

NSW Law Reform Commission

REPORT 75 (1995) – DEFAMATION

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Terms of Reference and Participants

To the Honourable Jeff Shaw QC
Attorney General for New South Wales

Dear Attorney

Defamation

We make this final Report to the reference to this Commission dated 4 November 1992.

Hon Gordon J Samuels AC QC

(Chairman)

Professor Michael Chesterman

(Commissioner)

The Hon Jerrold S Cripps

(Commissioner)

The Hon Justice David Hunt

(Commissioner)

Professor Michael Tilbury

(Commissioner)

Professor David Weisbrot

(Commissioner)

September 1995

Terms of Reference

On 4 November 1992, the Attorney General, the Hon John P Hannaford MLC, required the Commission to inquire into and report on the law of defamation in New South Wales, with particular reference to:

- (a) the relative roles of the judge and jury;
- (b) standards, defences, onus and procedures;
- (c) the determination of damages;
- (d) non-monetary remedies, including court-ordered correction statements;
- (e) alternative or additional techniques of dispute resolution;
- (f) the need for provision of a separate tort of invasion of privacy;
- (g) the need for the provision of "shield laws" to protect journalist's sources; and

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(h) any related matters.

The Commission should provide drafting instructions for amendment of the Bill, and in doing so, taking into consideration such empirical data relating to defamation matters as may be available and to have particular regard to the proposals of the Standing Committee of Attorneys General for uniformity of defamation laws in Australia and the Discussion Paper and Report of the Legislative Committee on the Defamation Bill 1992.

Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act 1967*. For the purpose of this reference, the Chairman, in accordance with the Act, established a Division comprising the following members of the Commission:

Professor Michael Chesterman

The Hon J S Cripps QC

The Hon R M Hope AC CMG QC (until 2 April 1993)

The Hon Justice David Hunt

The Hon G J Samuels AC QC* (from 3 April 1993)

Professor Michael Tilbury (from 15 August 1994)

Professor David Weisbrot

(* denotes Commissioner-in-Charge)

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Executive Summary

The object of the law of defamation is to protect reputation. The person whose reputation is lowered by a defamatory imputation has a cause of action in respect of that imputation.

The Commission has determined that, if defamation actions are to result in the effective vindication of reputation, the principal issue in such actions, so far as the nature of the particular case permits, should be the truth or falsity of each imputation pleaded. Accordingly, regardless of the remedy sought, the Commission recommends that the plaintiff will generally have to prove the falsity of the imputation in order to succeed in a defamation action. Exceptions are made to accommodate cases where the imputation is conveyed by a statement of opinion which cannot be proved to be either true or false, and in order to preserve such protection of privacy as the law of defamation provides in the absence of more specific legislation.

The remedies available to enforce the cause of action should facilitate the prompt public restoration or vindication of the plaintiff's reputation and provide the plaintiff with compensation for the injury suffered. Economic loss consequent upon the defamation should continue to be recoverable as under the present law.

Currently, the remedy most commonly pursued in respect of non-economic loss is damages, whose object is both to compensate the plaintiff for the injury to reputation and the hurt to feelings inflicted by the imputation and to serve as vindication of the plaintiff. But an award of damages is inadequate to furnish vindication to the plaintiff. It may come long after the defamatory publication and revive the imputation rather than extinguish it. It may not be publicised. Moreover, although the evidence in support of the proposition is anecdotal at best, the threat of large awards of damages for defamation is generally regarded as having a "chilling effect" on freedom of speech vital in a pluralist democratic society.

Under the Commission's recommendations, it will generally be unnecessary for a judge assessing damages to pay heed to the recognition of any element of vindication, since vindication will have been provided by the judge's reasons. The assessment of damages will focus, therefore, on providing compensation for injury to reputation and hurt to feelings.

As an alternative to an action for damages, the Commission recommends that plaintiffs should be able to seek a declaration of falsity, whose aim will be the speedy and effective vindication of the plaintiff's reputation. The remedy must generally be sought within four weeks of publication. It will be available, in the court's discretion, where the imputation of which the plaintiff complains is both defamatory and inherently capable of being proved false. A declaration will not be granted where the defendant has a triable defence of absolute privilege, protected report or court or official notice. But defences currently available to an action for damages - which have deflected the focus of the law of defamation away from the determination of issues of truth or falsity - cannot be raised in opposition to a declaration of falsity. A successful plaintiff will be entitled to costs, including, in the ordinary case, indemnity costs, and the court will have power to order publication of the terms of its declaration with the same prominence as that given to the defamatory statement.

The Commission also recommends that a plaintiff who wishes to avoid litigation altogether may choose to make a formal request in accordance with the specified procedure for a correction of an allegedly defamatory imputation. A publisher who responds to such a request by making a correction which, in point of promptness and adequacy, is agreed between the parties or complies with promulgated requirements, may, after paying the claimant's costs, plead the correction in bar to an action for non-economic damages.

The Commission has formulated its recommendations bearing in mind the importance of balancing the protection of individual reputation against the notion of freedom of speech. We have concluded that recent decisions of the High Court strike that balance better than would the importation of a "public-figure" test along American lines.

Underpinning any reform of the substantive law of defamation is a determination of the proper distribution of functions between judge and jury. Here the Commission endorses the position which now obtains in New South Wales where the function of the jury is restricted to the determination of whether or not the matter complained of was published by the defendant and, if it was, whether or not it conveyed the imputation pleaded by the plaintiff and, if so, whether or not that imputation is defamatory.

List of Recommendations

Recommendation 1 (page 37)

The Government should give urgent consideration to the development of privacy laws, including the interaction of those laws with the law of defamation.

Recommendation 2 (page 47)

The issue of falsity should be decided by the judge.

Recommendation 3 (page 48)

The issue of public interest should be decided by the judge.

Recommendation 4 (page 50)

Section 7A(3) of the *Defamation Act 1974* should be redrafted to provide explicitly that the issue of publication be decided by the jury.

Recommendation 5 (page 67)

In general, falsity should be an essential ingredient of the cause of action in the tort of defamation and the *Defamation Act 1974* (NSW) should be amended consequentially.

Recommendation 6 (page 68)

In an action for damages, the plaintiff, instead of proving that the defamatory imputations are false, may prove that they do not relate to a matter of public interest.

Recommendation 7 (page 71)

The burden of proving that a defamatory imputation is false should rest on the plaintiff.

Recommendation 8 (page 71)

The plaintiff may establish a cause of action for damages in defamation by establishing that the defamatory imputation is inherently not capable of being proved true or false.

Recommendation 9 (page 72)

Where the defendant relies on the defence of comment under section 32 of the *Defamation Act 1974*, the defendant should bear the onus of showing that the comment is the honest expression of the defendant's opinion. Where the defendant relies on the defence of comment under section 33, the defendant should bear the onus of showing that the comment is the honest expression of the opinion of the defendant's servant or agent.

Recommendation 10 (page 91)

Plaintiffs must elect to bring an action either for a declaration that the imputations published are false or for general damages for non-economic loss.

Recommendation 11 (page 91)

A plaintiff may combine a claim for damages for economic loss with an application for a declaration of falsity, but the court will not consider the claim for economic loss until after the declaration is granted.

Recommendation 12 (page 92)

The election of a plaintiff who successfully seeks a declaration becomes final when the defendant complies with the orders ancillary to the declaration.

Recommendation 13 (page 96)

A declaration of falsity should be available in the court's discretion.

Recommendation 14 (page 103)

"Affirmative defences" to actions for damages in defamation cases cannot be raised to defeat an application for a declaration of falsity. However, where the defendant has a triable defence of absolute privilege, protected report or court or official notice, the court will not grant a declaration of falsity.

Recommendation 15 (page 103)

Declarations should be sought within four weeks of publication or, exceptionally, within such other period as the court may in its discretion determine, to a maximum of one year from publication.

Recommendation 16 (page 104)

Declarations of falsity should be obtainable only in the Supreme Court.

Recommendation 17 (page 104)

A declaration of falsity should be heard by a judge alone.

Recommendation 18 (page 107)

The defendant should be ordered to publish the declaratory judgment as delivered by the court.

Recommendation 19 (page 109)

A plaintiff who successfully obtains a declaration of falsity should be awarded costs on an indemnity basis unless the court determines otherwise.

Recommendation 20 (page 110)

A plaintiff who successfully seeks a declaration may go on to recover damages for economic loss in the same proceedings, but only after the declaration has been made. All affirmative defences should apply to that part of the proceedings in which economic loss is claimed.

Recommendation 21 (page 126)

Section 47 of the *Defamation Act 1974* should be repealed.

Recommendation 22 (page 135)

All defendants should be able to rely on a published correction as a defence to a claim for non-economic loss where the correction was requested by the plaintiff. A requested correction is one which complies in all respects with a request by the plaintiff for a correction or, alternatively, one which complies with Recommendations 23, 25, 26 and 27.

Recommendation 23 (page 136)

A plaintiff seeking a correction must do so in writing prior to commencing proceedings and identify the publication complained of; the false and defamatory imputations said to arise from it; the facts, if any,

which demonstrate falsity; and any special facts which give rise to a defamatory meaning other than the express language of the publication.

Recommendation 24 (page 137)

The court should be given power to determine any questions which concern the steps which must be taken to comply with the requested corrections procedure and which are referred to it by agreement of the parties.

Recommendation 25 (page 138)

The correction must be prompt. For publications which are published on at least five days of each week, the correction must be published within seven days of a fully documented request complying with Recommendation 23. In other cases, the correction should be published in the next edition so far as this is practicable, or at such other time as the parties agree.

Recommendation 26 (page 140)

The correction must be adequate: it must be published in the same place and manner as the original defamatory statement, or else calculated to reach substantially the same audience. It must either correct the imputation, preferably by stating the facts rather than simply stating that the original imputation was false; or disclaim any intention to convey a secondary meaning or assert its truth.

Recommendation 27 (page 141)

Defendants who agree to publish a prompt and adequate correction should also pay the plaintiff's reasonable costs.

Recommendation 28 (page 142)

The defendant's publication of a prompt and adequate correction does not bar a claim for economic loss.

Recommendation 29 (page 144)

Section 43(1)(d) of the *Defamation Act 1974* (NSW) should be repealed.

Recommendation 30 (page 170)

There should be a clearly enunciated policy consistently applied to determine the statutory grant of absolute privilege to bodies dealing with investigation, reporting and discipline.

Recommendation 31 (page 175)

The clauses of Schedule 1, Part 1, of the *Defamation Bill 1992*, conferring absolute privilege on a wider class of Parliamentary proceedings and papers should be adopted.

Recommendation 32 (page 184)

The *Defamation Act 1974* should be amended so that, as far as is possible, all instances in which absolute privilege is conferred by legislation are also recorded in the Act in a consistent form. The legislation should clearly indicate the scope of the protection given in each case.

Recommendation 33 (page 184)

The drafting format of the *Defamation Bill 1992* (Schedule 1 - Absolute Privilege) should be adopted.

Recommendation 34 (page 193)

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There should be a clearly enunciated policy consistently applied to determine when protected report status is conferred.

Recommendation 35 (page 193)

The drafting format of the Defamation Bill for Schedule 2 — Protected Reports of Proceedings should be adopted.

Recommendation 36 (page 195)

The *Defamation Act 1974* Schedule 2, "Proceedings of Public Concern", should be amended to include proceedings in public of a local council, board, or other authority constituted for public purposes under the legislation of the Commonwealth, a State or a Territory, so far as the proceedings relate to a matter of public interest.

Recommendation 37 (page 204)

The limitation period for defamation actions (other than a declaration of falsity) should be shortened to one year from the date of publication, the court having a power to extend the period as the interests of justice require to a maximum of three years from the date of publication.

Recommendation 38 (page 216)

Mediation in defamation matters should be offered by the Supreme Court in accordance with the provisions of the *Supreme Court Act 1970* (NSW) as amended by the *Courts (Mediation and Evaluation) Amendment Act 1994* (NSW).

1. Introduction

BACKGROUND

1.1 In June 1990 the Attorneys General of NSW, Queensland and Victoria initiated a project with the aim of achieving uniformity of defamation laws in Australia. The *Defamation Bill 1991* (NSW), introduced into Parliament on 14 November 1991, was the culmination of this work. Similar, though not identical, Bills were also introduced into the Parliaments of Queensland and Victoria.¹ The Bills were never enacted.

1.2 The NSW Bill was referred to the Legislation Committee of the Legislative Assembly in November 1991. The Committee's Report, published in October 1992, recommended that the Bill be referred to the Law Reform Commission for a comprehensive review and redrafting. On 4 November 1992 the then Attorney General, the Hon John P Hannaford MLC, requested that the Commission undertake a review of the law of defamation in NSW. The terms of reference are set out at page x.

THE COURSE OF THE REFERENCE

1.3 In August 1993 the Commission published Discussion Paper 32 *Defamation* (DP 32). A general theme of the Paper was to argue for a shift from the preoccupation with awards of damages in defamation actions and for reform of procedures and remedies. The issues raised and proposals put forward were designed to restore reputation more quickly and effectively, reduce costs, and reduce the threat to free speech caused by the prospect of "excessive" damages.

1.4 The Discussion Paper was widely circulated. The Commission received 32 written submissions. A full list is set out in Appendix 2.

1.5 The Commission also participated in a number of conferences and seminars held between 1993 and 1995.² These provided opportunities for the Commission to present its proposals and to receive comment and criticism. The Commission also met with a number of distinguished academics from overseas including Professor Frederick Schauer, Frank Stanton Professor of the First Amendment, John F Kennedy School of Government, Harvard University and Professor John Soloski, School of Journalism and Mass Communications, University of Iowa.

1.6 In April 1995, the Commission met with a committee of the New South Wales Bar Association convened by Mr Henric Nicholas QC to discuss the proposals which the Commission was likely to make in this Report. The Commission is appreciative of the constructive comments which members of the Bar offered on our proposals and which helped both to indicate ways in which our proposed recommendations needed clarification and to refine them on a number of points.

DEVELOPMENTS DURING THE COURSE OF THE REFERENCE

1.7 A number of major developments in the law of defamation occurred in the course of this reference which have significantly influenced the recommendations which we make in this Report.

1.8 The first has been a number of cases involving large awards of damages, of which the most important was the *Carson* litigation.³ Mr Carson, a prominent Sydney solicitor, was awarded \$600,000 by a jury for two defamatory articles published in the *Sydney Morning Herald* in 1987 and 1988. This was held to be excessive by the NSW Court of Appeal which ordered a retrial on the issue of quantum. Mr Carson appealed to the High Court. The High Court, by majority, dismissed the appeal and in doing so commented on the extent to which a jury could be presented with information relating to the ordinary level of general damages in personal injury cases to assist in making an appropriate award. At the new trial on the issue of quantum, Justice Levine held that the dicta in the High Court did not require a trial judge to instruct a jury on the general level of damages awards and that it was, indeed, improper for the judge to do so.⁴ The second jury awarded Mr Carson \$1.3 million damages (an amount which was, of course, exclusive of interest and costs). The newspaper appealed but the case was settled before the appeal was heard. The concerns about large damages awards in defamation cases which were generated by this decision re-emerged in the late stages of the preparation of this Report when a jury in NSW awarded a plaintiff, an alderman of Fairfield Council, who was defamed by allegations published in the course of discussion

of and concerning the plaintiff in his conduct as an alderman, \$935,000 damages (an amount, once again, exclusive of interest and costs).⁵

1.9 The second was the decisions of the High Court in *Theophanous*⁶ and *Stephens*⁷ which considered the application of the constitutional implication of freedom of political discussion in the context of defamation law. The Court decided (by majority) that the implied constitutional guarantee does extend, in principle, to State defamation laws. In an action for damages, such laws are in conflict with the constitutional implication to the extent to which they fail, in cases of political discussion, to provide a defence to publications made without knowledge of their falsity, without recklessness and reasonably. The importance which these decisions give to freedom of political speech in the context of defamation law is reinforced by the earlier decision of the New South Wales Court of Appeal in *Ballina Shire Council v Ringland*,⁸ which denied a popularly elected local government authority the right to maintain an action in defamation in respect of published defamatory imputations which reflected on the performance of its functions. Although the reasoning in the case is not founded clearly on the notion of freedom of (political) discussion, the decision itself effectively promotes freedom of speech - an effect which the joint majority judgment in *Theophanous*⁹ recognises as flowing from a like holding of the House of Lords in *Derbyshire County Council v Times Newspapers Ltd.*¹⁰ The Commission has carefully considered these decisions in developing its recommendations.

1.10 The third major development was the passage of the *Defamation (Amendment) Act 1994* (NSW). On 22 November 1994 the then Attorney-General, the Hon John P Hannaford MLC, introduced the *Defamation (Amendment) Bill 1994* into the Parliament. The Bill proposed three major changes to the defamation laws of New South Wales:

the defence of justification should be amended so that truth alone was a defence to a defamatory imputation (rather than that the imputation was substantially true and related to a matter of public interest);¹¹

the trial judge and not the jury should determine whether any defence was established and the amount of damages;

in the assessment of damages the trial judge should ensure that any damages awarded have an appropriate relationship to the injury suffered and take account of the general range of damages for non-economic loss in personal injury awards in New South Wales.

1.11 The Bill was amended during its passage through the Parliament, and the proposal for truth alone to constitute the defence of justification did not survive.¹² The remaining proposals passed through the Parliament on 5 December 1994 and came into effect on 1 January 1995.

1.12 The Commission has analysed the provisions of the new Act which agree with some of the tentative views put forward in DP 32. Overall, the Commission supports the provisions of the Act.

COMMENT ON THE TERMS OF REFERENCE

1.13 The Commission's terms of reference are very broad. The Commission is required to report on the law of defamation and to focus on seven specific matters.¹³ Comment is necessary on five matters to which the Commission is directed to pay particular attention in its terms of reference: the desirability of uniformity of defamation laws in Australia; the weight to be placed on the *Defamation Bill*; the need to have regard to empirical evidence; the necessity for "shield laws" to protect journalists' sources; and the need for the provision of a separate tort of invasion of privacy.

Uniformity

1.14 The Commission's terms of reference require it "to have particular regard to the proposals of the Standing Committee of Attorneys General for uniformity of defamation laws in Australia". We recognise that a major force behind the three eastern States' Defamation Bills in 1990-1991 was the desire to attain uniformity in defamation laws, initially between New South Wales, Queensland and Victoria.¹⁴ We also note the desire for

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uniformity expressed in recent statements by the Standing Committee of Attorneys General¹⁵ and in the expectation expressed in the *Justice Statement* launched by the Prime Minister on 18 May 1995 that this Report will “form the basis for a renewed attempt to gain agreement on uniform defamation laws”.¹⁶

1.15 The Commission has interpreted its terms of reference as requiring it to consider, as an important factor in formulating its recommendations, their potential impact on uniformity of laws within Australia. We have been assisted in doing so by submissions containing a national perspective, as well as by submissions received from bodies outside New South Wales. We have also studied the draft *Defamation Bill* prepared by the Community Law Reform Committee of the Australian Capital Territory in November 1994.¹⁷

1.16 The Commission recognises, however, that, in the final analysis, our brief requires us to achieve the best possible defamation law for New South Wales - a law which reflects both current community expectations and recent legal developments (both in legislation and in the courts). It follows that where sustained research and analysis have led us inexorably to the conclusion that the best law can only be achieved by amendment of the current law, we have recommended change even where its implementation will promote disharmony between the law of New South Wales and that of the other Australian jurisdictions. A major recommendation in this Report is that falsity should form an ingredient of the tort of defamation.¹⁸ The implementation of this recommendation, which effects a radical change in the law, will mean that the cause of action in defamation in New South Wales will differ from that in all other Australian jurisdictions. In our view, however, it is only by making this change that the law of defamation can be made to fulfil its essential function of vindicating plaintiffs' reputations in a way which not only addresses many intractable and long-standing problems of the law of defamation but also promotes the flow of accurate information.¹⁹

1.17 In considering the effect of our proposals on uniformity of defamation laws in Australia, the Commission has been careful to keep in mind differences in practice and procedure between the several Australian jurisdictions. In our view, in the context of a highly technical branch of the law such as the law of defamation, some of these differences constitute real impediments to the achievement of uniformity which cannot be simply dismissed as “mere” differences in practice and procedure. This observation is particularly important in respect of two matters which we consider in this Report and where we prefer the current law of New South Wales to that which obtains in other jurisdictions: the distribution of functions between judge and jury; and the fact that, in New South Wales, each imputation is a separate cause of action.

1.18 Many of the recommendations which we make in this report are premised on, or influenced by, what the Commission regards as the proper distribution of functions between judge and jury in defamation matters.²⁰ For example, we do not believe that the question of whether or not there should be caps on awards of damages can be completely divorced from the question of who determines those damages: if it is to be a jury, the argument for a cap on awards is stronger than if it is to be a judge, for a judge can be assumed to have a knowledge of the prevailing general level of damages awards which a jury does not possess.²¹ The role of the jury in defamation actions in New South Wales is now restricted to deciding: (i) whether the defendant published the matter complained of;²² (ii) whether the matter complained of carries the imputation pleaded; and (iii) whether the imputation is defamatory.²³ Other Australian jurisdictions assign a wider or narrower role to the jury.²⁴

1.19 The defamatory meaning of any published matter is found in the imputations which it conveys.²⁵ In New South Wales a cause of action in defamation is founded on the imputations, each pleaded imputation giving rise to a separate cause of action.²⁶ The plaintiff fails where the imputation is not conveyed by the matter complained of or where the imputation is found not to be defamatory. By contrast, the common law position, which obtains in all other Australian jurisdictions, is that the cause of action is founded on the publication of the defamatory matter, so that, in principle, it is always open to the court to find that the matter conveys a defamatory meaning or imputation different from that pleaded by the plaintiff.²⁷ Practically, this is a substantial difference from the New South Wales position, which, by placing a premium on careful and accurate pleading,²⁸ achieves a precision in the formulation of the plaintiff's case which is not always attainable in other jurisdictions. This precision facilitates the recommendations which we make in this Report concerning the incidence of the burden of proof of falsity.²⁹

The Defamation Bill

1.20 The Commission has had particular regard to the Discussion Paper³⁰ and Report³¹ of the Legislation Committee on the *Defamation Bill 1992*. We have also considered the expectation, implicit in the requirement in our terms of reference that we “should provide drafting instructions for amendment of the Bill”, that our recommendations should take the form of amendments to the 1992 Bill. As we have pointed out in para 1.16, we regard our task as being to recommend the best possible defamation law for New South Wales. In our view, that law is best achieved by amendment of the *Defamation Act 1974* (NSW). The 1974 Act originated in a report of this Commission³² which was undertaken after the attempted codification of the law of defamation in the *Defamation Act 1958* (NSW) had proved unworkable.³³ The 1974 Act has been tested in practice over a number of years, and, as we pointed out in our Discussion Paper on *Defamation*,³⁴ the eastern States’ *Defamation Bills* were largely based on that Act. Our recommendations, therefore, take the form of amendments to the 1974 Act. Proposed amendments to this Act, and of other relevant legislation, have been drafted by Parliamentary Counsel and appear as Appendix 1 to this Report.

Empirical research

1.21 The Commission’s terms of reference require it to “take into consideration such empirical data relating to defamation matter as may be available”. The Commission has examined the studies undertaken in NSW by Tania Sourdin³⁵ and by Brendan Edgeworth and Michael Newcity,³⁶ as well as a number of studies undertaken overseas. The Commission investigated the possibility of conducting its own empirical study which would update and expand the information from the earlier studies. However, after examining a sample of defamation files at the Supreme Court and taking into account the limited data available from those files and elsewhere, the Commission concluded that more recent data would add little to the findings of the earlier studies.

Privacy

1.22 The existing law of defamation provides some protection to privacy interests.³⁷ It does so because our law has no separate tort of invasion of privacy. The Commission has come to the view that the desirability of the introduction of a tort of invasion of privacy should not be resolved in the context of a review of the law of defamation. In our view, this question should form the subject of a separate inquiry for it is, in itself, a major project involving extensive research and consultation. To undertake such a project as part of a review of the law of defamation would have resulted in the significant delay of the publication of this Report. On 18 November 1994, the Commission wrote to the then Attorney General advising him that it did not propose to deal with the question of whether or not there should be a separate tort of invasion of privacy in the context of this review. Privacy issues are, therefore, only dealt with peripherally in this Report.

1.23 The Commission has, however, considered whether it is appropriate to continue the existing level of privacy protection in the law of defamation until such time as privacy laws are developed,³⁸ especially in view of the fact that the *Defamation (Amendment) Bill 1994* (NSW), as originally introduced into Parliament, would have removed some of the privacy protection currently provided by the law of defamation.³⁹ It would have done so by amending the defence of justification to make truth alone a defence to a defamatory imputation (in place of the existing defence of justification which provides that it is a defence to a defamatory imputation that the imputation is a matter of substantial truth and that it either relates to a matter of public interest or is published under qualified privilege).⁴⁰

1.24 The Commission believes that until such time as there is a thorough review of the desirability of introducing a tort of invasion of privacy, the law of defamation should continue to provide limited protection for persons’ privacy even if such protection ought not, in itself, to be a goal of the law of defamation. In particular, the Commission is concerned about the potentially serious threat to individuals’ privacy which would result from amendment of the current defence of justification. Although, in the light of our recommendation that falsity should form an essential ingredient of the cause of action in defamation, we recommend in this Report that the defence of justification should be abolished, we also recommend that, in an action for damages, a plaintiff can, instead of

proving the falsity of the imputation, prove that the imputation does not relate to a matter of public interest.⁴¹ The effect of this latter recommendation will be to retain existing levels of privacy protection in the law of defamation.

1.25 Further, the Commission points out that the amendment of the defence of justification to make truth alone a defence to publication would not, in any event, significantly promote uniformity of defamation laws in Australia. While the adoption of truth alone as a defence would bring the law of New South Wales into line with the laws of the Northern Territory, South Australia, Victoria and Western Australia, it would also widen the gap that now exists between, on the one hand, the law of New South Wales and, on the other hand, the laws of the Australian Capital Territory, Queensland and Tasmania (where justification is a matter of truth and public benefit).

Shield laws

1.26 The Commission's terms of reference require that consideration be given to "the need for the provision of 'shield laws' to protect journalists' sources". Like privacy, this is not a discrete issue for the law of defamation and any detailed consideration of it in this context would have significantly delayed the completion of this Report. The extent to which journalists should be able to refuse to reveal sources in court raises the more general issue of the extent to which witnesses should be allowed to refuse to give evidence on particular matters by reason of "professional privilege". The Commission notes that the recent Commonwealth and New South Wales *Evidence Acts 1995* reaffirm the general principle that a person who is competent to give evidence about a fact is compellable to give that evidence⁴² and do not greatly extend the traditional categories in which persons have a privilege which takes them outside the general rule.⁴³ The Commission is of the view that any detailed consideration of "shield laws" should take place in the context of an examination of the desirability of the expansion of professional privilege, as is demonstrated in a recent Report of the Law Reform Commission of Western Australia,⁴⁴ whose recommendations, in respect of journalists' confidential sources, have largely been supported by the Senate Standing Committee on Legal and Constitutional Affairs.⁴⁵ The Commission has studied the work of these bodies and agrees with their conclusion that the right balance between the public interest in the protection of information received by journalists from confidential sources and the public interest in the administration of justice is found in the provision of a statutory discretion which may excuse journalists from revealing their sources in the circumstances of the particular case.

FOOTNOTES

1. For more detail on the background to the reference, see New South Wales Law Reform Commission, *Defamation* (DP 32, 1993) at 1-5.
2. See Appendix 3.
3. *John Fairfax & Sons v Carson* (1991) 24 NSWLR 259; *Carson v John Fairfax & Sons* (1993) 178 CLR 44. See also the *Ettingshausen* litigation which is mentioned in paras 2.34, 3.25 and 3.26.
4. *Carson v John Fairfax & Sons Ltd* (1994) 34 NSWLR 72.
5. *Hartley v Nationwide News Pty Ltd* (1995) 31 *Gazette of Law and Journalism* 9. An appeal is pending in this case (NSW, CA40316/95).
6. *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.
7. *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.
8. (1994) 33 NSWLR 680. An application for special leave to appeal to the High Court, filed on 14 June 1994, was withdrawn on 1 July 1994.

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9. *Theophanous* at 129-130 per Mason CJ, Toohey and Gaudron JJ.
10. [1993] AC 534. For a discussion of the *Ringland* case, see L W Maher, "Defamation, Free Speech and Local Government Politics" (1995) 3 *Torts Law Journal* 116.
11. Compare cl 20(2) of the *Defamation Bill 1992* (NSW) which provided protection for the plaintiff's "private affairs": see Attorneys General of NSW, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law* (August 1990) paras 7.1-7.13; *Reform of Defamation Laws Discussion Paper (No 2)* (January 1991) paras 4.1-4.8. But see Parliament of New South Wales, Legislative Assembly, *Report of the Legislation Committee on the Defamation Bill, 1992* (October, 1992) Ch 4.
12. Ms Clover Moore, an independent Member of the Legislative Assembly, successfully moved an amendment to delete this proposal in the Bill.
13. See Terms of Reference at x.
14. See Parliament of New South Wales, Legislative Assembly, *Report of the Legislation Committee on the Defamation Bill, 1992* at 3.
15. *The Australian*, 17 October 1994, at 5; Australia, *Parliamentary Debates (Hansard) House of Representatives*, 16 November 1994, at 3471 (Hon Michael H Lavarch).
16. Australia, Attorney-General's Department, *Justice Statement* (May 1995) at 128.
17. On a number of occasions in 1993 and 1994, pursuant to suggestions made by the then Attorneys-General of New South Wales and the Australian Capital Territory, representatives of the Commission met representatives of the Community Law Reform Committee of the Australian Capital Territory to discuss our separate references on defamation. It was resolved that the Commissions would keep one another informed on the progress of their respective references.
18. See Recommendation 5 in Chapter 4.
19. See paras 2.5-2.26.
20. See Chapter 3.
21. See paras 7.4-7.10.
22. *Defamation Act 1974* (NSW) s 7A(4).
23. *Defamation Act 1974* (NSW) s 7A(3).
24. See para 3.5.
25. On the meaning of "imputation" see para 4.2.
26. *Defamation Act 1974* (NSW) s 9(2).
27. See *Slim v Daily Telegraph Ltd* [1968] 2 QB 157; *Lucas Box v News Group Newspapers Ltd* [1986] 1 WLR 147.
28. The *Supreme Court Rules 1970* (NSW) Pt 67 contain detailed provisions on pleading in defamation cases.
29. See para 4.19.
30. Parliament of New South Wales, *Legislation Committee on the Defamation Bill, 1991* (Discussion Paper, May 1992).

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31. Parliament of New South Wales, Legislative Assembly, *Report of the Legislation Committee on the Defamation Bill, 1992* (October, 1992).
32. NSW Law Reform Commission, *Report of the Law Reform Commission on Defamation* (LRC 11, 1971).
33. The 1958 Act attempted to transpose Sir Samuel Griffith's Queensland Code into the law of New South Wales. The experiment highlights the point that codification should only be attempted in the law of defamation when absolutely necessary. Although the Code survives in Queensland, not a great deal of defamation litigation takes place in that State (especially in comparison with New South Wales).
34. DP 32 at para 1.21.
35. T Sourdin, "A Study of Defamation Proceedings Commenced in the New South Wales Supreme Court for the period 1.1.87 to 13.12.88" (unpublished paper, University of New South Wales, 1990).
36. B Edgeworth and M Newcity, "Politicians, Defamation Law and the 'Public Figure' Defence" (1992) 10 *Law in Context* 39.
37. See para 2.33.
38. See paras 2.34-2.36.
39. See para 1.10.
40. See *Defamation Act 1974* (NSW) s 15(2).
41. See paras 4.16-4.17.
42. *Evidence Act 1995* (Cth) s 12(b); *Evidence Act 1995* (NSW) s 12(b).
43. *Evidence Act 1995* (Cth) Pt 3.10; *Evidence Act 1995* (NSW) Pt 3.10.
44. Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications* (Project 90, 1993), especially Chapter 4.
45. Australia, Senate Standing Committee on Legal and Constitutional Affairs, *First Report of the Inquiry Into the Rights and Obligations of the Media: Off the Record (Shield Laws for Journalists' Confidential Sources)* (October 1994), especially Chapter 7.

2. The Objectives and Context of Defamation Law

2.1 The law of defamation exists to protect reputation. Statements and comments affecting the reputation of others are constantly made in everyday speech. Where those statements or comments tend to lower a person's reputation, any policy of protecting reputation immediately comes into conflict with a wider goal of the legal system, namely, the promotion of freedom of speech. Freedom of speech is a principle of the common law¹ and, at least to some extent, a constitutional principle.² The conflict is between two public interests:³ on the one hand, the interest in the public protection of individual reputation and the provision of an orderly means of achieving it by process of law; on the other hand, the interest in the facilitation of the public's right to know and in the discovery of truth.⁴

2.2 It is trite that a successful legal system must seek the optimum balance between the protection of reputation and the promotion of freedom of speech. That balance is variously struck in different ages and in disparate contexts. For example, in the context of political discussion, the most recent decisions of the High Court take the view that the traditional approach of Australian law has been to tilt the balance too far in favour of personal reputation at the expense of freedom of communication.⁵ To the extent to which this view leads to a denial of a remedy in defamation at the instance of holders of public office defamed in the course of political speech, it is in stark contrast to that which prevailed a century or so ago when Paterson could write that "the holders of such offices are entitled to the protection of such character and reputation as naturally belongs to such office".⁶

THE PROTECTION OF REPUTATION

The meaning of reputation

2.3 A person's reputation consists of the opinions which others hold of that person's character.⁷ Where, overall, those opinions are favourable, the law protects, in a defamation action, the esteem, goodwill or confidence which they generate.⁸ Reputation cannot be viewed, either historically or analytically, as a mere commodity or asset which possesses a value on some monetary scale. Our notion of reputation, as well as the protection which we afford it, needs to reflect the interest which individuals have in their honour and dignity, in their standing in the community. Roscoe Pound put this succinctly many years ago:

On the one hand there is the claim of the individual to be secured in his dignity and honor as part of his personality in a world in which one must live in society among his fellow men. On the other hand there is the claim to be secured in his reputation as part of his substance, in that in a world in which credit plays so large a part the confidence and esteem of one's fellow men may be a valuable asset.⁹

2.4 The opinions which collectively go to constitute a person's reputation may, or may not, reflect the plaintiff's real character or disposition. Indeed, they may, individually, be based upon matter which is true or untrue. There is, thus, no necessary connection between reputation and truth.¹⁰ This is reflected in the existing law in that the falsity of the imputation is not an essential ingredient of the cause of action in defamation. The truth of the imputation becomes relevant primarily by way of justification: the defendant who can prove that the imputation is a matter of substantial truth and relates to a matter of public interest or is published under qualified privilege has a defence to the plaintiff's claim.¹¹ Otherwise, the falsity of the defamatory matter is a factor relevant in the assessment of damages, which it can aggravate.¹²

How reputations should be vindicated

2.5 Where matter is published which damages a person's reputation, the person concerned has an interest in protecting his or her reputation. Except where publication is merely threatened (where an injunction is potentially available),¹³ and except in cases where the interest in reputation is purely financial (as in the case of a trading corporation), the most obvious form of protection for reputation is some public vindication of it. As a demonstrable mark of the wrong done to the plaintiff, vindication "sets the record straight", restores the plaintiff's standing in the community, and, ideally, assuages any desire for revenge.¹⁴

2.6 Vindication does not come from a finding that a publication is defamatory. To determine that the publication reduces the plaintiff's standing in the eyes of the community in itself does nothing to restore the plaintiff's reputation in that community. Only a finding that what was published is false can do so.¹⁵ This is recognised at common law in two ways. First, a finding of falsity is implicit in a defamation verdict. Once the plaintiff has proved the imputation to be defamatory, it is presumed to be false.¹⁶ In the law of New South Wales, however, there is (at least outside the context of political discussion)¹⁷ no such presumption.¹⁸ Secondly, recognising that the falsity of the imputation is inferred from the defamation verdict, the damages awarded must be of an amount which, in the circumstances, is "the minimum necessary to signal to the public the vindication of the [plaintiff's] reputation".¹⁹ This ensures that "in case the libel, driven underground, emerges from its lurking place at some future date, [the plaintiff is] able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge."²⁰ The vindicatory force of an award of damages necessarily relies on this factor in the law of New South Wales.

2.7 Preoccupation with the amount of damages awarded has meant that reform of the law of defamation has tended to proceed from perceived inadequacies in damages as a remedy for vindication of the plaintiff's reputation to the suggestion of other remedies which might be more effective in this respect. Thus, in DP 32, the Commission investigated an alternative remedial structure for the law of defamation which sought to move the emphasis away from large awards of damages towards correction orders (voluntary or court-ordered) and declaratory judgments.²¹ This approach is hardly surprising. It reflects a prevailing concern with very large awards of damages of which there had been a number of examples shortly before the publication of DP 32.²²

A new cause of action

2.8 Since the publication of DP 32, the focus of the Commission's inquiry has shifted. In the light of our own further research and reflection and of the submissions which we received in response to DP 32, we have concluded that the starting point for reform of the law of defamation should not be its remedial structure. After all, remedial rights are merely reflections of the substantive rights which they protect and enforce. For reasons to which we have already referred in para 2.6, and which we develop in Chapter 4,²³ a defamation action ought to promote express findings on the issue of truth or falsity if it is effectively to vindicate the plaintiff's reputation. Vindication ought not be left, as it currently is, to an inference drawn from the size of the damages award.²⁴ In our view, therefore, falsity ought to be an ingredient of the cause of action in defamation.

2.9 Once falsity is made an ingredient of the cause of action, every judgment for the plaintiff will necessarily involve a finding that the imputations (of statements of fact) are false - except where the plaintiff says only that the imputation does not relate to a matter of public interest.²⁵ Accordingly the plaintiff need not generally point to the size of the award to claim restoration of reputation, but need only point out that the judge found the issue of falsity in his or her favour. In the Commission's view, this conclusion is not rebutted by an argument that a judge's reasons will, or may, or are likely to, have less currency than the mere amount of the damages.²⁶ When damages were assessed by a jury and the judge had nothing to say upon the matter of assessment, it might happen that the jury's verdict was the only significant aspect of the trial which could be reported. But damages in New South Wales are now assessed by a judge alone²⁷ and the Commission recommends that this should remain the law.²⁸ The assessment of damages will ordinarily be found in the judgment as the culmination of a reasoning process which will involve, amongst other things, some analysis and description of the imputations upon which the plaintiff has succeeded, and, of course, the view the judge took of them as justification for the damages which he or she awarded. The Commission sees no reason to suppose that a judge's conclusions about the character and extent of a defamatory imputation will receive less publicity than an unvarnished report of the amount of the damages. Thus, vindication will generally follow judgment.

Remedial consequences

2.10 In the Commission's view, any remedies which the plaintiff pursues in defamation ought (i) to further the vindication of the reputation which the cause of action promotes; (ii) to compensate the plaintiff for injury suffered

to reputation and feelings;²⁹ and (iii) to compensate the plaintiff for economic loss. At present, all of these functions are subsumed in an award of damages.

Damages

2.11 In its Discussion Paper on *Defamation* ("DP 32")³⁰ the Commission pointed out that awards of damages run the risk that they may not vindicate the plaintiff's reputation for the following reasons:

- Damages may come a long time after publication. Where they do and where the award is publicised, there is a danger that the award may serve only to revive the defamatory matter rather than vindicate the plaintiff's reputation.
- Damages may not be publicised at all, as where they form part of a settlement whose terms are confidential. In such cases, the award may completely fail to vindicate the plaintiff's reputation.

The Commission adheres to these views which have been the driving force behind the new remedy of declaration of falsity which we propose in this Report.³¹

2.12 The deficiencies of damages as a means of vindication do not, of course, mean that damages are not capable of compensating plaintiffs for loss. "Compensation" is the restoration of plaintiffs, so far as money can do it, to the position which obtained before the wrong.³² Leaving aside economic loss (which we consider separately below), compensation may be required in a defamation action *for* injury to the plaintiff's reputation and feelings. It is true that, in respect of such injuries, plaintiffs cannot be precisely restored to their pre-publication states. Quite simply, a monetary award in itself is just as incapable in this context of replacing losses which are not commensurable in money as it is in personal injury cases.³³ Rather, the function of compensation is to provide solace or consolation to the plaintiff for the wrong done.³⁴ Such damages are aimed at alleviating the sorrow, distress or discomfort which the plaintiff suffers as a result of the defendant's defamation.

2.13 Currently, a damages award in a defamation case also serves the object of compensating the plaintiff *because* the plaintiff was defamed.³⁵ This is the vindicatory function of the award: it focuses on the attitude of others to the plaintiff and requires that the damages awarded to the plaintiff for injury to reputation and injury to feelings are of a sufficient magnitude to demonstrate the baselessness of the published defamatory matter. It is clear that the element of vindication is not recognised by an independent assessment of damages under that separate head, to be added to those awarded for injury to the plaintiff's reputation and feelings.³⁶ The total damages "must not exceed the amount appropriate to compensate the plaintiff for any relevant harm he or she has suffered".³⁷ The vindicatory element may be satisfied by inflating the compensatory damages within the range which is appropriate in the circumstances,³⁸ the one award of damages operating both as compensation and vindication.

2.14 The danger of introducing vindication as an element in damages in defamation cases is that the award will turn into an exemplary one,³⁹ and statute outlaws the award of exemplary damages in defamation cases in New South Wales.⁴⁰ Indeed, the suspicion is that, in the past, juries have, under the guise of vindicating the plaintiff's reputation, made large awards of damages which are really designed to punish the defendant, particularly media defendants. The adoption of the Commission's recommendation that falsity should be an ingredient of the cause of action will largely eliminate this danger. The emphasis on vindication in damages will be reduced since vindication will come primarily from the finding of falsity. This means that the central focus of the law of damages will be, as it should, to provide the plaintiff with compensation for injury to reputation and injury to feelings.

2.15 We should emphasize that in advancing the proposition that vindication will now be found primarily in the judge's reasons, we are not seeking to make any comparison between what a jury might award, or might have awarded, and what a judge might award in like circumstances.⁴¹ We have pointed out that the total damages

must not exceed what is appropriate for an assessment of compensation for injury to reputation and hurt to feelings. There cannot be any question, therefore, of a judge deleting from the assessment of damages an element which would have required a separate computation by a jury. The consequence which we have suggested is simply that it will be only in the most exceptional circumstances that a judge will find it necessary to inflate the compensatory damages to the top of the range for the purpose of underlining the vindicatory aspect of the award.

The declaration of falsity

2.16 The inadequacy of damages as a remedy to restore the plaintiff's reputation has led the Commission to investigate alternative remedial machinery which will result in the speedy and public vindication of the plaintiff's reputation. The Commission has determined that the most effective means by which plaintiffs can vindicate their reputations is by obtaining a declaration that a publication which defames them is false ("the declaration of falsity"), a remedy which we develop, as an alternative to damages, in Chapter 6. Although seldom used in practice, the declaration is, of course, a remedy which is already available to plaintiffs in defamation cases.⁴² The declaration of falsity proposed by the Commission is, however, substantially different from the declaratory procedure currently available since, by entailing findings on the single issue of the truth or falsity of the imputation about which complaint is made, the remedy is specifically designed to provide plaintiffs with a real opportunity of vindicating their reputations. And, while our declaratory remedy will constitute final relief, speed will be of its essence. Further, as the remedy will not, in our view, have the chilling effect on freedom of speech which is perceived in large awards of damages,⁴³ it should be available in the context of political discussion.

2.17 In outline, the declaratory remedy which the Commission recommends will be available to plaintiffs where: (i) the cause of action is founded on an imputation which is defamatory of the plaintiff and is false; (ii) the matter is published by the defendant of and concerning the plaintiff; and (iii) the remedy is sought within four weeks of publication (or, exceptionally, within such longer period as the court may in its discretion permit). The remedy will be granted in the court's discretion.⁴⁴ Affirmative defences cannot be raised in opposition to the action since they do not traverse the issue of falsity.⁴⁵ A successful plaintiff will be entitled to costs (prima facie, indemnity costs) and to an appropriate publication of the terms of the declaration. The reputation of plaintiffs who successfully obtain this remedy will be vindicated soon after the publication of the defamatory matter, the time at which such empirical evidence as is available suggests that plaintiffs are most likely to be satisfied with non-monetary relief.⁴⁶

Relationship between damages and the declaration of falsity

2.18 Under the Commission's proposals, the cause of action for defamation will give rise to a choice of remedies, primarily between an action for damages and one for a declaration.⁴⁷ In accordance with the general position in remedial law, choice of remedy will lie primarily with the plaintiff. Except in the case of economic loss,⁴⁸ plaintiffs will have to elect to bring an action either for a declaration or for damages in respect of defamatory imputations arising from the same matter. But where a plaintiff elects to pursue a declaration rather than damages, the election will become binding only when the terms of any orders ancillary to the declaration granted have been satisfied.

2.19 Plaintiffs whose primary concern is to restore their reputations as speedily as possible will, no doubt, generally opt for a declaration of falsity, just as those who are moved to obtain compensation for the injury done to them will opt for an award of damages. A major factor influencing plaintiffs' choice will be the defendant's ability to rely, in an action for damages, on a defence (such as qualified privilege) which is unavailable in a claim for a declaration. Another factor which may influence plaintiffs' choice is that indemnity costs will generally be available when a declaration is sought.⁴⁹

2.20 The Commission regards the development of alternative remedies in the law of defamation as a significant reform of the law. A legal system which effectively promotes damages as the sole remedy in defamation is remedially crude. A plaintiff obtains damages or nothing at all. One situation in which the plaintiff

obtains nothing at all is where the defendant can rely on a defence of privilege to defeat the action. Privilege will defeat the whole of the action, yet the plaintiff may neither demand nor need anything more to restore his or her reputation than a simple declaration that the imputation is false.

Economic loss

2.21 Injury to reputation can be productive of both economic loss ("special damage") and non-economic loss ("general damage"). The Commission believes, for basic reasons of corrective justice, that whatever the remedy plaintiffs pursue, they should be able to recover all the economic losses which they can prove are attributable to the defamation. In particular, we do not believe that the fact that a plaintiff seeks a declaration of falsity should, in itself, result in the plaintiff's being denied recovery of proved economic loss.

Weakening the hold of damages on defamation law

2.22 Although damages will remain a major remedy in defamation litigation under our proposals, the Commission is mindful that some submissions received in response to DP 32 were critical of *any* move away from the existing law in which damages is, generally, the only remedy sought in defamation actions.⁵⁰ We have therefore considered whether there are arguments of policy which require the maintenance of the status quo. The overlapping arguments which are made in favour of keeping the existing law are:

paying compensation is the accepted means of righting wrongs;

money payments have greater "cultural significance" than any alternative remedies;

only damages compensate and deter;

only damages are an adequate deterrent to the media;

plaintiffs will only be happy with damages and will not in practice pursue alternative remedies;

since *Carson's case*,⁵¹ damages might be expected to be lower, meeting community concern about the high level of damages awards; and

damages are necessary to cover costs.

2.23 In evaluating these arguments, the Commission begins by noting that they are directed only to the recovery of damages for non-economic loss (that is, for injury to reputation and to feelings) and for vindication.⁵² We also note that some of the arguments imply that damages should expressly serve the purpose of deterring defendants (and, by implication, free speech)⁵³ in defamation cases. Deterrence, a notion redolent of punishment, is appropriate only to exemplary damages, whose express object is to punish and deter. Pursuant to a recommendation of this Commission,⁵⁴ exemplary damages were abolished in defamation actions in this State in 1974,⁵⁵ and the Commission regards their reintroduction in this context as neither desirable nor feasible.

