



THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 8 – Part II

Defamation

REPORT

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The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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INTRODUCTION AND SUMMARY OF REPORT

1. In 1968 the Western Australian Law Reform Committee (the Commission's predecessor) was asked to:

"examine and make recommendations for amendment to the *Newspaper Libel and Registration Act 1884* and amendments and generally to consider whether any alterations are necessary or desirable in the law relating to civil defamation in Western Australia."

It dealt with the topic in two parts. The first was concerned specifically with the *Newspaper Libel and Registration Act 1884* and the occasions when the defence of privilege should be available in respect of published reports. A Working Paper was issued in 1969. The Committee's Report on this part was submitted on 3 August 1972.¹ The second part of the topic involved a general review of the law of civil defamation.

2. The Committee subsequently deferred work on the second part of the reference pending the outcome of moves, then apparent, towards the development of a law of defamation which would be uniform throughout Australia. It was anticipated that an opportunity might arise for the subject to be considered on a national basis. In 1973, when the Western Australian Law Reform Commission² was established, it inherited the Committee's uncompleted projects, including defamation.

3. The movement towards uniform defamation law reform crystallised on 23 June 1976 when the Australian Law Reform Commission³ was given a reference on this subject by the Commonwealth Attorney General. The ALRC was asked:

"To review the law of defamation (both libel and slander) in the Territories and in relation to other areas of Commonwealth responsibility, including radio and television (but excluding inquiries on matters falling within the reference made to the Commission on privacy) and to report on desirable changes to the existing law, practice and procedure relating to defamation and actions for defamation.

In making its enquiry and report the Commission will:

¹ Western Australian Law Reform Committee, *Report on Defamation : Privilege Reports* (1972) Project No.8.

² In this Report called the "WALRC".

³ In this Report called the "ALRC".

- (a) have regard to its function in accordance with section 6(1) of the *Law Reform Commission Act 1973* (Cwth)] to consider proposals for uniformity between laws of the Territories and laws of the States; and
- (b) note the need to strike a balance between the right to freedom of expression and the right of the person not to be exposed to unjustifiable attacks on his honour and reputation".

4. Bearing in mind the WALRC's inherited reference on defamation, the Chairmen and other members of the two Commissions agreed, subject to the approval of the Western Australian Attorney General, that the WALRC should co-operate with the ALRC in a study of the law of defamation. In August 1976 the Western Australian Attorney General confirmed that the WALRC's role in respect of its project on defamation should be to monitor progress by the ALRC on its defamation project , and, when that Commission submitted its report, to submit an independent report.

5. In fulfilment of its monitoring role, the WALRC has made use of every opportunity to take part in the deliberative processes leading to the ALRC's publications on this topic.⁴ It has commented on drafts of these publications and has on four occasions met with members of the ALRC for detailed discussions on a formal basis. The opportunity has also been taken on other occasions to exchange views informally.

6. For the first time in Australia, the task of developing law reform proposals on a particular topic has been shared by Commonwealth and State law reform commissions. It is appropriate that the topic should be defamation. The interstate publication of newspapers and magazines and other media developments make it desirable that defamation law should be uniform throughout Australia. This was agreed at the Second Australian Law Reform Agencies Conference at Sydney in 1975. It was also agreed that a recommendation be made to the Standing Committee of Attorneys General that the ALRC be given the reference on this topic. The WALRC was a party to these decisions. The co-operation which has existed between the ALRC and the WALRC in the development of this project is a concrete example of a constructive approach to uniform law reform in a federation. The WALRC acknowledges the high quality of the research work carried out by the ALRC and the extent to which

⁴ The ALRC's publications on defamation prior to the publication of its report are -

- (a) *Defamation –Background Paper on Present Law and Possible Changes* (1976).
- (b) *Defamation – Options For Reform* (1977) Discussion Paper No.1.
- (c) *Privacy and Publication -Proposals for Protection* (1977) Discussion Paper No. 2.
- (d) *Defamation and Publication Privacy – A Draft Uniform Bill* (1977) Discussion Paper No.3.

opportunities were created for representatives of the WALRC to participate in discussions at every stage.

7. Early in its research, the ALRC took the view that it would be undesirable to have a new defamation law without simultaneous privacy protection in the realm of publication.⁵ The ALRC has a separate reference on the law relating to privacy. However, the course which a majority of that Commission chose in its Report, which it has now submitted,⁶ was to amalgamate part of its privacy reference (namely the publication of sensitive private facts) with defamation law reform.

8. The WALRC also has a reference on the law relating to privacy which it sought and obtained from the Western Australian Attorney General. The terms of reference are largely parallel to those given to the ALRC. The object of the State reference is to enable the WALRC to co-operate with the ALRC and make contributions where desirable without duplicating effort.

9. The WALRC has carefully considered the ALRC's proposed "package deal" combining defamation and the publication of sensitive private facts, the latter being only one area of invasions of privacy. It considers that the ALRC's proposals on the publication of sensitive private facts are attractive. They raise the issue of policy, however, whether to provide civil remedies or leave protection of privacy to administrative action. The WALRC is not yet convinced that the creation of a new form of civil remedy is the most desirable solution. Consequently, it takes the view that the ALRC's privacy measures, as part of its defamation "package deal", are premature. Its concern is that debate concerning the policy approaches to privacy protection at this stage may hinder much needed national reform of the law of defamation. The WALRC considers that it would be more desirable as a first step to bring in a uniform law of defamation, leaving the ALRC's privacy proposals to be dealt with at a later stage when the general question of privacy protection is considered. The need for a uniform law of defamation has been demonstrated. The need for a uniform law of publication privacy has yet to be adequately debated.

⁵ ALRC, *Privacy and Publication - Proposals for Protection* (1977) Discussion Paper No. 2 at 4.

⁶ ALRC, *Unfair Publication: Defamation and Privacy* (1979) hereafter called "Report (Cwth)". The *Report* (Cwth) dated 29 December 1978 was tabled in the Commonwealth Parliament by the Commonwealth Attorney General, Senator Peter Durack, Q.C., on 7 June 1979. It contains a Draft Bill expressing the ALRC's recommendations in legislative form. The Bill is referred to in this Report as the "Draft Bill (Cwth)".

10. The approach taken by the WALRC in this Report is to outline the law as it applies at present in this State, consider the effect of reforms proposed by the ALRC, and by other bodies, and make recommendations as to the most suitable reforms for Western Australia. The table commencing on the following page summarises its major recommendations. The common goal of both Commissions has been the establishment of a new law of defamation which is uniform throughout Australia. On most issues, in relation to defamation law reform, the two Commissions are in substantial agreement. There are, however, some areas where the WALRC takes a different view. In expressing its views in this Report, the WALRC has no wish to create the impression that it is opposed to a uniform law of defamation. In its view an independent consideration of the ALRC's proposals is not inconsistent with the common goal of uniformity. On some issues compromise in the interests of uniformity may be desirable. By taking a fresh approach at a State level, the WALRC's aim is to enhance the development of a uniform law.

COMPARATIVE TABLE AND SUMMARY

CIVIL DEFAMATION

Existing W.A. law	ALRC's proposals	WALRC's recommendations
Source and application		
Part common law and part statute, applying only to publications within Western Australia. (para. 1.2)	Codification in a single enactment to apply throughout Australia with emphasis on a National Act. (para. 3.3) .	Supports codified uniform law whether by a National Act, or by complementary uniform State legislation , but doubts whether the ALRC's proposed code deals clearly with the continuing relevance of the common law. (paras. 3.5 & 3.11)
Libel and slander		
Distinguishes between libel and slander. (para. 4.1)	Abolish distinction. (para. 4.2)	Agrees that the distinction between libel and slander should be abolished. (para. 4.4)
Who may sue		
A person (including a trade union and a corporation) about whom defamatory matter is published. (para. 5.3)	A person (including a body corporate) about whom defamatory matter is published. (para. 5.3)	Agrees with the ALRC provided the ability of trade unions to sue is clarified. (para. 5.3)
Death of a defamed person prior to obtaining judgment extinguishes a cause of action in defamation. (para. 9.9)	A person representing a deceased person who was defamed while alive, should be able to obtain all the remedies available to a living person including damages for non- pecuniary loss. (para. 9.10)	Agrees with the ALRC but recommends that only damages for pecuniary loss should be recoverable. para. 9.13)
A person cannot be defamed after he dies. (para. 9.2)	A person representing a deceased person who was defamed within 3 years after his death should have an action but with no damages. (para.9.3)	Agrees with the ALRC but suggests that the time period should be 5 years, (although it would recommend 3 years as a compromise) and recommends that, in some cases, damages for pecuniary loss should be recoverable. (paras. 9.3 to 9.8)

Existing W.A. law	ALRC's proposals	WALRC's recommendations
Who may be sued		
Death of a defendant extinguishes the cause of action. (para. 9.14)	Actions should be able to be brought or continued against the estate of a deceased publisher with no special time limitations. (para 9.14)	Agrees with the ALRC but recommends that such actions should be subject to special time limitations. (para. 9. 17)
Publication		
A person may be liable for publication in some circumstances even though he is not actively responsible for its communication. (para. 7.1)	Publication is defined as the communication or transmission of matter by a person to another not being the person defamed. (para. 7.2)	Agrees with the ALRC's definition provided that it encompasses liability under existing law where a defendant is not actively responsible for communication of defamatory matter. (para. 7.5)
Multiple publication		
Each and every publication of the same or substantially the same defamatory matter by the same or other defendants gives rise to a separate cause of action. Under normal rules of procedure, actions against several defendants may be joined. (paras. 8.1 & 8.6)	There should be only one action for multiple publication by the same defendant, but only to the extent to which he discloses publication. (para. 8.4)	Agrees with the ALRC but recommends special provisions to encourage joinder of actions against several defendants who have published the same or substantially the same defamatory material. (para. 8.6)
Defamatory material		
There is no single definition of defamatory material. Common tests are whether a person's reputation is lowered in the eyes of ordinary citizens of fair average intelligence and includes exposure to hatred, ridicule or contempt or being shunned or avoided. (para. 5.1)	Defamatory material is defined as matter which tends - (a) to affect adversely the reputation of a person in the estimation of persons; (b) to deter ordinary persons from associating or dealing with him; or (c) to injure him in his occupation, trade, office or financial credit. (para. 5.1)	Agrees with the ALRC's definition provided it is interpreted in a manner which reflects the common law definition of defamatory material. (para. 5.5)

Existing W.A. law	ALRC's proposals	WALRC's recommendations
Proof of defamatory meaning		
A plaintiff must show that the words are defamatory and that they refer to him. He may rely on the ordinary meaning of words but can bring a separate action based on a special meaning - innuendo. (paras. 6.1 & 6.4)	A plaintiff should be able to rely on ordinary and special meanings of words, but proposes a procedure to eliminate the need for a separate action for innuendo. (paras. 6.8 to 6.9)	Agrees with the ALRC's proposals but with minor modifications to its proposed procedure. It also suggests drafting amendments to the ALRC's proposed test for determining whether the defamatory publication refers to the plaintiff. (paras 6.9 to 6.10 & 6.13)
Extensions to defamation actions		
A group cannot bring an action for defamation. (para 10.2).	Considered but a majority rejected conferring right of action on a group. (para. 10.3)	Agrees with the ALRC. (paras 10.4 to 10.6)
It is not sufficient if a person's reputation is lowered in the eyes of a specific group within the community, but group attitudes can be relevant if they reflect the views of a reasonable person and in cases where the plaintiff's action is based on a group's special knowledge, i.e. innuendo . (paras 10.7 & 10.11)	Considered but a majority rejected conferring a right of action where a person's reputation is lowered in the eyes of a specific group. (para. 10.10)	Agrees, provided that the ALRC's proposals do not exclude the limited extent to which existing law currently takes into consideration group attitudes. (para. 10.12)
Defences		
At common law, which appears to be applicable in Western Australia, substantial truth is a defence. (para. 11.2)	Substantial truth should be a defence. (paras. 11.5 & 11.13)	Agrees with the ALRC, but as a compromise, in the interest of obtaining uniformity, would agree to a defence of truth and public benefit. (paras 11.5, 11.12 & 11.13)
Under the Code it is a defence to express an honest opinion on facts which are published and which are true, but it must be an opinion on one of a number of specified	It should be a defence to express a genuine opinion on facts published or otherwise known to each recipient if such facts are substantially true, whether or not the topic is one of public interest.	Agrees with the ALRC, but suggests that the expressions "honest" and "genuine" could be avoided, and recommends that there should be a requirement that the comment be on a matter of public interest as defined for other purposes in the ALRC's

Existing W.A. law	ALRC's proposals	WALRC's recommendations
<p>topics of public interest. (para. 12.1)</p>	<p>(para. 12.2)</p>	<p>proposals. (paras. 12.4 to 12.8) & 12.13)</p>
<p>There is specific statutory protection for Parliamentary proceedings and the proceedings of Royal Commissions, and under common law there is protection for judicial and quasi-judicial proceedings and communications between high officers of State, and husband and wife. (para. 13.1)</p>	<p>The defence should apply only to Parliamentary and judicial proceedings and inquiries proceedings or hearings of a tribunal authorised by law. (paras. 13.3 to 13.4)</p>	<p>Agrees with the ALRC but recommends that the defence for tribunal proceedings should be limited to those of a judicial, as opposed to an administrative nature. One member does not agree that privilege for marital communication should be removed. (paras. 13.5,13.10 & 13.11 to 13.12)</p>
<p>At common law, applicable in W.A., a statement made by a person under a duty to make it and which is made to a person with an interest in receiving it is protected, provided publication was not actuated by malice. (paras. 14.1 to 14.2)</p>	<p>Publication for the purpose of giving information to persons reasonably believed to have a duty or interest in receiving it should be protected, provided that facts are believed true, opinions (implicitly of third persons) are believed to be genuine <i>or</i> the defendant's publication is reasonable. (para. 14.4)</p>	<p>Agrees in substance with the ALRC's proposed defence but recommends that it should also apply to comments by the publisher and that publication of the comment of others should be subject to the requirement of reasonableness. (paras. 14.8 to 14.11)</p>
<p>Under the Code, reports of specific proceedings of a public interest nature are protected if they are fair and accurate and made in good faith. Wider protection is given by statute to registered newspapers. (paras. 15.1 to 15.2)</p>	<p>Reports on specified matters should be protected provided the report is fair and accurate and, except in the case of court reports, the plaintiff is given a right of reply. There should be no requirement of good faith and no special protection for newspapers. (paras. 15.6 to 15.7)</p>	<p>Agrees with the ALRC's proposals but suggests minor alterations to the specified matters which can be the subject of a report. (paras. 15.9 & 15.13)</p>
<p>It is no defence to show that publication was merely a repetition of what another person has published. (para 15.8)</p>	<p>Reports of statements made by others on a topic of public interest should be protected, provided that the publisher did not influence the statement, acted reasonably in publishing and gave the</p>	<p>Does not agree that this extension should be made. Existing law should be retained. (para 15.19)</p>

Existing W.A. law	ALRC's proposals	WALRC's recommendations
<p>There appears to be a statutory defence of apology for libel published in a newspaper without malice or gross negligence. (paras. 16.1 & 16.6)</p>	<p>plaintiff a right of reply. (para. 15.8)</p> <p>There should be no defence for innocent non-negligent defamation. Offers to publish an apology should be relevant relevant only when assessing damages. (para. 16.11)</p>	<p>Agrees with the ALRC's proposals. (paras 16.12 to 16.13)</p>
<p>It is a defence if a person merely distributes material without knowing and without reason to know that it was defamatory provided that his lack of knowledge was not due to a want of care on his part. (para. 17.2)</p>	<p>There should be a complete defence for a person who is not the author but is merely a distributor of defamatory material. (para. 17.4)</p>	<p>Does not agree. Any intermediary in the publishing and distribution process should have a defence only if he neither knew nor ought to have known that the matter was defamatory and that such lack of knowledge was not due to want of care on his part. (paras. 17.7 to 17.8)</p>
<p>In that slander actions require proof of special damage, triviality is a defence. It is not a defence to a libel action but would be relevant to the damages awarded. (para. 18.1)</p>	<p>Triviality should be a defence if a plaintiff was unlikely to be harmed. (para. 18.2)</p>	<p>Does not agree. A plaintiff should not be deprived of a correction remedy and damages for actual loss merely because the circumstances of publication were such that he was not likely to be harmed. (paras. 18.3 to 18.4)</p>
<p>Remedies</p>	<p>Punitive damages should be abolished. Factors for assessment and mitigation of damages should be specified. (paras. 19.6 to 19.7)</p>	<p>Agrees with abolition of punitive damages, and proposed codification of factors relevant to assessment of damages, but recommends that in mitigation of damages a defendant should be able to plead repetition of defamatory matter published by another, and should be able to introduce evidence of specific acts of misconduct but only to establish the reputation which a plaintiff has. (paras. 19.6 & 19.17)</p>
<p>An injunction will rarely be granted before a court has decided that the material is defamatory.</p>	<p>Unless a defence is available a court should be able to restrain publication. A majority proposes to enable a court to refuse an</p>	<p>Agrees with remedy of injunction but not with the exemption for works of literary, historic, scientific or educational merit.</p>

Existing W.A. law	ALRC's proposals	WALRC's recommendations
(para. 19.18)	injunction if the publication has literary historic, scientific or educational merit. (para. 19.18)	(paras. 19.19 to 19.20)
No provision. (para. 19.2)	There should be a new remedy of an order for correction. (para. 19.2)	Agrees with ALRC. (paras. 19.3 to 19.6)
There is a general power in courts to make a declaratory order. (para. 19.21)	A plaintiff should be able to obtain a declaration of falsity. (para. 19.21)	Agrees with ALRC. (para. 19.21)
Procedure		
There is no special limitation period and no special procedure for defamation actions, but there is a provision enabling parties to a defamation action which is settled to seek leave to make a statement in open court. (para. 20.1)	There should be a shorter limitation period (6 months from the date the plaintiff first learns of the publication but not to exceed 3 years from publication) for the commencement of defamation actions, and once commenced there should be a special procedure to enable the dispute to be resolved quickly. (para. 20.4)	Agrees with the ALRC's proposals but considers that the time limits in respect of the special procedure are too severe. It recommends that there should be a general provision allowing parties to a defamation action to seek the assistance of a court to settle a defamation action at any stage of the proceedings. (paras. 20.9 & 20.11 to 20.14)
Role of juries		
As a general rule civil actions are heard by a judge alone, but exceptionally a party to a defamation action can apply for the action to be heard and damages to be assessed by a jury. (para. 21.1)	State law should be retained except that juries should not assess damages in an undefended defamation action. (para. 21.3)	Agrees that W. A. law should be retained for defended actions and agrees with ALRC's recommendations regarding undefended actions. (para. 21.7)
CRIMINAL DEFAMATION		
Under the Criminal Code it is unlawful to publish defamatory matter in the absence of a lawful excuse. (para. 22.1)	A majority takes the view that it should be an offence for a person to publish defamatory matter in the absence of a lawful excuse if he knows the matter is	Agrees with ALRC and recommends that the relevant provisions be enacted in proposed defamation legislation. (paras. 22.6 to 22.9)

Existing W.A. law

ALRC's proposals

WALRC's recommendations.

false or is recklessly
indifferent to its truth and
intends to cause serious harm.
(para. 22.4)

PRIVACY

Publication of
private facts is
not actionable.
(para. 11.6)

A majority takes the
view that there should
be a right of action
against a person who
publishes sensitive
private facts.
(para. 11.7)

Does not agree that this
is the appropriate occasion
for the introduction of
a new and distinct
cause of action in
Western Australia.
(paras. 11.9 to 11.10)

CHAPTER 1

THE EXISTING LAW IN WESTERN AUSTRALIA

1.1 There is no Defamation Act in force in Western Australia.

“The tort of defamation is, in this State and except to the extent to which the rules may have been modified or changed by statute, the creature of the common law...”¹

The major relevant statutory provisions modifying the common law are the *Newspaper Libel and Registration Act 1884* and amendments of 1888 and 1957, the *Parliamentary Privileges Act 1891*, the *Parliamentary Papers Act 1891*, the *Slander of Women Act 1900* and the *Criminal Code 1913* and amendments.

1.2 The Criminal Code deals with criminal law, including criminal defamation. However, it also applies to some civil matters including, to a limited extent, civil defamation. The operative provision is s.5 of the *Criminal Code Act* which provides that:

“When, by the Code, any act is declared to be lawful, no action can be brought in respect thereof.”

Some sections in Chapter XXXV of the Code, which deals with defamation, provide that certain publications are “lawful”.² Another provides that it shall be “a lawful excuse” if material is published on certain occasions.³ The effect of these provisions and of Chapter XXXV generally on the law of civil defamation has been before the courts in this State on more than one occasion.⁴ The matter has been the subject of controversy for at least thirty years. Since the decision of the High Court in *Western Australian Newspapers Ltd. v Bridge*⁵ it is now clear that the Code is to be strictly construed in so far as it affects civil defamation law. The provision of “a lawful excuse” in the Code is no defence to a defamation action.

¹ *Bridge v Tozer and West Australian Newspapers Ltd.* [1978] WAR 177 at 180 per Burt C.J.

² *Criminal Code 1913*, ss.354 (reports of matters of public interest - see paragraphs 15.1 to 15.2 below) and 355 (fair comment -see paragraph 12.1 below).

³ *Ibid.*, s.357 (qualified protection -see paragraph 14.1 below).

⁴ See, for example, *Antonovich v West Australian Newspapers Ltd.* [1960] WAR 176; *Logan v West Australian Newspapers Ltd.* [1968] WAR 104 and *Bridge v Tozer and West Australian Newspapers* [1978] WAR 177.

⁵ (1979) 23 ALR 257.

Despite this new clarity, further difficulties arising from the interaction of the Code and the common law on defamation could still occur.⁶

1.3 The main effect of the Newspaper Libel and Registration legislation is to make special provisions for newspapers in respect of the defence for privileged reports.⁷ In 1972,⁸ the Western Australian Law Reform Committee recommended a number of reforms to the defence of privileged reports in the *Criminal Code*⁹ and that the *Newspaper Libel and Registration Act 1884* and amendments (with the exception of a provision dealing with limitation) should be repealed.¹⁰ In 1977, following events which focussed renewed attention on the subject,¹¹ some of the Committee's recommendations were implemented by Parliament. An appropriate extension to the defence of privileged reports was made in the Code.¹² In all other respects, however, the Committee's recommendations¹³ have not yet been adopted.

1.4 The *Parliamentary Privileges Act 1891* and *Parliamentary Papers Act 1891* provide a defence of absolute privilege for publications made by members of the Legislative Council and Legislative Assembly and for authorised reports of the proceedings of these legislative bodies.¹⁴

⁶ For example -

- (a) Section 356 provides that it is lawful to publish defamatory matter if it is true *and* if it is for the public benefit. It is considered, however that although this clearly provides a defence to a civil action, the common law defence of truth alone would suffice: see *Western Australian Newspapers v Bridge* (1979) 23 ALR 257 per Jacobs J at 263.
- (b) It follows from (a) that the Code does not exclude the common law even in areas where it provides a defence. A defendant wishing to raise a defence, for example, of fair comment (s.355), could therefore rely on the common law, the Code, or even both.
- (c) It could be argued that Code provisions, such as the definition of defamatory material, although not generally relevant in civil law, are relevant in cases where a defendant seeks a Code defence.
- (d) Three sections deal with a defence of absolute privilege (ss.351-353) and state that in the defined circumstances "a person does not incur any liability as for defamation". By s .1 of the Code the term "liable" used alone, means liable to conviction on indictment and it is possible that these sections would be construed as relating to criminal prosecutions only.

A number of these issues are discussed in detail in an article by P. Brett, *Civil and Criminal Defamation In Western Australia* (1951) 2 Annual LR (WA) 43.

⁷ See paragraph 15.1 below.

⁸ See paragraph 1 above.

⁹ Section 354.

¹⁰ See paragraph 15.3 below.

¹¹ See paragraph 2.4 n.5 below.

¹² *Criminal Code Amendment Act 1977*, s.2. Its effect was to add to the range of topics which can be made the subject of a report so as to include reports of proceedings in a House of Parliament or Committee thereof or in the Legislature of any Australian State, reports published by authority of any such House or Legislature and certain official inquiries.

¹³ See paragraph 15.3 below.

¹⁴ See paragraph 13.1 below.

1.5 The *Slander of Women Act 1900* simply provides that words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable. The provision arises from the historical distinction between libel and slander. The Act could be repealed if that distinction were removed.¹⁵

¹⁵ See paragraphs 4.1 to 4.4 below.

