The Defence of Truth and Defamation Law Reform

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1. INTRODUCTION

On 17 May 1993 Michael Lavarch (as the newly appointed Commonwealth Attorney-General) made headlines in calling for uniform Australian defamation laws. He stated his belief that 'it would be logical for Australia to have national defamation laws. We have a national media. We are one nation.'[1] To those who have kept a casual eye on defamation law reform in Australia, these words may bring about a sensation of *déjà vu*. Gareth Evan's efforts (as the then newly appointed Commonwealth Attorney-General) were to the same effect eleven years ago,[2] as were those of the eastern sea-board States' Attorneys-General four years ago.[3]

It would be pointless to wonder at the time it will ultimately take for Mr Lavarch's laudable objective to be realised. It would be equally pointless to survey the fragmented landscape of Australian defamation law and plead the case for urgent unification. The former is as uncertain as the latter is obvious.

However, what law reformers do require is an appraisal of the role of defamation law, how the law presently stands and what any reformed, uniformed law should be. Such an appraisal is the aim of this article in relation to the defence of truth.

2. THE FUNCTION OF DEFAMATION LAW

2.1 Definition

Before extolling a view on what the role of defamation law is (and by this it is meant what it *should be*), the expression 'defamation law' must be given some content. It is often said that not every defamation is actionable,[4] thus drawing a distinction between defamatory publications and publications which constitute an actionable defamation. This takes account of the potential for publications to be defamatory but not actionable (in the sense that the plaintiff will not obtain a judgment) because the defendant has a good defence.

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1 M King, 'Lavarch Calls for National Libel Law', *Australian*, 17 May 1993.

2 See generally the transcript of the Uniform Defamation Code Seminar held at Sydney on 26 November 1983.

3 Attorneys-General of New South Wales, Queensland and Victoria, *Reform of Defamation Law*, Discussion Papers Nos 1 and 2 (1990).

4 *More* v *Weaver* [1928] 2 KB 520, 521 per Scrutton J: 'There are ... cases where ... statements are defamatory ... although the law does not allow any action to be brought in reference to them'.

Although the test of what is a defamatory publication has been variously described, the substance of each test is that the publication conveys an imputation which tends to disparage or damage the reputation of another.[5] An actionable defamation encompasses all considerations which a court will take into account in deciding whether a plaintiff can bring a successful action. A defamatory publication is actionable when it is not excused, protected or justified by law[6] and entitles the person defamed to judgment.

Defamation law must be considered in its actionable sense for there to be a meaningful discussion as to its role. If the concept of what is merely defamatory was taken as the meaning of 'defamation law' the tort's role clearly would be to protect reputation. However, as Justice McHugh argues:

> It used to be, and occasionally still is, said that the essence of the tort of defamation is injury to reputation. I do not believe that statement was either accurate or helpful. . . . In advising on problems relating to the law of defamation, it is the lawyer's duty to determine not simply whether the publication is defamatory, but whether it is actionable.[7]

2.2 Role

The role of defamation law in Australia is to strike a just balance between competing values. On the one hand sits the protection of well-founded reputation; on the other the right to freedom of expression and information. This proposition is reasonably orthodox. Lord Diplock in his summing-up in *Silkin* v *Beaverbrook* stated:

> Over the years the law has maintained a balance between, on the one hand, the right of the individual to his unsullied reputation *if he deserves it* . . . and the rights of the public . . . in matters of freedom of speech.[8]

However, this balance is achieved through the total operation of the tort and not through the courts specifically protecting reputation in pronouncing certain publications to be defamatory and then protecting free speech in allowing certain defences. Rather, the courts strike this balance indirectly: what constitutes an actionable defamation 'is taken from the field of free debate'.[9] When courts come to conclusions as to whether or not a publication constitutes an actionable defamation, they indirectly pronounce in favour of one value against the other.[10]

Freedom of expression and information as a value requires no particular explanation. However, the concept of 'well-founded reputation' does.

Reputation, not character, is what the law protects. The distinction has been expressed by the American commentator Veeder in the following way:

> Character is what a person really is; reputation is what he seems to be. One

[5] *Boyd* v *Mirror Newspaper Ltd* [1980] 2 NSWLR 449, 453 per Hunt J.
[6] See the introduction by M McHugh in J C Gibson (ed), *Aspects of the Law of Defamation in New South Wales* (1990) xxxi.
[7] Id xliii.
[8] [1958] 1 WLR 743, 745–6 (emphasis added).
[9] *Sweeney* v *Patterson* 128 F 2d 457, 458 (1942) per Edgerton J.
[10] See R E Brown, *Law of Defamation in Canada* (1987) Vol I, 4–5.

> is composed of the sum of the principles and motives . . . which govern his conduct. The other is the result of observation of his conduct.[11]

This distinction, although vital to defamation law, is elusive. In establishing reputation before a court it is not to the point to call a witness to say that in his or her opinion the plaintiff is a person of good character. Rather, the question must be put: 'What reputation has the plaintiff borne . . . for honesty (or morality or loyalty)?'. This accords with the use of character evidence in other areas of the law. In criminal law evidence of good 'character', in the sense of reputation, is admissible on behalf of an accused.

Often judges and statutes erroneously use 'character' as a synonym for 'reputation'. In *M'Pherson* v *Daniels*,[12] Littledale J spoke of defamation as being 'injury to character', about which a textbook writer notes that 'it would be more appropriate to substitute the word "reputation" for that of "character" in this statement.'[13] Similarly, Bower comments in relation to a statutory provision:

> [The] use of "character" in this double sense is responsible for *no little confusion of thought and looseness of reasoning in relation to the theory of justification.*[14]

However, the law does not protect mere reputation. Rather, defamation law takes cognisance only of reputation where it is well-founded in the plaintiff's character. To use the language of Lord Morris in *Plato Films* v *Speidel*, the law gives protection to such a reputation as the plaintiff 'deserves to have'.[15] The converse of this is that the law only recognises a right for a person to have his or her reputation protected from '*false* statements to his [or her] discredit'.[16] Hence, it is on this ground that the theory of truth as an absolute defence must be based.