2.24 In so far as the arguments in para 2.22 express a concern that vindication can come only from a large award of damages, they are met by the Commission's recommendation that falsity be a necessary ingredient of the cause of action: regardless of the remedy chosen by the plaintiff, vindication will now come primarily from the findings in the action. In so far as those arguments assert that damages are essential to effect compensation to the plaintiff, the Commission agrees. We also point out that our recommendations strengthen the compensatory focus of damages in defamation cases.

2.25 So far as the arguments in 2.22 assert as a fact that only damages will in practice provide vindication to plaintiffs (the "cultural significance" argument), the Commission points out that there is no empirical evidence about what plaintiffs and ordinary members of the public in New South Wales think about the role of damages in defamation cases. In particular, we do not know if they perceive that vindication is *only* possible through the

medium of an appropriately substantial damages award. Empirical evidence from the United States,⁵⁶ as well as anecdotal evidence which has come to the Commission's attention, suggest that, while plaintiffs may settle for a declaration or retraction (and costs) soon after publication, their mood hardens into a determination to seek damages as time passes. This may reflect a desire for revenge,⁵⁷ or a hardening of the plaintiff's attitude after the defendant's rejection of approaches seeking an apology or a correction. But, whatever the empirical force of the proposition that only damages vindicate, it does not argue against the development of *alternative* remedies aimed at obtaining the most effective vindication possible of the plaintiff's reputation.

Reform of aspects of the law of damages in defamation cases

2.26 In their dissenting judgment in *Coyne v Citizen Finance Ltd*,⁵⁸ Chief Justice Mason and Justice Deane, reflecting the widespread concern with damages awards in defamation cases to which we have drawn attention in para 2.7, spoke of "the somewhat unprincipled common law rules relating to the nature and limit of defamation damages". The lack of principle to which their Honours drew attention results largely from the vindictory factor in damages awards in defamation cases. Our recommendation that falsity should be an ingredient in the cause of action minimises this factor and asserts that compensation is the central function of damages. Taken together with the fact that judges now assess damages in defamation,⁵⁹ the result should be that the assessment of damages will be approached in a more sophisticated way. It will now be much easier for judges, concentrating on the compensatory nature of the award, to identify the factors relevant to the extent of harm; to isolate the factors relevant to the defendant's conduct which aggravate harm ("aggravated damages"); to draw analogies with non-economic loss in personal injury cases; and to be aware of the ranges within which the award in question should fall. Overall, it may be expected that the level of damages will fall.

THE CONTEXT OF FREEDOM OF SPEECH

2.27 The Constitution contains an implication of freedom of political discussion.⁶⁰ The common law of defamation chills political discussion and is in conflict with the constitutional implication to the extent to which it fails to provide a defence to an action in defamation to a defendant who can prove that (i) it was unaware of the falsity of the matter, (ii) it did not publish recklessly (that is, not caring whether the matter was true or false), and (iii) the publication was reasonable in all the circumstances.⁶¹

2.28 The scope of the constitutional implication is uncertain in a number of respects. First, the meaning of "political discussion" requires elucidation. As Justice Toohey pointed out in *Cunliffe v Commonwealth*,⁶² the constitutional implication asserts, at its lowest, "an implied freedom on the part of the people of the Commonwealth to communicate information, opinions and ideas relating to the system of representative government", while, at its highest, it recognises "a freedom to communicate in relation to public and political matters generally". Secondly, and more particularly, the constitutional guarantee arguably operates only in respect of a narrow range of plaintiffs, broadly "public figures" which would include politicians and candidates for political office, but not government employees or those who do not hold official or government positions.⁶³ Thirdly, the meaning of the "reasonableness" qualification requires clarification, particularly on the issue whether the defendant must establish an honest belief in the truth of the matter published, as the defendant is generally required to do under s 22 of the *Defamation Act 1974* (NSW).⁶⁴ Where relevant, these issues are addressed in detail in the appropriate places of this Report.⁶⁵

2.29 Fortunately, the doubts surrounding the precise scope of the constitutional implication do not, for the most part, require resolution for the purposes of this Report. First, as we explain in Chapter 5, the Commission does not favour the development of a "public figure" test in Australia which would expand, or at least intersect with, the constitutional implication of freedom of political speech. In our view, to the extent to which the approach in *Theophanous* focuses on "political speech" as the point at which the constitutional implication becomes crucial, it provides a more sensible expression of concerns about freedom of speech than would the introduction of an American-style public figure test. Secondly, and more broadly, the Commission has, in any event, worked from the premise that freedom of speech is not necessarily limited to the context of political discussion. Our concern has been much wider, namely, to ensure that the law of defamation should not unnecessarily interfere with freedom of speech in any context. The principle of freedom of speech has thus been a major influence on the recommendations which we make throughout this Report.

2.30 In particular, concerns about freedom of speech underline three of the major recommendations which the Commission makes in this Report. First, our recommendation that falsity should be an ingredient of the cause of action in all defamation cases is influenced by the consideration that the public interest in freedom of speech is often an interest in finding out the truth and that this generally requires the public adjudication of truth or falsity.⁶⁶ Secondly, the fact that this recommendation relieves the defendant of having to prove the truth of the imputation by way of defence facilitates freedom of speech in those cases in which the defendant may be deterred from publication because of doubts about being able to prove the truth.⁶⁷ Thirdly, the new remedy of “declaration of falsity” which we develop in Chapter 6, has been consciously driven by the consideration, amongst others, that it will not have the “chilling” effect on freedom of speech which is perceived in the threat of large awards of damages and which we noted in DP 32.⁶⁸

2.31 Of course, we recognise, as has the High Court,⁶⁹ that freedom of speech is not, and cannot be, unqualified. Like other freedoms, freedom of speech confers power and the possession of power in a democracy entails accountability. Power, in this context, refers principally to the power of the media, whether that of media proprietors or media editors (especially those who enjoy, or assert that they enjoy, a large measure of independence from proprietorial interference). The media is sometimes bound by self-regulating codes of ethics which seek to ensure the flow of accurate information and the protection of privacy (though not specifically of reputation).⁷⁰ But, in the event of a failure of self-regulation, the following question recently posed by a journalist, David Leser, inevitably arises:

[I]n an age where the power of the media is greater than ever before, who keeps a check on them (us) to see that they (we) haven't lost their (our) ethical moorings? Who dares take on the new philosopher/kings?⁷¹

The Commission is in no doubt about the answer: the media are ultimately accountable to the law, and the rules of law which apply to protect reputation must take cognisance of this. This consideration has weighed heavily with us, especially in our consideration of the scope and possible expansion of the defences which are available in defamation actions.

DEFAMATION AND PRIVACY

2.32 In DP 32 we pointed out that the law of defamation is concerned with the protection of reputation, not privacy.⁷² Although the scope of privacy laws is now potentially much wider,⁷³ its four classical forms are:⁷⁴

“appropriation”, that is, exploitation of the plaintiff's name or likeness;

“false light”, that is, portraying the plaintiff in a light that is highly offensive to the reasonable person;

“intrusion”, that is, violation of the plaintiff's private space or solitude; and

“publication of private facts”, that is, publication of true facts where that publication is offensive to the sensibilities of the reasonable person.

2.33 The existing law of defamation affords some protection to privacy interests. First, defamatory publications extend not only to those which tend to bring the plaintiff into hatred, ridicule and contempt, but also to those which tend to cause others to shun the plaintiff.⁷⁵ Thus, it is defamatory of the plaintiff to say that she has been raped because the publication of such a statement may lead people to shun her, even though it should not cause any right-thinking member of society to alter their opinion of her character.⁷⁶ Quite clearly, this also protects the interest which the plaintiff has in that aspect of privacy which guards against the publication of private facts.⁷⁷ Secondly, the defence of justification is only available to a defendant who can prove that the imputation is true *and* relates to a matter of public interest.⁷⁸ If the recommendations in this Report are adopted, the plaintiff will bear the burden of showing, in a damages claim, that the imputation is false *or*, if it is not, that its publication does not relate to a matter of public interest. This linkage of truth and public interest is designed to protect interests in the “publication of private facts” aspect of privacy. In *Rofe v Smith's Newspapers Ltd* Street ACJ gave the following example:

[T]o allow past misconduct, or discreditable episodes which were dead and gone, to be revived and dragged into the light of day at will by maliciously minded scandalmongers was too hard on people who, whatever indiscretions they might have committed in the past, were leading respectable lives.⁷⁹

In such cases, all other things being equal, a plaintiff succeeds in a defamation claim because, although what has been published about the past misconduct or discreditable episodes is true, that truth does not justify a publication which does not relate to a matter of public interest, but simply invades the plaintiff's privacy.

2.34 While the interests in reputation and privacy are theoretically quite separate, the practical allocation of problems to one or other, or both, branches of the law gives rise to great debate and controversy. The recent *Ettingshausen* litigation provides an example.⁸⁰ The defendant clearly invaded the plaintiff's privacy by photographing the plaintiff's genitals without the plaintiff's consent, an action which, in the circumstances, seems capable of falling within most of the four species of privacy identified in para 2.32. That action also carried a defamatory imputation (that the plaintiff "deliberately permitted a photograph to be taken of him with his genitals exposed (that is shown) for the purposes of reproduction in a publication with a widespread readership"). The question whether cases such as this should be allocated to the law of privacy or to defamation (or both) requires extensive consideration which cannot occur in the context of a review whose primary concern is with the law of defamation.

2.35 The Commission acknowledges that the introduction of privacy concerns into the law of defamation can have a distorting effect on the function of defamation law. That distortion is magnified if, as the Commission recommends in this Report, falsity becomes an ingredient of the cause of action in defamation. For there is no reason in principle why the plaintiff should be able to succeed in an action for damages *for defamation* by establishing either that the imputation is false or that it does not relate to a matter of public interest. The two are simply not alternatives. Proof that the matter does not relate to a matter of public interest will do nothing to vindicate the plaintiff's reputation, the primary objective of the law of defamation.⁸¹

2.36 However, to reform the law of defamation in such a way as to remove from it all matters which, more properly, belong to a law of privacy would be to leave many plaintiffs vulnerable and without a legal remedy for the invasion of their privacy. Except in the case of the declaration of falsity where there is no "public interest" alternative,⁸² the Commission's recommendations, therefore, deliberately do not touch this aspect of the law of defamation. We do, however, envisage that this should only be an interim position and that the "public interest" component which we now retain in the law of defamation should be removed when privacy laws are enacted. We therefore urge a comprehensive review of the law to consider the possible introduction of privacy laws, including the way in which such laws would interact with the law of defamation.

Recommendation 1

The Government should give urgent consideration to the development of privacy laws, including the interaction of those laws with the law of defamation.

FOOTNOTES

1. See E Barendt, *Freedom of Speech* (Clarendon Press, Oxford, reprinted ed 1987) at 30.
2. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Cunliffe v Commonwealth* (1994) 124 ALR 121. If some of their reasoning is disregarded, recent cases dealing with the inability of local councils to sue in defamation can also be seen as arguing in favour of free speech: see para 1.9.
3. *Theophanous* at 131, per Mason CJ, Toohey and Gaudron JJ); *Stephens* at 237-328 per Brennan J dissenting.

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4. Barendt at 8-23.
5. *Theophanous; Stephens*. Compare *Hill v Church of Scientology* (Supreme Court of Canada, 20 July 1995, No 24216, as yet unreported).
6. J Paterson, *The Liberty of the Press, Speech and Public Worship, Being Commentaries on the Liberty of the Subject and the Law of England* (Macmillan & Co, 1880) at 179 (where the author was speaking of holders of honorary office, though, at 180, he points out that the view is stronger in the case of a holder of an office of profit since in that case there is potentially tangible financial damage). Paterson's view probably mirrors that which led to the emergence of the earlier action, *scandalum magnatum*, derived from a criminal statute of 1275, which provided a remedy to men of high position who had been scandalised: see Paterson at 180-182.
7. *Gatley on Libel and Slander* (8th ed, Sweet & Maxwell, London, 1981) at para 203. For a judicial discussion, see *Re T and the Director of Youth and Community Services* [1980] 1 NSWLR 392 at 399.
8. See G Spencer Bower, *A Code of the Law of Actionable Defamation* (2nd ed, Butterworth & Co, London, 1923) at 243.
9. R Pound, "Interests of Personality " (Part 2) (1915) 28 *Harv L Rev* 445 at 447. See also R Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 *California Law Review* 691.
10. See *Aldridge v John Fairfax & Sons Ltd* [1984] 2 NSWLR 544 at 551 per Hunt J.
11. *Defamation Act 1974* (NSW) s 15(2).
12. Consider *Defamation Act 1974* (NSW) s 47. See paras 7.16-7.18.
13. That is, a quia timet injunction (one which protects against threatened injury). See further para 6.54.
14. See *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 105 per McHugh J dissenting.
15. *Theophanous* at 24 per Mason CJ, Toohey and Gaudron JJ. Consider also *Dun & Bradstreet Inc v Greenmoss Builders Inc* (1985) 472 US 749 at 771 per White J.
16. *Gatley* at para 351.
17. See para 4.13.
18. *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 205 per Windeyer J; *Singleton v Ffrench* (1986) 5 NSWLR 425 at 443-444 per McHugh JA.
19. See *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 61 per Mason CJ, Deane, Dawson and Gaudron JJ.
20. *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 per Lord Hailsham LC.
21. NSW Law Reform Commission, *Defamation* (DP 32, 1993) at Chapter 2.
22. Especially *John Fairfax & Sons Ltd v Carson* (1991) 24 NSWLR 259 (affmd as *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 with subsequent proceedings in (1994) 34 NSWLR 72); *Ettingshausen v Australian Consolidated Press* (Supreme Court of New South Wales, Common Law Division, No 12807/91, 10 February 1993, unreported).
23. See paras 4.7-4.15, 4.22-4.26.
24. Consider A Samuels, "Problems of Assessing Damages for Defamation" (1963) 79 LQR 63 at 77-78.
25. See paras 4.16-4.17.

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26. See, for example, *Dingle v Associated Newspapers Ltd* [1964] AC 371 at 404 per Lord Morton of Henryton. The Commission respectfully disagrees with dicta in the House of Lords in *Dingle* to the extent to which their disapproval of the decision in *Rook v Fairrie* [1941] 1 KB 507 rests on the assumption that vindication cannot come from the judge's reasoning only from the amount of the verdict. We point out that: (i) the disapproval came in the context of an attempt to ensure that actions heard by judges alone would not attract lesser damages than those awarded in jury verdicts - a factor which is of no relevance in NSW where damages are *always* assessed by the judge (see further para 2.15); (ii) their concern may have been to assert that a judge's reasoning can never displace a punitive award (see *McGregor on Damages* (15th ed, Sweet & Maxwell, London, 1988) at para 430) - a factor which is again irrelevant in NSW where there are no exemplary damages (see para 2.14); and (iii) there is no rigorous analysis of the ingredients which go to make up an award of damages in defamation, such as occurs in the decisions of the High Court in *Coyne* and *Carson* (see para 2.13).
27. *Defamation Act 1974* (NSW) s 7A(4)(b).
28. See paras 3.24-3.29.
29. And, if relevant, injury to health: see *Rigby v Mirror Newspapers Ltd* (1963) 64 SR (NSW) 34.
30. DP 32 at paras 2.7 - 2.10.
31. See paras 2.16-2.17 and Chapter 6.
32. See M J Tilbury, *Civil Remedies* Volume 1 (Butterworths, Sydney, 1990) at paras 3032-3034.
33. See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 per Windeyer J, who expressed similar views in personal injury cases: *Thatcher v Charles* (1961) 104 CLR 57 at 75-76; *Skelton v Collins* (1966) 115 CLR 94 at 130-131.
34. See especially *Smiths Newspapers v Becker* (1932) 47 CLR 279 at 300 per Dixon J; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 per Windeyer J; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-61 per Mason CJ, Deane, Dawson and Gaudron JJ, at 69-71 per Brennan J. See also *John Fairfax & Sons v Kelly* (1987) 8 NSWLR 131 at 136-139 per Samuels JA dissenting, at 143 per McHugh JA.
35. Cases in note 34 above.
36. *Carson* at 72 per Brennan J dissenting.
37. *Carson* at 66 per Mason CJ, Deane, Dawson and Gaudron JJ.
38. *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 216 per Mason CJ and Deane J dissenting.
39. See *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 at 139 per Samuels JA dissenting (damages for vindication "scarcely compensation at all"); *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1114 per Lord Wilberforce dissenting ("if one says that a plaintiff is given compensation *because* he has been injured, one is really denying the word its true meaning").
40. *Defamation Act 1974* s 46(3)(a).
41. See *Dingle v Associated Newspapers Ltd* [1964] AC 371 where the House of Lords disapproved, obiter, of the suggestion of the English Court of Appeal in *Rook v Fairrie* [1941] 1 KB 507 that where damages are assessed by a judge alone (as they were in England during the Second World War) the judge might award less in damages than the jury in the light of the judge's condemnation of the defendant: see further note 26 above.
42. See P W Young, *Declaratory Orders* (2nd ed, Butterworths, Sydney, 1984) at para 1712.
43. See paras 6.48-6.51.

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44. See paras 6.13-6.15.
45. See paras 6.16-6.32.
46. See note 56 below.
47. Other possible remedies include injunction and account of profits. These are considered in paras 6.52-6.57.
48. See para 2.21.
49. See paras 6.44-6.46.
50. Young Lawyers, *Submission* (29 October 1993) at 6-7; Law Institute of Victoria, *Submission* (2 December 1993) at 2-3.
51. *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44. But see *Hartley v Nationwide News Pty Ltd* (1995) 31 *Gazette of Law and Journalism* 9.
52. No submissions received by the Commission were directed at the recovery of economic loss, where we propose no alteration to the existing law: see para 2.21.
53. Consider *Rookes v Barnard* [1964] AC 1129 at 1227 per Lord Devlin (power to award exemplary damages can be used against liberty). See also J Stone, "Double Count and Double Talk: the End of Exemplary Damages?" (1974) 46 *Aust LJ* 311 at 321.
54. New South Wales Law Reform Commission, *Report of the Law Reform Commission on Defamation* (LRC 11, 1971) paras 42-50.
55. *Defamation Act 1974* (NSW) s 46(3)(a).
56. R P Bezanson, G Cranberg and J Soloski, *Libel Law and the Press: Myth and Reality* (Free Press, New York, 1987) at 171-183 (Iowa Libel Research Project).
57. See *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 104-105 per McHugh J dissenting.
58. (1990) 172 CLR 211 at 215.
59. *Defamation Act 1974* (NSW) s 7A(4)(b). See also paras 3.24-3.29.
60. *Nationwide News Pty Ltd v Wills; Australian Capital Television Pty Ltd v Commonwealth*.
61. *Theophanous* at 137. See also *Tolstoy Miloslavsky v United Kingdom* (*The Times*, 19 July 1995) where the European Court of Human Rights held that an English libel award of £1.5 million violated the right to freedom of expression guaranteed by art 10 of the European Convention on Human Rights. But compare the decision in *Hill v Church of Scientology* (Supreme Court of Canada, 20 July 1995, No 24216, as yet unreported) where the Court, unanimously, failed to detect any conflict between the common law of defamation and the Canadian Charter of Rights and Freedoms.
62. (1994) 124 ALR 120 at 195.
63. *Theophanous* at 134 per Mason CJ, Toohey and Gaudron JJ. This view finds some support in the judgment of Deane J who focused more clearly on the identity of the plaintiff: *Theophanous* esp at 185-187. See also *Hartley v Nationwide News Pty Ltd* (1995) 31 *Gazette of Law and Journalism* 9 (alderman); *Williams v John Fairfax & Sons Ltd* (Supreme Court of NSW, Levine J, No 10872/1989, unreported) at 11 (defendant to defamation action by magistrate arguably able to avail itself of "new common law privilege defence" and "implied freedom of speech" defence). Compare *Sporting Shooter's Association of Australia (Vic) v Gun Control Australia and Crook* (1995) 2 *Media Law Reporter* 83 (County Court of Victoria). See further Chapter 5.

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64. See para 10.10.
65. See esp Chapters 5 and 10.
66. See M Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA" (1995) 2 *UNSW Law Journal* 300 at 309-310.
67. *Theophanous* at 132.
68. DP 32 at para 2.11.
69. *Theophanous* at 133-139.
70. See Code of Ethics of the Australian Journalists' Association Section of the Media and Entertainment and Arts Alliance.
71. "The Seduction of Richard Carleton" in *Good Weekend*, January 7 1995, at 17.
72. DP 32 at paras 6.22 - 6.30.
73. See especially *Australian Privacy Charter* (1994), text in (1995) 69 *Australian Law Journal* 90-92.
74. See W L Prosser, "Privacy" (1960) 48 *California Law Review* 383.
75. See Spencer Bower (1923) at 2 (Article 3) and 253-257. See also *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1 at 23-24 per Mason J (dealing with the meaning of defamation under *Defamation Act 1958* (NSW) s 5).
76. *Youssouf v Metro-Goldwyn Mayer Publications Ltd* (1934) 50 TLR 581 is the classic authority.
77. See *Melvin v Reid* (1931) 297 P 91.
78. *Defamation Act 1974* (NSW) s 15(2).
79. (1924) 25 SR (NSW) 4 at 22.
80. See *Ettingshausen v Australian Consolidated Press Ltd* (Supreme Court of New South Wales, Common Law Division, No 12807/91, 10 February 1993, unreported). Earlier proceedings are reported at (1991) 23 NSWLR 443.
81. See para 2.1.
82. See para 4.17.

3. Judge and Jury

3.1 Central to any reform of the law of defamation is a determination of how the decisions which must be made in defamation litigation should be distributed between judge and jury (assuming that the jury is retained as part of the decision making process). This determination raises fundamental theoretical and practical issues. Theoretical considerations centre on the socio-political role of the jury in defamation litigation; while practical considerations focus on the feasibility and manner of segregating discrete issues which may arise at trial for assignment either to the judge or to the jury.

3.2 The socio-political role of the jury is founded on the notion of the jury as an appropriate barometer of public opinion to determine whether the matter in question is defamatory and, if it is, what amount of damages should be awarded. From a historical perspective, the role of the jury in defamation matters is intrinsically bound up with the protection of free speech, with juries figuring as watchdogs of democratic rights against unrepresentative governments.¹ After the passage in England of *Fox's Libel Act* of 1792,² the jury's increased role in libel cases was seen as among the central principles of freedom of speech and freedom of the press, with the people through their surrogate the jury determining how much could be said.³ Notwithstanding changes in political climate, the Parliament of New South Wales apparently continues to perceive advantages in having certain aspects of defamation actions determined by a cross-section of the community rather than by judges alone.⁴ For, unless the parties otherwise agree⁵ or unless the Court otherwise dispenses with the jury because the case requires a "prolonged examination of documents or scientific or local investigation" which "cannot conveniently be made with a jury",⁶ specific issues in defamation actions must, in the Supreme Court, be tried with a jury.⁷

3.3 It is, however, misleading to regard a defamation action in New South Wales as a "trial by jury". First, juries are relevant in defamation actions only where damages are claimed.⁸ A jury would not be sworn, for example, in an application for an interlocutory injunction. The Commission does not propose that the role of the jury be expanded beyond actions for damages. In particular, we see no role for a jury if a plaintiff chooses to seek a declaration of falsity, the new remedy which we develop in Chapter 6. In our view, the urgency associated with that remedy outweighs any concerns about removing community input from those actions. Further, we believe that it would be inappropriate and inefficient for the judge to have to formulate the terms of the declaration in conjunction with a jury.

3.4 Secondly, in actions for damages, s 7A of the *Defamation Act 1974* (NSW) (which was inserted by the *Defamation (Amendment) Act 1994*), severely restricts the role of the jury in defamation cases. That section provides that the judge decides whether the matter complained of is capable of carrying the imputation pleaded by the plaintiff, and, if it is, whether the imputation is capable of bearing a defamatory meaning ("the capacity of the imputations").⁹ If the judge determines these issues in the negative, a verdict is entered for the defendant in relation to the imputation pleaded.¹⁰ If the judge determines in the affirmative, the jury then decides whether the matter complained of does in fact carry the pleaded imputation and, if it does, whether the imputation is defamatory ("the imputations stage").¹¹ Having made these findings, and having decided that the defendant published the matter complained of,¹² the function of the jury comes to an end. In particular, the judge decides all matters relating to defences¹³ and damages.¹⁴

3.5 The specific allocation of tasks to the jury in defamation actions made by the 1994 amendments to the *Defamation Act* is not mirrored in the law of other Australian jurisdictions. In South Australia juries are not used at all in civil actions.¹⁵ In other jurisdictions, legislative provisions tend to allow the plaintiff or defendant to opt for, or to request the court to exercise a discretion to allow, trial by jury.¹⁶ In practice, juries are not normally used in the Northern Territory,¹⁷ nor in the Australian Capital Territory. But in Victoria¹⁸ and, to a lesser extent in Queensland,¹⁹ where jury trial can be requested by either party subject to the discretion of the court, juries are commonly used.

EVALUATING THE ROLE OF THE JURY

3.6 DP 32 canvassed three options aimed at improving procedure in defamation trials:

conducting defamation trials before judges alone;

retaining juries only to decide whether the imputations are conveyed and are defamatory; and

retaining juries in their present role but implementing other reforms such as imposing a cap on damages or allowing judges to give increased guidance on quantum.²⁰

Since the publication of DP 32, the 1994 amendments to the *Defamation Act 1974* (NSW) have effectively adopted the second option as the law of New South Wales. Generally, the Commission endorses this position.

3.7 No submission received in response to DP 32 advocated the abolition of the jury completely. Rather, submissions indicated continued community support for a jury role in defamation actions, but division over the nature of such a role.²¹ Community support tends to be founded on the view that, by drawing on its combined knowledge of how matters are regarded in the community at large, a jury is capable of providing a superior result, as compared with a judge who only deploys his or her own knowledge. This view is underpinned by an assumption that a jury, composed of persons with diverse backgrounds, has a wider experience of life than a single judge.²² In considering the appropriate role for juries in defamation actions, the Commission has considered this view against the background of the declining use of jury trials in civil actions in Australia as well as of the complex realities of defamation litigation.

3.8 First, while the Commission accepts that, at least where the composition of the jury is sufficiently diverse,²³ four persons are more likely to reflect community values, perceptions and expectations than one, it regards as too broadly drawn the argument that juries are, overall, more likely to arrive at a larger measure of social justice in defamation cases than judges. Many issues arise in a defamation trial. Not every one of those issues requires such a sensitivity to community values that it can be resolved only by a decision of a cross-section of the community. In short, it is the nature of the issue, rather than a general theoretical postulate, which determines the appropriate mode of trial for that particular issue.

3.9 Secondly, the Commission is conscious of the general decline in the use of juries in civil actions in Australia.²⁴ A major reason for that decline is the realisation that judges are often simply much better and more efficient at resolving disputed issues of fact than juries. The role of the jury has, of course, always been limited to the resolution of disputed issues of fact, the judge deciding all issues of law. But, in the context of modern civil litigation, where the facts are often specialised or complex and the borderline between issues of fact and issues of law is blurred, the resolution of disputed facts and issues of credibility is often best left to judges whose training, experience and tradition of detachment better equips them to deal with these issues than a jury.²⁵

3.10 Thirdly, the costs and delays associated with jury trials in defamation can be removed, or at least reduced, by confining the functions of the jury to the resolution of those issues in which community input is desirable. We note that giving instructions to the jury can be extremely complex and time consuming, particularly where the boundaries of the functions between judge and jury are finely drawn and need to be carefully spelled out, as where defences such as qualified privilege²⁶ or the new constitutional defence are in issue.²⁷ Evidence before the Legislation Committee indicated that explanations to the jury double the time that the matter would take before a judge.²⁸ This is hardly surprising as the judge must deal with every issue in the summing up even though it may turn out to be unnecessary because of the conclusions reached by the jury. But it does result in increased costs for all parties. It also creates the risk of appeal points directed principally at the proper distribution of functions between judge and jury.

3.11 In seeking to define the role of the jury in defamation cases in such a way so as to achieve as many advantages as possible in saved time and expenditure, the Commission's approach has been to consider individually the principal issues which arise in a defamation case to determine where community involvement is essential and where it is unnecessary. We have, throughout, been mindful of possible limitations which procedural considerations could place upon the recommendations we make. We address these in paras 3.30-3.33.

THE ISSUES IN AN ACTION FOR DAMAGES

Assessing what is defamatory

3.12 Apart from publication,²⁹ the function of a jury in a defamation trial in New South Wales is now restricted to the determination of whether or not the matter complained of conveys the imputation pleaded by the plaintiff and, if it does, whether or not the imputation is defamatory. Even those who support only a limited role for a jury in defamation trials consider it appropriate for members of the public to decide these matters.³⁰ The basis of this support is the argument that, in the final analysis, the question here in issue is whether the matter complained of would lower the standing of the plaintiff in the eyes of the community, and that question is best left to randomly selected members of the community to answer.³¹

3.13 The Commission has received submissions favouring the allocation of the imputations stage of defamation proceedings to the jury. Some submissions were of the view that the reason given in para 3.12 means that the input of the community into the imputations stage is not merely valuable, but fundamental and vital.³² Other submissions supported this role for the jury because of a perception that judges are not sufficiently representative of the general community.³³

3.14 For the reason given in para 3.12, the Commission considers that it is appropriate that randomly selected members of the community decide whether or not the matter complained of carries the imputation pleaded, and, if it does, whether or not the imputation is defamatory. The Commission, therefore, supports the allocation of this function to the jury. We accordingly endorse the legislative initiative enshrined in s 7A(3) of the *Defamation Act 1974* (NSW). For the avoidance of doubt, we point out that it is our understanding that the jury's function in this respect extends to the determination of any extrinsic (that is, unstated) facts or circumstances upon which either the identification of the plaintiff or an innuendo beyond the natural or ordinary meaning of the matter complained of depends.

Falsity

3.15 In Chapter 4 of this Report the Commission recommends that falsity should be an essential ingredient of the cause of action in defamation. The issue of falsity will centre on proof of contested facts and questions of credibility. In many cases, a considerable portion of the trial will be spent on the resolution of these questions. Proof of facts and issues of credibility are matters in which judges have much greater experience than juries.³⁴ Further, no "community perspective" is regularly required for their resolution. We do not, therefore, recommend that the issue of falsity should be decided by the jury.

Recommendation 2

The issue of falsity should be decided by the judge.

Public interest

3.16 In Chapter 4 of this Report the Commission recommends that, in an action for damages for defamation, the plaintiff, instead of proving that the defamatory imputation is false, may prove that the defamatory imputation does not relate to a matter of public interest. Under the existing law, the issue of whether or not material is, or relates to, a matter of public interest potentially arises for the purposes of the defences of justification and comment. In either case, as the issue is relevant for the purposes of a defence, it is determined by the judge, not by the jury.³⁵ The Commission recommends that, where the determination of "public interest" is made for the purpose of establishing the plaintiff's cause of action, it should remain a question for the judge. It would be anomalous if the determination of public interest were to be made by the jury where it is raised as part of the plaintiff's cause of action, but by the judge where it arises in the course of the defence of comment - especially where both issues are raised in the one case.³⁶

Recommendation 3

The issue of public interest should be decided by the judge.

Issues concerning publication

3.17 Publication is an ingredient of the tort of defamation. Defendants are liable only for such defamations as they have published or for whose publication they bear responsibility.³⁷ The issue is usually not in dispute between the parties. When it is (as it can be, for example, in cases of oral defamation), it can involve a considerable amount of evidence directed to the proof of facts and to the resolution of issues of credit. This may suggest that, as with falsity,³⁸ it should be decided by the judge. However, the Commission is persuaded that there are at least two reasons why publication should be determined by the jury.

3.18 First, the issue of "publication" can be viewed from different perspectives. It requires a determination of:

whether there is *publication* to a person other than the plaintiff;

whether it is a publication *by the defendant*; and

whether it is publication *of and concerning the plaintiff*.

The issues which may arise in answering these questions may be inextricably connected with issues which the jury has to determine in assessing whether or not the publication is defamatory, as where the jury has to determine any extrinsic facts or circumstances upon which either the identification of the plaintiff or an innuendo beyond the natural or ordinary meaning of the matter complained of depends.³⁹

3.19 Secondly, and as a practical matter, success for the defendant upon the issue of publication puts an end to the case. It can, therefore, be viewed logically in the same way as it is treated in practice: a preliminary issue to be determined before any question relating to the imputations. It would, obviously, be very inconvenient for the jury to be kept waiting until the judge had decided the issue of publication.

3.20 The Commission thus recommends no change to the present law where the jury determines publication.⁴⁰ However, the Commission does recommend that s 7A(3) of the *Defamation Act 1974* should be redrafted to include, as a function expressly assigned to the jury, the determination of the issue of publication. At present, the point is embedded in s 7A(4).

Recommendation 4

Section 7A(3) of the *Defamation Act 1974* should be redrafted to provide explicitly that the issue of publication be decided by the jury.

Defences

3.21 The Commission takes the view that there are at least two reasons why defences to defamation actions must be determined by judges and not by juries. This conclusion is not affected by any countervailing consideration that there are particular issues which arise in defences and which require community input. The Commission's view, therefore, accords with the existing law of New South Wales.⁴¹

3.22 First, and most importantly, the assignment of defences to the judge alone follows directly from our decision, which we discuss in paras 3.24-3.29, that damages are to be assessed by the judge. The quantum of damages depends on a number of findings of fact necessarily involved in the defences - as in a finding of malice in rebuttal of the defence of qualified privilege, a finding of partial truth or a finding that the plaintiff had knowledge that the defendant made insufficient inquiry into the truth of what was written. The judge would have to know what the jury findings were on such issues in order to assess the damages. This may require the jury to make special findings on the issues. It would mean that the judge would have to explain the whole exercise to the jury. Not only would this be a difficult task which would consume a good deal of the court's time, it would also run the risk of generating inconsistent findings which would destroy the validity of the whole trial.

3.23 Secondly, defences to defamation actions, such as privilege and comment, often involve difficult and complex questions of fact and law which are not always easily separable in a practical sense.⁴² The process of, and reason for, separation are often difficult for the jury to understand. From the judge's point of view, the assignment of some aspects of the defences to the judge and others to the jury creates the difficulty of giving proper directions to the jury which cover every contingency depending on the permutations and combinations of the facts which the jury may accept. This complexity dictates that all issues of law and fact to which the defences give rise should be decided by the judge, not the jury.

Damages

3.24 Submissions to the Commission were divided in their support for assigning the assessment of damages to juries. Those supporting this role for juries argued that a jury of four, without having to give reasons for their assessment of damages, is likely to provide a better synthesis of community views than a judge and that jurors are in a better position than a judge to reflect community views of the likely impact of the publication.⁴³ Those preferring that a judge alone award damages believed that the community sense of the jury is far more relevant to deciding the imputations stage of the trial.⁴⁴ They advocated that the experience gained by judges in practice and on the bench enables them to work out what sort of damages are appropriate for breaches of the law. As a result, awards of damages by judges should be more consistent and create a certainty in awards, which is desirable, but not the case where juries assess damages which run a great risk of being excessive or inadequate.⁴⁵

3.25 Empirical evidence suggests that jury awards in defamation actions in New South Wales have generally⁴⁶ fallen within a broad range between \$10,000 and \$100,000, but the evidence is insufficient to establish any standard award, or range of awards, of damages. Tania Sourdin's study of cases commenced in the New South Wales Supreme Court between January 1987 and December 1988 (and going to trial by October 1990) found only six cases which went to trial and resulted in verdicts for the plaintiff and assessment of damages.⁴⁷ In those cases the awards ranged from \$11,222 to \$436,000. The same study found that where proceedings were settled on the basis of disclosed amounts, the average settlement amount was approximately \$26,500.⁴⁸ Evidence before the Legislation Committee suggested that verdicts are commonly between \$10,000 and \$50,000.⁴⁹ Although juries have made larger awards,⁵⁰ such awards have sometimes been overturned on appeal.⁵¹

3.26 Greater consistency may be obtainable in jury awards if directions given by trial judges, while respecting the independence of the jury, provide the jury with clear and relevant criteria by which to consider the appropriateness of any sum which they are minded to award, such as the buying power of money or even an appropriate range of damages.⁵² In practice, a direction given by Justice Hunt in *Ettingshausen v Australian Consolidated Press*⁵³ was used as a guide for juries in New South Wales on the issue of quantum in trials relating to publications before the 1994 amendments to the *Defamation Act*. Juries were asked to appreciate the real value of the money which they may be awarding to a particular plaintiff (such as what a television or a holiday are worth to a plaintiff) in an effort to bring home to them what the financial implications of any sum awarded to a plaintiff may be. But, in the retrial in *Carson v John Fairfax & Sons Ltd*,⁵⁴ Justice Levine refused, because of the difficulty and impracticality of the exercise, to use the level of awards in personal injury cases as a relevant criterion in his direction to the jury, whatever may be the value of such a criterion in appellate courts.

3.27 The Commission is convinced that it is only by assigning the assessment of damages to judges that effect will be given to the High Court's injunction in *Carson v John Fairfax & Sons Ltd*⁵⁵ - which is now repeated in s 46A of the *Defamation Act 1974* (NSW) - that some rational relationship must be established between relevant harm and damages in defamation cases, especially if, as both of these sources of law now require, consideration must be given to the general range of damages for non-economic loss in personal injury cases. The knowledge to facilitate the achievement of these objectives is generally known to judges and invariably unknown to juries. To reveal such knowledge to juries with the addition of some background training which enables its useful employment would be very time consuming.

3.28 It is no answer to say juries might make assessments of damages more in line with community imperatives, even where these assessments are seen as "excessive" by judges. For, appellate courts have, in the interests of justice, set standards in defamation, as in other areas of the law,⁵⁶ which must be observed and which operate as a brake on the amounts which juries can award. In this context, the interests of justice require that the level of damages is not such as to chill speech or to inhibit the media's task of maintaining the free flow of information and opinion within society. Some would argue that juries sometimes fail to make the connection between excessive damages and freedom of speech by awarding damages that punish the media. In contrast, judges will arrive at verdicts which are more in line with the standards set by appellate courts and which will be consistent in imposing standards that will not chill freedom of speech.

3.29 The Commission's conclusion is that damages should always be assessed by the judge and not the jury. We, therefore, support the 1994 reforms of the *Defamation Act* in so far as they achieve this result.

PROCEDURAL CONSIDERATIONS

3.30 The Commission's view of the appropriate role of judge and jury in actions for damages in defamation cases - now supported by s 7A of the *Defamation Act 1974* (NSW), inserted by the 1994 amendments - involves the allocation of some issues to the jury and some to the judge. The Commission has given careful consideration to the question of whether or not this allocation of functions will give rise to any procedural difficulties. In our view, it will not.

3.31 The Commission's view derives in part from a procedure which successfully ordered the *jury's* functions before the 1994 amendments of the *Defamation Act*. That procedure, first advanced by Justice Clarke in *Radio 2UE Sydney Pty Ltd v Parker*,⁵⁷ was confirmed by the Court of Appeal in *TCN Channel 9 Pty Ltd v Mahony*.⁵⁸ Although initially applied only in relation to proceedings involving publication by electronic media, the procedure was extended to cases involving the print media.⁵⁹ In essence the procedure, which relies on s 85(2) of the *Supreme Court Act 1970* (NSW) and Part 31 r 2 of the *Supreme Court Rules 1970* (which authorise the separate decision of questions at trial), segregates issues for initial or separate determination by the jury to allow the logical progression of the plaintiff's case, to reduce the complexity of the issues which must be put to the jury at any one time, and to exclude evidence on issues which are no longer relevant.⁶⁰ Issues segregated for initial determination were publication (where it is necessary for evidence beyond the mere publication of the matter complained of to be called), whether the imputation was conveyed and whether it was defamatory, and, where the plaintiff's imputation relied upon extrinsic facts, whether those facts had been established. The determination of these issues was decided before the court embarked on the remainder of the plaintiff's case.

3.32 An advantage of proceeding in this way is that the jury can decide what imputations have been conveyed and whether they are defamatory without its perception being clouded by evidence of defences and damages, in much the same way as if it had just read the article, or watched or listened to a particular broadcast. The procedure also obviates trial judges' expending considerable time directing the jury to disregard evidence relevant to various defences that would distract it from the task of determining how the ordinary reasonable reader or listener would have interpreted the matter complained of, and to ignore evidence that would hamper the task of determining whether the imputations are defamatory (such as the defendant's intention as to what was meant, the plaintiff's understanding as to what was meant and the truth or falsity of what was said). These advantages are effectively preserved under the Commission's view of the appropriate allocation of functions between judge and jury. On that view, the jury's role ends once it has decided whether the matter was published, whether the imputations were conveyed, and whether the imputations are defamatory. The jury is therefore not confused by evidence on defences or damages.

3.33 A possible procedural criticism of separating the functions of judge and jury in this way is that the separation will cause inconvenience to witnesses in cases where a question of true innuendo or identification arises. An example⁶¹ of true innuendo that is often given is where an article says "X" was seen entering a particular house late one evening. Such an assertion could not be regarded as defamatory in its natural and ordinary meaning. However, if readers immediately identified that address as being one of a notorious drug dealer, it could well be defamatory. In such cases a plaintiff would call evidence from witnesses that at the time they read the article they were aware of the special facts, as well as evidence identifying the plaintiff as being the person about whom the article was written. The defendant would call any evidence it has and the plaintiff could present a case in reply, and the matter would then go before the jury. These same witnesses may have to be recalled to give evidence as to damages. While some may view this inconvenience as a criticism of the suggested procedure, in the Commission's view the value of the procedure to a defamation trial outweighs such concerns. In any event, the criticism overlooks the reality that many cases will, in practice, be settled once the jury has determined that the imputation has been conveyed and that it is defamatory.

THE POSITION IN THE DISTRICT COURT

3.34 The Commission's endorsement of the distribution of functions between judge and jury contained in the 1994 amendments of the *Defamation Act* is founded on the view that, in a defamation action, the "imputations stage" of the proceedings and the issue of publication are appropriately heard before, and the issues of fact relating thereto resolved by, a jury. As far as the Supreme Court is concerned, unless the parties otherwise agree or the court otherwise determines, these issues *will* be decided by a jury.⁶² Juries are not, however, generally used in civil actions in the District Court.⁶³ The Court does, however, have power to make an order (on terms if necessary) that a matter be tried with a jury.⁶⁴ This power is sufficient to enable the District Court to hold a defamation trial before a jury and so bring the provisions of s 7A(3) and (4) of the Act into operation.

3.35 Section 77(4) of the *District Court Act 1973* (NSW), which corresponds to s 85(2) of the *Supreme Court Act 1970* (NSW), permits the court to order that any question of fact in an action be tried before any other question of fact in the action. However, the *District Court Rules* contain no equivalent of Pt 31 r 2 of the *Supreme Court Rules* which enable the Court to determine any question separately from any other question, "question" being defined in rule 1 to include "any question or issue in any proceedings, whether of fact or law or partly of fact and partly of law". The Commission suggests that the District Court consider amending its rules to bring them into line with the *Supreme Court Rules* on this matter. The importance of doing so is to ensure that a separate trial can be had on the capacity of the imputations, since the resolution of the issue of the capacity of the imputations usually produces a settlement or, at least, a narrowing of the issues to be prepared for trial.⁶⁵

FOOTNOTES

1. J G Fleming, "Retraction and Reply; Alternative Remedies For Defamation" (1987) 12 *University of British Columbia Law Review* 15 at 17-18.
2. Prior to this Act, the essential function of the jury was to decide whether the alleged libel had or had not been published: see W Holdsworth, *A History of English Law* Volume 8 (2nd ed, Sweet & Maxwell, London, reprint 1966) at 345.
3. Holdsworth, Volume 10, at 672-700. See also F Schauer, "The Role of the People in First Amendment Theory" (1986) 74 *California Law Review* 761.
4. See *John Fairfax & Sons v Carson* (1991) 24 NSWLR 259 at 271 per Kirby P (affd (1993) 177 CLR 44).
5. *Supreme Court Act 1974* (NSW) s 89(2)(b).
6. *Supreme Court Act 1974* (NSW) s 89(2)(b). This is more likely to be relevant to the fraud cases mentioned in s 88(a) than the defamation cases to which s 88(b) applies.
7. *Supreme Court Act 1970* (NSW) s 88(b) read with *Defamation Act 1974* (NSW) s 7A(5). For the position in the District Court see para 3.34.

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8. *Supreme Court Act 1970* s 88(b) and the definition of “common law claim” in s 19(1).
9. *Defamation Act 1974* (NSW) s 7A(1).
10. *Defamation Act 1974* (NSW) s 7A(2).
11. *Defamation Act 1974* (NSW) s 7A(3).
12. *Defamation Act 1974* (NSW) s 7A(4).
13. *Defamation Act 1974* (NSW) s 7A(4)(a). The suggestion made by C Evatt, “The Jury Lives on” (1995) 29 *Gazette of Law and Journalism* at 2-3, that “defeasances” to defences are to be determined by the jury, is inconsistent both with the intention of Parliament and with the express wording of s 7A(4)(a) (“... all issues of fact and law relating to that defence ...”).
14. *Defamation Act 1974* (NSW) s 7A(4)(b).
15. See *Jury Act 1927* (SA) s 7.
16. See B C Cairns, *Australian Civil Procedure* (3rd ed, Law Book Co, Sydney, 1992) at 461-465.
17. In October 1994 a jury was empanelled in a civil defamation action in the Northern Territory for the first time in 68 years. The case lasted for 11 weeks and resulted in a verdict for the plaintiff of \$103,000: see *Hart v ABC*, noted in the *West Australian*, 1-2 April 1995, at 11.
18. *Supreme Court Rules 1986* (Vic) R 47.02. In 1990 and 1991 Victoria was generally opposed to limiting the role of juries in civil actions (see Attorneys General of NSW, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law* (August 1990) para 5.5), and, importantly, to assigning the assessment of damages to a judge alone: see Attorneys General of NSW, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law* (August 1990) paras 6.7; *Reform of Defamation Laws Discussion Paper (No 2)* (January 1991) para 10.2.
19. *Rules of the Supreme Court* (Qld) O 39 r 4.
20. A detailed examination of these proposals is found in DP 32 at Chapter 4.
21. See para 3.24.
22. This is perhaps not only a Parliamentary perception: see *John Fairfax & Sons v Carson* (1991) 24 NSWLR 259 at 271 per Kirby P (affd (1993) 177 CLR 44).
23. Chance may, of course, conspire to ensure that this is not so. Note too that a jury of four may effectively turn out to be a jury of one if the foreman or forewoman is a strong leader and persuasive. Cf *Hawke v Tamworth Newspaper Co Ltd* [1983] 1 NSWLR 699 at 706-707.
24. See Cairns (1992) at 461.
25. The Commission acknowledges that the public perception of the role of juries is probably different in criminal cases since the liberty of the subject is there in issue.
26. See, for example, *Morgan v John Fairfax & Sons Ltd* (1988) 13 NSWLR 208; *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374 (for purpose of defence of statutory qualified privilege, reasonableness of defendant’s publication to be decided by judge but disputed facts upon which based to be decided by jury).
27. The constitutional defence was left to the jury in *Hartley v Nationwide News Pty Ltd* (1995) 31 *Gazette of Law and Journalism* 9, the jury deciding that the defendant had failed to discharge the onus of proving that it was unaware of the falsity of the material; that it did not publish recklessly; and that the publication was reasonable in all the circumstances.