CHAPTER 2

THE NEED FOR REFORM

2.1 The ALRC, in chapter 3 of the *Report* (Cwth), recognised that there was a need to review the law of defamation to see whether it was operating in a way which struck a suitable balance between freedom of speech and protection of reputation, and to see whether it provided the most appropriate remedies for the harm caused by publication of a defamatory statement. A similar review was recently completed in New Zealand.¹ The law of defamation has also been reviewed in New South Wales,² and twice in England.³ In the two most recent reports, namely those of the ALRC and the New Zealand Committee, two major criticisms of the law of defamation emerged.

Stifling news

2.2 One criticism was that the law of defamation was stifling the publication of information which would be of benefit to the public. This was said to have been caused by such factors as strict liability for defamatory publications, the complexity, and in some cases uncertainty, of the law, "stop writs", unpredictable awards of damages by juries and the expense of defamation litigation. These factors, it was claimed, inhibited news publishers. It was said that some important news stories were never published simply because of the risks involved in defending a possible defamation claim.

Unsuitable remedies

2.3 The other major criticism was that the law had become embedded with unnecessary technicalities. Where a case was completed by an award of damages it may be long after the damaging publication occurred. In a real sense, substantial awards of damages long after publication were said to be nothing short of tax free windfalls, invited unmeritorious claims and did little to remedy the harm done. It was claimed that a better procedure would enable a

¹ Report of the Committee on Defamation, *Recommendations on the Law of Defamation* (1977) in this Report called the "*Report*" (NZ). The report includes a Draft Bill expressing the Committee's recommendations in legislative form. The Bill is referred to in this Report as the "*Draft Bill* (NZ)".

² *Report of the Law Reform Commission on Defamation* (1971) LRC 11, in this Report called the "*New South Wales Report 1971*".

³ *Report of Committee the Law of Defamation* (1948) Cmd. 7536 HMSO, in this Report called the "*Porter Committee Report 1948* (UK)", and *Report of the Committee on Defamation* (1975) Cmnd. 5909 HMSO, in this Report called the "*Faulks Committee Report 1975* (UK)".

person who had been defamed to have a reply published at the earliest opportunity and to have erroneous assertions publicly corrected. Damage to reputation might be prevented or reduced by a timely correction.

The situation in Western Australia

2.4 The above criticisms were voiced throughout Australia to the ALRC.⁴ The WALRC is aware of practical examples in Western Australia which illustrate the problems outlined. For example, until recently, Western Australian newspapers were advised not to publish reports of matters tabled in the New South Wales Parliament because of uncertainty as to whether publication in this State would be privileged.⁵ Specific legislation now permits such reports to be published.⁶ Other cases might well arise where the public in Western Australia could be deprived of information concerning matters of public interest.

2.5 At the ALRC's public hearings in Perth,⁷ it was claimed that writs have been issued in Western Australia to prevent discussion and further ventilation of particular issues. The operation of the existing law of defamation can make such a gagging device effective for a long period -sometimes two years or more. It was also claimed that delays preceding the trial can operate to the defendant's advantage. For example, in slander cases, lapse of time may increase the plaintiff's difficulty in proving precisely the words which he claimed were spoken about him.

Reasons for reform

2.6 Having regard to -

- (a) the criticisms of the law of defamation outlined by the ALRC in its report, which appear to apply equally to the law in this State;
- (b) the desirability of uniform law reform on this subject throughout Australia;⁸

⁴ Representatives of the WALRC attended the ALRC's public hearings in Perth on 17 May 1977 and a seminar at the Western Australian Institute of Technology on Saturday 21 May 1977 where these and other criticisms were made.

⁵ These reports concerned the collapse of the Barton companies (see ALRC, Discussion Paper No. 1 at 5), and inquiries into Murumba Oil NL, Regent Nickel Corporation NL and Bounty Oil Ltd. and a report by Mr. Spender, Q. C. on the activities of the directors of Gollin Holdings -see *The West Australian* 15 March 1977 at 3.

⁶ *Criminal Code Amendment Act 1977*, s.2 -see paragraph 1.3 above, n.12

⁷ See paragraph 2.4 above, n. 4.

⁸ See paragraphs 3.3 to 3.5 below.

- (c) the need to clarify the application of the provisions of the Criminal Code to civil defamation; and
- (d) the need to review the implementation of the Western Australian Law Reform Committee's recommendations in respect of the defence for privileged reports and the repeal of the *Newspaper Libel and Registration Act 1884* and amendments,

the WALRC considers that there is a clear and demonstrated need for a review and reform of the law of defamation in Western Australia. It is not necessary to repeat in this Report the ALRC's detailed review of defamation law which supports this conclusion.

The goals

2.7 There would appear to be four major goals which reform should aim to achieve. These are -

- (a) a simplified law of defamation which is uniform throughout Australia;
- (b) defences which enable a fair balance to be struck between freedom of speech and protection of reputation;
- (c) remedies which are designed to clear the reputation of a person defamed; and
- (d) a procedure designed to enable defamation actions to be disposed of with a minimum of delay and expense.

CHAPTER 3

IMPLEMENTATION OF REFORMS

3.1 Reform of the law of civil defamation in Western Australia should be implemented by statute. The legislation should not take the form of amendments to the Criminal Code. In the WALRC's view, the Criminal Code is not a suitable location for provisions relating to civil defamation. It suggests the enactment of separate legislation to deal with civil defamation. The question of criminal defamation reform is dealt with in chapter 22 below.

3.2 There are two further issues relating to the implementation of reforms. The first issue is whether uniformity should be achieved by seeking a reference of power to the Commonwealth. A suitable reference would enable the Commonwealth to enact a national law of defamation. The alternative is for the States and Commonwealth to enact uniform legislation.¹ The second issue is whether the proposed Defamation Act should be a comprehensive self-contained code replacing existing case law principles, or whether it should simply replace so much of the case law on this subject which is considered to be unsuitable .

Uniform defamation legislation

3.3 The WALRC agrees with the ALRC that a uniform law of defamation could be achieved in one of two ways. A national law of defamation based on a reference of power from States is considered by the ALRC to be the ideal solution from a legal point of view.² Some of the disadvantages of the alternative of separate uniform State and Commonwealth legislation appear to the ALRC to be -³

- (a) the possibility of one State, acting alone, destroying uniformity, as happened in the case of the uniform law relating to corporations;
- (b) inconvenience in that an amendment by one State must be followed immediately by identical amendments in all the others ;

¹ The WALRC does not consider it to be appropriate for it to consider a third possibility dealt with at some length by the ALRC, namely the enactment of national legislation by the Commonwealth on the basis of its existing powers : *Report (Cwth)* , at 174-189, paragraphs 310-337. See also paragraph 3.5 below, n.7.

² *Report (Cwth)* at 171, paragraph 304.

³ These criticisms were not listed in this fashion by the ALRC in its publications but they emerge from its discussions on this issue in *Report (Cwth)* at 171, paragraph 304 and *Defamation -Background on Present Law and Possible Changes* (1976) at 187-190, paragraphs 7.5 to 7.8.

- (c) jurisdictional difficulties when it comes to enforcing court orders, for example, orders for the publication of a correction, in another State; and
- (d) the need for supporting Commonwealth legislation to cover those areas within exclusive Commonwealth power .

3.4 The WALRC agrees that a reference of power from the States to the Commonwealth on defamation is technically possible. However, none of the disadvantages of uniform State legislation outlined above would necessarily give rise to insurmountable practical problems. Difficulty and delay in securing agreement by all States to refer the necessary power to the Commonwealth might pose a greater obstacle to uniform law reform. Apart from possible disagreement over both the substance and detail of proposed national legislation,⁴ the proposed format of such legislation may not suit every State. If, for example, a State preferred the offence of criminal defamation to be dealt with in the context of State criminal legislation, such as the Criminal Code in Western Australia,⁵ this alone could create an obstacle.

3.5 In anticipation of different points of view on this issue, the ALRC drafted legislation based on existing Commonwealth powers and the amendments which would be required if uniform State legislation were enacted.⁶ In the WALRC's view, the objective of uniformity is desirable, the means by which it should be achieved should be for Government to decide as a matter of policy.⁷

Should a code replace the common law?

3.6 An attempt in New South Wales in 1958 to codify the law of defamation was considered to be a failure. In its Report in 1971, the New South Wales Law Reform Commission said:⁸

⁴ Which could include differences in view arising from this and other Reports on the *Report* (Cwth).

⁵ See paragraphs 22.7 to 22.8 below.

⁶ There is no model for a national Act based on a reference of power to the Commonwealth from the States, but suitable provisions could be extracted from the *Draft Bills* (Cwth).

⁷ At the Australian Constitutional Convention in Hobart 1976 it was resolved by a majority of representatives present (by 54 votes to 32) to recommend that there should be a reference of power by all States to the Commonwealth to enact laws on defamation – see *Report* (Cwth) at 27, paragraph 47. The Western Australian Attorney General was subsequently reported as saying that the State Government would not refer power over defamation laws to the Commonwealth: *The West Australian* 25 November 1976 at 36.

⁸ *New South Wales Report* 1971 at 9-10, paragraphs 17-18.

"14. ... In the minds of lawyers, the Act is held to be the source of formidable difficulties, both in substantive law and in procedure.

...

17. We think that the law of New South Wales ought not to persist in the kind of codification attempted by the 1958 Act. Accordingly we recommend that it should be repealed. Should we recommend a return to the common law, with statutory modification, or should we recommend a codification in some different form?

18. The variety of circumstances which give rise to questions relating to defamation are great. The risk that the draftsman of a code will overlook possible future cases is correspondingly great. We think that the risks of inadvertent injustice, inherent in any codification, are particularly serious in the law of defamation and that in this field those risks outweigh the advantages of a code. The common law is, we believe, a more serviceable basis for the law of defamation. We recommend legislation ... [which] would modify the common law in those respects only in which we find the common law itself defective".

The Commission's report resulted in the *Defamation Act 1974* (NSW) which, in general terms, is limited to codification of the defences to an action for defamation. The New Zealand Committee took a similar view. For example, it recommended that the definition of defamation should remain in the province of common law and that a statutory definition should not be enacted.⁹

3.7 Much can be said in favour of retaining the wealth of case law principles, and legislating only to give effect to changes to that body of law, or to simplify difficult areas. However, the WALRC feels compelled to agree with the ALRC that there is little choice in the matter. In the interests of uniformity it is desirable to codify as much of the common law as possible, including definitions, the establishment of a cause of action and defences.¹⁰ The proposed code should be supplemented by case law principles which are not inconsistent with it. The common law generally should remain relevant as a guide to statutory interpretation.¹¹

3.8 One disadvantage of a code is the risk that because of a failure to incorporate in it a principle of common law, an undesirable result might be reached in a particular case. The

⁹ *Report* (NZ) at 22, paragraph 67.

¹⁰ *Report* (Cwth) at 39, paragraph 71, and at 47, paragraph 83 where the ALRC said: "...the present condition of, and conflict between, the various Australian systems is such that codification of the whole body of the law is desirable. This must include the critical definition of a defamatory matter".

¹¹ As proposed by the ALRC - *Report* (Cwth) at 38-39, paragraph 70. Clause 6(3) of the Draft Bill (Cwth) presumably is intended to give effect to this but see paragraphs 3.10 to 3.11 below.

ALRC's proposed code is extensive, but there are some areas which, in the WALRC's view, could be clarified.¹²

3.9 The WALRC's main concern, however, is that a new area of uncertainty will emerge as to the extent to which common law principles are intended to remain applicable. Clause 6 of the Draft Bill (Cwth) - the repeals and savings clause - does not remedy this uncertainty. On the contrary, the WALRC considers that, as drafted, this clause could give rise to difficulties of interpretation.

3.10 One of the major difficulties concerns the continued application of common law defences where these are wider than those proposed by the ALRC. Clause 6 begins by providing that the common law rules in so far as they provide defences to actions shall cease to have effect. But this repealing provision is "subject to this section", and clause 6(3) provides that the common law rules, save in so far as they are inconsistent with the proposed Act, apply to defences in actions under the Act. The intention is not clear, but it might be construed as being to retain common law defences provided these do not conflict with codified defences. Such an interpretation could yield a result which would not be intended by the ALRC.¹³

3.11 In the WALRC's view, it should be made clear that the only defences to a defamation action should be those provided in the Draft Bill (Cwth). There are also other areas considered in this Report¹⁴ where a more comprehensive treatment of the law in the Draft Bill (Cwth) could reduce the number of occasions where doubts might arise whether the intention is to adopt or modify common law principles .

¹² See paragraph 3.11 below.

¹³ For an example see paragraph 13.4 below.

¹⁴ See, for example, paragraphs 5.5, 6.13, and 7.3 to 7.5 below.

CHAPTER 4

THE DISTINCTION BETWEEN LIBEL AND SLANDER

4.1 Existing law in Western Australia distinguishes between libel and slander. Libel is defamatory material which is in permanent¹ form and is actionable per se. Slander is defamatory material spoken of another and, unless it falls within certain categories,² it is actionable only on proof of special damage. The distinction was intended to prevent actions for petty slander.

4.2 The distinction between libel and slander has been abolished (or effectively abolished by removing the need to prove special damage for slander) in New South Wales,³ Tasmania,⁴ Queensland,⁵ New Zealand⁶ and in Western Australia for the purposes of criminal defamation.⁷ Its abolition was recommended in England by the Faulks Committee⁸ and for the rest of Australia by the ALRC.⁹

4.3 The WALRC favours abolition of the distinction between libel and slander in Western Australia because -

- (a) the distinction is difficult to apply in practice and can produce anomalous practical consequences;¹⁰

¹ The word "permanent" is not used synonymously with "indestructible". Books, tape-recordings and films can all be destroyed, but defamatory material published in such a form is regarded as libel. That libel is permanent in form is, however, only one of several theories as to the distinction between libel and slander. Another theory is that it is the manner of communication which is important so that libel is seen and slander is heard. A third theory, combining both the form of the publication and the manner of its communication, is that the distinction depends on the reasonable understanding of a person hearing the defamatory utterance. If such a person would reasonably understand it to be a reproduction of matter which is permanent in form, such as reading from notes, it should be regarded as libel -see Fleming *The Law of Torts* (5th ed. 1977) at 520-521.

² For example words imputing a criminal offence, a contagious disease, unchastity in a woman or girl and words calculated to disparage in any office or profession: see Gatley, *Libel and Slander* (7th ed. 1974) at 78-94, paragraphs 149-187 and *Slander of Women Act 1900*.

³ *Defamation Act 1974* (NSW), s 8.

⁴ *Defamation Act 1957* (Tas), s.9.

⁵ *Criminal Code Act 1899* (Qld), s.368.

⁶ *Defamation Act 1954* (NZ), s .4.

⁷ *Criminal Code 1913*, s.348.

⁸ *Faulks Committee Report_1975* (UK) at 21, paragraph 91.

⁹ *Report* (Cwth) at 43, paragraph 76.

¹⁰ See paragraph 4.1 above, n.1 and consider the application of the distinction where defamatory material is contained -

- (i) in a speech ;
- (ii) in a speech while reading from notes ;
- (iii) in a speech while reading from notes which have been distributed.

- (b) there are more appropriate ways of dealing with petty slander actions;¹¹
- (c) there has been no upsurge in the incidence of petty slander actions in those jurisdictions where the distinction has been abolished;¹² and
- (d) this course is desirable in the interests of uniformity.

4.4 The WALRC therefore recommends that the distinction between libel and slander be abolished¹³ and replaced by the creation of a single tort of defamation.

¹¹ The ALRC's proposed streamlined procedure to combat the incidence of stop writs (see paragraphs 20.4 to 20.5 below) and a wide power for a court to award costs as appears to it to be just (Draft Bill (Cwth) clause 47(1)) should provide a more effective disincentive for the issue of proceedings over trivial slander. The trivial nature of the defamatory matter can also be taken into account when assessing damages and might result in the award of nominal or contemptuous damages: Draft Bill (Cwth) clause 28(1)(b) and see paragraph 18.3 below.

¹² *Report* (NZ) at 23, paragraph 69.

¹³ The assessment of damages is considered below in paragraphs 19.2 and 19.7 to 19.17.

CHAPTER 5

DEFINITION OF DEFAMATORY MATTER

5.1 For the reasons set out above,¹ the WALRC takes the view that the proposed code should include a definition of defamatory matter. The ALRC recommended the following definition:²

"published matter concerning a person which tends -

- (a) to affect adversely the reputation of that person in the estimation of ordinary persons;
- (b) to deter ordinary persons from associating or dealing with that person; or
- (c) to injure that person in his occupation, trade, office or financial credit."

5.2 This definition was intended to embody the case law definitions which at present apply in this State³ and is an improvement on the definition suggested in England by the Faulks Committee.⁴ The WALRC agrees with the proposed definition, but takes the view that it requires clarification in two respects. The first concerns the definition of a "person" who is the subject of a defamatory publication. The second concerns the concept of "ordinary persons".

Published matter concerning a person

5.3 Does the definition of "person" include a trade union? Under existing law in Western Australia, trade unions are able to bring actions for defamation.⁵ Under the ALRC's proposals "person" is defined as a "natural person or body corporate".⁶ For the purposes of industrial arbitration legislation, trade unions are regarded as bodies corporate,⁷ but it is not clear whether they would qualify in this regard for the purposes of the ALRC's proposed

¹ See paragraphs 3.6 to 3.7.

² Draft Bill (Cwth) clause 9(1).

³ *Report* (Cwth) at 43-44, paragraph 77.

⁴ "... matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally" - *Faulks Committee Report* 1975 (UK) at 15, paragraph 65.

⁵ *National Union of General and Municipal Workers v Gillian* [1946] KB 81, and see Gately, *Libel and Slander* (7th ed. 1974) at 382-383, paragraphs 899-901.

⁶ Draft Bill (Cwth) clause 7(1).

⁷ *Industrial Arbitration Act 1912* (WA), s.13(1).

defamation legislation.⁸ The WALRC therefore recommends that it should be made clear that the existing rights of trade unions to bring defamation actions should be continued.

The estimation of ordinary persons

5.4 The ALRC proposed that a defamatory publication should be one which "tends to affect adversely the reputation of [the plaintiff] *in the estimation of ordinary persons*". There are, however, a number of occasions when it is permissible under existing law to confer on ordinary persons certain subjective qualities. As the New Zealand Committee pointed out,⁹ a court must consider a publication in a business letter through the eyes of a business reader and a publication in a specialist journal through the eyes of a specialist reader. Existing law might also permit a plaintiff to recover if his reputation has been lowered in the eyes of a substantial and respectable group in the community.¹⁰ Thus, in some circumstances, it may be defamatory to refer to someone as a "communist" or as a "scab".

5.5 The point is that in a modern society made up of persons of many nationalities and possessing a variety of skills and expertise, the concept of a view held by an "ordinary person" becomes obscure. The problem is not unique to defamation law. The WALRC's concern is simply to emphasise that the ALRC's proposed definition of defamatory matter should be interpreted in a way which does not narrow the scope of a defamation action under existing law.

⁸ For the status of trade unions generally see Sykes and Glasbeek, *Labour Law in Australia* (1972) at 701-716. It is useful to compare the situation governing local authorities. Section 9(2) of the *Local Government Act 1960* (WA) provides generally that "a municipality is a body corporate".

⁹ *Report* (NZ) at 24, paragraph 74.

¹⁰ *Murphy v Plasterers Society* [1949] SASR 98; Gatley, *Libel and Slander* (7th ed. 1974) at 21, paragraph 45, n.66 and see paragraphs 10.9 to 10.12 below.

CHAPTER 6

PROOF OF DEFAMATORY MEANING

The meaning of words

6.1 In a defamation action, it is essential to the plaintiff's case that he show that the words complained of were capable of bearing the defamatory meaning he alleges them to have. His starting point is the natural and ordinary meaning of the words. This embodies both the literal meaning, and the meaning which any reader could reasonably infer by reading between the lines.

6.2 It has been suggested that the natural and ordinary meaning test is inadequate unless consideration can be given to the meaning actually taken by persons who have received the publication.¹ The suggestion has been rejected in other law reform proposals because it could add to the complexity, length and cost of a trial.² The same proposals also reject a suggestion that the meaning intended by the publisher should be relevant.

6.3 The Draft Bill (Cwth) adopts the natural and ordinary meaning test.³ Consequently, under the Bill, the meaning intended by a publisher and the meaning actually taken by recipients are irrelevant. The WALRC agrees with the test proposed in the Bill, which involves no change to existing law. It rejects the relevance of the meaning actually taken by recipients partly to avoid complex, lengthy and costly trials, but more importantly because of the need to strike a fair balance between the protection of reputation and freedom of expression. It is desirable to require a publisher to be on his guard for the meaning which is most likely to be taken by inference from what he publishes. It would be unreasonable to require him to make allowances also for other meanings which are actually taken.

6.4 The existing law in Western Australia also permits a plaintiff to bring a separate action if he can show a "true" or "legal" innuendo.⁴ This arises where the words are not defamatory in their natural and ordinary meaning, but are defamatory if read by persons who are aware of

¹ *Slim v Daily Telegraph* [1968] 2 QB 157 per Diplock L.J. at 172.

² *Faulks Committee Report* 1975 (UK) at 26, paragraphs 102-103; *Report* (NZ) at 25-26, paragraph 82.

³ Clause 9(3) of the Draft Bill (Cwth) provides:

"The question whether published matter has a particular tendency in relation to a person shall be determined according to the natural and ordinary meaning of the published matter...."

⁴ *Report* (Cwth) at 50, paragraph 90.

special circumstances. Thus, to accuse a barrister of advertising for clients might not be defamatory in its natural and ordinary meaning, but some persons might be aware that this amounts to professional misconduct. To those persons, aware of these special circumstances, the accusation could be defamatory.⁵ By the same token it may not appear to be defamatory to say incorrectly that Mr. C was seen at Ascot with his fiancée Miss X. But the statement would be read in a different light by those who were aware that Mr. C was married to another woman.⁶

6.5 The difference between "legal" innuendo and inference (the latter often called "false" or "popular" innuendo) can be difficult to draw. Nevertheless, it is a vital distinction for a plaintiff because there are special pleadings for a "legal" innuendo. It must be shown that there are extrinsic facts in existence which make the publication defamatory and that these facts were known to a reader or class of readers who received the publication.

6.6 A "legal" innuendo constitutes a separate cause of action, and can give rise to separate damages. Normal practice, however, is to deal with all defamatory imputations together and make a single award of damages. The Faulks Committee recommended that there should be a single action for defamation whether or not a legal innuendo was pleaded.⁷ The New Zealand Committee shared this view.⁸ In New South Wales, however, the view was taken that it might be better to deal separately with each defamatory imputation.⁹

6.7 Legal innuendo is dealt with by the ALRC by providing that matter may take on a special defamatory meaning:¹⁰

“...where, having regard to any particular circumstance likely to be known to him , a recipient would reasonably understand the matter to have [that] meaning ...”

As to the retention of the distinction between inference and innuendo the ALRC said:¹¹

⁵ Ibid. at 50, paragraph 89.

⁶ *Cassidy v Daily Mirror* [1929] 2 KB 331.

⁷ *Committee Report 1975* (UK) at 26, paragraph 104.

⁸ *Report* (NZ) at 26, paragraph 84.

⁹ *New South Wales Report 1971* at 99, paragraph 50.

¹⁰ Draft Bill (Cwth) clause 9(3).

¹¹ *Report* (Cwth) at 50-51, paragraph 90.

"So long as the plaintiff is required to draft his pleadings with sufficient particularity to inform a defendant of the case he has to meet, and all imputations are dealt with simultaneously by the selected remedies, the question whether there should be one cause of action or more is not of great practical significance."

6.8 Under the ALRC's proposed rules, all defamation actions would be required to contain particulars of -

- (a) the words used in the matter complained of;
- (b) any gesture, sound, picture or other representation in the matter complained of;
- (c) the time, place and manner of the publication of the matter;
- (d) any facts and matters on which the plaintiff relies to establish that the matter complained of concerned the plaintiff;
- (e) any defamatory imputation relied upon by the plaintiff;
- (f) the parts of the matter complained of that are alleged to convey such imputation;
- (g) any facts and matters on which the plaintiff relies to establish that imputation ;
- (h) the remedies claimed by the plaintiff.¹²

6.9 In effect, the ALRC's proposals would amalgamate inference and innuendo. They would also provide a procedure which would give better particulars of the nature of the claim to a defendant. In the WALRC's view, these provisions are desirable, except for one small reservation relating to (f) above. The New Zealand Committee decided that a plaintiff should not be required to specify the defamatory parts of the published matter:¹³

"We concluded, however, that the plaintiff had a general obligation to 'fairly inform the defendant' and where a statement or article was diffuse the requirement that the plaintiff specify parts of it would tie him to these parts and perhaps cause more difficulties".

