorship is often based upon an extremely cautious view of the law. In view of the variety of Australian defamation laws, misconceptions of this kind can scarcely cause surprise. In the result, many programmes or articles are "killed" on the editor's desk. The public is deprived of information which, perhaps, ought legitimately to be before it. The victim is the "right" of free speech.

The above Table also demonstrates that publishers in this country face a special difficulty, usually the use of "stop writs" to stifle debate of issues.[10] It is an abuse of the administration of justice that takes on a special relevance in Australia. We can have no appeal here to constitutional guarantees of freedom of speech. We have a *tradition* of free speech. But we do not have a legally protected and enforceable right of free speech.

Enough has been said to suggest that defamation actions are not working effectively. The tort of defamation has been treated as just another civil wrong to be tried in much the same way as a running down case or a claim for breach of contract. This has no doubt occurred for historical reasons and out of habit. Nobody has stopped to ask whether trial procedures developed to resolve other issues are apt to resolve the special issues that arise in a defamation case. If we

[10] The Queensland figures led the then Minister for Justice and Attorney-General for Queensland, Mr W. E. Knox to criticise the misuse of defamation "stop writs": Knox, Opening Speech, Seminar on Journalism and the Law, 24 August 1975, mimeo, 3.

remove the law's blinkers, what other models are available to balance more effectively the interests that are at stake here?

III. ALTERNATIVE PROCEDURES

(1) *Self-Discipline: The Press Council*

In April 1970, a committee was established in Britain to consider whether legislation was needed to give further protection under English law against intrusions into privacy. The report of this committee, whose chairman was Sir Kenneth Younger, was presented in May 1972. It is a major contribution to the discussions of the legal aspects of privacy. But the report discloses the committee's finding that the largest number of complaints concerning privacy intrusion related to complaints against the press.[11] In doing so it outlined the then composition and operation of the Press Council of Great Britain. It quoted statistics for the years 1970-1971. In that time 370 complaints were received by the Press Council's Secretariat. Of the total complaints received only thirty-eight (*i.e.* about 10 per cent) were considered by the Council itself. Of these thirteen were upheld. Twenty-five were rejected.[12] Thus only 3.5 per cent of those who took the trouble to put a written complaint to the Press Council were held to be justified.

In the end, the majority of the Younger Committee did not favour the creation of a tort of privacy to provide legal redress against the press. Although conceding the deficiencies of defamation law and of the Press Council, the majority sought to remedy the situation by recommending that the Press Council be reconstituted so as to improve its effectiveness. Principally, it was recommended that the proportion of press representatives upon it should be reduced and the proportion of lay members increased.

We now have a Press Council in Australia. Its first chairman is Sir Frank Kitto, a former Justice of the High Court of Australia. It is too early to evaluate this somewhat belated innovation. The Council is still in an experimental stage. It would be idle to ignore the criticisms that have been made of it since its establishment. One important publisher has recently withdrawn from membership of the Council. One major newspaper interest in Australia (the Fairfax group) has eschewed membership from the beginning. Its scattered publications are not subject to such discipline as the Council offers. It has published Press Council criticism of other newspapers in its columns. But it refuses to submit itself to like scrutiny. The absence of this major chain of publishers reduces significantly the universality of the Press Council's effectiveness. But this is not all. The composition of the Press

[11] *Report of the Committee on Privacy* (Chairman, Sir Kenneth Younger) Cmnd. 5012 (1972) para. 116.
[12] *Id.* para. 145.

Council has been criticised along lines rehearsed in the Younger Report. It comprises, at present, a majority of press representatives. This consideration takes on a special importance when it appears that members of the Council employed by a particular interest do not disqualify themselves when considering complaints against their newspaper. A third criticism tests this experiment against the willingness of those who are criticised to publish the finding of the Council when adverse to the interests involved. The repeated refusal of one newspaper in the early stages of the Council to publish criticisms made of it by the Press Council did not inspire confidence.[13] Other criticisms have been voiced concerning the results of particular determinations, the publicity given to findings made against newspapers and the adequacy of this form of redress. As well, the absence of coverage of broadcasting and television interests plainly limits its utility.

Those who are concerned about a free press which respects individual honour and privacy will be closely watching the operation of this experiment in institutionalized self-discipline. In other areas where public sensitivities are involved, there is a growing conviction that some matters are just too important to be left to the discipline of bodies comprising mainly or exclusively colleagues of those under fire.[14] The media may be in this class. Whether institutionalized or not, self-discipline will clearly have an abiding role to play in the balancing of interests at stake here. Most wrongs to reputation will continue to end up on the editor's cutting floor. Means of redress, legal and extra legal, will continue to be needed for the exceptional, aggravated cases.

(2) *A Media Ombudsman*

The delay and expense of judicial proceedings has contributed to the development of administrative means of resolving disputes. This presents a possibility that must be considered in resolving the competing claims of free speech and damaged reputation. Sweden established a Press Council as long ago as 1916. But in 1969, it took the procedure a step further. The Press Council was re-constituted so that the majority of members come otherwise than from the press. In addition, the 1969 reform established the office of Press Ombudsman for the General Public. This special Ombudsman's office is modelled directly

[13] Marr, "The Press Council Stumbles at its First Hurdle", Bulletin, 16 October 1976, 21.

[14] For example, lay participation in enquiries following complaints against members of the legal profession is now provided for by law in the United Kingdom, has recently been suggested in a New Zealand report, has been proposed in Victoria and South Australia and is under study in N.S.W. Independent and judicial scrutiny of compaints against police was proposed by the Law Reform Commission in its first report *Complaints Against Police*, A.L.R.C. 1 (1975). Certain self-discipline machinery does exist in respect of special aspects of media conduct. This includes the tribunals of the Media Council of Australia. It is a subject presently under study by the Autsralian Broadcasting Tribunal.

on the Swedish Parliamentary Ombudsman. But unlike the latter, he is appointed by the press organizations themselves as part of the self-discipline system. He has no legal powers. All complaints against newspapers and magazines go to him. The possibility of satisfying the complainant by securing a correction or a right of rejoinder is explored. Where this fails, the Press Ombudsman may either reject the complaint as not sufficiently well founded or refer it to the Press Council together with his opinion. In 1974 the functions of the Press Ombudsman were expanded to permit him to arbitrate as between the parties, in "mild cases of clear divergence from good journalistic practice".[15]