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28. J Gibson, *Evidence before NSW Legislation Committee* (19 February 1992) at 42-43; Hon Justice M J R Clarke, *Evidence before NSW Legislation Committee* (8 September 1992) at 2-10. And also P George, "Congruency: Unravelling the Defamation Action" (1990) 6 *Australian Bar Review* 124 at 134.
29. See paras 3.17-3.20.
30. The Hon Justice M J R Clarke, *Evidence before the NSW Legislation Committee* (8 September 1992) at 3.
31. Law Society, *Submission* (November 1993) at 10.
32. Consolidated Press Holdings Limited, *Submission* (7 December 1993) at 10; Nine Network Australia Limited, *Submission* (4 November 1993) at 10.
33. M G Sexton, *Submission* (1 November 1993) at 5-6.
34. See para 3.9.
35. *Defamation Act 1974* (NSW) s 7A(4)(a). The Commission supports this provision: see paras 3.21-3.23. Note that public interest was an issue for the court before the 1994 amendments of the Act: see *Defamation Act 1974* (NSW) s 12.
36. See NSW Law Reform Commission, *Report of the Law Reform Commission on Defamation* (LRC 11, 1971) Appendix D at para 70.
37. See C Duncan and B Neill, *Defamation* (Butterworths, London, 1978) para 8.01.
38. See para 3.15.
39. See further para 3.33.
40. *Defamation Act 1974* (NSW) s 7A(4).
41. *Defamation Act 1974* (NSW) s 7A(4)(a).
42. For example, *Morgan v John Fairfax & Sons Ltd* (1988) 13 NSWLR 208; *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374.
43. M G Sexton, *Submission* (1 November 1993) at 5. See also *Carson v John Fairfax & Sons Ltd* (1994) 34 NSWLR 72 at 92 per Levine J.
44. Consolidated Press Holdings Ltd, *Submission* (7 December 1993) at 10.
45. Law Society, *Submission* (5 November 1993) at 10.
46. The *Ettingshausen*, *Carson* and *Hartley* cases are exceptions. The first two verdicts were upset on appeal (see note 51 below) and an appeal is pending in the *Hartley* case: see para 1.8.
47. T Sourdin, "A Study of Defamation Proceedings Commenced in the New South Wales Supreme Court for the Period 1/1/1987 to 31/12/1988" (unpublished paper, University of New South Wales, 1990).
48. Because of the use of deeds of release and because settlements were frequently inclusive of costs, it was difficult to ascertain the average amount of damages agreed. While the figures may not reflect any particular trends in the amounts agreed upon in settlement, the settlement sums show an increase in comparison with the previous study conducted by B Edgeworth and M Newcity, "Politicians and Defamation Law" (Draft Study, 1990), though allowance must, of course, be made for inflation.
49. A review of the "Tables of Quantum" contained in the *Gazette of Law and Journalism* from 1990 to 1994 suggests that this figure may be slightly higher. Out of 12 cases from 1990 to 1994, there were 7 matters

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where damages were awarded by a jury (which were either not appealed from or upheld on appeal) with the average award being \$71,371.43.

50. The latest example is *Hartley v Nationwide News Pty Ltd* (1995) 31 *Gazette of Law and Journalism* 9, on which see para 1.8.
51. In *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 the first jury awarded \$600,000. This figure was upset on appeal, but at the new trial on quantum the second jury awarded \$1.3 million. An appeal was lodged against this second award but the matter was settled before the appeal. By way of comparison, the jury at the new trial on quantum following *Ettingshausen v Australian Consolidated Press Limited* (NSW CA, 13 October, 1993, unreported) awarded the plaintiff \$100,000 where \$350,000 had been awarded at the first trial.
52. *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 59-60.
53. Supreme Court of New South Wales, Common Law Division, Hunt CJ at CL, No 12807/91, 10 February 1993, unreported at 68-69. See also *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153.
54. (1994) 34 NSWLR 72.
55. (1993) 177 CLR 44.
56. See H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed, Butterworths, Sydney, 1990) paras 12.3.1 - 12.3.13.
57. (1991) 29 NSWLR 448. Justice Clarke also put the procedure in evidence before the Legislation Committee: *Evidence before the NSW Legislation Committee on the Defamation Bill 1992* (8 September 1992) at 3-8.
58. (1993) 32 NSWLR 397.
59. *RZ Mines (Newcastle) Pty Ltd & Anor v Newcastle Newspapers Pty Ltd & Anor* (Supreme Court of NSW, Hunt CJ at CL, CLD 10212/89, 16 November 1994, unreported).
60. *RZ Mines (Newcastle) Pty Ltd & Anor v Newcastle Newspapers Pty Ltd & Anor* (unreported) at 3 per Hunt CJ at CL.
61. The example is a variation of the one given by Lord Devlin in *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 278.
62. *Supreme Court Act 1970* (NSW) s 88(b) and s 89(2).
63. See *District Court Act 1973* (NSW) ss 77-79A.
64. *District Court Act 1973* (NSW) s 77(3).
65. See *Morris v Newcastle Newspapers Pty Ltd* (1985) 1 NSWLR 260 at 265-267 per Hunt J.

4. The Cause of Action

4.1 A plaintiff is entitled to succeed in a defamation action where he or she can prove that the defendant published matter which carries an imputation of and concerning the plaintiff which is defamatory of the plaintiff and where the defendant is unable to establish some recognised defence to the action (such as justification, privilege or comment).¹ In this chapter, the Commission reviews two aspects of the cause of action in defamation. First, the grounding of the action on the imputation or imputations pleaded and alleged to flow from the publication of the defamatory matter. Secondly, the question whether or not the falsity of the imputation ought to be an essential ingredient of the plaintiff's cause of action.

IMPUTATIONS

4.2 The "imputation" is the defamatory accusation or charge which the plaintiff alleges is conveyed by the matter published by the defendant of and concerning the plaintiff.² Section 9(2) of the *Defamation Act 1974* (NSW) makes each imputation a separate cause of action. Pursuant to s 9(4), rules of court prohibit the plaintiff from founding an action on more than one imputation arising from the publication of the same matter unless the imputations differ in substance.³ Section 9(3) provides that where a plaintiff has brought proceedings for defamation in respect of the publication of particular matter, no further proceedings can be brought in respect of the same or a similar publication without the leave of the court. Section 9 arose from recommendations by this Commission in 1971 as the solution most likely, in cases of multiple imputations, to promote just results and to overcome both areas of doubt and unserviceable distinctions in the common law.⁴ The fact that each imputation is a separate cause of action means that in New South Wales the defendant has to defend that imputation and no other.

4.3 The law of New South Wales differs from that in common law jurisdictions such as Victoria and the Australian Capital Territory.⁵ In those jurisdictions, if the meaning of the words is not clear, a plaintiff may plead the meanings which they are alleged to convey. However, the trier of fact is not restricted to those meanings and must decide for itself what meanings the words in fact convey. The defendant may allege that the words convey a different set of meanings from that pleaded by the plaintiff and may attempt to establish defences relevant to those meanings. The issues to be contested are thus not defined until after the trial has started. Indeed, at the conclusion of evidence a bargaining process often takes place between opposing counsel and the judge to decide which meanings can be left to the jury.

4.4 The Commission regards the uncertainties inherent in the common law system as productive of delays which unjustifiably increase the costs of litigation. The inefficiencies of the common law system include the delay in determining which imputations the judge should permit to go to the jury and in letting the defendant establish defences which are only relevant to the imputations for which it contends and which are never going to be accepted. In the latter case, the Commission also regards as unacceptable the fact that the defendant is able to put before the jury material which is wholly irrelevant to the plaintiff's complaint.⁶

4.5 In contrast to the common law system, the New South Wales procedure emphasises precision and make the issues clearer at trial, saving valuable court time. Although one submission received by the Commission expressed concern about a trend towards "increased technicality concerning imputations",⁷ there was general support for retaining imputations as the basis of the cause of action. The Commission acknowledges that the law of New South Wales places a premium on the careful pleading of imputations. However, the savings in costs and delay achieved by the precision of carefully pleaded imputations which clearly identify the issues at the commencement of the trial, far outweigh any appearance of technicality which the procedure may be thought to possess.

4.6 The Commission has, therefore, concluded that it is preferable to maintain existing practice and procedure in this instance, especially since this has the effect of simplifying the task of the jury whose function it is to resolve disputed issues of fact at the imputations stage of the trial.⁸ The procedure also has the practical effect that, once the plaintiff's imputation has been accepted, there is usually no real defence to it (the plaintiff having selected the imputation for that purpose). Alternatively, if the plaintiff's imputation has not been accepted, there is no time wasted on the defences pleaded to it.

FALSITY

The role of falsity in the law of defamation

4.7 The Commission has discussed the meaning of reputation in paras 2.3 and 2.4. We have pointed out that the law is generally concerned only with protecting the esteem, goodwill or confidence attaching to well-founded reputations.⁹ The law does not, however, require that the plaintiff prove the falsity of the publication before succeeding in an action for defamation. At common law this was explained by saying that once the plaintiff had proved the imputation to be defamatory, it was presumed to be false.¹⁰ Hence, although falsity is not a necessary ingredient in actionable defamation in the sense that it is necessary for proof of the cause of action, nevertheless a plaintiff can be said to succeed in a defamation action only for an imputation which is both defamatory and false. But in New South Wales there is no such presumption.¹¹ Falsity is, therefore, irrelevant to liability.

4.8 The effect of the common law presumption is that the issue of truth must be raised by the defendant as a defence to the plaintiff's claim (the defence of justification). This remains the case in South Wales, with the gloss that justification is only made out where the defendant proves that the publication is true and relates to a matter of public interest.¹² Whether the defence of justification is raised or not, truth or falsity may otherwise be raised by either party as a factor relevant in the assessment of damages.¹³

4.9 The result of relegating the determination of the truth or falsity of the defamatory matter to a defence of justification is that the issue of truth or falsity may not be, and usually is not, litigated in defamation actions, save on the issue of damages. On the one hand, plaintiffs, who are not required to put falsity in issue, can, in theory, utilise defamation actions to protect a reputation which is undeserved. On the other hand, the defendant may in any case be unable to prove truth or may be unwilling to persist in a weak defence of justification for fear of aggravating damages. In the Commission's view it is unsatisfactory, for a number of reasons, that the issue of truth or falsity should be relevant to liability in defamation actions primarily by way of the defence of justification, whether or not reliance is placed on a presumption of falsity.

4.10 First, we return to the point that "[a] libel action is fundamentally an action to vindicate a man's reputation on some point as to which he has been falsely defamed".¹⁴ But the public interest requires the protection of individual reputations only against the publication of *false* defamatory matter. Subject to what we have to say about privacy, speaking the truth ought not to give rise to civil liability simply because the truth is defamatory. The law of defamation ought not to protect individuals against injury to reputations which they neither have nor ought to possess.¹⁵ In saying this, we are not suggesting that there is never a public interest in protecting individuals against true statements (whether defamatory or not). We are simply saying that it is inappropriate that this protection should come, primarily, from the law of defamation.¹⁶

4.11 Secondly, vindication comes primarily from a finding that a defamatory publication is false. In *Theophanous v Herald and Weekly Times Ltd*,¹⁷ Chief Justice Mason and Justices Toohey and Gaudron were of the view that the determination of the truth or untruth of the defamatory imputation is "the gravamen of the plaintiff's complaint in most cases". We agree. We also believe that this ought to be so in all cases. Yet, as we have pointed out in para 4.9, in the current state of the law, the issue of truth or falsity is usually not litigated because the defendant is unable to establish truth. Our proposal forces the defendant either to litigate the issue or to concede it.

4.12 Thirdly, making falsity an ingredient of the tort of defamation facilitates freedom of speech because it removes the necessity of the defendant's having to prove the truth of the defamatory imputation. In contrast, requiring the defendant to prove truth as a defence acts as an inhibition on freedom of speech. In *Theophanous*, Chief Justice Mason and Justices Toohey and Gaudron paraphrased the view of Justice Brennan in the Supreme Court of the United States in *New York Times v Sullivan*¹⁸ that "the necessity of proving truth as a defence may well deter a critic from voicing criticism, even if it be true, because of doubt whether it can be proved or fear of the expense of having to do so".¹⁹ Their Honours pointed out that this view only loses force in Australia to the extent that the level of awards in defamation cases must bear an appropriate and rational relationship to awards in personal injury cases.²⁰

4.13 Fourthly, the constitutional defence will have a more coherent and effective operation in its application to the law of defamation in New South Wales where the plaintiff bears the onus of proving falsity. The effect of the

constitutional defence is that damages cannot be claimed in a defamation action where publication occurs in the course of political discussion and where the defendant establishes that (i) it was unaware of the falsity of the material, (ii) it did not publish the material recklessly (that is, not caring whether the material was true or false), and (iii) publication was reasonable in all the circumstances. This clearly means that the imputation must first be found to be false.²¹ Yet there is no general presumption of falsity in New South Wales, where falsity is simply irrelevant to the plaintiff's case on liability.²² The position where the constitutional defence is raised is unclear and was not addressed by the High Court in *Theophanous* (which came on appeal from Victoria where the common law presumption does apply). Presumably, however, if the plaintiff does not have to prove falsity, it must either be conceded or presumed. This hardly promotes free speech.²³ Whereas, as we have pointed out in para 4.12, making falsity an ingredient of the cause of action does.

4.14 A possible argument against making falsity an ingredient of the cause of action is that it will lead to an increased use of discovery procedures. Currently, if truth or falsity has not been put in issue between the parties, the defendant is not entitled to discovery of documents relating to that issue, and interrogatories directed to that issue can only be described as "fishing".²⁴ The Commission does not consider that increased usage of discovery procedures in itself argues against our proposal to make falsity a part of the cause of action in defamation. And a further argument, derived from American law, that where truth is in issue, defendants may conceivably seek to use discovery procedures to uncover damaging personal details of the plaintiff which could then be published under privilege and which would reduce the incentive to settle, is unsound. Material obtained through discovery under Australian law can only be used for the purposes of the action, unlike under United States law where it can be used for any legitimate purpose.²⁵ The court thus retains control of the discovery process to ensure it is not used for an improper purpose.

4.15 Subject to two exceptions (which arise where the plaintiff can establish that (i) the imputation does not relate to a matter of public interest,²⁶ and (ii) the imputation is not capable of being proved true or false),²⁷ the Commission therefore recommends that the falsity of the defamatory imputation should form an essential ingredient of the tort of defamation.²⁸ The effect of this proposal is that justification will be eliminated as a defence in defamation actions. The implementation of this recommendation will require that section 9 of the *Defamation Act 1974* (NSW) be revised to provide that falsity will be an ingredient of the cause of action and that section 15 be removed from Part 3 of the Act as justification will no longer be a defence. This applies to both variants of the defence in s 15(2)(b), namely, truth and public interest, and truth on an occasion of qualified privilege. With regard to contextual truth, section 16(2)(a) should be deleted, to accommodate the variation of the cause of action and effective elimination of the defence of justification.²⁹

Recommendation 5

In general, falsity should be an essential ingredient of the cause of action in the tort of defamation and the *Defamation Act 1974* (NSW) should be amended consequentially.

Privacy protection

4.16 As an alternative to proving falsity, a plaintiff who seeks general damages should have the option of proving that the published imputation did not relate to a matter of public interest. As we have explained in paras 2.32-2.36, the "public interest" requirement of the current defence of justification is designed to protect privacy. Giving plaintiffs this option will retain the current level of privacy protection, pending the creation of specialised remedies for invasion of privacy.

4.17 This option will not be available where the plaintiff seeks a declaration of falsity, a remedy which we recommend in Chapter 6. The primary issue in that case is the truth or falsity of the imputation, to which "public interest" is simply irrelevant. In addition, a publicised declaration is hardly an appropriate remedy for an invasion of privacy.

Recommendation 6

In an action for damages, the plaintiff, instead of proving that the defamatory imputations are false, may prove that they do not relate to a matter of public interest.

The incidence of the burden of proof

4.18 If the Commission's recommendation that falsity should be an essential ingredient of the cause of action (and, therefore, an essential part of the plaintiff's case) is accepted, it follows, on general principles, that the onus of proof on the issue of falsity must rest on the plaintiff, and, to avoid any doubt, the Commission makes this a separate recommendation. The Commission is, however, aware that arguments have been raised in opposition to the proposition that the plaintiff should bear the onus of proving falsity in defamation cases.³⁰

4.19 First, there is the argument that it is too onerous to put the burden of falsity on the plaintiff. The argument tends to take one of two forms. First, the plaintiff, it is said, ought not to be asked to prove a negative. But there are many instances in which plaintiffs are asked to prove negatives.³¹ Indeed, there are even instances in which plaintiffs are asked to prove falsity, as in the tort of injurious falsehood³² and in the law of misrepresentation (where the plaintiff has to prove that the representation is false).³³ Another objection is that the plaintiff may be asked to disprove a vague defamatory statement whose meaning is difficult to determine.³⁴ An example is the statement: "The plaintiff is a corrupt businessman". This statement implies the existence of undisclosed defamatory facts. But the answer to this objection is that the plaintiff's task is assisted and simplified in New South Wales by the requirement that the plaintiff identify the imputation(s) on which the cause of action is founded, thus facilitating proof of falsity.³⁵ In the example given, the plaintiff could frame the imputation as "The plaintiff is a corrupt businessman (in the sense of being open to bribery)".³⁶

4.20 In contrast to the arguments in para 4.19, the Commission believes that, as a practical matter, it makes sense to put the burden of proof of falsity on the plaintiff simply because the plaintiff, who "knows the truth", is more likely to be in a position to prove falsity than the defendant to prove truth. The result is likely to be that litigation and trials should not be overly protracted as they currently are in the rare cases where justification is relied on as a defence.³⁷ Further, the Commission notes that commentators have not identified any serious problems associated with placing the onus of proving falsity on the plaintiff in United States law; yet there is a good deal of commentary on the difficult problems caused to plaintiffs (and defendants) by the onus of proving actual malice.³⁸

4.21 Secondly, a minority of the Irish Law Commission was of the view that placing the onus of proof of falsity on the plaintiff is a purely cosmetic change in the law which is hardly worth making.³⁹ The Commission does not accept this argument. We do accept that, in many cases, the plaintiff will discharge the burden of proving falsity simply by giving evidence denying the veracity of the imputation. If the defendant then fails to produce any evidence in answer, the plaintiff may succeed.⁴⁰

Recommendation 7

The burden of proving that a defamatory imputation is false should rest on the plaintiff.

The onus in particular contexts

Imputations which are not statements of fact

4.22 *When plaintiff seeks damages.* Sometimes an imputation is a mere "statement of opinion". An example is the statement: "The plaintiff has written a bad play". Such a form of words is inherently incapable of being

proved true or false as it is purely a value judgment which depends on matters of personal impression. In such cases, the Commission recommends that a plaintiff seeking damages who *cannot* prove the falsity of the pleaded imputation relied on should plead that it is not capable of being proved true or false. If the plaintiff succeeds in showing that the imputation is inherently not capable of being proved false, then comment will be available as an affirmative defence which the defendant may choose to establish. Of course, the plaintiff will always put forward an imputation which *is* inherently capable of being proved true or false in order to prevent the defendant's having the advantage of pleading comment.⁴¹

Recommendation 8

The plaintiff may establish a cause of action for damages in defamation by establishing that the defamatory imputation is inherently not capable of being proved true or false.

4.23 If the defendant raises comment, the defendant will bear the onus of showing that the defendant or, as the case may be, the defendant's servant or agent is the author of the comment. This accords with the existing law.⁴²

4.24 Under the existing law, the plaintiff then bears the onus of showing that the comment is not an honest expression of the defendant's opinion or that of the defendant's servant or agent.⁴³ The defendant is, however, in a better position to establish this issue than the plaintiff is to refute it, just as the plaintiff is in a better position to prove falsity than the defendant is to prove truth. Accordingly, the Commission specifically recommends that this onus be reversed so that the defendant must establish this aspect of the defence. Sections 32(2) and 33(2) of the *Defamation Act 1974* should be amended to make this clear.

4.25 However, if the defendant relies on section 34 of the *Defamation Act* by showing that the comment is the comment of a stranger, the onus should remain on the plaintiff to defeat the defence by showing that the publication of it was not in good faith for public information or the advancement of education.⁴⁴ This will facilitate freedom of speech by providing some protection to newspapers which publish letters to the editor and to others who provide a public forum for the expression of opinions.

Recommendation 9

Where the defendant relies on the defence of comment under section 32 of the *Defamation Act 1974*, the defendant should bear the onus of showing that the comment is the honest expression of the defendant's opinion. Where the defendant relies on the defence of comment under section 33, the defendant should bear the onus of showing that the comment is the honest expression of the opinion of the defendant's servant or agent.

4.26 *When plaintiff seeks a declaration.* Where the plaintiff seeks a declaration of falsity, the defamatory imputation must be capable of being proved false. Otherwise it cannot be declared to be false. The plaintiff always bears the onus of showing that it is appropriate for the declaration of falsity to be granted.

Contextual truth

4.27 This defence is currently not needed where the defendant can prove the truth of the plaintiff's pleaded imputation. Under the Commission's recommendations the plaintiff must prove its falsity and so contextual truth may assume greater significance. The Commission proposes that the onus of showing that the contextual imputations are substantially true will remain on the defendant, as this is an affirmative defence which the defendant must establish. The defendant will also have to show that the contextual imputations either relate to a matter of public interest or are published on an occasion of qualified privilege.

FOOTNOTES

1. For the ingredients of a defamation action, see J G Fleming, *The Law of Torts* (8th ed, Law Book Co, Sydney, 1992) at Ch 25.
2. See *Petrtsis v Hellenic Herald Pty Ltd* [1978] 2 NSWLR 174 at 189 per Samuels JA.
3. *Supreme Court Rules 1970* Pt 67 r 11(1)(3); *District Court Rules 1973* Pt 49 r 10(3).
4. NSW Law Reform Commission, *Report of the Law Reform Commission on Defamation* (LRC 11, 1971) at paras 36-56.
5. See P T George, "Congruency: Unravelling the Defamation Action" (1990) 6 *Aust Bar Rev* 124 at 126-127; L W Maher, "Defamatory Meaning and the Defence of Truth: Polly Peck in Australia" (1993) 1 *Torts Law Journal* 215 at 215-220.
6. The decision of the English Court of Appeal in *Polly Peck (Holdings) Plc v Trelford* [1986] QB 1000 is illustrative of many of these difficulties and stands as an eloquent indictment of the common law system. For an attempted summary of its effect, see *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1 at 23-24 per Miles CJ.
7. Young Lawyers, *Submission* (29 October 1993) at 13.
8. See Chapter 3.
9. See G Spencer Bower, *A Code of the Law of Actionable Defamation* (2nd ed, Butterworth & Co, London, 1923) at 243.
10. *Gatley on Libel and Slander* (8th ed, Sweet & Maxwell, London, 1981) at para 351.
11. *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 205 per Windeyer J; *Singleton v Ffrench* (1986) 5 NSWLR 425 at 443-444 per McHugh JA.
12. *Defamation Act 1974* s 15.
13. *Defamation Act 1974* s 47. See also paras 7.16-7.18.
14. *Associated Newspapers Ltd v Dingle* [1964] AC 371 at 396 per Lord Radcliffe. See para 2.1.
15. Consider *M'Pherson v Daniels* (1829) 10 B & C 263 at 272; 109 ER 448 at 451 per Littledale J (though the reference to "character" is misleading).
16. See S Walker, "Regulating the Media: Reputation, Truth and Privacy" (1994) 19 *Melb U L Rev* 729 at 735.
17. (1994) 182 CLR 104 at 138. For an American perspective, see *Dun & Bradstreet Inc v Greenmoss Builders Inc* (1985) 472 US 749 at 771 per White J.
18. (1964) 376 US 254.
19. *Theophanous* at 132.
20. See paras 7.4-7.10.
21. See *Theophanous* at 137 per Mason CJ, Toohey and Gaudron JJ (defence may be established "if a defendant publishes false and defamatory matter about a plaintiff ...").
22. See para 4.7.

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23. In *Theophanous* at 137 Mason CJ, Toohey and Gaudron JJ said that they were not persuaded that “the constitutional character of the justification should make any difference to the onus of proof”, but their Honours were there considering which party should bear the onus of establishing or denying reasonableness. The Court does not seem to have addressed (because it was not argued or open to argument) whether the onus of proving falsity alone should be passed to the plaintiff as an effective way of promoting freedom of communication.
24. *Aldridge v John Fairfax & Sons Ltd* [1984] 2 NSWLR 544 at 549-551; *Gatley* at para 1234, notes 18 and 19.
25. *Gatley* at para 1210; B C Cairns, *The Law of Discovery in Australia* (Law Book Company, Sydney, 1984) at 3-8.
26. See paras 4.16-4.17.
27. See para 4.22-4.27.
28. A recommendation to like effect has been made by a majority of the Irish Law Reform Commission: see Ireland, The Law Reform Commission, *Report on the Civil Law of Defamation* (LRC 38 - 1991) paras 7.28 - 7.35. The *Defamation Bill 1995*, a Private Members' Bill which seeks to implement the recommendations in the Report of the Irish Law Reform Commission was introduced into the Irish Dáil on 9 February 1995. Cl 9 of the Bill, read with the definition of “defamatory matter” in cl 6, places the burden of proof of falsity on the plaintiff. Surprisingly, the defence of truth, with the burden on the defendant, is retained in cl 24. See *Report on the Civil Law of Defamation* at para 7.3. We are grateful to the Irish Law Reform Commission for providing us with information on the Bill.
29. See further 4.27.
30. Eg England and Wales, Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) (“Neill Report”) at 72-73.
31. *Phipson on Evidence* (14th ed, Sweet & Maxwell, London, 1990) para 4-05.
32. *Gatley* at paras 308 and 318.
33. *Spencer Bower and Turner, The Law of Actionable Misrepresentation* (3rd ed, Butterworths, London, 1974) para 68.
34. S P Anthony, “Vague Defamatory Statements and the Libel Plaintiff’s Burden of Proving Falsity” (1987) 87 *Columbia Law Review* 623 at 629-631; S Walker, “Regulating the Media: Reputation, Truth and Privacy” (1994) 19 *Melbourne University Law Review* 729 at 737.
35. See paras 4.2-4.6.
36. In any case, an imputation that “the plaintiff is corrupt” is usually too imprecise to enable the defendant to know the case it must meet: see *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148 at 152-158 per Hunt J.
37. G C Cook, “Reconciling the First Amendment with the Individual’s Reputation: The Declaratory Judgment as an Option for Libel Suits” (1989) 93 *Dickinson L Rev* 265 at 282-283.
38. See para 5.13. See also D A Anderson, “Is Libel Law Worth Reforming?” in J Soloski and R P Bezanson (eds) *Reforming Libel Law* (Guildford Press, New York, 1992) at 21-23; D A Barrett “Declaratory Judgments for Libel; a Better Alternative” (1986) 74 *California Law Review* 847 at 855-856, 861-863; G C Cook, “Reconciling the First Amendment with the Individual’s Reputation: the Declaratory Judgment as an Option for Libel Suits” (1989) 93 *Dickinson Law Review* 265 at 266. One result of the public figure test is that falsity is rarely contested: see paras 5.19-5.21. Some critics in the United States have suggested abandoning the actual malice privilege and returning to the common law, but with the onus of proving falsity on the plaintiff: B

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C Murchison, J Soloski, R P Bezanson, G Cranberg, and R L Wissler, "Sullivan's Paradox: The Emergence of Judicial Standards of Journalism" (1994) 73 *North Carolina Law Review* 7 at 102-104.

39. Ireland, The Law Reform Commission, *Report on the Civil Law of Defamation* (LRC 38 - 1991) at para 7.35.

40. Technically, because an evidential onus has shifted to the defendant.

41. See, for example, *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166.

42. *Defamation Act 1974* (NSW) ss 32 and 33.

43. *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 471 at 491.

44. *Defamation Act 1974* (NSW) s 34(2).

5. The Public Figure Test

5.1 The “public figure test” comprises a number of developments in the common law of defamation in the United States, introduced in a line of cases beginning with *New York Times Co v Sullivan*.¹ In summary, the reforms provide special criteria governing liability for plaintiffs in particular categories (“public figures”), making it more difficult for those plaintiffs to establish a cause of action in defamation.

5.2 The Commission discussed the public figure test in detail in our Discussion Paper.² We there identified a number of problems with the test as it operates in the United States.³ We attempted to predict what would happen if these reforms were introduced in New South Wales. As a result, we expressed a preliminary view that a formal public figure test is undesirable and that the objectives of the test could be better achieved by specific reforms affecting procedures and remedies as well as aspects of substantive liability.⁴

THE PUBLIC FIGURE TEST AFTER THEOPHANOUS

5.3 The High Court’s judgment in *Theophanous v Herald and Weekly Times Ltd*⁵ analysed in some detail the jurisprudence associated with *New York Times v Sullivan* and the United States public figure test. The majority judgments of the Court were influenced by a number of its theoretical justifications.⁶ However, the majority also considered the theoretical and practical difficulties with the test previously identified by this Commission in DP 32.⁷ As a result, the Court established a new defence, based on an implied constitutional freedom of political communication, to actions for damages for defamation in cases of political discussion. The Commission now addresses the relationship between this new defence and the United States public figure test.

5.4 In *Theophanous*, the High Court, by majority, established that the implied freedom of political communication in the Australian Constitution covers discussion of the conduct, policies or fitness for office of government members, political parties, public bodies, public officers and those seeking public office. It also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate.⁸ This formulation was not exhaustive; only “commercial speech without political content” was specifically excluded. In *Theophanous* the new defence was applied to publications involving criticism of a member of the Commonwealth Parliament. In the related case of *Stephens v West Australian Newspapers Ltd*, the Court held that it covered criticism of members of a State Parliament.⁹

5.5 This may establish a form of public figure test, as courts extend the principles of the decision to claims brought by other holders of, and candidates for, public office, and to those other persons whose activities have become the subject of political debate. Examples given were “trade union leaders, Aboriginal political leaders, political and economic commentators.”¹⁰ Deane J suggested that judges and “leading members of the Executive” were covered.¹¹ The joint judgment later appeared to restrict this broad approach, indicating a preliminary view that it should not cover government employees or public figures who do not hold official positions.¹² The key issue is whether the publication complained of took place in the course of political discussion,¹³ but it may be that a second element of the test to be applied will develop, requiring some categorisation of the plaintiff.¹⁴ If so, the decision may be used to establish special criteria governing liability for plaintiffs in particular categories.

5.6 It is arguable, then, that *Theophanous* has established a modified form of public figure test in Australia which could be further developed.¹⁵ It is, therefore, essential to give consideration to the public figure test as it has developed in American jurisprudence and to the possible lines of development of Australian defamation law.

5.7 The Commission addresses the public figure test at this point in its Report because the test has radically altered the cause of action in United States defamation law. This Chapter summarises the problems with the public figure test as it operates in the United States, and provides further justification for the Commission’s view that free speech and correction of unfair damage to reputation could be better served by other means.

THE PROBLEMS WITH THE PUBLIC FIGURE TEST

5.8 To succeed in a defamation claim in the United States, plaintiffs classed as “public officials” or “public figures” must prove that the defendant acted with “actual malice” - defined as actual knowledge of the falsity of

the published material or reckless disregard as to its truth.¹⁶ This is far more stringent than the common law concept of malice which defeats qualified privilege or comment. At common law, malice includes ill will, spite and improper motive.¹⁷ “Reckless disregard” exists only where the defendant consciously held doubts about the truth of the matters asserted; mere indifference to the truth and failure to investigate is insufficient.¹⁸ Further, in the United States the plaintiff must prove actual malice with “convincing clarity”, an onus of proof which goes beyond the “balance of probabilities” normally used in civil cases.¹⁹

5.9 The constitutional guarantee of free speech has also altered the position of plaintiffs who are neither public officials nor public figures. Such “private figures” must prove that the defendant was at least negligent, even where the defendant knew the material was defamatory and intended to refer to the plaintiff (in such a case, the plaintiff must show negligence in failing to discover the truth).²⁰ This means that all plaintiffs must prove some fault on the defendant’s part.²¹ Further, all plaintiffs bear the onus of proving falsity, as this is an essential element of the tort.

5.10 Finally, all plaintiffs must prove actual malice to recover presumed and punitive damages, unless the plaintiff is a private figure and the defamation does not relate to a “matter of public concern”, in which case the plaintiff in most States need only show negligence. In other cases, unless actual malice is shown, a private figure can recover only for actual loss.²²

5.11 Many expert commentators in the United States believe that the decision in *New York Times v Sullivan*, and the line of decisions following it, have not only proved ineffective, but also counterproductive, in achieving its purported aims. The problems arise from the interaction of this rule with the pre-existing law of libel and general aspects of American tort law and procedure. It is possible to identify seven general areas of difficulty arising from the public figure test.²³

Complex categories of plaintiffs

5.12 American courts spend a great deal of time assessing whether the plaintiff is a private figure or a public figure, and if the latter, then whether he or she is a public figure for all purposes or only for limited purposes.²⁴ If the plaintiff is held to be a private figure, different rules of liability will apply depending on whether the issue involved is one of public or private concern.²⁵

Difficulty and expense of litigating “fault”

5.13 Since most plaintiffs in the US must prove not only falsity but also “actual malice”, a key issue in most libel trials is the state of mind of the defendant.²⁶ Complications arise when the publication is the work of several people, such as a junior reporter, a sub-editor and an editor. Extensive American discovery procedures, involving the discovery not only of documents but also of evidence, result in close scrutiny of all circumstances leading up to the publication.²⁷ The requirement for plaintiffs to prove all these elements with “convincing clarity” causes further difficulties for plaintiffs and expense for both sides.²⁸

Need to overrule journalists’ privilege

5.14 Many US states have “shield laws” to protect journalists from revealing their confidential sources in court. However, many of these leave a discretion in the court to decide whether the privilege should be overruled. In defamation cases where “actual malice” needs to be proved, protection of sources often will be undermined because the existence and identity of the source and the information obtained from the source are crucial evidence in determining the state of mind of the defendant.²⁹

Excessive damage awards resulting from juries' focus on media fault

5.15 In cases against media defendants which reach trial, the jury will be shown in great detail all of the evidence that the plaintiff can produce to show that the defendant behaved recklessly or maliciously in publishing falsehood about the plaintiff. This may activate any existing prejudices which juries have against media defendants, which can be given full expression through a massive award of presumed and punitive damages. The highest award on record against a media defendant is US\$58 million,³⁰ while the average in 1990-1991 was more than US\$8 million. The average in 1992-1993 dropped sharply to a "mere" US\$1.06 million.³¹

High incidence of successful appeals by defendants

5.16 To protect the free speech values enshrined in the First Amendment, the US Supreme Court has laid down that its essential requirements, notably that of "clear and convincing" proof of known or reckless falsity, must on appeal be subject to independent judicial review involving an examination of the whole record.³² This is a distinctly intrusive form of judicial supervision, and arguably involves the appellate court in "state of mind" rulings that are inappropriate for a court that does not see or hear the witnesses. More significantly for present purposes, it means that only a small proportion of the huge jury awards of damages survive the appeal process. Appellate courts often completely overturn or massively reduce the amount of awards.³³

5.17 Often therefore, the public figure plaintiff will end up with total defeat or a pyrrhic victory. The defendant, even if victorious in formal terms, will have devoted enormous time and resources conducting the defence. Under US costs rules the defendant, even if victorious, will have to pay its own legal costs which can be huge.³⁴ The plaintiff, having most likely negotiated a contingent fee arrangement, will be better off in this regard, but will still have to meet out of pocket expenses.³⁵

Tendency to promote unsatisfactory regulatory standard

5.18 It has been argued that, since tort law standards inevitably affect not only the relations between private individuals but the conduct of all forms of enterprise in public life, it is appropriate to examine the *Sullivan* rule as an aspect of the regulatory standards governing media performance.³⁶ On this view of its role, *Sullivan* has clear shortcomings. First and foremost, it creates "perverse incentives": it encourages sloppy journalism because the lower the standard of care that is seen as "normal" for journalists, the harder it will be for public figure plaintiffs to prove the greater dereliction of "recklessness" required under the *Sullivan* rule. Secondly, it focuses on process rather than performance standards: how the story was put together becomes more important than whether it is true.³⁷ Proof of a breach of standards requires a highly intrusive investigation of the inner operations of the defendant organisation.³⁸ Thirdly, because it obscures the truth/falsehood issue, it "is ill tailored to achieve one important regulatory goal, preventing injury to individuals through falsehoods".³⁹

No resolution of issue of truth

5.19 Public figure plaintiffs, as well as most (if not all) private figure plaintiffs, clearly now bear the specific onus of proving the relevant defamatory allegation to be false.⁴⁰ Therefore, if the plaintiff wins, this does convey the message that the imputation was false. But, as outlined above, the plaintiff often loses.

5.20 It has been estimated that some three-quarters of cases filed against media defendants never get to trial, because of a successful motion by the defendant for summary judgment.⁴¹ If the case does make it to trial, plaintiffs (at least against media defendants) have reasonable prospects of success, because of the tendency of juries to punish the media. However, on appeal, plaintiffs often lose.

5.21 Since in most of these cases the reason for the plaintiff's loss is a failure to prove with "convincing clarity" an issue of subjective fault on the defendant's part, the objective issue of truth or falsity is often not directly addressed, let alone clearly resolved.⁴² It follows that, "whatever the popular view may be, truth and falsity have very little to do with libel litigation ... It is now the defendant's conduct, rather than the plaintiff's reputation, that is on trial".⁴³

Summary

5.22 The "public figure test" recognised in the United States appears only to contribute to the problems of lengthy and costly proceedings, with the sole emphasis on damages as a remedy, which the Commission seeks to avoid.⁴⁴ However, as stated in para 5.1, the public figure test actually comprises a package of reforms made in the wake of *New York Times Inc v Sullivan*. A wholesale importation of that package into the law of New South Wales would hinder effective adjudication of the issue of truth, which the Commission sees as an important yardstick by which to assess any defamation law.⁴⁵ The Commission believes that free speech is better served by requiring the plaintiff to prove falsity. This not only addresses the plaintiff's key complaint - that the defendant has published a false and defamatory imputation - but also promotes free speech by eliminating liability entirely for statements which the plaintiff cannot prove to be false.

FOOTNOTES

1. (1964) 376 US 254.
2. See New South Wales Law Reform Commission, *Defamation* (DP 32, 1993) at Chapter 10.
3. DP 32 at paras 10.36-10.56.
4. DP 32 at paras 10.61-10.62.
5. (1994) 182 CLR 104.
6. Mason CJ, Toohey and Gaudron JJ discussed the American law at 130-136 and framed the terms of the new implied freedom of speech defence at 137. Deane J would have gone further and held that no liability in damages for defamation arose from publications about the official conduct or suitability of a member of Parliament or other holder of high public office (at 185). However, he joined with the orders proposed by the joint judgment in order to achieve a majority (at 187-188).
7. *Theophanous* at 134-136.
8. *Theophanous* at 124 per Mason CJ, Toohey and Gaudron JJ, at 179-180 per Deane J. This formulation could include the *private* conduct of public officials, if this is relevant to their "fitness for office", though it covers only the "public conduct" of what may be broadly termed public figures.
9. (1994) 182 CLR 211 at 133-134 per Mason CJ, Toohey and Gaudron JJ, at 257 per Deane J. It was also held that a similar implied freedom existed in the Western Australian Constitution (at 89).
10. *Theophanous* at 124. In *Williams v John Fairfax and Sons* (Supreme Court of NSW, 24 October 1994, CLD 10872/89, unreported) Levine J held that it was arguable that the new defence applied to criticism of the conduct of a magistrate during committal proceedings. In *Lewandowski v Lovell* (Supreme Court of WA, 4 April 1995, unreported) Master Adams held that it was arguable that the new defence applied to criticism of the conduct of a police officer in charge of an investigation and invested with State power, who was therefore not "a public officer of insignificance".
11. At 180.
12. At 134.

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13. See *Sporting Shooter's Association of Australia (Vic) v Gun Control Australia and Crook* (1995) 2 *Media Law Reporter* 83 (exchange between rival lobby groups part of active political debate and within "political discussion").
14. See *Hartley v Nationwide News Pty Ltd* (1995) 31 *Gazette of Law and Journalism* 9 (alderman); *Williams v John Fairfax & Sons Ltd* (Supreme Court of NSW, Levine J, No 10872/1989, unreported) at 11 (defendant to defamation action by plaintiff magistrate arguably able to avail itself of "new common law privilege defence" and "implied freedom of speech" defence).
15. Eg A Deamer, "Don't Jump for Joy" (1994) 26 *Gazette of Law and Journalism* 3. But see S Walker, "The Impact of the High Court's Free Speech Cases on Defamation Law" (1995) 17 *Sydney Law Review* 43.
16. In Australia it is clear that, in cases to which the constitutional defence applies, the defendant does not have to establish absence of malice (*Theophanous* at 137-138). However, it is not clear whether the plaintiff can defeat the constitutional defence by relying on common law malice: see para 10.16.
17. *Horrocks v Lowe* [1975] AC 135 at 149-151. It should be noted that, in the US, a journalist's ill-will towards the plaintiff is not itself sufficient to support a finding of "actual malice": *Masson v New Yorker Magazine* (1991) 111 S Ct 2419 at 2429.
18. *St Amant v Thompson* (1968) 390 US 727 at 731; *Beckley Newspapers Corp v Hanks* (1967) 389 US 81 at 84-85.
19. *New York Times Co v Sullivan* (1964) 376 US 254 at 385-386.
20. *Gertz v Robert Welch Inc* (1974) 418 US 323 at 347; *Dun & Bradstreet Inc v Greenmoss Builders Inc* (1985) 472 US 749.
21. Each State may decide on the appropriate measure of liability for private figures, provided that it is at least negligence. Most States have adopted a negligence standard.
22. *Gertz v Robert Welch* at 349; *Dun & Bradstreet Inc v Greenmoss Builders Inc* (1985) 472 US 749.
23. This summary is drawn from M R Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA" (1995) 18 *UNSW Law Journal* 300 at 302-308.
24. *Rosenblatt v Baer* (1966) 383 US 75 at 85; *Curtis Publishing Co v Butts* (1967) 388 US 130 at 164; *Gertz v Robert Welch Inc* (1974) 418 US 323; *Time Inc v Firestone* (1976) 424 US 448; *Philadelphia Newspapers Inc v Hepps* (1986) 475 US 767. There are myriad cases addressing the issue of how to characterise the plaintiff.
25. See paras 5.9-5.10.
26. See D A Anderson, "Is Libel Law Worth Reforming?" in Soloski and Bezanson (eds) *Reforming Libel Law* (Guilford Press, New York, 1992) at 8-9, 15-17; G C Cook, "Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits" (1989) 93 *Dickinson Law Review* 265 at 265-266.
27. Anderson, in Soloski and Bezanson, at 15-17, 18-19.
28. See para 5.8.
29. *Herbert v Lando* (1979) 441 US 153; Anderson, in Soloski and Bezanson, at 20-21.
30. *Feazell v A H Belo Corp* (Texas District Court, McLennan County, 19 April 1991, No 86-22271).
31. Libel Defense Resource Center, "Trial Results, Damage Awards and Appeals, 1992-93", LDRC *Bulletin*, 31 January 1994 at 3.

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32. Anderson, in Soloski and Bezanson, at 4-7. An example of what this can involve is *Bose Corp v Consumers Union of United States Inc* (1984) 466 US 485.
33. The highest award upheld on appeal is US\$3 million: *Brown & Williamson Tobacco Corp v Jacobson* (1987) 827 F 2d 1119, cert denied (1988) 485 US 933.
34. *Summit Valley Industries Inc v Local 112 United Brotherhood of Carpenters* (1982) 456 US 717 at 721. Estimates of the defendant's legal costs in large public figure actions include US\$3-4 million for *Herbert v Lando* (1979) 441 US 153 and US\$3.75-5.75 million for *Westmoreland v CBS* (1984) 752 F 2d 16 (2d Cir): D M Cendali, "Of Things to Come - the Actual Impact of *Herbert v Lando* and a Proposed National Correction Statute" (1985) 22 *Harvard Journal of Legislation* 441 at 467.
35. The Iowa Libel Research Project, the largest empirical study into US defamation law, found that 73% of plaintiffs have a contingency fee arrangement; an additional 12.7% have a partial contingency fee arrangement: R P Bezanson, G Cranberg and J Soloski *Libel Law and the Press: Myth and Reality* (Free Press, New York, 1987) at 69.
36. M M Shapiro, "Libel Regulatory Analysis" (1986) 74 *California Law Review* 883.
37. Shapiro at 885-886. A recent study points out another questionable result of the actual malice rule, namely, that it involves judges setting standards of how journalists should behave: B C Murchison, J Soloski, R P Bezanson, G Cranberg, and R L Wissler, "Sullivan's Paradox: The Emergence of Judicial Standards of Journalism" (1994) 73 *North Carolina Law Review* 7. This, of course, can also occur under criteria such as "reasonableness".
38. J H Skolnick, "Foreword: The Sociological Tort of Defamation" (1986) 74 *California Law Review* 677 at 681-682 (arguing that US juries appear to care less about process (how the story came about) than about product (whether the story was true or false), despite the requirements of the public figure test). Cf 686-7.
39. Shapiro at 885.
40. See para 5.9.
41. Anderson, in Soloski and Bezanson, at 7-8; Cook at 266, 273.
42. Anderson, in Soloski and Bezanson, at 21-22.
43. L A Powe, *The Fourth Estate and the Constitution: Freedom of the Press in America* (University of California Press, Berkeley, 1991) at 121, 125.
44. See para 2.20.
45. See paras 4.7-4.15.

6. Remedies Other Than Damages

6.1 Chapter 2 of this Report points out that the law, currently, protects reputation primarily through the remedy of damages. One of the Commission's major concerns, in reviewing the law of defamation, has been to develop remedies which are more clearly aimed than damages at vindicating the plaintiff's reputation. As foreshadowed in DP 32,¹ we have investigated, in particular, the possibilities offered by declaratory orders and correction orders. In this Chapter, we recommend the introduction of a new remedy, the "declaration of falsity", which will, in our view, effectively achieve the object of restoring the plaintiff's reputation. For reasons which we explain below,² we do not, at this stage in the development of the law, favour the development of mandatory correction orders as a general statutory remedy.

THE DECLARATION OF FALSITY

6.2 The Commission proposes the development of a new remedy in defamation litigation, to be called the "declaration of falsity", whose objectives are to:

promote findings on the issue of truth or falsity;

recognise the public nature of reputation and the injury done to it by defamatory imputations;

promote the prompt public restoration of reputation as equally important as compensation for its loss;

reduce the length and cost of proceedings by removing defences which are irrelevant to the issue of truth or falsity;

provide plaintiffs who do not seek or who are denied a damages remedy by reason of the constitutional implication of freedom of political speech with a method of vindicating their reputations; and

ensure that special damages remain available to compensate for financial loss.

6.3 The notion that declarations should be used as a remedy in defamation cases received support in submissions to the Commission.³ However, a number of submissions were critical of the particular proposal in Discussion Paper 32.⁴ These submissions argued that declarations under that model would not be much cheaper or quicker than actions for damages and therefore would be unlikely to satisfy plaintiffs. In addition, it was argued that the proposal to make falsity an ingredient of the cause of action *only* in actions for damages would complicate the law. In response, the Commission has simplified and streamlined the proposal both to address the desire of plaintiffs to correct those things said about them which are false and defamatory and to protect freedom of speech.