6.10 The WALRC agrees. The defamatory imputation may not easily be attributable to specific parts of an intricate article. It may arise out of its general tenor or tone. It would seem to be too restrictive to require a plaintiff to tie himself down to specific portions in these circumstances.

¹² *Draft Rules* (Cwth) rule 8.

¹³ *Report* (NZ) at 28, paragraph 95.

Reference to the plaintiff

6.11 In addition to establishing that the matter published has the defamatory meaning he alleges, a plaintiff must show that the publication refers to him. The test for identification is the same as for defamatory meaning.¹⁴ At common law it is not necessary that the words should refer to the plaintiff by name. The question is whether the words would be understood by reasonable people to refer to the plaintiff.¹⁵ Intention to refer to the plaintiff is immaterial.

6.12 Under clause 9(2) of the Draft Bill (Cwth), published matter relates to the plaintiff:

“... where it refers to the person [plaintiff] or where a recipient of that matter, having regard to the terms of the matter and all surrounding circumstances, would reasonably understand that it was intended to refer to that person.”

There was no suggestion in the *Report* (Cwth) that this definition was intended to alter existing law on this point. However, as drafted, this provision might be given a narrower interpretation than the common law would permit. For example, the reference to "the terms of the matter and all surrounding circumstances" appears to be unnecessary and could create doubts whether events arising after the publication were able to be taken into account.¹⁶ More importantly, the last clause of the ALRC's provision introduces an element of intention to refer to the plaintiff. It suggests that to satisfy the test a person must reasonably believe that it was the defendant's intention to refer to the plaintiff. Such an interpretation could result in a significant and, in the WALRC's view, an undesirable departure from the common law.¹⁷

6.13 In the WALRC's view, clause 9(2) of the Draft Bill (Cwth) should yield a result which is consistent with existing law. To remove doubts and to ensure that such a result is achieved, the WALRC suggests that clause 9(2) should be amended to provide that published matter relates to the plaintiff:

¹⁴ Fleming, *The Law of Torts* (5th ed. 1977) at 536.

¹⁵ Gately, *Libel and Slander* (7th ed. 1974) at 126, paragraph 281, and at paragraph 290.

¹⁶ If, for example, it were published that an employee of a small company was a thief, and that his future employment was in jeopardy, this might implicate a person who left his job with that firm a short time later. In such a case, the publication might imply that the next person to leave his employment is a thief, but in determining whether the plaintiff was implicated a court should be able to take into account all of the circumstances. The proximity of the plaintiff ceasing work should be relevant even though it was not a circumstance existing at the time of publication.

¹⁷ The focus should not be on what the defendant intended, but on whether the plaintiff was in fact implicated by the defamatory publication.

"...where it refers to the person [plaintiff] or where a recipient of that matter would reasonably understand that it refers to that person".

CHAPTER 7

LIABILITY FOR PUBLICATION FOR REPETITION BY OTHERS

7.1 Publication, in the sense of any communication from one person to another, is the event which gives rise to liability for defamation. In most cases it involves an act of publication by speech or of written material by the defendant. At common law, however, liability can arise in other ways, for example by placing a wax effigy in a "rogues gallery"¹ or even by a defendant's failure to remove a defamatory item painted on premises under his control.² Other peculiarities of the common law relating to publication are that -

- (a) a publication from one spouse to another is not a sufficient publication;³
- (b) a defendant is liable for non-intentional, that is accidental, publication only if this was brought about by a want of care on his part;⁴
- (c) a defendant is excused liability arising from repetition of the libel by others unless such repetition was -
 - (i) authorised or permitted by him;
 - (ii) a natural and probable consequence;
 - (iii) made pursuant to a moral duty.⁵

7.2 Publication is defined by the ALRC⁶ in clause 7(1) of the Draft Bill (Cwth) as:

“... a communication or transmission ... of matter by a person to a person other than the person to whom the matter relates...”

Clause 7(2) exempts:

¹ *Monson v Tussaud's* [1894] 1 QB 671.

² Fleming, *The Law of Torts* (5th ed. 1977) at 539 says:

"By knowingly permitting a libel to remain after reasonable opportunity to remove it, the person in control of the premises becomes liable as for its republication, because the inference may then be drawn that he has made himself responsible for its continued presence – at all events unless its obliteration or removal would involve a great deal of trouble and expense".

³ *Ibid.* at 538 and see paragraph 13.1 below, n.8.

⁴ Gately, *Libel and Slander* (7th ed. 1974) at 108, paragraph 229.

⁵ *Ibid.* at 122, paragraph 267. Fleming, *The Law of Torts* (5th ed. 1977) at 527, confidently assumes:

"...that the originator of a calumny will no longer be excused if at the time of divulging it, he had reason to anticipate its repetition " .

Thus a person relating a story to a newspaper reporter may be held jointly or severally responsible for the damage caused by its circulation in the newspaper.

⁶ *Report* (NZ) does not recommend a definition of publication. This is left to the common law.

“a communication or transmission of matter made unintentionally by one person to another ... if [it] is made without want of care on the part of the person making it.”

7.3 This definition deals adequately with the question of liability for accidental publications.⁷ It also removes the protection given to communications between spouses. A majority of the WALRC agrees with this result.⁸ However, the ALRC's definition might be interpreted as requiring some positive act by a defendant, thereby excluding cases where the publication arises out of an exhibition of some kind, or by an omission on the part of the defendant. Publication in these circumstances could give rise to an action under the existing law. The WALRC considers that there should be no change to the law in this respect.

7.4 With regard to liability for republication, case law principles may be preserved under the ALRC's general provision that, in assessing damages, regard should be had to:⁹

“the nature of the defamatory matter and the circumstances in which it was published including the extent and manner of publication.”

The WALRC considers, however, that this is an important principle and, consistent with its view that legislation should be framed comprehensively,¹⁰ it considers that specific provision should be made.

7.5 The WALRC therefore recommends that uniform defamation legislation should make it clear that a defendant will be liable for publication where he fails to take reasonable steps to prevent communication from occurring; and, where matter is repeated by a person to whom it was published, in circumstances where repetition was intended, foreseen or ought reasonably to have been foreseen by the publisher.

⁷ Paragraph 7.1(b) above.

⁸ See paragraph 13.11 below.

⁹ Draft Bill (Cwth) clause 28(1)(a).

¹⁰ See paragraph 3.11 above.

CHAPTER 8

MULTIPLE PUBLICATIONS

8.1 In Western Australia every publication by the same or a different publisher can support a separate defamation action. Technically a plaintiff could commence separate proceedings in respect of every copy of a newspaper published in this State. He could also proceed similarly against other newspapers or news media which carried the same or substantially the same defamatory matter.

8.2 In New Zealand there is legislation designed to consolidate all actions based on the same or substantially the same defamatory item. Where the publication is in a newspaper no other action can be commenced in relation to the same or substantially the same defamatory matter in any other newspaper unless brought within thirty days of the first publication, and notice must be given to all defendants to enable them to join in their defence.¹ There is no provision dealing with the situation where the plaintiff brings further proceedings against the same defendant in respect of the same defamatory matter.

8.3 The New Zealand Committee made three recommendations to improve the law relating to multiple publications. They were -

- (a) that the statutory provisions be extended to include publications by news agencies, radio and television and the cinema;
- (b) that the thirty day limit should be relaxed by giving power to a court to grant extensions until the date that the first action is set down for trial; and
- (c) where proceedings have been concluded against a defendant, no further proceedings should be permitted against that defendant without the leave of the court on notice to the defendant.²

8.4 The ALRC dealt only with multiple publications by the same defendant. It recommended that in such circumstances a plaintiff should have only one cause of action, but

¹ *Defamation Act 1954 (NZ)*, s.9.

² *Report (NZ)* at 75, paragraph 321.

only to the extent to which publication was disclosed by the defendant.³ There would be a separate right of action for additional undisclosed publications.

8.5 The WALRC agrees with the ALRC's recommendations regarding publications by the same defendant. It considers, however, that defamation actions against several defendants should be consolidated where the publications relate to the same or substantially the same defamatory matter. Separate trials could lead to additional and unnecessary costs and duplication of effort. Distorted damages awards could result from separate trials.⁴

8.6 The *Supreme Court Rules* in Western Australia contain provisions allowing joinder of parties⁵ and consolidation of any number of causes of action.⁶ However, in the WALRC's view there should be separate provision in the defamation legislation enabling a court to order consolidation of actions against several defendants whenever this is considered to be desirable. To encourage consolidation, a plaintiff should be required to give notice to a defendant of any other action he has taken, or intends to take, against other defendants, concerning the same defamatory subject matter. Failure to do so should result in the striking out of his action and the award of costs against him. Apart from adding the requirement for notice by the plaintiff, such a provision would highlight the availability of existing consolidation procedures in the context of defamation actions.

³ Draft Bill (Cwth) clause 34.

⁴ Even if evidence in mitigation of damages can be given relating to publication of the same subject matter by other news media, or the amount of damages previously awarded (see paragraph 19.12 below) the assessment of damages remains a difficult task where there are separate trials. It is not sufficient that a jury (if any) be invited to make such allowance as they think fit for the damages the plaintiff is likely to recover in any other action:

"They must do the best they can to ensure that the sum which they award will fully compensate the plaintiffs for the damage caused by the libel with which they are concerned, but will not take into account that part of the total damage suffered by the plaintiffs which ought to enter into the other jury's assessment": per Lord Reid in *Lewis v Daily Telegraph* [1964] AC 234, at 262.

⁵ Order 18 rule 4 provides that two or more persons may be joined together as defendants with the leave of the Court or where -

- (a) if separate actions were brought against each of them some common question of law or fact would arise; and
- (b) all rights to relief claimed in the action are in respect of or arise out of the same transaction or series of transactions.

There is a proviso in Order 18 rule 5 that a court may order separate trials if it appears to it that joinder may embarrass or delay the trial or is otherwise inconvenient.

⁶ Order 83 rule 1 permits consolidation of causes of action notwithstanding that the parties and/or the evidence necessary to prove the issues are not identical.

CHAPTER 9

DEATH IN RELATION TO DEFAMATION

- 9.1 Death of a person can become relevant to defamation law in three ways, namely -
- (a) where a person is defamed after he is dead;
 - (b) where a person is defamed while alive but dies before he obtains a remedy;
 - (c) where a person who publishes defamatory material dies before judgment is entered against him.

The ALRC's proposals are considered under these heads.

Defamation of deceased persons

9.2 In Western Australia, no action lies against a person for publishing defamatory material about a dead person unless this reflects on the reputation of a living person.¹ A living person might have an action where it is said wrongfully that his deceased mother never married. There is no right of action in respect of any slur on the reputation of the deceased.

9.3 The WALRC agrees with the ALRC's proposal that a deceased person's family or personal representative should have a right of action for a specified period after death in respect of defamation of the deceased.² The remedies should be correction and injunction as the ALRC recommended. It also agrees that the action should not be limited, as recommended in New Zealand,³ to cases where the defendant knew that the defamatory matter concerning the deceased was false. The purpose of the action is to clear the deceased's name, and the degree of fault by the defendant should be irrelevant.

9.4 The WALRC accepts the ALRC's view that a time limit on the duration of the cause of action should be imposed so as not to stultify historical or biographical writing. It considers that five years, as recommended by a majority in the Faulks Committee,⁴ would not create an excessive inhibition on writing. Nevertheless the WALRC would support the ALRC's suggestion for a period of three years, if this were commonly accepted, for the purposes of a uniform law.

¹ Gatley, *Libel and Slander* (7th ed. 1974) at 10-11, paragraphs 15-16. The same rule applies to criminal defamation - Criminal Code 1913, s.346 and see *Report (Cwth)* at 44-45, paragraph 78.

² *Report (Cwth)* at 55, paragraph 101.

³ *Report (NZ)* at 98, paragraphs 436 to 441; Draft Bill (NZ) clause

⁴ *Faulks Committee Report 1975 (UK)* at 115, paragraph 420.

9.5 The remedies proposed by the ALRC are an order for correction and an injunction. The ALRC, the New Zealand Committee and the Faulks Committee all opposed a remedy of damages in any circumstances. No reasons were given,⁵ but their opposition is consistent with their concern not to inhibit historical or biographical writing. The Porter Committee in rejecting a claim for damages for the estate of a deceased person said:⁶

"The basis for a right of action on the part of personal representatives is the injury suffered by the estate of the deceased; and his estate cannot normally be damaged by defamatory statements made after his death".

9.6 The WALRC agrees with this as a general proposition. But it also takes the view that defamation is in some respects a unique personal wrong in that a person's character can survive his death. Preservation of this character might be important, for example, to keep up a family business for a short time following death until it has stabilised. There could be circumstances where loss to an estate could arise as a direct result of an untrue attack on the deceased's character. The wrong may be greater by reason of the fact that the publisher chose to wait until the subject's death before going to print.

9.7 The WALRC is conscious of the arguments for historical and biographical writing. However, it is also aware, in the language of the Faulks Committee, that:⁷

"Where publications contain false accusations against dead men, they constitute a highly objectionable method of profiteering out of his death and in our opinion, while grief is fresh and for rather longer, such accusations should be actionable".

9.8 In the WALRC's view, in a case where the personal representative can show that defamatory matter was published within the prescribed period from the deceased's death by a person who knew that the matter was false, and where actual loss has occurred to the estate as a result, such loss should be recoverable as damages. Publishers who were sure of their facts would suffer no inhibitions. Those who were not sure could take the risk of a correction action, or wait until the expiry of the prescribed limitation period. The WALRC does not consider that there would be any undesirable restriction on publication if a publisher, who

⁵ See *Report* (Cwth) at 55, paragraph 100; *Report* (NZ) at 98, paragraphs 440-441; *Faulks Committee Report* 1975 (UK) at 115, paragraph 421.

⁶ *Porter Committee Report* 1948 (UK) at 11, paragraph 27.

⁷ *Faulks Committee Report* 1975 (UK) at 115, paragraph 420. The Committee did not, however, recommend damages.

chose to publish within the prescribed period defamatory matter which he knew to be false, were made answerable for damage he actually caused.

Death of person defamed

9.9 In Western Australia, since 1941, the general rule for tort actions is that a personal representative may take action to remedy a wrong committed against the deceased when alive, but with limitations as to the type of damages recoverable.⁸ Exemplary damages⁹ are excluded, and so also are damages for non-pecuniary matters such as pain and suffering or for any bodily or mental harm.¹⁰ Defamation actions, however, are specifically excluded from this rule.¹¹ Consequently, if a person defamed does not bring an action for defamation before he dies, the cause of action is lost.

9.10 All recent reports on the subject of defamation law reform agree that an exemption for defamation actions from the survivorship rule is undesirable. But there are significant differences in the detailed reform proposals. The following models have been suggested -

- (1) defamation actions should survive only if the plaintiff commenced proceedings before he died, and only special damages should be recoverable;¹²
- (2) all defamation actions should survive, but in cases where the plaintiff did not commence proceedings before he died, only actual or likely pecuniary damages should be recoverable;¹³
- (3) all defamation actions should survive but only injury to property or financial loss should be recoverable;¹⁴
- (4) all defamation actions should survive and general and special damages should be recoverable.¹⁵

⁸ *Law Reform (Miscellaneous Provisions) Act 1941*, s.4(1).

⁹ See paragraph 19.1 below.

¹⁰ The operative date is the date of judgment. If the plaintiff survives the date of judgment he may recover general damages, e.g. for pain and suffering. If he dies before judgment he cannot: *Foppoli v Public Trustee* [1970] WAR 73. The ALRC's statement in *Report* (Cwth) at 58, paragraph 107 that damages for pain and suffering can be recovered is not the law in Western Australia.

¹¹ The only other exceptions are actions for seduction, enticement and for damages for adultery. Such actions have always been relatively rare, and enticement and adultery actions were abolished as from 5 January 1976 by 5.120 of the *Family Law Act 1975* (Cwth). *Report* (NZ) at 99, paragraph 435.

¹³ *Faulks Committee Report 1975* (UK) at 113, paragraph 415. The Committee recommended that special and general damages should be recoverable if the plaintiff commenced his action before he died.

¹⁴ *New South Wales Report 1971* at 137, paragraph 224; *Defamation Act 1974* (NSW), ss.5, 7(3) and 46(1)(b).

9.11 The WALRC agrees with the ALRC that any distinction dependent on whether the deceased plaintiff commenced his action before he died is unsatisfactory. The failure to commence the action might have been quite fortuitous. The WALRC does not agree, however, that there should be no limits to the type of damages which should be recoverable. The general rule in Western Australia and in most other Australian jurisdictions¹⁶ regarding survival of actions in tort is that damages for non-pecuniary items such as pain or suffering or mental harm are excluded. Fleming, in explaining this rule, says:¹⁷

“although, as a general proposition, recovery in a survival action is measured by loss not to the estate, but to the deceased, it is widely felt to be against sound policy to confer on the estate what would in effect be a windfall.”

9.12 Deceased plaintiffs in defamation actions would be placed in a privileged position in Western Australia in relation to other actions in tort as far as damages were concerned if the ALRC's proposals were adopted. The WALRC takes the view that there is no justification for such a result. It considers that damages for non-pecuniary items such as hurt feelings and humiliation would be an unnecessary windfall for the beneficiaries of the estate.

9.13 The WALRC therefore recommends that a defamation action should survive in favour of the representative of a deceased plaintiff, but that damages recoverable should be limited to pecuniary loss, including injury and financial loss accruing to the estate of the deceased.¹⁸

Death of the publisher

9.14 Since 1941, the general rule in Western Australia for actions in tort is that they survive against a deceased person's estate, but there is an exception for defamation actions.¹⁹ For

¹⁵ *Report (Cwth)* at 57, paragraph 107.

¹⁶ The only exceptions to the general rule are New South Wales, Victoria and the ACT where the deceased plaintiff's damages are limited to pecuniary losses only where the defendant's wrongful act caused death: Fleming, *The Law of Torts* (5th ed. 1977) at 662. Furthermore, New South Wales not an exception when it comes to defamation actions as damages for a deceased plaintiff are limited to injury to property or financial loss by virtue of s .46(1)(b) of the *Defamation Act 1974* (NSW). The ALRC's recommendations on this issue seem to have been influenced by the assumption that non-pecuniary loss is generally recoverable by a deceased plaintiff (*Report (Cwth)* at 58, paragraph 107) and that assumption cannot be supported.

¹⁷ Fleming, *Law of Torts* (5th ed. 1977) at 661.

¹⁸ This is the law in New South Wales (see paragraph 9.10(3) above) and it would be consistent with the law applicable to other actions in tort surviving in favour of the representative of a deceased plaintiff in Western Australia.

¹⁹ *Law Reform (Miscellaneous Provisions) Act 1941*, 5.4(1).

defamation the old common law rule prevails and the action dies with the defendant. It is generally recognised that this exception is unsatisfactory. The WALRC supports the ALRC's proposal that defamation actions should survive against the estate of a deceased defendant.²⁰ However, the question arises whether the ALRC's special proposals for defamation actions should be followed, or whether survival of such actions should simply be brought into line with other tort actions in this State.²¹

9.15 In a case where a tortfeasor has died there is generally a need to have the matter determined as quickly as possible while the evidence available is fresh, and to enable the estate to be distributed. For this reason, where an action in tort survives against a deceased defendant's estate under the *Law Reform (Miscellaneous Provisions) Act 1941* (WA), proceedings are not maintainable unless -

- (a) they were pending at the date of death; or
- (b) the cause of action arose not earlier than twelve months before the date of death and proceedings are taken within six months from the date the personal representative obtains authority to administer, or twelve months from the date of death, whichever is longer.²²

9.16 The ALRC's proposals do not include special limitation periods in respect of actions against deceased estates, but for other reasons, strict limitation provisions are provided in respect of all defamation actions generally. Under clause 33 of the Draft Bill (Cwth), a plaintiff must bring his action within three years of the date of publication, or within six months of the date he first learns of publication, whichever is the earlier.²³ The question is whether these provisions, or the more general Western Australian provisions applying to actions in tort where permitted against deceased defendants, should apply to defamation actions.

²⁰ *Report* (Cwth) at 56, paragraph 104.

²¹ Compare the question of damages recoverable in actions on behalf of a deceased plaintiff: paragraphs 9.11 to 9.12 above.

²² *Law Reform (Miscellaneous Provisions) Act 1941*, 5.4(3).

²³ Draft Bill (Cwth) clause 33(2) provides that certain State laws relating to limitation periods apply to defamation actions under the ALRC's proposals. This appears to be limited, however, to provisions which allow an extension of time for persons under a disability, and would not apply to the special limitation period for tort actions against deceased defendants.

9.17 In the WALRC's view, the policy underlying the special statutory limitation on actions against deceased defendants is relevant to defamation actions. There is no justification for a separate rule for defamation actions, and it would be anomalous and could give rise to confusion if such a separate rule were introduced. Consequently, it is recommended that the limitation period in respect of defamation actions against deceased defendants should be as provided in the *Law Reform (Miscellaneous Provisions) Act 1941*²⁴ for other actions in tort against deceased defendants in Western Australia.

²⁴ See paragraph 9.15 above.

CHAPTER 10

EXTENSIONS OF DEFAMATION ACTIONS

10.1 In the *Report* (Cwth), the ALRC considered whether the scope of defamation actions should be extended to cover a number of areas where no action lies under present law. One of these areas, namely defamation of deceased persons, has been discussed above.¹ The WALRC agrees in principle with this extension. There are two other areas, however, where the desirability of allowing a defamation action is doubtful. These are where defamatory material refers not to an individual but to a group of persons, and where an individual's reputation is lowered not in the eyes of ordinary persons generally, but in the eyes of a specific group with whom he associates.

Defamation of groups

10.2 In a discussion paper² the ALRC suggested that a defamatory slur on a group of persons should be actionable by a member of the group, the remedy being a correction, declaration of falsity and injunction. To prevent multiplicity of actions, only one action would be permitted.

10.3 In its report, the ALRC did not reach a unanimous view on this issue. All members were sympathetic towards groups who became the object of defamatory slurs, but a majority would not provide a remedy in defamation at this stage. They would prefer to allow time to judge the effectiveness of the correction procedure and of the approach to racial discrimination evidenced in the *Racial Discrimination Act 1975* and equivalent State legislation.³ A minority would have permitted a member of a defamed group to obtain a correction, declaration or injunction.

10.4 The WALRC considers that there would be considerable difficulty in extending the right of action to cover group defamation. It agrees with the views of the majority in the ALRC, but it also considers that there would be practical obstacles. There would be difficulties in defining what is meant by a group, and whether the plaintiff was a member of, and therefore entitled to represent, that group. The application of the correction remedy could

¹ See paragraphs 9.2 to 9.8.

² ALRC, *Defamation - Options for Reform* (1977) Discussion Paper 1 at 7.

³ *Report* (Cwth) at 54, paragraph 98.

also give rise to problems. In some cases it would be difficult to frame a form of correction which would remedy the slur on the group.

10.5 An example cited in the *Report* (Cwth), namely the publication of an article alleging use of drugs by students in the final year of a named high school, illustrates the limits of the proposed correction remedy in respect of group actions.⁴ If the article referred to **all** students, then each member of the defined class would have an action under existing defamation law.⁵ If the article referred only to **some** students without naming them, there would be a slur on the whole class, but presumably a correction could not be ordered if there were in fact some students who were using drugs. If the article referred to **widespread use** of drugs, perhaps a court could order a correction as to the degree of use (for example, "some use" or "one or two known cases" or "occasional use"), but this is clearly a difficult area, and it is doubtful whether the real harm, namely the general slur on the group, would be remedied. The only case where correction might be appropriate may be where the defamatory statement is untrue of every member of the class.

10.6 Similar difficulties might arise where the group is of a racial, ethnic or religious nature. It is questionable whether a form of representative action on behalf of the members of the group would serve to protect the reputation of the group. Any public attack on a particular group is likely to be given prominence in the media, as is the group's reply. The issues may be better resolved through public discussion or conciliation rather than by defamation litigation. For these reasons the WALRC does not support an extension of a defamation action to special groups.

Defamation of an individual in the eyes of a special group

10.7 One limitation of existing defamation law is that it takes cognisance only of the views of the general community. The result is that if an imputation were considered quite unexceptionable by the general community, no action would lie even though:⁶

"[the publication] might cause serious injury to a person in the eyes of members of a church, a political party, a trade union, a professional association, an ethnic or sporting group; perhaps the very persons who matter most to him."

⁴ *Report* (Cwth) at 53, paragraph 96.

⁵ Gatley, *Libel and Slander* (7th ed. 1974) at 128-129, paragraphs 283-286.

⁶ *Report* (Cwth) at 47, paragraph 82.