2.3 The Privacy Fallacy

In their 1990 Discussion Papers,[17] the Attorneys-General of New South Wales, Queensland and Victoria adopted the concept of a defamation law representing a 'convergence of public interest in freedom of the press and access to information, balanced against an individual right of reputation and privacy.'[18] Suggesting that defamation law should protect 'reputation and privacy' constitutes a double error. The first is that the law's role is not to protect mere reputation, but reputation only when it be well-founded in character. The second is that with respect to privacy interests, 'the law of

[11] V V Veeder, 'The History and Theory of the Law of Defamation' (1904) 4 *Col LR* 33, 33.
[12] (1829) 10 B & C 263; 109 ER 448.
[13] Brown, op cit (fn 10) 363 fn 5.
[14] Bower, *The Law of Actionable Defamation* (1923) 242 (emphasis added).
[15] [1961] AC 1105, 1145.
[16] *Scott* v *Sampson* (1882) 8 QBD 491, 503 per Cave J (emphasis added).
[17] Attorneys-General of New South Wales, Queensland and Victoria, Discussion Papers Nos 1 and 2, op cit (fn 3).
[18] Attorneys-General of New South Wales, Queensland and Victoria, Discussion Paper No 1, op cit (fn 3) para 1.

defamation was never intended to protect these interests, and it is not a fit instrument for that task.'[19]

Privacy has nothing directly to do with the role of defamation law; privacy and defamation are 'distinct concepts.'[20] As explained by Winfield in 1931:

> [A breach of privacy] differs from defamation in two respects. It does not necessarily affect a person's reputation as that word is understood in the law of libel and slander; and it need not be a "statement" of any sort, e.g. staring in the window of a man's private house.[21]

Hence, a breach of privacy may be non-defamatory or not involve a publication. Conversely, much defamation which becomes the subject of litigation does not involve any breach of privacy, such as comment on the public conduct of public figures.

Not surprisingly, nowhere in the Attorneys-General Discussion Papers is any definition of what is meant by 'privacy' as a value the law should protect. As has been recognised from the middle of the last century, 'to define the province of privacy distinctly is impossible.'[22] However, if defamation law is to protect privacy, whatever falls within the ambit of privacy is 'taken from the field of free debate'.[23] Thus, as the Porter Committee (UK) recognised, identifying privacy as a value leads to great difficulties in enacting defamation laws which, 'while effective to restrain improper invasion of privacy, would not interfere with the proper reporting of matters which are in the public interest.'[24]

In 1993 the New South Wales Law Reform Commission issued a discussion paper on defamation law.[25] In it, the Commission declined to assume the Attorneys'-General position, stating that 'privacy protection should not form part of the law of defamation.'[26] Further, the Commission considered privacy 'a notoriously slippery concept',[27] arguing that truth alone should be the defence of justification in a unified defamation law.

[19] New South Wales Law Reform Commission, *Report on Defamation* (1971) 7.
[20] Law Reform Committee, *Report of the Committee on Privacy*, Cmnd 5012 (1972) para 71.
[21] P H Winfield, 'Privacy' (1931) 47 LQR 23, 24.
[22] J F Stephen, *Liberty, Equality, Fraternity* (1967 reprint) 160.
[23] *Sweeney* v *Patterson* 128 F 2d 457, 458 (1942) per Edgerton J.
[24] Law Reform Committee, *Report on the Law of Defamation*, Cmnd 7536 (1948) 10.
[25] New South Wales Law Reform Commission, *Defamation*, Discussion Paper No 32 (1993).
[26] Id 114.
[27] Ibid.

3. THE SUBSTANTIVE DEFENCE OF TRUTH

3.1 Victoria, South Australia, Western Australia and the Northern Territory (The Common Law)

At common law, defamatory imputations are presumed to be false until proved true.[28] However, the defendant has a complete defence once the truth of each defamatory imputation is established. It is neither sufficient nor necessary for the defendant to prove the literal truth of the words; the defendant is entitled to succeed provided the substance (ie, 'sting') of the words complained of is established. As stated by Burrough J in *Edwards* v *Bell*, 'as much must be justified as meets the sting. . . and if any thing . . . does not add to the sting of it, that need not be justified.'[29] Within the conduct of a defamation trial, where counsel for the defendant is unable to obtain all the necessary admissions in cross-examining the plaintiff's witnesses, the defendant will have to go into evidence to prove the truth of the imputations complained of by the plaintiff. This evidence is adduced in the same way facts are established in any other tort or contract case where oral testimony is received.

The making of truth a complete defence is certainly a concession to freedom of expression and information. However, when the question is put, 'What fundamental policy is the law applying when it permits defamatory imputations to be non-actionable if proved true?', the answer lies more in the law fulfilling its role of protecting reputation only when well-founded.

The policy informing the law is that, notwithstanding the damage which truthful defamatory imputations may cause to a plaintiff's reputation, the law will not afford protection if it can be shown that the plaintiff 'should have had no reputation'.[30] Ultimately, for there to be an actionable defamation, the law requires that the plaintiff's reputation be well-founded in his or her character. As Veeder notes:

> In most cases reputation reflects actual character. *Such is the condition which best serves the interests of society, and which the individual may reasonably demand.* Since the right is only to respect [ie, reputation] so far as it is well founded, it is obviously not infringed by a truthful imputation.[31]

Thus, truth being a complete defence serves two imperatives. Firstly, it is in the interests of society for individuals' reputation and character to be consistent. A corollary of this is that it is not in society's interests for people to bring successful defamation actions relying entirely upon a reputation which falsely represents their character. Where a plaintiff has a bad character and a good reputation, if the law were to allow him to bring a successful action against the defendant who publicises that bad character, the law would be

[28] *Belt* v *Lawes* (1882) 51 LJ QB 359, 361. The reverse is the case in the United States.
[29] (1824) Bing 403, 409; 130 ER 162, 165.
[30] R Ray, 'Truth a Defense to Libel' (1931) 16 *Minnesota LR* 43, 56.
[31] Veeder, loc cit (fn 11) (emphasis added).

giving its imprimatur to the 'false light'[32] in which the plaintiff stands before the public. Secondly, all that any individual can reasonably demand from defamation law is to be protected from 'statements . . . which are untrue and . . . redound to his discredit'.[33] A person of bad character should not be able to demand that defamation law protect his or her good reputation against the truthful defendant.