The rationale of the declaration of falsity

6.4 The most important justification for the use of declarations in the law of defamation is found in the prospect which they (but not necessarily damages)⁵ hold out of the effective vindication of the plaintiff's reputation. Effective vindication means, first, that the declaration must be available to defamed plaintiffs as soon as possible after publication, for this is the time at which such empirical evidence as is available suggests that plaintiffs are most likely to be satisfied with non-monetary relief.⁶ The Commission's proposals therefore seek to deliver a judicial declaration of falsity to successful plaintiffs as expeditiously as is possible.⁷ Our proposals also address a second requirement of effective vindication, namely, the publication of the court's findings, by requiring that the declaration be published by the defendant.⁸

6.5 Another justification for declarations of falsity is that defamation law should promote public findings on the issue of truth or falsity.⁹ It is the Commission's view that it is inadequate to rely on the conflict of allegations in the media to establish truth. Media ownership in Australia is too heavily concentrated to produce a reliable "marketplace of ideas".¹⁰ Courts do make findings of fact every day, and are far more likely to make reliable

findings after hearing all the evidence from both of the most interested parties than a media organisation which relies on its own inquiries.¹¹

The relationship between the declaration of falsity and damages

6.6 Notwithstanding s 63 of the *Supreme Court Act 1970* (NSW) (which requires that, in any proceedings, the court should grant all the remedies to which the parties may be entitled so that, as far as possible, all matters in controversy between the parties are finally resolved), the Commission recommends that plaintiffs must elect to bring an action either for a declaration or for damages for non-economic loss ("general damages") in respect of the same defamatory matter.¹² In other words, declarations and damages for non-economic loss cannot be claimed in the same proceedings. If it were possible for a party to pursue both, the capacity of the declaration of falsity to resolve expeditiously the single issues of falsity and defamatory meaning, and thus to achieve the effective vindication of the plaintiff's reputation, would be lost.

Recommendation 10

Plaintiffs must elect to bring an action either for a declaration that the imputations published are false or for general damages for non-economic loss.

6.7 A plaintiff may, however, claim damages for economic loss in conjunction with a declaration of falsity. The claim for economic loss, in which all the usual defences are applicable,¹³ will not be dealt with by the court until the declaration has been granted. Once again, the reason is to avoid defeating the effectiveness of the declaration of falsity.

Recommendation 11

A plaintiff may combine a claim for damages for economic loss with an application for a declaration of falsity, but the court will not consider the claim for economic loss until after the declaration is granted.

6.8 The Commission proposes that the election of a plaintiff who successfully obtains a declaration of falsity should be binding and final after the defendant has complied with the terms of any orders ancillary to the declaration granted. To this extent, the plaintiff's election will avoid a multiplicity of proceedings concerning the matters in controversy between the parties. This is fair to the plaintiff, who is not denied relief in damages where, for example, the defendant refuses to publish the terms of the declaration as directed by the court.

6.9 If the defendant fails to comply with the court's orders regarding publication (and if the defendant has not obtained a stay of the proceedings), the plaintiff should then be permitted to amend the proceedings to make a claim for damages for non-economic loss. The defendant may also be in contempt for its failure to comply with the direction of the court. A recalcitrant defendant may, therefore, find itself facing (i) a claim for damages to which all the usual defences will be applicable, but in which the plaintiff will already have a favourable finding on the issue of falsity; (ii) the prospect of a substantial fine for contempt; and (iii) the costs of both proceedings. On the other hand, where the defendant's failure to comply with the court's orders is inadvertent or otherwise excusable (because, for example, the defendant was unaware that the orders had been made), the court may grant to the defendant such relief as the interests of justice may require. That relief may include restraining the plaintiff from pursuing the claim for general damages.

Recommendation 12

The election of a plaintiff who successfully seeks a declaration becomes final when the defendant complies with the orders ancillary to the declaration.

6.10 In the case of a plaintiff who unsuccessfully applies for a declaration, no specific provision is necessary. Where the declaration is refused because the plaintiff fails to satisfy the court that the imputations are false and defamatory, any subsequent action for damages would be pointless because it would be defeated by operation of the principles of issue estoppel. In all other cases, the plaintiff should, as a matter of justice, be allowed to make out a claim in damages if he or she can. This includes cases where:

the court refuses to entertain declaratory proceedings because the defendant has a triable defence of absolute privilege, protected report or court or official notice;¹⁴

the imputation is not capable of being proved true or false;¹⁵ and

the declaration is refused in the court's discretion.¹⁶

6.11 Another potential problem arises in defining the relationship between the declaration of falsity and damages. That problem occurs where the plaintiff attempts to establish more than one cause of action out of the same defamatory matter. Suppose, for example, that a plaintiff unsuccessfully seeks a declaration of falsity on the basis of an imputation which the court finds the matter is not reasonably capable of carrying. Can the plaintiff then seek to establish another cause of action (either for a declaration or for damages) on the basis of a different imputation arising from publication of the same matter? In the Commission's view, this problem is best accommodated, as it is under the existing law, by providing that further proceedings cannot be brought in respect of the publication of the same matter without the leave of the court.¹⁷

Factual imputations

6.12 In an application for a declaration, as in other defamation actions, the plaintiff will have the onus of establishing the threshold requirements that the defendant has published of and concerning the plaintiff a false and defamatory imputation. In addition, the plaintiff must establish that the imputation is one of fact. The reason is that, if the imputation is incapable of being proved true or false, no declaration of falsity can be made. Of course, if the imputation is reduced to some form of words which is capable of being declared false, and the plaintiff is able to prove that it is false, then the declaration may issue. The danger is that this reduction will produce a strained or forced imputation. But, in such cases, it will usually be impossible to prove that the imputation is conveyed in the first place. However, if the plaintiff succeeds in doing so and proving the falsity of the imputation, there is no reason why a declaration of falsity cannot be granted.¹⁸ Since only the pleaded imputation will be declared false, there will be no "undeserved whitewashing" of the plaintiff's reputation such as could result from an award of damages in such a situation.¹⁹

The court's discretion

6.13 As with all declaratory relief, the declaration of falsity will be available only in the discretion of the court.²⁰ That discretion will be relevant to the determination of whether or not a declaration should be granted,²¹ and, if so, as to the form it should take.²² All of the circumstances of the case will be relevant to the exercise of the court's discretion so far as they relate to the nature of the relief sought (that is, relief whose object is to provide judicial determinations of the issue of truth or falsity). In theory, the circumstances of the case can justify regard being had to any consideration which the court thinks appropriate, whether such considerations are

of a strictly legal, moral or ethical nature. In practice, broad discretionary factors relevant to the grant of declaratory relief have emerged, and it is possible to predict the force of these principles in particular types of proceedings.²³

6.14 Without being exhaustive, it is possible to identify some factors which will generally render inappropriate the grant of a declaration of falsity. These include: where any determination of the issue of truth or falsity will no longer serve any useful purpose, as where the defendant has published an adequate and otherwise appropriate correction;²⁴ or where the defendant has made an offer of amends.²⁵

6.15 Another example of a situation in which the court's discretion is likely to be exercised against the declaration of falsity is where the defendant has no real concern to contradict the declaration sought.²⁶ At present, a defence of innocent publication is available in an action for damages to distributors or vendors of defamatory matter in certain limited circumstances, allowing those persons to escape liability in damages even though they participate in the publication of defamatory matter and extend its area of dissemination.²⁷ For reasons which are explained in Chapter 9, the Commission recommends little change to the existing law in this respect. It is inappropriate, however, that a declaration of falsity should be made against an innocent publisher. First, such a publisher may have no knowledge of the truth or falsity of the imputations in question and will usually have no interest in contesting the declaration. Secondly, the interests of the original publisher could be prejudiced by the grant of the declaration and a court will generally not grant a declaration which can prejudice the interests of third persons who are not parties to the proceedings.²⁸ Of course, in the normal course of events, the original publisher would be joined as a party to the proceedings.

Recommendation 13

A declaration of falsity should be available in the court's discretion.

No affirmative defences

6.16 Where the plaintiff seeks a declaration of falsity, the defendant may, of course, traverse the issue of falsity and assert that the imputation is true. The Commission does not, however, believe that the defendant should generally be allowed to oppose the declaration of falsity by relying on one of the recognised defences (that is, privilege, comment, contextual truth or unlikelihood of harm) which apply to an action for damages in defamation (an "affirmative defence").²⁹ Two considerations have led the Commission to this conclusion.

6.17 First, the primary objective of the declaration of falsity is to obtain a judicial determination of the issue of truth or falsity. Yet, with the exception of justification (which ceases to be a defence when the burden of proof of falsity rests on the plaintiff),³⁰ the recognised defences which apply to actions for damages in defamation cases do not traverse the issue of truth or falsity; they are simply irrelevant to it. In our view, unless there are compelling countervailing policy reasons, the defence in question ought not to apply to declarations of falsity even though that defence will, of course, continue to be relevant in a claim for damages (where the award is aimed at providing compensation for injury to reputation rather than simply determining the issue of truth or falsity).³¹

6.18 Secondly, we have kept in mind that the purpose of the remedy is to provide the plaintiff with a speedy vindication of reputation. This goal will be frustrated if the trial of the issue turns into a lengthy determination of the application of complex defences which bear no relation to the issue of falsity.

6.19 The strength of the second consideration is put to the test in those cases in which the policies underlying a recognised defence suggest that the plaintiff should be denied a declaration of falsity in circumstances to which the defence applies even though the issue of truth or falsity is not traversed. The Commission's evaluation of the policies underlying the traditional defences in damages actions has led us to the conclusion that the policies which underlie three recognised defences do have this effect. These defences are absolute privilege,³² protected reports³³ and court and official notices.³⁴

6.20 In such cases, the Commission was faced with a choice of allowing those defences to be raised and determined in the plaintiff's application for a declaration of falsity or effectively requiring the plaintiff to bring an action for damages. The Commission prefers the latter course. In our view, the objective of obtaining a speedy vindication of the plaintiff's reputation is unacceptably compromised if the court is required to determine, in an action for a declaration of falsity, the complicated issues of fact and law to which these defences can give rise. Further, the "summary procedure" which we envisage will apply to declarations of falsity will simply be an inappropriate context for the making of such determinations.³⁵ Our recommendation is, therefore, that if the defendant raises a defence of absolute privilege, protected report or court or official notice, the judge should make a summary ruling on whether or not there is a triable issue in respect of that defence. If there is, it must be resolved in an action for damages and the application for a declaration of falsity refused.

Absolute privilege

6.21 The policy underlying absolute privilege is that certain proceedings or occasions require completely unrestricted freedom of speech in order to ensure the proper operation of governmental institutions, whether legislative, executive or judicial. In the Commission's view, this policy applies to protect true and false statements whether a plaintiff seeks damages, a declaration or any other remedy. If, in any case, the defendant raises this defence, the judge will need to make a summary ruling on its application. In many cases, it will be obvious whether or not absolute privilege is a triable issue. But where the applicability of the privilege depends on the resolution of disputed issues of fact and law,³⁶ the application for a declaration of falsity must be refused and the disputed issues resolved in an action for damages should the plaintiff wish to bring one.

Protected reports and court or official notices

6.22 In cases of protected reports the defendant is either relying on a derivative privilege flowing from the protection given to some original proceedings (statements or proceedings in court or parliament, or proceedings before statutory bodies) or on a legislative policy of maximising the publicity given to certain proceedings (such as those at a public meeting on a matter of public interest). In both cases the underlying policy is the promotion of publicity for the proceedings, which is desirable because of the public interest in what occurs in those proceedings.³⁷ In the Commission's view, that policy precludes the making of a declaration of falsity in a case to which it applies. Pragmatic considerations support this conclusion. It seems clearly inappropriate to make a declaration that what the defendant reported (although fair) was false where such a determination cannot be made directly in respect of the original proceedings. A possible result would be, for example, that one court would declare that what was said in proceedings before another court (and fairly reported) was false.³⁸ Nor is the publisher of such a report a proper contradictor in relation to the truth of what has been accurately reported.

6.23 In cases of court notices and official notices, the defendant is relying on a privilege flowing from a direction made by a court or from an official request by a government officer or public authority. A plaintiff who wishes to challenge the veracity of the contents of such notices in a defamation action should proceed against the maker of the notice. If such an action lies, it is the appropriate avenue of redress. If it does not (because the notice itself is privileged), it is clearly inappropriate to call into question the veracity of the direction or notice by obtaining a declaration of falsity against the person who publishes it under authority.

6.24 Cases of protected reports or court and official notices, which raise issues of "fairness", "good faith" and "public interest", are more likely to give rise to disputed questions of fact and law than cases of absolute privilege. Where this is so, these issues are appropriately resolved in an action for damages.

Inapplicable defences

6.25 *Qualified privilege at common law and under section 22.*³⁹ The development of defences of qualified privilege has tended to direct attention away from the issue of truth or falsity. The issues under qualified privilege

relate to such matters as a reciprocal duty and interest between defendant and recipients, the defendant's state of mind, and (under s 22 of the *Defamation Act 1974* (NSW)) whether the conduct in publishing was reasonable. While these issues are relevant to an action for damages whose objectives include compensating the plaintiff for harm suffered, they are, logically, simply irrelevant to a declaration of falsity. That they should be is supported by policy considerations. The rationale behind the Commission's proposal for the declaration of falsity is to facilitate the flow of *accurate* information to the public. While qualified privilege may encourage the free flow of information, it does nothing to ensure its accuracy or promote the public interest in the vindication of injured reputations.

6.26 The irrelevance of qualified privilege to a declaration of falsity is recognised in some of the American literature. Many proposals for reform of libel law in the United States are designed to avoid the problems caused by the focus on "actual malice" under the constitutional privileges.⁴⁰ Proposals for declaratory judgments recognise that issues relating to a defendant's state of mind are simply irrelevant to a remedy whose object is to deliver a judicial finding on the issue of truth or falsity.⁴¹ A number of the proposals have also specifically suggested that common law qualified privilege should be disregarded.⁴²

6.27 The Commission recognises that the adoption of its recommendations would mean that a judicial declaration of falsity will be available even where no damages would be payable because an action for damages would be met with a defence of qualified privilege. In our view, plaintiffs in that situation should still be given the opportunity to correct the record through a declaration. This avoids the lack of compromise in the current law under which there is no middle position: the plaintiff gets damages or nothing. And we do not believe that media or other defendants should, under the protection of qualified privilege (which protects less important social interests than absolute privilege), have a privilege to publish falsehood while leaving plaintiffs with no remedy.⁴³

6.28 *Contextual truth.* The defence of contextual truth applies where one or more imputations which are contextual to the imputation complained of are matters of substantial truth, and either relate to a matter of public interest or are published on an occasion of qualified privilege. If, by reason of the substantial truth of the contextual imputations, the plaintiff's reputation is not further harmed by the imputation complained of, it is considered inappropriate to make the defendant liable in damages.⁴⁴ For example, if the defendant imputes that the plaintiff is a murderer, a thief and an illegal immigrant, and if the first two charges are true but the third is not, then the plaintiff should not recover damages because, in the light of the truth of the first two imputations, the plaintiff's reputation is not further harmed by the falsity of the third. Awarding damages in this case could leave the impression that all the imputations are false.

6.29 However, there is no reason why the defence should apply where the plaintiff seeks only a declaration of the falsity of the pleaded imputation. The defence raises issues which are irrelevant to this question. The plaintiff should be entitled to correct those parts of the matter complained of which are false. Thus, in the example given, the plaintiff should be entitled to a declaration that he or she is not an illegal immigrant if that imputation is false. The other imputations will remain untouched. Of course, the court's general discretion remains relevant, and that discretion may well be exercised against the grant of declaratory relief if the plaintiff seeks correction of parts of the matter complained which are absolutely or comparatively trivial, such that the intervention of the court cannot be justified.

6.30 It is the finely adjusted nature of the declaratory remedy which makes it possible to do without the defence of contextual truth. By contrast, the crude message conveyed by an award of damages makes the defence necessary. Without contextual truth, an award of damages can result in an "undeserved whitewashing" of the plaintiff's reputation.⁴⁵

6.31 *Unlikelihood of harm.* This defence accepts that a defamatory imputation was published by the defendant but that the circumstances of its publication were such that the plaintiff was not likely to suffer harm.⁴⁶ In such cases it would be inappropriate to impose liability in damages on the defendant. However, if the plaintiff shows that the defendant published a false and defamatory imputation then (subject to the exercise of the court's discretion where the claim is too trivial to warrant its intervention), he or she should get a declaration to that effect. The order for publicising the declaration can be tailored to ensure that it is not circulated any more widely than the original imputation. If appropriate, this order could be dispensed with altogether where the matter complained of was not disseminated to any significant extent.

6.32 *Comment.* The defence of comment (another “traditional” defamation defence) cannot be raised in opposition to a declaration of falsity. This flows directly from the requirement that the imputation be capable of being proved true or false.⁴⁷

Recommendation 14

“Affirmative defences” to actions for damages in defamation cases cannot be raised to defeat an application for a declaration of falsity. However, where the defendant has a triable defence of absolute privilege, protected report or court or official notice, the court will not grant a declaration of falsity.

Speed

6.33 Reputation cannot be restored satisfactorily if too much time elapses between publication and the grant of a declaration of falsity. In such circumstances, the declaration may serve only to remind those who have forgotten of the imputations made. The plaintiff should not, therefore, be allowed to delay in bringing a claim. The Commission has decided that a declaration should be sought within four weeks of publication or, exceptionally, within such longer period as the Court should in its discretion permit, to a maximum of one year from publication (the limitation recommended for the tort generally in Chapter 13). Factors which may activate the court’s discretion to extend the time include cases where the plaintiff was not within the jurisdiction at the time of publication and was not aware of it, or where the parties must spend some time gathering sufficient evidence.

Recommendation 15

Declarations should be sought within four weeks of publication or, exceptionally, within such other period as the court may in its discretion determine, to a maximum of one year from publication.

Procedure

6.34 The Commission believes that the speed necessary to a declaration of falsity can only be achieved by taking action in the Supreme Court where an established Defamation List, with its existing procedures and expertise, will facilitate their determination.

Recommendation 16

Declarations of falsity should be obtainable only in the Supreme Court.

6.35 At present, an application for a declaration would be heard by a judge alone. The Commission recommends that this should continue to be the case where a plaintiff seeks a declaration of falsity, notwithstanding our view, expressed in Chapter 3, that juries should be retained at the imputations stage of proceedings in actions for damages. The empanelling of a jury to determine the defamatory nature of the imputations in a declaratory action would, in our view, destroy the essential requirement of speed which here outweighs the desirability of community input. Apart from ruling on the defamatory nature of the imputations, a judge in a declaration claim performs functions eminently suited to a judge alone - namely, the determination of the falsity of the imputations;⁴⁸ the triability of certain defences in an action for damages; and the exercise of a

judicial discretion as to whether or not the remedy should be granted and, if so, in what form. Indeed, the latter two issues, which involve questions of law, could not be dealt with by a jury in any event.

Recommendation 17

A declaration of falsity should be heard by a judge alone.

6.36 The Commission believes that the introduction of the declaration of falsity will not require the commitment of significant judicial and court resources. The issues in declaratory proceedings are narrowly drawn and can usually be promptly disposed of. The plaintiff will file originating process pleading the imputations. At trial, the defamatory nature of the imputations will generally be decided on the pleadings. If the defendant appeals to the court's discretion or points to a possible defence of absolute privilege, protected report or court or official notice, a summary ruling is required. If the court decides against the defendant, the court would then decide whether or not a declaration should be granted.

6.37 The threat to the speed and efficiency of declaratory proceedings comes from those cases where the defendant wishes to present significant evidence of truth, or the plaintiff relies on a true innuendo. It will, of course, generally be reasonable, subject to the court's discretion, to allow defendants to interrogate as to the issue of truth. But, with the onus on the plaintiff to prove falsity, the elimination of defences and of all issues going to damages, the scope of any discovery or interrogatories will be narrowly confined.⁴⁹

The publication of the declaration of falsity

6.38 The declaratory judgment must be published to be effective. The Commission has considered the argument that ordering the defendant to publicise a declaratory judgment may be viewed by some as a serious intrusion on freedom of speech or of the press.⁵⁰ However, the Commission does not now propose that defendants be forced to adopt statements with which they disagree. Nor do we propose that they be ordered to retract or apologise, which would seriously erode editorial freedom. The order should simply be to publish the judicial finding of falsity made by the court against them, much as they do now voluntarily in relation to determinations against them by the Press Council. Compliance with that order can clearly be distinguished from the defendant's own views.

6.39 The Commission does not view the requirement that the defendant publish the court's declaration as offensive to any known constitutional or other norms of free speech or of freedom of the press. Where the plaintiff proves falsity, it appears that such an order does not violate even the extensive protection of free speech and freedom of the press in the First Amendment to the United States Constitution.⁵¹ It therefore seems unlikely to violate the more limited freedom of political discussion in the Australian Constitution (which does not, in any event, explicitly refer to freedom of the press).⁵² Further, the Commission notes that, in the case of media defendants, the action of publishing the court's declaration could be seen as giving effect to their ethical obligation to "do their utmost to correct any published or broadcast information found to be harmfully inaccurate".⁵³

6.40 The Commission has considered whether defendants should be able to avoid publishing the declaration by paying for a sufficiently prominent advertisement in a competing publication. However, there may not be any other publication which is capable of reaching substantially the same audience. Other problems may arise where all of the media outlets in a particular location run the same defamatory story. Accordingly, the Commission recommends that the unsuccessful defendant should be ordered to provide an adequate remedy for the wrong done to the plaintiff.

6.41 To ensure that plaintiffs receive an adequate remedy, the Commission proposes that the Court's order should ensure that the published declaration, in its location and prominence, is reasonably likely to reach

substantially the same audience as the original publication. The guidelines in Chapter 8 for determining the adequacy of a requested correction are applicable to this exercise.⁵⁴

6.42 This recommendation is directed primarily at media publications. It could be tailored to fit other situations, in order to ensure that the plaintiff's reputation is vindicated by giving the same publicity to the declaration as was given to the original defamatory imputation. For example, if a false defamatory statement is published on a club noticeboard, the court could order that the declaration be published in the same place with the same prominence and for the same length of time.

6.43 There may be a concern that defendants would choose not to bother defending an action for a declaration where they have no liability in damages. However, in such cases, the declaration could state that the defendant has not defended the action, which could be seen as an admission of guilt. And the defendant will be liable in costs and ordered to publish the declaration. Thus, the court's findings will be publicised anyway, in terms less favourable to the defendant than if it had defended the action.

Recommendation 18

The defendant should be ordered to publish the declaratory judgment as delivered by the court.

Costs

6.44 Costs in a fully litigated defamation suit are substantial. It has been argued that damages are a necessary remedy to cover such costs.⁵⁵ However, in a declaration of falsity, no matter which party succeeds, the costs liability must be far lower than it is for a fully litigated defamation action simply because the issues are narrowly drawn. If the defendant does not wish to dispute the issue of truth or falsity, the costs will not be very great at all. The availability of the procedure and the prospect of an order for costs may well encourage defendants to publish corrections voluntarily more often. The Commission is of the view that where successful plaintiffs have chosen to seek a remedy designed to restore their reputation, rather than to compensate for its loss, they should be entitled to costs, prima facie on an indemnity basis. The reason is that there will be no fund of damages from which any discrepancy between party and party and solicitor and client costs can be met.

6.45 The normal costs rule is that the successful party recovers costs on a party and party basis⁵⁶ unless, pursuant to statute, rules of court or its general discretion,⁵⁷ the court awards costs on an indemnity basis.⁵⁸ In practice, costs are seldom awarded on an indemnity basis. The reluctance of courts to award costs on this basis justifies a prima facie rule from which courts will have to justify any departure in the circumstances of the individual case. It is neither possible nor desirable to lay down in advance a list of circumstances which the Court should take into account in deciding whether or not to depart from an award of indemnity costs. Nor does the Commission attempt to specify the circumstances in which "indemnity costs" should mean (as they usually do) all reasonable costs, with any doubts as to what is reasonable being resolved in favour of the receiving party,⁵⁹ as opposed to a complete indemnity (that is, everything the plaintiff has actually spent).⁶⁰

6.46 The Commission has carefully considered whether its recommendation that successful plaintiffs should, prima facie, be awarded indemnity costs pursuant to a declaration of falsity breaches the constitutional implication of freedom of political discussion. In *Theophanous* the reasoning of the majority was based on a desire to protect freedom of political discussion from the chilling effect of damages awards.⁶¹ The Commission notes that Justice Deane was of the view that a liability for costs can have a like chilling effect.⁶² There is, however, no Australian legal procedure known to us in which the loser does not run the risk of paying costs. In any event, we believe that where the plaintiff must prove falsity and the defendant has no liability in damages, the imposition of indemnity costs, subject to the discretion of the court, on an unsuccessful defendant to a declaratory judgment is consistent with the constitutional implication.

Recommendation 19

A plaintiff who successfully obtains a declaration of falsity should be awarded costs on an indemnity basis unless the court determines otherwise.

Economic loss

6.47 The Commission is of the view that a grant of a declaration of falsity should not preclude any claim in the same proceedings for economic loss caused by the defamation, provided that the claim is determined after the declaration has been made. Any issues which have been resolved by the declaratory judgment proceedings will also be established for the claim for economic loss, bearing in mind that, with the exception of the availability of all current defences, the same substantive rules apply to both. Defendants who can establish any of the affirmative defences currently available to a claim for damages should not be liable for economic loss. Discovery and interrogatories relevant to these defences and to the claim for special damages would be allowed, but only after the declaration is made so as not to impede the prompt determination of the declaration. To the extent that a plaintiff obtains advantages from having certain issues determined in proceedings for the declaratory judgment, this should be seen as a reward for not seeking general damages.

Recommendation 20

A plaintiff who successfully seeks a declaration may go on to recover damages for economic loss in the same proceedings, but only after the declaration has been made. All affirmative defences should apply to that part of the proceedings in which economic loss is claimed.

The declaration of falsity and the constitutional implication of freedom of political discussion

6.48 In fashioning the declaration of falsity, the Commission has been concerned to ensure that the new remedy does not fall foul of the constitutional implication of freedom of political discourse. In our view, a remedy whose simple object is to vindicate reputation by declaring whether or not defamatory material which the defendant published of and concerning the plaintiff is true or false cannot generally be regarded as having a chilling effect on freedom of speech.

6.49 It may be argued that the remedy breaches the constitutional implication in the case of statements published in the course of political speech. The argument here would be that the imposition of strict liability for false statements is incompatible with the tolerance which freedom of speech requires be given, in an action for damages, to defamatory and false material published without knowledge of falsity, carefully and reasonably. The basis of the argument is found in the joint majority judgment of Chief Justice Mason, Justices Toohey and Gaudron in *Theophanous*.⁶³ Their Honours held the constitutional implication does not protect statements which are knowingly false, or made with reckless disregard for their truth or untruth. "The public interest to be served does not warrant protecting statements made irresponsibly".⁶⁴ In addition to these concepts derived from American law, the Court imposed a requirement that the publication be reasonable in the circumstances, involving taking steps to check the accuracy of the material where "the standards and expectations of the community" demand it.⁶⁵ No defences of this sort are available to the Commission's proposed declaration of falsity.

6.50 Ultimately, the Commission regards this argument as being without foundation, since the effect of the existence or otherwise of specified defences cannot be isolated from the cause of action generally or from the remedy sought. The rationale underlying the decisions of all four majority judges in *Theophanous* was the concern to avoid the chilling effect on political discussion caused by the onus on the defendant to prove truth and the prospect of unlimited liability in damages should it fail.⁶⁶ Under the Commission's proposals, the onus is on

the plaintiff to prove falsity⁶⁷ and there is here no liability in damages. Further, the requirement that the judicial declaration be published⁶⁸ effectively ensures the free flow of information to the public (in addition to vindicating the plaintiff's reputation). We believe that our suggested approach advances, rather than impairs, the cause of freedom of political discussion and freedom of speech generally. The declaration of falsity should, therefore, be available even in the context of the political discussion to which the constitutional implication applies. We find some support for this view in the judgment of Justice Deane in *Theophanous*.

6.51 In *Theophanous*, Justice Deane expressed the view that the constitutional guarantee of freedom of political communication required that State defamation laws should not apply *at all* to render a citizen liable in damages for criticism of the official conduct of high public officials.⁶⁹ He thus took a more radical view than the joint judgment of Chief Justice Mason and Justices Toohey and Gaudron, who would impose liability where the defendant failed to make out the elements of the "implied freedom of speech" defence.⁷⁰ Justice Deane stated that the application of the constitutional guarantee to State defamation laws did not affect the laws of contempt, and then added:

Nor should anything in this judgment be understood as precluding the establishment of alternative procedures (not involving the imposition of liability to pay damages or costs) to which a parliamentarian or other holder of high office might resort for the purpose of vindicating his or her reputation when subjected to unjustified attack.⁷¹

Thus, even under Justice Deane's radical view, remedies directed to the vindication of reputation are consistent with the constitutional implication if they have no chilling effect in damages or costs. The declaration of falsity involves no liability in damages and, as we have pointed out in para 6.46, the costs rules which we propose do not, we believe, have a chilling effect on freedom of speech.

OTHER REMEDIES

6.52 The Commission has also considered the availability of two other remedies in defamation cases: injunctive relief and account of profits.

Injunctions

6.53 Two sorts of injunctions may be of use in the law of defamation. First, a prohibitory injunction which seeks to restrain the defendant from publication of matter which is potentially defamatory of the plaintiff. Secondly, a mandatory injunction which is designed to restore the plaintiff's reputation consequent on the defendant's publication of defamatory matter of and concerning the plaintiff.

6.54 Clearly, the most effective way of preventing injury to a plaintiff's reputation, especially where that injury is merely threatened, is to prohibit publication of the offending matter by interlocutory injunction. The objection to doing so is that such a prohibition inhibits freedom of speech, that is, freedom of speech as recognised by the common law which is wider than the constitutional freedom in so far as it is not limited to political discussion. The current law has developed expressly with this consideration in mind,⁷² so that interlocutory injunctive relief is only rarely available in defamation cases where, in the circumstances of the particular case, there is clearly no threat to the public interest in freedom of speech.⁷³ The Commission believes that the current law is satisfactory and proposes no change to it.

6.55 It is also possible that mandatory orders can be framed requiring defendants to issue correction statements aimed at vindicating the reputations they have harmed. The New Zealand Court of Appeal has recently recognised that an injunction to this effect can be issued in principle in cases of injurious falsehood and defamation.⁷⁴ The Commission does not favour the incorporation of a general mandatory injunction remedy of this sort in any statutory reform of the law. First, correction orders intrude on the principles of freedom of speech and of the press, since they require defendants to publish, *as their own statement*, something which they may not believe to be true.⁷⁵ This differs substantially from being compelled to publish the declaration of a court, identifying it as such.⁷⁶ Secondly, unlike the Commission's proposed declaration of falsity where the emphasis

is on the truth or falsity of the published imputation, it is questionable whether procedures could be put in place to ensure the rapid determination of correction orders.⁷⁷

6.56 This leaves open the possibility that a court may, in its equitable jurisdiction, issue a correction order in the form of a mandatory (and, usually, interlocutory) injunction if, in all the circumstances of the case, it is appropriate to do so. The Commission believes that it is sensible to leave any development of the law in this respect to the equitable jurisdiction of the courts. That jurisdiction is sensitive to the considerations mentioned in para 6.55, especially to the intrusive effect of mandatory orders,⁷⁸ and is well developed to determine and fashion relief according to the particular circumstances of the case.

Account of profits

6.57 The availability of account of profits in defamation cases has never been put to the test in Australian law. It has sometimes been argued that a plaintiff ought to be allowed to mount a restitutionary claim to recover from the defendant profits made at the plaintiff's expense,⁷⁹ especially in cases where the defendant has deliberately calculated that the profits to be made from publication outweigh any damages it may have to pay to the plaintiff.⁸⁰ We do not consider that this remedy should be developed as a general remedy in defamation cases because it is not addressed to the purpose of vindicating the plaintiff's reputation. We also consider that the uncertainties generated by the difficulties of calculating its quantum may (like large awards of damages) have a chilling effect on freedom of speech. We also note that the argument that the remedy ought to apply in cases of calculated wrongdoing has strong punitive overtones. It is, indeed, to such cases (amongst others) that English law restricts the availability of exemplary damages,⁸¹ which are not available in defamation cases in New South Wales.⁸²

FOOTNOTES

1. New South Wales Law Reform Commission, *Defamation* (DP 32, 1993), Chapter 2.
2. See paras 6.55-6.56.
3. Australian Press Council, Nine Network Australia, Consolidated Press Holdings: *Submissions*.
4. Law Society of NSW, Young Lawyers Section of the Law Society, Law Institute of Victoria, Australian Broadcasting Corporation: *Submissions*.
5. See para 2.11.
6. DP 32 para 2.8.
7. See paras 6.33-6.37.
8. See paras 6.38-6.43.
9. See paras 4.7-4.15.
10. M R Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA" (1995) 18 *UNSW Law Journal* 300 at 312-316. See *Australian Capital Television Pty Limited v Commonwealth* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ (declarations can be seen as "conducive to the overall availability of the effective means" of political (and other) communication). See also *Miami Herald Publishing Co v Tornillo* (1974) 418 US 241 at 250-251.
11. *Dun & Bradstreet, Inc v Greenmoss Builders Inc* (1986) 472 US 749 at 768 note 2, per White J (concurring). White J rejects the argument that only the interplay of ideas in the media can generate truth; even in the US, courts in libel cases are entrusted with making findings of whether what was published was true or false; if they were not competent to do this, then no libel suits could be allowed at all.

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12. For economic loss, see para 6.7.
13. See para 6.47.
14. See paras 6.19-6.20.
15. See para 6.12. The potential for an action for damages here lies in a plaintiff's ability to establish that the imputation is not capable of being proved true or false: see Recommendation 8 in Chapter 4.
16. See paras 6.13-6.15.
17. See *Defamation Act 1974* (NSW) s 9(3).
18. Indeed, the requirement of having to prove the falsity of the pleaded imputation should help to ensure that strained or forced imputations are not pleaded in the first place. An imputation that "The plaintiff is a bad playwright" would not be pleaded unless the plaintiff could prove he or she was a good playwright - a difficult task given the value judgments inherent in such a statement. See *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166. Cf B Reichel, "Artists, Critics and Defamation Law Reform" (1994) 2 *Torts Law Journal* 26.
19. See paras 6.28-6.30 regarding contextual truth.
20. See I Zamir, Lord Woolf and J Woolf, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993) Chapter 4; E Borchard, *Declaratory Judgments* (2nd ed, Banks-Baldwin Law Publishing Co, Cleveland, 1941) Chapter 6.
21. See paras 6.14-6.15.
22. See, for example, paras 6.31, 6.42.
23. See Zamir and Woolf at Chapter 4.
24. In cases where the plaintiff has agreed to accept a prompt and adequate correction in satisfaction of his or her claim, the principles raised by the general tort defences of release (or accord and satisfaction) would apply and usually deny any further remedy: see further Chapter 8. See also *Hogg v Scott* [1947] KB 759 at 767 (effect of delay on declaratory proceedings).
25. Under *Defamation Act 1974* Division 8 ss 36-46.
26. See generally *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* [1926] 2 AC 438 at 448.
27. See Chapter 9.
28. Zamir and Woolf at para 6.12.
29. For the avoidance of doubt, the Commission stresses that this discussion concerns affirmative defences available in the law of defamation. Defences available to all claims at general law (such as consent, accord and satisfaction, release and estoppel) may, of course, operate to defeat a declaration of falsity: see *Gatley on Libel and Slander* (8th ed, Sweet & Maxwell, London, 1981) at paras 851-865; *Ettingshausen v Australian Consolidated Press Limited* (1993) A Def R [51,065] per Hunt J (consent).
30. See para 4.15.
31. See para 2.12.
32. See Chapter 11.

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33. See Chapter 12.
34. See paras 12.28-12.29.
35. See paras 6.34-6.37.
36. An example is *Rajski v Carson* (1988) 15 NSWLR 84.
37. See New South Wales Law Reform Commission, *Report of the Law Reform Commission on Defamation* (LRC 11, 1971) Appendix D at para 121.
38. See DP 32 at 2.107.
39. For the issues arising under the constitutional implication of freedom of political discussion, see paras 6.48-6.51.
40. See Chapter 5. While “actual malice” creates the worst problems, difficulties also arise where plaintiffs must prove a lesser standard of fault, such as those private figure plaintiffs who need prove only negligence.
41. D A Barrett, “Declaratory Judgments for Libel: A Better Alternative” (1986) 75 *California Law Review* 847 at 853-856; G C Cook, “Reconciling the First Amendment with the Individual’s Reputation: the Declaratory Judgment as an Option for Libel Suits” (1989) 93 *Dickinson Law Review* 265 at 265-266, 271-273.
42. Barrett at 864 and note 104; J S Hulme and S M Springer, “Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation”, in J Soloski and R P Bezanson (eds), *Reforming Libel Law* (Guildford Press, New York, 1992) at 165-167; R A Smolla, “The Annenberg Libel Reform Proposal” in Soloski and Bezanson at 234. But cf M A Franklin, “A Declaratory Judgment Alternative to Current Libel Law”. (1986) 74 *California Law Review* 809 at 819 note 35.
43. DP 32 at para 2.105; Chesterman (1995) at 320-322; J G Fleming, “Retraction and Reply: Alternative Remedies for Defamation” (1978) 12 *University of British Columbia Law Review* 15 at 16.
44. *Defamation Act 1974* (NSW) s 16. See LRC 11, Appendix D, paras 73-74.
45. England, Law Reform Committee, *Report on the Law of Defamation*, Cmnd 7536 (1948) (Porter Committee Report) at para 80.
46. *Defamation Act 1974* (NSW) s 13.
47. See paras 4.26, 6.12.
48. See para 3.15.
49. Franklin at 828-830; Barrett at 877-879; R A Smolla, “Taking Libel Reform Seriously” (1987) 38 *Mercer Law Review* 793 at 798-799, 802.
50. See DP 32 para 2.113.
51. *Miami Herald Publishing Co v Tornillo* (1974) 418 US 241 at 258-259; *Coughlin v Westinghouse Broadcasting and Cable Inc* (1988) 689 F Supp 483 at 489-490; *Kramer v Thompson* (1991) 947 F 2nd 666 at 680-682; Model Communicative Torts Act, para 9-107 (see (1990) 47 *Washington and Lee Law Review* 1 at 64).
52. Nor may it need to. The Commission notes that a recent US based survey has found that Australia (together with Belgium) has the world’s least restrictive media environment: see W Harris, “Australia Tops Press Survey Freedom” (1995) 2 *Media Law Reporter* 152.

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53. Registered Rules of the Media, Entertainment and Art Alliance, Rule 64 (Journalists' Code of Ethics), Item (j).
54. See paras 8.11-8.16.
55. Law Institute of Victoria, *Submission* (2 December 1993) at paras 2.1.4, 2.3.2, 2.4.1. This argument does have serious flaws: it could not be suggested that damages should remain high in any other area of law where costs are high.
56. See *Legal Profession Act 1987* (NSW) Pt 11 Div 6.3.
57. See, for example *Colgate-Palmolive Company Pty Ltd v Cussons Pty Ltd* (1993) 46 FCR 226 at 233-234; *Rouse v Shepherd (No 2)* (1994) 35 NSWLR 277 at 279, 280-281.
58. The immediate source of the Supreme Court's general power to award costs is s 76 of the *Supreme Court Act 1970* (NSW). See also *Supreme Court Rules 1970* (NSW) Pt 52 r 28A; *Legal Profession Act 1987* (NSW) s 208I and s 208F(3).
59. *Legal Profession Act 1987* (NSW) s 208F(3); *Supreme Court Rules 1970* (NSW) Pt 52 r 28A.
60. This is the equivalent of an award of costs on a trustee basis: *Supreme Court Rules 1970* (NSW) Pt 52 r 31(4).
61. See Mason CJ, Toohey and Gaudron JJ at 130-133; Deane J at 175-177, 184-186.
62. *Theophanous* at 187.
63. *Theophanous* at 137.
64. At 134.
65. At 138.
66. *Theophanous* at 132, 175-177. The joint judgment noted that this chilling effect has been reduced in Australia by the decision in *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44.
67. See paras 4.7-4.15.
68. See paras 6.38-6.43.
69. (1994) 182 CLR 104 at 185-186. See also *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211 at 257.
70. As it was termed by Levine J in *Williams v John Fairfax & Sons Limited* (unreported, Supreme Court of NSW, 24 October 1994, CLD 10872/89) at 10-11. The joint judgment in *Theophanous* also broadened the protection available under common law qualified privilege for political discussion: see paras 10.6.
71. *Theophanous* at 187.
72. See R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992) at para 2126.
73. See *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153; *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747.
74. *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 436.

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75. See England and Wales, Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) (Neill Report) at 145. See also DP 32 at para 2.76.
76. See paras 6.38-6.43, 6.50.
77. DP 32 at paras 2.78-2.81. Cf paras 2.87-2.91.
78. See Meagher Gummow and Lehane at paras 2191-2197.
79. See Lord Goff and G Jones, *The Law of Restitution* (4th ed, Sweet & Maxwell, London, 1993) at 722.
80. See Goff and Jones at 723; P Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985) at 326-327.
81. *Rookes v Barnard* [1964] AC 1129 at 1226-1227.
82. *Defamation Act 1974* (NSW) s 46(3)(a).

7. Aspects of Damages

7.1 Although recommendations in this Report seek to increase the range of alternative remedies, damages will remain a major remedy in defamation litigation in New South Wales. In this chapter we address the question of the reforms (if any) which should be made to the law of damages in the context of actions for defamation. Most of these issues were addressed in some detail in DP 32. However, since the publication of DP 32, a change of major practical significance has occurred in the law of damages in defamation cases in New South Wales - namely, the removal of the jury from the determination and assessment of damages and the allocation of that function to the court in all cases.¹ In Chapter 3 of this Report, we explain why we support this change in the law.²

7.2 The allocation of the determination and assessment of damages to the judge rather than the jury means that some of the matters which we raised in relation to damages in DP 32 are no longer live issues. For example, there is no longer any need to consider the nature of the directions which judges should give juries for the purpose of assessing damages.³ Nor is there any need to discuss whether or not the ability of the Court of Appeal to substitute its own verdict for that of the jury should be enlarged.⁴ Where an appeal on damages comes from a verdict of a judge alone, such an appeal is by way of rehearing⁵ and the court has the powers of the court from which the appeal is brought including the power to assess damages.⁶

7.3 The Commission's recommendation that falsity should form an ingredient of the cause of action in defamation also affects the law of damages. Most immediately, it raises the question of the role which falsity now has in the assessment of damages.⁷ Its major effect, however, is that vindication will no longer generally be a factor influencing the level of awards of damages, since a successful plaintiff's vindication will come principally from the court's finding of falsity.⁸ This reinforces the compensatory function of damages in defamation cases. The Commission has considered the practical implications of this for the whole of the law of damages in defamation and has come to the conclusion that the change in emphasis will have a beneficial effect on that law. We consider it necessary to comment on the impact of the change in the cause of action on only two aspects of the law of damages in defamation: aggravated damages⁹ and the award of interest on damages.¹⁰

COMPARISON WITH AWARDS IN PERSONAL INJURY CASES

7.4 Section 46A(1) of the *Defamation Act 1974* (NSW), which was inserted by the *Defamation (Amendment) Act 1994*, requires the court, in assessing damages in a defamation case, to ensure that there is "an appropriate and rational relationship between the relevant harm and the amount of damages awarded". Such a relationship may be determinable with relative ease in the case of economic loss. But in the case of non-economic loss, where the award compensates for losses (injury to reputation and injury to feelings) which have no objective monetary value, that relationship is difficult to establish - especially if the award must also serve to vindicate the plaintiff's reputation. Section 46A(2) of the Act attempts to provide a standard to which the court must have regard in attempting to set the appropriate and rational relationship between the harm suffered and the damages which it awards. That section requires the court, in assessing damages for non-economic loss, to have regard to the general range of damages for non-economic loss in personal injury awards (including the amounts awarded pursuant to statutes which may regulate the award of damages in particular areas of law). The most important statutes which apply to regulate awards of damages in personal injury cases in New South Wales are the *Motor Accidents Act 1988*¹¹ and the *Workers Compensation Act 1987*.¹²

7.5 Section 46A of the *Defamation Act* reflects developments in case law. In *Carson v John Fairfax & Sons*,¹³ a majority of the High Court held that it is legitimate for appellate courts, called upon to consider the quantum of a defamation award, to have regard to the amounts awarded in personal injury cases for the purposes of comparison, the justification being that the scale of awards for non-economic loss in cases of serious personal injury must transcend injury to reputation. The majority also said, obiter, that they saw "no significant danger in permitting trial judges to provide to the jury an indication of the ordinary level of the general damages component of personal injury awards for comparative purposes, nor in counsel being permitted to make a similar reference."¹⁴

7.6 However, in the new trial on damages in the *Carson* case,¹⁵ Justice Levine declined to direct the jury for the purposes of assessing damages on the level of awards in personal injury.¹⁶ His Honour thought that there were three insurmountable difficulties in following such a course.¹⁷ First, there was the conceptual

difficulty which had been forcefully identified in the dissenting judgments in *Carson* and in a number of English cases. It is that there is no genuine basis for comparison between damages aimed at pain and suffering and loss of the amenities of life in personal injury cases and damages for injury to reputation and feelings and for vindication in defamation actions.¹⁸ And even if there were, to which personal injury scale is the comparison appropriate - that provided by the common law or by legislative schemes with their statutory caps?¹⁹ Secondly, problems of trial management arise - are all the details of personal injury cases to be put in evidence thereby prolonging, perhaps for substantial periods, the defamation proceedings?²⁰ Thirdly, there are related evidentiary problems - how are details of awards in personal injury cases to be put in evidence?²¹

7.7 The Commission has carefully considered whether the objections which Justice Levine raised in *Carson's* case mean that personal injury awards should never be used as a point of comparison in determining the quantum of defamation damages even where damages are assessed by a judge alone. In our view, for the reasons set out in paras 7.8-7.10, they do not. We do not, therefore, recommend any change to s 46A(2) of the *Defamation Act*.

7.8 First, the evidentiary and trial management problems to which Justice Levine draws attention in *Carson's* case largely disappear where damages are assessed by a judge alone. The judge's knowledge and experience will enable him or her to identify more easily and quickly those personal injury cases to which a comparison is appropriate. Further, the judge has control over the proceedings and will be able to indicate what form of assistance is required from counsel on this issue.

7.9 As far as the conceptual problem is concerned, the legislation partially solves this by specifying that the judge must have regard to the range of all personal injury awards in New South Wales, including those regulated by statute. Presumably this requires judges to use only the broadest of brushes, and does not require them to engage in a lengthy analysis of the policies underlying differing levels of personal injury damages and how those differing levels should be reflected in the defamation case at hand.

7.10 It is true that the fundamental objection remains that non-economic harm in personal injury and defamation cases are not comparable. This is particularly so in cases of serious defamation where vindication has been the dominant factor in the award.²² The Commission's recommendations result generally in the removal of the vindicatory factor from awards of damages. This obviously alleviates the conceptual objection to the extent to which the comparison will now be between species of non-economic loss both clearly concerned with compensation. The Commission accepts that the species of non-economic loss in defamation cases on the one hand, and personal injury cases on the other, are still not comparable. However, bearing in mind that the figure selected as compensation for non-economic loss in any case is necessarily somewhat arbitrary, the Commission does not believe that this in itself justifies a departure from the existing law, the justice and efficiency of which has yet to be put to the test.

