

# Balancing Reputation Rights and Freedom of Speech in the 21<sup>st</sup> Century

Judith Gibson<sup>1</sup>

31 March 2011

*“Given that defamation law serves so many important functions, one would expect that it has evolved along with our networked society. But, alas, defamation law looks today much as it did in 1964, when the Supreme Court issued its landmark decision in New York Times v Sullivan, or even 1764, when colonial Americans began to tinker with the common law’s English roots. Defamation law remains “perplexed with minute and barren distinctions”, “filled with technicalities and traps for the unwary” and “riddled with anomalies and absurdities.”*

David S Ardia, “Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law”, 2010 Harvard Civil Rights-Civil Liberties Law Review [footnotes omitted], electronic copy available at <http://ssrn.com/abstract=1689865>.

## Introduction

Bill Gates’ 1995 prediction of a “tidal wave”<sup>2</sup> of internet publication has now become a reality. How can courts and legislatures maintain the balance between freedom of speech in a world of instantaneous international publication? Are current legislative provisions able to cope even with traditional print-based defamation actions?

There have been different responses to these new demands on the legislative process in Australia, the United Kingdom, the United States, and European countries such as Iceland. Some of these can briefly be noted:

- In England and Wales, a series of House of Commons reports<sup>3</sup>, Lord Lester’s law reform bill<sup>4</sup> and debate about the adequacy of defences and legal costs rules have dominated discussion over the past year. In March 2011 the Draft

---

<sup>1</sup> Judge, District Court of NSW; Bulletin Author, *Australian Defamation Law & Practice* (LexisNexis). Extracts from my seminar paper have been published in the *Gazette of Law & Journalism* (editor Yvonne Kux) and *Inform*. The paper has been substantially revised to include discussion of the UK Draft Defamation Bill.

<sup>2</sup> Bill Gates’s memo can be found at <http://www.scribd.com/doc/881657/The-Internet-Tidal-Wave>

<sup>3</sup>For a list of reports see the House of Commons website at:

<http://www.publications.parliament.uk/pa/cm/cmcomeds.htm> .

<sup>4</sup> <http://services.parliament.uk/bills/2010-11/defamationhl.html> . See also <http://www.justice.gov.uk/consultations/defamation-internet-consultation-paper.htm> (on the multiple publication rule) and <http://www.justice.gov.uk/publications/libel-working-group-report.htm> from the Ministry of Justice.

Defamation Bill was tabled<sup>5</sup>. Debate over journalistic standards, and the relationship between journalists and their sources, have also been the subject of ongoing debate in the series “phone hacking” allegations<sup>6</sup>.

- In the United States, the success of First Amendment freedom of speech has been hailed as the reason for a significant drop in defamation litigation, although some commentators have suggested the “GFC” (global financial crisis) makes law firms reluctant to embark on risky, high-cost libel litigation. The principal concern has been the need for legislation to combat ‘libel tourism’. Interestingly, there are reports of use of the first amendment by credit agencies in GFC litigation.
- In Australia, where uniform defamation legislation was introduced in 2005, there has been complacency about defamation law reform, although legislation for the protection of journalists’ sources has been put before the Commonwealth parliament<sup>7</sup>. In view of the skyrocketing number of defamation actions, particularly in New South Wales, that complacency may be misplaced.
- In Iceland, following GFC-related litigation, legislation has been introduced which, it is claimed, will make Iceland the home for free speech in the world<sup>8</sup>.

This discussion will look at law reform proposals from an Australian viewpoint, with reference to common problems in defamation for which the draft Defamation Bill in the United Kingdom, or First Amendment rights of the kind available in the United States, may offer a solution.

American-style proposals for reform in Australia, such as constitutional protection or a public figure test, have been discussed (and rejected) by Australian law reform bodies in the past<sup>9</sup>. Are such reforms less, or more, appropriate in the internet age? Defamation law reform commentators are coming to focus on what can be identified as the two main causes of the rise in the number and complexity of defamation actions – the changing nature of publication, especially electronic publication, and the explosive growth of legal costs for defamation actions. Freedom of speech issues are no longer bound by national borders. Issues of legal costs and “libel tourism” have come to play an increasingly important role in defamation law reform discussions in Britain.

---

<sup>5</sup> For the text of the Bill, see <http://www.justice.gov.uk/consultations/draft-defamation-bill.htm>.

<sup>6</sup> A chronology of the phone hacking allegations is set out in the New York Times at <http://www.nytimes.com/interactive/2010/09/01/magazine/05tabloid-timeline.html>. These relate to the allegations of hacking by Glen Mulcaire. Information about the provision of services to *News of the World* journalist Alex Marunchak by Duncan Hanrahan and by Southern Investigations (Jonathan Rees and Sid Fillery) can be found in M Gillard and L Flynn “Untouchables”, London 2005. There is a series of articles in the *Guardian*, notably <http://www.guardian.co.uk/commentisfree/2011/mar/11/phone-hacking-dark-arts-jonathan-rees> and <http://www.nickdavies.net/2011/03/16/jonathan-rees-empire-of-corruption/>. Many of these deal with the circumstances in which Rees and Fillery were the subject of criminal charges arising out of the 1987 murder of Rees’ partner Daniel Morgan (Hanrahan was one of the “supergrass” in this prosecution), which was dropped in March 2011.

<sup>7</sup> [http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/0/D3D4CF2005018097CA2577AE000FB846/\\$file/S782Brs.doc](http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/0/D3D4CF2005018097CA2577AE000FB846/$file/S782Brs.doc).

<sup>8</sup> “It is hard to imagine a better resurrection for a country that has been devastated by financial corruption than to turn facilitating transparency and justice into a business model”:  
<http://immi.is/?l=en&p=vision>.

<sup>9</sup> See for example the Law Reform Commission Report No. 11, “Unfair Publication: Defamation and Privacy”, pp. 247 – 253.

The first issue to determine is whether there is an appropriate balance between freedom of speech and reputation rights in Australia. A simple test of this is to compare the number of defamation hearings in Australia (and their results) with the number of defamation hearings (and their results) in the United Kingdom and the United States. The results are of concern; the number of cases in Australia is far higher, not only proportionately, but numerically, than the United Kingdom and the United States put together. New South Wales Supreme Court was named, in September 2010, as being the reason why Sydney is the defamation capital of the common law world<sup>10</sup>, because it was hearing more defamation cases than the courts of England and Wales combined.

The need for balance in defamation law is not an issue of relevance to litigants alone. The role of freedom of speech in modern society is fundamental to our system of justice. The courts in many Western countries, including Australia, are actively involved in projects to promote the rule of law in developing countries. Developing countries are unlikely to model their legal system on a country like Australia if it continues to be hailed as the defamation capital of the world, or where legal costs are so high as to be matters for public complaint. Similarly, the value of First Amendment protection in the United States is less attractive if the verdicts are 15 times higher than in the United Kingdom<sup>11</sup>. An inappropriate proportion of plaintiff verdicts and high legal costs are, or should be, issues of concern in Australia, just as they are in the United Kingdom and United States.

### **Issues for discussion**

Should Australian law reform studies continue to look at first amendment-style remedies or start again from a new standpoint, taking into account the fundamental changes to publication caused by the internet? I have looked at the following issues:

- 1. Is freedom of speech an international issue, rather than a national issue? Can the chilling effect of freedom of speech in one country have ramifications for other countries?**

---

<sup>10</sup> *Inform*, <http://inform.wordpress.com/2010/09/19/defamation-in-new-south-wales-lots-of-cases-and-more-judges/#comments> ; <http://inform.wordpress.com/2010/10/12/defamation-in-new-south-wales-part-2-the-libel-capital-of-the-world/#more-4760> . *Inform*'s original claim was based on the number of NSW Supreme Court verdicts, then found another 18 District Court defamation judgments. Given the number of American libel cases proceeding to verdict in 2009 and 2010 total 11 cases, New South Wales courts are handing down more defamation verdicts than England and Wales and the United States combined. These statistics do not take into account defamation verdicts or judgments which are not placed on Caselaw websites in the NSW Supreme and District courts, or any interstate judgments, and the total number of Australian judgments would be much higher than *Inform*'s estimates. In fact, this is not the first time that Sydney has been called the "defamation capital of the world". Studies in 1991 and 1992 by Newcity and Edgeworth, and in 2003 by Knox, arrived at the same conclusion; at that time, there was 1 defamation writ for every 128,000 Sydneysiders, compared to 1 for every 200,000 UK residents, and the number of defamation actions in Sydney was the equivalent of 60% of US defamation actions: see Roy Baker, "Third Person Singular?" 17 October 2003, <http://www.law.uts.edu.au/comslaw/pdfs/publications/Third-Person-Singular-Instructing-the-Defamation-Jury.pdf>.

<sup>11</sup> *Inform*, <http://inform.wordpress.com/2010/10/30/revisited-defamation-damages-usa-and-england-compared/#more-5139> . *Inform* points out that while the hurdles for plaintiffs are much higher, so are the verdicts, such as the \$188 million verdict by a New York jury in 2009.

2. **Can concepts such as first amendment freedom of speech be transferred from Western democracies such as the United States to developing countries such as China, or are there better ways to enact reform (“legal culture” and “legal transplant” issues<sup>12</sup>).**
3. **What impact is the internet having on the balance between freedom of speech and reputation? Should internet and electronic publications be subject to the same regimes as traditional print publications?**
4. **How should privacy be protected?**
5. **How are courts coping with the “tidal wave” of defamation litigation? Should Australia have a specialist “freedom of speech” appellate court at Federal level, as is the case in the United States?**
6. **Do high legal costs have just as chilling an effect on freedom of speech as repressive government action or legislation?**

The enactment of the 2005 uniform defamation legislation in Australia has not checked the tidal wave of defamation and privacy litigation (particularly in relation to internet publications) which Newcity and Edgeworth noted in 2003<sup>13</sup>. The same significant increase in libel cases seen in England has been seen here, suggesting that the balance has not been achieved by present legislative reform.

The question is, then, whether constitutional or public figure defences can still offer solutions to the increasing number and cost of defamation actions and the pressure for protection of private information in this modern digital world. If not, why not, and what other reforms might achieve this? I conclude that only reforms which specifically deal with electronic publication on an international scale, and the major changes in social structure (for example, being recognized as a public figure was more difficult to achieve in the 1960s) can succeed.

I have divided my paper into three parts:

- **Past law reform proposals: constitutional guarantees, first amendment rights and the public figure test – are these still the right solutions?**
- **Electronic publication and social change – a proposal of a separate legal regime for blogs and internet publications. Can there be “an eBay of ideas”?**
- **Procedural and structure issues:**

---

<sup>12</sup> The term “legal culture” was introduced in 1975 by Lawrence Friedman, who defined it as understanding the law as a system, a product of social forces and itself a conduit of those same sources. For a review of the social scientific study of law see S S Silbey, “Legal Culture and Legal Consciousness”, accessible at [http://web.mit.edu/anthropology/faculty\\_staff/silbey/pdf/14iebss.pdf](http://web.mit.edu/anthropology/faculty_staff/silbey/pdf/14iebss.pdf). For “legal transplant” see A Watson, “Legal Transplants: An Approach to Comparative Law”, Athens, Georgia, 1993. The International Congress for Comparative Law’s discussion papers on “legal transplant” and “legal culture” issues will be published online under the editorship of Professor Graziadei (Italy) and Dr Jorge Sanchez Cordero (Mexico) in January 2010.

<sup>13</sup> See footnote 10 above.

- **A specialist “freedom of speech” court at Federal level?**
- **Privacy actions – where does privacy fit into the balancing exercise?**
- **Legal costs – I look at the proposal to restrict speculative fee briefs in England, but suggest the problem goes further, and that legislation and the courts must put brakes on legal costs.**
- **A review of law reform proposals for current Australian legislation, analysis (from an Australian point of view) of the Defamation Bill for England and Wales, and some general conclusions.**

## **PART 1 - CAN FIRST AMENDMENT FREEDOM OF SPEECH AND CONSTITUTIONAL DEFENCES STILL KEEP THE BALANCE?**

Australia was a patchwork of State and Territory defamation laws until uniform legislation was enacted in 2005. These reforms were largely modeled on the *Defamation Act* 1974 (NSW), and defences of qualified privilege and comment for media publications show only very limited change.

To place the balance in Australian defamation law in an international context, I note Gillooly<sup>14</sup> puts Amendments 1 – 10 of the United States Constitution (the Bill of Rights) at one end of the scale, while Australia stands at the other end (the United Kingdom, New Zealand and Canada being somewhere in the middle). Gillooly says (and I agree) that the question is how human rights can be protected from what he calls “the tyranny of the majority”.

The first problem, when considering a first amendment defence in relation to publication arising from modern technology, is territorial - defamation laws are limited to individual countries, whereas electronic publication (especially on the internet) is available to be downloaded (and thus published) all over the world. A plaintiff now has a variety of jurisdictions in which to commence the action, and can then seek to enforce these judgments in countries where the defendant’s assets are at risk. This has led to legislation in the United States to overcome the “libel tourism” problem.

The second reason why first amendment defences, if enacted in Australia, would not succeed is the very different court structure. None of the Australian commentators who support this proposal have explained how to take into account the significant advantage the defence enjoys in the United States because of the court structure and appellate review process. Where first amendment constitutional issues are raised, a heightened standard of review is employed, and an independent, de novo procedure of appeal by referral to a federal court, set up under federal constitutional law<sup>15</sup>. This

---

<sup>14</sup> M Gillooly, “The Third Man”, Sydney, 2004, at p. 15.

<sup>15</sup> Professor Brown, “Law of Defamation in Canada” (2<sup>nd</sup> ed.) at 27.1(6) n 196 sets out a list of articles discussing the ramifications of *New York Times v Sullivan* for the law in foreign countries generally. Many US commentators point out that the standard of review is of critical importance in first amendment appeals: L S Grasz, “Critical Facts and Free Speech: the Eighth Circuit clarifies its appellate standard of review for First Amendment free speech cases” (1997 – 8) 31 Creighton L Rev 387.

federal court must ensure that the entire court record is independently reviewed to make sure that the judgment of the lower court “does not constitute a forbidden intrusion into the field of free expression”<sup>16</sup>. This procedural step is in my view an essential prerequisite for specialist judicial consideration of freedom of speech issues.

The next area of difficulty for implementation of the a first amendment defence is that common law countries cannot even agree amongst themselves about the desirability of first amendment rights, which have been rejected by Australia, South Africa and Canada. In Canada, in *Hill v Church of Scientology of Toronto*<sup>17</sup>, the Supreme Court rejected the public figure test on the basis that:

- The “actual malice” test had been severely criticized by American judges and academic writers;
- The number of cases, and the size of awards of damages, had increased rather than decreased;
- The test added a complicated fact-finding process to an already complex trial;
- It lengthened the pre-trial and discovery process, adding to the legal costs and placing impecunious plaintiffs at a serious disadvantage;
- It had not been adopted in countries such as England and Australia; and, most importantly,
- It shifts the focus away from the fact-finding process.

In Canada, the enactment of the *Charter of Rights and Freedoms*<sup>18</sup>, rather than placing it in the vanguard of freedom of speech protection, has “held the law of defamation in this country back”<sup>19</sup>, because the Supreme Court put reputation ahead of freedom of expression: *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130. Even when modernizing the law of comment (*WIC Radio & Mair v Simpson* [2008] 2 SCR 420) and creating a new “public interest responsible communication” defence (*Grant v Torstar Corp* [2009] SCC 61) the court has failed to take the step of importing *Charter* analysis or standards into the common law.<sup>20</sup>

As to the English equivalent ( hereafter referred to as “the *Reynolds* defence”), Eady J has commented that it “seems hardly ever to be used in litigation. It rarely comes before the courts for consideration, despite the fact that last October it passed its tenth anniversary”<sup>21</sup>. In *Lange v Atkinson* [2000] 3 NZLR 385 the Court of Appeal

---

<sup>16</sup> *New York Times v Sullivan*, 376 US 254, 285 (1964) quoting *Edwards v South Carolina*, 372 US 220, 235 (1963). See also *FAIR v DSS*, 11 F. 3d at 1411 where the court states that the application of independent review is a constitutional duty.