Given that defamation law is concerned with the protection of well-founded reputation, truth as a complete defence is a paradigm instance of the law fulfilling its role. A necessary and important consequence of this is a broadening of scope for free speech with respect to true statement. However, as pertinently remarked in *Winfield & Jolowicz on Tort*:

> It is not that the law has any special relish for the indiscriminate infliction of the truth on other people, but defamation is an injury to a man's reputation, and if people think the worse of him when they hear the truth about him that merely shows that his reputation has been reduced to its proper level.[34]

This position reflects the sentiment that protection of reputation, only when well-founded, is the driving force behind the law. This creates the corresponding truism in the law of defamation that 'the speaking of the truth is not a ground of legal liability at all'.[35]

Judicial pronouncements have been consistent with this view. In *Bonnard* v *Perryman* the Court of Appeal stated:

> The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition on an alleged libel.[36]

As previously noted, Lord Diplock in *Silkin*[37] spoke of the law maintaining a balance between, on the one hand, 'the right of an individual to his unsullied reputation *if he deserves it*'[38] and, on the other, freedom of speech. Similarly, Lord Morris in *Plato Films* stated that 'a man should have damages . . . for injury to such reputation he deserves to have and not for injury to a reputation he does not deserve', that is why 'justification is recognised as a defence'.[39] Finally, Street ACJ in *Rofe* v *Smith's Newspapers Ltd*[40] noted that

> no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but merely brought down to it . . .[41]

[32] Ibid.
[33] *Silkin* v *Beaverbrook* [1958] 1 WLR 743, 746 per Lord Diplock.
[34] W V H Rogers, *Winfield & Jolowicz on Tort* (13th ed, 1989) 301.
[35] T A Street, *Foundations of Legal Liability* (1906) Vol I, 275.
[36] [1891] 2 Ch 269, 284.
[37] [1958] 1 WLR 743.
[38] Id 745–6 (emphasis added).
[39] [1961] AC 1105, 1145.
[40] (1925) 25 SR (NSW) 4.
[41] Id 21–2.

Consistent with its conclusion that privacy protection should not form part of defamation law, the New South Wales Law Reform Commission argued the case last year for the 'truth alone defence', concluding that 'truth alone is a better defence for defamation law; it is simpler, and disclosure of truth does not wrongfully harm a person's reputation'.[42] Truth as a complete defence to a defamation action should be embodied in any uniform defamation law so that the role the law has in protecting no more than well-founded reputation can be met.

3.2 New South Wales, Tasmania, Queensland and the Australian Capital Territory (Statutory Modifications)

In 1843 a House of Lords Select Committee[43] recommended that the defence of truth be modified by statute. 'The just consideration', the Committee stated, 'seems to be, whether the public have an interest in the truth being made known to them'.[44] This recommendation was prompted by the perceived injustice which arose through truth alone being a complete defence at common law. An instance of such injustice is illustrated in *Salmond's and Heuston's Law of Torts*:

> The common law affords no protection to the man who has led a blameless and worthy life for many years but finds his youthful follies published to the world at large in gloating and accurate details by some malicious enemy.[45]

The House of Lords Committee came to the conclusion that the law should permit the truth of a disclosure to be a defence when it is also for the good of the community at large. This modification, while ignored by the English Parliament, was adopted by New South Wales in 1847,[46] and presently has effect in various forms in three Australian states and the Australian Capital Territory. The rationale employed to justify its existence remains basically unchanged: 'gratuitous destruction of reputation is wrong, even if the matter published is true'.[47]

[42] New South Wales Law Reform Commission, *Defamation*, op cit (fn 25) 114. However, the Commission recommended retaining the status quo in New South Wales (essentially a public interest qualification on the truth defence: see infra 3.2.2) until uniform legislation is in place.

[43] *Report from the Select Committee of the House of Lords on the Law of Defamation and Libel* (1843).

[44] Id iv.

[45] R F V Heuston and R S Chambers, *Salmond's and Heuston's Law of Torts* (18th ed, 1981) 148.

[46] By s 4 of the Act 11 Vict No 13 (1847).

[47] New South Wales Law Reform Commission, *Report on Defamation*, op cit (fn 19) 103.

3.2.1 *The Public Benefit Test*

In Queensland,[48] Tasmania[49] and the Australian Capital Territory[50] the defence of truth requires not only that the matter is true, but that it was published for the public benefit. This requires a positive public benefit to be proved by the publisher. The test is a jury question,[51] which means, since a jury is at liberty to decide the issue without giving reasons, a lack of guidance for future cases. Thus, it is difficult for a truthful publisher to know beforehand whether what is proposed to be published will be defeasible.

Where there has been judicial attempts to define a test of public benefit, these have been described as 'vague and uncertain'.[52] In *Crowley* v *Glisson (No 2)* the High Court held that all the circumstances of the case are to be taken into account in determining whether a particular publication was for the public benefit.[53] Such a test, however, only begs the question. The same can be said of the New South Wales Supreme Court's approach in *Cohen* v *Mirror Newspapers*,[54] where it was held that rights to privacy must be weighed against rights to free speech in matters of public concern in determining public benefit. This vague test was applied strictly by Evatt J in *Howden* v *'Truth' and 'Sportsman' Ltd* where it was held that there must always be a nexus between the publication and *present* public benefit.[55]

The test has led to fine distinctions. In *Floyd* v *Taylor*,[56] the New South Wales Supreme Court held that an advertisement of an absconding debtor was for the public benefit, being the giving of caution to future creditors. In contrast, the Supreme Court of Queensland held in *Donkin* v *The Telegraph Newspaper Co*[57] that it was not for the public benefit to publish that a person had been found guilty of an attempt to defraud Customs.