In a discussion paper, the ALRC suggested that a person defamed in the eyes of a particular group, such as a church group, trade union or ethnic or sporting association, should be able to take action to have the statement corrected but without damages.⁷

10.8 Although comments for and against the extension were equally divided, the ALRC, in its Report,⁸ decided against it. In its view, such an extension could impose an unfair burden on publishers, notwithstanding that damages were not to be awarded. As the ALRC said:⁹

"The publisher may be quite unaware that the subject was a member of a particular group, or of the standards of that group."

10.9 The WALRC agrees, for the reasons given by the ALRC, and for practical reasons, that a right of action should not be specifically extended to a person who is defamed in the eyes of a small group. It is concerned, however, that the ALRC's recommendations on this issue could give rise to some misunderstanding.

10.10 It might be thought, for example, that the ALRC was advocating that group attitudes should be wholly irrelevant in defamation law. However, this would overlook the fact that the identification of the view of the general community might involve the preference of one group view over that of another. No one would suggest that it should not be defamatory to call someone a thief because this is the view of only one group in the community, and that there is another group, namely thieves, who would not take exception to it. In the WALRC's view the question is one of degree. It would prefer not to rule out the possibility that in some circumstances a person might be able to maintain an action if his reputation has been lowered in the eyes of a trade union or ethnic or religious group.¹⁰

10.11 Furthermore, existing law goes a considerable way towards allowing redress for persons who are defamed in the eyes of a particular group. For example, as the ALRC itself recognised, words can have different meanings to different groups and existing law takes cognisance of such meanings. Thus, with regard to reference to the plaintiff:¹¹

⁷ ALRC, *Defamation - Options Reform* (1977) Discussion Paper 1 at 7.

⁸ *Report* (Cwth) at 47, paragraph 82.

⁹ *Ibid.*

¹⁰ See, for example, *Murphy v Plasterers' Society* [1949] SASR 98 and Gatley, *Libel and Slander* (7th ed. 1974) at 21, paragraph 45, n .66.

¹¹ *Report*. (Cwth) at 48, paragraph 85.

"The criterion is whether the ordinary reader, viewer or listener would reasonably understand the words as referring to the plaintiff, having regard to their terms and, in appropriate circumstances, any special facts relevant to identification proved to have been known to a class of readers".

Innuendo provides another example. The gist of an action based on innuendo is evidence to show that a group of persons with special knowledge, such as lawyers, have received the publication and regard it as being defamatory.¹²

10.12 To summarise, the WALRC supports the ALRC's decision not to recommend specific extension of defamation actions to persons who are defamed in the eyes of a particular group. It should not follow from this that there must be a consensus of view throughout the entire community that relevant matter is defamatory before an action can be maintained, or that the meaning given to that matter by a particular group is necessarily irrelevant.

¹² Ibid. at 50, paragraphs 89 and 90, and see paragraph 6.4 above.

CHAPTER 11

THE DEFENCE OF TRUTH AND PROTECTION OF PRIVACY

A defence of truth alone

11.1 At common law, it is a defence to a civil defamation action if the defamation is justified. The expression "justification", has been given two separate meanings. The narrow meaning is that an allegation is justified if true or substantially true. The wider meaning is that the allegation is justified if made for the public benefit as well as being true. At common law the narrow meaning is adopted. The broader view was recommended by a Select Committee of the House of Lords in 1843.¹

11.2 The broader concept of "justification", of truth and public benefit, was adopted in New South Wales in 1847,² and in the Australian Capital Territory, Queensland and Tasmania. In Western Australia, s.356 of the *Criminal Code* provides a defence if defamatory matter is true and if publication is for the public benefit. It would appear, however, that the common law defence of truth alone is a sufficient defence to a civil action in this State.³ Truth alone is also a defence in Victoria, South Australia and New Zealand.

11.3 The advantage of a public benefit requirement is that it provides protection against publication of matter, whether true or not, which is of no public concern. In most cases this matter would relate to the private affairs of an individual. But it could also apply to the publication of matter of public record (such as a past criminal conviction) where the public benefit would not justify the potential harm which exposure of the record could cause to the individual concerned. The views put to the ALRC indicated substantial if not unanimous opposition within New South Wales, Queensland and Tasmania to any change in the law which would make truth alone a defence in the absence of separate protection for privacy interests.⁴

¹ Select Committee of the House of Lords, *Report on the Law of Defamation and Libel* 1843.

² See now *Defamation Act 1974* (NSW), s.15(2) where the public benefit test has been replaced by a public interest test.

³ P. Brett in an article (*Civil and Criminal Defamation in Western Australia* (1951) 2 Annual LR (WA) 43 at 51) argued that the common law defence remains unaffected by the *Criminal Code*. This view was also taken in *Western Australian Newspapers Ltd. v Bridge* (1979) 23 ALR 257 by Jacobs J. at 263. A majority in the High Court agreed with the conclusion and the reasoning of Jacobs J. and *Gobbart v West Australian Newspapers* [1968] WAR 113 at 115 was cited as an illustration of a case where truth alone was pleaded.

⁴ *Report* (Cwth) at 65, paragraph 123.

11.4 On the other hand, a public benefit requirement has serious disadvantages. The concept is ill-defined and this can give rise to uncertainty and consequently a "chilling effect" on the publication of news.⁵ For these reasons, jurisdictions with no public interest requirement could be opposed to its introduction.

11.5 These divergent views as to the requirements for the defence of justification placed the ALRC in a predicament. On such an important issue uniformity was clearly desirable. The ALRC's solution was to treat the law of defamation and the law of privacy as separate issues. In its view the law of defamation should be concerned only with damage to reputation caused by the publication of material which is incorrect. Protection against the improper publication of material which is true should, in its view, be governed by the laws of privacy. The WALRC agrees with this approach and, unless a compromise is considered to be desirable in the interest of uniformity,⁶ it supports the ALRC's recommendation that truth alone should be a defence to a civil defamation action.

Privacy protection legislation

11.6 The ALRC, like the WALRC, has a separate reference to consider law reform on the subject of privacy. The two Commissions have substantially⁷ parallel terms of reference which include the need to:

"...provide protection against, or redress for, undue intrusions into or interferences with privacy arising, *inter alia*, from the obtaining, recording, storage or communication of information in relation to individuals."

11.7 The recommendation that truth alone should be a defence to a defamation action would remove some measure of privacy protection in jurisdictions where public benefit or public interest also has to be shown. Consequently, a majority in the ALRC took the view that it would be desirable at this stage to specify its privacy protection proposals and incorporate these with its proposed defamation legislation.⁸ This involved the severance of what is referred to as "publication privacy" from the general privacy reference and a discrete

⁵ See paragraph 2.2 above.

⁶ See paragraphs 11.11 to 11.12 below.

⁷ The only major difference is that the WALRC's terms of reference were expanded on 1 March 1978 to include the question whether a person's criminal record should be expunged after a certain period.

⁸ *Report* (Cwth) at 130-131, paragraph 244.

treatment of this topic as part of the defamation project. The detailed provisions are contained in Part IV of the Draft Bill (Cwth). In broad terms it is proposed to create a right of action, with damages declaration, injunction and an order for account of profits as remedies, for the unlawful publication of private facts as defined in the Draft Bill (Cwth).⁹

11.8 One member of the ALRC¹⁰ took the view that the majority's recommendations concerning privacy publication were premature.¹¹ He maintained this view notwithstanding the majority's decision to reduce the areas to be covered by the proposed privacy action to the bedrock subjects of matters relating to the health, private behaviour, home life and personal and family relationships of the individual.¹²

11.9 The WALRC is of the opinion that the dissenting ALRC member's view applies with even greater force in Western Australia. In this jurisdiction, where truth alone is considered to be a defence in a civil defamation action, there is no need to enact stop-gap legislation for the protection of privacy in order to adopt the ALRC's proposed defence of justification.¹³ In addition, the WALRC considers that a combined treatment of the two topics, defamation and publication of private facts, at this stage would be undesirable for the following reasons -

- (a) Defamation and publication privacy are two distinct areas of law, protecting different interests. Defamation is concerned with false information which damages reputation. Publication privacy is concerned with information whether true or false, but usually true, which ought not to be made public.
- (b) Under the WALRC's separate privacy reference, many aspects of the need to protect privacy must be dealt with, not just publication privacy. Other areas for consideration include protection from intrusion and from the accumulation, storage, use and communication of information generally. Any precipitate adoption of legislation on publication privacy in isolation might create a risk

⁹ *Draft Bill* (Cwth) clause 19(1) .

¹⁰ Mr. Kelly, the member in charge of the ALRC's privacy reference.

¹¹ *Report* (Cwth) at 128, paragraph 243.

¹² Proposals were put forward originally in *Defamation and Publication Privacy -A Draft Uniform Bill* (1977) Discussion Paper 3 to cover not only publication of private facts but also -

- (a) photographs in private places;
- (b) criminal records ;
- (c) confidential material.

¹³ It should be noted that, as indicated by the dissenting ALRC member, the ALRC's privacy proposals do not completely cover the privacy area protected by the "truth and public benefit" requirement. For example, the ALRC's privacy proposals would not prevent the publication of old criminal records : *Report* (Cwth) at 127, paragraph 241.

that that legislation may ultimately be found to conflict with policies underlying the protection of privacy generally.¹⁴

- (c) The Western Australian community has not had a sufficient opportunity to express its views on privacy protection by means of legislation,¹⁵ and could object to the adoption of legislation on a specific area simply because of difficulties in other jurisdictions which do not exist here. The issue of policy whether to provide civil remedies or leave privacy protection to administrative action remains to be resolved.
- (d) The removal of the added complexity of the proposed privacy legislation from the proposed defamation bill would narrow the issues and could ease the passage of a uniform defamation law in this State. Much needed reforms to the defamation law should not be delayed by debate concerning the policy approach to privacy protection.

11.10 The WALRC therefore recommends that the ALRC's privacy protection proposals should not be adopted in Western Australia at this stage, and that the question of protecting individuals in respect of the publication of private facts should be deferred until the WALRC considers its reference on the protection of privacy as a whole.

Truth and public benefit: a possible compromise

11.11 There is a possibility that other jurisdictions might also reject the ALRC's proposals for the protection of privacy in relation to publication at this stage, preferring instead the defence of truth and public benefit. The fact that the ALRC's privacy proposals do not apply to the classic case of the reopening of an individual's long forgotten criminal record might be seen as one reason for taking this view.

11.12 The WALRC, for reasons outlined above,¹⁶ does not share the view that the defence of justification should require proof of truth and public benefit. However, it considers that this is an issue upon which some compromise might be necessary in order to obtain uniformity throughout Australia. In other words it takes the view that any disadvantage in adopting a

¹⁴ This is a view also taken by the dissenting member of the ALRC: *Report (Cwth)* at 128-129, paragraph 243.

¹⁵ There have been no public hearings or publications on the question of protecting privacy interests generally and the WALRC has not reached any views on this issue.

¹⁶ See paragraph 11.5.

defence of truth and public benefit in Western Australia would be outweighed by the greater disadvantage of a lack of uniformity throughout Australia as to the requirements for a defence of justification. It should be remembered that a "truth and public benefit" requirement is not a stranger in Western Australian law. It applies to criminal defamation.¹⁷ Whether "public benefit" was required for civil defamation was a live question for many years.¹⁸

Consequently, the WALRC recommends that, as a compromise, a defence of truth and public interest should be created if it appears that this is the most likely way in which a uniform defence of justification is to be obtained. The operation of the defence should be governed by the principles underlying the law in New South Wales¹⁹ rather than by s.356 of the *Criminal Code*.

Substantial truth and multiple allegations

11.13 The Commission agrees with the ALRC's proposal²⁰ that substantial truth, namely truth of the "substance" or "sting" of a defamatory publication, should be a complete defence, even though the publication is false in some minor detail. Thus, if it were alleged that X defrauded ten people, truth should be a defence even though the defendant could only prove fraud in the case of nine. Similarly, a statement that X stole a watch should be defensible even though X in fact stole a clock.²¹ If the statement falsely asserts that the watch was stolen from his employer, mere proof that he stole a clock might be insufficient. The reason is that the first statement contains two imputations, first that he is dishonest and secondly that he cannot be trusted in his employment. Only the first is proved substantially true.

11.14 A difficulty arises when a publication contains several distinct defamatory allegations, some of which are true, others false. The current law in Western Australia is that a person can bring an action in respect of the false allegations, even if this forms only a minor part of the defamatory publication.²² Thus if a statement is published alleging that X stole money from his employer, and failed to give truthful answers to his questions, X may be able to bring a

¹⁷ *Criminal Code* 1913, s.356 and see paragraph 11.2 above.

¹⁸ In *Western Australian Newspapers Ltd. v Bridge* (1979) 23 ALR 257, part of the majority's reasoning was that the common law defence of truth alone applied to civil defamation. The issue has not yet been directly decided.

¹⁹ See paragraph 11.2 above and s.15(2) of the *Defamation Act 1974* (NSW).

²⁰ Draft Bill (Cwth) clause 12(2).

²¹ In this situation there would be no defence at common law: Gately, *Libel and Slander* (7th ed. 1974) at 153, paragraph 354.

²² Fleming *The Law of Torts* (5th ed. 1977) at 547.

successful defamation action in respect of the imputation that he does not tell the truth even though it can be proved to be true that he stole the money.

11.15 In some jurisdictions, following the recommendations of the Porter Committee,²³ a statutory defence is available provided that the portion of the publication which cannot be proved true does not materially injure the plaintiff's reputation further.²⁴ Thus, in the example above, it might be sufficient to prove that X is a thief. This would show that he was dishonest, and the additional allegation that he did not tell the truth might not be regarded as a further injury to his reputation. A plaintiff could circumvent the statutory defence, however, by basing his action only on the part of the publication which could not be justified.²⁵ In New South Wales the defence has been redrafted to remedy the situation,²⁶ and similar reforms, enabling a court to take into account the entire publication, have been recommended in other jurisdictions.²⁷

11.16 The ALRC adopted a different approach. It accepted the view²⁸ that it was illogical to allow a complete defence because most of the defamatory content could be shown to be true. The ALRC's approach is to allow the defence of substantial truth in the type of case where, for example, a defendant is alleged to have defrauded ten companies but can be shown to have defrauded nine. In other cases, where substantial defamatory allegations can be justified, but others which do not further injure his reputation cannot, the ALRC considered that the plaintiff should be able to maintain an action. A better approach, according to the ALRC, would be to permit a court to take into account the whole publication when assessing damages,²⁹ whether or not the whole publication has been included in the plaintiff's pleadings.

11.17 The WALRC considers that there might be practical difficulties in distinguishing between cases where substantial truth should operate as a defence, and when it should be relevant only to the question of damages. Nevertheless, it agrees with the ALRC's approach

²³ *Porter Committee Report* 1948 (UK) at 21, paragraphs 79-82.

²⁴ See, for example, *Defamation Act 1952* (UK), s.5; *Defamation Act 1957* (Tas), s.18; *Defamation Act 1952* (NZ), s.7.

²⁵ *Plato Films Ltd. v Speidel* [1961] AC 1090.

²⁶ *Defamation Act 1974* (NSW), s.16. The scheme adopted is to provide a defence if the imputation complained of does not further injure the plaintiff because other contextual imputations are substantially true.

²⁷ *Faulks Committee Report* 1975 (UK) at 33-35, paragraphs 130-136; *Report* (NZ) at 31-32, paragraphs 108-111.

²⁸ Put forward by a Committee of the Law Council of Australia: *Report* (Cwth) at 64, paragraph 121.

²⁹ Draft Bill (Cwth) clause 28(2).

and recommends the adoption of its proposals.³⁰ To find the solutions to these difficulties, should they arise, would be preferable to the injustice which could arise if it were made a complete defence to show that most of the allegations were true.

³⁰ With regard to the admission of evidence of partial truth in mitigation of damages, see paragraphs 19.8 to 19.11 below.

CHAPTER 12

COMMENT

The law in Western Australia

12.1 In Western Australia, s.355 of the *Criminal Code* provides that fair comment on a matter of public interest is a defence to a civil defamation action. It is arguable that the common law defence of fair comment could be mounted if this were wider than that provided by the Code.¹ The Code defence has the following significant features -

1. The comment must be an expression of opinion based on facts which, in so far as they are included in the publication, must be true in every detail, unless their publication is privileged.²
2. Matters upon which comment may be made are specified in s.355. They are matters which can be the subject of a fair report, the public conduct of public figures, decided civil or criminal cases, published books or works of art, public performances, entertainment or sports, or any public communication on any topic.
3. The comment must be fair. This means that it has to be an honestly held opinion and, if it imputes corrupt or dishonourable motives, it must be an inference from the facts which a reasonable person might draw.³ It is not clear whether the existence of malice, which defeats the defence at common law, would defeat the defence under the Code.⁴

¹ The decision in *Western Australian Newspapers Ltd. v Bridge* (1979) 23 ALR 257 would support such a view. In that case it was accepted that s.356 of the *Criminal Code* (truth and public benefit) provided a defence to civil defamation actions, but that the wider common law defence of truth alone also continued to apply.

² *Antonovich v West Australian Newspapers* [1960] WAR 176. There have been legislative provisions to ease the strict requirement for proof of truth. Under s.6 of the *Defamation Act 1952* (UK) and s.8 of the *Defamation Act 1954* (NZ), substantial truth is sufficient. The New Zealand Committee proposed an extension to take into account substantial truth of matter which substantiates the comment, whether or not it forms part of the publication or extract complained of by the plaintiff: *Report* (NZ) at 38, paragraphs 143-147.

³ Gately, *Libel and Slander* (7th ed. 1974) at 305, paragraph 725.

⁴ Compare Brett, *Civil and Criminal Defamation in Western Australia* (1951) 2 Annual LR (WA) 43 at 51 and Sykes, *Some Aspects of Queensland Civil Defamation Law* (1951) U. of QLJ 19 at 24.

The ALRC's proposals

12.2 The ALRC proposed to widen the defence of fair comment in the interests of greater freedom of expression. It renamed the defence "comment" rather than "fair comment" to avoid the confusion which sometimes arose that a "fair" comment meant a comment which was balanced and reasonable, as distinct from a comment which was honest. Comment would be permitted on any facts which were published or were otherwise known to each recipient as long as those facts were in substance true, or in substance were not materially different from the truth, or were published on an absolutely privileged occasion.⁵ The only requirement would be that the comment must be the genuine opinion of the maker. There would be no need for it to be reasonably based, not even if it imputed corrupt or dishonourable motives, and the existence of malice would be irrelevant.⁶

12.3 In the context of remedies, the ALRC proposed that its correction procedure should apply to any untrue facts which were expressly or implicitly referred to as a basis for the comment.⁷ In its view, this would make the difficult delineation between fact and comment less important.⁸ It also proposed that a correction order should be available where a comment was shown not to be genuinely held by the maker.⁹

The WALRC's recommendations

12.4 The WALRC substantially agrees with the ALRC's proposed defence of comment. In particular it agrees that the defence should be re-named "comment", that it should be sufficient if the facts upon which the comment is based are substantially true, that there should be no requirement for the facts to be published if they are known by the person making the comment and the receiver, and that the presence or absence of malice by the person making the comment should be irrelevant.

⁵ *Report (Cwth)* at 68-69, paragraph 130. This would incorporate the statutory relaxation in the requirement for strict proof of truth enacted in the United Kingdom, and would extend it as recommended in New Zealand: see paragraph 12.1 above n.2.

⁶ These changes would be consistent with the recommendations in *New South Wales Report 1971* at 133, paragraphs 205-206, introduced into the law in that State in the *Defamation Act 1974* (NSW), s.32.

⁷ Draft Bill (Cwth) clause 27.

⁸ *Report (Cwth)* at 68, paragraph 130. ⁹ *Ibid.* at 143, paragraph 259.

⁹ *Ibid.* at 143, paragraph 259.

"Honest" or "genuine" opinion

12.5 In interim comments to the ALRC, the WALRC questioned why the essence of the defence of comment should be described as the expression of a "genuine" as opposed to an "honest" opinion. The WALRC's concern was that the word "genuine" was novel¹⁰ and could give rise to unnecessary and undesirable litigation to determine what changes, if any, were intended to be made to existing law on this topic. In reply the ALRC said:¹¹

"...'honest' has a connotation of being not dishonest or malicious and we are determined to try to avoid reviving that particular heresy".

12.6 The WALRC takes the view that the word "genuine" is no further removed from connotations of malice or other motive than "honest". The issue could be avoided by adopting the New South Wales provision that the defence should fail if the comment does not represent the opinion of the defendant.¹² The point is of relatively minor importance, however, and the WALRC would agree to a compromise in the interests of uniformity.

Topics of public interest

12.7 Of greater concern to the WALRC is the ALRC's proposal that comments should be permitted on any topic. Such a view might be justifiable if supported by provisions for the protection of privacy, but the WALRC does not agree with the implementation of the ALRC's privacy proposals at this stage.¹³ The WALRC is not alone in this view.¹⁴ There is, however, a more fundamental reason for opposing a defence of comment on any topic. Apart from any consideration for privacy interests, defamatory comment should be permitted only where justified in the public interest. There is no better way of ensuring this than to retain the requirement that the comment be on a topic of public interest.¹⁵

¹⁰ The test at common law is whether the opinion is honest: Gately, *Libel and Slander* (7th ed. 1974) at 308-309, paragraph 729.

¹¹ Letter dated 14 August 1978 on file with the WALRC.

¹² *Defamation Act 1974* (NSW), s.32(2).

¹³ See paragraphs 11.9 to 11.10 above.

¹⁴ The New South Wales Privacy Committee has also expressed doubts as to the desirability of the ALRC's enlarged defence of fair comment for this reason: Privacy Committee, *Defamation and Privacy. Submission of the New South Wales Committee on the Proposals of the Australian Law Reform Commission* (1977) at 8-9.

¹⁵ It should be the **comment** which is on a topic of public interest, not necessarily the facts on which it is based or the whole publication i.e. both fact and comment: see *New South Wales Report* 1971 at 126-127, paragraphs 179-181.

12.8 In Western Australia the public interest requirement is provided by specifying the particular topics which can be made the subject of a comment¹⁶. In New South Wales, no attempt was made to specify in the legislation what was a topic of public interest. This was left to the common law.¹⁷ The ALRC provided a definition of a "topic of public interest" for other purposes in its Draft Bill.¹⁸ This describes the concept of public interest without being too specific,¹⁹ or too vague.²⁰ The WALRC recommends the adoption of this definition of a "topic of public interest" for the purposes of its proposed defence of comment.

Correction

12.9 The WALRC agrees with the ALRC that the remedy of correction of untrue facts forming the basis of a defamatory comment is desirable. It doubts, however, if the correction procedure will have the practical effect of reducing the importance of the distinction between fact and comment.²¹ In fact, the very task of determining the extent of the correction order serves to introduce a further need for the distinction to be drawn.

12.10 There are two areas, however, where the WALRC considers that the proposed correction remedy could create difficulties. The first is where the comment is based on facts which are unpublished but are known to both the maker of the comment and the recipients. Presumably, if those facts turn out to be wrong,²² they should be corrected. But it seems unfair that this should be the task of a person who merely commented on them. He was not responsible for the publication of the inaccurate facts. There might also be practical difficulties for him to arrange for their correction.²³

12.11 The second area of difficulty is where the facts, published or not, are in substance true but not wholly true. The ALRC's proposals would permit a complete defence of comment, but

¹⁶ *Criminal Code 1913*, s.355 and see paragraph 12.1 above.

¹⁷ *Defamation Act 1974* (NSW), s.31.

¹⁸ Draft Bill (Cwth) clause 7(3). The definition was intended to apply to the proposed defence for reports of attributed statements (see paragraph 15.8 below) but is expressed in a *form* which is equally applicable to comments.

¹⁹ As in Western Australia.

²⁰ As in New South Wales.

²¹ *Report* (Cwth) at 68, paragraph 130.

²² This raises conceptual difficulties. "Known facts" imply truth. However, a comment could be based on material (to use a neutral term) which is commonly believed to be true but which turns out to be false. Presumably a correction would then be appropriate.

²³ For example, in complying with directions that "the correction will reach those persons who were recipients of the matter to which the correction relates": Draft Bill (Cwth) clause 26(2).

it might be thought that a correction would be appropriate notwithstanding the establishment of a successful defence.

12.12 On balance, however, the WALRC takes the view that special provisions to deal with these difficulties are neither necessary nor desirable. They are of relatively minor significance and the problems are unlikely to give rise to injustice.

12.13 The WALRC therefore recommends that the ALRC's proposed defence for comment be adopted, provided that the proposed legislation is amended to require the comment to be made on a topic of public interest as defined in the Draft Bill (Cwth), and to provide that the defence should fail if it is shown that the comment did not represent the opinion of the maker.