The power of the Ombudsman to move rapidly and to secure, by negotiation, a right of reply or a correction has attracted of late much approbation in England.[16] Although it has been said recently that we are suffering from "Ombudsmania", the merit of the Swedish system is clear. It allows swiftness of correction and the opportunity for an equal say, without necessarily determining the merits of a particular controversy. The modern dissemination of news may require a modern approach to the mistakes and errors that will inevitably arise in an industry of this magnitude. We ought not to be bound to a cause of action which is proving useful to a limited number of persons only and then after procedures that are fraught with technical snares. But using an Ombudsman is not without its own problems. It reposes vital decisions that affect important values in our society in the hands of administrators who may or may not adequately represent community standards. There may be dangers in creating an office that even remotely resembles that of a national censor to replace the judicial balancing of interests in this sensitive matter. The passage of the Commonwealth's Ombudsman Act 1976 and the enactment in most of the States of Australia of like legislation, will probably lead to more and more demands for Ombudsman-like remedies to cure social wrongs. If judicial procedures continue to respond inadequately to complaints against the media, there is little doubt that demand for Ombudsman-like redress will grow.

(3) *Defamation: Expedited Procedures*

A third possibility is to try to make present judicial procedures more effective by provision of compulsory curial means that will give special expedition to defamation actions. If defamation actions were to be instituted by summons returnable before a Judge or Master within days of issue, this would ensure that in most cases the parties would be brought before the court at a time when the damage to reputation or

---

[15] Groll, "The Press Council and the Press Ombudsman in Sweden" in Council of Europe (Directorate of Human Rights) *Round Table on Press Councils* (1974) 50, 51.

[16] *E.g.* Robertson, "The Libel Industry", New Statesman 2 July 1976, 6-7.

the justification of publication are still fresh.[17] It may be objected that such expedition and special treatment cannot be justified, at least in every case, when measured against the urgency of competing litigation. But if the nature of the alleged damage to be redressed is borne in mind, there may be a special reason for compulsory expedition of defamation cases. A procedure of this kind might provide the means to take hold of the large numbers of unlitigated writs which presently clutter the court lists and never come on for trial. Those who issue stop writs and those who persist with meritless defences would be obliged to face the court. This would have a salutory effect on each. Any scrutiny of defamation law reform inevitably requires consideration of defamation procedure. Delays, complexity and expense frustrate the purpose which the tort of defamation was designed to serve. That purpose is the provision by the law of a means to restore as far as possible a damaged reputation, consistent with competing values of free speech. This purpose is the guiding star for those who would reform defamation law. It is the reason that causes reformers to look increasingly to informal bodies such as the Press Council and administrative agencies such as an Ombudsman. Those who would prefer to keep this social discipline within the judicial process will succeed in the long run only if judicial machinery can prove capable of delivering prompt remedies that are appropriate to the wrong alleged.[18]

IV. NATIONAL LEGISLATION? THE PRESENT POSITION

Australia as a federation enjoys much diversity of law. This has sometimes promoted experimentation. It has sometimes encouraged legal progress. If it is assumed that a legally enforceable remedy in the nature of an action for defamation is desirable as an alternative or in addition to informal, administrative or other redress, the issue arises as to whether there is any special need for a national approach to this class of action. Consideration of this issue must start with an appreciation of the present position. There are eight different laws in Australia governing defamation: one for each State and Territory. Putting it broadly, these represent three significantly different systems. The first is a common law system. The second is a code system which provides a complete repository of the principles of actionable defamation and which goes beyond a mere restatement of the common law. The third is a mixed situation in which the law of defamation is partly statutory in origin and partly judge made. Under the influence of Sir Samuel

[17] Except where a delay occurs between the publication and the commencement of proceedings.

[18] Note that s. 7(a) of the Law Reform Commission Act 1973 (Cth) imposes a duty on the Commission to ensure that so far as practicable its proposals do not "unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions".

Griffith, Queensland adopted a code at the end of the nineteenth century.[19] Tasmania originally adopted the code in 1895 and this is now incorporated in the Defamation Act 1956.[20] Western Australia basically adopted the code in 1902, although primarily in connection with criminal defamation and only partly in connection with civil defamation.[21] New South Wales was a code State between 1958 and 1974.[22] In 1974 the Defamation Act 1958 was repealed upon the basis of the report of the New South Wales Law Reform Commission.[23] It was replaced by a new Act which returned the law, in many respects, to the common law whilst making several important modifications.[24] Accordingly the law of defamation in New South Wales is at present an amalgam of the common law and statutory law. With minor modifications, the common law alone still holds sway in Victoria and South Australia.[25] The two mainland territories of the Commonwealth are in a somewhat mixed position. In the Australian Capital Territory, the law is still governed by the New South Wales Act of 1901, as it was amended in 1909. This was the law which the Capital Territory inherited upon its establishment in 1911.[26] The Northern Territory is governed by the common law, as modified by a 1938 Ordinance.[27] Put broadly then, the common law governs defamation actions in Victoria and South Australia. Queensland, Tasmania and to a great extent Western Australia are code States. New South Wales and the two Territories are in a mixed position, although generally speaking the common law principles play a greater part in defamation law in the territories than in New South Wales.

These are not just theoretical differences of interest to scholars only. They are differences which affect defamation actions. They particularly affect the defences that are available to publishers. They will determine the success or otherwise of litigation commenced even upon the same publication, distributed in the several jurisdictions.[28]

---

[19] The Defamation Law of Queensland 1889 (Qld); Criminal Code 1899 (Qld) (criminal defamation).

[20] Act No. 42 of 1957.

[21] Criminal Code 1913, Chapter XXI (W.A.).

[22] Defamation Act 1958 (N.S.W.).

[23] *Cf.* n. 5 *supra*. The new Act is the Defamation Act 1974.

[24] Most notably in respect of the defence of justification, the scope of qualified privilege, the provision of an offer of amends and the quantum of recoverable damages.

[25] Wrongs Act 1958 (Vic.); Wrongs Act 1936 (S.A.).