<sup>17</sup> *Hill v Church of Scientology of Toronto* [1995] 2 S.C.R. 1130

<sup>18</sup> Part 1 of the *Constitution Act* 1982, Schedule B of the *Canada Act* 1982 (UK), c. 11.

<sup>19</sup> Jamie Cameron, “Does s 2(b) really make a difference?”, CLPE Research paper Series, vol 6 no 6, 2010.

<sup>20</sup> Professor Brown *The Law of Defamation in Canada*, 2<sup>nd</sup> ed., at [27.1].

<sup>21</sup> Mr Justice Eady, <http://www.scribd.com/doc/28195800/Justice-Eady-Speech-City-University-London-March-2010> . The High Court of Australia had the opportunity to consider the applicability of *Reynolds* in an Australian context in *Skalkos v Assaf* [2002] HCA Trans 649 (13 December 2002, per Gaudron, Gummow and Callinan JJ) but declined to do so on the basis of the way the defence had been particularised. The matter complained of was a letter to the Prime Minister from a newspaper proprietor complaining about government departments using an expensive translation service to translate government notices for insertion in foreign language newspapers. Although the High Court left the door open for future consideration of the defence (as Simpson J noted recently in *Megna v*

criticized and declined to follow *Reynoldsv Times Newspapers Ltd* [2001] 2 AC 127, for the reason that the decision had altered “the structure of the law of qualified privilege in a way which adds to the uncertainty and chilling effect almost inevitably present in this area of the law”. (Professor Brown notes the English Court of Appeal admitted this in *Loutchansky v Times Newspapers Ltd (Nos 2 – 5)* [2002] 2 WLR 640 at 653.) In addition, the Court noted the significant differences between the constitutional and political contexts of the two countries, societal differences, the different position of the media and the degree to which the courts had left matters for judicial interpretation (at 399). No such constraints appear to have operated in other areas of New Zealand law, and the case had in fact been sent back to New Zealand by the Privy Council to reconsider the proceedings in light of the *Reynolds* principles (*Lange v Atkinson* [2000] 1 NZLR 257), so I view these perceived differences with some suspicion.

The next area for review is the NSW Court of Appeal’s current interpretation of qualified privilege and malice, which may have contributed to a playing field tipped heavily against defendants, and which does not augur well for a more pro-defendant defence such as a first amendment right. I will illustrate this with a few examples:

- **Narrow interpretation of the qualified privilege defence as a whole:**

The NSW Court of Appeal has taken an increasingly narrow view of the circumstances in which a defence of qualified privilege will be available for a publication, and an increasingly broad view of the nature and test for the malice necessary to defeat the defence: *Moit v Bristow* [2005] NSWCA 322; *Goyan v Motyka* [2008] NSWCA 28 at [73], [77], [86], [88]; *Lindholdt v Hyer* [2008] NSWCA 264 at [91] – [93] and [162]; *Bennette v Cohen* [2009] NSWCA 60 at [21], [25], [60], [145], [151] and [211]; *Fraser v Holmes* (2009) 253 ALR 538; *Cush v Dillon*; *Boland v Dillon* [2010] NSWCA 165<sup>22</sup>. The Court had referred favourably, in these judgments, to the interpretation of the defence in the dissenting judgment of McHugh J in *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366, where McHugh J considered that where a publication was voluntary, it would not be protected unless there was a “pressing need” for publication. In *Pappaconstuntinos v Holmes à Court* [2010] NSWCA 329; [2011] NSWCA 59 the Court of Appeal, having urgently adjourned an appeal in order to determine a challenge to *Bennette v Cohen* concerning so-called “voluntary” publications, held that “pressing need” was not a superadded precondition for qualified privilege if the publication was voluntary. The members of the Court explained some (but not all) of these earlier decisions at [5] – [6], [12], [15] – [18] and [140] by stating that the voluntary nature and timing of the publication were not decisive as to whether that defence was made out, but that voluntariness was nevertheless a relevant matter, and there was no occasion for overruling these previous decisions (at [110] per McColl JA).

---

*Marshall* [2010] NSWSC 686 at [113]), there has been no further consideration of the *Reynolds* defence.

<sup>22</sup> An appeal from this decision is currently before the High Court, and a review of the errors of interpretation of *Bahsford* is set out in the respondent’s written submissions, available on the High Court’s website.

However, this is not the only basis upon which the Court of Appeal's interpretation of the occasion of qualified privilege has narrowed the defence. The defence came close to reaching its vanishing point in *Bennette v Cohen* [2009] HCATrans 291, when the High Court rejected an application for leave, where the complaint before it was that the decision appealed from had interpreted the defence of qualified privilege so strictly that the defence "ceases virtually to exist"<sup>23</sup>. The publication was a speech by a Greens politician at a meeting to raise money for legal costs for an old friend who had been sued by a developer for defamation. The Court of Appeal held ([2009] NSWCA 60) the politician was officiously interfering, and his speech had no bearing on the welfare of society, nor was it in the interest of the recipients. The Court held that the defence of qualified privilege was "confined to strict limits" and that "dissatisfaction" with this "relatively narrow" defence required the statutory amendment of s 30 ([2009] NSWCA 60 at [10]).

Although the appellant's counsel, Mr Clive Evatt, was unable to convince the High Court, I have to agree with his submission that this ruling conflates principles for mass media publications with occasions such as a fundraising rally, and that these principles do not apply if there is a reciprocity of interest. He was similarly unsuccessful in persuading the High Court that the Court of Appeal was wrong in holding that every recipient had to have the same interest, although this puts an impossible burden for a defendant<sup>24</sup>. (There is also the question of the Court of Appeal's findings concerning whether imputations that the plaintiff is a thug and a bully are fact or comment, but the longstanding problems for the defence of comment under the 2005 Act or its NSW predecessor fall outside the parameters of this discussion).

This statement in *Bennette v Cohen* that the defence of qualified privilege must be confined to strict limits, a restriction just as severe as the now-abandoned requirement for "pressing" need where the publication is voluntary, has been followed in *Mundine v Brown (No 6)* [2010] NSWSC 1285 at [32]. No other court has previously described the defence as "narrow" or having "strict limits"; for example, the Privy Council in *Austin v Mirror Newspapers Ltd* [1985] 3 NSWLR 354 at 358 said "interest" should be defined broadly. The High Court made similar observations in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570 – 1. (I note that in *Griffith v Australian Broadcasting Corporation* [2010] NSWCA 257 the NSW Court of Appeal disapproved other portions of *Austin* concerning malice).

Not all judges agree with the Court of Appeal. In *Megna v Marshall* [2010] NSWSC 686 at [155] – [161] Simpson J, "with considerable trepidation" was unable to accept the Court of Appeal's limits on the defence (at [159]); fortunately, her Honour noted (at [160] – [161]) it was possible to distinguish *Bennette* on the facts.

Inconsistencies of interpretation of a defence cause great uncertainty as to where the balance between freedom of speech and reputation protection lies,

---

<sup>23</sup> High Court transcript, <http://www.austlii.edu.au/au/other/HCATrans/2009/291.html>.

<sup>24</sup> See the submissions of Mr Evatt to this effect to the High Court, *ibid*.

because this defence lies at the very heart of freedom of speech. Issues of this kind would be able to be resolved in a manner more conducive to a good balance by an Australia-wide specialist appeals court at Federal level, because courts around Australia must have regard to *Bennette v Cohen*, and it will not always be possible to distinguish it (as Simpson J did) on the facts. This is one of the strengths of the American legal system, because balance is essential for certainty about the parameters for free speech.

\* **Problems with the role of falsity:** The falsity of the publication for which protection is sought has caused problems. In *Megna v Marshall* [2010] NSWSC 686 at [66] the trial judge states the defence of qualified privilege “protects false defamatory communications as well as those that are true”. However, the defence of qualified privilege applies to statements that are not protected by a defence of justification, and even if the person making the statement knows of the falsity, that mere knowledge may not be sufficient (*Roberts v Bass* (2002) 194 ALR 161 at [76]). If the court restricts this to persons with a “legal duty” to provide the information; this disqualifies the media, which owes no legal duties to its listeners, viewers or readers.

Statements by judges that cases where protection is given to persons with duties to pass on information known to be false are “rare and confined” (*Megna* at [66]) may have a chilling effect on publications of a “reportage” kind, where there is a need for people to know information notwithstanding its falsity<sup>25</sup>.

- **Problems with the test for malice:** In *McKenzie v Mergen Holdings Pty Ltd* (1990) 20 NSWLR 42 at 43 Mahoney JA held that courts should be slow to infer malice (a finding repeated by the High Court in *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183), and that evidence to the *Briginshaw* standard (*Briginshaw v Briginshaw* (1938) 60 CLR 336) was required. The NSW Court of Appeal has consistently overlooked *McKenzie* and has not referred to the test in *Briginshaw* when considering malice issues.

A search of the NSW Court of Appeal website reveals only one reference to *McKenzie: Liquor Marketing Group v Sadler* [2000] NSWCA 161 at [24]. However, the passage (at [24]) referring to it is not a statement of law by the Court of Appeal. It is a quotation taken from the trial judge, the late Judge Goldring, who correctly applied *McKenzie v Mergen Holdings Pty Ltd* (wrongly spelled as “Morgan Holdings” in the Court of Appeal’s judgment). (Although *Mergen Holdings* has been cited as authority on other issues, it is always misspelled as “Mervyn Holdings”: [2009] NSWSC 632, [2010] NSWSC 516 and [2010] NSWSC 711). The need for evidence to the *Briginshaw* standard, and what that means, has not been addressed in any of these judgments, but it would be a vital tool in achieving balance, in much the

---

<sup>25</sup> For another example of inconsistent decisions at first instance and appeal concerning falsity, albeit in the context of defamatory meaning, see *Maxwell-Smith v Warren & Anor* [2007] NSWCA 270 at [45] – [46], where a plaintiff led evidence that he was identified as a solicitor who misconducted himself. In fact he was not an employee of the firm at the relevant time. The Court held that as he could not therefore establish identification; cf *Abbott v TCN Channel Nine Pty Ltd* (1987) Aust Torts Reports 80-138; *Hall v Queensland Newspapers Pty Ltd* [2002] 1 Qd R 376.

same way that malice (and absence of malice) plays such an important role in first amendment cases in the United States.

I found one case where Sheller JA specifically noted that courts should be slow to come to a finding of malice (referring to *McKenzie*, but not to *Bellino*) in *Howell v Haines* (NSW Court of Appeal, 15 November 1996, unreported), but the Court went ahead to endorse the finding of malice by the trial judge as open on the evidence without explaining what factors were necessary for malice to be established to this standard. This was the only case I could find on the issue.

One of the strengths of the first amendment defence is the high standard of malice required; a stricter interpretation of the requirement, particularly where the subject matter related to elections, investigations of corruption or other issues of public importance, would go a long way to strengthening the defence.

A further potential area for uncertainty is that the NSW Court of Appeal, in *Griffith v Australian Broadcasting Corporation* [2010] NSWCA 257, has rewritten the law on malice for the statutory defence (for the 1974 Act), and put the onus on the defendant, dismissing statements to the contrary in *Austin* (*supra*), and the many decisions following it, which are now “disapproved”. In something of an understatement, Hodgson JA notes at [110]: “This view has consequences that are not necessarily favourable to defendants” – presumably a warning that the 2005 Act will be interpreted in the same fashion.

- **Timidity concerning freedom of speech issues:** The courts have circumscribed the nature and extent of speech which will be covered by the right of freedom of speech implied in the Constitution, and defendants either raise their arguments faintly or not at all. An example is *Fraser v Holmes* [2009] NSWCA 36, where the matter complained of was an election flyer; there is no reference to freedom of speech, and references to cases on parliamentary elections are discussed in the context of qualified privilege only (at [87] – [92]). The Court of Appeal was critical of the defendant for adopting, without independent checking, a draft letter from another member of parliament. The Court set aside Simpson J’s findings on malice, although her Honour’s careful analysis of the facts and law on this topic were, in my view, hard to find fault with.

Although some of the elements of s 30 *Defamation Act* seem to hint at “public figure” elements, the limitations to earlier and wider interpretations of the right of freedom of speech implied in the Constitution means that this defence comes before the court very rarely.

Australian courts take a very cautious approach to doctrines derived from human rights and freedom of speech charters. The Australian High Court, as well as never taking up the chance to consider the applicability of *Reynolds* (see Simpson J’s comments at [2010] NSWSC 686 at [113]), has rejected doctrines such as the margin of appreciation, derived from provisions of the European Convention of Human Rights (notably articles 7 – 11 and 15) which

allow the court to take into account what is necessary for the good order of society (e.g. *Ireland v United Kingdom* (1978) 2 EHRR 25). In *Roach v Electoral Commissioner* (2007) 239 ALR 1 Gleeson CJ warned that uncritical translation of the concept of proportionality from Canadian or American authorities could lead to “the application in this country of a constitutionally inappropriate standard of judicial review of legislative action” (at [17]). Heydon J, at [181], went further:

“...our law does not permit recourse to [material from international conventions]. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities — that is, denied by 21 of the justices of this court who have considered the matter, and affirmed by only one.”

### **Can the defence of qualified privilege achieve the necessary balance?**

Perhaps unsurprisingly, Professor Brown, while noting the optimistic approach taken by some researchers such as Andrew Kenyon to decisions such as *Reynolds*, recommends that England and Australia discard *Reynolds* and *Lange* and start all over again.<sup>26</sup>

Whether or not we start all over again, this is an opportunity to reconsider the best way to approach publications which are international rather than national, require careful analysis of the balance by a specialist court, and where the possibility of retraction, because of the unique ability of electronic publication to be changed, is a remedy of greater substance than the traditional defamation “apology”. This brings me to my first proposal for achieving balance by other ways of achieving defamation law reform, namely a separate regime for electronic and internet publications.

## **PART 2: LAW REFORM PROPOSALS - SOME NEW IDEAS**

I have set out three areas for discussion of reforms that will not require any amendment to the uniform legislation in Australia, but which are aimed at reducing the number of cases before the courts to take the pressure off the court system and enable a review of some long-term reforms.

The first of these is a greater use of “action before suit” in internet publications such as blogs or other electronic entries which are capable of alteration or removal and, therefore, remedies that are restorative and speedy, rather than financially compensatory and, given the choked court system, slow.

### **Separate remedies for blog and “non-media” internet publications?**

There is a long history of law reform proposals for a right of retraction or some other alternative to damages as a remedy<sup>27</sup>, but prior to electronic communication (where text can be deleted or changed and then transmitted to the recipients) this was not very

---

<sup>26</sup> *The Law of Defamation in Canada* [27-58] footnote 155.

<sup>27</sup> See, for example, J G Fleming, “Retraction and Reply; Alternative Remedies For Defamation” (1987) 12 *University of British Columbia Law Review* 15 at 17-18.

practical. The prospect of going to court to obtain a jury verdict known only to the parties unless a passing journalist wrote about it, or a written judgment which very few people were likely to sit down to read, must have been a daunting one; we take for granted the availability of judgments on case law websites such as the New South Wales Government's Lawlink site, but such facilities have only been available (in relation to my court, at least) on a very recent basis. Prior to computer-generated publication, a person who was defamed in a book or newspaper had to ask for remedies on the basis that the permanent nature of publication meant that the words could not be retracted. This has changed with electronic publication.