Understandably, the test has been subjected to trenchant criticism by publishers:

> When newspapers can not defend their printing of the truth in reports of such public activities as horse racing, trotting and greyhound racing because the benefit of reports is held . . . not to be of public benefit . . . the law is an ass.[58]

[48] *The Criminal Code Act* 1899 (Qld), s 376.
[49] *Defamation Act* 1957 (Tas), s 15.
[50] *Defamation Act* 1901 (NSW), s 6.
[51] New South Wales Law Reform Commission, *Report on Defamation*, op cit (fn 19) 103; *Rofe* v *Smith Newspapers Ltd* (1925) 25 SR (NSW) 4, 33 per Ferguson J.
[52] Evans, transcript of the Uniform Defamation Code Seminar held at Sydney on 26 November 1983, 7.
[53] (1905) 2 CLR 744, 756, 764.
[54] [1971] 1 NSWLR 623.
[55] (1937) 58 CLR 416, 427, 430.
[56] (1861) 2 Legge 1402.
[57] (1873) 3 QSCR 180.
[58] G H Wilkinson, transcript of the Uniform Defamation Code Seminar held at Sydney on 26 November 1983, 32.

3.2.2 *The Public Interest Test*

In New South Wales, the 'public benefit' requirement was changed to one of 'public interest' in 1974[59] upon the recommendation of the New South Wales Law Reform Commission.[60] As well, under the 1974 Act, public interest matters in relation to truth became a question for the judge to determine.[61] Both changes to the defence were designed to address problems with the public benefit formulation. Public interest was adopted as it had become well understood in the law of defamation relating to fair comment. 'Common considerations of policy'[62] were seen as underlying the public interest restraint on the defences of truth and comment. As there was 'perhaps little ultimate difference between the two tests',[63] the unique requirement for the defence of truth was 'not justified by considerations of substance'.[64]

The public interest requirement was formulated by Lord Denning MR in *London Artists* v *Littler* thus:

> I would not . . . confine [the definition of what is a matter of public interest] within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest.[65]

As public interest is determined by the judge according to known criteria, it supposedly should be 'easier for a man to know beforehand whether what he proposes to publish will be defensible if he is sued for defamation'.[66] Notwithstanding all this, any improvement the public interest test has over the public benefit test is marginal. Whilst the New South Wales test may not, on its face, require the proving of a positive benefit to the public and consigns the question to the judge, it remains a loose and uncertain concept. Gummow J must be correct when (albeit in the context of the law relating to confidence) he states:

> The so-called "public interest" defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis.[67]

[59] *Defamation Act* 1974 (NSW), s 15.
[60] New South Wales Law Reform Commission, *Report on Defamation*, op cit (fn 19) para 23. In addition, the defence was modified so that truth published on an occasion of qualified privilege became a complete defence: *Defamation Act* 1974 (NSW), s 15(2).
[61] *Defamation Act* 1974 (NSW), s 12.
[62] New South Wales Law Reform Commission, *Report on Defamation*, op cit (fn 19) para 66.
[63] Ibid.
[64] Ibid.
[65] [1969] 2 QB 375, 391.
[66] New South Wales Law Reform Commission, *Report on Defamation*, op cit (fn 19) para 69.
[67] *Smith Kline & French Laboratories (Aust) Ltd* v *Secretary, Department of Community Services & Health* (1990) 22 FCR 73, 111.

3.2.3 *Public Benefit, Public Interest and the Role of Defamation Law*

What relevance then, does the public benefit or public interest requirement have to defamation law's role, against which they must be assessed. Clearly, both have the effect of stifling freedom of expression, particularly the narrower public benefit formulation. As the Porter Committee stated:

> If every true but defamatory statement were to be actionable unless its publication were in the public interest . . . the author or the journalist . . . would have to guess . . . in advance whether a Court would decide that the publication of the defamatory truth in question was in the public interest. . . . Public discussion might be stifled and honesty excised from contemporary literature.[68]

Now this might be an acceptable loss if the gain were to be an increased protection for well-founded reputation, provided a just balance were struck. However, such limitations on the defence of truth have nothing to do with the protection of well-founded reputation and go against the whole thrust of defamation law. As the Faulks Committee argued, it is 'most unjust' for defamation law to produce outcomes where a plaintiff is entitled to recover damages for truthful defamatory statements about him merely because their publication was not for the public benefit.[69]

This injustice arises because the interest defamation law must be concerned with is the protection of well-founded reputation from injury. Placing public benefit and public interest hurdles on the truth defence means that the truthful defendant may be liable to the plaintiff whose reputation is not well-founded. Defamation law should never allow the truth to give rise to liability. Plaintiffs can only expect protection of reputation where they deserve it. Matters which gave rise to the existence of the public benefit and public interest requirements (the malicious, truthful defamer and privacy violations) are matters with which defamation law should not be concerned.

3.2.4 *The Evolution of Proposed Reform — the Hunt Defence*

Ironically, the substance of the most talked-about reform to the defence of truth, which adds specific privacy protection, evolved from a 1979 Australian Law Reform Commission ('ALRC') report which made the finding:

> Defamation and privacy . . . [relate] to separate interests. Defamation law protects against unjustified assaults on reputation. Privacy law . . . protects people from distressing and unfair disclosure of personal information, whether true or not and whether defamatory or not.[70]

The ALRC proposed a new Bill, entitled 'The Unfair Publication Act', which contained a Part III headed 'Defamation' and a Part IV headed 'Privacy'.[71] Part III provided in part:

[68] Law Reform Committee, *Report on the Law of Defamation*, op cit (fn 24) para 78.
[69] Law Reform Committee, *Report of the Committee on Defamation*, Cmnd 5909 (1975) para 138.
[70] Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) para 124.
[71] Id para 204.

12(1) It is a defence to a defamation action that the matter published was true.

(2) Matter shall be regarded as being true if the matter, and any imputation in the matter relied upon in the action by the plaintiff, was in substance true or in substance was not materially different from the truth.

This represents a codification of the common law position.

In Part IV cls 19 to 21 set out a discrete right of action for breach of privacy:

19(1) For the purposes of this Part, a person publishes sensitive private facts concerning an individual where the person publishes matter relating or purporting to relate to the health, private behaviour, home life or personal or family relationships of the individual in circumstances in which the publication is likely to cause distress, annoyance or embarrassment to an individual in the position of the first-mentioned individual. . . .

20 An individual concerning whom sensitive private facts are published has a right of action against each publisher of the sensitive private facts.