[26] The New South Wales Act of 1901 was substantially amended in 1912. It was the 1912 Act (as amended) which applied in New South Wales until 1958. The 1912 statute was passed in New South Wales too late for application to the Australian Capital Territory pursuant to the Seat of Government Acceptance Act 1909, s. 6 (Cth).

[27] Defamation Ordinance 1938 (N.T.).

[28] As disclosed in the discussion of the *Gorton* and *Wright* cases *infra*.

V. IS A NATIONAL APPROACH DESIRABLE?

(1) *The Arguments Against*

What are the arguments against national legislation? I would rehearse four. First, it might be said, the Constitution is a compact which was not lightly made and should not lightly be interfered with. Depending upon the view one takes of the Constitution, it either left to or conferred upon the States the general private law affecting citizens, including defamation law.[29] State communities have different histories and have developed different approaches and standards in publications that can be and are mirrored in their laws. Because defamation laws touch a matter close to the heart of liberty in any community, rather than seek a uniform approach, the argument would have it that we should encourage each State community, scattered around the continent, to establish its own standards and strike its own balances.

The second argument arises from the fact that few calls for national defamation laws actually envisage direct amendment of the Constitution. It is urged that if the balance of legal power is to be changed, so that the Commonwealth intrudes into an area which since Federation has been regarded as the province of the States, this change should not be done surreptitiously. It should not be done by an irregular use of Commonwealth powers which were plainly not intended to embrace defamation law reform. The record of attempts to amend the Australian Constitution formally may indicate general satisfaction with the present balance of legal power struck between the Commonwealth and the States. According to this argument, the initial compact should not be overthrown by stealth. Only if the people approve an amended constitutional contract, in the way laid down in the Constitution, should the Commonwealth intrude, the Territories apart, into the law of defamation. It is not the business of the Commonwealth. It is the business of the States.

Thirdly, it is often pointed out that diversity of laws can itself lead to useful experimentation. Each State can be a laboratory for change and innovation, the nation's legal systems progressing unevenly but under the impetus of imaginative changes introduced in different State legislatures. For example, it has been asserted that the very diversity of Australia's censorship laws has led to progress and liberalization in this area.[30] A national Defamation Act or uniform defamation laws might impose, in a vital area, the harsh hand of unimaginative conformity over the whole country: robbing the separate State communities

[29] *New South Wales* v. *Commonwealth* (1976) 50 A.L.J.R. 218, 226 (Barwick, C.J.); *Queensland* v. *Commonwealth* (1976) 50 A.L.J.R. 189, 203; *Bistricic* v. *Rokov* (1976) 11 A.L.R. 129, 138 *ff. per* Murphy J.

[30] Comment by Mr Justice Bray on an article Woodward, "Censorship" (1971) 45 A.L.J. 570, 585-586, where he called diversity "The protectress of freedom".

of the opportunity to undertake imaginative law reform. In the field of defamation, however, it must be acknowledged that no State other than New South Wales has endeavoured comprehensive review of defamation laws since Federation.

Fourthly, and to my mind most powerfully, there is a practical argument. Defamation litigation is a comparative rarity outside the eastern States. Indeed it is comparatively unusual outside New South Wales. The Victorian and Queensland figures have already been mentioned. The number of actions coming on for trial in South Australia, Western Australia and Tasmania and in the two Territories are remarkably few.[31] Only in New South Wales is defamation "big business". Outside New South Wales, defamation law reform may be a scholarly business. Within that State it is of vital importance to practitioners, the media and the public alike.

Upon the basis of these and other[32] arguments it is suggested by some that no national reform of defamation laws is needed in Australia. If reform is required supporters of this view would leave it exclusively to the States. Some are openly sceptical of the priority that should be assigned to the subject.[33]

(2) *Arguments for One Law*

Giving all due weight to these considerations some form of national legislation would appear to be required. Several possibilities exist. One would be to exhaust such Commonwealth power as exists under the Constitution. The other would be to seek references by the States in accordance with the rarely used procedure envisaged by section 51(xxxvii) of the Constitution. Another means would be to secure uniform laws which could be enacted by each of the States. I imagine that a fourth theoretical possibility would be the repeal of all legislation and a return to the exclusive discipline of the common law throughout Australia. There seems little likelihood of this fourth possibility recommending itself even in Victoria or South Australia.[34] If a single comprehensive law of defamation is to be found in Australia it must be found within the Constitution by a reference of power or by negotiations leading to a uniform Act.

---

[31] See Table. The paucity of actions may depend in part upon the inadequacy of current law procedure and excessively cautious legal advice, stemming from inexperience of the cause of action.

[32] For example, Mr Galbally's criticism of transfer of unconnected powers, in this context the law of defamation, unconnected with the law of contempt of court. *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, (Melbourne) (1975) 88.

[33] For example Mr F. Walker (N.S.W. Attorney-General), Bulletin, 4 September 1976, 25.

[34] The statutory defences relating to fair reports and other minor variations of the common law would be lost.

I shall seek to demonstrate that the problems presented by the present disparate situation are such as to warrant a search for such a single law, despite the considerations mentioned above. The first and most powerful argument arises from the very nature of news and information dissemination today. The Commonwealth Attorney-General, Mr Ellicott, put it this way in an address in June 1976 to the Women Lawyers Association of New South Wales:

> [Defamation] is one branch of the law where there should be uniformity. When you find that television programmes and radio are transmitted across State borders and when you find that there are many national magazines and newspapers, daily newspapers and weekly newspapers, across State borders it is rather obvious that there ought to be a uniform law in relation to defamation. The prospect of judges and juries bringing in different decisions in different States otherwise than because they've taken a different view of facts is not a prospect we ought to go on considering as reasonable.[35]

In a speech delivered a few days later in Launceston, Tasmania, the Commonwealth Attorney-General warmed to this theme:

> The development of the media and of other means of communication on a national basis has made urgent the task of tackling the reform of defamation laws on a basis that will produce uniformity throughout Australia. Newspapers are published for circulation on a national basis, or at least for circulation in several States. Television and radio programmes are broadcast simultaneously in all or a number of States. Yet there are great differences in the laws of defamation. These differences are so great as to produce the result that in adjoining States plaintiffs may succeed in an action for defamation in one State and fail in an adjoining State in respect of the publication of the same material.[36]

These are arguments of convenience and practicality. There are other reasons. The sheer complexity of defamation laws inevitably leads, in many cases, to results that are unsatisfactory from society's point of view. Every metropolitan daily newspaper in Australia has some distribution across State or Territorial boundaries. At least two newspapers are distributed in substantial numbers in all States. For the purposes of the law of defamation, each sale of a newspaper is a separate publication giving rise to a separate right of action.[37] A

---

[35] Ellicott, "Law Reform—The Challenge for Government", 11 June 1976, mimeo. 100.

