DANCING IN THE STREETS – THE DEFAMATION TANGO

Australian Bar Association Conference

Dublin, 29 - 2 July 2005

The Hon Justice Michael McHugh AC

High Court of Australia

DANCING IN THE STREETS – THE DEFAMATION TANGO[1]

Australian Bar Association Conference

Dublin, 29 June - 2 July 2005[2]

Rationale underlying defamation law in the 21st century

The title of this paper is taken from remarks made by Professor Alexander Meiklejohn, a prominent American First Amendment scholar. The First Amendment relevantly provides that "Congress shall make no law … abridging the freedom of speech, or of the press." In response to the decision of the United States Supreme Court in *New York Times Co v Sullivan*[3], which strengthened freedom of speech by invoking First Amendment protections to limit libel law, Professor Meiklejohn is reported to have exclaimed that: "It is an occasion for dancing in the streets."[4]

---

1 I am indebted to Lorraine van der Ende, Research Officer in the Library of the High Court of Australia, for her assistance in preparing this paper.

2 This paper has not been updated to deal with subsequent legal changes.

3 *New York Times Co v Sullivan* 376 US 254 (1964).

4 Quoted in Lewis, *Make No Law: The Sullivan Case and the First Amendment*, (1991) at 200.

In delivering the opinion of the Supreme Court in *New York Times Co v Sullivan*, Justice Brennan emphasised that the case was determined[5]:

> "… against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open."

Few doubt the importance of protecting freedom of expression. Freedom of expression is recognised as a fundamental human right in Article 19 of the *International Covenant on Civil and Political Rights*, and in numerous other international agreements[6], domestic constitutions[7]

---

5 *New York Times Co v Sullivan* 376 US 254 (1964) per Brennan J at 270.

6 For example: Art 19, Universal Declaration of Human Rights (1948); Art 9, African Charter of Human and Peoples' Rights (1981); Art 13(1), American Convention on Human Rights (1978); Art 11(1), European Convention on the Protection of Human Rights and Fundamental Freedoms (1953); Principle 1, Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1996); Principle 1, Inter-American Declaration of Principles on Freedom of Expression (2000).

7 For example: Art 19, Constitution of India (1950); Art 10, Federal Constitution of Malaysia (1981); Art 12, Constitution of Mauritius (1968); Art 19, Constitution of Pakistan (1973); s 46, Constitution of the Independent State of Papua New Guinea (1975); Art 16, Constitution of the Republic of South Africa; First Amendment, Constitution of the United States of America.

and judicial decisions[8]. Within Australia, Professor Michael Chesterman describes[9] freedom of speech as:

> "… a 'delicate plant' within Australian law. It is alive as an important value to be protected, and it is growing. But the plant needs to be nurtured. It is not so robust or so strongly established that it could never wither away on account of destructive or unsympathetic treatment."

While freedom of speech is a significant factor in considering the development of defamation law, it is only one part of the 'defamation dance'. The public interest that partners the right to freedom of speech in the 'defamation tango' is the right to protection of reputation. The title of this paper – 'The Defamation Tango' – invokes the constant tension between freedom of speech and the protection of reputation that is inherent within defamation law and the need to strike an appropriate balance between these two conflicting public interests.

International human rights instruments recognise the need to qualify freedom of expression so as to protect reputation. Both Article 12 of the *Universal Declaration of Human Rights* and Article 17 of the *International Covenant on Civil and Political Rights*, for example, provide

---

8 For example: *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (1986) 25 ILM 123 par 30; *Lingens v Austria* (1986) 88 ILR 513 par 41; *Handyside v United Kingdom* (1979) 50 ILR 150 par 49; *Media Rights Agenda et al v Nigeria* (1998), unreported, No. 105/93, 128/94, 130/94, 152/96 (African Commission on Human and Peoples' Rights) par 54.

9 Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*, (2000) at 1.

that no one shall be subjected to "… unlawful attacks on his honour and reputation" and that "everyone has the right to the protection of the law against such interference or attacks."

In the 21st century, both the right to freedom of speech and the right to reputation are legitimate values that should be recognised and protected by law. The law of defamation serves the important social purpose of attempting to find a balance between the two. The law of defamation is complex. But as I noted some years ago, its complex nature is "… the inevitable consequence of attempting to harmonise two irreconcilable concepts – a protection of reputation and freedom of expression."[10]

Balancing Freedom of Expression and Reputation in Australian Defamation Law

I doubt if any rational person would argue that freedom of expression must never be subject to legal restriction whatever the circumstances. No reasonable person would suggest that in war time a person should have the right to communicate sensitive information to the enemy. Nor, to take a famous example of Holmes J, is a person entitled to falsely shout "fire" in a crowded theatre. Once it is accepted that limits of some kind must be placed on freedom of expression, the question becomes: in what circumstances should freedom of expression

---

10 McHugh, "Introduction: What is an Actionable Defamation", contained in Gibson (ed), *Aspects of the Law of Defamation in New South Wales* (1990) at xliii.

give way to the need to protect the reputations of members of the particular society? Obviously, different societies and different eras of the same society will answer that question differently.

The extent to which freedom of expression and reputation are protected by defamation law in Australia differs across jurisdictions. There are at present, broadly, three different regimes in operation. These are, first, the common law states of South Australia, Victoria and Western Australia; second, the Code States of Queensland and Tasmania; and third, New South Wales, the Australian Capital Territory and the Northern Territory which have introduced substantial statutory modifications to the common law.

All of these jurisdictions balance freedom of expression and reputation. They provide a cause of action to individuals whose reputations are damaged by defamatory publications but they also provide a range of defences to a publication in circumstances where the value of the speech concerned is deemed sufficiently significant to outweigh the protection of reputation. But the differences in the law of defamation between jurisdictions in Australia suggest that no one has managed to find a universally acceptable balance that will provide for the protection of reputation without overly burdening freedom of expression.

Jurisdictions outside Australia also show different approaches in striking the balance between the two values. United States jurisprudence gives freedom of expression a far higher value than reputation. This is the result of the First Amendment to the United States Constitution. As a consequence, defamation law in the United States strongly favours the publisher in contrast to other common law

jurisdictions such as the United Kingdom and Australia. On the whole, United Kingdom, Irish and Australian law prefers the protection of reputation to freedom of expression, much to the chagrin of publishers.