CAPPING DAMAGES

7.11 DP 32 raised the possibility of creating a cap on general damages awarded in a defamation action.²³ Media submissions to the Commission supported a capping of damages at a figure of \$100,000, if juries were retained to determine damages.²⁴ Other submissions considered a cap on damages to be an irrational reaction to the occasional excessive jury verdict.²⁵

7.12 The argument for capping damages is the certainty which the existence of a maximum amount and a scale would infuse into the assessment of damages in defamation cases; this, in turn, would promote settlements. In addition, aberrant "excessive" verdicts would not occur. Capping would also promote freedom of speech since defendants would be aware in advance of their maximum liability.²⁶

7.13 The other side of the coin is that a cap on damages could encourage excesses on the part of the media which could balance expected profits from the sale of defamatory matter against a known maximum liability in damages.²⁷ Another danger of a cap on damages is that it could have the effect of inflating awards if vindication were seen to occur only in cases in which the award was at or near the cap. This danger is obviously reduced where vindication comes, generally, from the finding of falsity in the reasons for judgment.

7.14 The Commission has concluded that a case for capping damages has not been made out, since:

There is a lack of empirical evidence from which it is possible to conclude that jury awards in New South Wales are, in general, “excessive”.²⁸

The risk of “excessive” awards is reduced where, by force of the Commission’s recommendations, the vindictory factor is generally removed from awards of damages.

The risk of excessive damages awards is reduced where damages are determined by judges alone. This is now the law and the Commission’s view of what the law ought to be.²⁹

The latter change in practice will, the Commission believes, result in the development of consistent awards of damages within a recognisable range, the peaks and troughs of jury awards being flattened. This is strengthened by the consideration that the statutory requirement for a judge to refer to personal injury awards to arrive at a suitable defamation award in effect creates a cap and range of sorts, for a statutory maximum applies to damages for non-economic loss in motor accident and workers’ compensation cases³⁰ (which constitute the bulk of personal injury litigation in New South Wales).

7.15 The Commission is not suggesting that amounts awarded as damages for non-economic loss by judges will necessarily be, or ought to be, lower than those awarded in the past by juries.³¹ Indeed the average may well rise where judges publish reasons for their awards and focus on the factors which have influenced their decisions on quantum. The amounts that have been awarded as damages for defamation by judges in other jurisdictions seem to support this.³²

THE EFFECT OF FALSITY ON DAMAGES

7.16 Under section 47 of the *Defamation Act 1974* (NSW) evidence of the truth or falsity of the imputation may be given by either party on the question of the amount of damages: the plaintiff leads evidence of the falsity of the imputation to show the extent of injury to reputation or to aggravate the damages;³³ while the defendant leads evidence of the truth of the imputation to mitigate damages. The Commission recommends, in Chapter 4 of this Report, that falsity should be an essential ingredient of claims for damages for defamation. The implementation of this recommendation requires repeal of the current section 47. Quite clearly, the defendant will no longer be able to lead evidence of the truth of the imputation in mitigation of damages, for the imputation will have been found to be false. And section 47 has no further role to play where the plaintiff does not rely on the falsity of the imputation, but proves instead that the imputation does not relate to a matter of public interest. In such cases, even if the falsity of the imputation could be established, that falsity can logically only operate on the extent of damage to the plaintiff’s reputation, and this is not in issue.

7.17 Further, there will no longer be a need for a special provision authorising the practice of leading evidence of falsity on the issue of damages in order to show the extent of the harm to the plaintiff’s feelings. The provision is necessary under the existing law to enable the plaintiff, in the absence of a plea of justification, to raise falsity as a factor relevant to damages, there being, in the law of New South Wales, no presumption of falsity arising from the publication of defamatory matter.³⁴ The need for such a provision falls away where falsity is an ingredient of the cause of action so that the plaintiff can, obviously, put in all evidence relevant to the issue.

7.18 Where the defendant’s conduct is improper, unjustifiable or lacking in bona fides and consequently results in increased harm to the plaintiff’s reputation or feelings, the plaintiff may lead evidence of that conduct to augment the damages. Such damages are known as aggravated damages.³⁵ There are aspects of the defendant’s conduct which may aggravate damages and which may be connected with the falsity of the imputation; for example the plaintiff’s awareness of the defendant’s knowledge that the imputation was false, or the defendant’s reckless disregard of the truth or falsity of the imputation. Such factors will continue to aggravate damages under the Commission’s proposals. No legislative provision is necessary to achieve this result.

Recommendation 21

Section 47 of the *Defamation Act 1974* should be repealed.

7.19 We have described aggravated damages in para 7.18. Their essential function is to inflate an award of damages by reason of the increased harm presumed to be suffered by the plaintiff as a result of the defendant's outrageous conduct. The reference to the defendant's conduct means that awards of aggravated damages are often seen as containing a punitive element.³⁶ Indeed, their inevitable confusion with exemplary damages has led to a call for their general abolition by the Ontario Law Reform Commission,³⁷ and the Law Commission of England and Wales has tentatively reached a similar conclusion,³⁸ although both recommendations are premised on the general availability of exemplary damages. We have already pointed out that exemplary damages are not recoverable in defamation cases in New South Wales;³⁹ nor do we recommend that they should be.⁴⁰ Further, our recommendation that falsity should be an ingredient of the cause of action in defamation results inexorably in an emphasis on the compensatory role of damages. We have, therefore, considered whether or not we should follow the path suggested by the Ontario and English Commissions. Our conclusion is that we should not.

7.20 The Commission continues to regard aggravated damages as performing a valuable role in the law of damages in the context of defamation. First because such damages are reconcilable with the compensation principle - they compensate for the increased harm to the plaintiff's reputation and feelings which flows from the defendant's bad conduct.⁴¹ Secondly, because, by isolating aspects of the defendant's conduct which will give rise to aggravated damages, they not only provide some objective yardsticks for the assessment of damages in cases which essentially involve matters of impression, but also alert defendants to the sort of conduct which will increase the award of damages against them. It is not to the point that, incidentally, awards of aggravated damages may operate as restraints on defendants' conduct. All awards of compensatory damages may have this effect.

INTEREST ON DAMAGES

7.21 Both the Supreme Court and the District Court have power to award interest on damages.⁴² The object of an award of interest on damages is to compensate successful plaintiffs for the detriment they suffer by the delay in receiving the damages to which they theoretically become entitled at the time of the defendant's wrong.⁴³ The court has a wide discretion in any case to determine whether or not an award of interest should be made, and if so, for what period of time, on what heads of damage and at what rate.⁴⁴ It is established that, generally, the power to award interest extends to the award of interest on both economic and non-economic losses,⁴⁵ but not to losses whose practical effect will only be felt in the future.⁴⁶

7.22 The decision of the New South Wales Court of Appeal in *Kelly v John Fairfax & Sons Ltd*⁴⁷ establishes that, in defamation cases, the plaintiff is entitled, in principle, to an award of interest on the whole of an award of damages (that is, for injury to reputation and injury to feelings, and for vindication) between the date of publication and the date of trial.⁴⁸ The Commission is conscious that interest can inflate awards significantly in defamation cases. In *Kelly's* case, the interest was \$25,875 on a damages award of \$115,000, while in *Australian Consolidated Press v Driscoll*⁴⁹ the interest was \$36,000 on a damages award of \$100,000. We agree with the comment of Justice Mahoney in *Driscoll's* case⁵⁰ that awards of interest on damages in non-commercial cases probably now operate beyond what Parliament intended when provision was first made for them. We have, therefore, considered whether or not we should recommend the abolition of awards of interest on damages in defamation cases. We have come to the conclusion that we should not.

7.23 First, we note that the trend in the law is to treat plaintiffs as prima facie entitled to an award of interest on all heads of damage between the date of the accrual of the cause of action and the date of judgment⁵¹ (the court's discretions in the matter of interest being reduced to a series of prima facie rules).⁵² In principle, we can see no reason why defamation plaintiffs ought to be in a different position once the Commission's recommendation that falsity be an ingredient of the cause of action is put in place. Since the award will then clearly provide for compensation for detriments already experienced by the plaintiff, an award of interest will accord with the general practice of awarding interest on past non-economic loss. It would be otherwise if the award is intended to serve principally as a demonstrative mark of vindication. Here, the award does not compensate the plaintiff for being kept out of money which represents a "detriment" whose impact is suffered before trial. "Vindictory damages" cannot, therefore, easily be accommodated within the general purpose of

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awards of interest on damages,⁵³ any more than can exemplary damages.⁵⁴ But vindication will generally be a less relevant factor in the award of damages once falsity becomes an ingredient of the cause of action.

7.24 Secondly, although Parliament has, for policy reasons, excluded awards of interest on damages in some cases - such as in workers' compensation cases⁵⁵ and on non-economic loss in motor accident cases⁵⁶ - the Commission is not aware of any arguments of policy which would compel the same conclusion in the context of the law of defamation.

FOOTNOTES

1. *Defamation Act 1974* (NSW) s 7A(4)(b), which was inserted by the *Defamation (Amendment) Act 1994* (NSW).
2. See paras 3.24-3.29.
3. DP 32 at paras 4.71-4.87.
4. *Supreme Court Act 1970* (NSW) s 107. See DP 32 at paras 4.88-4.101.
5. *Supreme Court Act 1970* (NSW) s 75A(5).
6. *Supreme Court Act 1970* (NSW) s 75A(6)(c).
7. See paras 7.16-7.18.
8. See paras 2.9, 2.14.
9. See paras 7.19-7.20.
10. See paras 7.21-7.24.
11. *Motor Accidents Act 1988* (NSW) Part 7.
12. *Workers Compensation Act 1987* (NSW) Part 5.
13. (1993) 178 CLR 44.
14. *Carson* (1993) at 59.
15. *Carson v John Fairfax & Sons Ltd* (1994) 34 NSWLR 72.
16. See also *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 72-73 per McHugh J dissenting.
17. *Carson* (1994) at 87-91.
18. See especially *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 111-112 per McHugh J dissenting.
19. *Carson* (1994) at 90-91.
20. *Carson* (1994) at 88-89.
21. *Carson* (1994) at 89-90.
22. See *Carson* (1994) at 77 per Brennan J dissenting.
23. DP 32 at paras 4.53-4.64.

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24. See Nine Network Australia, Consolidated Press Holdings: *Submissions*.
25. M G Sexton, *Submission* (1 November 1993).
26. DP 32 at paras 4.57-4.58.
27. DP 32 at para 4.63.
28. See para 3.25.
29. See paras 3.24-3.29.
30. See *Workers Compensation Act 1987* (NSW) s 151G; *Motor Accidents Act 1988* (NSW) s 79.
31. See Peter Bartlett, Evidence to the Legislation Committee, quoted in Parliament of New South Wales, Legislative Assembly, *Report of the Legislation Committee on the Defamation Bill 1992* (October 1992) at 13.
32. In particular the Commission refers to the Australian Capital Territory, where in 1993 there was one award of \$25,000 (plus \$3,000 in lieu of interest) (*Humphries v TWT Ltd* (1993) 120 ALR 693 (Full Federal Court increasing trial judge's inadequate award of \$8,000)) and another of \$40,000 (*Packer v ABC*): see (1994) 27 *Gazette of Law and Journalism* at 2-3; in 1995, there has been an award of \$75,000 (plus interest of \$5,500): *Hewitt v Queensland Newspapers Pty Ltd* (Supreme Court, ACT, Higgins J, 5 June 1995, SC283/93, unreported). Compare the level of awards in New South Wales set out in para 3.25.
33. In practice, objective falsity has been treated in New South Wales as a matter going to aggravated damages (eg *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 75), though it is more accurate to regard it, in itself, as a factor relevant to the extent of the harm to the plaintiff: see *Singleton v Ffrench* (1986) 5 NSWLR 425 at 443. We deal with falsity as aggravated damage in para 7.18.
34. See *Singleton v Ffrench* (1986) 5 NSWLR 425 at 441-444 per McHugh JA.
35. See *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 45 at 65-66 per Mason CJ, Deane, Dawson and Gaudron JJ, 103-104 per McHugh J dissenting. See also M J Tilbury, *Civil Remedies Volume 2* (Butterworths, Sydney, 1993) paras 11012-11023.
36. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 151-152 per Windeyer J; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 101-110 per McHugh J dissenting. See also J Stone, "Double Count and Double Talk: the End of Exemplary Damages?" (1972) 46 *Australian Law Journal* 311.
37. Ontario, Law Reform Commission, *Report on Exemplary Damages* (1991) at Chapter 5.
38. England and Wales, Law Reform Commission, *Aggravated, Exemplary and Restitutionary Damages* (CP 132, 1993) at para 6.54.
39. *Defamation Act 1974* (NSW) s 46(3)(a).
40. See para 2.23.
41. See especially *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 50-51 per Mason CJ, Deane, Dawson and Gaudron JJ.
42. *Supreme Court Act 1970* (NSW) s 94; *District Court Act 1973* (NSW) s 83A.
43. *Haines v Bendall* (1991) 172 CLR 60 at 66 per Mason CJ, Toohey and Gaudron JJ, at 79 per McHugh J (dissenting); *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 663; *Batchelor v Burke* (1981) 148 CLR 448 at 455 per Gibbs CJ; *Ruby v Marsh* (1975) 132 CLR 642 at 652 per Barwick CJ; *Thompson v Feraonio*

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- (1979) 24 ALR 1; *Pheeny v Doolan (No 2)* [1977] 1 NSWLR 601 at 604 per Moffitt P, at 613 per Reynolds JA.
44. Eg *Pheeny v Doolan (No 2)* [1977] 1 NSWLR 601 at 618 per Mahoney JA.
45. Eg *Cullen v Trappell* (1980) 146 CLR 1 at 20-21.
46. *Fire and All Risks Insurance v Callinan* (1978) 140 CLR 427; *Thompson v Feraonio* (1979) 24 ALR 1; *Pheeny v Doolan (No 2)* [1977] 1 NSWLR 601; *Bennett v Jones* [1977] 2 NSWLR 358 at 363 per Moffitt P, at 377 per Samuels JA; *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 at 137-140 per Samuels JA dissenting, at 142-143 per McHugh J.
47. (1987) 9 NSWLR 369. See also *Australian Consolidated Press v Driscoll* (1988) Aust Torts Reports 80-175; *David Syme Ltd v Maher* [1977] VR 517.
48. *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131; *Australian Consolidated Press v Driscoll* (1988) Aust Torts Reports 80-175.
49. (1988) Aust Torts Reports 80-175.
50. (1988) Aust Torts Reports 80-175 at 67,653.
51. *Haines v Bendall* (1991) 172 CLR 60 at 67.
52. The clearest example of such an approach is the decision of the Court of Appeal in *Marsland v Andjeli (No 2)* (1993) 32 NSWLR 649 which dealt with the award of interest under s 73 of the *Motor Accidents Act 1988* (NSW) and which led to Parliamentary intervention to restate the law in the *Motor Accidents (Amendment) Act 1994* (NSW).
53. See *Kelly v John Fairfax & Sons Ltd* (1985) 1 NSWLR 462 at 469-471 per Hunt J; *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 at 135-141 per Samuels JA dissenting.
54. See *Murray v Commonwealth* (1986) 5 NSWLR 83.
55. *Workers Compensation Act 1987* (NSW) s 151M.
56. *Motor Accidents Act 1988* (NSW) s 79(2).

8. Requested Corrections as a Defence

8.1 In Discussion Paper 32, the Commission proposed that defendants should be able to escape liability in damages by publishing a prompt and adequate correction.¹ Voluntary corrections of this sort would constitute a complete defence to any claim for damages for non-economic loss. Reactions to the Commission's proposals in DP 32, anecdotal evidence given to the Commission, and the Commission's own experience, all demonstrate that corrections, or sometimes apologies, are indeed what most plaintiffs seek, at least initially.² Further, a comprehensive empirical survey of plaintiffs in the United States has shown that immediately after the publication of the defamatory matter, most plaintiffs are primarily interested in the effective restoration of their reputations.³ It is only when their requests for a correction are rudely dismissed or litigation is commenced that money becomes more important - often to punish the defendant and cover the expense of the proceedings.

8.2 The Commission itself has lacked the resources to undertake a survey of defamation plaintiffs to assess whether a rapid correction would satisfy most or all of them. Defamation plaintiffs can, of course, only be identified after the fact; there is no identifiable body of plaintiffs, unlike media organisations who are institutional defendants. As a result, the Commission has decided, in conformity with our general approach of giving plaintiffs the option of selecting the remedy which they consider most appropriate in the circumstances,⁴ that plaintiffs who seek damages should not generally be denied them by being forced to accept a non-monetary remedy. The only exception to this should be where defendants are "innocent" and able to avail themselves of the offer of amends defence.⁵

8.3 Plaintiffs who feel that their injury can properly be redressed by non-monetary relief will, of course, have the option of suing for a declaration of falsity under the procedure outlined in Chapter 6. Plaintiffs who wish to avoid litigation altogether should be able to make a formal request for a prompt and adequate correction. Where that request is made pursuant to the legislation which gives effect to the recommendations in this chapter,⁶ defendants who comply with the request and pay the plaintiff's reasonable costs will be able to raise the correction as a complete defence to any later claim for damages for non-economic loss. In addition, a prompt and adequate correction would usually be a powerful influence on a judge's discretion in deciding whether to grant a declaration of falsity.⁷

8.4 Currently plaintiffs often seek a correction as an initial step while reserving their right to claim damages. Such requests are rarely complied with because there is little forensic advantage for defendants to publish one. A volunteered correction cannot bar damages but may mitigate them. Further, a published correction may result in the denial of certain defences to the defendant if it is too generous to the plaintiff and contains admissions against the defendant. There is, therefore, a risk that published corrections will be inadequate. Where, however, parties do settle their claims on the basis that a correction or apology be published by the defendant, that correction will bar a claim for damages for non-economic loss. This will follow from a term of the agreement or settlement between the parties.

8.5 The Commission recommends a formalised procedure to guide parties in achieving what is often now sought through negotiation.⁸ The aim of this proposal is to avoid litigation and provide for the correction of false and defamatory statements at a time when the reputation of the person defamed can be restored. Defendants will be able to avoid liability in damages for non-economic loss by acting quickly to correct any unintended or careless damage to a plaintiff's reputation. This will also enhance their professional standards and image. Plaintiffs who seek only the speedy correction of the public record or the airing of their views will be able to achieve these aims more easily, as defendants will now have a real incentive to publish a correction. And the public will benefit through the provision of accurate information concerning the plaintiff.

8.6 Although this procedure may pose difficulties for some defendants, such as book and magazine publishers, there are a number of possibilities which will still remain open to them, such as placing advertisements in newspapers and sending correction notices to subscribers. This will make the defence more costly for such defendants to use than it would be for a newspaper or broadcaster, but much less expensive than defending a defamation action. The Commission believes that the requested correction defence should be expressly open to all defendants, not just media defendants. Unlike certain other jurisdictions where such remedies are available (for example, most Canadian provinces), defendants will not have to establish an

additional requirement such as a reasonable belief that the matter complained of was published for the public benefit.⁹ This will narrow the issues to the promptness and adequacy of the published correction.

Recommendation 22

All defendants should be able to rely on a published correction as a defence to a claim for non-economic loss where the correction was requested by the plaintiff. A requested correction is one which complies in all respects with a request by the plaintiff for a correction or, alternatively, one which complies with Recommendations 23, 25, 26 and 27.

Procedure

8.7 A plaintiff may choose to make a formal request for a correction in accordance with the procedure outlined in this chapter at any time before commencing proceedings for defamation. The Commission recommends that a plaintiff seeking a correction must do so in writing identifying the publication complained of; the false and defamatory imputations said to arise from it; the facts, if any, which demonstrate falsity; and any special facts which give rise to a defamatory meaning other than the express language of the publication. Plaintiffs may also suggest a proposed correction. These documentary requirements are designed to allow defendants to make a full and rapid assessment of whether to publish a correction. Defendants will not have to publish the precise correction (if any) submitted by the plaintiff, provided that the correction which is published meets the tests of promptness and adequacy. The requirements will also benefit plaintiffs by ensuring that the correction will properly address the plaintiff's concerns. The requirements should not be onerous for plaintiffs.

Recommendation 23

A plaintiff seeking a correction must do so in writing prior to commencing proceedings and identify the publication complained of; the false and defamatory imputations said to arise from it; the facts, if any, which demonstrate falsity; and any special facts which give rise to a defamatory meaning other than the express language of the publication.

8.8 Should the parties be unable to agree on aspects of the publication of a correction, they should be able to apply to the court for a summary ruling. The court should be given express power to determine any question which may arise in respect thereof and which, by consent, the parties wish the court to determine. Such power would be similar to that which is given to the court under s 39 of the *Defamation Act 1974* to determine any question as to the steps to be taken in performance of an agreement resulting from acceptance of an offer of amends. Rules of Court will be needed to regulate the procedure.¹⁰ The usual provisions as to costs should apply. Even if resort to the court proves necessary, settlement of matters between the parties which results in the publication of an agreed correction should preclude costly and drawn out litigation.

Recommendation 24

The court should be given power to determine any questions which concern the steps which must be taken to comply with the requested corrections procedure and which are referred to it by agreement of the parties.

Promptness of the correction

8.9 The period selected as appropriate to allow a correction to qualify as "prompt" should ensure that defendants have time to establish whether a correction should be published, if necessary by investigating the process of publication and asking questions of sources and so on. Bearing this in mind, the Commission

recommends that where a publication is published on at least five days in each week, a correction must be published within seven days of a fully documented request.¹¹

8.10 Publications which are issued over a longer time period, such as monthly, quarterly or annual publications, should be required to publish the correction so far as is practicable in the next edition. Where the defamatory statements are published in single editions, or in other circumstances where such requirements are not applicable, defendants may have to purchase space for corrections in newspapers or other daily media. This makes the defence harder for them to use, but then they have more time to investigate and check stories before publication.¹² In addition the defence will be much cheaper and easier to use than defending a defamation action. In all cases, if the parties cannot agree on what is prompt, they should be able to seek a determination from the court in accordance with the procedure envisaged in Recommendation 24.

Recommendation 25

The correction must be prompt. For publications which are published on at least five days of each week, the correction must be published within seven days of a fully documented request complying with Recommendation 23. In other cases, the correction should be published in the next edition so far as this is practicable, or at such other time as the parties agree.

Adequacy of the correction

Placement of the correction

8.11 The adequacy of any correction is always a matter of circumstance and degree. The key requirement in deciding the adequacy of the correction must be that its location and prominence make it reasonably likely to reach substantially the same audience as the original publication. This is "a functional standard aimed at effective vindication of reputation rather than one focusing mechanistically on particular location, identity of medium, specific size of audience, or the like".¹³ It is meant to be applied flexibly and creatively rather than focusing on rigid criteria such as a minimum size typeface.¹⁴

8.12 Thus, in the case of a newspaper story published on an inside page, use of a regular corrections column at a fixed location, such as the front or back of the news section or opposite an editorial page, should suffice. Many newspapers in those US States where retraction statutes are available have established regular corrections columns. The perception held by a number of commentators is that these columns are often more widely read than most other sections of the paper.¹⁵ However, a defamatory story published on the front page or in a specialised section of the paper would usually require a correction in the same place, and the Commission proposes this as the primary rule, notwithstanding the reluctance of newspapers to publish apologies on the front page - an apparent policy which the Commission finds quite unacceptable. For broadcast defamation, a correction broadcast at the same time of day and with the same coverage would suffice.

8.13 The correction should appear in the same publication as the original defamation, unless this cannot be done within the time limit of seven days (where it applies) or at all (such as where defamatory statements are made at a rally or printed in a book or pamphlet). In those situations, publication in any medium likely to reach a reasonably equivalent audience, such as the largest circulating newspaper in the region, or in such form as the parties agree, will suffice.¹⁶ Where the parties cannot agree on what is adequate, a determination should be sought from the court in accordance with the procedure envisaged in Recommendation 24.

8.14 Some examples will indicate what the Commission would consider adequate. Correction of a defamatory reference may require only contacting those persons or firms to whom the reference was sent. More extensive steps may be necessary where the defamation has been communicated to a broader audience or held in a permanent file. An oral defamation to friends or colleagues may be adequately corrected by a letter to the same persons. A defamatory statement posted on an electronic bulletin board would require a correction to be

published in the same place, or at least e-mailed to those who were the targets of the original defamatory posting.

Content of the correction

8.15 In some cases the correction may not be held adequate unless the facts are stated, such as where the plaintiff quickly points out a clear mistake by the defendant and outlines the true facts. In other cases it may be enough to state only that the original imputation was false.

8.16 Where the imputation arises from the defendant's report of a statement by someone else, the defendant will have to disclaim its truth if the ordinary reasonable reader would consider the defendant to have endorsed its truth in the original publication. The correction will not be adequate where it simply attributes the imputation to an identified person and disclaims any intention to assert the truth. If the defendant could escape liability in such cases, this would be a disincentive to the defendant to conduct its own investigations of the truth of information supplied to it.

Recommendation 26

The correction must be adequate: it must be published in the same place and manner as the original defamatory statement, or else calculated to reach substantially the same audience. It must either correct the imputation, preferably by stating the facts rather than simply stating that the original imputation was false; or disclaim any intention to convey a secondary meaning or assert its truth.

Using requested corrections as a defence

8.17 If the plaintiff proceeds with the claim after the publication of a correction, then the defendant will simply raise the correction as a defence and will bear the onus of establishing its promptness and adequacy.

Costs issues

8.18 A defendant who accepts that an error has occurred will have a complete defence to any claim for damages for non-economic loss if a prompt and adequate correction is published. In such circumstances the defendant should also be required to pay the plaintiff's reasonable costs.¹⁷ If there is any dispute over the amount which should be paid as a reasonable sum for seeking and recovering the correction, this issue should be resolved by the court.

8.19 In most cases the court will simply order that the matter be referred to a costs assessor, who will decide, within a short period of time,¹⁸ whether the amount claimed by the plaintiff is fair and reasonable.¹⁹ If so, that sum will have to be paid by the defendant in order to avoid liability in general damages. The assessor will have all usual powers to decide by whom and to what extent the costs of assessment should be paid.²⁰

Recommendation 27

Defendants who agree to publish a prompt and adequate correction should also pay the plaintiff's reasonable costs.

Recovery of damages for economic loss

8.20 Corrections are designed to restore the plaintiff's reputation by providing for prompt and adequate vindication. However, in this as in other contexts,²¹ the Commission sees no reason to prevent a plaintiff who seeks a correction from also claiming damages for economic loss.

Recommendation 28

The defendant's publication of a prompt and adequate correction does not bar a claim for economic loss.

OFFER OF AMENDS

8.21 Division 8 of Part 3 of the *Defamation Act 1974* (NSW) provides a defence to damages for a defendant who makes an offer of amends to the plaintiff (which must include an offer to publish, or to join in publishing, a reasonable correction and apology). The defence is only available where the publication is "innocent", that is where the publisher and its servants and agents concerned with the matter in question or its publication:

did not intend the matter to be defamatory of the plaintiff;

did not know of circumstances by reason of which the matter is or may be defamatory of the plaintiff; and

exercised reasonable care in relation to the matter in question and its publication.

To satisfy the defence, the defendant must comply with all the technical requirements specified in the Act.²² It appears that the defence is rarely used in practice.²³ Two major criticisms are levelled at the defence.²⁴

8.22 First, the restriction of the defence to "innocent" publication as described in para 8.21. Pursuant to a recommendation of this Commission, the offer of amends defence is restricted to cases of innocent publication because it makes inroads into the strict liability at common law for defamation.²⁵ The Commission continues to believe that where a defendant's actions can unilaterally prevent a plaintiff from recovering damages for harm to his or her reputation - even when the defendant's role has been a subordinate one²⁶ - then the circumstances in which this can occur should be limited. In particular, the Commission continues to favour limiting the availability of the defence to defendants whose behaviour is reasonable in relation to the matter in question and its publication, rather than to make it more generally available to defendants who have published unreasonably but unintentionally and without reckless indifference (especially where this is coupled with a presumption that the defendant published unintentionally).²⁷

8.23 Secondly, it is argued that the offer of amends defence is overly cumbersome and technical.²⁸ Subject to two qualifications, the Commission is not generally persuaded of this. The first qualification is that the requirement that the "offeror made the offer as soon as practicable after becoming aware that the matter in question is or may be defamatory of the offeree"²⁹ should be interpreted reasonably in the light of all the circumstances of the case - including making such allowance for the period that it takes the defendant to investigate the complaint and take advice as is appropriate in all of the circumstances.³⁰ The second qualification is that, like the Faulks Committee,³¹ we can find no justification for the requirement in s 43(1)(d) of the *Defamation Act 1974* (NSW) that an offeror who is not the author of the matter in question must prove that the author was not actuated by ill will to the offeree. Not only is this requirement unsound in failing to focus on the innocence or otherwise of the offeror, but requires the offeror to prove a fact which he or she will generally be unable to prove. We therefore recommend that this subsection be repealed.

Recommendation 29

Section 43(1)(d) of the *Defamation Act 1974 (NSW)* should be repealed.

8.24 The Commission has carefully considered whether or not we should recommend the adoption of that version of the offer of amends defence devised by the 1991 Neill Report in Great Britain³² and incorporated in the draft *Defamation Bill* recently circulated by the Lord Chancellor.³³ We have decided that we should not. First, we do not believe that the defence should only be available to defendants who offer to pay damages. In our view, “innocent” defendants are usually the very persons who ought to escape liability in damages. Secondly, we do not believe that the mere offer of amends should result in a defence as the English proposals envisage. We prefer the New South Wales position that acceptance and performance are generally crucial ingredients of the defence.³⁴ Thirdly, we are not convinced that, if amended as we have suggested in para 8.23 and if interpreted reasonably, the offer of amends defence in the 1974 Act has necessarily outlived its usefulness. Fourthly, we are hopeful that the recommendations which we make in this chapter will help plaintiffs achieve settlements without litigation, by giving a formal structure to the current informal negotiation process and by providing incentives to defendants to publish requested corrections.

FOOTNOTES

1. New South Wales Law Reform Commission, *Defamation* (DP 32, 1993) at paras 2.18-2.56.
2. Voluntary corrections as a defence were supported, though with some differences in detail, in Law Society of NSW, Australian Broadcasting Corporation, Nine Network Australia, Consolidated Press Holdings, Young Lawyers, Australian Press Council, Australian Book Publishers Association, Australian Society of Authors, and Law Institute of Victoria: *Submissions*. They were not specifically opposed in any submissions, although those of Young Lawyers and the Law Institute were generally critical of any attempt to move away from damages as the primary remedy in defamation actions.
3. R P Bezanson, G Cranberg and J Soloski, *Libel Law and the Press: Myth and Reality* (New York, Free Press, 1987) at 171-183. See DP 32 at para 45 note 5.
4. See especially para 2.16.
5. See para 8.21-8.24.
6. See Part 3A of Schedule 1 to the draft Bill in Appendix 1.
7. See para 6.14.
8. Retraction statutes have existed for some time in several States in the USA, and recently procedures similar to the Commission’s recommendations have been devised in a Uniform Correction or Clarification of Defamation Act. See D M Cendali, “Of Things to Come - The Actual Impact of *Herbert v Lando* and a Proposed National Correction Statute” (1985) 22 *Harvard Journal of Legislation* 441 at 490-491; “Current Retraction Practice - An LDRC Survey”, Libel Defense Resource Center *Bulletin* (Vol 1992-93 Issue 3) at 8-11; *Prefatory Note* to the *Uniform Correction or Clarification of Defamation Act*, drafted by the National Conference of Commissioners on Uniform State Laws in the United States. The Act was approved by the American Bar Association at its annual conference in Missouri on 7 February 1994. It has been passed in North Dakota and is expected to be adopted in a number of States in early 1996 in order to test its effectiveness.
9. See R Brown, *The Law of Defamation in Canada* (Carswell, Toronto, 1987) Vol 2 at 1059-1061. And see DP 32 at 2.24.
10. The Commission notes that *Supreme Court Rules 1970* (NSW) Pt 67 r 11B(b) authorise the Court to exercise its powers under Pt 3 Div 8 of *Defamation Act 1974* (NSW) where the plaintiff has moved for a

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directions hearing. This rule does not extend to allow the Court to determine issues under s 39 where there are no proceedings between the parties. For the avoidance of doubt, the Commission makes it clear that Recommendation 24 is intended to apply even where there are no proceedings between the parties and that Rules of Court which may be devised ought expressly to extend to such situations (as, in our view, they should in relation to the offer of amends defence). The Commission further believes that the provision in *Supreme Court Rules 1970* Pt 67 r 22 and *District Court Rules 1973* Pt 49 r 20 (which allows for the determination of issues under s 39 in the absence of the public) ought to be extended to determinations which the court may be called upon to make in relation to requested corrections.

11. A time limit of one week is applied in eleven of the 33 US States which have retraction statutes. A further seven apply a limit of ten days. Nine of these eighteen have a longer time limit for nondaily publications (usually the next issue). Current Retraction Practice, note 8 above, at 5-6.
12. G D Schwarzbach, "Shouldn't California's Retraction Statute Protect Magazines Too?" (1989) 18 *Southwestern University Law Review* 197 at 204-5, 209-210. Cf Cendali at 496.
13. *Uniform Correction or Clarification of Defamation Act* at 6-8.
14. H R Kaufman, "Special Report: The Potential Reform of State Defamation Law under the Uniform Correction or Clarification of Defamation Act" (Libel Defense Resource Center, New York City, 1993) at xxiv-xxv.
15. Current Retraction Practice, note 8 above, at 28-38.
16. Kaufman (1993) at xxv-xxvi.
17. This proposal is similar to the current offer of amends defence, where the court may order that the defendant pay the costs of the plaintiff arising from the acceptance of the offer (including costs on an indemnity basis), and the expenses of the plaintiff incurred in consequence of the publication of the matter complained of: *Defamation Act 1974* (NSW) s 41.
18. The Commission is advised that, except in very contentious cases, matters of this nature should generally be capable of resolution within a period of one month. Very contentious matters should be resolved within a period of two months.
19. *Legal Profession Act 1987* (NSW), s 202(2), s 208F.
20. *Legal Profession Act 1987* (NSW), s 208F(4).
21. See para 2.21.
22. See *Defamation Act 1974* (NSW) ss 37-45.
23. Parliament of New South Wales, *Report of the Legislation Committee on the Defamation Bill 1992* (October 1992) at 114 (evidence of Mr Peter Bartlett). For the position in England, see Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) at 69.
24. See DP 32 paras 11.3-11.14.
25. See NSW Law Reform Commission, *Report of the Law Reform Commission on Defamation* (LRC 11, 1971) Appendix D at para 214.
26. Innocent dissemination generally is considered in Chapter 9.
27. As proposed in England and Wales, Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) ("Neill Report") at 67-69. These proposals for the reform of the offer of amends defence are now incorporated in the draft *Defamation Act 1995* circulated by the Lord Chancellor in July 1995: see Lord Chancellor's Department, *Reforming Defamation Law and Procedure: Consultation on*

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Draft Bill (July 1995) ("Lord Chancellor's Consultation on Draft Bill") at Chapter 3 and Draft Bill cl 2. It is intended that the Act should apply principally to England and Wales: see cl 17.

28. See DP 32 paras 11.20-11.34.

29. *Defamation Act 1974* (NSW) s 43(1)(b).

30. Consider para 8.9. Compare Neill Report at 65, 69.

31. United Kingdom, *Report of the Committee on Defamation* (Cmnd 5909, 1975) para 284.

32. Neill Report at 62-80.

33. Lord Chancellor Consultation on Draft Bill at Chapter 3 and Draft Bill cls 2-4.

34. *Defamation Act 1974* (NSW) s 40 and s 43.

9. Innocent Dissemination

9.1 Defamation is a tort of strict liability. It can be committed unwittingly by reason of the existence of facts and circumstances unknown, and unlikely to be known, to the publisher of the defamatory statement.¹ Liability is shared by all those who participate in the publication of the matter whether their role is primary (as author, publisher or printer), or subordinate (as distributor, retailer, lender, relayer or rebroadcaster).

9.2 Some of those held responsible at law for the defamation can be said to be innocent of the intent to publish a statement which is, in fact, defamatory. Only limited relief is available for such an innocent involvement in the publication. At common law, a “defence” of innocent dissemination is available to a person who, neither knowingly nor negligently, had merely a subordinate role in the dissemination of the matter containing the defamatory statement.² The statutory defence for innocent publication, conditional on the defendant making an offer of amends, has been considered in the previous chapter.³ The constitutional defence is also available to subordinate publishers in the unlikely event that they have participated in political discussion, provided that they are unaware of the falsity of the material and have otherwise published it without recklessness and reasonably.⁴

9.3 The common law defence protects innocent publishers of the defamation where:

they did not know that the material distributed contained defamatory matter;

they had no grounds to suppose that it was likely to contain defamatory matter; and

their lack of knowledge was not due to their own negligence.

This defence is available only to those who are not the first or main publisher of the matter which contains the defamatory statement, but have taken only a subordinate part in disseminating it. The defence has been successfully maintained in only a few instances, since it is often difficult for the subordinate publisher to prove an absence of negligence in publishing.⁵

9.4 In DP 32, the Commission highlighted the difficulties facing innocent disseminators of defamatory material, and offered for consideration the defence of innocent dissemination proposed by the Australian Law Reform Commission.⁶ This defence would be available to specified disseminators, including libraries, news-vendors, retailers, wholesalers and printers or other reproducers; it would be coupled with the availability to the person defamed of an injunction to restrain the distribution of the defamatory material.

9.5 The Commission’s position on reform of the law relating to the innocent or unintentional publication of defamatory statements reflects our recommendations in Chapters 6 and 8 for alternative remedies for injury to reputation. The effect of those recommendations is that a declaration of falsity is unlikely to be granted where the defendant is an “innocent subordinate publisher” (in the sense in which that expression is used in this chapter) and, therefore, not a proper contradictor.⁷ Where such a defendant in response to a request from a claimant issues a correction which meets the requirements specified in Chapter 8, the defendant will have a defence to any claim for damages for non-economic loss. Where the defendant volunteers an otherwise adequate and prompt correction, but the plaintiff claims damages, that correction will operate to reduce the damages. Otherwise, the defences under the current law for an innocent publisher will not be rendered irrelevant, and defendants may continue to seek to rely on them as complete bars to liability. That being so, the Commission must consider whether any reform is necessary.

9.6 The statutory defence of innocent dissemination proposed by the Australian Law Reform Commission⁸ would give to distributors not primarily responsible for the defamation a complete defence, and significantly erode the position of the plaintiff whose reputation has undoubtedly been harmed by the publication. This, the Commission believes, should be permitted only where there are clear indications that an injustice would otherwise result. As far as the Commission can ascertain, it is not common for plaintiffs to join subordinate participants in the distribution process such as distributors, retailers or lenders.⁹ In many cases, indemnities would protect the minor participants in the event of suit.

9.7 A recent case demonstrates the reluctance of the courts to extend the application of the innocent dissemination defence. In *Thompson v Australian Capital Television Pty Ltd*,¹⁰ the Federal Court held by

majority that a television company broadcasting a program on instantaneous relay from another company was not in the class of subordinate participant in the distribution process to whom the defence is available, being the original publisher of the broadcast in the area to which it was beamed. In consideration of the policy which should be adopted by the law for television broadcasters of programs received from another source, the Court affirmed the principle that where the station intended to publish the material, they ought not to be able to rely on their ignorance of the contents.¹¹ This, it was noted, was consistent with the position regarding application of the defence to rebroadcasters taken in the report of the Faulks Committee.¹²

9.8 For printers, the position is currently less certain. Despite consistent authority that they cannot be considered subordinate participants in the process of publishing works that contain defamatory material,¹³ the possibility of printers' being entitled to the defence was noted in the most recent edition of Fleming.¹⁴ The Faulks Committee also made a recommendation to this effect.¹⁵ The NSW Court of Appeal has recently been asked to consider whether developments in computer technology have converted printers into reproducers rather than compositors and thus assigning them a subordinate role which should entitle them to rely on the defence of innocent dissemination.¹⁶ The Court considered that the defence should go to trial, with the printer having the opportunity to present evidence about the actual circumstances of the printing.

9.9 Ultimately, it is a question of policy whether the defence of innocent dissemination should generally be extended to deny a plaintiff access to damages, particularly should the primary publisher be insolvent, impecunious or unavailable. None of the submissions received by the Commission has offered any argument which would, in our view, justify such a general policy. The Commission considers that it is appropriate that the development of the law relating to innocent dissemination be left to the courts to determine when those involved in the publication of defamatory matter are to be classified as subordinate publishers and what the effects of that classification should be. This is especially desirable in the light of emerging technologies which are constantly revolutionising commercial publishing. In our view, any other approach would be likely to stultify the development of the law.¹⁷

FOOTNOTES

1. *Hulton v Jones* [1910] AC 20.
2. *Emmens v Pottle* (1885) 16 QBD 354.
3. *Defamation Act 1974* (NSW) Division 8, ss 36-45. See paras 8.21-8.24.
4. See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 137.
5. Eg *Vizetelly v Mudie's Select Library Limited* [1900] 2 QB 170. See Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (ALRC 11, 1979) paras 183-185.
6. NSW Law Reform Commission, *Defamation* (DP 32, 1993) at paras 11.16-11.19.
7. See para 6.15.
8. ALRC 11 paras 186-189.
9. However, this recently occurred in the litigation surrounding the publication of Kevin Perkins' *The Gambling Man*: see *McPhersons Ltd v Hickie* (Court of Appeal, NSW, 26 May 1995, CA 40290/94, unreported). It also occurred recently in the United Kingdom, when Prime Minister John Major and Claire Latimer accepted in settlement token damages from the magazine publisher of defamatory statements about them, and then proceeded with actions against distributors and retailers: see G Bindman "The Major-Latimer Gambit" (1994) 138 *Solicitors Journal* 391.
10. (1994) 127 ALR 317.
11. Per Burchett and Ryan JJ at 323.

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12. Great Britain, Committee on Defamation, *Report of the Committee on Defamation* (Cmnd 5909, 1975) at paras 298-300.
13. See especially the analysis by Studdert J in *Hickie v Perkins & Ors* (Supreme Court, NSW, Studdert J, CLD 11530/91, 13 May 1994, unreported).
14. J G Fleming, *The Law of Torts* (8th edition, Law Book Co, Sydney, 1992) at 541-2.
15. *Report of the Committee on Defamation* (Cmnd 5909, 1975) at paras 304-309.
16. *McPhersons Ltd v Hickie* (Court of Appeal, NSW, 26 May 1995, CA 40290/94, unreported).
17. Compare the approach in cl 1 of the Lord Chancellor's draft *Defamation Bill 1995*: see Lord Chancellor's Department, *Reforming Defamation Law and Procedure: Consultation on Draft Bill* (July 1995) at Chapter 2 and Draft Bill.

10. Qualified Privilege and the Constitutional Defence

10.1 Qualified privilege is a defence to the publication of defamatory statements which may be false but which warrant protection from an action in defamation because the occasion on which they are made demands that they be made freely with the prospect of litigation removed. The protection is not as great as that given by absolute privilege and can be defeated if the defendant is found to be motivated by malice. At common law, the defence is available if the statement is made in the performance of any legal, moral or social duty or interest, to a person having a corresponding duty or interest to receive it.¹ A common example is that of a current or former employer providing a character or professional reference for an employee (or former employee) at the request of a person proposing to make a job offer to that employee.

10.2 The common law defence is accompanied in New South Wales by a defence of statutory qualified privilege under section 22 of the *Defamation Act 1974*.² Section 22 provides a defendant with a defence of qualified privilege in circumstances where:

- (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 information to him or her on the subject; and
- (c) the conduct of the publisher in publishing the matter was reasonable in the circumstances.

The effect of section 22 is to overcome the restrictions of the duty/interest requirement at common law and to focus attention on reasonableness in all the circumstances.³

10.3 The decision in *Theophanous v Herald & Weekly Times*⁴ now supplements the operation of both the common law defence of qualified privilege and s 22 of the *Defamation Act 1974* (NSW) by applying the constitutional implication of freedom of political discourse to the law of defamation. The effect is to provide a defendant whose publication occurs in the course of political speech with a defence to a claim in defamation provided that the defendant can establish the elements of the defence.

10.4 The focus of this chapter is the operation of the qualified privilege and constitutional defences in respect of media defendants. This is the practical context in which the law gives rise to problems.

COMMON LAW QUALIFIED PRIVILEGE

10.5 In order to rely on a defence of qualified privilege at common law, the person who makes a statement must have an interest or a duty (legal, social or moral), to make the statement to the person to whom it is made, and the recipient of the statement must possess an interest in receiving, or a duty to receive, the information that corresponds with the interest or duty of the person making the statement.⁵ The question of moral or social duty is a question on the facts of each case.⁶ According to traditional learning, proving reciprocity of duty and interest poses difficulties for mass media defendants who attempt to rely on the defence. Only in exceptional cases would a person have an interest or duty to publish defamatory matter to the world at large.⁷ Further, the defence is not absolute as it may be defeated if the plaintiff can establish that the defendant's conduct was motivated by malice. One way to prove malice is to show that the publisher did not have an honest belief in the truth of what was published.⁸

10.6 In the light of the majority judgments in *Stephens v WA Newspapers*⁹ and *Theophanous*, the traditional understanding of common law qualified privilege now needs re-evaluation in respect of the reciprocal interest and duty requirement. Although the common law has on occasion upheld defences of qualified privilege for publications to the world at large,¹⁰ it has generally taken a restricted view of the occasions when a person has an interest or duty to publish material to the general public. However, the joint majority judgment in *Theophanous* now holds that the public at large has an interest in the discussion of political matters such that each and every person has an interest, of the kind contemplated by the common law, in communicating his or her views on those matters and each and every person has an interest in receiving information on those matters. Such an interest exists at all times, and it therefore follows that the discussion of political matters is an occasion of qualified

privilege.¹¹ This very substantial expansion of the range of privileged occasions was applied in a recent Victorian case.¹²

10.7 A more limited extension of the scope of the defence was proposed by Justice McHugh in his dissenting judgment in *Stephens*. Justice McHugh was of the view that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. His Honour was also of the opinion that persons with special knowledge of the exercise of public functions or powers or the performance by public representatives or officials of their duties, will, on occasions, have a corresponding duty or interest to communicate information concerning such functions, powers and performances to members of the general public. As a result, the existing common law categories of qualified privilege should be extended to protect communications made by such persons - for example, whistleblowers and investigative journalists. Such protection should also extend to the media which have an ancillary privilege to publish such information in good faith.¹³

10.8 Another limited extension of qualified privilege, focusing also on the role of the media in reporting statements of public interest, was proposed by Justice Brennan in his dissenting judgment in *Stephens*. His Honour would attach a qualified privilege to media reports, other than those of the proceedings of public bodies, where there is a duty to inform the public in order to allow the public to perform its own proper functions as viewed from time to time. Whether or not the privilege would attach in any case depends on a balancing of four factors: the "public interest" content of the statement; the fairness and accuracy of the report; the publisher's reasonable belief that the maker of the statement had particular knowledge of the defamatory matter; and the opportunity afforded to the defamed party to respond. The requirement that the defamed person must have been offered a right of reply is noteworthy. It is aimed (like the requirement that the publisher have a reasonable belief that the maker of the statement has particular knowledge of the defamatory matter), at providing the public with some assurance of the truth of the defamatory statement.¹⁴

SECTION 22 OF THE DEFAMATION ACT 1974 (NSW)

10.9 While the first two conditions of this section overcome the restrictions of the reciprocity requirement at common law,¹⁵ it is the interpretation of "reasonableness" which defendants (particularly media defendants) see as unduly limiting the scope of the defence. Section 22 may have been intended to provide the same protection as that available pursuant to s 17(d) and s 17(e) of the *Defamation Act 1958* (NSW).¹⁶ Those sections provided a defence of qualified privilege in specific cases where the publication was in answer to an inquiry, or where the purpose of it was to provide information. They did not require any examination of the circumstances of the publication; in particular, there was no requirement for a defendant to establish belief in the truth of what was published.¹⁷ However, it was quickly established that section 22 did not have the same effect as the provisions of the 1958 Act.¹⁸ For section 22 requires that the defendant's conduct in publishing must be reasonable in the circumstances, and this does not solely depend on the extent of the recipient's interest in knowing the truth.

