Education

The DP recognises that there is a need for greater education about Australian law and society and for greater understanding on the part of legal professionals about the diverse cultural values in a multicultural society. It seeks submissions on ways to achieve this. □

You can help

The Commission would like to know what you think about the proposals contained in its Discussion Paper, *Multiculturalism: Family Law*. A copy can be obtained by contacting: The Secretary, Law Reform Commission, GPO Box 3708, SYDNEY, NSW, 2001; Telephone: (02) 231 1733
Fax: (02) 223 1203.

Uniform defamation laws — a claytons reform?

by Evelyn McWilliams

Were libel a racehorse, its breeding would be by fear out of greed. Its sire was that ancient manifestation of fear the English Star Chamber and those potent representatives of anxiety, the English Ecclesiastical Courts of the middle ages. Greed, as we know, is a fertile mare.

Robert Pullan, Free Speech Committee Seminar on Defamation Reform, 19 October 1990

Those hoping for a clear cut pathway through Australia's labyrinthine defamation laws are likely to be only partially satisfied by the attempts of the Attorneys-General of Queensland, New South Wales and Victoria to reach a consensus on reforming their States' laws.

As reported in *Reform*, April 1990, the Queensland Attorney-General, Mr Dean Wells, revived flagging interest in achieving uniform defamation laws by placing it on the agenda for last year's June meeting of the Standing Committee of Commonwealth and States Attorneys General (SCAG). Two Discussion Papers later, the Attorneys have signalled their substantial agreement on the key issues of defamation law reform and targeted points for further discussion.

Topping the list of consensual achievements is justification. All three Attorneys have agreed that the defence of justification should consist of truth alone, except where publication is an invasion of privacy, in which case the publication will only be justified if it is in the public interest. At the moment Queensland and New South Wales laws have a defence of truth and public benefit and truth and public interest, respectively. Victoria has a common law defence of truth alone. Thus, in the interests of uniformity, Victoria has encumbered its truth alone defence with a privacy

element and the defence in Queensland and New South Wales, for all practical purposes, remains unchanged. Contrary to the ALRC's Report on Defamation (ALRC 11), which recommended a separate tort of invasion of privacy, the Attorneys are steadfast in their belief that privacy and reputation are inextricably linked. Exactly what constitutes private matters is still to be considered, but according to the second Discussion Paper, 'there was a general recognition ... of the need for some protection against serious invasion of a person's home life, personal and family relationships, health and private behaviour'. The Attorneys are, however, seriously considering using the ALRC's lesser option which it submitted in its draft uniform bill (ALRC alternative clause 11). This clause reads

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

It is difficult to see how this defence would prevent needless intrusions into privacy. In explaining their proposals the Attorneys cite the 'distress and embarrassment which may be caused by vindictive or sensation-mongering comments and the disclosure of sensitive private facts'. But there is much published material that falls into this category without being defamatory. The voyeuristic excesses of the kind emanating from the so-called 'street of shame' would, under this regimen, proceed largely unchecked.

On the other hand the Attorneys appear to have given considerable weight to extending the defence of qualified privilege. This defence protects a publisher from liability for defamation even if the statement is untrue. At the moment, Queensland, Tasmania and New South Wales are the only States to offer this defence to the media. In its report, the ALRC rejected proposals that such a defence be available throughout Australia, preferring a wider right to report attributed material. It had previously raised the possibility of a defence where a publisher could prove that the material was published on reasonable grounds. The defence would be conditional on the publisher publishing a correction and paying losses. But eventually the ALRC concluded that it was fundamentally wrong for an injured person to be denied compensation because the publisher genuinely believed what it was publishing. This argument presupposes that the purpose in bringing a defamation action is to get some monetary compensation. It ignores the more important function of defamation law in seeking to restore damaged reputation.

Speaking at a Free Speech Committee Seminar in October 1990, Queensland Attorney-General Dean Wells seemed to be specifying a limited role for the defence of qualified privilege under the new regimen.

> Since truth (with limited statutory protection for privacy) will be a sufficient answer to an action for defamation ... In contradistinction to the situation as it now exists qualilified privilege will only be relevant in the context of false ststatements. So the question which we would ask of those who have an interest in the defefence of qualified privilege is as follows: 'what damaging and f false statements do you wishh to allow to be non-defamatory'?

The trouble with this propoositior is that truth is not always aa suffi cient defence in a defanmatior action. Journalists may be uunwill ing to disclose sources, for exam ple, or a vital witness maay b dead. It is also worth remeember ing the key role that the ppresen defamation law played in aattenu ating those voices that, foor ter years had been warning aboout th dangers of deep sleep theraapy a practised at Chelmsford. OOne o the findings of the Chelnmsforc Royal Commission showedd tha the Royal Australian and l New Zealand College of Psychiiatrist (RANZCP) were first notifified ir 1978 about the deep sleep treat ment and that its legal advic warned against taking actiion or the grounds that it would expos members to a defamation actction.

Fortunately, with the sseconc discussion paper, the three Attor neys seem to be persuaded of th importance of media quualifiec privilege. Queensland and l New South Wales already have statu tory qualified privvilege (Queensland Code, s 377(5), (8 and NSW Act s 22) and theese wil be retained and made unniform across the three jurisdictioons. Ir addition, New South Wales is tc investigate the possibilitty o amending section 22 to permi publication of defamatory state ments in certain circumstance even if it is not possible for th statement to be proven true. .

In dismissing the possibilility o a public figure test, the Attorneys cited a study of defamatioon ac tions coming before the Supreme

:ourt of New South Wales by cademics Brendan Edgeworth nd Michael, D. According to this tudy, politicians do significantly /orse, both financially and in /inning the case, than other laintiffs. Apart from media or-anisations they are the biggest ategory of people being sued. In his regard, the Attorneys are in greement with the ALRC, which uled out a public figure test on he grounds that it was impos-ible to specify who would fall nto the category.

The Attorneys are taking court ecommended correction state-nents a step further than the ALRC report envisaged. The Co-mmission's position was that corrections should be an addition-al remedy to damages. The three Attorneys favour a system of court recommended correction statements as an intermediate proceeding. After a writ of defa-mation, any party can apply to a Supreme Court Judge in Chambers for a Court-recom-mended Statement. The advantage of making this available to both parties will ensure that a defend-ant willing to correct an error will not be penalised by a 'fast bucks merchant'. Other favoured op-tions, such as alternative dispute resolution using trained mediators and greater involvement by the Press Council, have their limita-tions. In the case of the former, many defamation lawyers have argued that no matter how amen-able the defendant, some plaintiffs are not interested in dispute reso-lution, all they see is a way to pay off a mortgage. In the case of the latter, many journalists would view an increased role for the Press Council with some disquiet because the Australian Journalists Association is no longer repre-sented on the Council. □

Contempt

In the course of proposing uniform defamation laws the Attorneys-General of Queensland, New South Wales and Victoria have noted increasing incidence of publishers breaching the subjudice rules by publishing prejudicial material. All three are to examine the option of a new tort for action that delays or aborts a trial. In their second Discussion Paper on Defamation the Attorneys cite the ALRC's various discussion papers on contempt as needing further careful consideration.

Queensland and Victoria are looking at the possibility of a tort action, while New South Wales is consider-ing a compensatory sanction for the offence of contempt so that, on conviction, the accused and the Crown can apply to the Court to recover additional costs caused by the contempt.