21 It is a defence to a privacy action in respect of the publication of sensitive private facts that —

(a) the plaintiff had consented, expressly or impliedly, to the publication and had not withdrawn the consent within a reasonable time before the publication;

(b) the sensitive private facts were matters of public record open to public inspection;

(d) the publication was authorised by law;

(e) the circumstances in which the publication was made were such that, if the matter published were defamatory, a defence referred to in section 14 [absolute privilege], 15 [limited privilege] or 17 ['protected dissemination'] would be available in relation to the publication;

(f) the publication was a fair, accurate and reasonably contemporaneous report of proceedings open to the public of any Parliament, tribunal or local government authority;

(g) the publication was made reasonably, whether directly or through an agent, for the personal safety, or the protection of property, of any person; or

(h) the publication was relevant to a topic of public interest.

This attempt to disprove the proposition that 'to define the province of privacy distinctly is impossible' falls well short of the mark.[72] The crucial definition of 'sensitive private facts' includes 'private behaviour', which merely begs the question in its circularity. As the New South Wales Law Reform Commission notes in relation to a later version of the definition suffering the same defect, 'being inclusive [it] was not a true definition and attempts to apply it in practice could cause endless disputes and confusion.'[73]

[72] Law Reform Committee, *Report on the Law of Defamation*, op cit (fn 24) 10.
[73] New South Wales Law Reform Commission, *Defamation*, op cit (fn 25) 113.

Further, a defence to a publication of 'sensitive private facts' includes that 'the publication was relevant to a topic of public interest', raising again all the difficulties with the concept.

However, notwithstanding the correct premise upon which the ALRC proceeded, viz the identification of the separateness of defamation and privacy laws, in 1983 Justice Hunt of the New South Wales Supreme Court argued the case convincingly, although it is submitted erroneously, to mesh the two together:

> I can see no reason why a defence of justification could not be adopted (even in the absence of a right of action for breach of privacy) whereby it is a defence to the publication of defamatory matter if that matter is true and, where the matter consists of sensitive private facts (as defined), if a defence presently proposed as a defence to a privacy action would apply in relation to the publication of those facts (see cl 21 of the proposed Bill).[74]

This proposal instantly found favour in many quarters. The Attorney-General Gareth Evans was so taken with the idea (describing it as a 'most satisfactory solution') that he inserted an alternative clause embodying Justice Hunt's suggestion in proposed uniform defamation legislation.[75]

In 1990, the New South Wales, Queensland and Victorian Attorneys-General suggested a simplified version of the Hunt defence:

> The defence of [substantial truth] would not be available where relating to the health, private behaviour, home life or personal or family relationships of the person concerned, unless it is proved that:
>
> (a) the matter was the subject of government or judicial record available for public inspection;
> (b) the publication was made reasonably for the purpose of preserving the personal safety, or protecting the property of any person; or
> (c) the matter was relevant to a topic of public interest.[76]

A further version (based upon the Attorneys' joint Discussion Papers) appeared in the Defamation Bills introduced into the Parliaments of Queensland, Victoria and New South Wales in 1991. In Queensland the Bill lapsed when the Parliament was prorogued in 1992, although the Queensland Government remains open to uniformity initiatives. The Victorian Government is no longer actively pursuing uniformity while in New South Wales the Bill has been referred to both a Legislation Committee of the Legislative Assembly and to the New South Wales Law Reform Commission, from which a final report is pending.

[74] Paper presented on 5 July 1983 at the 22nd Australian Legal Convention, Brisbane and reproduced in the transcript of the Uniform Defamation Code Seminar held at Sydney on 26 November 1983, 77.

[75] Id Appendix.

[76] Attorneys-General for New South Wales, Queensland and Victoria, Discussion Paper No 1, op cit (fn 3) 21 and Discussion Paper No 2, op cit (fn 3) 16.

3.2.5 *The Hunt Defence and the Role of Defamation*

Despite the enthusiasm with which the reform was greeted in 1983, little theoretical justification was offered for it then. The New South Wales, Queensland and Victorian Attorneys-General in 1990 did offer four distinct grounds for reviving the proposal, none of which survive close scrutiny.

Firstly, the Attorneys-General claimed that the history of defamation law reveals that since 1843 privacy has been regarded as 'inextricably linked' with reputation.[77] However, the 1843 Report of the House of Lords Select Committee (which first suggested a public interest element to the defence) simply did not base its recommendations upon privacy concerns. Rather, the curtailment of 'malicious' and 'spiteful' publications was the basis of its recommendation: 'a wrong may be maliciously done to an individual for which a remedy should be given.'[78] In making its final recommendation, the Committee was of the opinion that publications 'prompted by spite' should only be 'tolerated' by the law when the matter 'ought to be made the subject of public Comment . . . for the Good of the Community.'[79] It is difficult to conclude from this, as the Attorneys-General did, that the public interest element was suggested by the Committee to protect against 'the disclosure of sensitive private facts'.[80]

Secondly, support was drawn from the Australian Law Reform Commission's Report. This is in spite of the ALRC finding that privacy and defamation are distinct interests, and that the 'public benefit' requirement be excised from the truth defence in favour of separate privacy legislation. The Attorneys-General, somewhat extraordinarily, argued that

> any such determination was . . . secondary to the Commission's acknowledgment of the interrelation between publication privacy and defamation.[81]

This form of argument is absurd. Its logic assumes that once an investigation into the relationship between defamation and privacy is undertaken, the primary acknowledgment must be that the two are related even when the investigation concludes that they are not. The New South Wales Law Reform Commission's 1993 discussion paper corrects this, arguing that 'the interests to be protected are different and the means of protecting them should also be different.'[82]

Thirdly, the Attorneys-General argued that privacy protection is a necessary condition for there to be democratic support for defamation law.[83] However, this is a purely rhetorical proposition. Indeed, it could be said that, in

[77] Id Discussion Paper No 2, para 4.2.
[78] *Report from the Select Committee of the House of Lords on the Law of Defamation and Libel*, op cit (fn 43) iv.
[79] Id v.
[80] Attorneys-General of New South Wales, Queensland and Victoria, Discussion Paper No 2, op cit (fn 3) para 4.2.
[81] Id para 4.4.
[82] New South Wales Law Reform Commission, *Defamation*, op cit (fn 25) 114.
[83] Attorneys-General of New South Wales, Queensland and Victoria, Discussion Paper No 1, op cit (fn 3) para 7.7.

contrast, the public demand a defamation law which provides a free flow of truthful facts and information on which to form opinion.