Inevitably, the appropriate balance to be struck between free speech and reputation depends upon factors such as the value that society gives to reputation and free expression at a particular time, the subject matter of the expression, its truth, who is the publisher and the recipient of the material, the means used to convey the communication, and many other factual considerations. I suspect the balance is also influenced by the quality and standard of the media. There is no precise formula for determining the correct balance. Furthermore, no eternally perfect balance can be found because a shift in attitudes and social values necessarily influences developments in defamation law.

Accordingly, the "defamation tango" represents the constant interplay between two social values and the need to find an appropriate balance both in theory and practice. The recent discussion paper released by the Standing Committee of Attorneys-General[11] pointed out that:

> "If the balance is tilted too far in favour of protecting personal reputation, the danger is that the dissemination of information and public discourse will be stifled to an unhealthy degree. Conversely, if it is tilted too far in favour of freedom of expression there will be little to constrain people from lying, or exaggerating and distorting facts, and causing irreparable harm to the reputations of individuals."

---

11 SCAG Working Group of State and Territory Officers, *Proposal for Uniform Defamation Law*, (July 2004) at 6.

The Presumption of Falsity

In an action tried under the Anglo-Australian common law, there is a presumption that, if the matter published is defamatory, it is false[12]. No principle of the common law demonstrates more clearly the common law's preference for the protection of reputation over freedom of expression. As I explained in a judgment in the New South Wales Court of Appeal in *Singleton v Ffrench*[13], however, this rule resulted from an error by Lord Ellenborough in *Roberts v Camden*[14]. There, his Lordship said that, if the defendant did not prove the truth of the libel, the law assumes it be false. But a plea of truth in a defamation action is a plea in confession and avoidance; it is not a traverse of the allegation of defamatory matter. The plea of truth confesses that the matter is defamatory of the plaintiff but asserts that it is not actionable. Since 1652, the plaintiff in a defamation action has not had to prove the falsity of the words published to maintain the action[15]. Since that time, the common law courts have treated the allegation in the plaintiff's pleading that the words were published "falsely and maliciously" as surplusage[16].

---

12 *Beevis v Dawson* [1957] 1 QB 195.

13 (1986) 5 NSWLR 425 at 442. See also the criticism of Lord Ellenborough's statement in *Roberts* by Spencer Bower KC in his famous work, *Actionable Defamation*, 2nd ed (1923) at 236.

14 (1807) 9 East 93 at 95; 103 ER 508 at 509.

15 *Anon* (1652) Sty 392; 82 ER 804-805; *Rowe v Roach* (1813) 1 M & S 304; 105 ER 114.

16 *Motel Holdings Ltd v Bulletin Newspaper Co Pty Ltd* [1963] 63 SR (NSW) 208 at 212.

Indeed, the defendant is not permitted to deny those words. A plea that attempts to do so will be struck out as embarrassing[17]. Falsity is not an element that the plaintiff has to prove to make out a cause of action in defamation. Logically, no presumption of falsity can arise from the defendant's failure to plead truth. Lord Ellenbrough erred therefore in *Roberts v Camden* when he said that the failure to plead truth gave rise to a presumption of falsity. Despite the error, the course of authority in common law jurisdictions has long affirmed that there is such a presumption. However, in those jurisdictions where truth alone is not a defence to an action for defamation, the reasoning in *Roberts v Camden* cannot apply. At all events, the New South Wales Court of Appeal has held that there is no presumption in that State that defamatory matter is false[18].

In jurisdictions where the presumption applies, it imposes an onerous burden on a defendant in a defamation action. It reflects a tilting of the defamation law balance towards the protection of reputation. It contrasts dramatically with the presumption in favour of freedom of expression that operates in United States jurisdictions.

Critics of the presumption of falsity point to the potential for self censorship if a publisher fears its ability to prove the truth of a statement. However, as the United States experience has shown, Australian law would not be without social costs if the presumption were removed and a

---

17 *Belt v Lawes* (1882) 51 LJQB 359.

18 (1986) 5 NSWLR 425.

presumption made in favour of freedom of expression. As one critic has pointed out[19], removal of the presumption of falsity:

> "… would be to impose an onerous burden on all plaintiffs and there would be occasions when the falsity of a publication could not be proven. This would leave such plaintiffs with no means of redress at all, and would create the potential for publishers to publish defamatory fictions where they knew that their falsity could not be proved. These possibilities are both unacceptable."

While the presumption of falsity emphasises protection of reputation, a defendant can often avail itself of defences that tilt the balance back toward freedom of expression. The common law defence of truth and the statutory defence of truth and public benefit or truth relating to a matter of public interest are striking examples. In other situations, the value of the expression concerned is sufficiently high to tip the balance in favour of protecting that speech regardless of the truth of the statement or the damage done to individual reputations. These situations give rise to the defences of absolute and qualified privilege, fair comment and fair reports of court proceedings.

Truth as a defence to defamation

In the common law States of Australia, truth alone provides a complete defence to a defamation action. One well-known judicial

---

19 Tobin, "The United States Public Figure Test: Should it be introduced into Australia?", (1994) 17(2) *UNSW Law Journal* 383 at 405.

explanation of the underlying rationale for this defence to the publication of defamatory matter can be found in *Rofe v Smith's Newspapers*[20]:

> "… as the object of civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely bought down to it."

This explanation is flawed. The object of a defamation action is not "to clear the character of the plaintiff". It is to protect the reputation of the plaintiff in the particular sector of that person's social, business, or political life that is the subject of the publication. A plaintiff who is a thief is a person of bad character but is entitled to obtain damages – maybe substantial damages – for the false allegation that he is a paedophile. At common law, a defence pleading that alleged that he had been convicted of theft would be struck out[21]. Not only does it not answer the defamation but the common law will not allow it to be used in mitigation of damages[22]. In *Plato Films Ltd v Speidel*[23], Lord Radcliffe said:

> "I do not believe that 'the character that a man ought to have' or to enjoy had any intelligible meaning. It is not possible for a jury, learning, perhaps long after the event, of this or that discreditable action in a man's life, to remake the current public estimation of him by some ideal piece of

---

20 *Rofe v Smith's Newspapers* (1925) 25 SR(NSW) 4 per Street ACJ at 21-22.

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

22 [1961] AC 1090.

23 [1961] AC 1090 at 1129.

> analysis. The materials themselves could not be available. Moreover, any rule that made it possible for a defendant to put in evidence by way of mitigation some discreditable action of the plaintiff, irrespective of whether it was publicly known or not and so contributed to his reputation, would be a rule so inherently unfair that it ought not to be accepted."