[36] Ellicott, "Law Reform and the Role of the States", 13 June 1976, mimeo. 122.

[37] *Duke of Brunswick* v. *Harmer* (1849) 14 Q.B. 185; *McCracken* v. *Weston* (1904) 25 N.Z.L.R. 248; *McLean* v. *David Syme and Co. Ltd.* (1971) 92 W.N. (N.S.W.) 611. *Cf.* the model statute known as the Uniform Single Publication Act approved in 1952 by the United States Conference of Commissioners on Uniform State Laws. See now s. 9(3) of the Defamation Act 1974 (N.S.W.), (leave of the court necessary in certain cases).

particular item may give rise to no action whatever in the newspaper's home State. But it may be actionable in another State or Territory. The newspaper management is confronted daily with the task of knowing and complying with the law of every State and Territory in which it makes sales of its journal. It is not surprising in these circumstances that some newspapers employ a full time solicitor to check copy for compliance with the laws of the various areas of distribution and that all newspapers need constant access to legal advice concerning the complex and varying defences that are available in different jurisdictions of Australia. Difficulties such as these arising in the publication of newspapers increase significantly when the electronic media are involved. Many radio and television transmissions cross State boundaries. Indeed some programmes are specifically designed for nation-wide transmission. More often than not these are programmes with controversial news or comment in them. Whereas newspaper editors have hours within which to compile and print an issue, many radio and television programmes, especially those in the fields of current affairs or news, are produced to much more stringent time limits. The broadcasting station may have only minutes between taping and transmission. In some cases recording and transmission will be simultaneous. In talk-back programmes, the lapse is a matter of seconds only. In these circumstances, to require a producer or a staff member monitoring the broadcast, to know or obtain advice upon the widely differing defamation laws of eight different jurisdictions in this country is to require the impossible. The burdens cast upon publishers and even upon their lawyers are unreasonable. To calculate in a given case the various possibilities of liability, having regard to available defences, may be a logician's dream. To those laymen involved, it represents a great puzzle. To the lawyers involved, it is a dilemma. It bewilders and confuses juries who are charged to try defamation actions. It shames the law.

Where a publication is confined to a small community or a broadcast is transmitted locally only, no particular difficulty arises from the present lack of uniformity. Where any element of "interstateness" arises, the confusion begins. One of three results will follow. The first is that, ignorant of the diversity of the law, the publisher will simply proceed and hope for the best, guided by nothing more than his own sense of ethics. The second possibility is that the item will be published or the programme transmitted on the "commercial risk" philosophy. Being in doubt as to whether the programme ought to be broadcast, it might be decided to "publish and be damned". Some would seek to justify this approach by reference to a "market" in defamation actions. But such arguments are unacceptable. Those affected ought to know the law, not only for fear that if they disobey it they will face the consequences. This may be especially so in the case of Government

instrumentalities or bodies licensed by the Government. They are surely entitled to clear guidance, hopefully in simple terms.

A third possibility is that the producer or his management will "play safe". He may opt for the lowest common denominator amongst defamation laws and retreat to caution. This may produce either a significant "watering down" of the item in question, or its entire deletion from the programme. The result in either case is an unhappy one. A system of law which allows decisions to be made in ignorance and based upon timidity in matters so vital as freedom of speech and public discussion is open to serious objection.

Technical advances will increase rather than diminish the capacity for national distribution of information in Australia. Already we have the development of interstate telephones, telex and telefacsimile which expedite the distribution of information to all parts of the country. Developments of this kind in the simultaneous printing of newspapers in different parts of Australia are sure to expand in sophistication. Furthermore, developments of ethnic radio, of "talk-back" and local broadcasting stations, of university and community broadcasts all pose new problems for the law of defamation.[38] The pressures for a single straightforward law are likely to prove irresistible for the simple reason that those engaged in these vital activities will demand clear guidance from society about the conduct which is permissible in law and that which is not.

VI. PRACTICAL PROBLEMS

(1) *The Differing Defences of Justification*

To illustrate the practical problems thrown up by the eight differing laws presently in force in Australia, I instance the defence of justification. By the common law, truth alone is a defence to a libel action. This is still the position in the United Kingdom. It also remains the position in Victoria, South Australia, Western Australia and in the Northern Territory. In Queensland, Tasmania and the Australian Capital Territory, the defendant must prove, to justify a libel, not only that the publication was true but that it was also "for the public benefit". In New South Wales, since 1974, the defendant must prove, in addition to truth that the publication relates to a matter of "public interest".[39] In a jury trial "public benefit" is determined by the jury. "Public interest" in New South Wales is determined by the judge.[40] The consequence of such diversity arises at two stages: at publication and at the trial of the action. Suppose a Melbourne newspaper wishes to

[38] Non-profit community broadcasting stations are likely to increase following amendments in 1976 to the Broadcasting and Television Act 1942 (Cth).

[39] Defamation Act 1974, s. 15 (N.S.W.).

[40] *Id.* s. 12

publish an article which it believes to be defamatory but true. By Victorian law, it is permitted to do this. Proof of truth will be its defence. If, however, even one copy of the newspaper is sold in New South Wales, the publisher will be liable to be sued in that State.[41] In such an event, to escape liability to the plaintiff defamed, the newspaper would have to establish not only truth but the additional ingredient of public interest. If the newspaper is sold in the Australian Capital Territory, the publisher will also be liable to be sued there. There he must establish the additional ingredient of public benefit. In the case of any major publication in Australia, some sales in New South Wales and the Capital Territory are inevitable. Accordingly, in practice the management decision is likely to be (exceptionally newsworthy stories apart) not to print the material unless satisfied that the New South Wales and Capital Territory requirements can be met. Therefore, the Victorian editor, despite the legal situation in Victoria, may feel obliged to forego his rights to publish under Victorian law. Notwithstanding the fact that few of his sales are outside the State he must decide whether to expose himself to the risk of suit in other jurisdictions. Inevitably legal advice tends to be cautious. The lowest common denominator tends to prevail.