10.10 The meaning of "reasonableness" in this context was authoritatively established by the Court of Appeal in *Morgan v John Fairfax & Sons Ltd*.¹⁹ This decision explains the construction of s 22 (1)(c) in the following way: in circumstances where a publisher intends to convey an imputation that is found to be conveyed, the defendant must establish that it believed in the truth of that imputation; but where a defendant did not intend to convey any imputation which was in fact so conveyed, the defendant must establish that its conduct was nevertheless reasonable in relation to each imputation it did not intend to convey but which was in fact conveyed. Reasonableness in the latter case requires the court to take into account whether the defendant held a belief in the truth of the matter published, but it is not the sole factor considered by the court.²⁰

10.11 Some media submissions received in response to DP 32 voiced dissatisfaction with this unwarranted emphasis on proof of belief in truth. It was argued that this does not serve the public interest in the free flow of information. Generally, media submissions tended to prefer versions of statutory qualified privilege - such as those found in s 17(e) of the *Defamation Act 1958* (NSW) - which do not require the reasonableness of a defendant's conduct to depend on the defendant's belief in the truth, but focus rather on the strength of the recipient's interest in knowing the truth.²¹ Suggested reform of s 22 excluded the necessity of establishing an honest belief in the truth of any imputation held to arise; however, it was accepted that publication of matter that was known to be untrue should negate such a defence.²²

10.12 A factor underlying media concerns with the interpretation of section 22 is the fear of possibly having to reveal sources in order to establish an honest belief in the truth of what is published. This issue is addressed below at paras 10.21-10.27.

THE CONSTITUTIONAL DEFENCE

10.13 In *Australian Capital Television Pty Ltd v Commonwealth*²³ and *Nationwide News Pty Ltd v Wills*,²⁴ the High Court recognised a constitutional implication of freedom of political discussion, derived from the principle of representative government which forms part of the Constitution. The majority in *Theophanous* and *Stephens* held that the constitutional implication extends in principle to State defamation laws which may otherwise restrict the freedom of the people to engage in political discussion. They were further of the opinion that existing State defamation laws do seriously inhibit freedom of communication on political matters, especially in relation to the views, conduct and suitability for office of an elected representative of Parliament.

10.14 The High Court held that, where the defendant publishes false and defamatory statements in the course of political speech, the defendant is not liable in damages in a defamation claim unless the defendant can show that: (a) it was unaware of the falsity of the matter; (b) it did not publish recklessly (that is, not caring whether the matter was true or false); and (c) the publication was reasonable in all the circumstances.²⁵ "Reasonableness" in these circumstances requires a defendant to show that it took steps to check the accuracy of the material published, or that it was justified in publishing without checking, or that it took steps that were adequate in the circumstances.²⁶

10.15 *Theophanous* provides the media with a defence to a defamation action when material is published in the course of political discussion. The efficacy and range of the defence as a "media defence" will, however, depend on a number of factors. First, as we have already discussed in this Report, the parameters of "political discussion" have yet to be determined.²⁷ Thus, it is not yet clear whether or not the defence will only arise when the plaintiff is a member of Parliament, a parliamentary candidate or a public official.

10.16 Secondly, the meaning which the courts give to the "reasonableness" requirement of the *Theophanous* test will be crucial.²⁸ Both at common law²⁹ and pursuant to section 22,³⁰ "reasonableness" in the context of qualified privilege normally requires an honest belief in the truth of what was published. But the focus in *Theophanous* was on whether adequate and appropriate steps were taken to check the accuracy of the material,³¹ rather than on the defendant's belief in the truth of the material. The majority likened the implied freedom to the statutory defence of lawful excuse provided by section 377(1)(h) of the *Criminal Code (Qld)*.³² The policy behind the Queensland defence is the encouragement and protection of freedom of discussion on a matter of public interest for the benefit of the public. The provision does not require that persons wishing to participate in the discussion of matters of public interest must satisfy themselves of the truth of the facts upon which the discussion is based.³³ This seems to indicate that belief in the truth of what is published does not form part of the constitutional defence.

10.17 Thirdly, to the extent to which "political discussion" and "reasonableness" prove limiting factors, the constitutional defence may prove practically unimportant in the light of the broad view of common law qualified privilege taken by the majority in *Theophanous* and in *Stephens v WA Newspapers*.³⁴ The joint majority judgment in *Theophanous*³⁵ stated that the availability of the defence derived from the Constitution will inevitably have the consequence that the common law defence of qualified privilege will have little, if any, practical significance where publication occurs in the course of the discussion of political matters. However, this proposition is difficult to reconcile with the expansion of common law qualified privilege to cover "political discussion".³⁶

EVALUATION OF COMMON LAW QUALIFIED PRIVILEGE, SECTION 22 AND THE CONSTITUTIONAL DEFENCE

10.18 The Commission has been concerned throughout this Report to ensure that reform of the law of defamation only interferes with freedom of speech where the provision of such freedom would tilt too heavily

against protection of reputation. A consequence of the decision in *Theophanous* is a greater latitude for freedom of political speech. Deterrence of even ill-founded political statements is liable to be subversive of the basis and working of the system of representative government.³⁷ Outside the context set by that decision, however, the balance between freedom of speech and protection of reputation needs to be weighed differently. While the Commission recognises that the media have an important role in conveying information about State agencies and public officials to the public, it does not suggest that the media should have a generally privileged status in public debate.³⁸

10.19 Whatever the truth or falsity of the allegedly defamatory matter, providing the community with information on a topic of political discussion may override in importance any consideration of compensating damage to individual reputation, provided that the publication is a reasonable one.³⁹ However, for some issues that fall outside the scope of "political matters", there may not be an equivalent public interest factor (other than curiosity and scandal-mongering) which could afford similar immunity. In such cases, the protection of personal reputation may outweigh the public's interest in the subject matter. In those cases, both the common law and s 22 require a publisher to demonstrate that the publication was reasonable by proving an honest belief in the truth of what was published. The Commission believes that this premise is correct, for freedom of speech is not unqualified and the power which it confers requires accountability.⁴⁰

10.20 The Commission makes no recommendation to alter the existing common law or statutory qualified privilege defence at this stage. In the Commission's view, any developments regarding the duty/interest requirement should be left to the common law. Given the state of flux into which the recent High Court decisions have plunged the law of qualified privilege, any codification of the common law at this stage would be premature.

REVELATION OF SOURCES

10.21 The statutory defence of qualified privilege requires a defendant to establish that the publication was reasonable. As a part of proving "reasonableness", the publisher is usually required to establish a belief in the truth of the matter published. How a court requires a defendant to prove that belief will depend on the circumstances of each case. The defendant may be required to reveal the source of the allegedly defamatory material to show its conduct was reasonable (rather than identifying the defendant's source generally).

10.22 In *John Fairfax & Sons v Cojuangco*, the High Court stated that:

It is a fundamental principle of our law, repeatedly affirmed by Australian and English courts, that the media and journalists have no public interest immunity from being required to disclose their sources of information when such disclosure is necessary in the interests of justice.⁴¹

Potentially this conflicts with a section of the Journalists' Code of Ethics which states that journalists shall "in all circumstances ... respect all confidences received in the course of their calling".⁴²

10.23 Journalists believe that their ethical code creates a conscience based bar to disclosure of the name of a source where they have been provided with information on an undertaking that the identity of the source will remain confidential.⁴³ The Code does not create any *legal* privilege to maintain confidentiality, and courts regard a refusal to disclose a journalist's source as a contempt of court. Recent cases have highlighted the dilemma faced by journalists, who insist that the confidential nature of their relationship with a source is vital to the media's role as a facilitator of free communication and outweighs the need of the court to have all relevant and admissible information before it.⁴⁴

10.24 Although the "newspaper rule" allows a newspaper publisher, proprietor or editor to withhold information about the name of the writer of the article which is the subject of the action and about the sources of information supporting the article, this rule only pertains to interlocutory proceedings. It is not applicable at a defamation trial because the question of malice is often an issue and it may become necessary to identify the source in order to assess the motive behind the disclosure of the allegedly defamatory material.

10.25 After examining this specific problem in detail, the Western Australian Law Reform Commission and the Senate Standing Committee on Legal and Constitutional Affairs have recently concluded that a form of statutory

judicial discretion should be introduced to excuse a journalist, in the circumstances of the particular case, from answering questions about the identity of a confidential source.

10.26 Such a discretion would balance competing public interests and would be exercised after consideration of a number of factors, including: whether the evidence about the source's identity is essential to the issue of the case; the truth of statements made about the plaintiff; whether the witness has been given the opportunity to contact the source in order to seek a waiver; whether the communication is of such a nature that it is reasonable that it should be revealed; whether withholding evidence about the identity of the source will cause unfair prejudice to a party to the proceedings; and whether the evidence is obtainable by other means which will not add significantly to the time taken by, or the costs of the proceedings.⁴⁵

10.27 While these issues are essentially ones of contempt and evidence they effect defamation proceedings and therefore require comment by the Commission. The Commission believes that the proposals outlined in para 10.25 go a long way to strike a balance between the competing public interests in the administration of justice and in maintaining a free flow of information.

FOOTNOTES

1. *Adam v Ward* [1917] AC 309 at 334 per Lord Atkinson.
2. The only other Australian jurisdictions with a statutory defence of qualified privilege are Queensland and Tasmania: see *Criminal Code* (Qld) s 377 and *Defamation Act 1957* (Tas) s 16.
3. The intention behind section 22 was not to diminish or abrogate any defence that may exist at common law in respect of a defendant having an honest belief in the truth of the statement published. A discussion on the purpose of section 22 is contained in DP 32 at paras 10.8-10.10.
4. (1994) 182 CLR 104.
5. *Adam v Ward* [1917] AC 309 at 334.
6. *Stuart v Bell* [1891] 2 QB 341 at 350.
7. *Stephens v WA Newspapers* (1994) 182 CLR 211 at 261 per McHugh J dissenting.
8. See *Horrocks v Lowe* [1975] AC 135 at 150, approved in *Theophanous* at 154-155 per Brennan J dissenting.
9. (1994) 182 CLR 211.
10. See *Adam v Ward* [1917] AC 309 and *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503.
11. *Theophanous* at 140.
12. *Sporting Shooter's Association of Australia (Vic) v Gun Control Australia and Crook* (1995) 2 *Media Law Reporter* 83.
13. *Stephens* at 266.
14. *Stephens* at 251-253.
15. For discussion of s 22(1)(a), see *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383 at 390 and (1985) 3 NSWLR 354 at 358-10. For discussion of s 22(1)(b), see *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697.
16. See New South Wales Law Reform Commission, *Report on Defamation* (LRC 11, 1971) Appendix D at para 103. But compare para 105.

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17. See *Calwell v Ipec Australia Ltd* [1973] 1 NSWLR 550 (CA); (1975) 135 CLR 321 (HC) (*Defamation Act 1958* (NSW) s 17(e)).
18. See *Wright v ABC* [1977] 1 NSWLR 697 at 705, 712; *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 793-794, 797-798.
19. (1991) 23 NSWLR 374.
20. *Morgan* at 387-388 per Hunt AJA, with whom Samuels JA agreed.
21. See Nine Network Australia, Consolidated Press Holdings: *Submissions*. See also DP 32 at paras 9.30-9.31.
22. Australian Broadcasting Corporation *Submission* (27 October 1993).
23. (1992) 177 CLR 106.
24. (1992) 177 CLR 1.
25. *Theophanous* at 137.
26. *Theophanous* at 138.
27. See especially paras 2.28, 5.3-5.6.
28. For discussion, see S Walker, "The Impact of the High Court's Free Speech Cases on Defamation Law" (1995) 17 *Sydney Law Review* 43 at 51-53.
29. *Horrocks v Lowe* [1975] AC 135 at 150; *Theophanous* at 154-155 per Brennan J dissenting.
30. See *Morgan v John Fairfax & Sons Ltd* (1991) 23 NSWLR 374 at 387. The test established in this case is subject to the exceptions set out in the cases of *Barbaro v Amalgamated Television Services Pty Ltd* (1989) 20 NSWLR 493, and *Collins v Ryan* (1991) 6 BR 2210. These exceptions were considered in DP 32 at paras 10.15-10.16.
31. This may, of course, still result in journalists' having to disclose their sources at trial to enable plaintiffs to investigate whether the journalists did in fact check with their sources.
32. See *Theophanous* at 138-139.
33. *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 at 328.
34. (1994) 182 CLR 211. See para 10.6.
35. *Theophanous* at 140.
36. See *Sporting Shooter's Association of Australia (Vic) v Gun Control Australia and Crook* (1995) 2 *Media Law Reporter* 83.
37. *Theophanous* at 177 per Deane J.
38. M Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA" (1995) 18 *UNSW Law Journal* 300 at 320-322. Neither *Theophanous* nor *Stephens* suggests otherwise.
39. By contrast, allowing the plaintiff to obtain a publicised declaration of falsity without having to face a defence of privilege does not unduly chill freedom of political discussion by inhibiting contributions to it from the media. It actually enhances such discussion by ensuring that the court's finding receives publicity: see para 6.39.

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40. See para 2.31.
41. (1988) 165 CLR 346 at 354.
42. Registered Rules of the Media, Entertainment and Arts Alliance, Rule 64 (Journalists' Code of Ethics), Item (c).
43. Australia, Senate Standing Committee on Legal and Constitutional Affairs, *First Report of the Inquiry Into the Rights and Obligations of the Media: Off The Record (Shield Laws for Journalist's Confidential Sources)* (October 1994) at 8.
44. For cases, see *Off the Record* at Chapter 3.
45. See *Off the Record* at 110-112; and Western Australia, Law Reform Commission, *Report on Professional Privilege for Confidential Communications* (Project No 90, May 1993) at 129-130.

11. Absolute Privilege

11.1 In limited circumstances, public policy recognises that the interests of society in free speech are paramount. In such cases, it is a complete defence to an action for defamation that the defamatory imputations were published on an occasion of absolute privilege.

11.2 The occasions on which absolute privilege applies at both common law and by statute are restricted. As courts have been reluctant to extend the circumstances in which statements will be absolutely privileged at common law, statutory privilege has become the greater, and a constantly growing, source of protection.

11.3 In this Chapter, the Commission considers the concept, incidence and possible regulation of absolute privilege. A particular concern has been the privilege enjoyed by Members of Parliament, and whether persons defamed in Parliament may seek some redress. Quite clearly, the serious consequences which flow from allowing a person to damage another's reputation with complete immunity indicate the importance of clarifying the circumstances in which absolute privilege should operate as a defence to defamation. Yet submissions to the Commission (as to the Legislation Committee inquiry)¹ emphasise that there is uncertainty about the scope and application of this defence.

LEGISLATIVE PRACTICE AND POLICY

11.4 Since 1974, legislative practice has been to amend the *Defamation Act* on numerous occasions to confer absolute privilege on a range of quasi-judicial, investigative and disciplinary bodies and on positions created by legislation to assist in the regulation of society.² This proliferation understandably raises the question of the policy on which the decision to confer absolute privilege is founded.

11.5 The Commission is advised that, in conjunction with relevant departmental officers, Parliamentary Counsel's Office will usually consider whether absolute privilege ought to be conferred on any newly created body, inquiry, or position.³ While the policy underlying absolute privilege at common law can be of use in deciding the appropriate level of privilege, the Commission understands there are no formal guidelines to which reference may be made during the drafting process. These, we feel, should be provided.

11.6 The Commission considers that the Office of Parliamentary Counsel should prepare policy guidelines for determining whether absolute privilege ought to be conferred by statute on any proceedings, publications or actions required by legislation. These should be made available to those responsible for preparing legislation where a privilege may be appropriate.

11.7 In the Commission's view, principles drawn from the common law should be the basis on which more detailed statements are developed. The law has long recognised that the proper functioning of governmental institutions - executive, legislative and judicial - requires that certain officials and citizens are completely protected from actions for defamation and so may fearlessly undertake their duties.⁴ The potential for abuse of the privilege is undeniable. However, in each category where absolute privilege applies at common law, there are internal safeguards operating which act as a check on the unimpeded exercise of free speech by those who enjoy the protection it affords.

11.8 In the Commission's view, the circumstances in which there is a defence of absolute privilege for publication of defamatory statements should be restricted. Freedom to make defamatory statements without restraint may be regarded as a temptation to discard inhibitions which might otherwise operate. In addition, such statements may be accurately reported in the mass media. The cumulative damage to reputation may well be immense.

11.9 The Commission is of the view that absolute privilege should be granted only where there is a clearly demonstrated need. The legislature should be wary of responding to calls to confer absolute privilege in circumstances where a lesser level of protection would be sufficient, or where the lack of control over the conduct of proceedings so protected may lead to its abuse.

11.10 The Commission stresses that there is no evidence that absolute privilege has been conferred inappropriately. However, the absence of a coherent and consistent policy suggests that this may occur. The existence of such a policy will also avoid the question of whether failure to confer a privilege is inadvertent or

deliberate. In conjunction with the Commission's Recommendation 32 relating to the desirability of recording instances of absolute privilege in the *Defamation Act* where possible, guidelines will reduce uncertainty about the law in this area.

Recommendation 30

There should be a clearly enunciated policy consistently applied to determine the statutory grant of absolute privilege to bodies dealing with investigation, reporting and discipline.

COMMUNICATIONS CONCERNING MATTERS OF STATE

11.11 At common law absolute privilege attaches to communications relating to an act of state by high officers of state,⁵ although, as "act of state", or the class of officials whose communications are privileged are not defined, the extent of this protection is uncertain.⁶ The object of the privilege is to "secure the free and fearless discharge of high public duty"⁷ by protecting certain activities of government from scrutiny.

11.12 This is a rarely used defence and appears to present no problems in practice. Legislation has abrogated it in some States.⁸ The courts have been reluctant to extend absolute privilege in this area.⁹ The Australian Law Reform Commission argued that the protection for internal executive communications may be overstated and that qualified privilege only should apply.¹⁰ Subsequently, the Commonwealth Parliament's Joint Select Committee on Parliamentary Privilege recommended that the privilege should remain, but declined to widen it by legislation.¹¹ An option is to codify the privilege.

11.13 The Commission accepts that there are circumstances in government where free speech is paramount, but considers that these circumstances are limited. In accordance with the position stated in paras 11.8-11.9, we do not recommend any extension of absolute privilege without demonstrated need. Uncertainty surrounding the extent of protection for communications concerning matters of State does exist. However, given that qualified privilege will protect the communications of lesser officials, the Commission considers that legislative action to clarify the position has not been shown to be necessary. Codification may have the disadvantage of widening the privilege unjustifiably, without providing proper analysis of the communications to which it applies.

PROCEEDINGS IN PARLIAMENT

11.14 Absolute privilege for defamatory statements made in the course of Parliamentary proceedings is considered essential so that the business of government is conducted free from interference. Freedom of expression by the legislature is a principle of ancient heritage which culminated in the enactment of Article 9 of the *Bill of Rights 1688*, which provides that the freedom of speech and debates or proceedings in Parliament are not to be impeached or questioned in any court or place outside Parliament. The principle has been extended by privileges conferred in various other statutes.¹² The origin of this privilege accounts for some difficulty in determining the extent of its application in the late twentieth century. The potential for the privilege to be misused makes it a sometimes contentious one.

11.15 The Commission considered various aspects of parliamentary privilege relating to defamation in DP 32, and sought submissions particularly on the need (i) to clarify its scope; (ii) to enact comprehensive legislation covering parliamentary papers and proceedings; and (iii) to introduce a right of reply to people defamed under cloak of the privilege.

11.16 In addressing these issues, the Commission has been mindful that its recommendations could have an impact outside the terms of this reference. The legal principles of parliamentary privilege have a basis and application far beyond the law of defamation. Immunity for defamatory statements is only one of many privileges

which attach to the conduct of the business of Parliament. Further, the Commission recognises that Parliament itself determines the privileges which are enjoyed by the members individually and collectively. The Parliament of New South Wales conducted an extensive review of parliamentary privilege a decade ago.¹³ Many of the recommendations, including those concerning matters relevant to defamation and canvassed in DP 32, have not yet been adopted. Ultimately it is for Parliament itself to make amendments to the privileges it enjoys.

Extent of parliamentary privilege

11.17 There is uncertainty about the extent of parliamentary privilege, an issue particularly relevant to the determination of the scope of protection from actions for defamation in respect of statements made in the course of parliamentary proceedings. DP 32 dealt with two phrases in Art 9 of the *Bill of Rights* which have been subject to differing interpretations.

Meaning of “proceedings in Parliament”

11.18 Calls for clarification of the scope and meaning of the phrase “proceedings in parliament” were noted in DP 32.¹⁴ A major area of uncertainty is whether absolute privilege extends to the repetition outside Parliament of defamatory statements made in the House or a Committee by Members of Parliament (and people who are witnesses before Committees). Canadian decisions have taken a broad view holding that press releases of statements made in the House are part of proceedings in the Parliament.¹⁵ Australian decisions have not been so expansive.¹⁶ Other areas of uncertainty are communications between Members and Ministers,¹⁷ and correspondence received by Committees and passed on to other investigatory bodies such as ICAC or the Ombudsman.¹⁸ Technological changes have created some other grey areas in the publication of parliamentary proceedings, such as electronic transmission of proceedings.

11.19 The Commission does not consider that “proceedings in parliament” should encompass statements made by a Member of Parliament outside the chamber repeating what was said in the course of proceedings. Nor do we consider it necessary to make provision for extending the privilege to correspondence by Members to Ministers, or publications to a Committee which may fall outside the cover of existing common law or statutory protection. Such statements should be entitled to a defence of qualified privilege.¹⁹ The Commission considers that this is sufficient protection and one which balances the competing interests of freedom of speech and protection of reputation.

Provisions of the draft Defamation Bill 1992

11.20 The draft *Defamation Bill 1992* addressed some uncertainties about the extent of protection by absolute privilege of proceedings in Parliament by incorporating into Schedule 1 Part 1 proposals made by the NSW Joint Select Committee on Parliamentary Privilege.²⁰ Protection for papers relating to joint sittings and committees is specifically conferred. The Bill clarifies the status of absolute privilege for proofs of Hansard, and brings under the umbrella of protection of the *Defamation Act* audio recordings, and transcripts of debates and proceedings in the stages preparatory to the printing of Hansard. The Bill extends the cover of absolute privilege to authorised extracts from Hansard of individual complete speeches by Members. The Commission considers that these draft provisions should be enacted.

Recommendation 31

The clauses of Schedule 1, Part 1, of the *Defamation Bill 1992*, conferring absolute privilege on a wider class of Parliamentary proceedings and papers should be adopted.

Meaning of “impeached or questioned in any court or place out of Parliament”

11.21 Another area of uncertainty noted in DP 32 is the scope and meaning of the phrase “ought not to be impeached or questioned” in Art 9 of the *Bill of Rights*, which has been the subject of differing judicial interpretations.²¹ The use which can be made of statements made in parliamentary proceedings is particularly relevant in defamation actions. The most widely accepted view, recently affirmed by the Privy Council in *Prebble v Television New Zealand Ltd*,²² and enshrined in s 16(3) of the *Parliamentary Privileges Act 1987* (Cth), is that a court will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions or in protection of its established privileges. A narrower view, expressed by Justice Hunt in *R v Murphy*,²³ is that the exercise of the freedom of speech given to members (and witnesses before Committees) may not be challenged by court (or similar) process having legal consequences for those persons because they had exercised that freedom.²⁴ The Commission draws attention to this continuing uncertainty, but, for the reasons specified in para 11.16, considers it inappropriate that the uncertainty should be resolved in the context of defamation law alone.

Statutory definition

11.22 One solution to the uncertainty about the extent of absolute privilege applicable to “parliamentary proceedings” lies in adopting a new statutory definition of the term for that purpose. DP 32²⁵ cited a definition recommended by the Faulks Committee.²⁶ There is also a definition in s 16 of the *Parliamentary Privileges Act 1987* (Cth).

11.23 The Commission’s tentative view in DP 32 was that, if a definition were to be adopted, it should be inclusive and exhaustive, but that we were not convinced certainty would come from adopting any statutory definition.²⁷ Despite several inquiries in the United Kingdom supporting statutory definition, the recommendation of the Faulks Committee has not yet been adopted.²⁸ No submissions presented any evidence that would lead the Commission to change its tentative view. The Commission does not recommend that absolute privilege be extended beyond existing publications and occasions and those new situations provided for in the *Defamation Bill 1992*.

Parliamentary papers and proceedings legislation

11.24 DP 32 sought submissions on the efficacy of implementing a recommendation of the New South Wales Joint Select Committee on Parliamentary Privilege to remove from the *Defamation Act 1974* provisions relating to parliamentary privilege and incorporate them in a comprehensive “Parliamentary Papers and Proceedings Act”. The Commission’s tentative view was that statutory provisions concerning defamation should be kept as far as possible in the *Defamation Act*.²⁹ Although the utility of such a statute for Parliament’s purposes is undeniable, the Commission considers that it would be to the detriment of access to the law relating to defamation. These are, however, matters for Parliament to determine.

Right of reply

11.25 In DP 32 the Commission considered a mechanism enabling people to seek some redress when their reputations have been damaged under the cloak of Parliamentary privilege. Although Members of Parliament should exercise their privileges with an appropriate sense of responsibility, it is inevitable that defamatory statements made in parliamentary proceedings and fairly reported with impunity can have devastating effects on those concerned. Unless matters are investigated in the course of further Parliamentary debate, the reputations of persons allegedly defamed may well be permanently harmed, as there are only limited means by which to make an explanation or seek an apology, correction, retraction or damages.³⁰

11.26 Several submissions to the Commission on this issue supported right of reply procedures,³¹ such as those adopted in the Australian Senate³² which give a right of reply to a citizen whose reputation has been attacked under parliamentary privilege. The Commission records that the Senate's procedures appear to have the approval of the Senators and the people who make use of them.³³ Since the inception of such procedures in 1988, there have been 20 occasions when a reply has been incorporated into Hansard. Similar procedures have been adopted by the Legislative Assembly of the Australian Capital Territory, and are being considered by other legislatures.³⁴ The Clerk of the Legislative Assembly submitted to the Commission that in the then Speaker's view, current provisions were adequate and procedures such as those in the Senate unnecessary.³⁵ However, the current Speaker of the Legislative Assembly has argued that

Where the reputation of an individual or group has been unreasonably maligned under parliamentary privilege, the aggrieved party should be given an opportunity to provide a written response which, if deemed appropriate by the Speaker, will be recorded in Hansard.³⁶

11.27 The New South Wales Parliament must determine for itself whether to introduce right of reply procedures and the form they should take. The Commission declines to make a formal recommendation on this matter, but urges that the Parliament should give careful consideration to the issue.

JUDICIAL OR QUASI-JUDICIAL PROCEEDINGS

11.28 At common law absolute privilege attaches to statements made in the course of proceedings before a court or tribunal exercising the functions of a court.³⁷ In recent years various tribunals and other investigative and disciplinary bodies have been created by statute. Often with powers and procedures similar to those of courts, it is not always clear whether their proceedings are judicial proceedings for the purposes of absolute privilege at common law.³⁸ Courts have been very reluctant to extend the protection of absolute privilege to quasi-judicial proceedings.³⁹

11.29 The legislature in New South Wales has not been so reticent. There are several statutes conferring absolute privilege on proceedings and reports of tribunals, investigative and disciplinary bodies. The *Defamation Act 1974* alters the common law position by granting absolute privilege to publications in the course of, and official reports of, authorised inquiries generally.⁴⁰ Since 1974, the *Defamation Act* has been amended consequentially to confer absolute privilege for publications to or by specific newly created public officials and bodies.⁴¹ Several other statutes confer absolute privilege on publications to and by officials or bodies, but do so without a corresponding section also being incorporated in the *Defamation Act*.⁴² Alternatively, statutes enact that no liability for defamation is incurred by complying with a requirement of an Act.⁴³ The *Royal Commissions Act 1923* (NSW) provides, in section 6, for the immunities of judicial proceedings to apply to proceedings of Royal Commissions. Without specifically conferring an absolute privilege for defamation, many statutes confer immunity on officials acting in the course of their duties which may apply to protect them from liability for the publication of defamatory statements.

EXTENSIONS OF ABSOLUTE PRIVILEGE

11.30 From time to time various private and public bodies seek to have absolute privilege accorded to their proceedings or communications.⁴⁴ In most instances a defence of qualified privilege will be available for defamatory statements made in the course of their proceedings, for example in proceedings of church tribunals or private disciplinary tribunals. The Commission received few submissions proposing extension of absolute privilege to specific circumstances⁴⁵ (other than local government as discussed below) and has not been persuaded of the need to amend the *Defamation Act 1974* (NSW) so as to extend absolute privilege to any private body, or public authority, agency or official not currently enjoying that protection.

Local government proceedings

11.31 In DP 32 the Commission raised the question of extending absolute privilege to proceedings of local government bodies. Although local government represents the third tier of government in New South Wales,⁴⁶ neither the *Defamation Act 1974* (NSW) nor statutes concerning local government (the *Local Government Act 1919* (NSW) or the *Local Government Act 1993* (NSW)) expressly provide for any privilege. Defamatory statements made in the course of proceedings in local councils attract qualified privilege. Reports of proceedings currently fall under the protection of clause 9 of Schedule 2 ("Protected Reports"), although the Commission recommends in Chapter 12 that these be specifically accorded the status of protected reports rather than rely on clause 11.⁴⁷ While there are periodic calls for the extension to local councils of a form of absolute privilege similar to that which pertains to Parliamentary proceedings - calls which were supported in some submissions received in response to DP 32⁴⁸ - the Commission is not aware of any argument which would compel such a recommendation, nor of any other State that has so legislated. The question was considered during the recent review and rewriting of local government legislation in New South Wales, but no change to the law was considered necessary.⁴⁹

IDENTIFYING ABSOLUTE PRIVILEGE

Recording absolute privilege in *Defamation Act*

11.32 Uncertainty about whether absolute privilege exists in any particular case has been identified as a significant problem.⁵⁰ No legislation specifies comprehensively whether, and to what extent, proceedings and publications relating to any tribunal, inquiry, statutory authority, government body or official, are protected by absolute privilege. Unless there is a specific reference in s 17 of the *Defamation Act*, it is necessary to ascertain whether the general provisions of sections 18 ("proceedings of inquiry") and 19 ("reports of inquiry") of the Act apply, or whether a privilege has been conferred by another statute, including Commonwealth legislation, or by the common law, or, indeed, by more than one of these sources.

11.33 The Commission's Recommendation 30 for the formulation of a policy enunciating the principles to which the decision to confer absolute privilege can be referable will help to remove some of the uncertainty. Complementary action is needed to implement the policy.

11.34 The Commission considers that it is preferable to specify clearly that a particular tribunal, authority, official or body has been granted absolute privilege and the extent to which proceedings and matters arising under any relevant statute are privileged. In the interests of accessibility and certainty, the *Defamation Act* should, wherever possible, reflect all situations where absolute privilege has been conferred specifically by legislation.

11.35 The Commission recognises, however, that considerable difficulties stand in the way of the achievement of a uniform system. For a start, Commonwealth legislation operative in New South Wales may confer absolute privilege. And, as far as New South Wales legislation itself is concerned, we do not favour requiring in all cases that the *Defamation Act* be used to confer absolute privilege. Nor do we favour a general provision conferring absolute privilege on every inquiry by statutory bodies.⁵¹ At common law there will always be an open class of proceedings and publications that will be entitled to the privilege, so the question of whether a particular tribunal is entitled at common law to absolute privilege for its proceedings will still fall to be determined by the courts. Further, sections 18 and 19 of the *Defamation Act*, which confer absolute privilege on official "inquiries" from various sources, currently protect a class of proceedings which will always be difficult to specify precisely and in advance. Parliamentary Counsel's advice to the Commission is that the use of different legislative models for conferring absolute privilege is necessary, for example if legislation is to conform with that of other States.⁵² The Commission considers that the techniques of footnoting and cross-referencing which are being used more frequently by Parliamentary Counsel may overcome some of the difficulties in ascertaining whether statutory absolute privilege applies in a particular situation.

Recommendation 32

The *Defamation Act 1974* should be amended so that, as far as is possible, all instances in which absolute privilege is conferred by legislation are also recorded in the Act in a consistent form. The legislation should clearly indicate the scope of the protection given in each case.

Adoption of draft *Defamation Bill* format

11.36 The *Defamation Bill 1992* has a different format from the *Defamation Act 1974* for specifying in what circumstances a defence of absolute privilege will be available. There is a succinct statement in the body of the Bill that “(t)here is a defence of absolute privilege as provided by Schedule 1”. The Schedule contains two parts. In the first, “General Defences”, the areas of parliamentary papers, and proceedings and reports of official inquiries are stated (incorporating *Defamation Act* s 17 and 18-19 respectively). In the second, “Specific Defences”, the Schedule contains a comprehensive list (some seven pages) of the proceedings, documents and publications under other legislation which have absolute privilege (*Defamation Act* ss 17A-17R).

11.37 In the Commission’s view, the format of the Bill is to be preferred. It removes to the Schedule the details of specific protected proceedings and publications. When other legislation requires the *Defamation Act* to be amended so as to confer absolute privilege on publications or proceedings, then this will be reflected in the Schedule. The Commission considers this is a more efficient and accessible way of stating the law.

Recommendation 33

The drafting format of the *Defamation Bill 1992* (Schedule 1 - Absolute Privilege) should be adopted.

Proceedings of inquiry not specifically mentioned

11.38 Section 18 of the *Defamation Act 1974* (NSW)⁵³ is a general provision which acts as a “catch all”, conferring absolute privilege on the proceedings of inquiries other than those specifically conferred by amendment to the Act in ss 17A-17R. Although there are some five instances in which a tribunal is statutorily deemed to be a “tribunal for the purposes of s 18 of the *Defamation Act*”,⁵⁴ the Commission does not accept that the section applies only to the proceedings of the nominated tribunals.⁵⁵ However, one aspect of

s 18 may be potentially uncertain. The heading of the section in the *Defamation Act 1974* is “Proceedings of inquiry” and the section states that “(t)here is a defence of absolute privilege for a publication in the course of an inquiry”. Is the protection limited to statements made during proceedings only, or does it also apply to communications to and by the inquiry? The Commission is firmly of the view that the language⁵⁶ and the context of the provision⁵⁷ make it clear that “inquiry” refers to the act of inquiring. It does not refer to the body set up to conduct the inquiry. Absolute privilege can, therefore, only apply to publications made in the course of the act of inquiring by the body in question - that is, in questions asked (orally or in writing) in the course of that act and in answers supplied to those questions. Letters of complaint sent to the body conducting the inquiry will have qualified privilege only. The Commission does not believe that it is necessary to amend the “catch all” provision to give any wider protection than this.

FOOTNOTES

1. Parliament of New South Wales, Legislative Assembly, *Report of the Legislation Committee on the Defamation Bill 1992* (October 1992) Chapter 6.
2. See *Defamation Act 1974* (NSW) s 17A-17R. Several other statutes confer absolute privilege on a range of officials, proceedings and documents outside the *Defamation Act*: see eg para 11.29.

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3. Advice to the Commission from Parliamentary Counsel's Office, August 1994.
4. See *Royal Aquarium And Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431; *Gibbons v Duffell* (1932) 47 CLR 520.
5. *Chatterton v Secretary of State for India* [1895] 2 QB 189.
6. *Gibbons v Duffell* (1932) 47 CLR 520 at 530 per Starke J. Communications by Ministers of State with the Crown and one another are definitely protected. It is, however, the communication rather than the status of the official involved which attracts the privilege.
7. J G Fleming *The Law of Torts* (8th ed, Law Book Company, Sydney, 1992) at 536.
8. The Codes offer at most a qualified privilege for such communications: *The Criminal Code* (Qld) s 377; *The Criminal Code* (WA) s 357; *Defamation Act 1957* (Tas) s 16.
9. *Gibbons v Duffell* (1932) 47 CLR 520. In the United States it has been held to apply to communications of a much more extensive class of officials and occasions, eg a press release explaining an official's actions: *Barr v Matteo* (1959) 360 US 564. See W P Keeton (ed) *Prosser and Keeton on the Law of Torts* (5th ed, West Publishing Co, St Paul, 1984) at 821-3.
10. Australia, Law Reform Commission *Unfair Publication: Defamation and Privacy* (Report 11, 1979) at para 136.
11. Australia, Parliament, Joint Select Committee on Parliamentary Privilege, *Report on Parliamentary Privilege Final Report* (October 1984) at para 5.22.
12. *Parliamentary Evidence Act 1901* (NSW), *Parliamentary Papers (Supplementary Provisions) Act 1975* (NSW).
13. New South Wales, Parliament, Joint Select Committee upon Parliamentary Privilege, *Report from the Joint Select Committee upon Parliamentary Privilege* (1985).
14. See DP 32 at paras 7.21-7.42.
15. *Re Clark and Attorney General of Canada* (1977) 81 DLR (3d) 33. See DP 32 at paras 7.21-7.24.
16. *ABC v Chatterton* (1986) 46 SASR 1; *Beitzel v Crabb* [1992] 2 VR 121. See DP 32 at paras 7.25-7.27.
17. NSW Joint Select Committee on Parliamentary Privilege, *Report From the Joint Select Committee upon Parliamentary Privilege* (1985) Recommendation 17. See also Australia, Parliament, Joint Select Committee on Parliamentary Privilege, *Report on Parliamentary Privilege Final Report* (October 1984) at 43-47. See also DP 32 at para 7.28.
18. See DP 32 para at 7.66.
19. The position adopted by the Commonwealth Joint Select Committee on Parliamentary Privilege: see Australia, Parliament, Joint Select Committee on Parliamentary Privilege, *Report on Parliamentary Privilege Final Report* (October 1984) at para 5.22. And see s 16(3) of the *Parliamentary Privileges Act 1987* (Cth).
20. NSW Joint Select Committee on Parliamentary Privilege, Recommendations 8, 9, 14. See also NSW Attorney General's Department, Legislation & Policy Division *Parliamentary Privilege in New South Wales: Discussion Paper* (December 1991) at 25-27.
21. DP 32 at paras 7.43-7.51.
22. [1995] 1 AC 321.

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23. (1986) 5 NSWLR 18.
24. The ban on use in court of anything said in parliament is not absolute; evidence may be used consistent with Art 9 to establish material facts about the conduct of proceedings, and where an offence of perjury has been committed. See eg *R v Murphy* at 26; *Prebble v Television New Zealand* at 337.
25. DP 32 at para 7.33.
26. Great Britain, *Report of the Committee on Defamation* (Faulks Committee) (Cmnd 5909, 1975) at 6 and Appendix X.
27. DP 32 at para 7.35.
28. Legislation to extend and clarify the scope of both absolute and qualified privilege was recommended in the United Kingdom by: Select Committee on Parliamentary Privilege (1967); the Joint Committee on the Publication of Proceedings in Parliament, Second Report (1970) (which proposed a draft definition); the Faulks Committee (1975). The recommendation for legislation reflecting the way Parliament actually works was repeated by the Committee on Privileges in 1977. More recently, the Committee of Privileges in 1987 declined to make such a recommendation, and to date, no legislation to define proceedings in Parliament has been laid before Parliament. C J Boulton (ed) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21st edition, Butterworths, London, 1989) at 93.
29. DP 32 at paras 7.53-7.55.
30. The person aggrieved is protected by qualified privilege for a reply to a defamatory attack, and this protection will extend to the media if they are persuaded to carry a person's response to a public attack on his or her character: *Adam v Ward* [1917] AC 311. Furthermore, the person may approach another Member with the grievance and seek to have that Member put a response to the House, although Standing Orders restrict the way in which such an issue can continue to be debated.
31. Law Society of NSW, Law Institute of Victoria: *Submissions*.
32. See DP 32 at para 7.60. See also Australia, House of Representatives Standing Committee on Procedure, *A Citizen's Right of Reply, Report* (June 1991).
33. *A Citizen's Right of Reply* at 7; advice to the Commission from the Deputy Clerk of the Senate, Anne Lynch, June 1994.
34. Advice to the Commission from Deputy Clerk of the Senate, Anne Lynch, June 1994.
35. Mr R D Grove, Clerk of the Legislative Assembly, *Submission* (6 January 1994) at 1.
36. Hon John Murray, "Some Proposals Worthy of Consideration for Parliamentary Reform in the New South Wales Lower House" (July 1995) at p 11.
37. See *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431; *Jamieson v R* (1993) 177 CLR 574. The most recent discussions are in *O'Neill v Mann* (1994) 54 FCR 212 and *Oliver v Bryant Strata Management Pty Ltd* (Supreme Court, NSW, Levine J, 28 April 1995, CLD 20521/94, unreported).
38. Relevant considerations are the object of the tribunal, its constitution and manner of proceeding, the authority under which it acts, the nature of the question into which it is its duty to inquire, and finally the legal consequences of the conclusion reached by the tribunal: see *Trapp v Mackie* [1979] 1 WLR 377.
39. *Royal Aquarium v Parkinson* [1892] 1 QB 431. See also *Douglass v Lewis* (1982) 30 SASR 50, where a Royal Commission was held not to be entitled to claim absolute privilege at common law. Statutory protection is conferred on Royal Commissions in some jurisdictions, including NSW: *Royal Commissions Act 1923* (NSW) s 6.

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40. *Defamation Act 1974* (NSW) ss 18, 19. See para 11.38.
41. *Defamation Act 1974* (NSW) s 17A-17R.
42. *Commissioner of Public Complaints Act 1984* (NSW) s 25; *Freedom of Information Act 1989* (NSW) s 64(1); *Pure Food Act 1908* (NSW) ss 16, 53; *Special Commissions of Enquiry Act 1983* (NSW) s 10(4); *Judicial Officers Act 1986* (NSW) s 48(2); *Victims Compensation Act 1987* (NSW) s 68. The *Community Justice Centres Act 1983* (NSW) provides for privilege as for judicial proceedings on mediations under the Act. See also *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW).
43. Eg *Children (Care and Protection) Act 1987* (NSW) s 22 (8)(b), 23 (6)(b), *Freedom of Information Act 1989* (NSW) s 64. Some privileges created this way are qualified only, eg *Fair Trading Act 1987* (NSW) s 10.
44. See DP 32 at para 7.62.
45. The Australian Securities Commission sought absolute privilege for “publications to or by the Commission”: Australian Securities Commission *Submission* (17 December 1993) at 1. But this is a matter for federal legislation.
46. *Ballina Shire Council v Ringland* (1994) 33 NSWLR 11.
47. Recommendation 36, para 12.19.
48. Law Institute of Victoria, Communications Law Centre, Australian Broadcasting Corporation: *Submissions*.
49. Advice to the Commission from the Department of Local Government, NSW, June 1994.
50. See DP 32 at para 7.8; New South Wales, *Report of the Legislation Committee on the Defamation Bill* at 57-58.
51. The model proposed in submissions to the Legislation Committee and the Commission came from an earlier Victorian draft for the uniform Defamation Acts, namely, “publication in the course of proceedings of any tribunal board, committee or any other body established by any Act of Parliament”. See DP 32 at paras 7.9-7.11.
52. Advice to the Commission from Parliamentary Counsel’s Office, August 1994.
53. Section 18 becomes cl 3 of Schedule 2 of the draft Bill in Appendix 1.
54. Guardianship Board, Transport Appeals Board, Victims Compensation Board, GREAT, Mental Health Review Tribunal.
55. Young Lawyers (Law Society of New South Wales) *Submission to the NSW Legislation Committee on the Defamation Bill 1992* (31 January 1992) at 11. See also DP 32 para 7.11.
56. “[I]n the course of an inquiry”.
57. A Schedule in which absolute privilege extends in some instances to publications “to or by” the body in question: see Appendix 1, Draft Bill Sch 2 cls 5, 6, 9, 11, 13-16, 18-23, 26, 27 and 30.

12. Protected Reports

12.1 A report of certain proceedings which contains defamatory statements made in the course of those proceedings may be protected by a qualified privilege either at common law or by statute. This privilege recognises the public interest in having full information about the administration of public affairs. The limited circumstances in which statute and the common law (at least before the decisions in *Theophanous*¹ and *Stephens*)² provide the media with a defence of qualified privilege for publishing defamatory material, makes the protected report defence of potentially great practical importance to the media in performing their functions, particularly at times of increasing scrutiny of public affairs.³

PROTECTED REPORTS AT COMMON LAW

12.2 The common law affords a privilege for the publication of a defamatory statement in a report of certain proceedings. The defence is available only if the report is a fair and accurate account of the proceedings⁴ and made without malice.⁵

12.3 The principal categories of protected reports at common law are those of judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court,⁶ and of Parliamentary reports and debates.⁷ Reports of such proceedings attract privilege by reason of the public interest in the proceedings themselves, not in the subject matter discussed in those proceedings.⁸ Generally, the public have a right to attend Parliament and the courts; if unable to attend in person, it is better that the public should have a fair and accurate report of what took place there rather than rely on rumours.⁹

12.4 A privilege attaches to the publication of fair and accurate reports of proceedings of public bodies other than Parliament and the courts where such publication is justified by:

the public interest in the functioning of the body (its status, constitution, functions, and the circumstances in which the defamatory statement was made);

the public interest in the subject matter of the report (the source of the defamatory statement, the opportunity for response and any making of a finding after inquiry); and

the interest of the recipients in its subject matter.¹⁰

Thus reports of the proceedings of tribunals have been held to be protected where the nature of the tribunal, the interests of the public in the subject matter of the proceedings, and the duty of the tribunal towards the public justify the publication.¹¹ In the Commission's view, the availability of the privilege of fair protected report ought to continue to depend upon a careful evaluation by the courts of the three factors listed above. To make the privilege more generally available would run the risk that "the power of the press to libel public men with impunity would in the absence of malice be almost unlimited."¹²

PROTECTED REPORTS UNDER THE DEFAMATION ACT 1974

12.5 Division 5 of the *Defamation Act 1974* (NSW) provides a defence for the publication of a fair protected report, where "protected report" is one of numerous "Proceedings of Public Concern" specified in clause 2 of Schedule 2. Documents specified in clause 3 of Schedule 2 (and fair extracts, abstracts or summaries of them) are similarly protected. As at common law, the defence of protected report is a qualified privilege. Notwithstanding that the report is a fair and substantially accurate summary of the proceedings which it purports to report, the defence is lost if the plaintiff is able to establish that it was not published in good faith for public information or the advancement of education.¹³

12.6 New South Wales has a very extensive privilege relating to protected reports. Proceedings to which the defence of fair protected report applies include those of parliament and courts (widely defined to include the courts and parliaments of any country), proceedings of international organisations and conferences and official inquiries held in any country. Proceedings of several nominated public investigatory authorities and professional

disciplinary tribunals join general classes of associations with specified objects (trade, professional, sporting), and public meetings generally. Documents and records protected by s 25 include proceedings and reports published by parliamentary bodies and court judgments. The broadest category is a record or document kept by a government, statutory authority or court and open to inspection by the public.