For reasons similar to those to which Lord Radcliffe gave in respect of mitigation of damages, a number of Australian States and Territories long ago modified the defence of truth in a defamation action. For the defence to be invoked in these jurisdictions, a defendant must establish not only the truth of the defamatory statement, but also that the publication related to the "public interest"[24] or was for the "public benefit"[25]. The additional public interest/public benefit requirement is intended to reflect the fact that a statement, while true, can destroy a reputation while conferring little or no public benefit. The typical example here is a reputation being destroyed by the publication of the details of a youthful indiscretion when the individual concerned has otherwise led an entirely blameless life.

Defenders of the public interest or public benefit requirement contend that the public interest is not served and the welfare of society is not improved by destroying or harming reputations unless the destruction or harm benefits the public. Defenders of truth alone as a

---

24 The "public interest" test applies in New South Wales, having been modified from the "public benefit" test in 1974.

25 The "public benefit" test applies in Queensland, Tasmania and the Australian Capital Territory.

defence argue that the only reputations that ought to be protected are those reputations that are well-founded. Which defence achieves the appropriate balance is no doubt a question of personal priorities and preferences. Although I think any fair reading of my judgments[26] indicates a disposition to favour freedom of expression where judicial choice is open, I have never seen any advantage in destroying or harming reputations when to do so does not benefit society. Many senior journalists would agree with this view, although it is probably fair to say that most of them think it is a matter for journalistic ethics rather than law and its supervision better left to Press Councils and their equivalents than to courts.

The New South Wales Law Reform Commission has recognised that the defence of truth alone is generally simpler to apply[27]. As a result, the Commission recommended that truth alone should be a defence for defamation. But it qualified its recommendation by stating that this change in New South Wales defamation law should not occur until a tort of privacy had been introduced through separate legislation[28].

---

26 See eg *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465; *Attorney-General (NSW) v John Fairfax & Sons Ltd and Bacon* (1986) 6 NSWLR 695; *Lange v Australian Broadcasting Commission* (1997) 189 CLR 590; *Mann v O'Neill* (1998) 191 CLR 204; *Roberts v Bass* (2002) 212 CLR 1; *Coleman v Power* (2004) 78 ALJR 1166; 209 ALR 182.

27 New South Wales Law Reform Commission, *Defamation (Discussion Paper 32)* (1993), at [6.10].

28 New South Wales Law Reform Commission, *Defamation (Discussion Paper 32)* (1993), at [6.21].

Those who disagree with the view that truth alone should be a defence to a defamation action think that, if truth is to be a defence to that action, there has to be a tort of privacy. They argue that a defence of truth provides no protection against the publication of private facts about a person when those facts are published primarily for their scandalous nature and sensationalist value. We are all familiar with the scandalous revelation of some indiscretion, real or imagined, concerning celebrities. While questions of privacy are undoubtedly of great importance in an age of ever-increasing media pervasiveness, defamation law is aimed at different ends. The ultimate role of defamation law is to provide a level of protection for a person's reputation. As both the Australian Law Reform Commission[29] and the New South Wales Law Reform Commission[30] have noted, the protection of reputation is an entirely separate interest to the protection of privacy and is more appropriately dealt with through means other than defamation law.

Absolute Privilege

---

29 Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy (Report No 11)* (1979) at p 66.

30 New South Wales Law Reform Commission, *Defamation (Discussion Paper 32)* (1993), at [6.22]-[6.24].

Freedom of expression finds its highest recognition in the defence of absolute privilege. This defence operates in relation to statements such as those made in the course of parliamentary proceedings, judicial or quasi-judicial proceedings, and communications concerning matters of state. This defence applies even if the relevant statement is motivated by malice. Once it is held that a statement is protected by absolute privilege that is essentially the end of the matter and the statement is not an actionable defamation.

Underlying this defence is the idea that it is essential for the functioning of public institutions, such as Parliament and courts, that statements made in the course of their proceedings are protected from defamation actions. It is in the public interest for parliamentary and judicial proceedings to be pursued in an open manner that allows for the vigorous exchange of views and ideas without participants in these settings tempering their actions because of the threat of defamation proceedings being bought against them. The inherent value of expression in these circumstances renders it necessary to prefer the protection of such expression to the protection of reputation through the defence of absolute privilege.

Recent attempts to wind back occasions of absolute privilege in South Australia emphasises the need to keep the delicate nature of the balancing act that informs defamation law and the need to weigh carefully the impact of any reform on the rights to speech and reputation. In response to allegations of sexual abuse being raised in the South

Australian Parliament by the then-Speaker Peter Lewis, the South Australian Government introduced the *Parliamentary Privilege (Special Temporary Abrogation) Bill* (2005). This Bill removed the right of privilege for any Member of Parliament naming public officials in connection with allegations of sexual criminal misconduct. The proposal was ultimately withdrawn on 5th April 2005 after Opposition parties declared that they would not support the proposed legislation.

If the Legislature had adopted the proposal, it would have significantly altered the balance that has been struck within Australia between freedom of expression and protection of reputation. Parliamentary privilege is fundamental to the Westminster system of government. Any attempt to weaken that principle must be viewed with great suspicion.

Qualified Privilege

In addition to those occasions where the common law gives absolute protection to freedom of expression, the common law also recognises that society can benefit if other occasions of social interaction prefer freedom of expression to protection of reputation. Unlike occasions of absolute privilege, however, these occasions give only a qualified preference to freedom of expression. The principal occasion of such qualified preference is one where there exists a reciprocity of interest or duty in giving and receiving information. The preference is lost when the occasion is used for a purpose other than that of protecting the interest or discharging the duty. Hence, such

occasions are called "occasions of qualified privilege". In determining whether the occasion is one of qualified privilege:

> "the Court will regard the alleged libel and will examine by whom it was published, to whom it was published, when, why and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives rise to a social or moral right or duty, and the consideration of questions of public policy …".[31]

Arguably, the most significant constitutional development in Australia over the past fifteen years has been the development of an implied constitutional freedom of communication with respect to government and political affairs. Recognition of this implied freedom has had a profound effect on the law of defamation in its application to publications concerning politics and government. The existence of this constitutional implication was initially established in the 1992 decisions of *Australian Capital Television Pty Ltd v Commonwealth*[32] and *Nationwide News Pty Ltd v Wills*[33]. In *Theophanous v The Herald & Weekly Times Ltd*[34] and *Stephens v West Australian Newspapers Ltd*[35] the High Court applied this freedom to the sphere of defamation law, essentially "constitutionalising" the law of defamation within Australia.