CHAPTER 13

ABSOLUTE PRIVILEGE

13.1 It is now doubtful whether the defence of absolute privilege in the Criminal Code applies to civil defamation actions.¹ The Legislative Council and Legislative Assembly of Western Australia enjoy a separate statutory absolute privilege.² The same protection is conferred on persons who report the proceedings of these bodies with their authority.³ There is also statutory protection for Royal Commissions and persons appearing before them.⁴ In other respects the common law defence of absolute privilege applies to judicial proceedings, other "tribunals acting in a manner similar to that in which such courts act"⁵ and certain high executive communications.⁶ There is an argument that the privilege given to judicial proceedings extends to communications between solicitor and client, but it is doubtful whether such communications would enjoy more than qualified or limited privilege.⁷ It can also be argued that communications between husband and wife should be protected under this head.⁸

13.2 The ALRC received a number of complaints of abuse by politicians of their absolute privilege in Parliament. However, it considered that, in the interests of free speech in a

¹ Section 351 of the Criminal Code confers absolute privilege on speeches by a member of either House in Parliament, petitions made to Parliament and publications by order or under the authority of either House of Parliament; s.352 of the Criminal Code confers absolute privilege on publication made in the course of judicial proceedings and in inquiries authorised by statute, Her Majesty, the Governor in Council or either House of Parliament and s.353 protects authorised official reports of such inquiries. However, these provisions do not provide that such publications are "lawful" as required by s.5 of the *Criminal Code Act 1913*; they provide instead that a person shall not "incur any liability" in the circumstances outlined. In the light of the High Court decision in *Western Australian Newspapers Ltd. v Bridge* (1979) 23 ALR 257 it is doubtful that these words would be interpreted as applying to civil defamation cases: see paragraph 1.2 above.

² *Parliamentary Privileges Act 1891*, s.1.

³ *Parliamentary Papers Act 1891*, s.1.

⁴ More specifically s.31 of the *Royal Commissions Act 1968* gives proceedings of a Royal Commission the same protection as would be given to proceedings held in the Supreme Court, and s.20 protects persons who give answers to questions before the Commission.

⁵ *Royal Aquarium v Parkinson* [1892] 1 QB 431 at 442 per Lord Esher. Absolute privilege has been extended accordingly to a board of inquiry into police malpractice, military courts of inquiry, hearings by a town council on a town planning scheme and disciplinary proceedings by a law society: Fleming, *The Law of Torts* (5th ed. 1977) at 551. The privilege does not apply to tribunals carrying out administrative functions.

⁶ Such as communications by Ministers to each other or to the Crown.

⁷ See Fleming, *The Law of Torts* (5th ed. 1977) at 552.

⁸ The immunity of a spouse from liability for defamatory publications made to another spouse is traceable to the notion in law that a husband and wife are a single entity. In modern conditions this is an unacceptable basis for the immunity, but Fleming at 554 argues that immunity should be retained in the interests of :

"the confidential relationship between spouses as to avoid 'results disastrous to social life'".

democracy, absolute privilege in this area should be retained.⁹ The matter of abuse should be controlled by the Parliament itself.

13.3 It also recommended that absolute privilege should apply, to the proceedings and record of a "tribunal", which was defined as any court, whether in Australia or elsewhere, or a person or authority conducting an inquiry, hearing or proceeding in Australia or elsewhere under the authority of an Australian law or under the authority of the Governor General, or the Governor of any State, or of a Parliament.¹⁰

13.4 This is as far as the ALRC considered that the defence of absolute privilege should extend. It did not agree that absolute privilege should apply to high executive communications¹¹ or to the more doubtful categories of communications between solicitor and client or husband and wife.¹² It might, however, be arguable whether this result is achieved by the Draft Bill (Cwth).¹³ A proposal by the New Zealand Committee to extend absolute privilege to live television and radio broadcasts of Parliamentary proceedings was also rejected by the ALRC.¹⁴ In its view qualified privilege for such broadcasts would be more suitable in that a defamed person would be given an opportunity to reply.¹⁵

13.5 The WALRC substantially agrees with the ALRC's proposed defence of absolute privilege, but it has reservations as to its application to hearings, inquiries and proceedings of

⁹ The ALRC's proposals apply to Parliamentary proceedings and authorised or official reports thereof, other publications authorised by Parliament and documents or petitions laid before Parliament: Draft Bill (Cwth) cl.14.

¹⁰ Draft Bill (Cwth) clauses 7(1) and 14.

¹¹ At 71, paragraph 136 it gives the following reasons:

"Accepting that government officials should be encouraged to speak and write frankly on matters of mutual official interest, it is difficult to see that absolute privilege is necessary to ensure good and sound advice. The public interest in frankness among government officers does not differ from the public interest in the full and frank exchange of information between say, university officers, officers of a statutory commission, or directors of a public company".

¹² At 70, paragraph 132 the ALRC says:

"The problem ... is the variety of situations in which there may be communication between spouses. It may be reasonable to accord protection for a communication between spouses relevant to their life together but be quite unreasonable to extend this to a seriously defamatory statement made by a spouse to his estranged partner, or made in relation to a business acquaintance. If it is reasonable to accord this protection in the interests of domestic harmony it seems equally appropriate to accord protection to publications made between members of a family, persons living in a de facto relationship, close friends or business partners".

¹³ The view might be taken that such common law defences are intended to survive the legislation proposed by the ALRC on the basis that they are not inconsistent with any of its provisions: see paragraphs 3.10 to 3.11 above.

¹⁴ Draft Bill (NZ) clause 12(2).

¹⁵ Draft Bill (Cwth) clause 16(1)(a) and see paragraphs 15.6 and 15.13 below.

persons or authorities, and it has mixed views as to the desirability of removing privilege for communications between spouses.

Hearings, inquiries and proceedings of a person or authority

13.6 The WALRC's view is that the extension of the defence to all tribunals within the ALRC's definition is too wide. It is not limited, as it is under existing common law in Western Australia, to tribunals conducting hearings or proceedings of a judicial nature. The ALRC's proposed defence could apply to persons or authorities engaged in administrative proceedings. The ALRC did not discuss this extension to the types of proceedings to which it proposed to grant absolute privilege¹⁶ and it did not consider the possibilities for abuse. The WALRC takes the view that the extension proposed by the ALRC is not justified and could be abused.¹⁷ Proceedings for which there should be no absolute privilege would still attract the defence of limited privilege.¹⁸ The difficulty is how to define which proceedings should be given absolute privilege and which should have limited privilege.

13.7 The New Zealand Committee when considering this issue, recognised the difficulty of distinguishing between "judicial" as opposed to "administrative" bodies. It considered but rejected the possibility of specifying the tribunals to which the privilege should apply. Its recommendation was that the defence should apply to tribunals with a power to compel the attendance of witnesses or having a duty to act judicially.¹⁹ The Faulks Committee recommended no change to the common law on this issue.²⁰

13.8 The WALRC agrees with the New Zealand Committee that it would be difficult and undesirable to specify the bodies to which the defence of absolute privilege should apply. It is

¹⁶ For example, the WALRC has just completed a survey of administrative tribunals operating in Western Australia from which there is a right of appeal: Law Reform Commission of Western Australia, *Review of Administrative Decisions: Part I - Appeals* (1978) Project No. 26 working paper and survey. A table lists (at ix-xv) 151 such tribunals, and there may be many others in existence which are not listed because there is no right of appeal.

¹⁷ For example, s.175 of the *Local Government Act 1960* provides that a council shall hold meetings open to the public for transacting the ordinary business of the council. This includes an inquiry into the state and progress of works. At such a meeting a heated exchange of views could occur and in the WALRC's view it would be wrong to confer absolute privilege on the participants on the basis that it was an "authority conducting an inquiry, hearing or proceeding held ... under the authority of a law in force in any part of Australia".

¹⁸ On the basis that publication was limited to persons with an interest or duty to receive it: see paragraph 14.8 below.

¹⁹ *Report* (NZ) at 44-46, paragraph 171-183.

²⁰ *Faulks Committee Report 1975* (UK) at 51, paragraph 202 and see paragraph 13.1 above.

essentially a matter of policy how far absolute privilege should extend before the risk of abuse becomes unacceptable. This is particularly so where a body is presided over by persons without legal qualifications. Apart from the qualifications of the persons presiding over the body other tests could be the nature of the proceedings, whether there is a duty to act judicially or the nature of the issue to be decided by the particular person or authority.

13.9 The New Zealand Committee's double-barrelled test is concerned with the nature of the proceedings and chooses a power to summon witnesses as an indication that they are judicial proceedings. The WALRC is aware that a power to summon witnesses is not recognised at common law as a decisive indicator that the proceedings are of a judicial nature.²¹ Nevertheless, such a power is an important indication. There is also an advantage in focussing on a power to summon witnesses in that it introduces an element of certainty to the scope of a defence of absolute privilege, whilst proceedings which would otherwise qualify for the defence at common law would still do so under the more flexible second limb of the New Zealand Committee's test.

13.10 The WALRC therefore recommends that a defence of absolute privilege should apply to a person or authority conducting an inquiry, hearing or proceeding held, whether in Australia or elsewhere, under the authority of a law in force in any part of Australia or under the Authority of the Governor-General or the Governor of a State or of a Parliament, where that person or authority -

- (a) has the power to compel the attendance of witnesses, or
- (b) is under a duty to act judicially.

Marital communications

13.11 A majority of the WALRC agrees with the ALRC's proposal to abolish the privilege²² which is conferred on communications between husband and wife. The justification for the defence is to enable the parties to a marriage to communicate freely and in confidence. However, in most cases liability for defamation would arise only after one of the spouses

²¹ Fleming, *The Law of Torts* (5th ed. 1977) at 551.

²² The WALRC takes the view that in modern times it is more appropriate to classify this matter as a question of privilege rather than one of non-publication based on the concept of unity between spouses: see paragraph 13.1 above, n.8.

communicated the matter to other persons outside the marriage thereby breaking the marital confidence. In such cases the interest to be protected by granting a defence of absolute privilege is lost before the question of liability for defamation arises. In other cases, where there has been no general communication of the defamatory matter outside the marriage, the need for the defence would rarely arise.²³ In addition to this objection in principle to the defence, a majority of the WALRC agrees with the ALRC's proposal to abolish the privilege for marital communications, because -

- (a) it is illogical to limit the defence to communications between spouses when there are other personal relationships, for example, business partners, parent and child and de facto marriage partners, which equally depend on freedom to communicate;²⁴ and
- (b) it might be inappropriate for the defence to apply to all communications between spouses, but impracticable to distinguish between the circumstances when it should or should not apply.²⁵

13.12 One member of the WALRC takes a dissenting view. In his opinion, marriage, unlike other relationships, can be clearly defined and establishes a permanent social and emotional bond between the parties. As a matter of social policy he is concerned to uphold the sanctity of marriage and to reduce legal impediments on freedom of communication between husband and wife. He is also of the view that if damages were awarded against one spouse in respect of a marital communication this might tend to prejudice the marriage. His view is that the possibility of substantial damage to reputation being caused by a communication between spouses is remote and that public interest would be better served by preventing a situation

²³ One example would be where the plaintiff discovers that he has not obtained a job because of a defamatory communication from his prospective employer's wife to her husband. However, in cases of this kind the spouse making the communication would qualify for the defence of limited privilege because of the other spouse's interest in the subject: see paragraph 14.8 below. In cases where the other spouse did not have such an interest, e.g. gossip, the likelihood of much harm being caused to the plaintiff would be remote.

²⁴ This is the reason which appears to have influenced the ALRC: see paragraph 13.5 above, n.12. The argument is that the anomaly should be removed by abolishing the defence rather than by extending it to such other relationships

²⁵ In principle much should depend on the circumstances of the spouses (for example, whether they are living together) and the topic - for example, whether it is a business or domestic topic.

from arising where spouses are made answerable in court for defamatory statements made to each other in confidence, whether broken or not.²⁶

²⁶ There is arguably an analogy between freedom to communicate without fear of liability for defamation and freedom to communicate without fear of having to give evidence against a spouse in criminal cases. In a recent report on the latter topic (*Report on Competence and Compellability of Spouses to give Evidence in Criminal Proceedings* 1977 Project No. 31), the WALRC makes recommendations to strike a balance between preservation of the sanctity of marriage and the public interest in convicting the person responsible for an offence.

CHAPTER 14

LIMITED OR QUALIFIED PRIVILEGE

The Law in Western Australia

14.1 It is now clear in Western Australia that the defence of qualified privilege provided in s.357 of the *Criminal Code 1913* applies only to criminal defamation, and not to civil defamation.¹ The result is that a defendant wishing to plead qualified privilege as a defence to a defamation action in this State is governed by the common law.

14.2 The most important features of the defence of qualified privilege at common law are:²

- (a) publication in protection of a lawful interest of the publisher or in performance of a legal moral or social duty;
- (b) publication to a person or persons having an interest in the content of the statement; and
- (c) an absence of malice or ill-will by the defendant towards the plaintiff or any improper motive in publishing the statement.

14.3 It has been argued that newspapers should be able to avail themselves of the defence of qualified privilege on the basis that they are performing a public duty by publishing news, and that the publication is made to persons, namely the public, who have an interest in such publications. Such arguments have been largely unsuccessful at common law.³

The ALRC's proposals

14.4 The ALRC discussed several criticisms of the common law defence of qualified privilege.⁴ It also discussed the question whether the defence was suitable for the news

¹ *Western Australian Newspapers Ltd. v Bridge* (1979) 23 ALR 257.

² See Gatley, *Libel and Slander* (7th ed. 1974) at 186-253, paragraph 441-592.

³ *Report* (Cwth) at 74, paragraph 141, and see *Truth (N.Z.) Ltd. v Holloway* [1960] NZLR 69; *Brooks v Muldoon* [1973] 1 NZLR 1.

⁴ *Report* (Cwth) at 74-76, paragraph 142. In brief, the criticisms are directed against -

- (a) the requirement of reciprocal duty/interest: a proper interest should be sufficient;
- (b) the strict requirement for an interest: reasonable belief by the publisher that the recipient had an interest should suffice;
- (c) the rule denying the privilege to a publication for reward;

media. Its recommendation was that the defence should apply only to publications to a particular person or to a particular group, which would exclude the news media publishing to the public at large.⁵ The other requirements of the ALRC's proposed defence are that:⁶

- (a) the defendant must believe, on reasonable grounds, that the recipient, or all intended recipients, had an interest in receiving, or duty to receive, information of the kind contained in the matter; and
- (b) the publication must be made in the course of giving to the recipient or recipients information of the kind which they had an interest or duty to receive;

and either -

- (c) (i) the defendant must believe that the matter was true; or
- (ii) in the case of matter consisting of comment, the defendant must believe that the comment expressed the genuine opinion of the author of the comment; or
- (d) in all the circumstances, the conduct of the defendant in publishing the matter was reasonable.

The ALRC also recommended that, because it would not be defeated by proving malice, its proposed defence should be renamed "limited privilege".

14.5 The New Zealand Committee took a different view on the question of malice. It recommended that a defence of limited privilege should be defeated where it was proved that the defendant was activated by spite or ill-will or it was proved that he took any other improper advantage of the occasion.⁷ It also recommended that the term "malice" should be redefined accordingly.

(d) the rule denying the privilege where publication is excessive : this is said to be heretical and improperly drawn from the cases and a better test would be reasonable publication in the circumstances ;

(e) the concept of malice which is not clear.

⁵ *Report* (Cwth) at 78-79, paragraph 148; Draft Bill (Cwth) clause 15. To avoid the argument that the readers of a newspaper constitute a particular group it is provided that persons shall not be regarded as constituting a particular group by reason only of the fact that they received particular published matter.

⁶ Draft Bill (Cwth) clause 15(1).

⁷ *Report* (NZ) at 49, paragraph 201 where it said:

"Qualified privilege affords protection for certain communications. If the occasion of the privilege is used for a different purpose such as the venting of spite or ill-will, we can see no reason why it should be protected. We believe that the exclusion of motives of ill-will from the meaning of malice would give a licence to persons to deliberately abuse occasions of qualified privilege".

The WALRC's recommendations

14.6 The WALRC agrees with the ALRC's criticisms of the common law defence of qualified privilege. These criticisms would not apply if the defence provided in s.357 of the *Criminal Code* were extended to civil defamation actions.⁸ However, some parts of that defence are obscure and do not appear to be particularly suited to publications of the limited type which, in the WALRC's view, should fall within the defence of privilege.⁹ The WALRC therefore does not recommend that such an extension should be made.

14.7 The essential features of the ALRC's proposed defence are that -

- (a) publication must be limited to particular persons who are reasonably believed to have an interest in the matter;
- and either
- (b) that the defendant must believe that the matter was true or that it was the genuine opinion of others; or
- (c) the defendant must show that his conduct in publishing the matter was reasonable in all the circumstances .

According to the ALRC the test of reasonable conduct is necessary to meet the rare case of a person not believing a statement but feeling under a duty to pass it on.¹⁰ The WALRC considers, however, that reasonable conduct could be relevant also in the more common situation where a defendant feels under a duty to pass on a statement not knowing whether it is true or false. The ALRC's proposed defence would not be defeated by a defendant's ill-will or other improper motive, although no doubt such factors would have an important bearing in cases where a defendant has to establish reasonable conduct.

14.8 The WALRC agrees in principle with the ALRC's proposed defence. It agrees that the defence should only be available where publication is limited to a particular group which has or is believed to have an interest in the published matter. The result will be that the defence

⁸ This step was recommended by the Western Australian Law Reform Committee, *Defamation: Privileged Reports* (1972) at 24, paragraph 85.

⁹ For example, s.357(3) protects a publication "made in good faith ... for the public good", and s.357(8) protects a publication "made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit...".

¹⁰ *Report* (Cwth) at 78-79, paragraph 148.

will be excluded from the news media. Truth will be the principal defence available to the media together with the defence of comment. This is the current law in Western Australia and the WALRC agrees with the result. In its view there would be no public benefit in allowing the news media a defence which avoids the issue of truth.¹¹ The news media may also be able to take advantage of the revised defence of fair report.¹²

14.9 The question of malice on the part of the defendant raises more difficult issues. For example, the ALRC's proposed defence would protect a person passing on information which he believed to be true even though he did so for malicious reasons. On balance, the WALRC agrees with the ALRC that the defendant's motives for publication should be irrelevant. It is useful for a prospective employer to obtain information which is believed to be true and which is relevant to a job applicant regardless of the motive of the person for supplying that information. The WALRC also agrees that the defence should be known as "limited privilege."

14.10 In the WALRC's view, however, the application of the proposed defence to the publication of comment to a particular group could give rise to anomalies. For example, a person could publish the genuine comment of another person even if he were aware of, and suppressed, facts which did not support it. Such a publication would be malicious in most cases, but more importantly it would also be misleading. Publication of the defendant's own comment would appear to be governed by different criteria.¹³ Assuming that it does not meet the requirements of a defence of comment on a topic of public interest,¹⁴ it would appear that a defendant would have to show that his conduct in publishing his own comment to a particular group was reasonable. In the WALRC's view such anomalies could be removed if the defendant were expressly permitted to publish his own genuine comment on a privileged

¹¹ *Report* (Cwth) at 32-33, paragraph 59. The New South Wales Privacy Committee took the view that a defence of truth was too narrow. In its submission on the ALRC's defamation/publication privacy proposals (August 1977, PG/GWG BP 37 at 7) it said:

"The central issue here is whether media responsibility is best achieved by requiring that the media publish only what they can justify as the truth in a Court of Law. In our view, while emphasis on the truth may promote responsibility, it does so at the expense of the public interest. In many instances it is extremely difficult to establish the truth of a statement. Despite all reasonable and diligent efforts to ascertain the accuracy of information, a reporter may nonetheless withhold publication because he simply cannot satisfy a court that the information is true".

¹² See paragraph 15.13 below.

¹³ The reason is that clause 15(1)(c)(ii) of the Draft Bill (Cwth) applies to comment only where "the defendant... believed that the comment expressed the genuine opinion of the author of the comment". The implication is that this excludes his own comment.

¹⁴ See paragraphs 12.4 to 12.8 above.

occasion, and if the requirement of reasonableness were imposed in respect of the publication of comments by others.

14.11 The WALRC therefore recommends that the ALRC's proposed defence of limited privilege should be adopted but in an amended form to allow a defendant to publish -

- (a) matter which he believes to be true;
- (b) his own genuine comment;
- (c) comment which he believes to be the genuine comment of another person provided that his conduct in publishing such comment is reasonable in all the circumstances; or
- (d) any other matter provided his conduct in publishing such matter is reasonable in all the circumstances.

CHAPTER 15

FAIR REPORTS

The law in Western Australia

15.1 In Western Australia the defence of fair report in s.354 of the *Criminal Code* applies to civil actions. This deals with reports, for the information of the public, of certain official proceedings¹ and publication of certain official notices.² Reports of local authority and public meetings are also included in this category. A public meeting is defined as a meeting held for a lawful purpose and for the furtherance of discussion in good faith of a matter of public concern, or for the advocacy of the candidature of any person for a public office, whether admission to the meeting is open or restricted. There is additional statutory protection for newspapers in the *Newspaper Libel and Registration Act 1884* and amendment 1888. Further defences might also be available at common law, in the court's discretion, depending on the nature and content of the report.³

15.2 A defence under the *Criminal Code* will fail if an absence of good faith on the part of the publisher is shown.⁴ This is defined as an absence of ill-will to the person defamed, or any other improper motive, and the manner of publication must be such as is ordinarily and fairly used in the case of the publication of news. In the case of a publication in a periodical⁵ of a report of a public meeting, a failure to publish a reasonable letter or statement by way of contradiction or explanation if asked to do so is evidence of a lack of good faith.⁶

Possible reforms

15.3 In 1972, the WALRC's predecessor, the Law Reform Committee, recommended a number of reforms to this area of the law.⁷ In summary these were that -

- (a) the special statutory defences for newspapers should be removed;⁸

¹ Parliamentary or judicial proceedings and Royal or statutory inquiries.

² Such as papers ordered or authorised to be published by either House in Parliament, and notices issued by a Government Department or the Police.

³ *Perera v Peiris* [1949] AC 1.

⁴ The burden of proof falls on the person alleging the absence of good faith: *Criminal Code 1913*, s.358.

⁵ Which is defined to include a newspaper: s.345.

⁶ *Criminal Code 1913*, s.354.

⁷ Western Australian Law Reform Committee, *Report on Defamation: Privileged Reports* (1972).

- (b) the range of report subjects in the Criminal Code should be extended to include certain official foreign matters,⁹ proceedings at a general meeting of a company within Australia and proceedings of voluntary associations within or having effect within Australia;¹⁰
- (c) with only two exceptions,¹¹ the defence should fail if the publisher refuses or neglects to publish a reasonable letter or statement of explanation;¹²
- (d) the published material should have a sufficient element of public interest, but that there should be no requirement that proceedings themselves be open to the public;¹³ and
- (e) all reports should be fair¹⁴ and should be published in good faith.¹⁵

15.4 The New Zealand Committee's review of the defence for fair reports gave rise to two major recommendations. One was to extend the range of topics which could become the subject of a fair report. Its recommendations in this respect were similar to those made by the Western Australian Committee but included some additional topics.¹⁶ The other was to create a new statutory defence for the news media in response to their complaints that the strict nature of their liability for defamation was having an inhibiting effect on the publication of

⁸ This would involve the repeal of the *Newspaper Libel and Registration Act 1884* and its amendments in 1888 and 1957 with the exception of the provisions dealing with limitation.

⁹ Such as proceedings of international organisations, conferences and international courts and foreign judicial and legislative proceedings. The recommendations included reports tabled in Parliament in other Australian States and this was implemented in Western Australia by s.2 of the *Criminal Code Amendment Act 1977*: see paragraph 1.3 above.

¹⁰ The Committee's recommendations as to extensions to the range of report subjects are based largely on the *New South Wales Report 1971*.

¹¹ Reports of legislative or judicial proceedings within Australia.

¹² The Committee preferred to make publication of a reply a condition of the defence rather than merely evidence of a want of good faith.

¹³ The Committee's recommendation was that all reports should be published for public information or for the furtherance of the objective of public enlightenment, and that, in addition, to qualify for a report, proceedings of local authorities, associations, public meetings and company meetings should relate to matters of public concern.

¹⁴ The Committee considered that this should implicitly require accuracy.

¹⁵ The Committee took the view that the expression "good faith" was sufficiently well known in law, and that the definition in the *Criminal Code* requiring an absence of ill-will or other improper motive, should be dispensed with.