12.7 In proposing the contents of Schedule 2 "Proceedings of Public Concern", the policy adopted by this Commission in its 1971 Report on defamation (on which the 1974 Act is based), was that reports of the proceedings nominated provided material necessary for informed discussion about matters of public interest, whether politics, law, finance or other public concern.¹⁴ Dual considerations for the Commission were the importance of openness about the workings of political society, and the importance of informed decision-making.

EXTENDING THE PROTECTED REPORTS DEFENCE

12.8 Since 1974, Schedule 2 has been frequently amended to reflect the statutory creation of tribunals or officials with quasi-judicial, investigatory, disciplinary or compensatory powers. Recent additions have included proceedings of the HomeFund Commissioner, the NSW Crime Commission, the ICAC, the Legal Services Commissioner and Legal Services Tribunal which join the Ombudsman, the Privacy Committee and the perennials, the Racing and Trotting Appeals Tribunals and the Australian Jockey Club.¹⁵ Frequently, but not consistently, the amendments correspond with absolute privilege being conferred by ss 17A-17R *Defamation Act 1974* on the proceedings of the bodies or officials.

12.9 There is no evidence that the very extensive list of proceedings with protected report status in the Act is considered too generous, nor has it been suggested that it be generally extended further. Specific suggestions for extensions are considered below at paras 12.15-12.21. However, the proliferation of specific occasions where reports of proceedings are afforded protection understandably raises the question of the policy which underlies the decision to confer protected report status under the *Defamation Act*.

General principles

12.10 Amendments to Schedule 2 of the *Defamation Act* are made by the legislature, on the advice of parliamentary drafters and the relevant department. The Commission understands that Parliamentary Counsel's Office will usually consider whether the proceedings of any new authority should have protected report status, but that no formal procedure is followed.¹⁶ While the policy enunciated in the common law is available to assist this decision, the Commission understands that there are no formal guidelines to which reference may be made during the drafting process. This, we feel, should be changed.

12.11 The Commission does not consider that the privilege has been extended inappropriately, but is concerned that the current procedures may not ensure that proper consideration is given to all proceedings which could merit inclusion in Schedule 2. There is a need to ensure that there are principles to which any decision to confer protected report status is referable and that they are consistently applied.

12.12 The Commission recommends that the Office of Parliamentary Counsel prepare a policy for determining whether proceedings are appropriate for inclusion in Schedule 2 as Proceedings of Public Concern. This policy should be made available to those responsible for the preparation of legislation concerning the proceedings of any body or official which could be considered to merit this protection.

12.13 The policy guidelines should have reference to the common law principles governing protected reports.¹⁷ The privilege applies at common law in order to inform the public of what occurred in the proceedings of certain public bodies, even if this means that untrue and defamatory statements are published. The privilege should be conferred only where there is a clearly demonstrated need.

There should be a clearly enunciated policy consistently applied to determine when protected report status is conferred.

Drafting practice

12.14 The format adopted in the draft *Defamation Bill 1992* separates the Schedule of Proceedings of Public Concern into proceedings classified by reference to a general character, such as parliamentary bodies, courts, tribunals and certain categories of associations, and reports of proceedings of specified bodies under specified Acts.¹⁸ The Commission considers that this format assists in ascertaining easily whether any particular report may have a privilege and as an improvement on the existing Act should be adopted.

Recommendation 35

The drafting format of the Defamation Bill for Schedule 2 — Protected Reports of Proceedings should be adopted.

Specific extensions of the defence

12.15 In DP 32, several specific proceedings were mentioned for possible incorporation in Schedule 2 so as to attract the protected report privilege.¹⁹ Any decision to do so should be made with reference to the purpose of the privilege, that is the public interest in the community's being informed about the conduct of public affairs even if this results in defamatory statements about a person being published without means of redress.

Technical amendments

12.16 As noted in the DP 32, proceedings under Part 10 of the *Legal Profession Act 1987* (NSW) were omitted from the Bill.²⁰ This appears to be a technical omission only, but should not be overlooked should the format of the draft Bill Schedule 2 be adopted. The other technical correction noted in the Discussion Paper as necessary for the *Defamation Act 1974* (NSW), that relating to the commencement of operation of the *Medical Practice Act 1992* (NSW), has already occurred.²¹

Proceedings of a local authority

12.17 Clause 7 Schedule 2 of the *Defamation Bill 1992* makes reports of proceedings of local councils and authorities protected reports. Although this Commission proposed such a clause in the draft legislation accompanying our 1971 Report on defamation,²² a policy decision by the Government of the day saw it removed from the *Defamation Act 1974*. No explanation for the decision was offered in debate on the *Defamation Bill*, but the Government indicated the matters were relevant to its plans for protection of privacy.²³

12.18 Although the status of local council proceedings was uncertain in 1974, the Supreme Court has since held them to be "proceedings of a public meeting" within the meaning of clause 2 (9) of Schedule 2 to the *Defamation Act 1974* so that the defence of s 24 (2) is available for publication of a report of such proceedings.²⁴ It is arguable that proceedings of the other local authorities included in the proposed clause would also fall within the definition of "public meetings" in Sch 2 cl (9) of the current Act (Sch 2 cl (10) of the draft Bill).

12.19 The Commission considers, however, that the status of reports of proceedings of local authorities should be put beyond doubt. Local councils are the third tier of government in this country, and authorities constituted at

the local level are responsible for significant aspects of the government of the Australian people. The public interest in being informed about the conduct of affairs in local councils and authorities is unarguable.²⁵ Therefore the Commission recommends that Schedule 2 clause 7 of the *Defamation Bill 1992* making proceedings of local council, boards and authorities "Proceedings of Public Concern" be enacted.

Recommendation 36

The *Defamation Act 1974* Schedule 2, "Proceedings of Public Concern", should be amended to include proceedings in public of a local council, board, or other authority constituted for public purposes under the legislation of the Commonwealth, a State or a Territory, so far as the proceedings relate to a matter of public interest.

Proceedings at company general meetings

12.20 Another proposal from this Commission omitted from the *Defamation Act 1974* by the then Government for unexplained policy reasons was the detailed clause relating to proceedings at a general meeting of various categories of companies.²⁶ The draft *Defamation Bill 1992* included this clause in almost identical terms,²⁷ proposing protection for reports of general meetings held in Australia or overseas of companies incorporated, listed or carrying on business in Australia. It would extend to meetings of unincorporated associations but exclude foreign and exempt proprietary companies.

12.21 The Commission is not now persuaded that widening the category of protected reports by incorporating this clause from the draft *Defamation Bill* is necessary. No evidence has been presented to the Commission that restrictions on what may be reported from company meetings without privilege in practice unduly inhibits the media's publication of information about the activities of companies that is in the public interest. The privilege attaching to reports of public meetings in clause 9 of Schedule 2 of the *Defamation Act 1974* offers an alternative source of protection for reports of many of the proceedings covered by the draft clause. The Commission does not consider that the public interest warrants conferring the privilege more extensively in this area.

ATTRIBUTED STATEMENTS

12.22 In its report *Unfair Publication: Defamation and Privacy*, the Australian Law Reform Commission proposed that there should be a separate defence of fair report for attributed statements generally.²⁸ This recognised that, although the categories of protected reports such as in the NSW legislation were comprehensive, a list could not cover all proceedings and statements which are of legitimate public concern. It also addressed the effect of the republication rule that a person who repeats a defamatory statement made by another is also liable, as if he had made the original statement: "For the purposes of the law of libel a hearsay statement is the same as a direct statement and that is all there is to it".²⁹ This, the ALRC argued, limits the media's ability to publicise serious allegations against people because the media was not in a position to determine the truth of the contents of another's defamatory statement. As a result, the public was denied its legitimate interest in being informed about the conduct of public affairs.

12.23 The Commission is not persuaded that this category of statements deserves the status of protected report. We are mindful of the danger that a statutory provision such as proposed by the ALRC may be abused, despite the safeguards it incorporates. The original author may not wish a defamatory statement made in a private setting, or one which attracted qualified privilege, published to the world at large. The right of reply requirement is intended to provide the public with balanced information, but may be insufficient guarantee against abuse. The person defamed may be unable to exercise it, or to do so ably, or to dispel the public perception that any reply is purely self-serving.

12.24 Even without abuse, the availability of such a defence could lead to unnecessary harm. Unless the condition regarding reasonableness is read down, the republisher will have no obligation to consider the truth of the statement repeated. The publisher may avoid investigating the matter further so as to be certain of complying with the requirement of only adopting it. As a result the defamation will be given a far wider airing, more seriously affect the person's reputation, and yet entitle that person to a lesser remedy.

12.25 There has been little support for the development of a general attributed statements defence. Nor, in the Commission's view, is there any evidence that such a defence is necessary for proper debate on matters of public administration and public interest. In any event, the existing privilege for protected reports in New South Wales is already very generous,³⁰ while the development of the constitutional defence and the expanded notion of common law qualified privilege have opened up significantly the range of occasions on which attributed statements will be protected.³¹

RIGHT OF REPLY

12.26 In DP 32, the issue of making the protected report defence subject to a right of reply was raised, and the model proposed by the ALRC offered for consideration.³² It is a common, but not universal, practice of media to solicit a reply to accompany an otherwise protected report. When this does not occur the person defamed is denied both redress and the chance to offer an explanation. Concern on this score lies behind Justice Brennan's recommending that the extension of common law qualified privilege for media reports of statements by another person depend upon the defamed party being given an opportunity to make a reply.³³

12.27 A right of reply has long been a feature of defamation law in other jurisdictions.³⁴ We are not, however, persuaded of the need to require, or the efficacy of requiring, a right of reply as a condition of using the defence of protected report. The rationale of the defence is predicated on communicating to the public what occurs in courts and other proceedings which the public are entitled to attend, and on informing them about the conduct of public affairs, rather than providing the public with a balanced account of any public issue.³⁵ Fairness is a matter of whether the report is a substantially accurate summary of the proceedings, not whether as a whole it is fair or unfair to any particular person. This explains why the defence is available even though the reporter knows that what was said during the proceedings is untrue. Further, there are some circumstances where to allow a right of reply published in the media may, indeed, question the integrity of the proceedings reported, especially if there were no right of reply available during the proceedings themselves.

COURT AND OFFICIAL NOTICES

12.28 The *Defamation Act 1974* (NSW) provides a defence for the publication of a notice in accordance with the direction of a court of any country,³⁶ and the publication of any notice or report in accordance with an official request.³⁷ The protection does not extend to the person making the official request and this has led to the suggestion that the official therefore has insufficient protection against a suit for defamation.

12.29 The Commission is not persuaded that further protection is necessary for an official making the original statement. In our 1971 Report on defamation, which was where the current provisions of the 1974 Act originated, this Commission considered that "(c)ommonly, he would have some separate defence of privilege".³⁸ The potential for abuse of the provision is such that any greater level of protection is unwarranted.³⁹

FOOTNOTES

1. *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.
2. *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.
3. For the extent to which the media can now rely on common law qualified privilege, see paras 10.5-10.8.

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4. *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 780; *John Fairfax & Sons Ltd v Punch* (1980) 31 ALR 624 at 634; *Stephens* at 246-247 per Brennan J dissenting.
5. See *Anderson v Nationwide News Pty Ltd* [1970] 1 NSWLR 317 at 320-21, considering a provision of the now repealed *Defamation Act 1958* (NSW).
6. *Kimber v Press Association* [1983] 1 QB 65 at 68.
7. *R v Wright* (1799) 8 TR 293; 101 ER 1396; *Wason v Waller* (1868) LR 4 QB 73.
8. *Stephens* at 247 per Brennan J dissenting, citing *Allbutt v General Council of Medical Education and Registration* (1889) 23 QBD 400 at 410; *Davison v Duncan* (1857) 7 EI & BI 229 at 231; 119 ER 1233 at 1233.
9. C Duncan and B Neill, *Defamation* (Butterworths, London, 1978) at para 14.29.
10. *Stephens* at 249 per Brennan J dissenting.
11. *Allbutt v General Council of Medical Education and Registration* (1889) 23 QBD 400; *Perera (MG) v Peiris* [1949] AC 1 at 21 per Lord Uthwatt. Protection was denied in *Chapman v Ellesmere (Lord)* [1932] 2 KB 431; *Purcell v Sowler* (1877) 2 CPD 215.
12. *Chapman v Lord Ellesmere* [1932] 2 KB 431 at 474-475 per Romer LJ.
13. *Defamation Act 1974* s 26. See *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 63-4.
14. New South Wales Law Reform Commission, *Report of the Law Reform Commission on Defamation* (LRC 11, 1971) Appendix D at paras 18-121. Schedule 2 reproduces, apart from two items, the list proposed by this Commission in the 1971 Report. Omitted were "proceedings of a local council, board, or other authority", and "proceedings at a general meeting of a company" (extensively defined, but including unincorporated associations, and excluding exempt proprietary and foreign companies). See below at paras 12.17-12.19 and 12.20-12.21 respectively.
15. See *Defamation Act 1974* Schedule 2 cl 10-20.
16. Advice to the Commission from Parliamentary Counsel's Office, 17 August 1994.
17. See particularly *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.
18. A similar format for absolute privilege is recommended. See Recommendation 30, Chapter 11.
19. DP 32 at para 8.16.
20. DP 32 at para 8.7.
21. *Defamation Act 1974* (NSW) Sch 2 cl 14A.
22. See note 14 above.
23. New South Wales *Parliamentary Debates (Hansard)* Legislative Assembly, 28 February 1974 at 906; New South Wales *Parliamentary Debates (Hansard)* Legislative Council, 19 March 1974 at 1517.
24. *Cassell v Gold Coast Publications Pty Ltd* [1984] 1 NSWLR 12.
25. See *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 especially at 690-691 per Gleeson CJ.
26. See note 14 above.

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27. *Defamation Bill 1992* (NSW) Schedule 2, cl 9.
28. Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (ALRC 11, 1979) at para 92. A recommendation for a similar defence of Neutral Reportage was made in the *Annenberg Washington Program Report* at 22: see R A Smolla, "The Annenberg Libel Libel Reform Proposal" in J Soloski and R P Bezanson (ed), *Reforming Libel Law* (Guilford Press, New York, 1992) 229 at 243-244.
29. *Lewis v Daily Telegraph Co Ltd* [1964] AC 234 at 284 per Lord Devlin.
30. See paras 12.5-12.7.
31. In particular reports of persons "with special knowledge" see *Stephens* at 264-265 per McHugh J dissenting.
32. DP 32 at paras 8.19-8.21. See ALRC 11 at paras 156, 178-180.
33. *Stephens* at 252-253. See para 10.8.
34. In other Australian jurisdictions reports of certain public meetings are protected if the publisher meets a request to insert a reasonable letter or statement by way of explanation or contradiction: *Wrongs Act 1958* (Vic) s 5; *Wrongs Act* (SA) s 7; *Newspaper Libel and Registration Act 1884* (WA). In the Code states, failure by the publisher of a report of a public meeting to publish a reply is merely evidence of lack of good faith: *Criminal Code* (Qld) s 374; *Criminal Code* (WA) s 354; *Defamation Act 1957* (Tas) s 13(2)(b). In England protected reports published in the media ("newspapers" as defined in the Act), broadcasts within the UK, and cable broadcasts are divided into those which are privileged without explanation or contradiction, and those privileged subject to explanation or contradiction: *Defamation Act 1952* (Eng) s 7 and Schedule Parts I and II. In Canada, the provinces of Ontario, British Columbia, Nova Scotia, Alberta and Saskatchewan all have right of reply procedures for reports of various proceedings: see British Columbia, Law Reform Commission *Report on Defamation* (Report 83, 1985) at 39. Under the French Press Law, a person named in the press, whether defamed or not, has a legally enforceable right to a reply of equal prominence and length: see ALRC 11 at para 178, footnote 138.
35. *Waterhouse v 2GB* (1985) 1 NSWLR 58 at 62 per Hunt J.
36. *Defamation Act 1974* (NSW) s 27. See also *Defamation Bill 1992* cl 32.
37. *Defamation Act 1974* (NSW) s 28. See also *Defamation Bill 1992* cl 33.
38. NSW Law Reform Commission, *Defamation* (LRC 11, 1971) Appendix D at para 159.
39. See *Campbell v Associated Newspapers Ltd* (1948) SR (NSW) 301.

13. Procedural Issues

13.1 In DP 32 the Commission suggested changes to several procedural issues which are involved in defamation trials with a view to ensuring their speedier and more effective resolution.¹ In particular, the Commission looked at shorter limitation periods; express powers to strike out actions; the use of stop writs; and filing agreed statements of issues and witnesses' statements. The Commission has nothing to add to what was said in DP 32 about the filing of agreed statements of issues and witnesses' statements, the latter being a procedure already in use in the Supreme Court's Defamation List.² The other procedural issues are revisited in this Chapter.

LIMITATION PERIOD FOR DEFAMATION ACTIONS

13.2 Generally speaking, limitation periods for the commencement of actions arise out of considerations of fairness to the defendant and the orderly administration of justice.³ They aim to balance the interests of potential defendants who cannot be expected to have the threat of proceedings hanging over them for an indeterminate period, with the interest of plaintiffs who need time to establish and prepare their cases.

13.3 Currently the limitation period for actions in defamation in New South Wales is six years from the date of publication of the matter which is the subject of the complaint.⁴ A similar period exists in other Australian jurisdictions,⁵ although in Western Australia a libel action against a newspaper or any person responsible for its publication must be brought within twelve months of that publication.⁶ The *Defamation Bill 1992* (NSW) proposed amendments to the *Limitation Act 1969* (NSW) to provide for a limitation period in defamation actions of six months from discovery of publication of the defamatory matter, subject to a maximum of three years from date of publication.⁷ The policy argument behind such a proposal is that the law should encourage persons whose reputations have been injured to attempt to vindicate their reputations at the earliest possible opportunity.⁸

13.4 Arguments for shortening the limitation period for defamation actions are more compelling than in the case of other tort actions. Once the material has been published to a third person, the defamation has occurred and the injury is apparent. In cases of personal injury or damage to property, the consequences of the injury sustained may take several years to manifest themselves, making a longer limitation period more appropriate. Although a plaintiff needs time to prepare a case (and a potential defendant to collate evidence), research indicates that most defamation actions are commenced promptly,⁹ so a shorter limitation period would not be unduly onerous on the parties involved. If plaintiffs are genuine in their attempt to restore reputation, they will want to do so quickly.

13.5 In respect of actions for a declaration of falsity, the Commission has recommended that a shorter limitation period apply.¹⁰ In other cases, we support a shortening of the limitation period within the following parameters:

We believe that the limitation period should run from the date of publication, not from the date of the plaintiff's discovery of the publication. To change to the date of discovery would make it virtually impossible for a defendant to defend a defamation action given the mobility of the media and the failing memories of witnesses. From a practical perspective, it would also raise difficulties for the parties to prove or disprove when discovery of publication actually occurred.

We recognise that the selection of an "appropriate" period of limitation is necessarily an arbitrary exercise. We believe that a one-year limitation is appropriate and reasonable for most defamation actions, notwithstanding the six-month limitation period generally favoured in the submissions which we received on this topic.¹¹

Because of the artificiality of the exercise, we favour giving courts a discretion to extend the limitation period where the interests of justice require, subject to a maximum of three years from the date of publication.

Recommendation 37

The limitation period for defamation actions (other than a declaration of falsity) should be shortened to one year from the date of publication, the court having a power to extend the period as the interests of justice require to a maximum of three years from the date of publication.

EXPRESS POWER TO STRIKE OUT DEFAMATION ACTIONS

13.6 This issue was raised in DP 32 because the *Defamation Bill 1992* contained a “want of prosecution” provision that proposed that the court could strike out proceedings if it considers that the plaintiff has failed to prosecute the proceedings for a year, or has shown disregard for an interlocutory order made in relation to the proceedings or an unwillingness to comply promptly with an interlocutory order. The provision of an express power to strike out was included in the *Defamation Bill* in response to criticism of the allegedly narrow way in which the Court of Appeal has interpreted its existing powers to strike out actions.¹² There was considerable support in submissions to the Commission for giving the court an express power to strike out defamation actions for want of prosecution or excessive delay on behalf of a plaintiff.¹³ There was also support in the submissions received for specifically defining “excessive delay”.

13.7 The power to strike out actions in defamation cases is applied in the same way as the power to strike out actions generally.¹⁴ The court must exercise its discretion in such a way as to do that which in the whole of the circumstances of the particular case is just between the parties, there being no fixed formulae as to how the discretion should be exercised.¹⁵ The Commission considers that this interpretation of the striking out power is appropriate and sufficient to deal with dilatory or defaulting plaintiffs.¹⁶ We are not persuaded that there should be a specific power in defamation cases to strike out actions on some wider basis than this.

THE MYTHOLOGY OF THE STOP WRIT

13.8 An injunction will not usually be granted to restrain the publication, or further publication, of matter which is alleged to be defamatory because it will have the effect of inhibiting freedom of speech.¹⁷ An action for damages for defamation may, however, be commenced with the sole or dominant purpose of gagging further discussion of a particular subject. Such an action is known as a “stop writ”. It relies for its efficacy principally on fears of the defendants and other potential publishers of the material of subjecting themselves to liability either for contempt of court or aggravated damages.

13.9 The idea that the commencement of a defamation action can “stop” the publication of material is based on a misconception of the law of contempt. The commencement of proceedings does not, of itself, make the publication of matter concerning the subject-matter of the litigation a contempt of court.¹⁸ Contempt only occurs where the clear tendency of the publication is to interfere with the due administration of justice.¹⁹ Where the subject-matter of the proceedings is a matter of public importance, the public interest may well override any possible prejudice of a litigant in favour of free discussion.²⁰

13.10 The republication of defamatory material exposes the defendant to the risk of aggravated damages where republication is, in the circumstances, improper, unjustifiable or lacking in bona fides.²¹ But this risk is present in the republication of any defamatory material, regardless of the motive with which the plaintiff has commenced the defamation proceedings. That risk must, therefore, be weighed up by the defendant in every case.

13.11 Although there is a perception that some defamation actions are commenced to curtail discussion on a particular issue,²² there is no empirical evidence to suggest the prevalence or otherwise of the issue of “stop writs”, simply because it is impossible to ascertain the plaintiff’s motivation for instituting proceedings.²³

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13.12 From a practical point of view the only effective way of controlling the issue of “stop writs” is by education. In 1987, the Australian Law Reform Commission pointed to the benefits of giving journalists careful and thorough training in the law of contempt.²⁴ The Commission agrees. Beyond this, parties to defamation proceedings can reduce the incidence of “stop writs” by being aware, and making more use, of the court’s existing power to dismiss matters for want of prosecution where there is an obvious and continuing failure to comply with directions, or to proceed with the matter generally.

PROCEDURAL RULES

13.13 The procedural consequences of adopting many of the Commission’s recommendations will clearly require amendment of some of the Rules of Court relating to the conduct of defamation actions. This probability should be kept under review.

FOOTNOTES

1. NSW Law Reform Commission, *Defamation* (DP 32, 1993) at Chapter 5.
2. See DP 32 at paras 5.32-5.34.
3. See F A Trindade and P Cane, *The Law of Torts in Australia* (2nd ed, OUP, Melbourne, 1993) at 741.
4. *Limitation Act 1969* (NSW) s 14.
5. DP 32 para 5.4.
6. *Newspaper Libel and Registration Act 1884 Amendment Act 1888* (WA) s 5.
7. *Defamation Bill 1992* (NSW) cl 73, Sch 4.
8. Attorneys General of NSW, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law* (August 1990) para 3.5.
9. A recent study of cases in New South Wales found that approximately 80% of matters were commenced within six months of publication; only 7.9% were commenced more than twelve months after publication. See T Sourdin, “A Study of Defamation Proceedings Commenced in the New South Wales Supreme Court for the period 1.1.87 to 13.12.88” (unpublished paper, University of NSW, 1990) at 10-14. These figures were based on a sample size of 264 actions commenced between 1 January 1987 and 31 December 1988.
10. See para 6.33.
11. Consolidated Press Holdings, Nine Network Australia, Communications Law Centre, the Australian Society of Authors: *Submissions*.
12. Parliament of New South Wales, Legislative Assembly, *Report of the Legislation Committee on the Defamation Bill 1992* (October 1992) at 30.
13. Australian Press Council, Nine Network Australia, Consolidated Press Holdings, Young Lawyers, Australian Broadcasting Commission: *Submissions*.
14. *Razvan v Berecht* (Court of Appeal, NSW, 23 February 1990, CA496/87, unreported).
15. *Stollznow v Calvert* [1980] 2 NSWLR 749 at 752-753.
16. See, for example, *Burke v TCN Channel Nine Pty Ltd* (SC, NSW, 16 December 1994, CLD10688/89, Levine J, unreported).

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17. See para 6.54.
18. *Wallersteiner v Moir* (1974) 1 WLR 991 at 1004-1005 per Lord Denning MR.
19. See *Hinch v Attorney-General of Victoria* (1987) 164 CLR 15.
20. *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242.
21. See para 7.18. See further H McGregor, *McGregor on Damages* (15th ed, Sweet & Maxwell, London, 1988) at paras 1669-1670.
22. The suggestion that they occur is, in the opinion of the Young Lawyers, a misconception promulgated by journalists and the media (see Young Lawyers: *Submission* (29 October 1993) at 14).
23. See DP 32 at paras 5.20-5.21.
24. Australian Law Reform Commission, *Contempt* (ALRC 35, 1987) at para 265.

14. Alternative Dispute Resolution

14.1 The Commission's recommendations for defamation law reform focus on more effective means of restoring the reputation of people who have been defamed. The use of alternatives to protracted litigation to settle defamation actions is an important element in achieving that objective. In this Chapter we recommend that mediation should be offered to parties involved in defamation actions in New South Wales.

14.2 Mediation is the primary consensual dispute resolution process, where a neutral third party assists the parties to negotiate a mutually acceptable resolution of matters in dispute.¹ Mediation is the Commission's preferred alternative dispute resolution (ADR) process because it has become the most widely understood and practised of the varieties of ADR techniques.² It is the commonly used ADR technique in New South Wales for disputes in which litigation is contemplated, both in private dispute resolution and in court-connected programs.³ Experienced mediators, usually but not exclusively lawyers, are readily available in New South Wales and the process has the support of the legal profession, courts administration and participants.⁴

14.3 Mediation has already been actively considered for resolving defamation actions.⁵ Submissions on DP 32 were generally in favour of mediation being used more frequently for resolution of defamation actions,⁶ though some proposed more coercive or compulsory elements than occur in mediation as is currently understood and practised.⁷ There was little support for using other alternatives to litigation currently available,⁸ or for arbitration such as the procedure offered by the Iowa Libel Dispute Resolution Program.⁹ The Commission considers that other current alternatives are unlikely to provide an effective alternative to litigation.

MEDIATION IN DEFAMATION ACTIONS

14.4 The Commission strongly supports the use of mediation in the resolution of defamation disputes. This conclusion recognises the potential benefits to be obtained by many parties to defamation actions which currently follow the lengthy, tortuous and expensive path of litigation, but the overwhelming majority of which are settled by negotiation prior to trial. In many respects, incorporating mediation into the methods of resolving defamation disputes is no different from the use of mediation in other civil litigation, a phenomenon which is increasingly apparent in the Australian legal system.¹⁰ The potential benefits of mediation likely to appeal to parties to defamation actions include speed, lower costs, flexibility, informality, confidentiality and the consensual and creative nature of settlements.

14.5 The circumstances of defamation litigation suggest consensual resolution of disputes is potentially more appropriate and satisfying for some parties. The focus of many defamation actions is the actual vindication of reputation rather than the assertion of abstract legal rights. In cases of accidental defamation, which are likely to be settled, this can be done more efficiently. The uncertainty in defamation litigation makes financial considerations particularly relevant to parties contemplating mediation. Speedy settlements permit more rapid restoration of reputation, and remedies other than damages more relevant redress for hurt.

14.6 It must be acknowledged, however, that for other parties, successful participation will be extremely unlikely. It is the intensely felt, entrenched and intangible interests characterising defamation actions which can make parties extremely polarised, drag out litigation and preclude contemplation of settlement.¹¹ There will also be some cases in which difficult questions of law arise which, while not precluding mediation, may make its successful employment improbable.

14.7 Mediation has been used already in the resolution of some defamation actions in New South Wales. The Commission is aware that a small number of defamation matters are among those mediated in the Settlement Week Programme conducted by the NSW Law Society, and that others have been mediated by private agreement between the parties during the pre-trial period. Confidentiality surrounding the process of mediation prevents the Commission reporting on the conduct and outcomes of these mediations in detail. The numbers are relatively small, but some conclusions can be made about their effectiveness.¹² Parties are more likely to be individuals, although some media defendants, including major ones, do choose to mediate. The benefits of defamation mediation put to the Commission include: savings in costs; the non-threatening atmosphere; greater confidentiality;¹³ the opportunity to explain, or to apologise and accept the apology; face-saving and creative solutions beyond those which a court is empowered to order; more efficient settlement of matters which were most likely to settle before trial.

MEDIATION UNDER THE SUPREME COURT ACT

14.8 The Commission considered several options for implementing mediation of defamation actions. Mediation could continue to be offered in an informal way, with parties making arrangements privately, or participating in the Settlement Week Programme. Alternatively, the Court could incorporate settlement negotiations into the pre-trial procedures of the Defamation List.¹⁴ Between these options lies the court-connected program, using independent mediators but with the Court assuming an administrative role to a greater or lesser degree. In the Commission's view, this middle path is to be preferred. Avoiding the dangers inherent in the court's direct involvement in the mediation process,¹⁵ this should make mediation more readily used where parties desire to settle their disputes.

14.9 In the Commission's view, recent amendments to the Supreme Court Act offer the most effective method of implementing mediation of defamation actions. The *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW) enables the Supreme Court (among others) to establish ADR procedures. It sets broad parameters within which courts can develop individualised court-annexed dispute resolution programs for different types of cases. The flexibility afforded by this legislation is most suited to developing a voluntary mediation procedure most appropriate for parties to defamation actions, but one where accountability for the quality and integrity of the program rests with the court.

14.10 The *Supreme Court Act 1970* (NSW) now permits the Court to make an order referring parties, with their agreement, to mediation.¹⁶ Where this occurs, the Act confers a privilege similar to that for judicial proceedings on mediation sessions and documents prepared for them, specifies the confidentiality which applies to mediation sessions and limits the liability of mediators. Costs of mediation are to be paid as agreed by the parties. Agreements reached at mediation are enforceable as orders of the Court. The Court is empowered to compile lists of persons suitable to be mediators, and set the necessary qualifications. Specialist lists for different types of matters are permitted. More detailed procedures can be established by Rules of Court, allowing for flexibility in the way programs can operate. The over-riding principle of the amending legislation is that participation in mediation is voluntary.

14.11 In an earlier report, *Training and Accreditation of Mediators* (LRC 67) the Commission recommended that dispute resolution programs conducted in connection with courts and tribunals be operated so as to guarantee the integrity of the process and quality of service.¹⁷ Of particular concern to the Commission were the dangers that unless safeguards were built into the procedures, ADR processes could be used to coerce parties to settle and predominantly to serve objectives such as clearing the court lists and saving Court resources.¹⁸ The *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW) accords with the Commission's recommendations in LRC 67 to the extent that the Court must accept responsibility for any ADR program connected with its jurisdiction.

Procedures for mediation

14.12 The Commission also recommended in LRC 67 that appropriate procedures should be developed complying with clearly enunciated guidelines and operating with adequate resources. The Commission did not consider that these guidelines could be specified in the abstract, except the requirement that mediators should be appropriately trained. The new legislation puts the onus on the courts to establish program procedures, and determine who may act as a mediator. The Commission reiterates its earlier recommendations that a mediation program for defamation matters should have clear objectives and appropriate procedures, be adequately resourced and, above all, that mediators should be trained.

14.13 The Commission considers that the Court should be left to develop specific procedures for mediation of defamation actions. Submissions in response to issues raised in DP 32 offered various suggestions about the timing of mediation, attendance at the sessions, disclosure and confidentiality, costs etc. A considerable amount of expertise and research in court-connected mediation now exists. The Commission considers that the Court has sufficient access to these resources to enable it to devise the most appropriate procedures for defamation actions, under the umbrella of the legislative provisions introduced by the *Courts Legislation (Mediation and*

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Evaluation) Amendment Act 1994 (NSW). Accordingly we make no recommendations about how mediation of defamation actions should occur.

Recommendation 38

Mediation in defamation matters should be offered by the Supreme Court in accordance with the provisions of the *Supreme Court Act 1970 (NSW)* as amended by the *Courts (Mediation and Evaluation) Amendment Act 1994 (NSW)*.

FOOTNOTES

1. See New South Wales Law Reform Commission *Training and Accreditation of Mediators* (Report 67, 1991) at para 2.5; *Supreme Court Act 1970 (NSW)* s 110I.
2. See LRC 67 at para 2.10 for descriptions of consensual ADR techniques.
3. Mediation has been made available for matters proceeding in the Federal Court, the Family Court, NSW Supreme, District and Local Courts, the Land and Environment Court, the Commonwealth Administrative Appeals Tribunal, and several other Courts in Australian jurisdictions. See *Courts Legislation (Mediation and Evaluation) Amendment Act 1994 (NSW)*.
4. M Dewdney, B Sordo and C M Chinkin, *Contemporary Developments in Mediation Within the Legal System and Evaluation of the 1992-93 Settlement Week Programme* (Law Society of NSW, Sydney, 1994) at Chapter 2; T F M Naughton, "Mediation and the Land and Environment Court of New South Wales" (1992) 9 *Environment and Planning Law Journal* 219.
5. The *Defamation Bill 1992 (NSW)* cl 55 provided for a mediator to advise on correction statements or replies. The Legislation Committee received many submissions supporting mediation in defamation, and considered quite detailed proposals about how mediation could function: Parliament of New South Wales, Legislative Assembly, *Report of the Legislative Assembly on the Defamation Bill 1992* (October 1992) Chapter 14.
6. M G Sexton, Australian Society of Authors, Australian Press Council, Law Institute of Victoria, Australian Book Publishers Association, Law Society of NSW: *Submissions*.
7. Nine Network Australia, Consolidated Press Holdings, ACP Publishing, Australian Press Council, Australian Broadcasting Commission: *Submissions*.
8. DP 32 at paras 3.12-3.20.
9. DP 32 at paras 3.46-3.62.
10. See Dewdney, Sordo, Chinkin at Chapter 2; H Astor and C M Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney, 1992).
11. See DP 32 paras 3.5-3.11, and also references noted there: R P Bezanson, G Cranberg, J Soloski, *Libel Law and the Press: Myth and Reality* (Free Press, New York, 1987); R M Ackerman, "Defamation and Alternative Dispute Resolution: Healing the Sting" (1986) *Missouri Journal of Dispute Resolution* 1 at 18-20.
12. Advice to the Commission from Settlement Week Programme administrators and mediators, July 1994.
13. Though where the parties agree that a correction or apology will be published, they will necessarily agree to forgo the confidentiality of the mediation to the extent necessary to comply with the agreed terms.
14. Conducted by Court personnel in a manner similar to Status Conferences under Differential Case Management Program which applies to other Common Law matters in the Supreme Court: see Supreme Court *Practice Note 81*.

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15. A theme developed strongly in many critiques of court connected ADR: see LRC 67 Chapter 6 generally, and references in footnotes 7, 19, 26.
16. *Supreme Court Act 1970* (NSW) Part 7B ss 110H-110S.
17. LRC 67 at Chapter 6.
18. See LRC 67 at Chapter 6.⁴

Appendix 1: Defamation Amendment Bill 1995

[STATE ARMS]
New South Wales

Defamation Amendment Bill 1995

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to implement the recommendations of the New South Wales Law Reform Commission contained in its *Report on the Law of Defamation* (LRC 75, 1995) (*NSWLRC Report*). In particular, the Bill:

(a) amends the *Defamation Act 1974*:

to require the falsity of a defamatory imputation to be proved in most cases to establish a cause of action for defamation, and

to ensure that the defence of comment is only available if the defendant proves that the comment represents the opinion of its maker, and

to provide a defence if a defendant publishes an adequate requested correction of a defamatory imputation, and

to enable a plaintiff to seek a declaration from the Supreme Court that a defamatory imputation is false and to have that declaration published by the defendant, and

to reorganise existing provisions relating to absolute privilege, protected reports and official and public documents and records, and

to extend the defence relating to protected reports to proceedings of local councils and other public authorities, and

(b) amends the *Limitation Act 1969* to ensure that a limitation period of one year applies to defamation actions unless a court considers it appropriate to extend that period in a particular case, and

(c) amends consequentially the *Anti-Discrimination Act 1977*, the *Government and Related Employees Appeal Tribunal Act 1980*, the *Guardianship Act 1987*, the *Health Care Complaints Act 1993*, the *Independent Commission Against Corruption Act 1988*, the *Mental Health Act 1990*, the *Ombudsman Act 1974*, the *Public Finance and Audit Act 1983*, the *Regulation Review Act 1987*, the *Transport Appeal Boards Act 1980* and the *Victims Compensation Act 1987*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

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Clause 3 is a formal provision giving effect to the amendments to the *Defamation Act 1974* set out in Schedules 1 and 2.

Clause 4 is a formal provision giving effect to the amendments to the *Limitation Act 1969* set out in Schedule 3.

Clause 5 is a formal provision giving effect to the consequential amendments to various Acts set out in Schedule 4.

Clause 6 provides that explanatory notes contained in the amending Schedules do not form part of the proposed Act.

Schedules 1 and 2 make the amendments to the *Defamation Act 1974* described above.

Schedule 3 makes the amendments to the *Limitation Act 1969* described above.

Schedule 4 makes consequential amendments to the various Acts mentioned above.

Further explanation of the amendments is made in the explanatory notes relating to the amendments concerned.

[STATE ARMS]

New South Wales

Defamation Amendment Bill 1995

Contents

1	Name of Act
2	Commencement
3	Amendment of Defamation Act 1974 No 18
4	Amendment of Limitation Act 1969 No 31
5	Consequential amendment of other Acts
6	Explanatory notes
	Schedules
1	Amendments to Defamation Act 1974—causes of action and remedies
2	Amendments to Defamation Act 1974—defences and savings and transitional matters
3	Amendment of Limitation Act 1969
4	Consequential amendment of other Acts

Summary of provisions affected

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Schedule 1 Amendments to Defamation Act 1974—causes of action and remedies

<i>Provision</i>	<i>Amending item</i>
	Amendments—elements of cause of action
s 7	item [1]
s 7A	items [2]–[4]
Part 2A (ss 9–9E)	items [5]
s 11	item [6]
s 15	item [7]
s 16	item [8]
s 47	item [9]
	Amendment—requested corrections
Part 3A (ss 45A–45E)	item [10]
Amendment—declarations of falsity	
Part 4A (ss 48A–48E)	item [11]

Schedule 2 Amendments to Defamation Act 1974—defences and savings and transitional matters

<i>Provision</i>	<i>Amending item</i>
	Amendments—defence of comment

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s 32 item [1]

s 33 item [2]

Amendments—absolute privilege

ss 17–19 item [3]

Sch 2 item [4]

Amendments—protected reports and
official and public documents and records

s 24 item [5]

s 25 item [6]

Sch 2A item [7]

Sch 2B item [8]

Amendments—offers of amends

s 43 item [9]

Amendments—savings and transitional
provisions

Sch 3, cl 1 item [10]

Sch 3, Part 3 item [11]

Schedule 3 Amendment of Limitation Act 1969

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<i>Provision</i>	<i>Amending item</i>
s 14B	item [1]
Part 3, Div 4 (ss 62A–62D)	item [2]

Schedule 4 Consequential amendment of other Acts

Anti-Discrimination Act 1977

<i>Provision</i>	<i>Amending Schedule</i>
s 20C	Sch 4.1 [1]
s 49ZT	Sch 4.1 [2]
s 49ZXB	

Government and Related Employees Appeal Tribunal Act 1980

<i>Provision</i>	<i>Amending Schedule</i>
s 50Sch 4.2	

Guardianship Act 1987

<i>Provision</i>	<i>Amending Schedule</i>
s 74	Sch 4.3

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Health Care Complaints Act 1993

Provision

Amending Schedule

s 72

Sch 4.4

Independent Commission Against Corruption Act 1988

Provision

Amending Schedule

s 70Sch 4.5

Mental Health Act 1990

Provision

Amending Schedule

s 260

Sch 4.6

Ombudsman Act 1974

Provision

Amending Schedule

s 31H

Sch 4.7

Public Finance and Audit Act 1983

Provision

Amending Schedule

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s 58

Sch 4.8

Regulation Review Act 1987

Provision

Amending Schedule

s 12

Sch 4.9

Transport Appeal Boards Act 1980

Provision

Amending Schedule

s 26

Sch 4.10

Victims Compensation Act 1987

Provision

Amending Schedule

s 69

Sch 4.11

[STATE ARMS]

New South Wales

Defamation Amendment Bill 1995

No , 1995

A Bill for

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An Act to amend the *Defamation Act 1974* in relation to causes of action for defamation, defences, requested corrections and declarations of falsity; to amend the *Limitation Act 1969* to provide for a one year limitation period for defamation actions; to amend consequentially the *Anti-Discrimination Act 1977*, the *Government and Related Employees Appeal Tribunal Act 1980*, the *Guardianship Act 1987*, the *Health Care Complaints Act 1993*, the *Independent Commission Against Corruption Act 1988*, the *Mental Health Act 1990*, the *Ombudsman Act 1974*, the *Public Finance and Audit Act 1983*, the *Regulation Review Act 1987*, the *Transport Appeal Boards Act 1980* and the *Victims Compensation Act 1987*; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Defamation Amendment Act 1995*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Defamation Act 1974 No 18

The *Defamation Act 1974* is amended as set out in Schedules 1 and 2.

4 Amendment of Limitation Act 1969 No 31

The *Limitation Act 1969* is amended as set out in Schedule 3.

5 Consequential amendment of other Acts

The Acts specified in Schedule 4 are amended as set out in that Schedule.

6 Explanatory notes

Matter appearing under the heading "Explanatory note" in this Act does not form part of this Act.

Schedule 1 Amendments to Defamation Act 1974—causes of action and remedies

(Section 3)

Amendments—elements of cause of action

[1] Section 7 Definitions

Omit section 7 (1). Insert instead:

(1) In this Act:

actionable defamatory imputation has the meaning it has in section 9 (2).

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country includes:

- (a) a federation and a state, province or other part of a federation, and
- (b) a territory governed under a trusteeship agreement.

declaration of falsity means a declaration by the Supreme Court under section 48A that an actionable defamatory imputation is false.

parliamentary body means:

- (a) a parliament or legislature of any country, and
- (b) a house of a parliament of any country, and
- (c) a committee of a parliament or legislature of any country, and
- (d) a committee of a house or houses of a parliament or legislature of any country.

Territory of the Commonwealth includes a territory governed by the Commonwealth under a trusteeship agreement.

[2] Section 7A Functions of judge and jury

Section 7A (3)

Omit ``the jury is to determine whether the matter complained of carries the imputation and, if it does, whether the imputation is defamatory.".

Insert instead ``the jury is to determine whether the matter complained of was published by the defendant and, if so, whether the matter carries the imputation. If the jury determines that the defendant published matter carrying the imputation, the jury is then to determine whether the imputation is defamatory."

[3] Section 7A (4)

Omit the subsection. Insert instead:

- (4) If the jury determines that the matter complained of was published by the defendant and carries an imputation that is defamatory of the plaintiff, the court and not the jury:
 - (a) is to determine whether or not the imputation:
 - (i) is false, or
 - (ii) is inherently not capable of being proved true or false, or
 - (iii) does not relate to a matter of public interest, and
 - (b) is to determine whether any defence raised by the defendant (including all issues of fact and law relating to that defence) has been established, and
 - (c) is to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.

[4] Section 7A (6)

Insert after section 7A (5):

(6) Subsections (1)–(5) do not apply to proceedings for defamation in which a declaration of falsity is sought. The court and not the jury is to determine all issues of fact or law relevant to the resolution of such proceedings.

[5] Part 2A

Omit section 9. Insert instead.

Part 2A Causes of action for defamation

9 When cause of action exists

(1) A person has a cause of action for defamation against another person (*the publisher*) if and only if the person proves that an actionable defamatory imputation concerning the person has been made by the publisher.

(2) An *actionable defamatory imputation* is an imputation made by a person (whether by innuendo or otherwise) concerning another person by publishing the whole or any part of any matter (being a report, article, letter, note, picture, oral utterance or other thing):

(a) that is defamatory of the person concerning whom it is made, and

(b) that:

(i) is false, or

(ii) is inherently not capable of being proved true or false, or

(iii) does not relate to a matter of public interest.

(3) A person has such a cause of action for defamation for any of the following:

(a) each publication of matter by which an actionable defamatory imputation is made,

(b) each actionable defamatory imputation that is made by means of the publication of the same matter.

9A Election between remedies

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- (1) A person who has a cause of action for defamation may elect:
 - (a) to commence proceedings to recover damages for non-economic loss or economic loss, or for both, or
 - (b) to commence proceedings for a declaration of falsity, but only if the imputation complained of is inherently capable of being proved true or false.
- (2) If a person elects to bring proceedings for the award of one of the remedies referred to in subsection (1), the determination of the proceedings for that remedy precludes the bringing of proceedings for, or the award of, the other remedy.
- (3) However, nothing in this Part:
 - (a) prevents a person who has obtained a declaration of falsity against a defendant from subsequently commencing proceedings to recover (or from being awarded) damages for non-economic loss in respect of the imputation for which the declaration was made if the defendant fails to comply with an order to publish the declaration, or
 - (b) prevents a person who has obtained a declaration of falsity from recovering in those same proceedings damages for economic loss in respect of the same imputation for which the declaration was made, or
 - (c) enables a person to commence proceedings seeking both:
 - (i) damages for non-economic loss for any imputation, and
 - (ii) a declaration of falsity in respect of that, or any other, imputation (however made).

9B Leave required to institute certain proceedings

If a person has brought defamation proceedings (whether in New South Wales or elsewhere) against any person in respect of the publication of any matter, the person may not bring further defamation proceedings against the same defendant in respect of the same or any other publication of the same or like matter, except with the leave of the court in which the further proceedings are to be brought.

9C Rules of court concerning imputations

Rules of court may prohibit or regulate the reliance by a plaintiff in defamation proceedings on several imputations alleged to have been made by means of the same matter published by the defendant, where the several imputations do not differ in substance.

9D Awards of damages by court

If the court or the jury (if any) finds for the plaintiff as to more than one cause of action in the same proceedings for defamation, the court must assess damages in a single sum in respect of all causes of action in respect of which the plaintiff succeeds unless the court considers the interests of justice require otherwise.

9E Application of this Part

This Part does not affect the powers of any court in respect of vexatious proceedings or abuse of process.

[6] Section 11 Common law and other defences

Insert at the end of section 11:

- (2) Any defence of justification or truth at common law is abrogated.

[7] Section 15 Truth generally

Omit the section.

[8] Section 16 Truth: contextual imputations

Omit section 16 (2) (a).