---

31 *James v Baird* [1916] SC (HL) 159 at 163-164 cited by Starke J in *Telegraph Newspapers Co Ltd v Bedford* (1934) 50 CLR 632 at 646-647.

32 (1992) 177 CLR 106.

33 (1992) 177 CLR 1.

34 (1994) 182 CLR 104.

35 (1994) 182 CLR 211.

In *Lange v Australian Broadcasting Corporation*[36] the High Court affirmed the implied constitutional freedom and held that it affected the common law and statutory rules of defamation. The unanimous judgment of the High Court found that, at least by 1992[37]:

> "… the constitutional implication precluded an unqualified application in Australia of the English common law in so far as it continued to provide no defence for the mistaken publication of defamatory matter concerning government and political matters to a wide audience."

However, the Court held that the Constitution itself did not provide a defence to an action for defamation arising out. It held, however, that the Constitution necessarily affected both the common and statutory laws governing defamation. In a well-known passage, the Court said[38]:

> "Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds. The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution."

---

36 (1997) 189 CLR 520.

37 (1997) 189 CLR 520 at 556.

38 (1997) 189 CLR 520 at 566.

As one commentator has said, the overriding feature of the constitutionally extended qualified privilege defence is that it[39]:

> "… recognises the different value of different kinds of speech and the consequent need to alter the balance of the law accordingly. That is, it avails greater protection to speech on matters of public concern because it has greater social value relative to speech on matters of private concern."

The constitutional implication of freedom of communication does not mean however that defamatory material concerning government and politics has unqualified protection. The limits placed on this defence are, again, indicative of the delicate balancing act required to protect both speech and reputation. To begin with, the defence is only available in relation to material concerning government and political matters and is "limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution."[40] A defendant must also meet a standard of "reasonableness". The defendant must have reasonable grounds for believing the material to be true and have taken reasonable steps to verify the material. This standard is designed to encourage accurate reporting techniques and to provide some safeguards to protect reputation by not extending the defence to the malicious publication of accusations known by the publisher to be false.

---

39 Tobin, "The United States Public Figure Test: Should it be introduced into Australia?", (1994) 17(2) *UNSW Law Journal* 382 at 395.

40 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

While the defence of qualified privilege is based on the need to balance the competing demands of freedom of expression and the right to personal reputation, it has a number of weaknesses. The most obvious arises where the publication is made honestly and without malice – and in the case of matters concerning government or politics reasonably – but the matter published proves to be false. The fact that material is false does not, in itself, prevent the defence of qualified privilege from being invoked. The decision to allow a defendant to escape liability for the publication of false material in these circumstances is based upon the assessment that the duty or interest – or in the case of political expression, its inherent value – renders it deserving of particular protection. At the same time, however, it is difficult to see why provision should not be made in these circumstances for a declaration of falsity. Freedom of expression would still be protected because the defence of qualified privilege would prevent legal liability from arising. And allowing reputational damage to be partly ameliorated through a declaration of falsity would provide for a stronger equilibrium between these two competing values.

The adoption of a public figure doctrine

The extension of qualified privilege through the implied constitutional freedom of political communication tilts the balance of defamation law towards the protection of political expression. When the decisions affirming freedom of communication on government and political matters were first delivered, one commentator suggested that they may ultimately lead to something like a public figure test that

applies in the United States being developed in Australia[41]. Indeed, a number of groups have recently suggested that Australian law should develop further in this direction and expressly adopt a public figure doctrine similar to that operating in US jurisdictions[42].

The public figure doctrine in America was established by *New York Times Co v Sullivan*[43]. The United States Supreme Court held that public officials cannot sue for defamatory falsehoods relating to their official conduct unless they can establish that the statements were made with actual malice or with a reckless disregard for the truth or falsity of the statements. This decision "constitutionalized" defamation law in the United States because it was based upon the constitutional protections offered under the First and Fourteenth Amendments. Chief Justice Rehnquist affirmed the constitutional foundation of the public figure defence in *Hustler Magazine v Falwell*[44], saying that:

> "… [a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."

---

41 Blackshield, "Commentary – How free is your expression?", *The Gazette of Law and Journalism*, No. 17, November 1992 at 3.

42 For example: Australian Press Council, *Submission of the Australian Press Council to the NSW Attorney-General on Possible Reforms to NSW Defamation Laws* (2001); Combined Media Defamation Reform Group, *Submission in Response to "Outline of Possible National Defamation Law" Attorney-General's Discussion Paper* (2004); Free Speech Victoria, *Submission on behalf of Free Speech Victoria to the Discussion Paper of the State and Territory Attorneys General* (2004).

43 *New York Times Co v Sullivan* 376 US 254 (1964).

44 *Hustler Magazine v Falwell* 486 US 46 (1988) at 50.

Defenders of and advocates for the public figure doctrine advance a number of justifications to support it. First, they argue that this type of "public" expression has an inherently greater social value than other communications and therefore justifies greater protection. Second, they argue that, by entering the public domain, public officials have accepted a higher level of public scrutiny. Third, they argue that by virtue of their public positions, public officials have a greater opportunity to respond to defamatory statements because they enjoy greater access than private citizens to the communications media than private citizens do.

The public figure doctrine is an example of the adoption within the United States of a different balance in defamation law balance to that which operates in Australia. In the United States, the protection of free expression is strongly preferred to the protection of reputation, a focus that is largely explained by the express guarantee of protection provided by the First Amendment. It should occasion no surprise then that the Supreme Court of the United States would develop a public figure doctrine. There is even less room for surprise when it is remembered that the Court developed the defence to overcome the actions of racist public officials who were using libel actions to obtain damages awards, from sympathetic Southern juries, to freeze criticisms of their racist policies and actions.

However, the public figure doctrine has been criticised strongly both within the United States and by those considering whether the doctrine would be appropriate to adopt within Australia. Within Australia, the majority of law reform and legislative bodies who have considered

this issue have concluded that the public figure doctrine should *not* be adopted in Australia[45]. Professor Chesterman recently observed[46] that:

> "What the [Supreme] Court could not have foreseen was that it might have created the worst of all possible worlds, where the rules designed to free the press from a chilling effect nevertheless do not keep it warm enough, while the reputational interests recognised by other rules remain consistently frustrated. A quarter-century of litigation since *New York Times* has led to the ironic situation where the law of libel protects neither the press nor the individual. Libel has become a lose-lose proposition."