Fourthly, the Attorneys-General argued that as specific privacy legislation is far from being universally accepted in the various jurisdictions, an alternative is a reformulation of the truth defence in the manner proposed.[84] However, such a modification is simply not a valid alternative to privacy legislation. As has been noted in reference to the proposal:

> "Truth plus privacy" would be raised only as a possible defence to an action for defamation. In many cases an invasion of privacy does not involve any issue relating to defamation law. Even if the invasion of privacy involves the publication of material, not all statements regarding private matters are defamatory.[85]

And this returns to a central issue: privacy is not defamation law's concern. Piecemeal attempts to make it so lack theoretical justification having regard to the role of defamation law, and thus result in both a failure to protect only well-founded reputation and lead to an excessive stifling of free speech.

Finally, all recent attempts to provide for a uniform defamation law have provided the remedy of correction statements. Such a remedy must be premised upon the defamatory statement being false. Assuming the 'Hunt defence' be adopted, in cases where a defendant has published the defamatory truth relating to a plaintiff's 'private behaviour' and no public interest can be proved, it is difficult to understand how a court ordered or recommended correction statement could be relevant.[86] How can there be correction of truth?

4. APPLICATION OF THE DEFENCE

4.1 Victoria, South Australia, Western Australia, Northern Territory, Queensland and Australian Capital Territory (The Common Law)

As previously noted, the common law presumes in the plaintiff's favour that every defamatory imputation is false,[87] and the defendant is required to prove the substance of each distinct imputation pleaded.[88] Where the publication contains a number of severable imputations which are claimed to be defamatory, a defendant may justify only some of those imputations.[89] The defendant will be liable, however, for those defamatory imputations which are not justified, if they are otherwise actionable.[90]

[84] Attorneys-General of New South Wales, Queensland and Victoria, Discussion Paper No 2, op cit (fn 3) paras 7.9–7.10.
[85] S Walker, 'Defamation Law Reform' (1990) 10(4) *Communications Law Bulletin* 17; cf Winfield, op cit (fn 21).
[86] See Australian Law Reform Commission, op cit (fn 70) para 124.
[87] *Belt* v *Lawes* (1882) 51 LJ QB 359, 361.
[88] *Edwards* v *Bell* (1824) Bing 403, 409; 130 ER 162, 165.
[89] *Clarke* v *Taylor* (1836) 2 Bing NC 654; 132 ER 252.
[90] Ibid. See also *Rofe* v *Smith's Newspapers Ltd* (1925) 25 SR (NSW) 4, 22.

4.1.1 *Where Justified Imputations Mean that Those Unjustified Cause No Appreciable Harm to Well-Founded Reputation*

The common law takes a strict approach when allowing a defendant to justify defamatory imputations pleaded by the plaintiff. As every distinct defamatory imputation must be justified, absurd results can arise. It may be that a publication contains a whole series of defamatory imputations which the defendant succeeds in proving, and one which the defendant fails to prove. The defence of truth fails for the unjustified imputations, even if the justified imputations have shown there to be only nominal damage to any well-founded reputation.[91]

An illustration of the operation of the law in this regard is found in *Thiess* v *TCN Channel Nine*.[92] There, the imputations which were justified (before a jury at trial) were that the plaintiff had bribed a State Premier on numerous occasions and had stolen from his shareholders and partners. However, as the defendant failed to prove another specific bribery imputation as well as an imputation that the plaintiff dismissed an employee to silence him from revealing the bribery, a jury awarded damages of $50 000 and $5000 for the respective imputations. The Queensland Full Court upheld the award, stating:

> The amounts of $50 000 and $5000 cannot be considered to be excessive in the sense that no reasonable jury could fairly have awarded them as proper compensation to Thiess for the injury sustained by reason of the defamatory matter published but not justified.[93]

In view of the charges proved it may well have been that the unproved imputations caused no appreciable harm to any well-founded reputation and it is therefore puzzling that damages were awarded in the plaintiff's favour. This puzzle is unsatisfactorily resolved, given defamation law's role, by the Court's reasoning that

> the distinction between forfeiting a reputation for public honesty and integrity, and retaining popular esteem for treating fellow human beings in a decent and considerate manner is one that a jury . . . might be expected to recognise and give effect.[94]

4.1.2 *Where a Plaintiff Sues Selectively on the Defamatory Imputations Contained in a Publication: The First* Polly Peck *Principle*

It is open to a plaintiff to only sue in relation to one imputation contained in a publication which the defendant could not justify. In *Templeton* v *Jones*[95] the defendant accused the plaintiff of despising bureaucrats, civil servants, politicians, women, Jews and professionals. The plaintiff only sued with respect

[91] *Rofe* v *Smith's Newspapers Ltd* (1925) 25 SR (NSW) 4, 22 per Street ACJ: 'the test . . . [is] whether the part not justified would . . . form a substantial ground for libel'.
[92] Unreported, Full Court of the Supreme Court of Queensland, 2 April 1991 (No 4150 of 1989).
[93] Id 87.
[94] Id 85–6.
[95] [1984] 1 NZLR 448.

to the imputation that he despised Jews; the defendant was able to prove the truth of all imputations, except the one of which complaint was made. Cooke J explained the common law position as it then stood:

> A defendant may not justify . . . that of which the plaintiff does not complain. If . . . [a publication] makes several charges against the plaintiff, he is entitled to sue on one charge only. The defendant may justify that charge if he can, but he is not allowed to confuse the issue by bringing evidence that the other charges are true.[96]

While Cooke J acknowledged the law did permit the defendant to point out to the Court that the other imputations were not complained of, any considerations flowing from that went only to the quantum of damages. Hence, an anomaly similar to that illustrated in *Thiess* arose. The defendant was unable to rely on the defence that well-founded reputation was substantially unaffected, by having regard to the truth of all the statements in the publication about which the plaintiff has chosen not to complain.