Defamation legislation should, in my view, be amended to exclude an automatic right of suit for blogs and other publications by non-media defendants which exist solely in electronic form on the internet either as a pre-action suit requirement, or (if pre-suit applications turn out to be a success) entirely. Complaints about allegedly defamatory publications should first go through a complaints procedure set up by internet service providers, perhaps as part of the Global Network Initiative. Internet service providers are corporations which can well afford the cost of setting up self-regulation systems of this nature. Furthermore, as is set out below, they may have no option other than to do so, as there is an increasing tendency to join the internet service provider as a defendant in proceedings.

### **The impact of electronic publication on defamation law**

The principal reason for reform is the increase in defamation litigation for internet publications<sup>28</sup>. The "tidal wave" of defamation cases on the internet<sup>29</sup> is matched by "tidal waves" in other areas of electronic communication e.g. child pornography (*R v Sharpe* [2001] 1 SCR 45 at [166]; see also "Sentencing Offenders convicted of child pornography and child abuse material offences", JCR Monograph 34, September 2010, p. 5). Bloggers are not only being sued for damages, but also being charged with criminal offences.<sup>30</sup> The question of adequate legislation for blogging and

---

<sup>28</sup> Defamation cases have been brought for emails (*Ryan v Premechandran* [2009] NSWSC 1186; *Simeone v Walker* [2009] SASC 201), websites (*Restifa v Pallotta* [2009] NSWSC 958; *Young v The Neil Jenman Group Pty Ltd* [2010] FCA 318), ISPs (*Trkjula v Yahoo! Inc* [2010] VSC 215; *Trjkula v Google Inc* [2010] VSC 226) and more recently Twitter (<http://www.thesun.co.uk/sol/homepage/news/3463538/First-UK-Twitter-libel-case-sees-former-mayor-lose-53000.html>). Action has been commenced against the *Sydney Morning Herald* for republishing documents obtained through Wikileaks. Where defamation actions against newspapers are brought, the action generally includes an internet claim as well. The definition of "matter" under the uniform Code includes electronic communication.

<sup>29</sup> Bill Gates famously wrote about "The Internet Tidal Wave" in a 1995 memo: <http://www.scribd.com/doc/881657/The-Internet-Tidal-Wave>. It has now come to be called the 21<sup>st</sup> Century Tidal Wave, although it has been suggested that "perhaps tsunami is better": <http://www.bpwrap.com/2005/11/the-internet-tidal-wave/>. The ABA Journal for March 2001 first used the term "tidal wave" to describe defamation actions for internet publications in "Libel online: Suit raises protection for anonymous Web comments". The anonymous blog complained about judicial appointments in Pennsylvania. For more comments about the tidal wave of libel on the internet, see <http://www.theglobeandmail.com/news/national/court-to-rule-on-tidal-wave-brof-press-freedom-cases/article1147878/>; The "tidal wave" of arguably defamatory material on the net is discussed at <http://chicagopersonalinjurylegalblog.com/2010/01/dont-tweet-your-way-to-a-defamation-lawsuit.html>; <http://www.internetonlinereputationmanagement.com/>;

<sup>30</sup> There are several websites keeping records of litigation against bloggers e.g. [http://mlrcblogsuits.blogspot.com/2009\\_11\\_22\\_archive.html](http://mlrcblogsuits.blogspot.com/2009_11_22_archive.html). Several recent cases are discussed in "The fall of libel and the rise of privacy" (GLJ, 12 November 2010).

internet use is not limited to defamation law, but as this is a discussion on defamation law reform I shall simply note that the issue of liability for internet blogs is part of a much larger problem.

The first problem is that those cases coming before the courts have not yet required judicial interpretation of many of the new issues of fact and law arising from internet publication. In *Metropolitan International Schools v Designtecnica* [2010] 3 All E R 584 at [35] Eady J commented that it was “surprising how little authority there is within this jurisdiction applying the common law of publication or its modern statutory refinements to internet communications”, and the same is the case in Australia<sup>31</sup>.

In Australia there are broadly based defences and immunities which limit the exposure of liability of internet service providers (ISP) and internet content hosts (ICH), notably the *Broadcasting Services Act* 1992 (Cth) schedule 5 cl 91, which prevails over any State legislative or common law liability for hosting content of which the ISP or ICH was unaware. Problem areas include what “unaware” means, the exclusion of electronic communications such as emails and the very broad common law definition of “publication” which has not changed since *Duke of Brunswick v Hamer* (1849) 14 QB 185. Courts initially saw the internet as something permanent, and the damage to reputation as indelible as in print publications. However, not only is electronic text capable of change, but the sheer bulk of it, and the constant addition of new material, has led to fundamental changes in readership patterns. The ordinary reasonable reader of the internet today would be a more cynical, and better informed, person than the man on the Clapham omnibus, and the time has come for remedies which take this into account.

### **Alternative remedies for electronic publications – corrections or withdrawals of allegedly defamatory material**

Since any legislation for pre-action requests for correction or to exclude such publications from claims under the uniform legislation would be a far-reaching change and require implementation on an international scale, I shall start by setting out what others have had to say about proposals for alternative remedies for internet publications:

#### **(a) Mr Justice Eady: the need for international comity concerning the applicable law for international publications**

Mr Justice Eady, who oversaw the defamation list in the High Court until September 2010, identified the need for international agreement about the applicable law for internet publications:

“The recent communications revolution is comparable to the invention of printing, just on a vaster scale numerically and geographically. The conflict is not between princes and people, as it was in the 16<sup>th</sup> and 17<sup>th</sup> centuries, but between individual communicators and a multiplicity of laws...

---

<sup>31</sup> D Rolph, “Publication, innocent dissemination and the internet after *Dow Jones & Co Inc v Gutnick*” (2010) 33 University of NSW Law Journal 562 at 580.

What is plainly required is an international agreement to govern communications on the web and, in particular, to determine whether they are to be regulated by an agreed set of supra-national regulations or, if not, to provide a generally acceptable means of deciding which domestic law should apply to any offending publication. ... I would characterize this as essentially an international problem deriving from technical advances. It is obviously not a specifically English or UK issue.”<sup>32</sup>

### **(b) Mr Hugh Tomlinson QC: the need for appropriate remedies as well as protection of bloggers**

If agreement of the kind described by Mr Justice Eady could be reached concerning the applicable law, why not also agreement about applicable remedies? The possibility of a special defence for bloggers was considered by Hugh Tomlinson QC made this very perceptive comment at the 4 November 2010 conference in England on defamation law reform<sup>33</sup>:

“The second possible area for the development of a new defence relates to bloggers and others who produce material on the internet, often with fairly limited readerships, but who face the possibility of ruinously expensive libel actions. As far as I am aware, there has been very little research in this area and it is difficult to know how serious a practical problem there is. Nevertheless, there are obvious anomalies about treating non-commercial bloggers and large media corporations in the same way for the purposes of a “public interest defence”<sup>34</sup>.

There are a number of possible ways of dealing with this issue. One possibility would be to develop a “Code of Practice” for bloggers defining the standards of “responsible blogging” – which could be referred as a part of any “responsible publication” defence. The approach would be very different to that which applies to the mainstream media and might involve speedy take down of dispute material. Another possibility might be to limit the available remedies (and costs) in claims against bloggers if the material was taken down within a reasonable time of notice being given that it was defamatory. On the one hand, responsible bloggers should be protected against abusive legal action whilst, on the other, the law should not provide a “defamers charter”. This seems to me an important area in which research and creative thinking is needed.”

### **(c) The Australian Press Council’s 2007 submission to the Minister for Telecommunication 23 April 2007**

The APC suggested, albeit in two paragraphs, that a voluntary code of conduct for bloggers could be considered<sup>35</sup>.

### **(d) Current developments in the United States**

The *Gazette of Law and Journalism*<sup>36</sup> published an article by Michael Cameron (“The fall of libel and the rise of privacy”) which notes one of the reasons for the decline of defamation suits as being that:

---

<sup>32</sup> Mr Justice Eady, <http://www.scribd.com/doc/28195800/Justice-Eady-Speech-City-University-London-March-2010>, at p. 7.

<sup>33</sup> <http://inform.wordpress.com/2010/11/05/reframing-libel-a-practitioners-perspective-part-1-hugh-tomlinson-qc/> .

<sup>34</sup> <http://inform.wordpress.com/2010/11/05/reframing-libel-a-practitioners-perspective-part-1-hugh-tomlinson-qc/> (5 November 2010).

<sup>35</sup> [http://www.presscouncil.org.au/pcsitesite/fop/fop\\_subs/bsa\\_defam.html](http://www.presscouncil.org.au/pcsitesite/fop/fop_subs/bsa_defam.html)

“...complainants had more options available to them in the digital age. Internet publication provides media companies with the ability to quickly redress and erroneous slight on someone’s character, at little cost or inconvenience. Media entities are using a variety of web-based mechanisms to assuage the potential claimant. The *Times*, for example, will attach an “Editor’s Note” to the web version of an article to allow the subject of the article a form of redress. The Editor’s Note is a curious hybrid – neither a correction nor an apology but an opportunity for the aggrieved to record their version of the facts.”

The article reports views from a conference in the United States where the attendees noted there was a whole new industry of reputation-restoration firms such as the UK-based Kwikchex. However, suits are still being brought, in the United States as well as the United Kingdom, such as proceedings brought against Kim Kardashian for her Twitter comment that a particular diet was “unhealthy” and against Courtney Love for statements on Twitter that a dress designer was a “asswipe nasty lying hosebag thief”<sup>37</sup>.

### **The increasing tendency to join ISPs in defamation proceedings**

Other reasons for proposing an eBay-style self-regulation by the internet by setting up a forum or complaints procedure to process defamation complaints extra-curially, as either a precursor or an alternative to defamation proceedings, are:

- (a) Requests of this kind are already being made to servers to remove defamatory material. Bloggers or websites which receive a letter demanding the removal of material from the website (at the risk of being sued for failure to comply) may err on the side of caution to take down the offending material<sup>38</sup> for fear of the substantial legal costs of defamation proceedings. This is not a good way to balance freedom of speech with protection of reputation.
- (b) Proceedings are in fact being brought against ISPs in Australia for search results (*Trjkula v Google Inc LLC & Anor* [2010] VSC 226), and the question of how quickly an ISP should act, and what inquiries should be made beforehand, are issues of some complexity for the courts. Self-help remedies such as counterspeech and online retractions are cost-effective and, by reason of the internet’s accessibility, a more effective remedy. Courts in the United States have encouraged these self-help remedies. In *Mathis v Canon* 573 SE 2d 376 (Ga 2002) the plaintiff sued for allegedly libelous postings on a bulletin board. As the law in Georgia included a provision that a request for an apology was relevant to damages, the court looked at the availability of retractions on the internet. The court noted that a retraction in cyberspace would be likely to reach the same audience that had read the libelous statements. The court denied the application for punitive damages, saying that the court hoped to encourage plaintiffs to seek self-help, their first remedy, by “using available opportunities to contradict the lie or correct the error and

---

<sup>36</sup> Gazette of Law & Journalism, 12 November 2010. This insightful article by Michael Cameron has since been published in *Inform*: <http://inform.wordpress.com/2011/03/01/the-fall-of-libel-and-the-rise-of-privacy-michael-cameron/>.

<sup>37</sup> Ms Love settled the case for \$430,000: <http://au.ibtimes.com/articles/118734/20110304/courtney-love-says-sorry-to-twitter-defamation-case-at-pricey-430-000.htm>.

<sup>38</sup> Jennifer M Liebman, “Defamed by a blogger: legal protections, self-regulation and other failures”, (2006) *Journal of Law, Technology and Policy* 101 at Part V. D and p. 130.

thereby to minimize its adverse impact on reputation”<sup>39</sup>. The purpose of encouraging this self-help remedy, hoped to “strike a balance in favour of ‘uninhibited, robust and wide-open’ debate in an age of communications where ‘anyone, anywhere in the worlds, with access to the internet’ can address a worldwide audience in cyberspace.”<sup>40</sup>

- (c) The test for an interlocutory injunction in defamation is difficult to satisfy. In defamation litigation in Australia plaintiffs are making requests for removal of the material to the courts, rather than to the servers, and unless there are interim orders, these requests (the jurisdictional basis for which is doubtful in some courts, such as the District Court of NSW) are not going to be put to the court until the hearing, which is really too late.
- (d) There is anecdotal evidence that part of the significant growth of defamation actions in England and Australia comes from internet-related actions.<sup>41</sup> There are now companies calling themselves “on-line reputation-management companies” such as Kwickchex, which trawls the internet looking for unflattering reviews of any of its 800+ hotel and restaurant clients. The managing director told *the Telegraph* that the firm threatens legal action to persons who do not either substantiate or withdraw their comments, and that if the website did not remove them, “the website will be presumed to have taken full responsibility for the continued publication of the posts.”<sup>42</sup> Other internet reputation protectors include “Reputation Defender” (<http://www.reputationdefender.com/>), Web Protection Management (<http://www.onlinerepmanagement.com.au/>) and Online Name Reputation Defense and Management ([http://searchengineoptimization-usa.com/defendonlinenamereputation/defend\\_online\\_name\\_reputation\\_seo.htm](http://searchengineoptimization-usa.com/defendonlinenamereputation/defend_online_name_reputation_seo.htm)). There are many more.

In other words, the problem is already with us – there has been a rise in internet cases that will continue, and ISPs who are identified by these reputation protector services may risk being joined as parties.

There is limited protection offered to ISPs by statute, and by the defence of innocent dissemination. The best escape for ISPs is to avoid a finding of publication in the first place. In *Metropolitan International Schools Ltd v Designtecnica Corporation* [2009] EWHC 1765 (QB) Eady J held that Google was not liable because it had no control over the search terms entered, and the results were produced without human intervention (meaning it was not a publisher in the first place), but how will the courts be able to draw a distinction between “publication” and “mere passive facilitation” where a request is made to the ISP to modify its searches?<sup>43</sup> The conviction of Google

---

<sup>39</sup> *Mathis*, quoting *Gertz v Robert Welch, Inc* 418 US 323, 344 (1974).

<sup>40</sup> *Mathis*, quoting *Reno v ACLU*, 521 US 844, 851 – 3 (1997) and *New York Times Co v Sullivan* 376 US 254, 279 (1964).

<sup>41</sup> See for example “Defamation cases multiply from Facebook, Twitter”, *The Sunday Mail (Qld)*, September 19, 2010, noting claims from a Sydney suburban solicitor that his firm was handling “over 20 cases”, while Queensland lawyers were saying their caseload had “doubled in the past few years”.

<sup>42</sup> “Fraudulent contributors to TripAdvisor, and other user-generated review sites, are to be named and shamed, reports Charles Starmer-Smith”, *the Telegraph*, September 2010.

<sup>43</sup> For a recent review of the law of innocent dissemination and the internet, see D Rolph, “Publication, dissemination and the internet since *Dow Jones v Gutnick*”, *loc. cit.*

in France for a search engine which identified a person as a rapist is a reminder of the difficulties of applying the existing law as opposed to finding new ways to deal with new definitions of publication and production of material.

The real question would be what would occur if the matter could not be resolved by a pre-action suit, or if actual damage resulted. One solution would be a limited right of action similar in its elements to a claim for malicious falsehood (i.e. claims for special but not general damages, and with requirements to establish malice), which would be a more appropriate vehicle than an action for defamation with the presumption of injury to reputation.