The public figure doctrine has a number of problems. First, defining exactly who is a "public official" or "public figure" is a difficult task which one United States judge has described as being "… much like trying to nail a jellyfish to the wall."[47] Second, focusing on the status of the plaintiff rather than the nature of the expression has little to do with the supposed rationale of the doctrine – "recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." If the aim of the doctrine is to provide a higher level of protection for "public" expression because of the perceived social

---

45 For example: Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy (Report No. 11)* (1979); New South Wales Law Reform Commission, *Defamation (Discussion Paper No. 32)* (1993); SCAG Working Group of State and Territory Officers, *Proposal for Uniform Defamation Laws* (2004); New South Wales Legislative Assembly Committee, *Report of the Legislation Committee on the Defamation Bill* (1992); Attorneys General of NSW, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law* (1990).

46 Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA", (1995) 18(2) *UNSW Law Journal* 300 at 303.

47 *Rosanova v Playboy Enterprises* (SD Ga 1976) 411 F Supp 440 per Lawrence CJ at 443.

value of such expression, basing the test around the status of the plaintiff is not the best way of achieving this aim. Instead, this focus merely gives the impression that certain classes of people are entitled to a lower level of legal protection than other classes have. A possible negative consequence of such discrimination is the creation of a disincentive towards participation in public affairs.

Third, making the plaintiff's remedy dependent on the state of mind of the defendant means that the public figure doctrine largely ignores the question of reputation. As one critic has said, it is therefore "… ill tailored to achieve one important regulatory goal, preventing injury to individuals through falsehoods."[48]

Fourth, in practice, the public figure doctrine has simply not achieved its goal of providing greater protection to "public" expression. In the US, it has not resulted in a reduction in the number of defamation actions involving public affairs or public figures. Indeed, the actual malice requirement has resulted in an increase in both the length and cost of litigation, primarily through increasingly complex pre-trial discovery procedures.

Fifth, giving immunity to the publication of defamatory matter concerning public figures if the plaintiff cannot prove that the publication

---

48 Tobin, "The United States Public Figure Test: Should it be Introduced into Australia?", (1994) 17(2) *UNSW Law Journal* 383 at 394.

was actuated by actual malice creates perverse incentives and encourages poor journalistic standards. One critic has said that this approach essentially means that "… a defendant is able to publish a complete fiction when he is aware that the plaintiff will be unable to prove the falsity of the publication."[49]

These criticisms make an overpowering case for concluding that the public figure doctrine tilts the balance of defamation law too far towards the protection of expression at the expense of reputation. In many respects, the existing Australian approach in this area exhibits a more appropriate balance. The common law defence of qualified privilege, as informed by the implied constitutional freedom of political communication, recognises the need to extend greater protection to "public" expression than to other forms of expression. At the same time, it has characteristics that distinguish it from the US approach and which reflect the need to continue providing a level of protection to reputation even in cases of "public" speech.

First, the Australian doctrine focuses on the status of the speech and not the status of the plaintiff. It is applicable to communications regarding political or governmental affairs and draws no distinction between "public" or "private" persons. By limiting the constitutional

---

49 Shapiro, "Libel Regulatory Analysis", (1986) 74 *California Law Review* 883 at 885, quoted in Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA", (1995) 18 *University of New South Wales Law Journal* 300 at 308.

implication to the discussion of political and government matters, the Australian approach avoids the possibility existing under the American public figure doctrine "that a public figure or official could be required to prove actual malice in relation to a private matter because it is the status of the plaintiff, rather than the status of the speech, that invokes the application of the rule."[50]

Second, the adoption of a standard of "reasonableness", which is not required under the US doctrine, ensures a more appropriate balance between the two values. This promotes responsible media standards and places greater emphasis on the truth or falsity of the defamatory material.

Third, the Australian doctrine places the onus on the defendant to prove the elements of the defence. Under the American public figure doctrine, it rests upon the plaintiff to prove actual malice or a reckless disregard for truth or falsity.

Fair Comment

Defendants commenting honestly on facts that are a matter of public interest are protected by the defence of fair comment.

---

50 Tobin, "The United States Public Figure Test: Should it be Introduced into Australia?", (1994) 17(2) *UNSW Law Journal* 383 at 393.

Unfortunately for defendants, however, that defence fails unless the published facts are truly stated. In Australia, the defence of fair comment is frequently unavailable because the facts that are the basis of the comment are untrue.

This discussion shows that Australian law gives much greater emphasis to the protection of reputation than the United States does even where the subject of a defamatory communication is government or politics. In the United States, freedom of expression is preferred to the protection of reputation. It contrasts with the strong presumption in favour of free speech that applies in America. Which jurisdiction has adopted the right balance between speech and reputation is a subjective question. What is crystal clear, however, is that the values of free speech and reputation are given different priority in the defamation laws of the two countries.

Damages

The usual remedy for an actionable defamation in Australia is damages. These are divided into compensatory damages, aggravated compensatory damages and exemplary damages. The role of damages in defamation is to compensate and console for the damage to reputation, to vindicate that reputation and, in certain circumstances, to punish the defendant and deter others from similar behaviour. In some exceptional cases, a plaintiff may be able to obtain an injunction to prevent further publication of the libel.

The primary focus on compensatory damages and the presumption of damage (except in the case of slander not actionable without proof of special loss) reflect the emphasis that the common law of defamation gives to protecting reputation. However, the limited remedies available to a plaintiff represent one of the obvious shortcomings of defamation law. The provision of other remedies would strike a more appropriate balance between freedom of expression and protection of reputation.

Except in the few cases where injunctions can be obtained, damages are the only remedy available under common law, a fact that automatically precludes defamation actions from fully achieving their aim of restoring a damaged reputation. Research conducted by the Iowa Libel Research Project found that, following the publication of

defamatory material, most plaintiffs' immediate priority was to obtain public vindication of their reputation[51]. It may well be that public vindication of a plaintiff's reputation is the immediate priority. But my impression, after acting for many plaintiffs and defendants in defamation actions, was that it was not the real reason why plaintiffs bring actions for defamation. My strong impression was that, speaking generally, defamation plaintiffs want to hit back at their defamers. They want to punish them for the wrong that they perceive they have suffered. Only an award of damages satisfies the hurt and resentment that the publication has caused. Unless human nature has changed dramatically in the last 400 years, it should occasion no surprise that those defamed want revenge. After all, the Star Chamber and the common law developed the action for defamation as a substitute for the duel.