At the trial stage, the problem may be even greater. In the situation just cited, the person defamed may choose to sue in Sydney before a jury making a separate claim in his action in respect of publication in other jurisdictions. The defendant will plead truth and also public interest in respect of the New South Wales claim. To the Capital Territory claim, truth will be pleaded together with public benefit. If a claim in respect of publication in Victoria were made, truth alone will be pleaded. The jury will be instructed that if it should find the article untrue, a verdict may be entered for the plaintiff in respect of publication in each of the three jurisdictions. If however it is found to be true, the jury must find for the defendant in respect of the Victorian claim but consider, in relation to those sales which occurred in the Capital Territory, whether the defendant has established the additional element of "public benefit". In respect of the New South Wales sales, it will be for the judge to decide the somewhat similar issue of "public interest" and to charge the jury accordingly on that issue. Should the jury find truth but not public benefit, its duty will be to assess damages on the basis of the sales in the Capital Territory. It will have to put entirely out of mind the much more extensive publication that may have taken place in Victoria. To ask such logical contortions of a jury appears unreasonable.

In *McLean* v. *David Syme and Co. Ltd*[42] the plaintiff owned a property on the south coast of New South Wales between Bega and

[41] *McLean* v. *David Syme and Co. Ltd.* (1971) 92 W.N. (N.S.W.) 611.
[42] (1971) 92 W.N. (N.S.W.) 611.

the Victorian border. An article appeared in *The Age* newspaper suggesting that the plaintiff had interfered with public water supply passing through his property for his own ends. The newspaper was printed in Victoria, circulated principally in that State but also had a circulation of about 2,000 in New South Wales, fewer than 60 in the area close to the plaintiff's property. The trial judge and the New South Wales Court of Appeal found that the plaintiff's statement of claim alleged a cause of action in New South Wales only. Accordingly the question of whether the statement complained of was actionable in Victoria did not arise. The trial judge refused to admit evidence concerning the paper's circulation outside New South Wales. But the Court of Appeal held that this evidence was admissible. It was admissible for the purpose of defeating a defence of qualified privilege. But it was also admissible on the issue of damages.

Might not this conclusion lead to strange results? Assume the defamatory statement was perfectly actionable in New South Wales because the additional element of "public benefit" or "public interest" was lacking. A New South Wales court would still admit evidence of the wide circulation of the journal in Victoria for the purposes of awarding aggravated damages to the plaintiff even though, in that State, the statement complained of would not give rise to a cause of action at all.

(2) *Simultaneous broadcasts, different results*[43]

Simultaneous broadcasts to several jurisdictions pose acutely the problems presented by differing laws. In *Gorton* v. *Australian Broadcasting Commission*[44] the plaintiff, then Prime Minister of Australia, complained in the Supreme Court of the Australian Capital Territory that the defendant[45] had published a defamatory television programme concerning him. The programme was broadcast simultaneously from the same video tape to the Australian Capital Territory, Victoria and New South Wales. The interview took place in March 1971. Mr Gorton complained that he was seriously damaged by it. Between March 1971 and final judgment in July 1973, not only did Mr Gorton lose office, but his Party lost Government.

The statement of claim alleged three distinct causes of action in relation to the publication in each jurisdiction. The defendant raised defences under the laws of the respective jurisdictions in which the

[43] It is beyond the scope of this article to consider the scope of the Commonwealth's power to enact a uniform choice of law rule for operation throughout Australia. Nor is it possible to discuss the proper content and approach to such a rule in defamation actions. *Cf. Mackiff* v. *Simpson* [1968] V.R. 62, 65 (Menhennitt J.); *Maple* v. *David Syme & Co. Ltd.* [1975] 1 N.S.W.L.R. 97, 105 (Begg J.) and the unreported observations of the High Court in *Garretty* v. *Nationwide News Pty. Ltd.* cited by Begg J.

[44] (1974) 22 F.L.R. 181.

[45] The plaintiff sued the Commission and a journalist as joint tortfeasors. *Id.* 182.

publication was alleged. In relation to the publication in Victoria, truth was pleaded. In relation to the publication in New South Wales and the Australian Capital Territory, truth and public benefit was pleaded. At the time of the proceedings the relevant New South Wales law was the Defamation Act 1958. With respect to the New South Wales publication, reliance was also placed upon section 17(h) of the New South Wales Act. This accorded qualified privilege to a publication made in good faith of defamatory matter "in the course of or for the purposes of the discussion of some subject of public interest, the public discussion of which is for the public benefit and if, so far as the defamatory matter consists of comment, the comment is fair".

The plaintiff chose to sue in the A.C.T. Supreme Court. Fox J., as he then was, found on the facts that the statements complained of were defamatory and false. Therefore, the cause of action was made out in relation to the Victorian publication. Similarly the New South Wales and Capital Territory defences of truth and public benefit failed since, although the element of "public benefit" was present, truth was lacking. However, in relation to the publication in New South Wales, his Honour held that the defamatory statement was protected by section 17(h) of the New South Wales Act. The statement, although defamatory, was made in good faith in the course of and for the purposes of the discussion of a subject of public interest. The plaintiff therefore succeeded in respect of the publication in Victoria and the Capital Territory. He failed in respect of the self-same publication in New South Wales. The result moved Fox J. to observe:

> That the same matter, published simultaneously in three jurisdictions from the same videotape should be the basis for the recovery of damages in two, but not in the third, is doubtless a strange and unsatisfactory result, but it is one which flows from the differences in the laws of those places.[46]

The development of multiple means of simultaneously transmitting information across jurisdictional boundaries promises an increase, not a diminution, in problems of this kind.

(3) *Qualified Privilege and Forum Shopping*

Unless a unified defamation code is enacted, there is little doubt that forum shopping will become a first obligation of plaintiffs entering the defamation lists. Justification is only one of the many variations that can arise in different defences available in the eight jurisdictions of Australia. A recent case illustrates the disadvantages that may accrue from suing in a particular jurisdiction.[47] Senator R. C. Wright, a

---

[46] *Id.* 196.