Discussion in this paper is limited to publications appearing only on the internet and only by non-media publishers. However, if such a scheme could work, in the long term similar remedies could be trialled in relation to media publications involving publication in the print media as well as on the internet. Any such project would be a significant and long-term plan, and it would be unwise even to attempt it until the adaptability of the internet to self-regulation for non-media publications had been tested.

Could self-regulation or a complaints process for internet-only publications by non-media publishers work? How is the internet regulating itself, if at all? To consider whether such a scheme is practical, it is necessary to look at the history of internet self-regulation, as well as attempts to regulate it by legislation.

### **A history of regulation of the internet**

The internet has passed through a series of different regulatory structures. In his helpful article “Four Phases of Internet Regulation”<sup>44</sup> John Palfrey explains that internet regulation has gone through four phases:

- the “open internet” period (up to 2000) when there was little control<sup>45</sup>;
- the “access denied” period up to about 2005 when countries such as China and Saudi Arabia erected filters or other means to block access to certain information;
- the “access controlled” period, where countries have emphasized regulatory approaches which are layered on top of filters and blocks in a more subtle fashion; and
- the period we are now entering, which John Palfrey calls “access contested”. Regulation of internet content in an “access contested” atmosphere could, in my view, include the provision of complaints mechanisms and remedies which would permit a complaints process aimed at the correction or removal of material from the internet.

The nature of internet publications is functionally entirely different to other forms of human communication; it can easily be changed, modified or blocked, it is

---

<sup>44</sup> J Palfrey, “Four Phases of Internet Regulation”, The Berkman Center for Internet & Society Research Publication Series: <http://cyber.law.harvard.edu/publications> (August 11, 2010).

<sup>45</sup> See, however, Malitz, T. “US Act sets off a “Tidal Wave” of Net Censorship” (1996) 118 Com Update 27.

internationally accessible and it is often accompanied by contributions or comments from many persons. Most of all, it is a source of publication on such a vast scale that it dwarfs all other publications, and its centrality to everyday life and ability to transmit and respond to information is unmatched by any other means of publishing.

One of the great successes for the internet has been that of the success of eBay. Goldsmith & Wu<sup>46</sup> note how eBay coped with English libel laws by establishing special procedures:

“In 1999, eBay opened its first overseas auction site, in the United Kingdom, and by the end of 2002, had established auction sites across Europe and Asia. As might be expected, different laws in different nations created new legal and business challenges. In the UK, for example, defamation laws are strict. When users received negative feedback, they often threatened to sue both eBay and the person who left the feedback, and so eBay had to create a process for handling defamation complaints.”

South Korea, where 97% of all households had broadband in 2008, was quick to introduce requirements for registration of online users and control of internet input<sup>47</sup>. Regulation of this kind is inevitable in some countries, and it is in the interest of the service providers as well as users for such a procedure to be uniform, if only to prevent overzealous supervision by governments with a repressive bent. In response to conflicts with governments in some countries (for example, the circumstances in which Google ceased operation in China) internet companies such as Google, Microsoft and Yahoo! have set up, with the assistance of academics and human rights groups, the Global Network Initiative<sup>48</sup>. These companies are filtering content about certain matters in certain parts of the world<sup>49</sup>. In addition, countries, including Australia, seriously considered State-mandated filtering, although these plans were dropped after widespread opposition<sup>50</sup>.

The question is not, therefore, whether the internet can be regulated, but how it can be regulated, and whether that could include a regulatory process to enable aggrieved persons to seek corrections or the removal of defamatory or private material. Appropriate regulation would redefine publication and restrict damages awards for defamation to traditional non-electronic publications, so that internet, facebook and twitter sites have to use complaint “gripe sites” in a complaints process

In 2002 the UK Internet Service Providers Association (ISPA) complained that responding to defamation complaints about online content cost between £50 - 100.<sup>51</sup> That gives some idea of the cost to ISPs, which is a lot cheaper than going to court in an increasing number of actions.

---

<sup>46</sup> “Who controls the internet? Illusions of a borderless world”, *loc. cit.*, at p. 143. The authors go on to note (at 147 – 8) that despite the chilling effect of decisions such as *Dow Jones v Gutnick*, conflicts of law issues have not had the devastating effect on the internet that has been predicted, and publishing and commerce have continued to flourish despite “parochial” national laws to which internet activity is subject. See also the policies developed for the removal of matter from YouTube.

<sup>47</sup> <http://www.guardian.co.uk/technology/2008/oct/09/news.internet> (8 October 2008). By comparison, in 2008, 35% of English households did not have any internet access.

<sup>48</sup> Palfrey, *loc. cit.*, at p 16.

<sup>49</sup> Palfrey, *ibid*, at 16 cites Noman 2010.

<sup>50</sup> Palfrey, *ibid*, at 17.

<sup>51</sup> 2002 Law Reform Commission Report.

It is not possible, in this short overview, to do more than generally outline the history of changing views about internet regulation, and to note some of the proposed statutory regulations currently under consideration, such as the Web Censorship Bill passed by the US Senate Committee on 18 November 2010.

The NSW Auditor-General recently complained the government was not doing enough to protect privacy<sup>52</sup>, which tends to suggest that there is bureaucratic support for more control.

### **Can self-regulation or a complaints process outside, or prior to, court proceedings work effectively?**

People tend to assume that regulation is an activity of governments, and to overlook the trend towards self-regulation of business and commercial enterprises.<sup>53</sup> If eBay can self-regulate disputes arising from the millions of purchases made by eBay customers through using informal procedures, why not an eBay of ideas? ISPs already play an important role in assisting law enforcement concerning cybercrime and breach of copyright; setting up a code of ethics for bloggers and a procedure for retractions is a more attractive option to libel suits, especially if ISPs run the risk of being joined if they do not take the material off the web.

A person who used the dispute resolution process could commence proceedings to dispute a finding of refusal to remove, or claim special damages but not otherwise. Court proceedings commenced after such a procedure should provide more appropriate, and different, remedies, including court-ordered removal of the publication from the internet, rather than claims for general damages. Defamation legislation does not provide for the publication of retractions or withdrawal from the internet in express terms.

The attraction for ISP and blog site service providers is that they could then enjoy immunity from suit, rather than the current risky situation of having to respond to lawyers' letters demanding that items be removed from the internet or the server will be joined as a defendant.

In terms of implementation, it would be open to the Commonwealth Government to use the telecommunications or corporations power in the Constitution to draft an Australia-wide internet law, where any defamation actions which survive (e.g. claims for special damages, refusal to withdraw) could be brought in the Federal courts (either at magistrate level, or in the Federal Court).

Another attraction of this alternative to litigation, however, is that it is a procedure which, if adopted in countries like Australia, is a less expensive way of resolving disputes for countries where regulation of freedom of public expression is a significant issue. This brings me to the issue of the need to control internet misuse.

---

<sup>52</sup> *Sydney Morning Herald* 22 October 2010.

<sup>53</sup> Joseph A Cannataci and Jeanne Pia Mifsud Bonnici, "Can self-regulation satisfy the transnational requisite of successful internet regulation?", 17<sup>th</sup> BILETA Annual Conference, April 5 – 6, 2002, Amsterdam.

## Internet self-regulation and the “human flesh search engine” 人肉搜索 (rénròu sōusuǒ)<sup>54</sup>

Independent of the need to regulate defamation is the need for internet service providers to regulate the internet to prevent not only criminal conduct but misuse for purposes such as targeted attacks on individuals by the electronic community. Twitter, Flickr and other new services create a new form of communication which has been called “crowdsourcing”, “flash mobs”<sup>55</sup> or “human flesh search engine”, which is used to describe the increasingly frequent phenomenon of online crowds gathering via China’s bulletin board systems, chat rooms, and instant messaging to collaborate on a common task. The human flesh search engine shares many of the same characteristics of networked social collaboration and has a variety of purposes ranging from social networking of internet issues that go viral (e.g. the kitten killer from Hangzhou<sup>56</sup>) to exposing corruption (such as publishing a boast by the drunken son of an official after a car accident<sup>57</sup>). Some commentators have noted the dangers of a lynch mob or witch hunt mentality (given the execution of about 100,000 witches over several hundred years in Europe<sup>58</sup>, this is conduct with a long history).

Closely allied to the problem of mass publications of this kind is publication of material capable of amounting to contempt of court by canvassing the innocence or guilt of a person accused of crime. This is not something limited to the internet, as press coverage of the Lindy Chamberlain and Madeleine McCann investigations shows.

How the internet regulates such conduct is a complex issue, but part of that regulation could include a process for resolution of complaints of defamation.

Whether or not these a different regime for the internet (either as a pre-suit requirement, or as an alternative) would make a difference, the question of judicial interpretation of the appropriate balance is an issue of vital relevance to those defamation actions which require adjudication by the courts, and that brings me to my second proposal for defamation law reform – a specialist “freedom of speech” appellate court as part of the Federal Court of Australia’s appellate system.

---

<sup>54</sup> A recent example is the Wang Fei case (<http://news.sina.com.cn/s/2009-12-24/151319330944.shtml>); for discussion of the first Beijing Intermediate Court judgment see [http://www.pep.com.cn/sxpd/jszx/zkzl/szrdpx/200904/t20090410\\_561628.htm](http://www.pep.com.cn/sxpd/jszx/zkzl/szrdpx/200904/t20090410_561628.htm).

<sup>55</sup> Some early science fiction writing discussed this kind of conduct e.g. Larry Niven’s 1973 novel “Flash Crowd”.

<sup>56</sup> [http://hi.baidu.com/denver\\_space/blog/item/f5633e0fd4a53a216059f3fc.html](http://hi.baidu.com/denver_space/blog/item/f5633e0fd4a53a216059f3fc.html). Although generally referred to as being from Hangzhou, she was tracked down by netizens to Luobei. Her posting of killing a kitten and her subsequent pursuit by angry netizens turned the human flesh search engine into a national phenomenon in China and provoked extensive public debate about appropriate use of electronic communication.

<sup>57</sup> <http://hi.baidu.com/%C4%CF%B7%BD%B5%C4%D1%BC%D7%D3/blog/item/dc81a31795389019c93d6d7b.html>. “My father is Li Gang”, a boast by a drunk driver to police officers before leaving the scene, became a national saying for the avoidance of responsibility after he was tracked down by netizens, who revealed the events on the internet.

<sup>58</sup> Although reports of the time led some commentators, such as “Superfreakonomics” authors Levitt & Dubner, to assert millions died, the number of witches actually burned at the stake, drowned or otherwise executed is generally agreed to be this lower figure: B Levack, “The Witch Hunt in Early Modern Europe”, 2<sup>nd</sup> ed., 1995, pp. 19 – 21. Perhaps this is an early example of press inaccuracy.

## A specialist “freedom of speech” court at Federal level?

Where legislation is Australia-wide, inconsistency of approach by judges (whether of the same or of different courts) can lead to uncertainty and lack of clarity of the kind that Mr Justice Eady says should be avoided at all costs<sup>59</sup>.

Some reasons for considering the creation of a specialist court are:

- This would be similar to the system for appeals concerning first amendment issues in the United States. If any kind of first amendment or constitutional reform is being considered, a heightened standard of review is required, and this is in fact what occurs in the United States, where appellate courts are required to conduct independent and de novo reviews of the record to determine if the judgment can be constitutionally supported, and whether there is clear and convincing evidence of actual malice.<sup>60</sup> This is a federal constitutional law and, as is the case in Australia, federal law prevails where there is a conflict.<sup>61</sup> The appellate court has a special role in ensuring that sufficient weight has been given to first amendment rights and in ensuring the lower court judgment is not a forbidden intrusion into the field of free expression. Stephen J noted in *Bose v Consumers Union of United States Inc* 104 S. Ct. 1949 at 1965 (1984) that the requirement of independent review reiterated in *New York Times Co v Sullivan*, 376 US 254 (1964) is a rule of federal constitutional law reflecting a deeply held conviction that independent review was necessary to preserve the precious liberties of freedom of speech enshrined in the Constitution.

I suggest that the referral of all appeals from findings by trial judges where such a defence has been pleaded to a specially constituted appellate court as part of the Federal Court, whether such reforms are considered appropriate or not, would ensure a consistent Australia-wide consideration of the balance of freedom of speech issues.

However, I also suggest that Australia can go further than the United States in one regard. This bifurcation of the judicial role in the United States goes back to the 1960s; the role of the Federal Court in the United States in determining such issues is restricted to first amendment, public figure and related defences in an action, not issues such as defamatory meaning, justification or falsity. In the interests of avoiding the expense of two appeals, a time-saving step could be for all issues in appeals where any defence concerning the right of freedom of speech form part of the proceedings to be considered by this appellate court. For example, speech concerning issues of government or political matters may be more robust<sup>62</sup> than ordinary speech, and this may be relevant to whether or

---

<sup>59</sup> Mr Justice Eady, *loc. cit.*, p. 1.

<sup>60</sup> *The Law of Defamation in Canada*, [27.10], citing *Journal Publishing Co v McCullough* 743 So. 2d 352 (Miss 1999), cases following upon *New York Times v Sullivan* including, most recently, *Weaver v Lancaster Newspapers Inc* 592 Pa. 458 (2007), *Eastwood v National Inquirer Inc* 123 F. 3d 1249 (9<sup>th</sup> Cir. 1997), *Gibson v Maloney* 263 So. 2d 632 (Fla. App. 1972) and, as to the appellate investigation of actual malice, many authorities including *Eastwood*.

<sup>61</sup> *Levinsky's Inc v Wal-Mart Stores Inc* 127 F. 3d 122 (1<sup>st</sup> Cir. 1997).

<sup>62</sup> *Mayes v Hudson* (1993) 173 LSJS 200; see other cases collected at [18,030] in Tobin & Sexton (eds.), *Australian Defamation Law & Practice*. See also the High Court of Australia in *Roberts v Bass*,

not the imputations are conveyed. If a specialist Federal appeals court hears a case where issues other than freedom of speech are raised, it would make sense for those issues to be dealt with as well.

The setting up of such a court would not require any change to the uniform code; it would be Commonwealth legislation, based upon the freedom of speech defences.

Setting up such a court ahead of the passing of legislation would appear, at first blush, to be putting the cart before the horse. However, the establishment of a specialist court will ensure that careful attention is given to our existing legislation, which may turn out to be adequate if it is properly interpreted, as well as identifying loopholes, inconsistencies or other injustices requiring remedy.

- The establishment of such a court would mean that it could deal with “problem” cases where appellate courts hand down inconsistent decisions (e.g. *Ainsworth v Burden* (2003) 56 NSWLR 621 and *Morgan v Mallard* [2001] SASC 364), or where there is a sudden overturning of cases regarded as fundamental to defamation law (*Griffith v Australian Broadcasting Corporation* [2010] NSWCA 257), or where an urgent problem concerning the interpretation of a defence arises (such as the wording of the statutory provision for the defence of contextual justification: *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852).

Accordingly, where a party can establish that there are inconsistent authorities, especially between interstate appellate courts, it might be desirable for a specialist appeals court to make a ruling. Whether that would be a right solely of appeal to the specialist appeals court, or whether it would be an alternative to seeking leave from the High Court, are matters for further consideration.

The question arises why the High Court cannot hear such arguments as it presently does. The problem is that the High Court grants leave in only about 5% of all applications, and defamation cases should not be taking up the High Court’s time in an unfair ratio to other cases, particularly given the nature of the “heightened standard of review”<sup>63</sup> required for freedom of speech issues in the United States.

A specialist court would also confer the benefit of speed for cases where speed was necessary.