Few plaintiffs in my experience are satisfied with a simple retraction and fulsome apology. Plaintiffs who accept a bare retraction and apology in settlement of their claims usually do so because they cannot afford, or are unwilling to risk, the cost of a losing action or fear that a public hearing will expose their reputations to further harm.

Nevertheless, in so far as one of the objects of a defamation action is to restore the plaintiff's reputation, an award of damages is

---

51 Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA", (1995) 18(2) *University of New South Wales Law Journal* 300 at 309.

hardly the ideal remedy. An award, obtained a long time after the initial publication – an award which may not itself receive publicity – is unlikely, in practice, to restore a damaged reputation. Providing for alternative remedies, such as a declaration of truth, right of reply or apology, would seem to be more adapted to this purpose.

Defamation Law Reform in Australia

The subjective nature of what is the appropriate balance to be struck between the rights to freedom of expression and reputation inevitably leads to continued calls for defamation law reform. Similarly, the complexity of Australian defamation law, with different balances being struck in different Australian jurisdictions, has led to periodic calls for the development of a uniform defamation law. The calls of publishers – who have a day to day interest in the subject – inevitably require the balance to be skewed in favour of the freedom of expression. They also have the considerable advantage of controlling the means through which much of the discussion takes place. By hypothesis, defamation plaintiffs do not exist until they have been defamed. Accordingly, plaintiffs as such have little – almost no – input into the continuing defamation debate. Nevertheless, the discussion of defamation reform is far from one sided. Practising lawyers who appear for plaintiffs almost invariably oppose calls to reform the law of defamation. Many academic lawyers with an interest in the subject also oppose what they see as unfair attempts to tilt the balance in favour of publishers. But at least until recently, the greatest obstacle to defamation law reform was a significant group of potential plaintiffs – politicians.

The idea of uniform defamation laws across Australia has been on and off the national agenda since 1979. In that year the Australian Law Reform Commission released its report, "Unfair Publications: Defamation and Privacy". The following year the Standing Committee of Attorneys-General formally began discussing this question. A *Uniform Defamation Bill* was introduced before the Senate by then Attorney-General Gareth Evans in 1984; however this proposal was dropped after the States were unable to agree on various elements. Since then there have been continued periodic calls for the introduction of uniform laws. Until recently, real progress on the issue has not been forthcoming.

Current reform proposals

In the last year, however, the Commonwealth Attorney-General, Phillip Ruddock, has placed the issue back on the national agenda. In March 2004, he announced his intention to oversee the introduction of uniform laws. As a result, the Attorney-General's Department released a proposal for reform, entitled "Outline of a Possible National Defamation Law". In doing so, the Attorney-General specifically emphasised that the federal Government would enact Commonwealth legislation if the States had not achieved uniformity by the beginning of 2006. Some have already hailed the idea of uniform defamation laws being a reality in Australia by 2006 as an occasion for "dancing in the streets".

The States responded by releasing their own proposal for uniform defamation laws in July 2004 under the auspices of the Standing Committee of Attorneys-General. The debate about defamation law reform is now clearly back on the national agenda.

The question of uniformity

There are a number of significant differences between the proposals put forward by the Commonwealth Government and the Standing Committee of Attorneys-General. The first point of contention is the very form that uniform defamation laws should take. All appear to agree that the concept of uniform laws is desirable. In an era of instantaneous communications, where both publications and reputations are increasingly national rather than confined by State boundaries, the existence of eight different defamation jurisdictions within one country is an anachronism. The present lack of uniformity creates significant practical difficulties. First, national publishers are potentially liable under different standards across the country. Second, multi-jurisdictional defamation claims are not unknown. Third, plaintiffs can search for the most favourable forum to commence their actions.

Gorton v Australian Broadcasting Commission[52] illustrates the anomalies that can arise through the lack of uniformity. The case concerned a report by journalist, Maximillian Walsh, in the nation-wide television program "This Day Tonight" regarding the then Prime Minister, John Gorton. Justice Fox tried the action in the ACT Supreme Court. His Honour found that the identical material constituted an actionable defamation in two of the three jurisdictions where it was published. As he noted[53]:

---

52 *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181.

53 *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181 at 196.

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

While the advantages of a uniform defamation law are clearly recognised, the State and Territory Ministers announced that they did not support the introduction of a uniform Commonwealth law in the form proposed by the Commonwealth Attorney-General. The pointed out that the Commonwealth lacks the constitutional power to completely "cover the field" of defamation. The Attorney-General acknowledged this possible limitation, and recognised that the federal proposal would be limited to matters within Commonwealth constitutional powers. As such, it would cover defamatory publications crossing State boundaries and those involving corporations but would not apply to some defamatory publications made within State boundaries by individuals against each other. The Commonwealth Attorney-General argued however that the vast majority of proceedings would be within the scope of Commonwealth legislative powers, and the Commonwealth legislation would therefore fulfil the aim of reducing the complexity of defamation law by acting as a code for the majority of defamation proceedings. Moreover, a reference of power from the States under s 51(xxxvii) of the Constitution would remove any such limitations. However, the States have rejected the possibility that they will provide such a reference, claiming that to do so would mean that the[54]:

---

54 SCAG Working Group of State and Territory Officers, *Proposal for Uniform Defamation Law* (July 2004) at 7.

> "Commonwealth would be in a position to determine where the balance should be struck between freedom of expression and the protection of personal reputation."

Given that the proposed Commonwealth legislation could not on its own exhaustively cover the field the State and Territory Ministers claim that any attempt to introduce Commonwealth legislation without a reference of power would act to increase complexity by adding a ninth layer to defamation law in Australia.

The Standing Committee of Attorneys-General has also pointed to the fact that the proposal would see Commonwealth defamation law being applied concurrently by State and federal courts that may have significant procedural differences. The most significant of these is where juries play a role in proceedings. The Commonwealth proposal is that juries would be used in federal courts and in those State and Territory courts where permitted by State and territory legislation. The role of juries would be limited to deciding whether a publication was defamatory and whether there were any applicable defences established. Juries would have no role in the assessment of damages. The laws of each individual State and Territory would however still govern procedural issues such as the size and composition of juries, with there being therefore resulting differences between various States. Whether procedural differences such as this will be significant enough to continue the practice of forum shopping by defamation plaintiffs is an open question that only experience could resolve.