[47] *Wright* v. *Australian Broadcasting Commission*, unreported, 7 September 1976 (Supreme Court of N.S.W.).

Senator for Tasmania, sued the Australian Broadcasting Commission in respect of a telecast which dealt with the election for the President of the Australian Senate. The vote for the President had made it fairly obvious that one Opposition Senator had voted in the secret ballot for the Government's candidate. Senator Wright was then a Member for the Opposition. It was conceded that as a result of a television interview with Senator Wright a reasonable viewer could have formed the opinion that the senator's failure to deny that he had so voted, pointed to the fact that he was the person who had defected from the Opposition's candidate. Senator Wright told the reporter that he considered the question "below the level of honour". He said that he regarded it as "insulting" implying disloyalty to his Party. The reporter was shown the door. No explanation or account was offered to justify the conclusion that it was Senator Wright who had defected or "ratted".

The action was tried in the New South Wales Supreme Court before Yeldham J. and a jury of twelve. At the close of the plaintiff's case the defendant successfully moved for a verdict. It relied upon section 22 of the New South Wales Defamation Act which provides for a defence of qualified privilege for a publication:

> 22(1) Where, in respect of matter published to any person—
>
> (a) the recipient has an interest or apparent interest in having information on some subject;
>
> (b) the matter is published to the recipient in the course of giving to him information on that subject; and
>
> (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances.[48]

Yeldham J. upheld the submission. He found that the plaintiff had not proved malice on the part of the defendant. He instructed the jury to return a verdict for the defendant. They did so. No appeal was lodged. However, Yeldham J. at the end of his judgment said this:

> I have held, albeit with some regret, that although the defendants undoubtedly did publish of the plaintiff matter which was false and which was defamatory of him, nevertheless because it was published upon a privileged occasion, and he has failed to prove malice, he cannot succeed in the present action. That is in no way to say, however, that he has failed to clear his good name from what I regard as the wholly unjustified slur which the defendants put upon it. Whatever the precise legal situation may be, common fairness in my opinion dictated that there should have come from both defendants, once the fallacy of their statements was exposed, a retraction and an apology to this man whose service in the interests of his country has clearly been demonstrated. . . . If this

[48] Contrast the observations of the N.S.W. Law Reform Commission in L.R.C. 11, op. cit., 110-113.

case was to be decided upon the merits alone, the plaintiff clearly must have succeeded.[49]

Although defences analogous to section 22(1) exist elsewhere in Australia, it is unlikely in the common law States, at least, that the defence would have barred Senator Wright's recovery, as it did in New South Wales.[50] Had he sued in another State, and had the same view of the merits been taken as expressed by Yeldham J., there is at least the possibility that he would have succeeded. The result is an unhappy one. The lesson for practitioners is that care must be taken to choose the most advantageous jurisdiction. There are other cases which illustrate this point but it is really an obvious one.[51] The increasingly national organization of news and other information dissemination makes the problem an urgent one. Unless we are prepared to accept confusion and uncertainty, with its inevitable tendency to injustice to genuine plaintiffs or to the lowest common denominator in free speech, the argument for a resolution of this diversity seems irresistible. Making every full allowance for the advantages of diversity and experimentation, there seems to be a clear case for a single national law. But can it be achieved?

VII. A SINGLE CODE: IS IT POSSIBLE?

Of the four possible ways to achieve uniformity of defamation laws in Australia, the least likely is a spontaneous return by all States to the common law. Even New South Wales, which recently partially restored the common law, felt it necessary to do so cautiously, modifying it in a number of important respects.[52] It is unlikely, local susceptibilities being as they are, that the code and statute States would suddenly abandon an approach that has endured for the better part of this century. Other means must be found.

The Australian Constitutional Convention has been exploring those other means. The issue was before the Convention in Sydney in September 1973.[53] It was referred to a Standing Committee which reported to the Melbourne Convention in September 1975.[54] The

---

[49] Page 14 of the as yet unpublished judgment.

[50] The implication of *Calwell* v. *Ipec Australia Ltd.* [1973] 1 N.S.W.L.R. 550, 562-563; on appeal (1976) 50 A.L.J.R. 152, 155 and of *Wright's* case is probably to afford greater protection to the media in ventilating matters of public interest, particularly if the plaintiff sues in New South Wales.

[51] *Maple* v. *David Syme & Co. Ltd.* [1974] 1 N.S.W.L.R. 290, affd. [1975] 1 N.S.W.L.R. 97.

[52] Law Reform Commission of N.S.W., *op. cit.*, 9ff.

[53] *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, (Sydney) (1973).

[54] The recommendation of the Standing Committee (Standing Committee C), sixth meeting, is contained in Australian Constitutional Convention 1974, *Standing Committee C, Interim Reports to Executive Committee* (Melbourne), 36-37.

record of that Committee's recommendation on defamation is as follows:

> The Committee agreed to recommend to the Convention that this matter was of national concern and should be transferred to the Commonwealth under the reference power, if all States can agree on the terms of reference. If not, then by amendment to the Constitution, provided that such amendment does not confer power on the Commonwealth to legislate in respect of the questions of defamation as it affects the privileges of State Parliaments and Courts.[55]

The motion was resubmitted to the Convention meeting in Hobart on 27 October 1976. The resolution which initially came before the Convention was in the following terms:

> That this Convention recommends that—
>
> (a) the matter of defamation shall be the subject of uniform references of power by all States to the Parliament of the Commonwealth; and
>
> (b) if such references are not made within a reasonable time the Constitution should be altered to confer the power to make laws with respect to defamation on the Parliament of the Commonwealth—
>
> but any power so referred or conferred should not extend to the making of laws with respect to the privileges of State Parliaments or State Courts.[56]

This resolution was adopted by the Convention at Melbourne on 25 September 1975. The debate which ensued demonstrated that there was little support for the present diversity of laws. An amendment was moved proposing a differing approach to the matter, namely:

> The matter of defamation shall be the subject of uniform laws throughout the Commonwealth, and that the precise form of uniformity of laws with respect to defamation should be settled by the Commonwealth and State Governments in consultation.[57]

Those who supported this amendment emphasised that a single code should be achieved through co-operation between the Commonwealth and States, arriving together at an acceptable formula.[58] Those who opposed this approach argued that it amounted to no more than pushing the problem "back to the Attorneys-General, who proved ineffective

---

[55] *Ibid.*

[56] Agenda item No. S. 7, *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention* (Melbourne) (1975) xlvi. It was adopted, *op. cit.*, 89. It went in this form to the Hobart meeting of the Convention.