- Another advantage of setting up such a court would be that it could meet the concerns expressed by academics (such as Professor Brown), judges (such as

---

*loc. cit.*, at [172]: “Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest. In this country, a philosophical ideal that political discourse should be based only upon objective facts, noble ideas and temperate beliefs gives way to the reality of passionate and sometimes irrational and highly charged interchange. Communications in this field of discourse including in, but not limited to, the mass media, place emphasis upon brevity, hyperbole, entertainment, image and vivid expression.”

<sup>63</sup> *Journal Publishing Co v McCullough* 743 So. 2d 352 (Miss. 1999).

Lord Steyn) and practitioners about the need for specialist judges. Many commentators, such as UK defamation list judges<sup>64</sup>, the World Bank<sup>65</sup> and the House of Commons have referred to the desirability for specialist judges.

- A specialist court could consider related problem areas such as the nature and extent of publications for which the defence was available, the appropriate test for malice and the degree to which Australian law requires amendment to ensure the proper balance is maintained.

The establishment of a specialist appellate court, with the flexibility and speed to deal quickly with freedom of speech issues and resolve apparent inconsistencies or oversights in the law would, in my view, show a major commitment by the Australian legal system to value freedom of speech. Not only would it silence the critics who deride New South Wales as the defamation capital of the world, it would also take the burden of defamation appeals from State appellate courts.

The increasing overlap between defamation and breach of privacy is another area which could be the subject of examination by a specialist court. However, there are other fundamental issues about privacy rights that need to be looked at first.

### **Establishing the balance in privacy actions – should there be a tort at all?**

Traditionally, actions for protection have been based in defamation law, where the emphasis is on whether information which is asserted to have been false and defamatory is excused, justified or otherwise protected by law. Technological advances making electronic and video surveillance easier, and the lowering of economic barriers to publication by the availability of the internet, mean that private or confidential information can be published, sometimes by illegal means, to the world at large. While some such publications may result in claims for defamation, there has been an increasing number of actions for damages for the publication of confidential information on the basis that the information should not have been published at all and/or was obtained by illegal means. These actions for damage to reputation may not be based on the traditional defamation complaint that the information is false; the question is whether it belongs in the public domain, and the fact that it is true is not to the point.

Two main areas for legislative reform arise:

- actions for breach of privacy where private information is obtained either illegally (e.g. by “phone hacking”) or improperly;
- complaints of harassment or trespass by paparazzi-style reporting

Publication of confidential information is not new; the problem of illegally obtained confidential information is, however, a serious problem in reputation law. Recent concern has centred on the circumstances giving rise to prosecutions of private detectives and journalists supplying illegally obtained information for financial

---

<sup>64</sup> Mr Justice Eady, *loc. cit.*

<sup>65</sup> “Doing Business” Report, 2004, “Establishing Specialised Courts”, at pp 51 – 3. The establishment of specialist courts was one of the principal reform proposals endorsed by the World Bank for ensuring greater economic efficiency through law reform.

reward<sup>66</sup>. Detective agencies whose staff were involved in criminal activities<sup>67</sup> run by corrupt former police<sup>68</sup> used information obtained by hacking into voicemail. Some of that information was not only illegally obtained but confidential by reason of legal professional privilege, as the conversations hacked into were between solicitor and client.

Some examples illustrating the nature and extent of this very serious problem are:

- As an example of a private publication of confidential information, the broadcast of secretly taped webcam film onto the internet showing a Rutgers student in homosexual activity in his dorm room; the student who was filmed committed suicide.<sup>69</sup> In April 2011 an 18 year old Australian naval cadet told the media she had been secretly filmed having consensual sex with another cadet, which was watched by other cadets<sup>70</sup>; following this being made public, other complaints were made and a major inquiry seems likely.
- Publication of confidential advice given to Elle McPherson by her lawyer, which appear to have been obtained through an illegal phone tap. Elle McPherson, believing her lawyer had betrayed her confidence by providing privileged information to the press, sacked her, which destroyed the lawyer's career and well-being<sup>71</sup>. There are currently more than two dozen actions for damages before the High Court in England bringing similar claims.<sup>72</sup>
- Claims that persons who are not public figures have been targeted, such as the murder victims' families who had their phones hacked into by the private investigator at the centre of the "phone hacking" scandal in England.<sup>73</sup>

---

<sup>66</sup> There are too many articles to list, but there is a timeline in the Guardian articles referred to in footnote 67.

<sup>67</sup> Private investigators Steve Whittamore and John Boyall were convicted in 2005 for procuring confidential police information to sell to newspapers (Boyall's former associate Glen Mulcaire and journalist Clive Goodman were convicted in 2006 for illegal interception of telephone voicemail over an 8-month period). In March 2011 *Panorama* asserted *News of the World* journalist Alex Marunchak had a long association with Southern Investigations principals Jonathan Rees and Sid Fillery. In 2004 Fillery told Gillard & Flynn ("Untouchables", London, 2004, pp 276 - 283) he and Rees had started carrying out work for Alex Marunchak, of *News of the World* after meeting him at the Daniel Morgan murder inquest in 1988 (Rees was charged with this murder, along with the Vian brothers, and Fillery with conspiracy to pervert the course of justice, but the exclusion of "supergrass" evidence led to the collapse of the trial in March 2010: <http://www.guardian.co.uk/media/2011/mar/11/news-of-the-world-police-corruption> ). In 2000 Rees was sentenced to 7 years for conspiracy to pervert the course of justice, in 2003 Fillery was convicted of child pornography offences and in 2005 Glen Vian was sentenced to 14 years for drug supply. Fillery also claimed he had carried out a series of assignments for another journalist, Mazher Mahmood.

<sup>68</sup> Private investigator Duncan Hanrahan told Gillard & Flynn he worked for Alex Marunchak. A retired police officer and "supergrass" in the Morgan murder trial, Hanrahan was arrested in May 1997 for trying to bribe a police officer on behalf of one of his clients, Hanrahan admitted to extensive further robbery and drug supply offences (Gillard & Flynn, *loc. cit.*, pp. 276 – 283).

<sup>69</sup> [http://www.nydailynews.com/news/ny\\_crime/2010/09/29](http://www.nydailynews.com/news/ny_crime/2010/09/29) . The two students who filmed these activities were charged with two counts of invasion of privacy.

<sup>70</sup> <http://www.abc.net.au/lateline/content/2011/s3185514.htm?site=brisbane> .

<sup>71</sup> <http://www.abc.net.au/news/stories/2011/02/10/3134952.htm> .

<sup>72</sup> <http://www.thelawyer.com/vos-j-to-oversee-claims-relating-to-news-of-the-world-phone-hacking-scandal/1007313.article> . At the time this seminar paper was being finalised, News admitted liability in a number of these cases.

<sup>73</sup> <http://www.independent.co.uk/news/uk/crime/were-phones-of-soham-families-hacked-mp-makes-shocking-claim-2252466.html> . Glenn Mulcaire, the private investigator, was one of four persons gaoled in 2005 and 2006 for phone hacking. Police investigating Mulcaire for the offence for which he

Historically, the general view has been that the development of a law of privacy should be left to judges to do in accordance with common law principles<sup>74</sup>. The first problem with this approach is that there is not even agreement as to whether tort law principles, or equitable principles (as an extension of principles governing the law of confidence) should apply<sup>75</sup>. The second problem is that many of these publications are made not simply on occasions of breach of confidence, but in circumstances where conduct amounting to a criminal offence has been committed. Sooner or later some kind of legislative response will need to be made to regulate this cause of action, to provide appropriate relief, and to take account of breaches of the law. Whether there is statutory reform, or the law continues to develop as judge-made law, the problem of achieving an appropriate balance will arise.

Where claims are brought for the misuse of private information, as opposed to defamation, the balancing exercise of the rights between the parties is not necessarily referable to issues of freedom of speech, but rather by applying an “intense focus” to the facts of the case, and turn on issues of proportionality: *Campbell v MGN Ltd* [2004] 2 AC 457.

Legislators and lawyers need to appreciate that reputation law of the future will have less to do with defamation and more to do with misuse of confidential information, where the balancing exercise must be carried out not by references to generalities such as freedom of speech, but by applying an “intense focus” to the facts of a particular case: *Campbell v MGN Ltd* [2004] 2 AC 457. Our human rights environment is no longer one where a newspaper, or a gossipmonger, prints or speaks the words: “X is disgusting”<sup>76</sup>; we are surrounded by the printed and spoken word in electronic, visual and written form, where the evidence of X being disgusting may be surreptitiously taken video of X having gay sex in his bedroom.

The collision between freedom of expression and criminal conduct is likely to be a feature of this cause of action, and the balancing exercise must take into account how to treat this kind of activity. The extensive nature of eavesdropping on celebrities as set out in the 2010 House of Commons report and recent scandals in other countries (such as the 2006 trial and conviction of Antony “P.I. to the stars” Pellicano in the United States for his wiretapping of many celebrities) show that the boundaries are being overstepped. Are these stories vital issues of community importance, or intrusions into the private lives of celebrities?

Mr Justice Eady’s comments<sup>77</sup> on the development of the law in England show that, even with the benefits of the ECHR, the problem is similar:

---

was ultimately convicted found evidence of thousands of potential victims of phone hacking, and the recent investigation of those matters has led to a number of victims commencing proceedings.

<sup>74</sup> See the discussion of the history of privacy law by Mr Justice Eady in “Strasbourg and sexual shenanigans: a search for clarity”, March 11, 2010, available at <http://www.indexoncensorship.org/tag/mr-justice-eady>.

<sup>75</sup> Mr Justice Eady (ibid) notes that McGregor on Damages at [42.47] categorises it as a tort, while Clerk & Lindsell on Tort at [28.03] think it is an extension from equity, but cover it in their textbook just in case.

<sup>76</sup> *Drummoyne MC v ABC* (1990) NSWLR 135 at 137 per Gleeson CJ.

<sup>77</sup> Mr Justice Eady, *loc cit*.

“The truth may be simpler, namely that the law of privacy is a new creature deriving from the Strasbourg way of doing things, thus requiring language and terminology of its own. The new cause of action may not be classifiable as a tort because the balancing exercise is not about wrongs but about rights. If you are ordered not to do something, or to pay compensation for having done it, because it is not regarded as necessary and proportionate, that is quite a different concept from the court ruling that a legal “wrong” or “tort” has been committed. At least until the judge has carried out the required balancing exercise, it may be said in a real sense that no “wrong” has been committed. It is in the nature of the new technology that there are no absolute answers. It all depends on the facts.”

Mr Justice Eady goes on to note that the very different balancing act required for this kind of cause of action may spread into other areas such as defamation, and the role of proportionality may be a factor to take into account, resulting in losing the reasonably clear black and white distinctions of truth and falsehood in defamation law, and that this may already be occurring in the context of interim injunctions. Whether this occurs or not, it underlines how important it is to distil the elements in the balancing equation in actions where the key claim is not the falsity, but the fact that the information is made public. The biggest concern for the media concerning privacy actions in England has been the availability of interim injunctions, especially “superinjunctions”<sup>78</sup> and this is likely to be a problem area in Australia if a balancing test different to that imposed in defamation actions were to be imposed.

Looking at the list of media cases before the English courts in 2010, as summarized in *Inform*, more than a quarter deal with privacy issues. In 2011, the number of cases brought for damages arising out of publication obtained by “phone hacking” has led to the court setting up a specialist list under Mr Justice Vos’s direction. How can courts and the legislature keep a balance where confidential material, such as advice from a solicitor, or personal information, such as sexual activities, is obtained by stealth, or outright contravention of the law?

There are provisions in Australia permitting a court to exclude improperly or illegally obtained evidence (s 138 *Evidence Act* 1995 (NSW), and some legislation (such as s 17 *Defamation Act* 1992 (New Zealand)) will exclude a qualified privilege defence where the publication was prohibited. These provisions were, however, drafted at a time when electronic publication and “phone hacking” were undreamt of. Not only courts but legislatures are completely unprepared for the complex legal issues raised by publication to the world of information never intended for such a purpose.

How the courts will deal with these claims, and the very different balancing exercise that is required, especially where the confidential material was obtained illegally or improperly, is a matter the Australian courts have yet to confront<sup>79</sup>. The legal implications of the destruction of privacy rights will have a profound impact upon social as well as legal structures, not only concerning protection of reputation but for publication (especially internet publication) generally. I shall, however, mention two

---

<sup>78</sup> See Heather Rogers QC’s article in *Inform*, 26 November 2010.

<sup>79</sup> Prosecutions concerning phonetapping have been brought (*Fawcett v Nimmo* (2005) 156 A Crim R 431; *Fawcett v John Fairfax Publications Pty Ltd* [2008] NSWSC 139; *DPP v Fordham* [2010] NSWSC 958), but “phone hacking” damages claims have yet to be made. The impact of the very recent decisions of *NK v Northern Sydney Central Coast Area Health Service (No 2)*[2011] NSWADT 81 and Mr Justice Eady’s novel remedial solution of the injunction “contra mundum” in *OPQ v BJM* [2011] EWHC 1059 will be interesting to watch.

issues which are currently a source of contention, namely “foot-in-door” reporting and the use of confidential sources by journalists.

### **Paparazzi-style and “foot-in-door” reporting**

Most “foot-in-door” journalism is adequately dealt with by claims for damages for trespass and allied torts. The fairly relaxed approach to celebrity in Australia means that over-exuberant reporting is rare. This is not the case in the United States, where California recently saw fit to enact legislation to prevent car pursuits and other excesses by the paparazzi<sup>80</sup>

### **Privacy and journalists’ sources**

Privacy issues tend to be the other side of the coin when considering journalists’ sources, since the private information is often released as a result of information from a source. For “soft news” stories, the source may be an employee in the clinic where the famous supermodel is being treated for heroin addiction, or the ex-girlfriend or disgruntled former employee of a celebrity. The source may be providing the information in breach of employment obligations, or for other reasons which may or may not have the public interest at heart. The question is really one of the public’s right to know.

The *Protection of Sources Bill*<sup>81</sup> which has now come before the Australian parliament is an important step in the protection of journalists’ sources. However, I consider there should be some regulation about just who a source really is. A significant reason for the growth of defamation actions in England has been the use of sources who have a vested interest, such as press agents who provide information about celebrities to the newspaper, or whose methods are questionable, such as the private investigators who have been revealed to be the source for many stories about celebrities such as members of the royal family. Similarly, the attempts of large organizations to cosy up to journalists or their employers to ensure that only good publicity is provided<sup>82</sup>, or arrangements of the “cash for comment” variety should not be protected in the same way as revelations of a whistleblower variety.

---

<sup>80</sup> The Gazette of Law & Journalism (29 March, 2011) provides the text of this legislation: “A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.”

<sup>81</sup> [http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/0/D3D4CF2005018097CA2577AE000FB846/\\$file/S782Brs.doc](http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/0/D3D4CF2005018097CA2577AE000FB846/$file/S782Brs.doc)

<sup>82</sup> <http://www.smh.com.au/world/revealed-shells-pr-tricks-in-nigeria-20101112-17r8a.html> - a description of Shell’s attempts to reduce bad publicity following the execution of Nigerian writer Ken Saro-Wiwa.

Perhaps protection of sources should be limited to investigative journalism about matters of government and political interest; articles about whether Tom Cruise and his wife are separating would not fall into this category.

At least famous people like Tom Cruise have the assets to afford this kind of litigation. Many people, quite a lot of them defendants, do not, and that brings me to the third and possibly least popular of the reforms I would like to see – a reform of the legal costs structures for lawyers.