After *Templeton*, the Court of Appeal in *Polly Peck (Holdings) PLC* v *Trelford*[97] reformulated the law. O'Connor LJ, after stating the law in similar terms to those expressed by Cooke J in *Templeton*, added:

> Several defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting, and . . . it is fortuitous that what is in fact similar fact evidence is found in the publication.[98]

On this basis, O'Connor LJ reconsidered by way of obiter the facts in *Templeton* and concluded:

> I would have thought the words in their context were at least capable of meaning that the plaintiff was an intolerant bigot, preaching politics of hatred in the hope of political advantage and that, if that was the sting of the passage as a whole, the defendant was entitled to introduce the particulars which were rejected.[99]

In *Woodger* v *Federal Capital Press of Australia*[100] Miles CJ of the ACT Supreme Court accepted this as forming part of the common law of the ACT, calling it 'the first *Polly Peck* principle'. He lucidly re-stated it:

> Where the plaintiff alleges several distinct defamatory meanings but there is arguably a "common sting" to them upon which the plaintiff does not expressly rely, then the defendant may seek to justify the common sting and the plaintiff is not entitled to restrict the defendant to seeking to justify the several meanings selected by the plaintiff.[101]

[96] Id 451.
[97] [1986] QB 1000.
[98] Id 1032.
[99] Id 1031.
[100] (1992) 107 ACTR 1.
[101] Id 23.

4.1.3 *Where the Defendant Can Justify the Defamatory Imputation in Light of the Publication* in toto*: The Second* Polly Peck *Principle*

Originally, the common law imposed a strict confinement upon the manner in which a defendant could justify a defamatory imputation. It had been held that where a plaintiff complained of a defamatory imputation, the words and meaning of which could be severed from the remainder of the publication, a defendant was unable to establish that

> if the whole of the article was taken, the plaintiff would have had a different cause of action . . . and . . . to set out the whole article, and, so to justify it as true in fact.[102]

The strictness of this approach was mitigated in *S and K Holdings Ltd* v *Throgmorton Publications Ltd*, where Lord Denning MR stated:

> Even if the plaintiff has not complained of the whole, but only of part, the judge will let the jury see the whole. He must indeed do so, for the very purpose of enabling them to decide what is the natural and ordinary meaning of the words in their context.[103]

Later, he noted:

> It seems to me that, in cases where the jury are entitled to see the whole, the defendants are entitled to plead justification or fair comment as to the whole.[104]

In *S and K Holdings*, the majority (Lord Denning MR and Roskill LJ) did not make the finding that the different parts of the article complained of were not plainly severable, and in *Polly Peck* O'Connor LJ understood Lord Denning MR as 'not saying that where properly severable charges were made in an article, one could be justified by proving the truth of the other'.[105]

However, *Polly Peck* extended *S and K Holdings* to enable a defendant to look at the whole of a publication, regardless of the possibility to sever, to assert a meaning in fact of the alleged defamatory words to which to justify. Again, in *Woodger* Miles CJ accepted this as forming part of the common law in the Australian Capital Territory and describing it as 'the second *Polly Peck* principle', re-stated it clearly:

> Where the plaintiff alleges a defamatory meaning or several distinct defamatory meanings but the defendant denies the meaning or meanings alleged by the plaintiff and asserts an arguable claim that in the context of the whole publication a different defamatory meaning or several different defamatory meanings . . . the plaintiff is not entitled to restrict the defendant to seeking to justify the meaning or meanings selected by the plaintiff.[106]

[102] *Watkin* v *Hall* (1868) 3 LR QB 396, 402 per Blackburn J.
[103] [1972] 1 WLR 1036, 1039.
[104] Id 1040.
[105] [1986] QB 1000, 1031.
[106] (1992) 107 ACTR 1, 24.

4.1.4 *Common Law Application and the Role of Defamation Law*

The anomaly illustrated by *Thiess* is insupportable in light of the role of defamation law. The plaintiff

> in effect obtains an undeserved whitewashing of his reputation, since he is in position to say that he has recovered damages from the defendant for the libel of which he complains, although ninety-nine percent of the libel was in fact, true.[107]

By dissecting each defamatory imputation in this way — at the expense of the real effect of the imputations taken as a whole — and demanding discrete justification for each, the law is stifling freedom of speech without protecting well-founded reputation. Indeed, again to use Veeder's apt expression, the law gives its imprimatur to the 'false light' in which the plaintiff stands before the public.[108]

Similarly, in *Templeton*, the unjustified imputations are completely overwhelmed by that which could be justified in the publication if it were complained of. Although only nominal or contemptuous damages would normally be awarded in such cases,[109] the law still permits the undeserving plaintiff to succeed, does not protect any well-founded reputation and gratuitously curtails freedom of speech.

The first *Polly Peck* principle remedies the anomalies illustrated in *Thiess* and *Templeton* by denying the plaintiff the opportunity, where a number of defamatory imputations have a common sting, to pick and choose those imputations which it is thought the defendant will be unable to justify. The entitlement of the defendant to justify the general sting as a complete defence consistently ties the law back to protecting what should be the interest it recognises: reputation well-founded in character.

The second *Polly Peck* principle is a similar triumph of substance over form. If an imputation can not be justified when its meaning is construed out of context of the wider publication, but its meaning in context can be justified, absurd and unjust results arise when the truth defence fails. As stated by O'Connor LJ in *Polly Peck*:

> I do not think that a plaintiff is permitted to use a blue pencil upon words published of him so as to change their meaning and then prevent the defendant from justifying the words in their unexpurgated form.[110]

The second *Polly Peck* principle returns the law to fulfilling its role in protecting only well-founded reputation by not allowing plaintiffs to bring successful defamation actions for reason only that the meaning of the imputation was taken out of context.

[107] Law Reform Committee, *Report on the Law of Defamation*, op cit (fn 24) para 80.
[108] Veeder, op cit (fn 11) 33.
[109] See *Plato Films* v *Speidel* [1961] AC 1105; *Scott* v *Sampson* (1882) 8 QBD 491.
[110] [1986] QB 1000, 1023.