[57] Australian Constitutional Convention, Official Record of Debates, (Hobart), 27 October 1976, mimeo. 54.

[58] Mr Solomons (N.S.W.); Mr Medcalf (Attorney-General, W.A.); Mr Storey (Attorney-General, Vic.).

in this regard".[59] The Convention divided. Thirty-nine delegates supported the amendment. Forty-two opposed. The amendment was accordingly negatived. The Convention then reverted to the original resolution which was put and carried by fifty-four votes in favour, thirty-two delegates being against. The Commonwealth Attorney-General, Mr Ellicott, acknowledged the problem at the end of the debate:

> The main motion . . . first tries to solve the problem by proposing a reference of power. Then, if that reference does not take effect, it suggests a referendum. In the light of the debate here today, neither of these courses appears to be very hopeful. It appears that three State Governments are against the reference and that does not augur well for the success of a referendum. The Commonwealth Government does regard this as an important area for uniformity and the Law Reform Commission is considering the law on defamation with that in mind.[60]

During the discussion at the Hobart Convention, even those who were not in favour of the reference of power or amendment of the Constitution, expressed their opposition in cautious terms. For example, the Attorney-General for Victoria, Mr H. Storey, said that:

> If the States and the Commonwealth can agree upon uniform laws in this field, it may be that a carefully drawn reference of power could be made to the Commonwealth. I would not exclude that possibility.[61]

Practicalities, as the Commonwealth Attorney-General stressed, suggest that the solution of uniform laws may have to be first explored. There is no point in disguising the problems which this entails. The history of uniform laws in Australia is a discouraging one. In the first place, there are immense difficulties in securing the agreement of the States upon the form of legislation. Then there are difficulties, not least of machinery, in keeping uniform legislation up to date and consistent.[62] Necessary amendments may be made in some States only or not at all. Modernization proceeds at the pace of the tardiest State. Experience teaches that it is difficult to arrange for six States and two Territories to march in step. The current debate about the Commonwealth's corporation power originates, in part at least, from frustration arising from the growing lack of uniformity in the Uniform Companies Act of 1961.[63]

---

[59] Australian Constitutional Convention Official Record of Debates, (Hobart) *op. cit.*, 55, Mr R. W. Baker (Tas.).

[60] *Id.* 71.

[61] *Id.* 69.

[62] Cranston, "Uniform Laws in Australia" (1971) 30 Journal of Public Administration 229; the Law Reform Commission (Aust.), *Annual Report 1975* A.L.R.C. 3, 48; *Annual Report 1976* A.L.R.C. 5, 5.

[63] H.R. Deb. 1976, Vol. 101, 2853.

From the point of view of the reformer, however, there is another and perhaps more significant problem in seeking a national defamation code through uniform State and Territory laws. If it is assumed that the road to reform in defamation law lies in the reform of defamation procedures, special problems may arise unless State courts can be invested with federal jurisdiction sufficient to support orders having effect throughout the Commonwealth. In several jurisdictions overseas, for example Japan and Quebec, court-ordered retractions are part of the procedure in defamation trials.[64] Assume court-ordered corrections were considered an appropriate part of a modern, effective defamation code. The State courts, operating under State legislation might very well wish to ensure that, to be effective, an order for retraction, correction or reply was obeyed in interstate publications. It is doubtful whether a State Supreme Court, not invested with federal jurisdiction, would be prepared to make an *in personam* order in respect of something to be done outside that State.[65] It is even more doubtful whether a State Act could properly empower a State court to do so. Yet, if such procedures were confined to operation in a particular State, they might lose much of their effectiveness. Other problems may also arise. Once a decision is made that a single national code is, on balance, desirable, the mode of achieving that code requires careful consideration of the limits which each method necessarily involves. Even if all of the practical considerations that usually stand in the way of achieving agreement on a uniform State law can be set to one side in this case, the result of approaching the problem through uniform laws may dictate acceptance of reforms which are less adventurous and less desirable. This is not just a matter of delivering the same product in a different way. The vehicle chosen will inevitably affect the solutions that can be offered.

Considerations such as these have driven some of those who argue for a single national approach to call for the Commonwealth to exhaust its powers and to cover, so far as it can, those areas of defamation which are within its constitutional grasp. One head of legislative power is that contained in section 51(v) of the Constitution. By this, the Commonwealth is empowered to make laws with respect to "postal, telegraphic, telephonic, and other like services". Other heads of power, frequently suggested for use here include the interstate trade and commerce power, the power in respect of copyright, patents and trade marks, the corporations power, the external affairs power, the Territories power and the incidental power.

The power contained in placitum (v) of section 51 is the one which is most frequently referred to as the means by which the Commonwealth could unilaterally take hold of a great area of defamation law,

---

[64] Carter-Ruck, *op. cit.*, 288 (Quebec); 321 (Japan).
[65] *Carron Iron Co.* v. *Maclaren* (1855) 5 H.L.C. 416; 10 E.R. 961.

leaving it to the States to consider, under that pressure, the need to adjust their laws. The approach of exhausting Commonwealth powers has its own special hazards and inadequacies as the enactment of any law based upon such a hybrid mixture of powers necessarily entails. Furthermore, the scope of the Commonwealth's power to do this is a matter of controversy. The problem includes the familiar one of characterization although at least one author has concluded that the Commonwealth would have power to control defamatory material occurring in radio and television broadcasts.[66] Save in one respect, there is nothing much that can be added to his exploration of the issues. A recent decision of the High Court of Australia suggests however that his conclusion may be the correct one.