### **The chill of the dollar – freedom of speech and libel legal costs**

“Ask any media organisation about the real problem about legal issues and they are likely to give a one word answer: costs. The many and varied issues of costs in relation to defamation litigation – not least, the Report of Jackson LJ, the changes in the CPR relating to costs budgets and ATE insurance premiums, and the level of CFA success fees – are outside the scope of this paper. But, in practice, it is not the substantive law that causes the major headache for the media – it is the costs of going to court.”

- Heather Rogers QC, *Inform*, <http://inform.wordpress.com/2010/11/20/defamation-problem-what-problem-heather-rogers-qc/>.

In the prolonged-antitrust battle between Howard Hughes and TWA (*Hughes Tool Co v Trans World Airlines* (1972) 409 US 363, 393) Supreme Court Chief Justice Burger labeled the 1.7 million documents (694 feet of shelf space) and 10-foot high briefs “the twentieth-century sequel to *Bleak House*”, noting that 56,000 lawyers’ billing hours added up to \$7.5 million. Most lawyers today would regard complaining about such figures as Dickensian.

Legal costs today face two challenges. The first (“the plaintiff cost problem”), the issue of speculative fees, has received significant consideration in the defamation field in England. The second (“the defendant cost problem”, as it is more commonly a defendant’s tactic) is “megalitigation”<sup>83</sup>.

Concerns about the cost to society of “overlitigation” or “jackpot justice”<sup>84</sup>, in the form of frivolous suits and excessive damages, was widespread in the early 1990s. The American jury award of \$US 2,860,000 (of which \$2,700,000 was punitive

---

<sup>83</sup> In *Seven Network Limited v News Ltd* [2007] FCA 1062 by Sackville J at [2] – [6] used the word “mega-litigation” to describe “electronic courtroom” proceedings which had taken 120 days to hear, resulting in 9,530 pages of transcript, thousands of exhibits and a “truly astonishing” (at [4]) 2,500 pages of submissions from both sides of the bar table. The causes and solutions to the problems of “mega-litigation” in cases other than defamation cases are discussed by the Honourable Justice Pagone, “Lost in Translation: The Judge From Provider to Consumer of Legal Services” in “The Art of Judging”, Southern Cross University Law Review vol. 12, 2008 at p. 160; the Honourable Justice Hayne, “The Vanishing Trial” (2008) *The Judicial Review* 33). The reducing number of trials actually taking place has led to fears for the future of the adversarial trial process if the trial process means litigation is “too horrible to contemplate” (to quote Sackville AJ in “Meeting the Challenges of Complex Litigation: Some Further Questions” (2009) *The Judicial Review* 197). The issue of over-complexity and delay in litigation has also arisen in a number of long-running trials including *Bell Group Limited (in liquidation) v Westpac Banking Corporation (No. 9)* [2008] WASC 239, which led to the drafting of the *Access to Justice (Civil Litigation Reform) Amendment Act 2009* (Cth). The High Court of Australia has also considered these issues in *AON Risk Services Australia Limited v Australian National University* (2010) 239 CLR 175.

<sup>84</sup> K McFetridge, “Medical litigation” (2005) 16 Aust Insurance L J 41 at 41.

damages) to a woman scalded by coffee at McDonalds resulted in a frenzy of publicity which overlooked the facts of the case (including the fact that the 79-year-old plaintiff received third-degree burns and the 700 prior complaints about the scalding heat of McDonalds coffee). The sensationalist reporting of the result of this and other American trial verdicts was one of the reasons for significant modifications to personal injury and negligence law throughout Australia during the first decade of the 21<sup>st</sup> century. In fact, contrary to what was being asserted in Australia, plaintiffs in the United States only received punitive damages in 2 – 4% of civil cases generally<sup>85</sup>, but the pervasive belief that not just the insurance industry but the whole Australian way of life would collapse unless legislation was enacted to restrict legal rights.

Speaking in the NSW Legislative Council concerning the NSW Bill, the Hon Michael Egan, the NSW Treasurer, explained:

“But I emphasise that these reforms are not only a response to the current problems regarding insurance. It is important to remember that these reforms are not only about reducing premiums.

The insurance crisis served to highlight just how far the law has drifted away from the concept of personal responsibility. This is the Americanization of our legal system.

I want this Parliament to seize the opportunity to wind back this culture of blame. If we do, we will help to preserve the community’s access to socially important activities.

Our community deserves our best efforts to preserve the Australian way of life. That it what it is about.”

Following the introduction of this legislation in 2002, the growth of personal injury litigation was checked. However, there were complaints about continued high legal costs. Many of these complaints came from the plaintiffs themselves. A *Sydney Morning Herald* investigation into the legal costs charged by one New South Wales personal injury law firm<sup>86</sup> led to costs reforms for personal injury but the steep rise of defamation costs remains unchecked.

In addition, personal injury defendants are usually insured, which cushions costs of the litigation; in defamation law, insurance is rare, and the burden of costs even for a successful litigant can be crippling. Costs for a successful plaintiff for a small defamation action in the Supreme and District Courts are very similar, as the following cases demonstrate<sup>87</sup>. The party-party costs for the plaintiff in the *Assaf v Skalkos* litigation (a letter to the Prime Minister, which his secretary put in the rubbish bin, and an article in a Macedonian language newspaper where Mr Assaf was identified by a handful of people) were assessed at just under a million dollars:

---

<sup>85</sup> R A Klinck, “The Punitive Damage Debate” (2001) *Harvard Jnl on Legislation* 469 at 469.

<sup>86</sup> <http://smh.drive.com.au/search.html?category=Drive%2Fsearch.html&keywords=Keddies> .

Newspaper reports suggest more than 70 former clients are suing the firm; 35 clients are represented by one law firm alone.

<sup>87</sup> I mention this because one of the costs law reform proposals in England has been for the County Court to hear defamation actions, in the misguided belief that this will reduce costs. The approach of simply increasing the number of judges to cope with case overload was strongly attacked by the World Bank in its 2004 “Doing Business” report (at p. 52), noting studies showing that it does not increase efficiency because it treats the manifestation (overworked judges) rather than the cause. The lack of resources (such as transcript, judgment websites, court facilities and research staff) may also be relevant.

*Skalkos v T S Recoveries Pty Ltd* [2004] NSWCA 281. According to *the Manly Daily* the costs sought by the successful plaintiff in the *Jones v Sutton* litigation (three publications to a handful of people resulting in a judgment of \$5,000) were close to \$1 million; the plaintiff had offered to settle prior to trial for \$1,000 and payment of \$80,000 legal costs and wanted indemnity costs when he won on appeal. The *Jones v Sutton* litigation (11 days) actually ran for about a quarter of the length of the six-week *Skalkos* trial<sup>88</sup>.

Defamation case preparation for both plaintiff and defendant generally involves a group of barristers, solicitors and paralegals charging the client at high hourly rates. Unfortunately, this is no guarantee that they are ready to run the case. In *Siu Sheng Lee v Keddie* [2010] NSWSC 1010, the plaintiffs' lawyers were very experienced. Two weeks before the trial, the defendants pointed out that the senior counsel who had recently been retained to appear at the trial had previously provided advice to the defendants, and this barrister had to withdraw from the case. The plaintiffs sought, and obtained, an adjournment of the hearing on the basis that they were unable to run the trial, and they could not find another senior counsel competent to conduct the trial in the two weeks before the trial. A subsequent application by the plaintiffs to amend their pleadings, and for the hearing date to be vacated to accommodate this, was refused: *Lee v Keddie* [2011] NSWCA 1.

Adjournments of defamation trials are not lightly granted; in *Megna v Marshall* [2010] NSWSC 686 at [11] – [15], an unrepresented defendant unsuccessfully sought an adjournment shortly before the trial because he was ill and his wife had just died. A second application to the trial judge was also unsuccessful because it was a “three week, four party, three counsel trial” (the matter was, for unrelated reasons, adjourned part-heard for two years in any event).

In both cases, the size of the costs involved overshadowed the issues of justice between the parties.

Similar problems with costs in England led to the comprehensive 2009 report by Lord Jackson<sup>89</sup> and the general support for these proposals, which deal mainly with plaintiffs' costs, has resulted in many of the recommendations being implemented<sup>90</sup>. Some recent proposals for reform of defamation costs include a costs cap on hourly rates, which would of course apply to defendants as well. I note there were calls for the reintroduction of legal aid by judges interviewed in October 2010 by the *Sydney Morning Herald*; however, the granting of legal aid for libel cases in England has,

---

<sup>88</sup> This case led to the introduction of s 48A, the precursor to s 40, enabling courts to award indemnity costs where there had been misuse by a litigant of a superior bargaining position, or refusal to make an offer <http://www.parliament.nsw.gov.au/Prod/parlment/hansart.nsf/V3Key/LA20051012054>.

<sup>89</sup> Lord Jackson's *Review of Civil Litigation Costs* recommendations were that CFA success fees and ATE insurance premiums should cease to be recoverable from the losing party; raising the general level of damages in defamation and breach of privacy proceedings by 10%; and introducing a regime of qualified one-way costs shifting (whereby the Defendant/publisher does not recover its costs even if it succeeds in defending the claim, thereby negating the need for ATE insurance. For a review of these proposals see the paper delivered by Ravi Mireskandari on 4 November 2010 as summarised in Inform.

<sup>90</sup> For a discussion of the issue from a legal funding body's point of view, see [http://news.casefunds.co.uk/blog/\\_archives/2010/4/21](http://news.casefunds.co.uk/blog/_archives/2010/4/21) (referring to the complaints of a “tidal wave” of frivolous litigation).

according to at least one of the speakers at the London November 4 2010 defamation law reform forum, been part of the problem<sup>91</sup>.

Professor Mullis and Dr Scott say that the real problem with defamation law is that it is “far too expensive and procedurally complex for a defamed claimant to vindicate his reputation or for a wrongly sued defendant to clear his name.”<sup>92</sup> Their proposal, in answer to Lord Lester’s proposal to outlaw conditional fee agreements, is to make “appropriate adjustments” to them. However, they do not deal with the other part of the problem, namely the need to prevent megalitigation tactics of the kind seen in the Marsden litigation. In my view the English debate on legal costs would have benefited from looking at provisions in Australian legislation which are designed to prevent these excesses, such as s 40 *Defamation Act*.

The provisions of s 40, which are to be found in defamation legislation around Australia, represent one of the most important brakes upon legal costs in my view. Section 40 (and its predecessor, s 48A) have rarely been used in Supreme Court defamation proceedings (as McClellan CJ at CL noted in *Davis v Nationwide News Pty Ltd* [2008] NSWSC 946), which may be indicative of that court’s more permissive view of legal costs generally. It has, however, been regularly applied in the District Court.

In response to Lord Lester’s Bill, the UK Government now proposes to restrict speculative fee agreements in defamation matters<sup>93</sup>. Similar provisions in Australia might help reduce the increase in defamation actions which has led to New South Wales being dubbed the libel capital of the world, but these reforms will only work if the courts similarly curb costs excesses by defendants, which I suspect are a lot higher than the amounts plaintiffs get back on assessment.

The drop in US libel cases, while needing to be seen in the context of the corresponding rise of GFC-related litigation<sup>94</sup>, may in fact partially be due to the cost of bringing an action against a media company and the disincentive this is for potential plaintiffs in a country where costs are rarely granted to the victorious party, even if damages are awarded<sup>95</sup>.

As pointed out earlier, English law firms have noticed an increase in speculative fee defamation cases brought by firms who usually run personal injury cases rather than defamation trials. I understand that there is anecdotal evidence of a similar pattern in

---

<sup>91</sup> <http://inform.wordpress.com/2010/11/14/reframing-libel-costs-razi-mireskandari/#more-5405>

<sup>92</sup> *Loc. cit.*, at paragraph 4.

<sup>93</sup> <http://www.dailymail.co.uk/news/article-1324044/Kenneth-Clarke-hits-greedy-solicitors-scrapping-win-fee-deals.html?ito=feeds-newsxml>

<sup>94</sup> “The fall of libel and the rise of privacy”, *Gazette of Law & Journalism*, 12 November 2010;

<sup>95</sup> Galanter, “Mega-Law and Mega-Lawyering in the contemporary United States”, in “The Sociology of the Professionals: Lawyers, Doctors and Others”, R Dingwall & P Lewis (eds.), London, 1983, at pp 152 – 176, gave an early and prescient warning of this; at p. 172 he says the rise of mega-lawyering in the United States in the 1980s occurred when no-fault motor vehicle insurance and no-fault divorce reduced the need for lawyers’ services and that this development, coupled with reduced restrictions on advertising and marketing of legal services led to the use of mega-law procedures by American law firms previously reliant on this work. The “vast batteries” of lawyers brought in to manage the “litigation explosion” led to the legal system becoming “indeterminate, manipulable and political” (at p. 173).

New South Wales. Defendants are usually not insured and therefore more likely to settle to avoid the crippling legal costs, and the usual rules for prevention of trial by ambush, such as witness statements and agreed bundles of documents, have not been used in defamation trials, even where there is no jury.

Occasionally the media highlights a particularly bad example of expensive defamation litigation. *Rural & General Insurance Broking Pty Ltd v Australian Prudential Regulation Authority* (2009) 231 FLR 199; [2009] ACTSC 67 was a case that attracted widespread public criticism<sup>96</sup>. The proceedings were in fact started in the NSW District Court defamation list, where it became the first (and only) action to be struck out because the plaintiff was a corporation which employed more than the prescribed number of persons. The action was struck out with costs<sup>97</sup> but the plaintiff, undaunted, started all over again in the ACT, where this restriction on defamation actions by companies did not exist. The subsequent disastrous litigation was pungently summarised by Susannah Moran in *The Australian*, who wrote:

“Rural & General Insurance Broking Pty Ltd sued the Australian Prudential Regulation Authority in 2003 for defamation and injurious falsehood over a press release about the insurance company's behaviour.

It was seeking up to \$40m in damages.

After years in court and the expenditure of hundreds of thousands of dollars, it was discovered -- on the second day of the hearing -- that the document in dispute was only a draft, and not the press release published by APRA on its website.

None of the solicitors, barristers or government officials had noticed the mistake.

ACT Supreme Court judge Hilary Penfold said: "Both parties have been remarkably careless in their conduct of the litigation."

This kind of publicity causes public concern about the administration of justice – another good reason for reform.

### **Cutting down legal costs**

I would suggest that defamation costs can be restrained by interlocutory steps such as the following:

- Where a defendant has pleaded a defence of justification or contextual truth, case management should include requirements for a reply to the particulars of truth and, in appropriate cases, service of statements, especially expert witness statements. Parties should not be permitted to raise matters outside their respective particulars concerning justification. This will not only shorten the

---

<sup>96</sup> Susannah Moran, “Farcical End to Five-Year Lawsuit”, *The Australian*, 14 January 2009; “Public will pay for bungled lawsuit”, *The Australian*, 14 January 2010; Editorial, “Less than legal eagles – someone should have discovered this glitch”, *The Australian*, 16 January 2010.

<sup>97</sup> See the Gazette of Law & Journalism September 2003 report. An attempt by APRA to obtain security for costs in the ACT was unsuccessful: “Insurance broker permitted to sue regulator for defamation”, Fairfax Digital, 2 April 2004.

trial and decrease applications for further discovery and particulars, but lead to more settlements.