4.2 Tasmania and New South Wales (Statutory Modification)

Due to the anomalous outcomes produced by the common law — especially before the decision in *Polly Peck* — two Australian states modified the law by statute.

4.2.1 *Partial Justification*

In 1948, the Porter Committee came to the conclusion that, 'judged by first principles', a defendant should succeed completely in the defence of justification if a substantial proportion of the defamatory imputations are proved to be true, so as to leave the court with the view that the remaining imputations do not add appreciable injury to the plaintiff's reputation.[111] This led to a statutory modification in England in 1952.[112] Five years later a similar modification was adopted in Tasmania, which reads:

> In an action for defamation in respect of words containing two or more distinct charges against the plaintiff, a defence of justification does not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges.[113]

If *Thiess* were to be decided under this regime, the defendant could have relied upon the true imputations to establish that the unjustified imputations did not materially injure any well-founded reputation of the plaintiff. Thus, it is likely the defendant would have succeeded completely in its defence and the seemingly unmeritorious plaintiff would be denied relief.

However, the deficiency in the Tasmanian legislation is that it is based on the assumption that a plaintiff will raise all defamatory imputations within a publication, so that a defendant has sufficient scope to partially justify and rely upon the provision. A Tasmanian plaintiff can avoid the effect of the provision merely by raising those imputations which he or she believed the defendant could not justify. This stratagem was successfully adopted in *Plato Films* v *Speidel*[114] under the corresponding English provision. Similarly, if the section were applied in *Templeton*, it would not alter the outcome as the plaintiff there chose to sue only on the imputation which the defendant could not justify.

4.2.2 *Contextual Justification*

Reacting to the avoidance of the English partial justification provision in *Plato Films*, in 1975 the Faulks Committee recommended that

> where defamatory words complained of by a plaintiff form part of a larger publication, it should be open to the defendant to rely on the whole of the

[111] Law Reform Committee, *Report on the Law of Defamation*, op cit (fn 24) para 81.
[112] *Defamation Act* 1952 (Eng), s 5.
[113] *Defamation Act* 1957 (Tas), s 18.
[114] [1961] AC 1105.

> publication, including those parts not specifically complained of by the plaintiff, in a defence of justification.[115]

While this recommendation was never legislatively adopted in England, it was accepted by the New South Wales Law Reform Commission, and enacted in s 16 of the *Defamation Act* 1974 (NSW). While the language of s 16 has been described by one commentator as 'almost impenetrable', its practical effect is the same as the second principle in *Polly Peck*. In *Jackson* v *John Fairfax & Sons Ltd* Hunt J described the operation of s 16:

> The defence of contextual truth accepts that the matter complained of conveys the imputation pleaded by the plaintiff and that no other defence has been established in relation to the imputation; it asserts . . . the imputation pleaded by the defendant is also conveyed by the matter complained of (such imputation being called the contextual imputation); the defence then asserts that, even though the plaintiff's imputation is otherwise indefensible, such is the effect of the substantial truth of the defendant's contextual imputation upon the plaintiff's reputation that the publication of the imputation of which he complains did not further injure his reputation.[116]

Where it is appropriate for the combined effect of the contextual imputations to be considered, a jury is required to consider that combined effect.

Hence, if s 16 were applied in *Templeton* the defendant would be permitted to prove, by way of justification to the imputation sued upon, the combined effect of the truth of those remaining imputations not claimed by the plaintiff. The application of the law would be the same as that stated by O'Connor LJ when he, by way of obiter, applied the second *Polly Peck* principle to the facts in *Templeton*.

The ALRC has criticised s 16. It argued that reputation has a number of different aspects, and proof that a person has short-comings in one 'sector' is not logically proved by shortcomings in a different 'sector'.[117] However, as noted by Justice Hunt,[118] this is neither a 'legal nor logical consequence' of s 16. His Honour argues (with logic which could be equally applied to the second *Polly Peck* principle) that s 16 only operates when the contextual imputations are of such a nature that their truth means that the imputations complained of do not cause additional injury to the plaintiff's reputation. Where the contextual and pleaded imputations are from two entirely different 'sectors' there would be no room for the operation of s 16; clearly the pleaded imputation would cause additional injury.

4.2.3 *Statutory Modification and the Role of Defamation Law*

Notwithstanding the possibility to avoid the Tasmanian provision, the gist of these modifications is thoroughly consistent with the role of defamation law. The whole basis of the modifications rests upon the concept that the law will

[115] Law Reform Committee, *Report of the Committee on Defamation*, op cit (fn 69) para 131.
[116] [1981] 1 NSWLR 36, 39.
[117] Australian Law Reform Commission, op cit (fn 70) paras 121–2.
[118] See fn 74 supra.

refuse to protect reputation where it is shown to be not well-founded. Hence the language of the Tasmanian provision: '[having regard to the truth] . . . the words not proved true do not materially injure the plaintiff's reputation'.[119] 'Reputation' is being used here in the sense of reputation which is well-founded in the character of the plaintiff. The modifications' ultimate effect is to broaden the scope a defendant has to establish the true character of a plaintiff. Under the Tasmanian provision the defendant can rely upon the truth of all imputations complained about. Under the New South Wales provision — as with the second *Polly Peck* principle — the defendant can rely upon the truth of all imputations contained within the relevant publication. Giving a defendant this wider scope enables a court to better assess whether the unjustified imputations have actually injured any well-founded reputation. Therefore, the New South Wales provision is to be preferred as being most consistent with defamation law's role.

4.3 Reform

The unification proposals of the state Attorneys-General in 1990 adopted the New South Wales provision. However, given the welcome upheaval to the common law caused by the two principles of *Polly Peck*, a more satisfactory reform avenue may be to codify these principles. This would ensure that the first principle would be captured in statutory form. Further, given the convoluted language of the NSW contextual imputations provision, codification of the more descriptive and direct language of the second *Polly Peck* principle would provide a more comprehensible statutory defence. To these ends, future statutory draftspeople would be well-advised to be cognisant of the exposition of the *Polly Peck* principles by Miles CJ in *Woodger*.

[119] *Defamation Act* 1957 (Tas), s 18.