The aim of uniformity is to simplify and improve the existing laws of defamation. Emerging from the process with a "ninth layer" or with a uniform law that is worse than the existing regimes is a result that must

be avoided. Clearly, the best opportunity to ensure both uniform and improved defamation law is for the Federal and State governments to co-operate in pursuit of this common objective.

Publication as the cause of action

There are a number of areas in which the Commonwealth and State Ministers agree on reforms in a number of areas. They accept, for example, that under a uniform defamation law the cause of action should be based upon the defamatory material. This represents a shift away from the position in New South Wales where defamatory imputation constitutes the cause of action. The imputation based approach has been criticised in that it "fosters complex interlocutory skirmishing and distracts from the real issue."[55] Removing the imputation system is designed to reduce the complexity and cost of litigation, a result that, if achieved, would certainly be a positive development.

But the New South Wales approach was not an arbitrary innovation. It was the product of experience in defamation litigation in Sydney, the defamation capital of the world. Making the imputation the cause of action defines the issues with a precision that is generally not possible when the publication is the cause of action. It avoids the delays in jury trials that result from the parties arguing about the true nature of their cases. It avoids arguments as to what words represent the defamatory publication and what is its "sting". It avoids surprise and consequent delays and, often enough, requests for adjournments. Moreover, the High Court has held that, even where the imputation is not the cause of action, a defendant who pleads truth must justify not only the

---

55 Attorney-General's Department, *Revised outline of a possible national defamation law*, July 2004 at 10.

literal meaning of the publication but also every inference and insinuation that fairly flows from it[56]. And that principle is, I think, applicable when the defendant relies on other defences. Some but not all of the problems arising from making the publication the cause of action can be ameliorated by ordering the plaintiff to furnish particulars of meaning. But that simply leads to the same "complex interlocutory skirmishing" that occurs when the imputation is the cause of action.

Limitation Periods

The Commonwealth proposal for a uniform and reduced limitation period, being twelve months from the date of publication, has also received general support from the Standing Committee of Attorneys-General. Reducing the limitation period is designed to advance the protection of expression by providing greater certainty to publishers through reducing the possible threat of litigation lingering for years after publication. The proposal also seeks to address concerns regarding the need to balance certainty and finality with the protection of reputation by allowing a court to extend the limitation period to a maximum of three years if it considered it just and reasonable to do so.

One problem that has not yet been satisfactorily addressed in the current reform proposals is the difficulties that publishers face in maintaining archives for the terms of limitation periods. This problem is becoming increasingly acute with the growing number of online archives

---

56 *Howden v Truth and Sportsman Ltd* (1937) 58 CLR 416 at 424-425.

that are easily accessible to any individual with internet access. As the High Court of Australia recently held in *Dow Jones & Company Inc v Gutnick*[57], defamation in internet cases, as in other cases, occurs when the publication is made. That is when and where the recipient reads the material. Consequently, a new cause of action arises in the context of online material each time the material is downloaded. In relation to online archives, therefore, the imposition of a limitation period becomes effectively meaningless.

Loutchansky v The Times Newspaper[58] illustrates the problem. In *Loutchansky*, the same plaintiff commenced a second action for libel more than a year after the initial publication of the offending articles in *The Times*. This second action was based upon the same articles being available through an online archive. Hence, the problem of applying current limitation periods to archives has the potential to substantially "chill" free expression. The Attorney-General's Department has indeed acknowledged that further consideration needs to be given to this problem, including consideration as to the feasibility of a specific archives defence. At present, resolving this issue does not appear to have made any progress.

The Defence of Truth

---

57 (2002) 210 CLR 575.

58 *Loutchansky v The Times Newspaper* [2002] 1 All ER 652.

Considerable controversy has surrounded the question of the form to be taken by the defence of truth in any uniform legislation. The federal Government has proposed that a defendant would have to satisfy the additional element of "public interest" for the defence of truth to apply. As I have already mentioned, the addition of a "public interest" requirement enhances the protection provided to reputation beyond that provided under the defence of truth alone. The proposed defence departs from the form and substance of the corresponding defences currently operating in New South Wales, Queensland, Tasmania and the Australian Capital Territory. The proposed legislation provides that a matter would be deemed to relate to a subject of public interest unless it involved an unwarranted disclosure of specified private affairs. Categories of "private affairs" would actually be listed in the legislation. This proposal therefore falls somewhere in the middle of the present defences of truth alone and truth with a public interest/public benefit requirement in terms of the balance struck between speech and reputation.

Emphasising the protection of reputation

Two areas that indicate a strong emphasis on reputation within the Commonwealth reform proposals are the proposals to allow corporations to sue for defamation and to allow relatives to commence defamation actions on behalf of the dead. The proposal to allow corporations to sue under uniform defamation legislation is designed to strengthen the overall protection offered to reputations under the defamation regime. Providing enhanced protection for reputation also underlies the proposals to allow relatives to sue for defamation on behalf of the dead and for the survival of defamation actions following the death of the plaintiff. However, all of the reforms proposed by the Commonwealth limit or remove the right to recover damages.

The Standing Committee of Attorneys-General oppose giving corporations the right to sue. The Committee maintains that corporations should be barred from bringing defamation actions. They argue that the reputations of corporations are not comparable with, nor deserving of the same protection as, the reputations of individual persons, that alternative remedies remain available to corporations and that corporations are in a better position that individuals to defend their interests without resorting to defamation claims. There is also concern that allowing corporations to commence actions will disproportionately restrict freedom of expression

through the potential for corporations to use "SLAAP" lawsuits[59] to stifle expression critical of their commercial activities.

Those who think corporations should be able to sue assert that corporations do have reputations deserving of protection under defamation law, particularly in smaller family businesses where there is a strong identification between the reputations of the individuals running the business and the business itself. Indeed, denying reputational protection through defamation law to corporations on the basis that they do not have reputations comparable to individual persons appears at odds with the separate legal personality afforded at law to corporate entities. The fact that some corporations are well-resourced and have deep pockets is as irrelevant to their right to legal protection as is the fact that some individuals are better resourced than others. Alternative actions open to corporations, such as the tort of injurious falsehood, require proof of financial loss. Where defamatory material cases damage to a company, that damage generally manifests itself through people deciding not to conduct business with that company. Proving that this type of financial loss has occurred as a result of a defamatory publication is often extremely difficult to do.