- The requirements for service of experts' reports, agreed bundles and chronologies which are used in commercial and personal injury litigation should also be used in defamation litigation. This will ensure that the litigation is conducted efficiently, and adjournments of the kind that occurred in *Lee v Keddie* would not occur.
- Where a party appears to be making use of its superior financial resources by adopting the "six-pack of lawyers" approach, or by repeated failure to comply with timetables, the court could require a statement of legal costs (including WIP rates and amount of time spent) to be provided to the case management judge and appropriate cases of overspending referred to the Legal Services Commission. An appropriate addition to s 61 *Civil Procedure Act 2005* to permit judges to require the filing of such a document would have a chilling effect on excessive legal costs.
- Where a party has run up unnecessary fees, or otherwise conducted itself in a way to attract orders such as the striking out of proceedings, these judgments must be placed on Caselaw by the judges concerned. For example, multiple applications to amend might be less common if decisions such as the list judge's decision in *McMahon v John Fairfax Publications Pty Ltd* were put onto the court website (see the unsuccessful appeal from this decision at [2010] NSWCA 308). By not putting these decisions onto Caselaw, judges may unwittingly give the green light to practitioners who flout procedural rules, run up costs, or otherwise behave in a way that might not occur if the judgment were publicly available.
- Finally, could I suggest that not only defamation lawyers, but lawyers generally, should join in the "tidal wave"<sup>98</sup> of debate about the future of the legal profession arising from the reissued publication of David Susskind's thought-provoking book "The End of Lawyers? Rethinking the Nature of Legal Services" (Oxford University Press). The legal costs problems in personal injury, defamation and other areas of the law are not necessarily specific to the subject matter of the litigation. They raise wider issues of the role of lawyers as providers of services, and these questions must be looked at in a cohesive manner.

### **PART 3 – AMENDMENTS TO EXISTING LEGISLATION AND PROCEDURE IN AUSTRALIA AND THE PROPOSALS IN THE DRAFT DEFAMATION BILL IN ENGLAND AND WALES**

Amendments to the uniform legislation to correct perceived oversights are of interest to defamation practitioners only, so my comments on these are brief.

**Contextual justification:** The NSW Court of Appeal has yet to hear the appeal in *Kermode John Fairfax Publications Pty Ltd* [2010] NSWSC 852 concerning the drafting and ambit of the defence of contextual justification. If statutory amendment is necessary, I hope that consideration will be given to taking a red pencil to delete the "Polly Peck" imputation, which is an unnecessary and overcomplicated defence, now that contextual justification is available.

---

<sup>98</sup> [http://fds.oup.com/www.oup.co.uk/pdf/catalogues/lawprof10/it\\_media.pdf](http://fds.oup.com/www.oup.co.uk/pdf/catalogues/lawprof10/it_media.pdf)

**Comment:** Joinder of journalists as defendants, following throwaway comments by McClellan CJ at Cl in the *Corby v Nationwide News Pty Ltd* trial (in 2008), continues to be a feature of NSW defamation actions. There should either be legislative reform, or a decision one way or the other. Journalists should not be at the risk of joinder in litigation because of some perceived oversight in legislative drafting. It is a serious chill upon journalistic freedom of expression.

**Offer of amends:** The legislation is unclear as to whether this is a defence for the jury or trial judge (given the current division of labour between judge and jury) and clarification of this issue may be possible if the procedure is amended for the jury to determine all issues.

**Unlikelihood of harm:** Given the wording of the statutory provision in the 2005 Act (which is perilously close to Mahoney JA's definition in *McKenzie*), I predict more fights about whether the test for this is no harm at all as originally stated by Mahoney JA or whether it is the more condign approach taken by the NSW Court of Appeal.

**Juries and Damages:** The division of the trial into issues of liability for the jury and issues of quantum for the judge has effectively led to two trials, more expense, confusion and delay. As there is a cap on damages, this issue should be determined by the jury – that is what the cap on damages is for. Jury trials should be the general rule in defamation cases and should not be dispensed with in media trials other than in exceptional circumstances. Claims that juries, who determine matters of great complexity in criminal trials, are not able to understand defamation law, are insulting. Nor is it the case that juries return perverse verdicts; the only perverse verdicts juries have returned have been Supreme Court s 7A jury trial verdicts, where the artificial nature of a mini-trial on defamatory meaning (an invention of the Court of Appeal in the *Parker v 2UE* appeal) was the cause of the confusion. Jury trials under the 2005 Act have been conducted without these problems occurring.

**Justice being seen to be done:** While the reason for the drop in English libel cases is difficult to determine, it seems likely that the greater use of summary judgment applications is a significant factor, particularly since the publication of these judgments online can warn potential litigants of the traps before them. Another factor, in my view, has been the extensive publication given to prosecution of plaintiffs (such as Jeffrey Archer) whose evidence to the court has subsequently been discovered to be false. Such prosecutions are rare in Australia.

There can be no doubt that the provision of information to the public concerning freedom of speech-related litigation is a vital part of maintaining the balance concerning freedom of speech. The publication of defamation judgments online is a vital part of the public information process concerning freedom of speech for all countries<sup>99</sup>. These judgments are an important barometer for determining whether the

---

<sup>99</sup> For example, the Hauser Global Law School Program's "Globalex" website for online legislation and judgments in Africa ([http://www.nyulawglobal.org/Globalex/African\\_Law1.htm](http://www.nyulawglobal.org/Globalex/African_Law1.htm)) was set up in response to a perceived need for public confidence in the courts and their judgments; see also Transparency International's 2007 report on judicial corruption ([http://www.transparency.org/news\\_room/latest\\_news/press\\_releases/2007/2007\\_05\\_24\\_gcr2007\\_launch](http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_05_24_gcr2007_launch)) and its review of judicial reform in Zambia including publication of judgments online

balance has been met, but a useful guide for academics and practitioners in legal research<sup>100</sup>.

In the 2010 Searby oration, Chief Justice Warren of the Supreme Court of Victoria made the following closing remarks<sup>101</sup>:

“For society to have full confidence in the judiciary that underpins our democracy the judgment process needs to be accessible through effective language including technology. Then, I would hope, the obligation to communicate and an effective interaction between language and the law would be fulfilled to the ultimate benefit of society.”

### 3. Summary dismissal and special procedures for small claims

This is a particularly difficult area for law reform, because there is a history of unintended side-effects (of which the section 7A “mini trial” of defamatory meaning is perhaps the best example).

Some commentators suggest a different procedural regime for media and non-media publications; Dario Milo makes this suggestion in “Defamation and Freedom of Speech”<sup>102</sup>. The problem is that non-media cases can be just as complex as media cases. There is, however, much to say for the courts exercising special care where the defendant is a litigant in person, or does not appear, or is at a disadvantage because of the superior financial position of the opposing party.

A scheme for cases to be heard in the County Court rather than the High Court, with mini-trials on defamatory meaning before being transferred to the High Court, has been proposed in England<sup>103</sup>, but the dismal failure of the s 7A mini-trial in New South Wales will hopefully cause the proponents of this particular proposal to think twice.

More recently, there have been calls, both in England and Australia, for “simple” cases to be heard in lower courts; the difficulty is how, and when, to determine whether the proceedings will indeed be “simple”.

The principle issue of concern in this area is how to deal with cases which are asserted to amount to an abuse of process. Concern about use of defamation proceedings to put pressure upon another party (referred to variously as “silly season” or “SLAPP suits”)

---

<http://www.u4.no/helpdesk/helpdesk/query.cfm?id=169>. “The requirement for all courts to publish their judgements online” is an important part of the fight against corruption in Bulgaria: see the 10-point plan by the Bulgarian government (and the EU’s comments) at [http://sofiaecho.com/2010/07/20/935074\\_bulgaria-has-strong-reform-momentum-against-crime-european-commission](http://sofiaecho.com/2010/07/20/935074_bulgaria-has-strong-reform-momentum-against-crime-european-commission).

<sup>100</sup> See, for example, the statistics for the number of judgments published in Australia, England and other counties which are reviewed in publications such as *Inform*.

<sup>101</sup> <http://www.deakin.edu.au/news/homepage/2010-searby-oration-transcript.pdf>.

<sup>102</sup> Oxford University Press, 2008, at p. 284.

<sup>103</sup> <http://inform.wordpress.com/2010/11/12/reframing-libel-mullis-and-scott-propose-two-stream-libel-regime-with-only-most-unusual-cases-going-to-high-court-judith-townend/#comment-2452>

has been the subject of extensive academic debate and public discussion for many years<sup>104</sup>.

In the United Kingdom, the refusal to strike out defamation actions brought against distributors of *Private Eye*, where settlement of the claim was offered if the distributors agreed no longer to stock this publication (*Goldsmith v Sperrings Ltd* [1977] 1 WLR 478; [1977] 2 All ER 566) discouraged further abuse of process applications for decades. During the 1990s, an increase in defamation actions against individuals and/or for very limited publications, in circumstances where there was unlikelihood of harm to reputation, led to a reconsideration of the principles of abuse in England. Eady J's judgment in *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296 was the first to bring such an application in the context of the civil procedure rules; Eady J (at 318) noted "the overriding objective even in those categories of litigation and in particular to have regard to proportionality". This is the first basis upon which an application may be brought; the second is in reliance upon the *Human Rights Act* 1998 (*Jameel v Dow Jones* [2005] QB 946 at [55]).

This procedure has been used with success in England, as s 8 *Defamation Act* 1996 permits the court, on application by the defendant, to dismiss actions where the extent of publication is limited, or the bringing of the litigation akin to abuse of process<sup>105</sup>. It has been applied in a number of cases where there is doubt about defamatory meaning, the defendant is not a media publisher, and/or there is a threshold question of whether there is a real and substantial tort (*Jameel v Dow Jones* [2005] QB 946; *LonZim plc v Sprague* [2009] All E R 132) and is one of the key advances in English defamation law. The impact of these decisions has now been reinforced by what Dario Milo calls the most important of the reforms in the *Defamation Bill*, namely the requirement that a statement will only be regarded as defamatory if "its publication has caused or is likely to cause substantial harm to the reputation of the claimant".<sup>106</sup>

Although Australian States and Territories have procedure legislation (such as the *Civil Procedure Act* 2005 (NSW)) which refers to such principles as proportionality and fairness, there have been no signs of interest in summary judgment applications. As the judge on a summary judgment application, I have, on one occasion, applied the principles set out in *Jameel v Dow Jones* [2005] QB 946 in *Calabro v Zappia* [2010] NSWDC 127, on the basis of the nature and extent of the publication (a statutory declaration by a potential witness in a case, given to the mother of the litigant and surreptitiously removed from her file by a family member of the opponent in the proceedings). However, given the approach of the NSW Court of Appeal to abuse of process, not only in defamation (e.g. *Habib, supra*), but generally (e.g. *McGuirk v University of New South Wales* [2010] NSWCA 104), such reform seems very unlikely.

Examples of cases in Australia where there are findings for the plaintiff which might be struck out as an abuse of process under the English system are:

---

<sup>104</sup> Brian Walters SC, "Slapping on the Writs", University of NSW Press, 2003)

<sup>105</sup> For a list of recent UK cases, see <http://inform.wordpress.com/2011/03/29/defamation-update-part-1-%e2%80%93-heather-rogers-qc/#more-8406>.

<sup>106</sup> <http://inform.wordpress.com/2011/04/06/uk-defamation-bill-paves-the-way-for-south-africa-dario-milo/#more-8618>

- Cases involving very limited publication, where *Jameel* principles could be applied. Surprisingly, there have been several cases go to trial (in one case, damages were awarded) where there has been no publication at all to a third party: *Rural & General Insurance Broking Pty Ltd v Australian Prudential Regulation Authority* (2009) 231 FLR 199; [2009] ACTSC 67; *Osuamadi v Okoroafor* [2011] NSWDC 1.
- Where the allegations are not only made to one person but may arguably not be likely to cause substantial harm to reputation, e.g. *Cush v Dillon; Boland v Dillon* [2010] NSWCA 165 (damages of \$5,000 for a slander to one person that the plaintiffs might be having an affair). An award of \$5,000 was made by the trial judge, which was overturned on appeal and returned for a fresh hearing on qualified privilege (no appeal in relation to rejection of the defence of triviality was brought). The High Court transcript is at [2011] HCA Trans 82.
- Repetition of the contents of a non-libellous publication in a satirical context: *Habib v Radio 2UE Pty Ltd* [2009] NSWCA 231 (satirical song and radio comment about a person receiving a disability pension for health problems who was physically fit enough to compete in a marathon race, where the newspaper publication the subject of the comment was found by a jury not to convey defamatory imputations). The Court of Appeal set aside the striking out of these provisions by the trial judge (who was myself) and remitted the matter for rehearing. A s 7A jury rejected 38 of the 42 pleaded imputations and the case will now go to trial on imputations that the plaintiff was dishonest for obtaining a disability pension for which he was not entitled<sup>107</sup>.
- Claims brought by criminals, or persons of notorious reputation. In *Nationwide News Pty Ltd v El-Azzi* [2004] NSWCA 382 the Court of Appeal grappled with the problem of a plaintiff with an extensive criminal background (he was eventually awarded \$5,600, including \$600 interest for the 13 years it took for the case to get to court: [2005] NSWSC 47).
- Claims brought where the circumstances of discovery of the publication the subject of the claim are obtained by stealth or in other circumstances repugnant to justice: *Calabro v Zappia* [2010] NSWDC 127 (unused witness statement removed from court documents left in the court foyer). This case was struck out on limitation grounds, but the trial judge (who was myself) went on to hold that if the action had been brought in time, it should be struck out on *Jameel* principles, and it remains the only case to apply such principles.

The NSW Court of Appeal has been prepared to refuse leave to parties who seek to replead their cases in circumstances where there are multiple applications to amend or the hearing date may be lost: *Lee v Keddie* [2011] NSWCA 1. However, the principles applied here are the general principles which would be applied to all litigation, not merely to defamation claims.

English courts have been prepared to strike out claims where a defence of comment or qualified privilege is likely to succeed (see for example *Lait v Evening Standard Ltd* [2010] EWHC 3239), Australian courts have (other than in absolute privilege cases) never been prepared to do so (see for example

---

<sup>107</sup> For an account of the s 7A trial see the *Gazette of Law & Journalism*, March 29 and 30, 2011.

*Sutherland v Australian Consolidated Press Pty Ltd*, Supreme Court of NSW, Levine J, unreported).

As I have noted above, the success of the summary judgment procedure in England has led to the provision in the draft Defamation Bill of a provision to discourage or eliminate trivial claims. I now set out a brief overview of the main points of this important draft legislation.

## **UK LAW REFORM PROPOSALS – THE DRAFT DEFAMATION BILL**

The Draft Defamation Bill, the provisions of which will apply in England and Wales, provides the following reforms:

- A jurisdictional rule to protect defendants who are not domiciled in the UK, the EU or a Lugano<sup>108</sup> Convention State from “libel tourism” (clause 7).
- A requirement for substantial harm to reputation: the publication must cause or be likely to cause substantial harm to reputation (clause 1). This is a significant reform of the law of defamation as it discourages trivial claims and actions for very limited publication.
- Publication: a single publication rule (a 1-year limit for suing for online publications) (clause 6) and the existing common law definitions of “publish”, “publication” and “statement” to be imported from the common law (clause 9).
- Removal of the presumption in favour of jury trial with a general discretion to order trial before a jury where the court considers it to be in the interests of justice (clause 8).
- Qualified privilege defence: a defence of responsible publication on a matter of public interest (a stronger *Reynolds* defence for investigative journalism) (clause 2).
- Comment: a statutory defence of honest opinion where an honest person could have held the opinion on the basis of a fact at the time of publication or a privileged statement before the publication, which would replace the common law defence (clause 4).
- Absolute privilege: extension to proceedings in any court outside the UK and extends to fair and accurate reports of scientific/academic conferences and extracts from conference documents (clause 5).
- A statutory defence of justification which, unlike Australia, will repeal the existing common law defence of justification (clause 3).
- Although not in the Act, some costs reforms to prevent speculative and premium style fee arrangements have also been proposed.