¹⁶ *Report (NZ)* at 50-55, paragraphs. 208-227. Additional topics not falling within the Western Australian Committee's recommendations were -

- (a) proceedings of any press association; this is already the law in New Zealand: *Defamation Act 1954* (NZ), First Schedule Part II, clause 10A.
- (b) notices published pursuant to a statutory requirement such as the winding up of a company or a mortgagee's sale, provided that where the notice relates to a court application such application has been filed in court;
- (c) documents circulated by companies or their auditors to shareholders;
- (d) proceedings at a general meeting of a registered society such as a football club, as opposed to findings or decisions of such an association;
- (e) reports of press conferences held by a person or body who or which has privilege.

matters of public interest. In essence its recommendation¹⁷ was to provide a defence for a newspaper which acted reasonably in publishing facts which it believed to be true, or a genuine opinion capable of being supported by such facts, provided the subject matter was one of public interest, and the person defamed was given a reasonable opportunity to reply.¹⁸ The Committee considered the possibility of extending the defence to non-media defendants but decided against taking such a step. Its reasons were that a private slander would seldom be of public interest and there could be difficulty in publishing a suitable explanation or rebuttal.

15.5 The ALRC adopted a similar approach. It dealt first with the range of topics which should be capable of being the subject of a fair report. Secondly, it responded to complaints by the Australian news media that defamation laws unduly restricted the publication of news in this country. Its recommendations, however, particularly on the second issue, were quite different from those made by the New Zealand Committee.

15.6 With regard to the range of fair report topics, the ALRC recommended nine main categories. These are comprehensive and, with only minor exceptions,¹⁹ encompass all of the matters which were recommended for inclusion by the Western Australian and New Zealand Committees. In addition to the requirement that the report should deal with a topic within the specified range, there are two further requirements for the ALRC's proposed defence -

- (a) the report must be fair and accurate;²⁰ and
- (b) with the exception of reports relating to the proceedings of a court, the plaintiff must be given a right of reply.²¹

¹⁷ Although controversial the recommendation is not novel. It follows a similar recommendation made in 1965 by the Shawcross Committee in the United Kingdom: see paragraph 15.14 below.

¹⁸ Report (NZ) at 58-63, paragraphs 235-266. The defendant would be required to provide for the plaintiff within 30 days, details of the grounds for his belief in the accuracy of the facts published, and offer to pay the costs of publishing the plaintiff's reply and any other costs incurred. The question whether the defence had been established would be decided by a judge and not a jury.

¹⁹ Report (Cwth) at 85-88, paragraphs 156-164. In the WALRC's view there might be doubt whether the following matters would be included under the ALRC's proposals -

- (a) reports of the proceedings of non-Australian inquiries and publication of the findings;
- (b) papers published by or with the authority of a non-Australian Parliamentary body;
- (c) notices or advertisements published by or with the authority of a court, issued by a Government or Police Department or published pursuant to statutory authority;
- (d) documents circulated by a company or its auditor to shareholders.

²⁰ Ibid. at 85, paragraph 156.

²¹ Ibid. and at 94-97, paragraphs 178-180. The inclusion of court proceedings is to prevent a retrial in the media of issues to be decided or which have already been decided in a court. Legislative guidance is given to help determine what is the earliest opportunity reasonably available for the reply and there is power for a court to give directions as to the content, form, manner or extent of the reply: Draft Bill (Cwth) clause 45.

15.7 There is no requirement that the report should be published in good faith for the information of the public.²²

15.8 The ALRC's recommendations in answer to the media complaint are novel. A new defence of fair report of an attributed statement was recommended. The scheme proposed²³ is to provide a defence for reporting what someone else has said or written on a topic of public interest subject to certain safeguards, namely that -

- (a) the person who made the statement was not the servant or agent of the defendant;
- (b) the defendant did not influence in any way the substance of the statement;
- (c) publication by the defendant, having regard to the nature of the statement and the circumstances of its making, was reasonable; and
- (d) the plaintiff is given a right of reply.

Unlike the New Zealand Committee's proposals, the defence would be generally available, although designed primarily for the news media.

The WALRC's recommendations

Reports on specified topics

15.9 The WALRC agrees in principle with the ALRC's proposed defence for fair reports on specified topics. The Western Australian Committee and the New Zealand Committee both took the view that there should be a requirement that the report be published in good faith.²⁴ The WALRC, however, agrees with the ALRC that the publisher's motives should be

²² The effect of the proposals is that the motive of the publisher is irrelevant. Public interest is deemed to arise from the official nature of the subject matter, but proceedings of local government authorities must be public, and statements made at a public meeting must be on a topic of public interest.

²³ *Report (Cwth)* at 88-94, paragraphs 165-177.

²⁴ For the Western Australian Committee's recommendation see paragraph 15.3(e) above. The New Zealand Committee's recommendation was that malice, defined as spite or ill-will or some other improper advantage of the occasion of privilege, should deprive a defendant of the defence: *Report (NZ)* at 48-49, paragraphs 195-201.

irrelevant. The object of the defence should be to enable the public to be informed on matters of public interest.²⁵ It should not be limited to information published for the right reasons.²⁶

15.10 The topics specified by the ALRC do not match those which can at present be the subject of a fair report in Western Australia. For example, the ALRC's list does not apply to -

- (a) a report or notice issued by and published at the request of any Government Department, officer of State, or police officer²⁷;
- (b) the proceedings of any board, or body of trustees or other persons constituted under the provisions of any statute for the discharge of public functions so far as the report relates to matters of public concern .²⁸

Other possible omissions from the ALRC's list and from existing Western Australian law are -

- (c) the proceedings of a person or authority held, whether in Australia or elsewhere, under the authority of a law in force or of a Parliament in any country other than Australia;²⁹
- (d) a publication issued by or authorised by the Government of any country other than Australia;³⁰
- (e) notices or advertisements published in order to comply with the requirement of any law in force in Australia, provided that if the notice is issued in relation to any application to a tribunal the privilege should apply only after the relevant application has been filed;³¹ and

²⁵ In most cases public interest would arise from the official or public source of the publication. This would not apply to reports of public meetings, but in this case the ALRC proposed that there be an express requirement that the report be on a topic of public interest: see paragraph 15.7 above, n.22.

²⁶ The same argument applies to the WALRC's recommendation that the presence or absence of malice should be irrelevant in regard to the defence of limited privilege: see paragraph 14.9 above.

²⁷ *Criminal Code 1913*, s.354(5). This would apply to press releases issued by State Departments.

²⁸ *Ibid*, s.354(6). The ALRC's proposal only applies to the public proceedings of a local authority.

²⁹ By a combination of *Draft Bill* (Cwth) Schedule I, clause 14 and the definition of "tribunal" in clause 7(1) the ALRC's proposals are limited to reports of inquiries, hearings or proceedings held under the authority of a law in force in Australia: cf. *Defamation Act 1974* (NSW), Schedule 2, clause 2(6).

³⁰ The ALRC's proposals apply to proceedings and documents presented to, laid before or published by order of Parliament in Australia (*Draft Bill* (Cwth) , schedule I item No. 1, clause 14(a) , (b) and clause 7(1)) but in the case of foreign Parliaments the privilege applies only to proceedings. The New Zealand Committee recommended an extension to foreign Parliamentary publications: *Report* (NZ) at 52, paragraph 213.

³¹ Existing law in Western Australia, and New Zealand and the ALRC's proposals apply only to court proceedings. The New Zealand Committee took the view that this would not apply to statutory public notices such as a notice concerning a petition for the winding up of a public company or a notice of a mortgagee's intended sale of mortgaged property. Consequently it recommended the above extension to

- (f) a document (not designated as a restricted communication) circulated by or on behalf of a company or its auditor to share-holders.³²

15.11 The issue whether the ALRC's proposed list should be extended to include all or any of these topics is a matter of policy. The answer may be a compromise in the interests of attaining uniformity. However, in the WALRC's view, when considering reform to this area of the law, the tendency should be to enlarge rather than to narrow the scope for fair reports.³³ The WALRC considers that with one exception the topics listed above should be included in the ALRC's proposed list.

15.12 The exception relates to matter circulated by a company to its members (item (f)). In the WALRC's view such a provision would be too wide. A more satisfactory balance would be to protect reports only of such documents as are required to be circulated to members of a company³⁴ in performance of a statutory requirement, such as the notice to be circulated to members outlining the matters to be raised at an annual general meeting³⁵ and the report of an auditor.³⁶

15.13 The WALRC therefore recommends that the ALRC's proposed defence of report on specified topics should be adopted but suggests that the proposed topics should be extended to include -

- (a) a report or notice issued by and published at the request of any Government Department, officer of State or police officer;

statutory notices. The object of the requirement that an application, if any, be filed is to provide a safeguard against the improper insertion of a statutory notice in a newspaper: *Report (NZ)* at 52-53, paragraphs 214-216.

³² The ALRC's proposals apply only to the proceedings at a company general meeting: Draft Bill (Cwth) Schedule I, item No.7. Section 167B(1) of the *Companies Act 1961* (WA) in the absence of malice excuses an auditor from liability for defamation for any statement which he makes in the course of his duties as auditor. s.167B(2) in the absence of malice provides a defence to any person who publishes any document prepared by an auditor in the course of his duties and which is required to be lodged with the Commissioner for Corporate Affairs. The New Zealand Committee, following recommendations of the Faulks Committee, recommended that a report or document circulated by or with the authority of the board of a company to its members should be capable of being the subject of a fair report, but added the requirement that it be not designated a restricted document: *Report (NZ)* at 53-54, paragraphs 218-221.

³³ This is particularly so if the WALRC's recommendation not to adopt the ALRC's proposed defence of reporting an attributed statement were followed: see paragraph 15.19 below.

³⁴ The limitation to publication to members is significant. It would mean, for example, that a publication by a company to the stock exchange could not be reported and the WALRC agrees with such a result.

³⁵ *Companies Act 1961* (WA), s.143(1).

³⁶ *Ibid.*, s.167(1).

- (b) the proceedings in public of any board, or body of trustees or other person constituted under the provisions of any statute for the discharge of public functions so far as the report relates to matters of public concern;
- (c) the proceedings of a person or authority held whether in Australia or elsewhere under the authority of a law in force or of a Parliament in any country other than Australia;
- (d) a publication issued by or authorised by the Government of any country other than Australia;
- (e) notices or advertisements published in order to comply with the requirement of any law in force in Australia, provided that if the notice is issued in relation to any application to a tribunal the privilege should apply only after the relevant application has been filed;
- (f) a document circulated by a company or its auditor to its members in accordance with or pursuant to the provisions of any law in force in Australia.

A special defence for the news media :

Reasonable belief in truth

15.14 The New Zealand Committee's recommendation for a special statutory defence for newspaper reports follows a similar proposal advanced by Lord Shawcross's Committee in the United Kingdom.³⁷ It has been opposed, however, by the New South Wales Law Reform Commission,³⁸ the Faulks Committee³⁹ and the ALRC.⁴⁰ The most convincing reason for opposition to the proposal is that:⁴¹

"a person whose reputation has been injured should not be denied compensation merely because the person causing the injury genuinely believed that he did not deserve the reputation... The plaintiff is passive, the defendant active. The defendant is wrong in fact even if, in a particular case, he is morally blameless. As between those two parties loss should be suffered by the active, wrong party - the defendant - rather than the plaintiff."

³⁷ Joint Working Party of the British Section of the International Commission of Jurists and the International Press Institute, *The Law and the Press* (1965) at 43-44. The Committee recommended that: "there should be a statutory defence of qualified privilege for newspapers in respect of the publication of matters of public interest where the publication is made in good faith without malice and is based upon evidence which might reasonably be believed to be true, provided that the defendant has published upon request a reasonable letter or statement by way of explanation or contradiction and withdrawn any inaccurate statements with an apology if appropriate to the circumstances".

³⁸ *New South Wales Report* 1971 at 109, paragraph 96.

³⁹ *Faulks Committee Report* 1975 (UK) at 53-55, paragraphs 211-215.

⁴⁰ *Report* (Cwth) at 66, paragraph 126.

⁴¹ *Ibid.*

15.15 The WALRC agrees with these comments. It also takes the view that there would be considerable difficulty in establishing whether a defendant's belief in truth was reasonable. The issue would tend not to be whether a reasonable person would have believed the statement to be true,⁴² but whether a particular journalist behaved in a reasonable way. The tendency would be for the case to be decided by the application of journalists' self imposed ethics. The WALRC therefore agrees with the ALRC's recommendation that there should be no special statutory defence for statements published which are reasonably believed to be true which are not otherwise protected by limited privilege.

Reports of attributed statements

15.16 The ALRC's proposal for a defence for reporting attributed statements is no doubt a proposal of considerable significance for the media. The WALRC is sympathetic to the reasons behind the recommendation that a report of an attributed statement should afford a defence where the publisher has acted reasonably, has not influenced the substance of the statement and has extended a right of reply. Such a defence, if added to the other defences available to a media publisher, would considerably enlarge the scope for publication of matter on a topic of public interest.⁴³ It would mean that a newspaper could publish -

- (a) matter which can be shown to be substantially true;⁴⁴
- (b) its own comment, or the comment of another person on a topic of public interest, based on facts which are substantially true provided the comment expresses, or is believed to express, the genuine opinion of the maker;⁴⁵
- (c) fair and accurate reports of specified matters of public interest;⁴⁶ and
- (d) fair and accurate reports of what other persons have stated on a topic of public interest provided it does not influence the substance of the statement and publication is reasonable having regard to the nature of the statement and the circumstances surrounding its making.

⁴² An objective determination involving a concept with which judges are familiar.

⁴³ A topic of public interest is defined in the Draft Bill (Cwth) to include matters "of legitimate concern to the general public": clause 7(3)(f).

⁴⁴ See paragraph 11.13 above.

⁴⁵ See paragraphs 12.4 to 12.8 above.

⁴⁶ See paragraph 15.3 above.

The major difference between (c) and (d) is that (d) extends to an open range of topics of public interest and statements of a less official nature, but subject to the controlling requirement that it would have to be reasonable for the defendant to publish the report.

15.17 The ALRC's proposal to exclude the defence of limited or qualified privilege from the news media might also be considered in some jurisdictions to be an added reason for allowing an extended defence of reporting attributed statements. This would not apply to Western Australia, however, as it is now clear that the defence of qualified privilege is governed by the common law and is not generally available to the news media.⁴⁷

15.18 The WALRC considers that the ALRC's proposed defence of reporting attributed statements could give rise to considerable problems. For example -

- (a) It might be difficult to determine by what criteria the reasonableness of the defendant's conduct is to be measured. As explained above,⁴⁸ the difficulty with a test of reasonableness in relation to the media is that the issue might tend to be decided according to journalists' self-imposed ethics and might tend to tip the balance unduly in favour of the media and free expression.⁴⁹
- (b) It might also be difficult to determine whether a defendant has influenced the substance of the reported statement.⁵⁰
- (c) It might be open to abuse if newspapers made use of the defence in order to ferment or promote rumours.⁵¹
- (d) The publisher of the report is excused on the basis that the plaintiff can seek his remedy against the person who made the defamatory statement, but this might be insufficient in some cases.⁵²

⁴⁷ See paragraph 14.1 to 14.3 above and *Report (Cwth)* at 73-74, paragraph 141.

⁴⁸ This point is made in rejecting the New Zealand Committee's proposal for a defence of reasonable belief in the truth: see paragraph 15.15 above.

⁴⁹ For example, an analogy might be drawn with the difficulty of proving that a medical practitioner has been negligent.

⁵⁰ For example, if a reporter obtains the statement by asking questions, possibly leading questions, would he be influencing its substance?

⁵¹ For example, a newspaper might seek an outspoken person in order to spark off a full scale attack in the media on the reputation of a person in public office. Although protection would be lost if the newspaper influenced the substance of the statement there would appear to be an important distinction between influencing the substance and encouraging a person to speak out on a controversial topic. The plaintiff could bring an action against the originator of the statement. In some cases, however, damages might be lower than would be assessed against the newspaper, and the originator would be unlikely to be covered by defamation insurance.

- (e) The defence overlooks the fact that the real damage could be caused by the person who repeats the defamatory matter rather than by the person who originates it.⁵³

15.19 On balance, the WALRC takes the view that the ALRC's proposed defence of reporting an attributed statement should not be adopted. Such a novel defence should be contemplated only if it can be framed in a way which leaves little scope for abuse. In its view the defence proposed by the ALRC leaves room for doubt and abuse, and there appears to be no way of tightening the defence requirements in order to overcome this problem. In attaining the delicate balance between public interest in receiving information and protection of reputation, the WALRC considers that it is better to err on the side of protecting reputation. The proper balance should be reached by modernising and clarifying the defence of publishing a fair report on a specified topic of public interest. In the WALRC's view its recommendations above,⁵⁴ which enlarge and clarify the scope of that defence, achieve a satisfactory balance and should remedy much of the difficulty previously experienced by the news media in this area of the law.

⁵² For example, difficulties in pursuing a remedy against the maker of the statement could arise where he is overseas or if he is a person of limited means. Injustice could also occur where the statement is made on an occasion of qualified privilege, for example at a meeting. In such a case the plaintiff would have no remedy at all, not even a correction.

⁵³ For example, an exchange of views as to X's character over dinner between A and B could give rise to serious consequences if B, who happened to be a reporter published in the media what A said. Yet B and the publisher might have the protection of a defence of reporting an attributed statement.

⁵⁴ See paragraph 15.13.

CHAPTER 16

APOLOGY

Strict liability for defamation

16.1 Defamation does not require any fault on the part of the defendant. A person can be liable for a defamatory publication even if he did not intend to refer to the plaintiff, and if he neither knew nor had reason to know that what he published was defamatory of anyone. Two cases illustrate the severity of strict liability for defamation.

16.2 The first is *Hulton v Jones*.¹ It arose over a humorous but defamatory account of a fictitious character at a motor festival in Dieppe. The character was referred to as Artemus Jones and described as a church warden at Peckham. The plaintiff, a barrister called Artemus Jones, succeeded in an action for defamation even though he did not live in Peckham, was not a church warden and was not at the Dieppe festival.

16.3 The other case is *Cassidy v Daily Mirror*.² The defendant published a photograph with the caption "Mr. M.C., the race-horse owner, and Miss [X.], whose engagement has been announced". Mr. M.C. had supplied the information to the photographer and authorised publication of the item. Unknown to the publisher, Mr. M.C. was already married to the plaintiff, Mrs. Cassidy. She received substantial damages for the defamatory implication that because she was living with a man who was not her husband she was an immoral woman.

Defence of apology

16.4 Strict liability for defamation has been tempered by statutory defences framed around an apology. In England, it is a defence if the libel was published in a newspaper or other periodical publication without actual malice and without gross negligence and if the defendant published a full apology at the earliest opportunity and made amends by paying a sum of money into court.³ Because of the requirement for money to be paid into court the defence is

¹ [1908-1910] All ER 29.

² [1929] All ER 117.

³ *Libel Act 1843* (*Lord Campbell's Act* (UK), s.2 and *Libel Act 1845* (UK), s.2. Under *Lord Campbell's Act* a defendant was "at liberty" to pay a sum of money into court. This was made a requirement by the 1845 Act.

rarely used. The preferred course is for a defendant to pay a sum into court under the general court procedural rules and plead the apology in mitigation of damages.⁴

16.5 In 1948 the Porter Committee recommended that there should be a statutory defence of apology without financial amends for unintentional defamation.⁵ This recommendation was adopted in England,⁶ New South Wales,⁷ Tasmania⁸ and New Zealand.⁹ To qualify for the defence a defendant must make an offer of amends by publishing a suitable correction and sufficient apology and must be able to show that he -

- (a) did not intend the matter to be defamatory of the plaintiff; and
- (b) (i) either did not know of circumstances by which the publication might be understood to refer to the plaintiff;¹⁰
(ii) or did not know of circumstances which were likely to give the words a defamatory meaning;¹¹ and
- (c) exercised reasonable care.

If his offer is accepted it is a complete defence. If it is refused the making of the offer can be taken into account by a court in a subsequent defamation action.

The law in Western Australia

16.6 The defence of apology in *Lord Campbell's Libel Act 1843* was adopted in Western Australia by the *Imperial Act Adopting Ordinance 1847*¹² but not the Act of 1845 which made it clear that a payment into court was required as part of the defence. A defendant in Western Australia is therefore "at liberty" to pay a sum of money into court as part of a defence of

⁴ This course is preferred because the defendant does not have to show an absence of malice or gross negligence, and even if his defence fails he may receive costs incurred since the date of payment into court if the damages awarded are no greater than the amount paid in: Gately, *Libel and Slander* (7th ed. 1974) at 348, paragraph 811.

⁵ *Porter Committee Report* 1948 (UK) at 16-20, paragraphs 55-73.

⁶ *Defamation Act 1952* (UK), s.4.

⁷ *Defamation Act 1974* (NSW), ss.36-45.

⁸ *Defamation Act 1957* (Tas), s.17.

⁹ *Defamation Act 1954* (NZ), s.6.

¹⁰ This deals with the situation in *Hulton v Jones*: see paragraph 16.2 above.

¹¹ This deals with the situation in *Cassidy v Daily Newspaper*: see paragraph 16.3 above.

¹² 10 Victoriae No.8.

apology. It is not clear whether this is a requirement.¹³ The practice, as in England, is for a defendant to disregard the defence in Lord Campbell's Act and simply pay the money into court under the general procedural rules.¹⁴ The Porter Committee's recommendations have not been adopted in Western Australia.

Possible reforms

16.7 The Western Australian Law Reform Committee recommended that the *Imperial Act Adopting Ordinance 1847* be repealed on the ground of obsolescence.¹⁵ The WALRC agrees, partly on the ground of obsolescence, but more importantly on the ground that the nature of the defence is not clear.¹⁶

16.8 The next question is whether the defence of apology recommended by the Porter Committee should be adopted in Western Australia. The Faulks Committee and the New Zealand Committee on defamation both supported retention of the defence but with procedural improvements. One of the difficulties was the application of the defence to a publisher, that is, a person who did not originate the statement. It was difficult for him to show that the author made the statement innocently. The Faulks Committee suggested that the defence should be available to the publisher if he published the matter innocently without having to consider the state of mind of the author.¹⁷

16.9 Another difficulty was that the defence procedure placed the defendant in a dilemma. He was required to submit an affidavit setting out the basis of his claim that the publication was innocent. This affidavit had to be carefully worded as its contents were relevant in any subsequent court action if the offer were not accepted. Consequently, the defendant needed time to prepare the affidavit carefully. The difficulty was that the defendant also had an obligation to make his offer of amends to the plaintiff at his earliest opportunity. Care in the preparation of his affidavit could cause an unacceptable delay in making his offer of amends.

16.10 The following suggestions have been made to improve the application of the defence -

¹³ The reasons for the 1845 amendment in England do not emerge in the Parliamentary Debates. It appears from reported cases, however, that the practice in England, even prior to the 1845 Act, was to pay money into court as part of the defence of apology.

¹⁴ *Rules of the Supreme Court 1971*, Order 24.

¹⁵ *Defamation: Privileged Reports* (1972) at 23, paragraph 82.

¹⁶ See paragraph 16.6 above.

¹⁷ *Faulks Committee Report 1975* (UK) at 77, paragraph 284.

- (a) the expression "offer of amends" should be more accurately described as "apology" to show that no payment of money is involved;¹⁸
- (b) the formal affidavit requirement establishing the claim of innocence should be removed;¹⁹
- (c) an unaccepted offer should not be regarded as an admission of liability or be referred to in later court proceedings;²⁰
- (d) a procedure should be available to enable disputes over the form of the proposed apology and correction to be settled;²¹
- (e) an innocent defendant should be liable to pay the plaintiff's legal costs and expenses with power to refer any dispute to a Judge in Chambers;²²
- (f) a plaintiff who refused an offer and proceeded to trial on an insubstantial matter should be required to provide security for costs;²³ and
- (g) a procedure should be implemented for the rectification or withdrawal of unsold copies of the offending publication.²⁴

16.11 The ALRC, on the other hand, made no special provision for a defence of apology for innocent defamation. Three reasons were given for such an omission. First, apology machinery already available is rarely, if ever, used in Australia. Secondly, it is always open to parties to settle their differences. Thirdly, the ALRC's hope was that procedural reforms would provide a venue and the opportunity to resolve disputes through consent orders for correction and/or rights of reply.²⁵ In addition, a correction, retraction or apology by the defendant is one of the factors which the ALRC recommended should be taken into account when awarding damages.²⁶ Absence of any intention to defame the plaintiff or other fault on the part of the defendant is not listed as a relevant factor.

¹⁸ *Report (NZ)* at 69, paragraph 298.

¹⁹ The *Faulks Committee Report 1975 (UK)* at 77, paragraph 283 suggested simple reliance on the defendant's obligation to inform the plaintiff of relevant factors in a letter. The New Zealand Committee (*Report (NZ)* at 71, paragraph 306) suggested a statement to accompany the offer.

²⁰ *Report (NZ)* at 73, paragraph 314 viii.