Providing a cause of action to protect the reputation of a deceased person addresses an area identified by various law reform commissions as being a weakness in Australia's current defamation regimes[60]. It is

---

59 "Strategic Lawsuits Against Public Participation".

60 For example: Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy (Report No. 11)* (1979); Law

Footnote continues

clear that a person's reputation can be harmed by publications made after his or her death. Claims that allowing these actions would curtail historical writings or would make it impossible for defendants to defend actions due to the impossibility of cross-examining the defamed person are frequently over-stated. Allowing such actions clearly focuses on the protection of reputation as being the underlying function of defamation law in Australia. Limiting such actions to those commenced within three years of the death of the person concerned, as is proposed, is an attempt to prevent the balance being tilted too far in favour of reputation at the expense of freedom of speech.

Allowing for alternative remedies

The focus on reputation is further reinforced by the proposed reforms to the remedies available in relation to an actionable defamation. The Commonwealth Attorney-General has proposed to allow for a range of remedies designed to lead to the vindication of reputation. Examples of such remedies include the right of reply, apologies and correction orders. The aim is to reduce the current emphasis on damages in defamation proceedings, which is further illustrated by the introduction of a cap on damages awards to a maximum of $250,000.

The primary criticism of these proposals regarding remedies has been the fear that providing for compulsory correction orders will unfairly

---

Reform Commission of Western Australia, *Report on Defamation (Project No. 8)* (1979); Community Law Reform Committee of the Australian Capital Territory, *Defamation (Report No. 10)* (1995).

encroach upon freedom of expression by forcing publishers to publish statements of correction. Some media outlets have proposed that defendants be given the option of paying additional damages instead of publishing such a correction. It is however difficult to see how such orders unfairly impinge on freedom of expression, given that they are designed solely to repair the damage that has been done to a reputation by a defamatory publication. The aim of restoring a damaged reputation will not, in practice, be achieved through providing the publisher with the option of making a further monetary payment instead of being required to actually attempt to correct the wrongful publication that occurred.

At a meeting of the Standing Committee of Attorneys-General ("SCAG") in March this year, the Committee agreed that the Federal Attorney-General and the NSW Attorney-General, Bob Debus, would conduct negotiations to reach a compromise on remaining points of difference between the States and the Commonwealth regarding uniform defamation laws. The Committee hoped that they would be able to produce a report on uniform laws to be sent to the Attorneys-General before the next scheduled meeting in July 2005[61].

According to Michelle Grattan, during the subsequent negotiations the Commonwealth has abandoned its requirements that the defence of truth be qualified by the addition of a "public interest" element and that

---

61 AAP, "Uniform defamation laws closer", 21 March 2005 (accessed at: http://www.news.ninemsn.com.au/article.aspx?id= 3400&print = truee>).

relatives be allowed to commence defamation actions on behalf of the dead[62].

However, differences between the models preferred by the Commonwealth and the States still remain. These include the issues of the right of corporations to sue, jury trials and court ordered corrections. Mr Debus recently presented a compromise proposal to Mr Ruddock, suggesting that companies should be allowed to sue only if they had fewer than ten employees and that publishers should be given the option of printing court ordered corrections or paying damages[63]. An editorial in *The Australian* claims that this compromise brings the States "within a whisker of the Commonwealth's position"[64]. But differences between the federal Attorney-General and the States have not yet been resolved. Mr Ruddock had stated, for example, that a reasonable compromise on the right of companies to sue is to permit them to sue if they obtain a judicial order allowing them to do so[65].

Despite these remaining differences, Mr Ruddock wrote to Mr Debus on May 1, stating that, even if the differences were not resolved, the federal Government "will not stand in the way of enactment

---

62 Grattan, "Nationwide defamation laws closer", *The Age*, 7 March 2005.

63 Merritt, "States offer defamation compromise", *The Australian*, 19 May 2005.

64 Editorial, "Free speech is the main game", *The Australian*, 19 May 2005.

65 Priest, "Discord continues in defamation law", *Australian Financial Review*, 19 May 2005 at 9.

by the [S]tates and [T]erritories of uniform laws by their target date of January 1 2006."[66] The letter warned, however, that, after reviewing the State laws after January 1, the enactment of a Commonwealth law was still a possibility "if, in light of the laws actually enacted, a Commonwealth law would be in the national interest."[67]

---

66 Pelly, "Defamation goes national", *Sydney Morning Herald*, 20 May 2005 at 8.

67 Priest, "Discord continues in defamation law", *Australian Financial Review*, 19 May 2005 at 9.

Draft Bills

As I noted earlier, the federal Attorney-General released an *Outline of Possible national Defamation Law* in March 2004. A revised outline was released in July 2004, taking into account submissions received in response to the intitial proposal.

SCAG also released a proposed framework for uniform defamation laws in July 2004, in the form of a discussion paper. This was followed by a model Defamation Bill which SCAG endorsed at its meeting in November 2004. South Australia is the first State to place these model provisions before Parliament, with the *Defamation Bill* 2005 (SA) being introduced into the House of Assembly on 2 March 2005. The remaining States and Territories are committed to introducing legislation reflecting the model provisions by 1 January 2006[68].

Conclusion

To be effective, the law of defamation must strike an appropriate balance between the protection of free expression and the protection of reputation. Within Australia this balance has, overall, traditionally tilted slightly towards the protection of reputation. The proposal put forward by the Commonwealth Attorney-General for uniform defamation laws, when considered in totality, broadly continues this approach.

---

68 Debus, "Defamation Law Reform", *NSW Legislative Assembly Hansard*, 4 May 2005 at 15581.

Whether a particular individual considers this balance to be appropriate depends upon the relative value that that person places on these two conflicting interests. What is considered to be an appropriate balance may indeed change depending upon the specific circumstances of any particular case. There is no objectively right or wrong answer, and no one answer that will be correct in all circumstances and for all time.

An examination of the proposals for reform in Australia illustrates the fundamental importance however of recognising both partners in the "defamation tango". Developments in defamation law must be informed by the principles of both freedom of expression and protection of reputation. Neither principle should be exclusively protected at the expense of the other. Rather, the aim of any reforms must be to continue to maintain a workable balance between the two.