### **Comments**

The draft legislation has been the subject of extensive discussion in *Inform's Blog* (<http://inform.wordpress.com/>) and the *Gazette of Law & Journalism* (<http://www.glj.com.au>), so my comments will be brief.

---

<sup>108</sup> For information about the Lugano Convention see [http://curia.europa.eu/common/recdoc/convention/en/c-textes/\\_lug-textes.htm](http://curia.europa.eu/common/recdoc/convention/en/c-textes/_lug-textes.htm) .

There are important reforms but this is, on balance, a plaintiff's bill. The chief issues, from my point of view as a judge in New South Wales, are:

- The provisions in clause 7 concerning jurisdiction, which are aimed at tackling the “widespread perception that the English courts have become the forum of choice for those who wish to sue for libel” and the chilling effect this may have on freedom of expression “throughout the world”, essentially repeats what is already the set out in the existing rules relating to jurisdiction. This is not going to discourage the bringing of such applications.
- Consideration of damages awards, and alternatives to damages for electronic publications, should be an essential part of defamation law reform. Australia remains the only common law country to have a cap on general damages, and the abolition of exemplary damages in Australia is also of significance.
- The two most important areas of reform are the summary judgment procedure and new provisions of relevance to publications on the internet.

The summary judgment procedure for trivial claims has been working well to date, and it would help if there were more specificity as to how the statutory regime would work; the Bill fails to address the mechanics for determining, let alone striking out, claims that fail to satisfy the substantial harm threshold. The Consultation Paper merely proposes that this should be achieved by the court exercising its existing discretion to strike out or give a summary judgment. This suggests that the courts could retain its discretion not to strike out claims on the basis that it would be a matter for the trial judge. In addition, what is “substantial” harm? Evidence may be led, even in the most limited publication, of persons being shunned at church, or of the plaintiff being asked by friends on the street “Are you out on bail?”<sup>109</sup> Such evidence is difficult to test or refute.

Such a reform would fall on deaf ears in Australia, where the court's reluctance to strike out defamation actions as an abuse of process other than in exceptional circumstances is clear from decisions such as *Habib v Radio 2UE Pty Ltd* [2009] NSWCA 231. In addition, the continued failure of the defence of unlikelihood of harm (s 33) paints a dismal picture of the likelihood of any publication being considered as not causing substantial harm. The defence failed in *Cush v Dillon* (supra), where the slander to one person was that the plaintiffs could be having an affair; the defendant appealed the rejection of the qualified privilege defence but did not appeal the rejection of the defence of unlikelihood of harm.

The second area of interest relates to changes for publications on the internet. First, there are the provisions of clause 6, which will benefit online sites such as newspapers which keep archives of earlier publications; since the Australian courts appear accidentally to have adopted the single publication

---

<sup>109</sup> These examples are taken from the facts in *Hartley v Nationwide News Pty Ltd*, a jury trial where notwithstanding community concern about large verdicts following the Carson verdicts of \$400,000 and \$600,000, the jury awarded \$850,000 (set aside on appeal): see the NSW Law Reform Commission's discussion of this problem at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R75CHP2>.

rule in cases such as *Pingle v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, such a rule would be easily adaptable for Australian defamation law.

This brings me to the section of the discussion paper concerning responsibility for publication on the internet (paragraphs 101 and following) indicate an appreciation of the possibility of “notice and takedown” procedures (at paragraph 110 and following). I was particularly impressed by the following suggestions (at p. 44):

“Another possible approach would be to introduce a statutory system akin to that which currently applies in relation to copyright disputes in the USA. This would involve the ISP or discussion board owner acting as a liaison point between the person complaining about a defamatory posting and the person who had posted the material. If after an initial exchange of correspondence the issue remained in dispute, the complainant would be required to initiate legal proceedings against the poster to secure removal of the material, and could not pursue an action against the ISP. However, this approach would encourage recourse to litigation, and would in particular be likely to disadvantage claimants who were individuals or had limited resources, as a defendant with greater resources could afford to dispute the removal of defamatory material in the knowledge that the claimant could not afford the cost of proceedings, and leave the claimant with no other means of securing its removal.

Another possible approach would be for the claimant to be required to obtain a court order for removal of the allegedly defamatory material...

A further option (to address specific concerns that the current law may affect the extent to which people are willing to establish and run local discussion forums) might be to develop separate provisions to provide a greater degree of protection to small scale forums and blogs than is available to larger corporate ISPs with greater resources. For example the complainant could be required to take action against the individual poster in these circumstances, as they would be more likely to be readily identifiable in these situations. However, there would be considerable difficulty in defining exactly what types of situation would and would not fall within such a provision, and it could be open to accusations that it discriminates unfairly against a particular group of claimants.”

The consideration of a statutory procedure for notice and takedown (paragraphs 120 – 121), and the offer in paragraph 121 to consider further submissions, are the first time any common law country has considered such legislation in a defamation context.

This is a significant step forward in the consideration of special rules for internet publications. It is to be hoped that discussion about the Draft Defamation Bill leads to legislation designed to ensure a rational balance between Tweeters, facebookers, bloggers and other expressers of internet chat and opinion and the reputations of those about whom the statements are made.

- The proposal to replace the presumption in favour of jury trial with a discretion to order a jury trial where it is in the interests of justice comes from judicial statements to the effect that the right to jury trial encourages the parties to engage in protracted interlocutory disputes.<sup>110</sup> However, I am unaware of any suggestion that such an approach exists in criminal jury trials. Similarly, the idea that juries find defamation trials complex is troubling, since juries hear criminal trials of great complexity without such objections being raised, and where there is no evidence put forward of juries not understanding, for example, qualified privilege or comment defences.

Another argument put forward is the cost, and there is much to say for the removal of jury trials from non-media defamation actions. However, while the removal of jury trials may save money in individual cases, it is likely to have two unwanted side-effects. The first is that abandonment of the jury trial would almost certainly lead to greater success by plaintiffs, to which the long history of successful plaintiffs in the Australian Capital Territory (where there was no jury trial) is mute testimony. The higher failure rate of politician plaintiffs before juries has long been noted by commentators<sup>111</sup>. One of the reasons for the rise in defamation actions in New South Wales since 1995 has been, in my view, the restriction of the jury's role to defamatory meaning. These jury requirements applied in the Supreme Court but not the District Court. It did not take long for plaintiffs to realise the benefits of trial without a jury in the District Court, which is one of the reasons why there was such an increase in defamation trials in the District Court from that time onwards and until this loophole was the subject of further legislation in 2003.

The second result is that defamation trials without a jury will take far longer. The pressure of a jury trial means that a party who spins the case out runs the risk of losing the jury. The Marsden trial in New South Wales<sup>112</sup> is a warning about the real risk if jury trials are abandoned, namely the risk of megalitigation. If courts do abandon the jury trial, it will be necessary for trial judges to take a much tougher line on preparation for trial by lawyers. That will have a trickle-down effect on professional negligence claims.

- Although the proposed extension of the *Reynolds* defence has been hailed as a powerful new defence of responsible public interest publication, I agree with Antony White QC and Edward Craven that clause 2 is "little more than a statutory reformulation of the existing common law defence of *Reynolds* privilege"<sup>113</sup>. As Justice Eady has pointed out, this is a defence which is rarely

---

<sup>110</sup> Antony White QC and Edward Craven set out the statement to this effect by Lord Phillips in *Spiller v Joseph* at <http://inform.wordpress.com/2011/04/07/opinion-draft-defamation-bill-proposals-problems-and-practicalities-part-3-antony-white-qc-and-eddie-craven/#more-8575>.

<sup>111</sup> See Brendan Edgeworth and Michael Newcity, "Politicians, defamation law and the 'public figure' defence", (1992) *Law in Context* 39.

<sup>112</sup> *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 570. There were more than a dozen appeals, most of them during the very lengthy trial. The statistics for the number of judgments, witnesses and exhibits are set out in the judgment.

<sup>113</sup> *Inform*, <http://inform.wordpress.com/2011/04/03/opinion-draft-defamation-bill-proposals-problems-and-practicalities-part-1-anthony-white-qc-and-eddie-craven/#more-8508>.

pleaded, and as Heather Rogers QC explains<sup>114</sup>, it is a defence which even more rarely has succeeded. One welcome addition is the elevation of reportage onto a statutory footing (clause 2.3) and another is the extension of protection to statements of opinion, but otherwise the law is much the same as it was before. The omission of “public interest” from the definition (the Consultation Paper said that its meaning was well-established in the English common law) may cause difficulties given the obsession UK tabloids appear to have with the private lives of anyone in the public glare.

- The “honest opinion” defence differs little from the common law defence. It would appear that the common law defence is to be repealed, as are all other common law defences, but as the Bill makes no reference to the future status of, for example, common law *Reynolds* privilege, this may not be the case. This needs to be clarified, particularly in relation to the defence of partial justification, where the United Kingdom’s statutory and common law defences are inferior to the complete defence available under statute in Australia.
- The partial justification defence remains the same as before. The defence of contextual truth in Australia enables a defendant not only to rely upon unpleaded imputations but also to plead back the plaintiff’s imputations to “swamp” those imputations which are true.
- Changes to the system for assessment of damages are very limited.
- Major problem areas, such as “superinjunctions” and privacy claims, are not dealt with, although these applications are matters of concern to the media<sup>115</sup>.
- Finally, and perhaps most importantly, there is an extensive review procedure, so that members of the public, media organizations, and other interested parties can make submissions.

Where will the balance between freedom of speech and protection of reputation lie if this Bill is enacted?

The introduction of the single publication rule and the extension of absolute privilege to academic publications are useful reforms. The provisions for consideration of a special regime for electronic publications are in my view a very significant development, and one which Australian law reformers should consider carefully. Electronic publication will be the dominant means of communication in the future.

The Bill otherwise offers reframing rather than reform, and has not yet taken on important reforms (such as not permitting corporations to sue for defamation) which

---

<sup>114</sup> *Inform*, <http://inform.wordpress.com/2011/04/01/defamation-update-part-3-%e2%80%93-heather-rogers-qc/#more-8437> .

<sup>115</sup> <http://www.independent.co.uk/opinion/commentators/john-kampfner-the-worrying-rise-of-the-rich-mans-weapon-of-justice-2258869.html> .

have enjoyed success in Australia, such as limitations on the right of corporations to bring defamation actions.

## CONCLUSIONS

The difficulty of effective defamation law reform, as illustrated by the s 7A jury trial experiment in New South Wales, is that reforms which introduce greater technicality, such as bifurcating the trial or complex constitutional defences, may create more problems than they solve. Changes to the nature of publication, in the electronic era, and to the profession, particularly the increased cost of litigation, also need to be taken into account. Nor is it necessary to have a “one size fits all” approach to different kinds of publications; reforms that are appropriate for electronic publications or the media may be different to those which are appropriate for private communications or limited publications such as a slander.

The immediate short-term problem is how to reduce the number and cost of defamation actions. I believe this can be achieved by three interim changes to procedure.

The first of these, Commonwealth legislative recognition of alternative means of redress for internet and electronic publications (at first as a pre-action requirement and perhaps later as a complete alternative) would take the pressure off the court system of having to reduce the number of cases. The second, the setting up of a specialist appeals court to determine appeals where freedom of speech issues arise, would lead to a consistency of approach concerning balance issues, by specialist judges, and enable more studied consideration of law reform issues in the future. The third proposal, carrying forward a review of legal costs (not only speculative fees, but “megalitigation” practices) to ensure the abuses that bedevilled personal injury are expunged from defamation law, would reduce costs for the media and help restore public confidence in the legal profession generally. The damage done to the legal profession by the extensive newspaper coverage of lawyers’ overcharging in personal injuries cases is far greater than lawyers and judges have been prepared to acknowledge.

Another short-term reform would be to consider amendments to the Defamation Act to correct anomalies in the defences which have come to light since the uniform legislation was introduced. Proposals by individual courts to get rid of juries, or reorganise workloads between courts, should not be attempted on an individual court basis, but by co-operation and discussion between courts around Australia.

It is important not to trivialise defamation law reform. A criticism often made by those who administer justice, or the courts, is that defamation cases are of less importance than other court proceedings, such as personal injury cases. The reputations of our courts and our legal system are, however, judged by how courts deal with issues such as freedom of speech. If *Inform*’s response to the cases published on court websites is to award the crown for defamation capital of the world to New South Wales, imagine the response of the developing countries who look to Australia for guidance on issues such as freedom of speech, and who exchange visits with delegations of judges, lawyers and prosecutors for the purpose of discussing such

matters. Officials in these countries read Australian newspapers<sup>116</sup>, and court websites, with interest, and if we cannot achieve a proper balance for freedom of speech, we cannot expect our opinions on other legal issues to be taken seriously by them.

Finally, freedom of speech, and the proper balance necessary to obtain it, should not be dismissed in this fashion, for an even more powerful reason. Professor Vai Io Lo and Xiaowen Tian have, in their insightful review of the importance of the freedom of the press in combating corruption, demonstrated that media freedom of expression is the most significant control on corruption than elections – in fact, it is more successful in this regard than democracy itself<sup>117</sup>. The importance of freedom of speech is that this exchange of ideas and information, through a news source available to any interested reader or listener, by definition will operate outside the framework of political influence. Lo and Tian, in their research, demonstrate that “vertical”<sup>118</sup> democratic mechanisms such as press freedom and elections are more effective than “horizontal” democratic mechanisms such as courts, anti-corruption commissions and parliament. The Nobel Peace Prize Committee presumably had such issues in mind when awarding the Peace Prize to Liu Xiao Bo, and the members of the Australian government who spoke about these matters in parliament on 22 November<sup>119</sup> presumably did too. Chinese bloggers and journalists<sup>120</sup> seeking to enlarge the parameters of speech will not benefit from having personal liability for damages added to existing uncertainties.

In conclusion, a surge in defamation actions, particularly internet and electronic publication actions, has led to the Australian court system being swamped, and the balance between freedom of speech and protection of reputation will become increasingly difficult to maintain, particularly with restrictive interpretations at appellate level of defences such as qualified privilege and unlikelihood of harm. Before long-term defamation reform can be embarked upon, short-term measures to restore this balance, such as alternative dispute resolution for internet cases, restrictions on legal costs and the creation of a specialist appellate court, are needed to take the pressure off the overloaded court system. An appellate court at Federal level can ensure Australia-wide consistency of interpretation and identify areas requiring legislative adjustment, including problem areas concerning the individual’s right to privacy. Only then will the right path to more comprehensive legal reform in Australia become clear<sup>121</sup>.

---

<sup>116</sup> This includes the Taliban, who are regular readers of the *Australian Financial Review: Dehsabzi v Dehsabzi* (2007) 6 DCLR 68 at [7] – [8].

<sup>117</sup> See the research on this topic collected by Xiaowen Tian and Professor Vai Io Lo in “Conviction and Punishment: Free press and competitive election as deterrents to corruption”, (2009) 11 *Public Management Review* 155 – 172 at p.156.

<sup>118</sup> Tian and Lo, *ibid*.

<sup>119</sup> “MPs slam China over jailed Nobel activist”, *Sydney Morning Herald*, 23 November 2010.

<sup>120</sup> It is not possible in this short paper to review the Chinese media in any detail, but I would like to mention, as examples of the rise in journalistic standards, the simultaneous publication of the 23 editorials calling for action on the hukou system and the April 2009 *China Youth Daily* report of the libel prosecution of a blogger (the prosecution was dropped in the ensuing public outrage).

<sup>121</sup> For discussions and comments please contact me at [jcgibson@courts.nsw.gov.au](mailto:jcgibson@courts.nsw.gov.au). I thank my associate Vincent Mok for his assistance.