²¹ The *Faulks Committee Report 1975 (UK)* at 78, paragraph 287 (ii) recommended that references should be made for this purpose to a Judge in Chambers. The New Zealand Committee suggested a third party arbitration procedure - failure to submit being relevant to the question in a later court hearing whether a party acted reasonably: *Report (NZ)* at 71-72, paragraphs 309-310.

²² *Report (NZ)* at 72, paragraphs 311 and 314(iv).

²³ *Ibid.* at 73, paragraph 314(vi).

²⁴ *Ibid.* at 73, paragraph 314(v).

²⁵ Kirby J, *Defamation Reform : New Zealand and Australian Style* [1978] NZLJ 305 at 314.

²⁶ Draft Bill (Cwth) clause 28(f) .

The WALRC's recommendations

16.12 The WALRC has given careful consideration to the question whether an innocent defamer should have a defence to a defamation action. The ALRC's proposals, omitting such a defence, could give rise to injustice. For example, a plaintiff could accept an apology, have a correction published and still pursue an action for damages for any residual smear to his reputation. The possibility of liability for damages for an innocent or unintentional defamation also leaves intact one of the causes of the "chilling effect" of defamation law which is claimed to inhibit writers today.²⁷ Alternatively, short of providing a full defence, the WALRC has also considered whether innocent defamation should be added specifically as a factor relevant to damages.

16.13 On balance, the WALRC has reached the conclusion that a defence or other special provision for innocent defamation should not be made. A correction and apology would be sufficient remedies in most cases, and an innocent defendant could explain in his apology the circumstances of the publication and his innocence in order to reduce damages in rare cases where these were claimed. The tort of defamation has developed as a tort of strict liability and it would be inconsistent with this development and the ALRC's general scheme²⁸ to introduce questions of fault. Finally, to operate fairly and effectively a defence of innocent defamation requires a complex procedure.²⁹ In the absence of a clear need for the defence such complexity would not be desirable in the legislation proposed by the ALRC. For these reasons, therefore, the WALRC agrees with the ALRC's proposals not to create a defence or make special provision for cases where the defamation is innocent.

²⁷ See paragraph 2.2 above. One of the other causes is the uncertainty of the law.

²⁸ The irrelevance of fault underlies the removal of malice as a relevant factor in the defences of privilege and report: see paragraphs 14.9 and 15.9 above. See also paragraph 9.3 above.

²⁹ For example, in New South Wales the defence occupies ten separate sections: *Defamation Act 1974* (NSW), ss.36-45.

CHAPTER 17

INNOCENT PUBLICATION

The law in Western Australia

17.1 The point has been made already that liability for defamation, being a tort of strict liability, may arise irrespective of fault on the part of the defendant.¹ A further illustration of this principle is found in the rule that any person who assists in the publication of defamatory matter, for example a printer, is liable even though he played no part in writing or originating the contents and had no idea that it was or could have been defamatory.²

17.2 There is a limited exception to this rule. In *Vizetelli v Mudie's Select Library*³ it was held that a person, such as a newsboy or librarian, who merely distributes defamatory material, should not be liable if he can show that he did not know, nor had reason to know because of the character of the publication, that it contained defamatory material, and that his lack of knowledge in this respect was not due to a want of care on his part.

17.3 The strict liability of innocent publishers for defamation has been criticised in two respects.⁴ First, it is claimed that it gives rise to an impossible burden on publishers (including distributors within the rule in *Vizetelli's* case) to check the contents of every publication to see whether it contains defamatory material. Secondly, it provides an opportunity for a person to stop circulation of a publication before it has been shown to be defamatory.⁵ This can be achieved by informing distributors that a publication allegedly contains defamatory material. With such knowledge a distributor could lose the special defence in *Vizetelli's* case and the simplest course for him to take might be to withdraw the publication from further sale.

¹ See paragraph 16.1 above.

² There are provisions in the *Criminal Code 1913* dealing with persons innocently associated with the publication of defamatory matter. Section 364 provides "a defence" for a proprietor, publisher or editor of a periodical if he can show that defamatory matter was inserted without his knowledge and without neglect on his part. In light of the High Court decision in *Western Australian Newspapers Ltd v Bridge* (1979) 23 ALR 257 this provision would be unlikely to be interpreted as applying to civil defamation. Sections 365-367 provide defences for innocent sellers of periodicals and books, but once again, the language used ("a person is not criminally responsible") would preclude their application to civil cases.

³ [1900] QB 170.

⁴ *Report* (Cwth) at 97, paragraph 183.

⁵ There is an analogy in this respect to stop writs: see paragraph 20.2 below. A stop writ is the name given to the process of issuing court proceedings to prevent further discussion of a certain matter.

Possible reforms

17.4 The ALRC recommended a broad defence for innocent publishers. Clause 17 of the Draft Bill (Cwth) provides a defence for printers, librarians, newsagents, newsvendors and retailers. Unlike the existing defence in Western Australia, the ALRC's proposed defence would apply even if the distributor knew or had reason to know that the publication contained defamatory matter. This remarkable extension to the defence was explained by likening the position of an innocent publisher to that of a person who repeats what has been said or written by another.⁶ Both categories concern persons who are not concerned with the origin of the defamatory matter but merely pass it on without associating themselves with its truth or otherwise. The ALRC's scheme is to provide both with protection in the first case by a defence of innocent publication, and in the second by a defence of reporting an attributed statement.⁷

17.5 The New Zealand Committee also received submissions that distributors and printers should not be liable for defamation in any circumstances.⁸ In the case of printers, the submission was based on the increasing difficulty for them to supervise the material being printed. This was said to be due to changes in technology and in printing processes (many parts of the printing process are sub-contracted out) and increasing volume and technicality of printed matter.⁹

17.6 The New Zealand Committee, in rejecting the submission for an absolute defence for innocent distribution said:¹⁰

“We are concerned that ... in cases where the author and publisher of the offending publication could not be located or were impecunious, the plaintiff would be left without redress and without any means of vindicating his reputation. We do not consider that this is acceptable. In other cases the distribution may not be without fault”.

⁶ The analogy was made in an unpublished paper prepared for the purposes of focussing the ALRC's attention on aspects of defamation law requiring consideration: *Defamation - Background Paper on Present Law and Possible Changes* (1976) at 140-141, paragraph 3.114. The paper is on file with the WALRC.

⁷ See paragraph 15.8 above.

⁸ *Report* (NZ) at 76-78, paragraphs 322-337.

⁹ *Ibid.* at 77, paragraph 333. No reasons were given by the Committee for the claim that distributors should be protected.

¹⁰ *Ibid.* at 76, paragraph 326.

In rejecting an absolute defence for printers it said:¹¹

"in cases of ephemeral publications distributed by the authors themselves and neither separately published nor distributed through commercial channels a defamed plaintiff might have no effective remedy if printers enjoyed complete immunity. The general nature of many such publications gives sufficient warning of the risk that defamatory statements may be included in them and the printer has a financial interest in their publication".

The Committee's recommendation was that the common law defence should be retained but that it should be codified to make it clear that it applies to book sellers as well as other distributors and to extend it to printers, plate-makers and type printers.¹²

The WALRC's recommendations

17.7 The WALRC shares the doubts of the New Zealand Committee as to the desirability of granting an absolute defence to printers and distributors as recommended by the ALRC. First, it does not agree with the ALRC's broad approach that persons who merely repeat or pass on defamatory matter spoken or written by others should be protected.¹³ Secondly, even if a defence for reporting attributed statements were desirable, the defence proposed by the ALRC would be subject to qualifications, unlike the defence proposed for innocent publication.¹⁴ Thirdly, and most importantly in the view of the WALRC, the existing law provides a measure of secondary protection against the spread of defamatory matter through scurrilous or financially dubious publications. The WALRC does not agree that in the case of publications by such media the burden should be imposed on a plaintiff to obtain an injunction.

17.8 The WALRC therefore recommends that the limited defence available at common law to distributors of defamatory material should continue to apply, but in a codified form. It should be extended to other persons who innocently take part in the publication process, such as printers, proof readers, typists, secretaries and interpreters. The result would be that these persons would have a defence to a defamation action provided they did not know, nor had

¹¹ Ibid. at 78, paragraph 334.

¹² Draft Bill (NZ) clause 19.

¹³ See paragraph 15.19 above regarding the WALRC's opposition to a defence for reporting attributed statements.

¹⁴ For example, for a defence of reporting an attributed statement the ALRC proposed that the defendant must show that publication in the circumstances was reasonable and that he published a reply by the plaintiff - Draft Bill (Cwth) clause 16.

reason to know, that the particular publication was defamatory, and that any such lack of knowledge was not due to a want of care on their part.

CHAPTER 18

TRIVIALITY

Existing law in Western Australia and possible reform

18.1 Subject to certain exceptions, an action for slander in Western Australia requires proof of special damage.¹ The purpose of such a rule is to prevent trivial actions, but it may not necessarily succeed in doing so. Some spoken remarks can be extremely damaging, and some written statements, which fall outside the requirement for proof of special damages, can be trivial. The WALRC has recommended that the distinction between libel and slander should be removed.² The question is whether there should be a general defence of triviality to defamation actions.³

18.2 The ALRC recommended a defence of triviality to discourage actions where the matter and the particular circumstances of publication were such that the plaintiff was not likely to be harmed.⁴ Such a defence is available in New South Wales.⁵ The New Zealand Committee did not deal with this issue.⁶

The WALRC's recommendations

18.3 The WALRC does not agree with the ALRC that triviality should be treated as a defence. It takes this view for two main reasons. First, it considers that other aspects of the ALRC's proposals are sufficient to discourage actions for trivial defamation. For example -

- (a) if the publication is of matter which does not have a tendency to harm the plaintiff it would not be defamatory;⁷

¹ This common law rule and its exceptions are discussed in paragraph 4.1 above.

² See paragraph 4.4 above.

³ Section 362 of the *Criminal Code 1913* provides a defence if defamatory words or gestures are published on an occasion and under circumstances when the person defamed was not likely to be injured. However, being expressed as "a defence to a prosecution" it could not be used as a defence to civil defamation: see paragraph 1.2 above.

⁴ *Report (Cwth)* at 101, paragraph 191 and Draft Bill (Cwth) clause 18.

⁵ *Defamation Act 1974 (NSW)*, s.13.

⁶ The *Report (NZ)* deals with vexatious proceedings, that is proceedings which are not bona fide or which are frivolous (see Glossary of Terms, *Report (NZ)* Appendix IX) but the provisions are designed to discourage the issue of stop writs, (see paragraph 20.8(d) below) not trivial actions .

⁷ Defamatory matter is defined as "published matter which tends to affect adversely the reputation of [the plaintiff]...": Draft Bill (Cwth) clause 9(1)(a).

- (b) if the publication is of a type which would normally tend to harm the plaintiff but is published in circumstances where harm is unlikely, this can be taken into account when assessing damages,⁸ and nominal or contemptuous damages may be awarded.⁹

18.4 Secondly, the effect of the ALRC's proposal would be to introduce foreseeability of damage as a pre-requisite for liability for defamation.¹⁰ In the WALRC's view this would be undesirable in principle in that it could leave a plaintiff without a remedy in cases where some harm to his reputation has in fact resulted. This would occur in a case where defamatory matter is published in circumstances where harm to reputation is unlikely, but where, for some reason, it has actually occurred.¹¹ In such a case the WALRC considers that a plaintiff should be able, at least, to obtain a correction. The question of damages should be left to the discretion of the court. The WALRC therefore recommends that there should be no defence for triviality.

⁸ Draft Bill (Cwth) clause 28(1)(a).

⁹ Such damages could be awarded at common law, and, presumably, could be awarded under the ALRC's proposals: *Report (Cwth)* at 144, paragraph 261.

¹⁰ Foreseeability of damages has never been an ingredient for liability for defamation at common law.

¹¹ For example, two persons exchanging defamatory comments about X in an aeroplane might escape liability on the unforeseeability principle even though their comments were in fact overheard by X's employer and caused X to lose his job.

CHAPTER 19

REMEDIES

Damages and correction

19.1 As the ALRC pointed out,¹ the traditional remedy in defamation actions has been an award of damages. Such an award can include special damages,² general damages,³ aggravated damages⁴ and punitive or exemplary damages.⁵ The ALRC made two major recommendations for reform. First it proposed to introduce a new remedy - a correction order - which was intended to reduce the reliance customarily placed on damages as an effective remedy. Secondly, it proposed to abolish punitive damages.

19.2 The WALRC has always maintained the view that damages cannot be replaced as a remedy in defamation actions⁶ and that they should be allowed on the basis of the propensity of the defamatory matter to harm the plaintiff's reputation, rather than on the basis that actual harm must be shown to have occurred.⁷ It agrees, however, that in many cases such an award operates as a windfall and has its limitations as an effective remedy. In its view, a correction order, as a supplementary remedy, coupled with a more streamlined procedure,⁸ could more effectively reduce the damaging impact of a defamatory publication.

19.3 One difficulty regarding a correction is whether compliance should be voluntary or compulsory. In most cases no issue would arise. An unsuccessful defendant would comply with a court order for correction in order to reduce the amount of damages which might otherwise be awarded against him.⁹ There might be cases, however, where a defendant maintains that, notwithstanding a court finding to the contrary, what he published regarding

¹ *Report (Cwth)* at 139-140, paragraphs 251-253.

² For actual loss suffered.

³ To compensate generally for the loss of reputation.

⁴ To compensate for additional hurt to the plaintiff brought about by the defendant's conduct.

⁵ *Uren v John Fairfax & Sons Pty. Ltd.* (1966) 117 CLR 118. Punitive damages are designed not to compensate the plaintiff for any harm caused, but to punish the defendant if his conduct in publishing the defamatory item was high-handed, insolent, vindictive or malicious or in some other way exhibited contumelious disregard of the plaintiff's rights.

⁶ In interim comments to the ALRC it opposed suggestions made in Discussion Paper No. 1 (*Defamation - Options for Reform* (1977) at 8-9) that general damages should not be awarded where a defendant shows that on reasonable grounds and after making all enquiries reasonably open to him in the circumstances he in fact believed the truth of all statements of fact contained in the matter published.

⁷ *Report (Cwth)* at 45-46, paragraph 81.

⁸ See paragraphs 20.4 to 20.5 below.

⁹ A failure to publish a reply voluntarily in the face of a judicial finding could be regarded as an aggravating feature and damages awarded may be higher: *Report (Cwth)* at 143, paragraph 258.

the plaintiff was true. To compel such a defendant to publish a correction, with contents as determined by a court,¹⁰ would prevent him from maintaining his stand and facing the consequences in damages as he is able to do under existing law.¹¹ It could also be argued that readers of such a correction in terms of the finding of a court, and in view of the defendant's attitude, might reach the conclusion that it is not necessarily a correction, but a notice that the defendant has not on this occasion succeeded with a defence of truth.¹² Such considerations support the view that the only effective correction should be one given voluntarily by a defendant.

19.4 It is important to emphasise, however, that a compulsory correction order would not mean that such a remedy would be granted in every case where a plaintiff succeeds. What it means is that where a plaintiff seeks such a remedy, and where a court agrees that the case is suitable for such a remedy, compliance by the defendant should be compulsory.¹³ In cases of doubt, a plaintiff might not seek a correction remedy, or a court might not grant it. In other cases, where the defamatory matter consists of a report in a newspaper, a court might consider it to be more appropriate to order the defendant to publish a fair and accurate report of the result of the defamation action instead.¹⁴ The theme of the ALRC's proposals is to ensure speedy correction of matter which is incorrect and defamatory. To permit a defendant to choose whether to publish a correction would amount to an offer to him to purchase, through payment of damages, a licence to destroy another person's reputation.

19.5 The WALRC therefore agrees with the ALRC that compliance with a correction order should be compulsory. Publication of the findings of a court is desirable and the WALRC agrees with the ALRC that this would satisfy most people as to the truth. In cases where doubt exists about the effectiveness of a correction because of the defendant's attitude, damages would be assessed taking this into account. The WALRC also agrees that a court should have

¹⁰ The ALRC proposed that a court should be empowered to make an order as to the contents of a correction if the parties are unable to agree on this issue: *Report (Cwth)* at 142, paragraph 258.

¹¹ The point was raised editorially in *The Age*.

¹² A finding by a court is governed by the evidence given before it. A defendant might believe in his sources but be unable to present sufficient admissible evidence to satisfy a court as to the truth.

¹³ There is provision for a limited right of appeal, with leave, against an order requiring publication of a correction if a defendant can show that the order resulted from an error of law, or that an appeal in the action generally has been instituted which appears to have merit and which, if successful, would be likely to affect the order: Draft Bill (Cwth) clause 43.

¹⁴ Draft Bill (Cwth) clause 46.

power not only to give directions as to the content of a correction but also as to its publication.¹⁵

19.6 With regard to punitive (or exemplary) damages, the WALRC agrees, for the reasons given by the ALRC,¹⁶ that these should be abolished. In the WALRC's view, the question of punishment should not arise outside the defined areas to be governed by criminal defamation provisions.¹⁷

Assessment of damages

19.7 The ALRC proposes to codify the factors which should be taken into account when assessing damages¹⁸ and the steps which a defendant should be entitled to take in mitigation of damages.¹⁹ In general the ALRC's proposals reflect existing law on this subject in Western Australia. There are some alterations and omissions, however, which, in the WALRC's view, require separate consideration.

Proof of partial truth

19.8 At common law proof of partial truth is permitted only if introduced in an attempt to establish a defence of justification. In fact, to prove partial truth without pleading a defence of justification can be regarded as a ground for awarding aggravated damages.²⁰ The ALRC proposes to allow a defendant to introduce evidence of partial truth without having to plead a defence of justification.²¹

¹⁵ Draft Bill (Cwth) clause 26.

¹⁶ *Report* (Cwth) at 145, paragraph 263 - namely the unsuitability of a civil hearing as a tribunal for imposing punishment, the undesirability of an individual profiting from the punishment of another, and for a jury if any (see paragraphs 21.1 and 21.7 below) to decide not only the question of guilt but also the punishment.

¹⁷ See Chapter 22 below. The abolition of punitive damages was also recommended in the *Faulks Committee Report 1975* (UK) at 97, paragraph 360, and *New South Wales Report_1971* at 14-16, paragraphs 42-55, and see *Defamation Act 1974* (NSW), s.46(3)(a). The New Zealand Committee did not recommend the abolition of punitive damages, but it is significant that it recommended the abolition of the offence of criminal libel: *Report* (NZ) at 89, paragraph 391 and at 103, paragraph 459.

¹⁸ Draft Bill (Cwth) clause 28.

¹⁹ *Ibid.* clause 30 and *Draft Rules* (Cwth) rule 22.

²⁰ *Gatley, Libel and Slander* (7th ed. 1974) at 534-535, paragraphs 1300-130 and also at 544, paragraph 1324 and at 551, paragraph 1340.

²¹ Draft Bill (Cwth) clause 28(2).

19.9 Initially the WALRC doubted whether it would be desirable to permit a defendant to prove partial truth in mitigation of damages. Its view was that the discouragement of publication of half truths was a more desirable objective than permitting a defendant to mitigate his damages.

19.10 On further consideration, however, the WALRC agrees with the ALRC that a court should be able to consider the defamatory publication as a whole and the effect it has had on the plaintiff's reputation without exclusionary rules. The common law rule is unfair in that it forces a defendant to plead a defence which he cannot maintain in order to introduce evidence relevant to the damage to a plaintiff's reputation. He thereby runs the risk that his ill-founded plea of justification will be regarded as an aggravating factor.

19.11 The WALRC therefore agrees with the ALRC that proof of partial truth of the defamatory publication should be admissible in evidence as a relevant factor in the assessment of damages. However, the WALRC considers that a defendant should be required to give notice and particulars of the matters he intends to prove true.²²

Other proceedings in respect of the same defamatory publication

19.12 In several Australian jurisdictions, and in New Zealand, there are statutory provisions permitting a defendant to introduce evidence of other actions by the plaintiff in respect of the same or substantially the same defamatory publication.²³ In Western Australia, however, there is no such provision and the general common law rule that a defendant cannot adduce such evidence appears to apply.²⁴ The ALRC recommended that a defendant should be permitted to show that the plaintiff has recovered, or is proceeding to recover damages in respect of a defamatory statement to the same effect as that published by him.²⁵ This would not be important in cases where actions were joined.²⁶ But in the WALRC's view, it would be a desirable provision to adopt to deal with the situation where actions were brought separately and it so recommends.

²² The ALRC recommended that such a requirement should be imposed on a defendant who was seeking to introduce evidence in mitigation of damages (Draft Bill (Cwth) clause 30 and Draft Rules (Cwth) rule 22) but this would not necessarily apply to evidence introduced under clause 28 as being a relevant factor in the assessment of damages.

²³ See *Report (Cwth)* at 146, paragraph 266; *Report (NZ)* at 88, paragraph 384.

²⁴ Gatley, *Libel and Slander* (7th ed. 1974) at 552, paragraph 1344.

²⁵ Draft Bill (Cwth) clause 30(b).

²⁶ See paragraph 8.6 above for the WALRC's recommendations in relation to joinder of actions .

Proof of specific acts of misconduct in mitigation of damages

19.13 At common law a defendant is able to show generally that the part of the plaintiff's reputation having relevance to the defamatory matter was not as good as the plaintiff might claim prior to the publication. However, he is not permitted to substantiate his attack by proving specific acts of misconduct. The rule has been criticised and the suggestion made that evidence of any matter, general or particular, relevant at the date of the trial to that aspect of the plaintiff's reputation with which the defamation is concerned, should be admissible.²⁷ The ALRC appears to take the matter further by suggesting that relevant specific incidents should be admissible not only to substantiate the reputation a person is alleged to have, but to show the reputation which he deserves to have.²⁸ If this were so, a defendant would be entitled to introduce evidence at the hearing, which was not previously known about the plaintiff, in order to destroy the reputation he in fact has and create a reputation which he deserves. The ALRC's Draft Bill leaves the matter in some doubt.²⁹

19.14 The WALRC takes the view that evidence of specific incidents of misconduct should be admissible to substantiate the reputation which a plaintiff has in fact, but that it should not be introduced in order to establish the reputation he should have. Defamation actions are designed to protect a person's actual reputation. They should not provide an opportunity for a defendant, under protection of privilege, to expose what that reputation should be.³⁰ Whether or not the plaintiff deserves the reputation he has is, and should remain, irrelevant.

19.15 In many cases the distinction between actual and deserved reputation could be difficult to define. In the WALRC's view the essence of the distinction is notoriety. If a defendant is not able to establish, as a condition precedent, that the specific incident which he wishes to

²⁷ *Porter Committee Report* 1948 (UK) at 35-37, paragraphs 146-156; *Plato Films Ltd v Speidel* [1961] All ER 876 per Lord Radcliffe at *Faulks Committee Report* 1975 (UK) at 98-103, paragraphs 363-372 and *Report* (NZ) at 90, paragraphs 393-395.

²⁸ For this proposition the ALRC relies on Lord Radcliffe's judgment in *Plato Films Ltd. v Speidel* [1961] All ER 876: *Report* (Cwth) at 146 paragraph 265. But Lord Radcliffe clearly refers to evidence of specific incidents of sufficient notoriety to be likely to contribute to a plaintiff's *current reputation*, and not to establish the reputation he deserves to have.

²⁹ The relevant provision (Draft Bill (Cwth) clause 30(a)) refers to "any general or particular evidence which relates to the effect upon the plaintiff of the matters alleged in the publication". To determine the effect of the publication it would be necessary to know something of the plaintiff's reputation prior to publication, but it is not clear whether this refers to actual or deserved reputation.

³⁰ There appears to be no provision for evidence in a defamation case to be heard in closed court or in chambers. The conduct of the defendant during the trial can, however, be taken into account in the assessment of damages: *Report* (Cwth) at 143, paragraph 260 and Draft Bill (Cwth) clause 28(b).

prove is relevant and notorious, then the tendency of his evidence would be to reveal a plaintiff's deserved reputation and it should not be admitted. The WALRC also agrees with the ALRC that a defendant wishing to introduce such evidence should be required to give notice and sufficient particulars to the plaintiff.³¹

Repetition of matter honestly believed to be true

19.16 At common law, a defendant can mitigate damages if he can show that the publication was mere repetition of material honestly believed to be true, the original source of which is disclosed.³² The ALRC considered that no special provision was needed to preserve this rule as such publications would fall within its proposed extended defence of fair reports and, in any event, the circumstances of publication would be one of the proposed criteria for assessing damages. The WALRC does not support the ALRC's proposed extended defence of report,³³ and it takes the view that this mitigatory rule is too important to be left merely as a factor to be taken into account when assessing damages. It is therefore recommended that the factors expressed to be relevant in mitigation of damages should include repetition of material honestly believed to be true, the original source of which is disclosed.