[9] Section 47 Truth or falsity of imputation

Omit the section.

Explanatory note—items [1]–[9]

The proposed replacement of section 9 by item [5] with a new Part 2A will ensure that the circumstances that can give rise to a civil cause of action for defamation are limited. The publication of a defamatory imputation about a person will not, of itself, found an action for a remedy. Damages for non-economic loss will only be available if the plaintiff can prove that the defamatory imputation is false, inherently incapable of being proved true or false or does not relate to a matter of public interest (proposed section 9). A plaintiff seeking a declaration that an

imputation is false will have to prove that the imputation is inherently capable of being proved true or false (proposed section 9).

Damages for both non-economic loss and a declaration of falsity will not generally be available as remedies in respect of the same defamatory imputation or in the same proceedings; they will usually be alternative remedies. An exception is provided for the institution of proceedings for damages for non-economic loss in cases where a defendant has previously failed to obey a publication order concerning a declaration of falsity (proposed section 9A (1) and (3)).

In addition, it will be possible to combine a claim for damages for economic loss with an application for a declaration of falsity. The claim for economic loss will be determined in the same proceedings following the determination of the application for the declaration (proposed section 9A (3)).

Proposed sections 9B–9E re-enact (with minor modifications) provisions that are already contained in existing section 9.

Items [6] and [7] amend sections 11 and 15 to abolish the defence of truth, whether under the Act or at common law. At present, section 15 provides that the defence of truth is available only if it is proved that an imputation is true or a matter of substantial truth and either relates to a matter of public interest or is published under qualified privilege. The defence has been rendered otiose in view of the elements that will now be needed to establish a cause of action. Item [9] consequentially repeals section 47.

Item [8] makes a consequential amendment to section 16 (truth: contextual imputations) to ensure that proof of the public interest of a contextual imputation is not required to establish a defence of contextual imputation.

Items [1] and [3] make consequential amendments to section 7 (definitions) and 7A (functions of judge and jury). Item [2] also amends section 7A to make it clear that in jury trials it is the jury's function to decide whether in fact the matter complained of was published by the defendant.

See recommendations 2–8, 10–12, 17 and 21 of the *NSWLRC Report*.

Amendments—requested corrections

[10] Part 3A

Insert after Part 3:

Part 3A Requested corrections

45A Definitions

In this Part:

complainant means the person who alleges that the publication of matter carries an actionable defamatory imputation about the person.

medium means a newspaper, magazine, television program, radio program or other method of communication.

offending matter means the matter that is alleged to carry the actionable defamatory imputation complained of.

formal correction request means a correction request by a complainant that complies with section 45D.

publisher means the person who publishes the offending matter.

45B Effect on damages assessment of publication of requested correction under this Part

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- (1) A publisher of offending matter who:
 - (a) has published an adequate requested correction in accordance with this Part in relation to that matter, and
 - (b) has paid the reasonable costs of the complainant up to the date on which the correction is published, is not liable to pay damages to the complainant for non-economic loss resulting from the publication of the offending matter.
- (2) However, nothing in this section prevents a complainant from recovering from the publisher damages for economic loss resulting from the publication of the offending matter.

45C Adequate requested corrections

- (1) An adequate requested correction is published in accordance with this Part if the publisher causes a correction to be published that
 - (a) is published in the terms proposed by a formal correction request, and
 - (b) is published in the same medium and in a similar place within that medium as the offending matter was originally published or is published in a medium that is calculated to reach substantially the same audience as that original publication, and
 - (c) unequivocally asserts that the imputation complained of in the correction request is false and, where reasonably possible, states the true state of affairs, and
 - (d) in the case of any imputation alleged to carry a defamatory meaning by reason of the existence of any extrinsic fact or circumstance—asserts that the publication of the offending matter was not intended to convey that imputation, and
 - (e) in the case of offending matter published in an edition of a medium produced on 5 or more days in any one week—is published by a date that:
 - (i) is within 7 days of receipt of a prescribed correction request, or

- (ii) is agreed between the publisher and the complainant, and
- (f) in a case to which paragraph (e) does not apply—is published by a date that:
 - (i) is requested by the complainant in a formal correction request, or
 - (ii) is agreed between the publisher and the complainant, or
 - (iii) is reasonable in all the circumstances.

(2) Alternatively, an adequate requested correction is published in accordance with this Part if the publisher causes a correction to be published that complies with a reasonable request by the complainant for a correction.

45D Formal correction requests by complainants

A complainant makes a formal correction request if the request:

- (a) is made in writing and served on the publisher before the commencement of any proceedings for defamation in respect of the offending matter, and
- (b) identifies the medium in which the offending matter was published, and
- (c) specifies any defamatory imputation alleged to have been carried by the publication of the offending matter, and
- (d) specifies any facts that demonstrate the falsity of that imputation, and
- (e) in the case of any imputation alleged to carry a defamatory meaning by reason of the existence of any extrinsic fact or circumstance—specifies any such fact or circumstance, and
- (f) proposes the terms of, and time for, the publication of a correction that are reasonable in all the circumstances.

45E Determination of steps to be taken under this Part

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(1) If a publisher agrees to publish an adequate requested correction under this Part, the publisher or the complainant may apply to a relevant court for the determination of any question concerning the steps to be taken to comply with the provisions of this Part.

(2) On any such application, the court may:

(a) make or refuse to make a determination on any question concerning any step to be taken to comply with the provisions of this Part, and

(b) make such orders as to costs as appears to it just in the circumstances.

(3) Any such determination or order as to costs may be made by the court regardless of whether or not other proceedings in respect of the publication of the offending matter have been commenced.

(4) An appeal does not lie in respect of a determination made under subsection (2).

(5) For the purposes of this section, **relevant court** means:

(a) if the complainant has brought proceedings against the publisher for damages for non-economic loss in respect of the offending matter—the court in those proceedings, and

(b) in any other case—a court that would have jurisdiction to determine proceedings for damages for non-economic loss brought in respect of the publication of the offending matter.

Explanatory note—item [10]

The proposed amendment inserts a new Part 3A in the Act to provide for requested corrections. The proposed Part contains the following provisions:

Proposed section 45A contains definitions of terms used in the Part.

Proposed section 45B ensures that a publisher of an actionable defamatory imputation is not liable to pay damages for non-economic loss resulting from its publication if an adequate requested correction is published and if the publisher has paid the complainant's reasonable costs to date. However, the publication of such a correction will not affect the liability of the publisher to pay damages for economic loss.

Proposed section 45C provides for two alternative forms of adequate requested corrections for the purposes of the new Part. The first involves a correction published in response to a formal correction request made under proposed section 45D and that complies with certain detailed requirements laid down in proposed subsection (1). The second involves a correction that complies with a reasonable written request (other than a request under proposed section 45D) from a complainant.

Proposed section 45D sets out the requirements for prescribed correction requests by complainants for the purposes of the new Part.

Proposed section 45E enables a relevant court, on the application of a publisher or a complainant, to make determinations as to the steps required for the publication of an adequate requested correction under the proposed Part.

See recommendations 22–28 of the *NSWLRC Report*.

Amendments—declarations of falsity

[11] Part 4A

Insert after Part 4:

Part 4A Declarations of falsity

48A Supreme Court may make a declaration of falsity

(1) A person who claims that an actionable defamatory imputation has been published in respect of the person may apply to the Supreme Court for a declaration as to the falsity of that imputation.

(2) If, on any such application, it is proved to the satisfaction of the Court that an actionable defamatory imputation concerning the applicant has been published, the Court may:

(a) declare that the imputation is false, and

(b) order that the declaration be published, on such conditions as the Court may impose, by the person who published the imputation.

(3) A declaration of falsity may be made only if:

(a) the imputation is false, and

(b) the other elements for an actionable defamatory imputation referred to in section 9 (2) have been established.

(4) Proceedings for a declaration of falsity must be commenced within 4 weeks of the publication of the matter carrying the imputation unless the Court grants leave to commence proceedings after that period.

However, the Court cannot grant leave if the matter carrying the imputation was published more than one year before leave is sought.

(5) Without limiting the matters the Court may take into account in determining whether to make a declaration, the Court may decline to make a declaration in any of the following circumstances:

- (a) if the defendant has been granted a release,
- (b) if an accord and satisfaction has been made,
- (c) if an appropriate correction has been published,
- (d) if an offer of amends has been made,
- (e) if the making of a declaration would no longer serve a useful purpose.

48B Defences to action for declaration of falsity

(1) Subject to subsection (2), the Supreme Court cannot decline to make a declaration of falsity only because of the existence of any defence to an action for damages based on the publication of a defamatory imputation.

(2) The Court cannot make a declaration of falsity if it is satisfied of the availability on the facts of a triable defence of absolute privilege or a triable defence under section 24, 25, 27 or 28.

48C Indemnity costs for successful plaintiffs

The Supreme Court is to order costs of or incidental to a successful application for a declaration of falsity to be assessed on an indemnity basis unless the interests of justice require otherwise.

48D Effect of determination of proceedings for declaration of falsity

(1) Nothing in this Part prevents a person who has obtained a declaration of falsity in respect of an actionable defamatory imputation from recovering in the same proceedings damages for economic loss for the

publication of that imputation. However, any defence (whether under this Act or otherwise) will, if established, defeat any claim for such damages.

(2) The determination of proceedings for a declaration of falsity precludes a person from seeking or being awarded damages for non-economic loss for the imputation concerned except where proceedings to recover such damages are commenced following the defendant's failure to comply with an order to publish the declaration.

48E Rules may prescribe form and content of declarations of falsity

(1) Rules of court for or with respect to the form and content of a declaration of falsity may be made under the *Supreme Court Act 1970*.

(2) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.

Explanatory note—item [11]

The proposed amendment inserts a new Part 4A dealing with the making of declarations of falsity by the Supreme Court. The new Part contains the following provisions:

Proposed section 48A provides that the Supreme Court may make a declaration that an actionable defamatory imputation is false in certain circumstances. An action for such a declaration must be brought within 4 weeks of the publication of the imputation.

Proposed section 48B ensures that the defences that can prevent the making of a declaration of falsity are limited to the defences concerning protected reports and official and public documents and records under sections 24 and 25 and the defences under section 27 and 28 relating to the publication of court notices and official notices.

Proposed section 48C requires the Court to assess a plaintiff's costs on an indemnity basis in successful proceedings for a declaration unless the interests of justice require otherwise.

Proposed section 48D makes it clear that a plaintiff may seek a declaration of falsity and damages for economic loss only. Damages of non-economic loss are generally not available to a plaintiff who seeks or who has obtained a declaration of falsity. An exception is provided in cases where a defendant fails to comply with an order to publish a declaration of falsity.

Proposed section 48E enables rules of court to be made concerning the form and content of declarations of falsity.

See recommendations 10–20 of the *NSWLRC Report*.

Schedule 2 Amendments to Defamation Act 1974—defences and savings and transitional matters

(Section 3)

Amendments—defence of comment

[1] Section 32

Omit the section. Insert instead:

32 Comment of defendant

Subject to sections 30 and 31, it is a defence as to comment that the comment is the comment of the defendant, but only if the defendant establishes that the comment represents the defendant's opinion.

[2] Section 33

Omit the section. Insert instead:

33 Comment of servant or agent of defendant

Subject to sections 30 and 31, it is a defence as to comment that the comment is the comment of a servant or agent of the defendant, but only if the defendant establishes that the comment represents the opinion of the agent or servant.

Explanatory note—items [1] and [2]

The proposed amendments ensure that if a defendant relies on the defence of comment under the *Defamation Act 1974*, the defendant bears the onus of showing that the comment is the defendant's real opinion in the case of a defence of comment under section 32 or the real opinion of the defendant's agent or servant in the case of a defence of comment under section 33.

See recommendation 9 of the *NSWLRC Report*.

Amendments—absolute privilege

[3] Sections 17–19

Omit the sections. Insert instead:

17 Absolute privilege

There is a defence of absolute privilege as provided by Schedule 2.

[4] Schedule 2

Omit the Schedule. Insert instead:

Schedule 2 Absolute privilege

(Section 17)

Part 1 General defences

1 Parliamentary papers

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(1) There is a defence of absolute privilege for the publication of a document by order or under the authority of a parliamentary body.

(2) There is a defence of absolute privilege for the publication of a document previously published as mentioned in subclause (1) or a copy of a document so published.

2 Other parliamentary papers of this State

(1) There is a defence of absolute privilege for the publication by the Government Printer or under the authority of the Presiding Officer of either House of Parliament of:

(a) reports of the debates and proceedings of the House or any committee of that House, and

(b) a report of an individual complete speech of a Member of the House, provided the report is printed with a certificate by a person authorised by the Presiding Officer, stating the date and context of the speech and stating that the speech is published under authority, and

(c) proofs of such reports and copies of proofs of such reports, provided they are not known by the publisher to contain substantial printing or typographical errors or omissions and only while the official version of the reports has not become available, and

(d) recordings, or transcripts of recordings, of the debates and proceedings of the House or any committee of that House (being recordings or transcripts made in connection with the preparation of such reports), but only while the official version of those reports has not become available.

(2) There is a defence of absolute privilege for the publication by the Government Printer or under the authority of the Presiding Officers jointly of:

(a) reports of debates and proceedings of a joint sitting or of a joint committee, and

(b) a report of an individual complete speech of a Member at a joint sitting, provided the report is printed with a certificate by a person authorised by the Presiding Officers, stating the date and context of the speech and stating that the speech is published under authority, and

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(c) proofs of such reports and copies of proofs of such reports, provided they are not known by the publisher to contain substantial printing or typographical errors or omissions, and

(d) recordings, or transcripts of recordings, of the debates and proceedings of a joint sitting or of a joint committee (being recordings or transcripts made in connection with the preparation of such reports), but only while the official version of those reports has not become available.

(3) There is a defence of absolute privilege for the publication of reports and proofs, previously published as mentioned in subclause (1) or (2), or a copy of reports and proofs so published.

(4) In this clause:

joint committee means a joint committee of both Houses of Parliament.

joint sitting means a joint sitting of the Members of the Legislative Council and the Members of the Legislative Assembly.

Presiding Officer means the President of the Legislative Council or the Speaker of the Legislative Assembly.

recordings includes audio recordings and audio-visual recordings.

3 Proceedings of inquiry

There is a defence of absolute privilege for a publication in the course of an inquiry made under the authority of an Act or Imperial Act or under the authority of Her Majesty, of the Governor, or of either House or both Houses of Parliament.

4 Report of inquiry

If a person is appointed under the authority of an Act or an Imperial Act or under the authority of Her Majesty, of the Governor or of either House or both Houses of Parliament to hold an inquiry, there is a defence of absolute privilege for a publication by the person in an official report of the result of the inquiry.

Part 2 Specific defences

5 Anti-Discrimination Act 1977

(1) There is a defence of absolute privilege for:

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- (a) a publication to or by:
 - (i) a member or the Registrar of the Equal Opportunity Tribunal constituted under the *Anti-Discrimination Act 1977*, or
 - (ii) a member of the Anti-Discrimination Board constituted under that Act, or
 - (iii) the President, or
 - (iv) any officer of the President of that Board, or
- (b) a publication to any officer of the Public Service appointed or employed to assist in the execution or administration of that Act, or
- (c) a publication to or by the Director of Equal Opportunity in Public Employment appointed under that Act, if the publication is made for the purpose of the execution or administration of the Act.

(2) There is a defence of absolute privilege for the publication of a report:

- (a) referred to in section 91 (2) or 94 (1) of the *Anti-Discrimination Act 1977* of the President of the Anti-Discrimination Board made to the Equal Opportunity Tribunal, or
- (b) referred to in section 120 (2), 121, 122 or 122R (b) of that Act to the Minister administering that Act.

6 Casino Control Act 1992

There is a defence of absolute privilege for a publication to or by:

- (a) the Casino Control Authority, or
- (b) a member of that Authority as such a member,

for the purpose of the holding of an inquiry under section 143 of the *Casino Control Act 1992*.

7 Children (Care and Protection) Act 1987

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There is a defence of absolute privilege for the publication of a report made under section 100 (6) of the *Children (Care and Protection) Act 1987* by a Board of Review established under that Act.

Note

This provision is based on section 17H of the *Defamation Act 1974*, which had not been commenced at the time this draft was prepared.

8 Coal Mines Regulation Act 1982

There is a defence of absolute privilege for the publication of a report referred to in section 94 of the *Coal Mines Regulation Act 1982* of an inspector appointed under that Act to or by the Minister administering that Act.

9 Community Services (Complaints, Appeals and Monitoring) Act 1993

There is a defence of absolute privilege:

- (a) for a publication to or by a solution facilitator for the purpose of the resolution of a complaint under the *Community Services (Complaints, Appeals and Monitoring) Act 1993*, and
- (b) for the publication by any such facilitator of a report or information under section 34 of that Act, and
- (c) for a publication in the course of proceedings before the Community Services Appeals Tribunal under that Act, and
- (d) for the publication by that Tribunal of an official report of a decision of that Tribunal or of the reasons for that decision.

10 Farm Produce Act 1983

There is a defence of absolute privilege for the publication of a notice under section 47 or 48 of the *Farm Produce Act 1983*.

11 Government Pricing Tribunal Act 1992

NSW Law Reform Commission: REPORT 75 (1995) - DEFAMATION

(1) There is a defence of absolute privilege for a publication to or by the Government Pricing Tribunal or to any member of the Tribunal or member of staff of the Tribunal in his or her capacity as such a member.

(2) This clause applies in relation to any hearing before the Government Pricing Tribunal or any other matter relating to the powers, authorities, duties or functions of the Tribunal.

12 Harness Racing Authority Act 1977

There is a defence of absolute privilege:

(a) for a publication in the course of an appeal under Part 5 of the *Harness Racing Authority Act 1977*, and

(b) for a publication by the Harness Racing Authority of New South Wales or the Harness Racing Appeals Tribunal in an official report of its decision in respect of any such appeal and of the reasons for that decision.

13 Health Care Complaints Act 1993

(1) There is a defence of absolute privilege:

(a) for a publication to or by the Commission of or concerning a complaint by a complainant under the *Health Care Complaints Act 1993*, and

(b) for a publication to or by a conciliator for the purpose of the conciliation of a complaint under the *Health Care Complaints Act 1993*, and

(c) for the publication by any such conciliator of a report or information under section 53 or 54 of the *Health Care Complaints Act 1993*.

(2) There is a defence of absolute privilege:

(a) for a publication of a report under section 30 of the *Health Care Complaints Act 1993* (or that section as applied by section 61 of that Act), and

(b) for the publication of a report made under section 62 (1) of the *Health Care Complaints Act 1993* by the Health Care Complaints Commission constituted under that Act.

14 HomeFund Commissioner Act 1993

(1) There is a defence of absolute privilege for a publication to or by the HomeFund Commissioner, as HomeFund Commissioner, or to any member of the staff of the HomeFund Commissioner, as such a member.

(2) Subclause (1) applies in relation to an acting HomeFund Commissioner in the same way as it applies in relation to the HomeFund Commissioner.

(3) There is a defence of absolute privilege for the publication under section 34 (3) of the *HomeFund Commissioner Act 1993* of a report.

(4) There is a defence of absolute privilege for the publication, under the authority of the Minister for the time being administering the *HomeFund Commissioner Act 1993*, of a copy of a report previously made public under section 34 (3) of that Act.

15 HomeFund Restructuring Act 1993

There is a defence of absolute privilege for a publication to or by the HomeFund Advisory Panel, or to or by any member of the HomeFund Advisory Panel, for the purposes of section 10, 11 or 12 of the *HomeFund Restructuring Act 1993*.

16 Independent Commission Against Corruption Act 1988

(1) There is a defence of absolute privilege for a publication to or by the Independent Commission Against Corruption or the Commissioner for the Commission as Commissioner, or to any officer of the Commission (within the meaning of the *Independent Commission Against Corruption Act 1988*) as such an officer.

(2) This clause applies in relation to any hearing before the Independent Commission Against Corruption or any other matter relating to the powers, authorities, duties or functions of the Commission.

(3) This clause extends to publications made before the commencement of this clause.

17 Law Reform Commission Act 1967

NSW Law Reform Commission: REPORT 75 (1995) - DEFAMATION

(1) A report published pursuant to section 13 (6) of the *Law Reform Commission Act 1967* is, for the purposes of this Act, taken to have been published under the authority of either House of Parliament.

(2) There is a defence of absolute privilege:

(a) for a publication in the course of the proceedings of, or in the course of an inquiry held by, the Law Reform Commission under the *Law Reform Commission Act 1967*, and

(b) for any other publication by the Law Reform Commission in connection with a reference to it under that Act.

(3) Subclause (2) does not apply to a report referred to in section 13 of the *Law Reform Commission Act 1967*.

18 Legal Aid Commission Act 1979

There is a defence of absolute privilege for a publication to or by the Legal Aid Commission of New South Wales constituted under the *Legal Aid Commission Act 1979*, an officer of that Commission or a committee established under that Act if the publication is made for the purpose of the execution or administration of that Act.

19 Legal Profession Act 1987

(1) There is a defence of absolute privilege:

(a) for a publication to or by:

(i) the Bar Council, or

(ii) the Law Society Council, or

(iii) the Legal Services Commissioner, or

(iv) the Legal Services Tribunal, or

(v) a member of any of those bodies as such a member,

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for the purpose of the making or referral of a complaint, or the investigation, hearing or review of a complaint, under Part 10 of the *Legal Profession Act 1987*, and

(b) for the publication by a body or person referred to in paragraph (a) of a report of the decision or determination of the body or person in respect of a complaint, and of the reasons for that decision or determination, under Part 10 of the *Legal Profession Act 1987*.

(2) In this clause:

(a) a reference to the Bar Council or the Law Society Council includes a reference to a committee of either of those Councils, and

(b) a reference to a member of the Bar Council or the Law Society Council includes a reference to a member of any such committee.

20 Medical Practice Act 1992

(1) There is a defence of absolute privilege:

(a) for a publication to or by:

(i) the New South Wales Medical Board, or

(ii) an Impaired Registrants Panel, or

(iii) a Professional Standards Committee, or

(iv) the Medical Tribunal, or

(v) a member of any of those bodies as such a member,

of the assessment or referral of a complaint or other matter or the holding of any inquiry or investigation or any appeal under the *Medical Practice Act 1992*, and

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(b) for a publication by a body or person referred to in paragraph (a) of a report of a decision or determination in respect of a complaint or other matter or any inquiry, investigation or appeal, and of the reasons for that decision or determination.

(2) In this clause:

(a) a reference to the New South Wales Medical Board includes a reference to a committee of the Board, and

(b) a reference to a member of the Board includes a reference to a member of any such committee.

21 Motor Accidents Act 1988

There is a defence of absolute privilege:

(a) for a publication to or by:

(i) a licensed insurer (within the meaning of the *Motor Accidents Act 1988*), or

(ii) the Nominal Defendant,

for the purpose of any claim or any proceedings arising from any claim under the *Motor Accidents Act 1988*, and

(b) for a publication by any such licensed insurer or the Nominal Defendant of a report of a decision or determination in respect of any such claim and of the reason for that decision or determination, and

(c) for a publication by the Motor Accidents Authority of New South Wales of the whole or any part of the register maintained by the Authority under section 67 of the *Motor Accidents Act 1988*.

22 New South Wales Crime Commission Act 1985

(1) There is a defence of absolute privilege for a publication to or by the New South Wales Crime Commission or to any member of the Commission or member of the staff of the Commission in his or her capacity as such a member.

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(2) This clause applies in relation to any hearing before the New South Wales Crime Commission or any other matter relating to the powers, authorities, duties or functions of the Commission.

(3) This clause extends to publications made before the commencement of this clause.

23 Ombudsman Act 1974 and Police Service Act 1990

(1) There is a defence of absolute privilege for a publication to or by the Ombudsman, as Ombudsman, or to any officer of the Ombudsman, as such an officer.

(2) Subclause (1) applies in relation to an acting Ombudsman, the Deputy Ombudsman and a special officer of the Ombudsman in the same way as it applies in relation to the Ombudsman.

(3) There is a defence of absolute privilege for a publication to a member of Parliament for the purposes of section 12 (2) of the *Ombudsman Act 1974* or section 125 (4) of the *Police Service Act 1990*.

(4) There is a defence of absolute privilege for the publication under section 31AA of the *Ombudsman Act 1974* or under section 170A or 197 (5) of the *Police Service Act 1990* of a report.

(5) There is a defence of absolute privilege for the publication, under the authority of the Minister for the time being administering the *Ombudsman Act 1974*, of a copy of a report previously made public under section 31AA of that Act.

(6) There is a defence of absolute privilege for the publication, under the authority of the Minister for the time being administering the *Police Service Act 1990* of a copy of a report previously made public under section 170A or 197 (5) of that Act.

24 Prisons Act 1952 and Sentencing Act 1989

(1) There is a defence of absolute privilege:

(a) for a publication of a report or other document under Part 10 of the *Prisons Act 1952* or Part 3 of, or Part 2 of Schedule 2 to, the *Sentencing Act 1989*, and

(b) for a publication in the course of any proceedings of the following bodies:

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- (i) the Offenders Review Board or a Division or a committee of that Board,
- (ii) the Serious Offenders Review Council or a Division or a committee of that Council,
- (c) for a publication by a body referred to in paragraph (b) of a report of any proceedings referred to in that paragraph.

25 Privacy Committee Act 1975

(1) There is a defence of absolute privilege for a publication to a member of the Privacy Committee constituted under the *Privacy Committee Act 1975*, a member of a subcommittee of that Committee or an officer of that Committee for the purpose of the execution or administration of that Act or, for the purpose, by that Committee, by a subcommittee of that Committee to that Committee or by such a member or officer.

(2) There is a defence of absolute privilege for the publication under section 18 (3) of the *Privacy Committee Act 1975* of a report under that Act.

(3) There is a defence of absolute privilege for the publication under the authority of the Minister for the time being administering the *Privacy Committee Act 1975* of a copy of a report previously made public under section 18 (3) of that Act.

26 Protected Disclosures Act 1994

There is a defence of absolute privilege for a publication to or by a public official or public authority referred to in section 8 (1) (b) or (c) of the *Protected Disclosures Act 1994* of a disclosure made to the public official or public authority in relation to an allegation of corrupt conduct, maladministration or serious and substantial waste of public money if the publication is for the purpose of investigating that allegation.

27 Public Finance and Audit Act 1983

There is a defence of absolute privilege for a publication to or by the Auditor-General or a member of the Audit Office of New South Wales as such a member of a disclosure made in relation to a complaint under section 38B (1A) of the *Public Finance and Audit Act 1983*.

28 Public Hospitals Act 1929

There is a defence of absolute privilege for the publication under section 33H of the *Public Hospitals Act 1929* of a decision and the reasons for that decision of a board referred to in that section.

29 Racing Appeals Tribunal Act 1983

There is a defence of absolute privilege:

- (a) for a publication in the course of an appeal under the *Racing Appeals Tribunal Act 1983*, and
- (b) for a publication by the Racing Appeals Tribunal in an official report of its decision in respect of any such appeal and of the reasons for that decision.

30 Workers Compensation Act 1987

(1) There is a defence of absolute privilege:

- (a) for a publication to or by a conciliation officer for the purpose of any proceedings under the *Workers Compensation Act 1987*, and
- (b) for the publication by any such conciliation officer of a report of a decision or determination in respect of any such proceedings and of the reasons for that decision or determination.

(2) There is a defence of absolute privilege:

- (a) for a publication to or by an insurer for the purpose of any claim or any proceedings arising from any claim under the *Workers Compensation Act 1987*, and
- (b) for a publication by an insurer of a report of a decision or determination in respect of any such claim and of the reason for that decision or determination, and
- (c) for a publication of information under section 93D of the *Workers Compensation Act 1987* by the Authority referred to in that section, and

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(d) for a publication to or by an insurer pursuant to an exchange of information authorised by section 93D (2) of the *Workers Compensation Act 1987*.

(3) In subclause (2), *insurer* and *claim* have the same meanings as in Division 1A of Part 4 of the *Workers Compensation Act 1987* and in subclause (2) (d), insurer has the extended meaning it has in section 93D of that Act.

Explanatory note—items [3] and [4]

The proposed amendment made by item [4] replaces Schedule 2 of the Principal Act. The Schedule follows the drafting format for absolute privilege contained in the *Defamation Bill 1992* in that the circumstances of absolute privilege are listed (with appropriate updates) in alphabetical order of Acts within a Schedule rather than in the main body of the Act. Item [3] consequentially repeals sections 17–19.

Section 30 of the *Interpretation Act 1987* will preserve existing privileges from an action for defamation arising out of any defences contained in repealed sections 17–19 or repealed Schedule 2.

See recommendations 31–33 of the *NSWLRC Report*.

Amendments—protected reports and official and public documents and records

[5] Section 24 Protected reports

Omit "clause 2 of Schedule 2 as proceedings for the purposes of this definition" from section 24 (1).

Insert instead "Schedule 2A".

[6] Section 25 Official and public documents and records

Omit "clause 3 of Schedule 2 as a document or record to which this section applies" from section 25 (a).

Insert instead "Schedule 2B".

[7] Schedule 2A

Insert after Schedule 2:

Schedule 2A Protected reports

(Section 24)

Part 1 General reports

1 Public proceedings of parliamentary bodies

Proceedings in public of a parliamentary body.

2 Public proceedings in international organisations

Proceedings in public of an international organisation of any country or of governments of any countries.

3 Public proceedings of international governmental conferences

Proceedings in public of an international conference at which governments of any countries are represented.

4 Proceedings of international judicial or arbitral tribunals

Proceedings in public of the International Court of Justice or of any other judicial or arbitral tribunal for the decision of any matter in dispute between nations or of any other international judicial or arbitral tribunal.

5 Public proceedings of a court

Proceedings in public of a court of any country.

6 Public proceedings of inquiries

Proceedings in public of an inquiry held under:

- (a) the legislation of the Commonwealth, another State, a Territory of the Commonwealth or a foreign country, or
- (b) the authority of the government of the Commonwealth, another State, a Territory of the Commonwealth or a foreign country.

7 Public proceedings of local and other public authorities

Proceedings in public of a local council, board or other authority constituted for public purposes under the legislation of the Commonwealth, a State or a Territory of the Commonwealth, so far as the proceedings relate to a matter of public interest.

8 Proceedings of certain associations

(1) So much of the proceedings in public of an association to which this clause applies or of a committee or governing body of an association to which this clause applies (being proceedings in furtherance of the objects referred to in subclause (2)) as comprises a finding or decision that:

(a) relates to a member of the association or a person subject by contract or otherwise by law to control by the association, and

(b) was made in Australia or has effect, by law or custom or otherwise, in any part of Australia.

(2) This clause applies to an association, whether incorporated or not and wherever formed, that is:

(a) an association:

(i) having among its objects the advancement of any art, science or religion or the advancement of learning in any field, and

(ii) empowered by its constitution to control or adjudicate on matters connected with those objects, or

(b) an association:

(i) having among its objects the promotion of any calling (ie any trade, business, industry or profession) or the promotion or protection of the interests of persons engaged in any calling, and

(ii) empowered by its constitution to control or adjudicate on matters connected with the calling or on matters connected with the conduct of persons engaged in the calling, or

(c) an association:

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(i) having among its objects the promotion of any game, sport or pastime to the playing or exercise of which the public is admitted as spectators or otherwise or the promotion or protection of the interests of persons connected with the game, sport or pastime, and

(ii) empowered by its constitution to control or adjudicate on matters connected with the game, sport or pastime.

9 Proceedings of public meetings

Proceedings of a meeting open to the public, whether with or without restriction, held in Australia, so far as the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for a public office.

Part 2 Specific reports

10 Proceedings of Anti-Discrimination Board

Proceedings at an investigation, inquiry or examination conducted by or on behalf of the Anti-Discrimination Board constituted under the *Anti-Discrimination Act 1977*.

11 Proceedings of Bar Council, Law Society Council, Legal Services Commissioner and Legal Services Tribunal

Proceedings of the Bar Council, Law Society Council, Legal Services Commissioner or Legal Services Tribunal under Part 10 of the *Legal Profession Act 1987*.

12 Proceedings of Committee of Australian Jockey Club

Proceedings on an appeal to the Committee of the Australian Jockey Club under section 32 of the *Australian Jockey Club Act 1873*.

13 Proceedings of Crime Commission

Proceedings held in public by the New South Wales Crime Commission.

14 Proceedings of Equal Opportunity Tribunal

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Proceedings at an inquiry conducted by the Equal Opportunity Tribunal constituted under the *Anti-Discrimination Act 1977*.

15 Proceedings of Harness Racing Authority and Appeal Tribunal

Proceedings on an appeal to the Harness Racing Authority or to the Harness Racing Appeals Tribunal under Part 5 of the *Harness Racing Authority Act 1977*.

16 Proceedings of HomeFund Commissioner

Proceedings of the HomeFund Commissioner, so far as those proceedings are included in a report previously made public under section 34 (3) of the *HomeFund Commissioner Act 1993*.

17 Proceedings of Independent Commission Against Corruption

Proceedings at a hearing held in public by the Independent Commission Against Corruption.

18 Proceedings of Law Reform Commission

Proceedings in public of, or proceedings in public at an inquiry held by, the Law Reform Commission under the *Law Reform Commission Act 1967*.

19 Proceeding of Medical Board and other medical bodies

Proceedings of the New South Wales Medical Board, a Professional Standards Committee or the Medical Tribunal under the *Medical Practice Act 1992*.

20 Proceedings of Ombudsman

Proceedings of the Ombudsman, so far as those proceedings are included in a report previously made public under section 31AA of the *Ombudsman Act 1974* or under section 170A (2) or 197 (5) of the *Police Service Act 1990*.

21 Proceedings of Privacy Committee

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Proceedings of the Privacy Committee, so far as those proceedings are included in a report previously made public under section 18 (3) of the *Privacy Committee Act 1975*.

22 Proceedings of Racing Appeals Tribunal

Proceedings on an appeal to the Racing Appeals Tribunal under the *Racing Appeals Tribunal Act 1983*.

23 Proceedings of Workers Compensation conciliation officer

Proceedings of a conciliation officer under the *Workers Compensation Act 1987*.

[8] Schedule 2B

Insert after Schedule 2A:

Schedule 2B Official and public documents and records

(Section 25)

1 Parliamentary documents

Any report, papers, votes or proceedings published in any country by order or under the authority of a parliamentary body of that country.

2 Parliamentary debates and proceedings

The debates and proceedings of either House of Parliament published by the Government Printer or under the authority of the President or Speaker of the House.

3 Court judgments and records

A document that is:

(a) a judgment, being a judgment, decree or order in civil proceedings, of a court of any country, or

(b) a record of the court relating to:

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(i) such a judgment, or

(ii) the enforcement or satisfaction of such a judgment.

4 Documents open to public inspection

A record or document kept by a government or statutory authority or court of the Commonwealth, a State or a Territory of the Commonwealth or kept in pursuance of the legislation of the Commonwealth, a State or a Territory, being a record or document that is open to inspection by the public.

5 Document of Bar Council, Law Society Council or other legal disciplinary bodies

A document that consists of a report made by:

(a) the Bar Council, or

(b) the Law Society Council, or

(c) the Legal Services Commissioner, or

(d) the Legal Services Tribunal,

of its decision or determination in respect of a complaint, and of the reasons for the decision or determination, under Part 10 of the *Legal Profession Act 1987*.

6 Document of Medical Board, Professional Standards Committee or Medical Tribunal

A document that consists of a report made by:

(a) the New South Wales Medical Board, or

(b) a Professional Standards Committee, or

(c) the Medical Tribunal,

of its decision or determination in respect of a complaint or an inquiry or appeal, and of its reasons for that decision or determination, under the *Medical Practice Act 1992*.

7 Report of Workers Compensation conciliation officer

A document that consists of a report made by a conciliation officer of his or her decision or determination, and of the reasons for the decision or determination, in respect of any proceedings under the *Workers Compensation Act 1987*.

Explanatory note—items [5]–[8]

The proposed amendments made by items [7] and [8] insert Schedules into the Principal Act that follow the drafting format (with appropriate updates) for protected reports and for official and public documents and records contained in the *Defamation Bill 1992*. Items [5] and [6] make consequential amendments to sections 24 and 25.

Also, the categories of protected reports are extended to proceedings of local councils and other public authorities (clause 7 of proposed Schedule 2A).

See recommendations 35 and 36 of the *NSWLRC Report*.

Amendment—offers of amends

[9] Section 43 Offer not accepted

Omit section 43 (1) (c)–(d). Insert instead:

, and

(c) the offeror is ready and willing to perform an agreement arising from the offeree's acceptance, at any time before the commencement of the trial on issues in relation to a defence under this section, of an offer made under this Division.

Explanatory note—item [9]

The proposed amendment removes section 43 (1) (d). That paragraph provides that a defence is available to a person whose offer of amends concerning matter of which he or she was not the author only if it is proved that the actual author was not actuated by ill will to the offeree. The proposed amendment also re-enacts section 43 (1) (c) in clearer language.

See recommendation 29 of the *NSWLRC Report*.

Amendments—savings and transitional provisions

[10] Schedule 3 Savings and transitional provisions

Insert at the end of clause 1 (1) of Part 1 in Schedule 3:

Defamation Amendment Act 1995

[11] Schedule 3, Part 3

Insert after Part 2:

Part 3 Provisions consequent on enactment of Defamation Amendment Act 1995

4 Definition

In this Part:

amending Act means the *Defamation Amendment Act 1995*.

5 Application of amendments

(1) An amendment made by the amending Act applies only to causes of action that accrue after the commencement of the amendment.

(2) However, an amendment made by the amending Act does not apply to a cause of action that accrues after the commencement of the amendment if:

(a) the cause of action is one of two or more causes of action in proceedings commenced by the plaintiff,
and

(b) each cause of action in the proceedings accrues because of the publication of the same, or substantially the same, matter on separate occasions (whether by the same defendant or another defendant),
and

(c) one or more of the other causes of action in the proceedings accrued before the commencement of the amendment.

(3) If an amendment made by the amending Act does not apply to a cause of action, this Act is taken to apply to the cause of action as if the amendment had not been made.

Explanatory note—items [10] and [11]

The proposed amendments make provision for matters of a savings or transitional nature.

Schedule 3 Amendment of Limitation Act 1969

(Section 4)

[1] Section 14B

Insert after section 14A:

14B Defamation

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(1) This section applies to a cause of action based on the publication of defamatory matter that accrued after the commencement of this section. However, if:

(a) such a cause of action is one of two or more causes of action in proceedings commenced by the plaintiff, and

(b) each cause of action in the proceedings accrues because of the publication of the same, or substantially the same, matter on separate occasions (whether by the same defendant or another defendant), and

(c) one or more of the other causes of action in the proceedings accrued before the commencement of this section,

then this Act applies to each cause of action regardless of when it accrues as if this section had not been enacted.

(2) An action on a cause of action to which this section applies is not maintainable if brought after the expiration of one year running from the date on which the defamatory matter was published.

(3) Nothing in this section affects the operation of section 48A (4) of the *Defamation Act 1974*.

[2] Part 3, Division 4

Insert after Division 3:

Division 4 Defamation

62A Extension of limitation period by court

(1) This section applies to a cause of action based on the publication of defamatory matter that accrued after the commencement of this section. However, if:

(a) such a cause of action is one of two or more causes of action in proceedings commenced by the plaintiff, and

(b) each cause of action in the proceedings accrues because of the publication of the same, or substantially the same, matter on separate occasions (whether by the same defendant or another defendant), and

(c) one or more of the other causes of action in the proceedings accrued before the commencement of this section,

then this Act applies to each cause of action regardless of when it accrues as if this section had not been enacted.

(2) A person claiming to have a cause of action to which this section applies may apply to a court for an order extending the limitation period for the cause of action.

(3) After hearing such of the persons likely to be affected by the application as it sees fit, the court may, if it decides that it is just and reasonable to do so, order that the limitation period for the cause of action be extended for such period as it determines. However, the court cannot extend the period beyond 3 years running from the date on which the defamatory matter concerned was published.

62B Effect of order

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If a court orders the extension of a limitation period for a cause of action under section 62A, the limitation period is accordingly extended for the purposes of:

- (a) an action brought by the applicant in that court on the cause of action that the applicant claims to have, and
- (b) section 26 (1) (b) in relation to any associated contribution action brought by the person against whom that cause of action lies.

62C Costs

Without affecting any discretion that a court has in relation to costs, a court hearing an action brought as a result of an order under section 62A may reduce the costs otherwise payable to a successful plaintiff, on account of the expense to which the defendant has been put because the action was commenced outside the original limitation period.

62D Prior expiry of limitation period

An order for the extension of a limitation period, and an application for such an order, may be made under this Division even though the limitation period has already expired.

Explanatory note

The proposed amendments ensure that the limitation period for defamation actions generally is shortened to one year from the date of publication of defamatory matter, with the court having a discretion to extend the period in exceptional circumstances. However, a court will not be able to grant an extension beyond 3 years dating from the time of the publication of the defamatory matter.

See recommendation 37 of the *NSWLRC Report*.

Schedule 4 Consequential amendment of other Acts

(Section 5)

Explanatory note

The proposed amendments to be made to the various Acts set out in this Schedule will update references to the *Defamation Act 1974* that will become outdated on the commencement of proposed Schedules 2–2B.

4.1 Anti-Discrimination Act 1977 No 48

[1] Section 20C Racial vilification unlawful

Omit "Division 3 of Part 3 of" from section 20C (2) (b).

Insert instead "Schedule 2 to".

[2] Section 49ZT Homosexual vilification unlawful

Omit "Division 3 of Part 3 of" from section 49ZT (2) (b).

Insert instead "Schedule 2 to".

[3] Section 49ZXB HIV/AIDS vilification unlawful

Omit "Division 3 of Part 3 of" from section 49ZXB (2) (b).

Insert instead "Schedule 2 to".

4.2 Government and Related Employees Appeal Tribunal Act 1980 No 39

Section 50 Application of the Defamation Act 1974

Omit "section 18 of".

Insert instead "clause 3 of Schedule 2 to".

4.3 Guardianship Act 1987 No 257

Section 74 Application of the Defamation Act 1974

Omit "section 18 of".

Insert instead "clause 3 of Schedule 2 to".

4.4 Health Care Complaints Act 1993 No 105

Section 72 Confidentiality

Omit "Schedule 2" from section 72 (11) (b).

Insert instead "Schedules 2A and 2B".

4.5 Independent Commission Against Corruption Act 1988 No 35

Section 70 Confidentiality

Omit "Schedule 2" from section 70 (8) (b).

Insert instead ``Schedules 2A and 2B".

4.6 Mental Health Act 1990 No 9

Section 260 Application of the Defamation Act 1974

Omit ``section 18 of".

Insert instead ``clause 3 of Schedule 2 to".

4.7 Ombudsman Act 1974 No 68

Section 31H Confidentiality

Omit ``Schedule 2" from section 31H (8) (b).

Insert instead ``Schedules 2A and 2B".

4.8 Public Finance and Audit Act 1983 No 152

Section 58 Evidence

Omit ``Schedule 2" from section 58 (9) (b).

Insert instead ``Schedules 2A and 2B".

4.9 Regulation Review Act 1987 No 165

Section 12 Confidentiality

Omit ``Schedule 2" from section 12 (8) (b).

Insert instead ``Schedules 2A and 2B".

4.10 Transport Appeal Boards Act 1980 No 104

Section 26 Application of the Defamation Act 1974

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Omit ``section 18 of".

Insert instead ``clause 3 of Schedule 2 to".

4.11 Victims Compensation Act 1987 No 237

Section 69 Application of Defamation Act 1974

Omit ``section 18 of".

Insert instead ``clause 3 of Schedule 2 to".

Appendix 2: List of Submissions Received

1. Professor G de Q. Walker (14/1/93)
2. Communications Law Centre (March '92 - received - 5/2/93)
3. Mr P Bartlett (9/2/93)
4. Mr J McCurrick (15/2/93)
5. Australian Press Council (12/3/93)
6. NSW Council of Churches (23/4/93)
7. Mrs A B Parkins (6/7/93)
8. Mr N Hampton (29/9/93; 4/10/93; 9/10/93;14/10/93; 15/10/93; 18/10/93; 25/10/93; 27/10/93; 28/10/93; 1/11/93; 8/11/93; 12/11/93;19/11/93; 25/11/93; 28/11/93; 6/12/93; 10/12/93)
9. Ms N Rue (14/10/93)
10. Mr M Richardson (25/10/93)
11. Mr G Reading (27/10/93)
12. ABC Legal & Copyright (27/10/93)
13. Australian Society of Authors (27/10/93)
14. Mr M G Sexton (1/11/93)
15. Mr P George (MEMF) (29/10/93)
16. Ms W Machin (29/10/93)
17. Ms J C Gibson for Young Lawyers Section of the NSW Law Society (29/10/93)
18. Nine Network Australia (4/11/93)
19. Australian Press Council (5/11/93)
20. Australian Book Publishers Association (8/11/93)
21. Law Society of New South Wales (5/11/93)
22. Victorian Judiciary Committee of AJA Section of the MEAA (Ms Prue Innes) (19/11/93)
23. ACP Publishing Pty Ltd (25/11/93)
24. Speed and Stracey, Solicitors (26/11/93)
25. Law Institute of Victoria (2/12/93)
26. Consolidated Press Holdings Ltd (7/12/93)

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27. Australian Securities Commission (17/12/93)
28. Mr R D Grove, Clerk of NSW Legislative Assembly (6/1/94)
29. Ms C Coucke (13/1/94)
30. Mr J S Walsh (17/1/94)
31. Mr P G Lasky (27/1/94)
32. Commercial Law Association (16/5/94)

Appendix 3: Seminars and Conferences Attended By Commissioners and Staff

Latest Developments in Media Law, Free Speech Committee, 4 December 1992

Finding a Remedy for Defamation, Continuing Legal Education, University of NSW, Faculty of Law, 1 June 1993.

Recent Developments in Defamation, Continuing Legal Education, Young Lawyers, 14 July 1993 (chaired by Mr Ben Reichel).

Journalists and Confidential Sources, Australian Centre for Independent Journalism, University of Technology, Sydney, 16 August 1993. (Professor Michael Chesterman presented a paper.)

When Careless Talk Costs... Commercial Law Association, 8 October, 1993.

1993 Fulbright Symposium, The Australian Centre for American Studies, 27-28 October 1993. (Professor Michael Chesterman presented a paper.)

The Right to Investigate and Report, Centre for Media and Telecommunications Law and Policy, University of Melbourne, 31 October 1993 (Paper presented by the Honourable Gordon J Samuels AC QC).

Defamation in Transition: International Comparisons in a Globalising Era, Centre for the Comparative Study of Law and Culture, Macquarie University, 12-13 March 1994 (Paper presented by the Honourable Gordon J Samuels AC QC).

Recent Developments in Defamation Law, Continuing Legal Education, Young Lawyers, 21 September 1994 (chaired by Mr Ben Reichel).

Defamation and the High Court, Free Speech Committee, 11 November 1994.

Defaming Political Figures: Implied Freedom of Political Publication and the Law of Defamation, Continuing Legal Education, Law School, University of Sydney, 30 November 1994.

Defamation: The principles, practice and trends for compensating words that injure Continuing Legal Education, The College of Law, 23 March 1995.

Seminar on Defamation, University of Technology, Sydney, 18 July 1995 (Paper presented by the Honourable Gordon J Samuels AC QC)

1995 Australian Legal Convention, 24-28 September 1995 (Paper presented by the Honourable Gordon J Samuels AC QC)

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