In *Ex parte C.L.M. Holdings Pty. Limited; re The Judges of the Australian Industrial Court*,[67] the facts of which are not relevant for present purposes, an issue arose concerning the constitutional validity of section 79 of the Trade Practices Act 1974. The answer to this question required, in the opinion of Mason J. (who wrote the leading judgment), a consideration of what he termed the "direct operation" of the provisions of that Act, as well as a consideration of "the extended operation" which the Act is given by complicated provisions in s. 6(2) and (3).[68]

Section 6(3) of the Act seeks to give the Act an extended operation by reference to a number of head of constitutional power. Mason J. described the technique as follows:

> Subsection (3) [of s. 6] then provides for Div. 1 of Pt. V having a further additional operation on the footing that it is to have the same effect as it would have if the Division (other than s. 55) were confined in its application to engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast (s. 6(3)(a)) and, subject to one other alteration, if a reference to "corporation" included a reference to a person not being a corporation (s. 6(3)(c)). Thus it appears that sub-s. (3) is designed to give the Act a further operation which can be supported by reference to the power contained in s. 51(v) of the Constitution.[69]

Mason J. explored this "extended operation" which section 6(3) aimed to give the relevant provisions of the Trade Practices Act. His Honour concluded that section 6(3) afforded quite independent, additional operation to the sections of the Trade Practices Act, supported by "the

---

[66] Miller, "The Commonwealth Broadcasting Power and Defamation By Radio or Television" (1971-1972) 4 University of Tasmania Law Review.
[67] (1977) 13 A.L.R. 273.
[68] *Id.* 277.
[69] *Id.* 280.

heads of constitutional power on which s. 6(2) and (3) are based".[70] The decision certainly suggests in this particular context an expansive scope for the operation of the postal and telegraphic power.

The decision is also important for the scope of the external affairs power of the Commonwealth. The operation of section 55 of the Act in conjunction with s. 79 was challenged because s. 55 was not confined to "corporations" but was addressed "to a wider world".[71] Mason J. saw the section (which forbids misleading conduct) as "designed to carry into effect a provision of an international convention, the Paris Convention for the Protection of Industrial Property as revised at Stockholm on 14 July 1967, which came into operation on 27 September 1975".[72] Although it was not strictly necessary for his decision, Mason J. expressed "no difficulty" with the notion that:

> The external affairs power (s. 51(xxix)) or that power in combination with the incidental power (s. 51(xxxix)) [can] sustain the enactment in an anticipatory way of provisions designed to give effect to an international convention once it becomes binding on Australia so long as the provisions do not come into operation before the convention does become binding on this country.[73]

The International Convenant on Civil and Political Rights was adopted on 16 December 1966. It was signed by Australia on 18 December 1972. It has not yet been ratified by Australia.[74] However, with the deposit of sufficient ratifications by other countries, it came into force on 23 March 1976. Discussions are being had with the States concerning Australia's ratification.[75] The Covenant contains, in Article 17, the following provisions relevant to defamation:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, *nor to unlawful attacks on his honour and reputation.*
2. Everyone has the right to the protection of the law against such interference or attacks.

The question inevitably arises, following the observations of Mason J., as to whether ratification of the Covenant by Australia might not afford the Commonwealth Parliament the power to ensure by its own legislation that Article 17 is carried into effect throughout Australia. It is a question that must be left to the future.

---

[70] *Ibid.*
[71] *Id.* 278.
[72] *Ibid.*
[73] *Id.* 279.
[74] The Covenant was adopted by Resolution No. 2200(xxi) by the General Assembly of the United Nations Organization. *General Assembly Official Records*, xxi, Supplement No. 16 (A/6316), 52-58. It was Schedule 1 to the Human Rights Bill 1973 (Cth).
[75] H.R. Deb. 1976, Vol. 101, 3560.

Barwick C.J. specifically aligned himself with the conclusions of Mason J. concerning "the use of s. 6 of the Act in producing what is in substance a series of enactments, none of which are inconsistent with each other, and each of which is separately supported by a head or heads of legislative power".[76] Gibbs J. concurred, subject to a reservation concerning the validity of section 55.[77] Stephen, Jacobs and Murphy JJ. contented themselves with expressing full agreement with the reasons for judgment delivered by Mason J.[78] The High Court's decision, which was therefore all but unanimous, is relevant not only to the operation of the postal and telegraphic power and to the external affairs power. It is also relevant for that method of Commonwealth legislative drafting which seeks to call in aid, in support of a Commonwealth Act, multiple heads of constitutional power. It gives some encouragement to those who claim that the Commonwealth could enact a substantial defamation law of its own.

VIII. CONCLUSIONS

Any approach to defamation law reform in Australia requires the reformer to grasp two fundamental and inter-related problems. The first is the inefficiency of the defamation action to correct the wrong complained of, namely the damage to a person's honour or reputation. It is inefficient because of delays that are involved in treating this as just another tort. It is inapt in that the remedies which are provided are delivered years after the event and then only after the numerous technical impediments have been overcome. Unless the judicial process can provide speedier and more relevant remedies, alternative solutions will inevitably be considered. These alternatives will include, in the case of media defamation at least, administrative and self-regulating mechanisms which can determine controversies quickly and endeavour to remedy damaged reputation, whilst it is still possible to do so.

The second issue arises from the disparity of eight separate defamation laws presently operating in Australia. Every due allowance should be made for the arguments in favour of diversity. These range from the preservation of the constitutional compact to the need to uphold experimentation in private law areas and to face the reality that defamation litigation is in fact big business in some parts of the country only. But even after allowance is made for these considerations, the problems which arise, in an age of mass communications, go beyond mere inconvenience. They result in confusion and uncertainty on the part of publishers, where there should be clarity and legal guidance. They promote caution and encourage timidity where

[76] (1977) 13 A.L.R. 273, 274.
[77] *Id.* 275.
[78] *Id.* 275, 281 and 282.

there should be freedom of speech and of the press.. They undoubtedly lead to self-censorship and undesirable expurgation of information. They produce unfair results and will encourage forum shopping unless a single national code can be achieved.

The ways to secure such a code are four. One, the return to the common law, can be put out of account. A reference of power to the Commonwealth has not been the Australian way of constitutionally doing things. Frank amendment of the Constitution would seem equally unlikely. The choice is therefore narrowed to a quest for uniform laws or the exhaustion of such Commonwealth power as might support a substantial Commonwealth measure to control defamation. The choice taken will be a matter, ultimately, for Parliaments. But for the good name of the law it ought not to be long delayed.