Assessment of damages: the WALRC's recommendations

19.17 The WALRC recommends that the factors specified by the ALRC as being relevant to the assessment of damages and the matters which a defendant should be permitted to raise in mitigation of damages should be adopted, provided that -

- (a) a defendant wishing to prove partial truth of a defamatory publication should be required to give sufficient notice and particulars to the plaintiff with his pleadings;³⁴

³¹ *Draft Rules* (Cwth) rule 22(b). See also Order 34 rule 6 of the *Rules of the Supreme Court 1971* (WA) which provides that in actions for libel or slander, unless truth is pleaded as a defence, a defendant must give seven days notice and particulars before he is permitted to give evidence in mitigation of damages as to the circumstances of the publication or as to the character of the plaintiff.

³² Report (Cwth) at 147, paragraph 268; *Report* (NZ) at 89, paragraph 392(b). The basis of such mitigatory evidence is that it tends to show the innocence of the defendant's conduct and not that it tends to show that the plaintiff's reputation has already been tarnished: Gately, *Libel and Slander* (7th ed. 1974) at 547, paragraph 1331.

³³ See paragraph 15.19 above.

³⁴ See paragraph 19.11 above.

- (b) evidence of specific acts of misconduct by the plaintiff should be admitted only if the defendant -
 - (i) gives sufficient notice and particulars to the plaintiff;
 - (ii) shows that such acts would be relevant to that part of the plaintiff's reputation which is under consideration; and
 - (iii) shows that such acts are sufficiently notorious to affect the plaintiff's actual or current reputation;³⁵ and
- (c) a defendant should be permitted to plead, in mitigation of damages, that the defamatory material published was repetition by him of matter which he believed to be true, and that he disclosed its source.³⁶

Other remedies

Injunction

19.18 The ALRC proposed to continue the plaintiff's remedy of an injunction restraining continued or renewed publication of a defamatory item, but a majority in that Commission wished to create a special exemption for works of literary, artistic, historic or educational merit.³⁷ The view taken was that the public benefit in continuing such publications could outweigh the benefit to the plaintiff in suppressing its defamatory content. It therefore proposed that a court should be empowered to refuse to grant an injunction in respect of such a publication, possibly taking this into account when assessing damages. In other words it would confer on a court a power to license the continued publication of defamatory matter.

19.19 The WALRC does not agree with the ALRC's proposed exemption for the following reasons, namely -

³⁵ See paragraph 19.15 above. Because the WALRC recommends that evidence establishing partial truth of the publication should be admitted (see paragraph 19.11 above) there is no need to make special provisions, as the Porter Committee did, to deal with the situation where evidence of a specific incident of misconduct also tends to establish partial truth of the defamatory publication: *Porter Committee Report* 1948 (UK) at 36-37, paragraph 154.

³⁶ See paragraph 19.16 above.

³⁷ *Report* (Cwth) at 149, paragraph 273.

- (a) it foresees considerable difficulty in deciding whether particular items, which as of necessity must be incorrect,³⁸ have educational, historical, literary or artistic merit;
- (b) it agrees with the minority view in the ALRC that it would be inappropriate for a court to take into account, when fixing a remedy, matters which were irrelevant to the cause of action;
- (c) there is no distinction, nor is it made clear whether there should be a distinction, between cases where the defamatory portion itself purports to have literary or educational³⁹ merit, and cases where it is of no benefit at all but is sandwiched into an educational or historical book; and
- (d) there could be considerable difficulty in calculating a suitable sum by way of damages to compensate a plaintiff for his continuing humiliation and the award could be a high price for a defendant to pay in the cause of public benefit.

19.20 In the WALRC's view, publication of defamatory matter should not be permitted under the umbrella of artistic or literary merit. The remedy of injunction should be available in respect of all defamatory publications. If publication of the remainder of the item is considered to be of sufficient public benefit, it should be republished excising the defamatory portion. In cases where excision is not practicable, the responsibility should rest on the author to create his material without making allegations against identifiable persons which cannot be proved to be true.

Declaration

19.21 Under existing law a remedy of a declaration is available but it is rarely sought in defamation cases.⁴⁰ Both the ALRC and the New Zealand Committee recommended that a plaintiff should be entitled to obtain a declaration of falsity from a court as a remedy.⁴¹ They also recommended that where a plaintiff sought such a remedy only, without damages, a court

³⁸ If the matter were correct a defence of justification would be available.

³⁹ Given that this part of the publication must be incorrect it is difficult to see how it would have educational or historical merit.

⁴⁰ *Report (Cwth)* at 149, paragraph 274.

⁴¹ *Ibid*, and see *Report (NZ)* at 91, paragraphs 401-405.

should be empowered to award his costs on a solicitor/client basis.⁴² The WALRC agrees with both recommendations.

⁴² The ALRC's proposals on this issue apply to a plaintiff seeking a correction, injunction or declaration: Draft Bill (Cwth) clause 47(2).

CHAPTER 20

PROCEDURE

The law in Western Australia

20.1 There is no special procedure for defamation actions in Western Australia. There are, however, some provisions in the *Rules of the Supreme Court 1971* which relate specifically to defamation actions. For example, the statement of claim to accompany a writ for libel must be indorsed with sufficient particulars to enable identification of the publication complained of.¹ If a defamation action is settled there are procedures for either party to obtain leave to make a statement in open court² which would enable relevant terms of settlement and any apology or correction to be stated publicly.

20.2 One major criticism of the procedure relating to defamation actions is that there is no machinery to prevent a plaintiff from issuing a writ solely for the purpose of frightening off further discussion on a particular topic which he claims to be defamatory of him. This gagging device, commonly known as a "stop writ", can be effective for a number of years and poses a major threat to freedom of expression. The ALRC's research reveals that, on average, 94.6 per cent of all writs issued for defamation in Victoria, Queensland, Tasmania, the Australian Capital Territory and the Northern Territory are never set down for trial.³ Many of these could be genuine cases which are settled, but solicitors experienced in defamation cases indicated to the ALRC that over 50 per cent of the cases are commenced and allowed to die by the plaintiff without any attempt to have them settled or brought to a hearing. The WALRC is aware that there is a general view amongst practitioners and journalists that stop writs are used as frequently and as effectively in this State as in any other part of Australia.

20.3 A further criticism is that delays in the determination of a defamation action, whether arising in the normal course of events, or from interlocutory manoeuvres, tend to obscure the issues and make it less likely that the plaintiff's reputation will be vindicated by the result of the action. The limitation period within which a plaintiff must bring his action is two years in

¹ *Rules of the Supreme Court 1971* Order 6 rule 2.

² *Ibid.* Order 24 rule 3(5).

³ *Report (Cwth)* at 29-30, paragraph 53. The Western Australian Supreme Court Registry has indicated to the WALRC that the percentage of writs for defamation issued in this State which are never set down for trial would be similar although no actual figures are available.

the case of slander actionable without proof of special damage,⁴ and six years for all other actions founded on tort.⁵

Possible reforms

20.4 The ALRC recommended that the limitation period for a plaintiff's claim in defamation should be shortened to six months from the date he first becomes aware of the publication and in any event should not exceed three years unless there are grounds for granting an extension.⁶ It also recommended that there should be a separate streamlined procedure designed to give priority to defamation actions once commenced.⁷ To give effect to this procedure the originating process should include a summons which should be returnable before a court within fourteen days of the date of its issue.

20.5 If the defendant does not file an appearance, or if he indicates that he does not wish to defend the action, or if the parties are willing to settle, a Judge should be empowered to dispose of the action there and then.⁸ If the defendant indicates that he wishes to proceed with a defence, the Judge should give directions as to the time for filing a statement of defence and, if practicable, fix a date for an early hearing. By introducing such a procedure for the speedy resolution of issues between parties to a defamation action, the ALRC's aim is to encourage settlement, discourage stop writs and provide a closer nexus between the publication of the defamatory matter and the result of the defamation action to help to vindicate the plaintiff's reputation.

20.6 In New South Wales special procedures have already been introduced for defamation actions on an experimental basis.⁹ As from 21 April 1978 a plaintiff is required to file and serve with his statement of claim a notice of motion for directions. The date for the hearing of the motion is normally a Monday occurring next after ten days from the date of filing and which is the second or fourth Monday in the month. At such hearing the defendant is to state

⁴ *Limitation Act 1935*, s.38(1)(a)(ii) and see paragraph 4.1 above for examples of slander actionable without proof of special damage.

⁵ *Ibid.*, s.38(1)(c)(vi).

⁶ *Report* (Cwth) at 154, paragraph 281. The ALRC recommends that State laws providing for extensions of time for persons under legal disability should apply: Draft Bill (Cwth) clause 33(2).

⁷ Clause 39 of the Draft Bill (Cwth) empowers a court to establish rules of court to give effect to this procedure, but until such rules, if any, come into effect, rules drafted by the ALRC are to apply.

⁸ Draft Bill (Cwth) clause 40 and *Draft Rules* (Cwth) rules 11-13.

⁹ Chief Justice of New South Wales, *Practice Note Common Law Division; Defamation* (1978) and *Supreme Court Rules (Amendment No.83) 1978*.

his defences, if any, and both parties are expected to inform the court of other relevant matters to enable it to give directions regarding the future conduct of the case.¹⁰ No statistics are readily available as to the impact of the new procedure on defamation actions in that jurisdiction. The Prothonotary has informed the WALRC, however, that the experiment has been regarded as a success and that the procedure is to be continued. The impression gained is that the number of stop writs issued has been reduced and the number of cases which have been settled has increased.

20.7 The New Zealand Committee dealt with the problem of stop writs¹¹ but did not recommend a speedy procedure for the resolution of issues in a defamation action as a solution. Its objections were that this would -

- (a) place an unfair time constraint on a defendant;
- (b) create practical difficulties in having the summons heard within days of its issue;
- (c) give undesirable precedence to defamation actions over other civil actions; and
- (d) not solve the difficulty in distinguishing between stop writs and genuine cases.¹²

20.8 Instead, the Committee recommended that -

¹⁰ The WALRC understands that a plaintiff will normally be expected to signify -

- (a) whether he desires an early hearing and whether he has acted promptly in instituting proceedings after the publication of the defamatory matter complained of;
- (b) whether he requires admission of facts by the defendant;
- (c) whether he requires production of documents for inspection;
- (d) whether he requires interrogatories;
- (e) whether he desires formal discovery and inspection;
- (f) whether he accepts or requires amendment to an apology, if any, offered by the defendant;
- (g) whether any steps arising out of an agreement to accept an offer of amends require determination;
- (h) whether any other directions are sought;
- (i) when he expects to be ready for trial;
- (j) whether any orders for attendance of witnesses are required;
- (k) whether any questions of law or fact are required to be determined at separate hearings before the trial.

A defendant will normally be expected to signify -

- (a) what defences he will rely upon;
- (b) whether any further particulars are required;
- (c) whether any of the matters referred to above in relation to the plaintiff are required by the defendant;
- (d) when he expects to be ready for a trial.

¹¹ See paragraph 20.8(d) below. A correction order and early vindication of a plaintiff's reputation are not part of the Committee's recommendations for reform.

¹² *Report (NZ)* at 95, paragraphs 420-421.

- (a) a plaintiff suing a news medium should not be permitted to disclose in the statement of claim the amount of damages sought;¹³
- (b) judges should be more bold in the exercise of their discretion in relation to costs;
- (c) the limitation period should be shortened so that actions must be brought within two years, and where no step has been taken for twelve months in respect of an action which has been commenced but not set down for trial the defendant should be able to have the action dismissed; and
- (d) the issue of a stop writ should be regarded as an abuse of procedure and unethical conduct on the part of a solicitor and should provide the basis for possible disciplinary action within the Law Society.

The WALRC's recommendations

20.9 The WALRC had reservations at one stage about the ALRC's proposed limitation period for defamation actions.¹⁴ However, with one exception relating to actions brought against deceased defendants,¹⁵ the Commission now supports the ALRC's proposals. Subject to this exception, and to provisions relating to legal disability and extensions of time,¹⁶ it recommends that defamation actions should be commenced within six months from the date the plaintiff first becomes aware of the publication and in any event not later than three years from the date of publication.

20.10 With regard to the ALRC's proposal for a special procedure for the speedy resolution of defamation disputes, and the new procedure introduced in New South Wales, the WALRC sought comments from the Chief Justice of Western Australia, the Hon Sir Francis Burt. In reply, the Chief Justice indicated that, under existing procedure in Western Australia,¹⁷ a party to a defamation action could take steps to arrange an early hearing. However, he also said that he saw merit in the idea of devising a procedure enabling a party to have a defamation action

¹³ The theory being that this would diminish the intimidatory effect of the defamation action.

¹⁴ The Commission has a project to review the *Limitation Act 1935* generally: Project No.36. Its initial reaction was that limitation periods for defamation actions should be dealt with as part of that general review.

¹⁵ See paragraphs 9.15 to 9.17 above.

¹⁶ See paragraph 20.4 above.

¹⁷ Order 29 rule 3 of the *Rules of the Supreme Court 1971* provides that on hearing a summons for directions, which can be issued by any party at any time, a court may order that the action be set down for trial forthwith. Such an order may be accompanied where appropriate by an order that money paid into court be paid out in satisfaction of the cause of action: Order 24 rule 5.

The settlement agreement could include making statements in open court, but the court's powers appear to be limited to the occasion where an agreement to settle is made at the hearing on the return of the summons. In the WALRC's view every assistance should be given to the parties to settle their dispute at any stage of the proceedings. To facilitate this, the WALRC recommends that there should be a provision enabling the parties at any stage of the proceedings to seek the assistance of a court in reaching an agreement to settle the dispute, and a court should be given power to make any orders needed to give effect to any such agreement. This could include orders regarding the making of statements in open court as well as a correction and apology, and the existing Western Australian rule²¹ could then be revoked. The New Zealand Committee recommended that either party should be able to apply for such orders²² giving a court power to refuse to make an order. The WALRC agrees, provided that the other party has been served with notice of the application.²³

²¹ *Rules of the Supreme Court 1971* Order 24 rule 3(5).

²² *Report* (NZ) at 92, paragraph 410.

²³ The Faulks Committee made a similar recommendation but took the view that all parties should combine to make the application to court before an order could be made: *Faulks Committee Report 1975* (UK) at 105, paragraph 381.

CHAPTER 21

ROLE OF JURIES

Existing role in Western Australia

21.1 In Western Australia a party may apply to have a civil action heard before a jury only if -

- (a) there is an allegation of fraud against a party, *or*
- (b) the action is one for defamation, malicious prosecution, false imprisonment or seduction¹

unless the judge is of the opinion that the trial requires a prolonged examination of documents or accounts or scientific or local examination which cannot conveniently be made with a jury.² In addition, a court or a judge has a discretion to order that any action be tried by a jury.³ It is very seldom that a jury is empanelled in a civil trial - at the most once or twice a year. Normally civil actions are tried by a judge alone.

Proposals for reform

21.2 There has been considerable debate as to the proper role of juries in defamation cases. It has been suggested that -

- (a) juries should be abolished;⁴
- (b) juries should decide whether a defendant is liable but should not be involved in the assessment of damages;⁵
- (c) juries should decide liability and damages, but in respect of the latter should not decide the actual amount but merely indicate whether damages should be 'substantial', 'moderate', 'nominal', or 'contemptuous';⁶ and
- (d) the existing role of juries should be continued.⁷

¹ Breach of promise of marriage was also included but such actions were abolished by s.111A of the *Marriage Act 1961* (Cwth), inserted by s.23 of the *Marriage Amendment Act 1976* (Cwth).

² *Supreme Court Act 1935*, s.42.

³ *Ibid.*

⁴ Three members of the seven man New Zealand Committee took this view: *Report* (NZ) at 106, paragraph 468.

⁵ Submissions made to the New South Wales Law Reform Commission, *Working Paper on Defamation* (1968), at 19 paragraph 38.

⁶ This view which originated with the *Faulks Committee Report 1975* (UK) at 143, paragraph 513 was adopted by three members of the New Zealand Committee: *Report* (NZ) at 106, paragraph 468.

21.3 The ALRC was equally divided in its views as to desirability of juries and their role in defamation cases. With one exception, however, its recommendation was that local practice in each State should continue.⁸ The exception arises where a defendant does not wish to defend an action. If damages were awarded in such a case, the ALRC considered that it would be preferable for a judge alone to assess the relevant amount. Frequently he could deal with this issue quite promptly, perhaps on affidavit evidence, and he would be in a better position than a jury to make proper allowance for a correction order, and any other circumstances surrounding the settlement reached by the parties. In effect, therefore, the only change to existing law in Western Australia which would result from the ALRC's proposals with regard to the role of juries in defamation actions would be to deprive a plaintiff and a defendant of the right to apply to have damages assessed by a jury when there was no defence to the action.

The WALRC's recommendations

21.4 The WALRC recognises that in other jurisdictions opinions have been sharply divided as to the proper role of juries in defamation actions. It agrees with the ALRC's proposal to leave this issue to the law of each individual State or Territory, but two questions remain. The first is whether it agrees with the ALRC's proposal for a judge sitting alone to assess damages in undefended cases. The second is whether existing law in Western Australia as to the role of juries in defamation actions is satisfactory.

21.5 Both questions could provoke considerable debate. In particular the WALRC sees merit in the recommendations of the Faulks Committee and the New Zealand Committee that a jury should not assess the actual amount of damages but should simply indicate to the judge whether damages should be 'substantial', 'moderate', 'nominal,' or 'contemptuous'. The point is, however, that juries seldom hear defamation actions in Western Australia, even where liability is in issue. There is little evidence in this State of excessive or other faulty awards of damages by juries, and in the WALRC's view, there is no need to modify a jury's function in cases where one is called upon to assess damages.

⁷ In New South Wales, damages for defamation are almost always assessed by a jury and no change was recommended by the *New South Wales Report* 1971 at 13, paragraph 42.

⁸ *Report* (Cwth) at 160-161, paragraph 289.

21.6 The ALRC's proposal for a judge alone to assess damages in an undefended defamation action has a number of practical advantages. In the WALRC's view these clearly outweigh the disadvantage of removing a party's ability to choose assessment by a jury in such a case, particularly when the existing choice is so rarely exercised in practice.

21.7 The WALRC therefore recommends that -

- (a) damages (if any) in an undefended defamation action should be assessed by a judge sitting alone; and
- (b) the role of juries in defended defamation actions should be governed by the existing law of Western Australian without further amendment.⁹

⁹ See paragraph 21.1

CHAPTER 22

CRIMINAL DEFAMATION¹

The law in Western Australia

22.1 Chapter 35 of the *Criminal Code* contains twenty-five sections which deal with criminal defamation. Section 350 provides that it is unlawful to publish defamatory matter unless such publication is protected, or justified or excused by law. The maximum penalty is twelve months imprisonment and a fine of \$600. If the defendant knows the defamatory matter to be false he is liable to imprisonment for two years and a fine of \$1,000.² Some special defences are provided for criminal defamation³ but, generally speaking, there is a substantial similarity between liability for criminal defamation and liability for civil defamation. In other words, liability for criminal defamation is strict. A defendant could be prosecuted for criminal defamation even if he did not know that what he was saying was incorrect and defamatory, and even though he did not intend to cause harm.

22.2 In practice, prosecutions for criminal defamation are rare. In 1977, in Western Australia, a number of persons were tried for and convicted of criminal defamation arising out of a number of allegations made in the form of statutory declarations against certain members of the police. Two were sentenced to twelve and one was sentenced to eighteen months imprisonment. It was explained during the trial that criminal defamation proceedings were instituted because the allegations touched on the good name of the whole police force and could weaken the community's confidence in it.

Possible reforms

22.3 There are good arguments for abolishing criminal defamation. One member of the ALRC recommended such a step because of the fear that a prosecution could be threatened

¹ The WALRC's terms of reference, inherited from the Law Reform Committee of Western Australia, were limited to the law of civil defamation: see paragraph 1 above. However, the WALRC was subsequently instructed by the Attorney General to monitor progress by the ALRC on its defamation project and submit an independent report: see paragraph 4 above. The WALRC regards this as a revised reference incorporating criminal defamation.

² *Criminal Code 1913*, s.360.

³ For example, there is a special defence for the proprietor, publisher or editor of a newspaper if defamatory matter was inserted in the paper without his knowledge and without negligence on his part: *Criminal Code 1913*, s.364.

for political purposes or to stifle opinion on a particular issue.⁴ The New Zealand Committee also recommended abolition of criminal libel for two main reasons. First because it had largely fallen into desuetude.⁵ Secondly, because it considered that it was beyond the proper scope of the criminal law to protect reputation unless a breach of peace were likely to result and this situation was dealt with adequately by separate criminal law provisions.⁶

22.4 On the other hand, a majority of the ALRC took the view that criminal defamation should be retained in a restricted form for use in cases where a civil remedy was inadequate.⁷ The recommendation was that it should be an offence if a person without lawful excuse published defamatory matter knowing the matter to be false or being recklessly indifferent to whether it was true or false and having intent to cause serious harm to a person, whether the person defamed or not.

The WALRC's recommendations

22.5 The WALRC takes the view that the existing law in Western Australia relating to criminal defamation leaves open a real possibility for misuse. It is concerned, for example, that recent successful prosecutions in this State for criminal defamation could seriously inhibit free expression. In its view it is not sufficient that prosecutions are only brought in bad cases. However, the WALRC would not go as far as to recommend the abolition of criminal defamation. Cases could arise where the existence of civil remedies would not provide a sufficient deterrent, particularly if punitive or exemplary damages were abolished as recommended.⁸ In the WALRC's view, notwithstanding the availability of civil remedies, there is a residual area of protection to the general community which should be governed by the criminal law. This would apply, for example, to a defendant who is bankrupt, who knows he has nothing to lose in civil proceedings, and who deliberately and maliciously destroys another person's reputation.

⁴ *Report* (Cwth) at 106, paragraph 204. For example the police in Western Australia would now be in a strong position to cause an individual to think very carefully before making a defamatory allegation against a policeman.

⁵ The *Report* (NZ) does not mention the Western Australian cases referred to in paragraph 22.2 above.

⁶ Namely s.30 of the *Police Offences Act 1927* (NZ) which provides that it is an offence to use any threatening, abusive or insulting words in or within view of any public place or within anyone's hearing.

⁷ For example where the defendant is bankrupt or has no means to meet a verdict: *Report* (Cwth) at 105, paragraph 203.

⁸ See paragraph 19.6 above.

22.6 In the WALRC's view the offence as redefined by the ALRC incorporates the necessary elements of criminal behaviour which were absent from Sir Samuel Griffith's treatment of this subject in the *Criminal Code* - namely knowledge of falsity and intention to cause harm. Consequently, the WALRC recommends the adoption of the ALRC's proposals regarding criminal defamation, namely -

“A person who, without lawful excuse, publishes defamatory matter concerning another living person:⁹

- (a) knowing the matter to be false or being recklessly indifferent to the question whether the matter is true or false; and
- (b) with intent to cause serious harm to a person (whether the person defamed or not) or with knowledge of the probability that the publication of the defamatory matter will cause serious harm to a person (whether the person defamed or not),

is guilty of an indictable offence punishable on conviction by imprisonment for a term not exceeding three years or by a fine of such amount as the court imposes, or both.”

22.7 In addition to the civil defences provided in the proposed defamation legislation,¹⁰ a defendant in Western Australia would also be able to avail himself of the general defences in Chapter V of the *Criminal Code 1913*.¹¹

22.8 The separate question arises whether the proposed criminal defamation provision should be retained in the *Criminal Code*, or whether it should appear as part of the proposed new Defamation Act.

22.9 In principle it is desirable that in a State such as Western Australia, where the criminal law is codified, all matters relating to criminal offences should be dealt with in the *Criminal Code*. However, a person's liability for criminal defamation would depend on definitions and defences appearing in the proposed new uniform law on defamation. From a practical point of view it would therefore be preferable for the topic of criminal defamation to be dealt with as part of the proposed new defamation legislation. Finally, it would be consistent with the objective of a uniform law for the code jurisdictions, which are a minority, to agree that

⁹ It is noted that the offence is confined to a living person. This raises a doubt whether criminal defamation would extend to a case where the subject defamed was a body corporate: see definition of person Draft Bill (Cwth) clause 7(1). In this respect the provisions in the *Criminal Code 1913* also appear to be obscure.

¹⁰ Draft Bill (Cwth) clause 57(1).

¹¹ These provisions apply to all persons charged with any offence against the statute Law of Western Australia: *Criminal Code 1913*, s.36.

criminal defamation form part of the new Defamation Act. The WALRC recommends accordingly.

(Signed) David K. Malcolm
Chairman

Neville H. Crago
Member

Eric Freeman
Member

C .W. Ogilvie
Member

3 October 1979