

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

**STANDING COMMITTEE ON
LEGAL AFFAIRS**

**INQUIRY INTO DEFAMATION LAW
IN THE AUSTRALIAN CAPITAL TERRITORY**

JUNE 1991

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TERMS OF REFERENCE

On 12 September 1990 the Assembly agreed to the resolution that the committee inquire into and report on:

- 1) the incidence of defamation litigation in the ACT
- 2) the financial costs to the community, organisations and individuals of defamation litigation in the ACT
- 3) the time it takes for defamation actions to be dealt with by the courts in the ACT
- 4) the feasibility of introducing alternatives to litigation in defamation cases
- 5) any other aspects of defamation law and practice in the ACT that the committee considers to be of concern to the community.

1. BACKGROUND TO THE INQUIRY

1.1 For the size of its population the ACT has become an important jurisdiction of choice for defamation actions. This can be put down to a number of factors, an important one being that the ACT accommodates the Federal Parliament and Government, which are the focus of media attention. Because of the location of the ACT vis a vis the major eastern states there is considerable cross-border publication of news and media comment and this in turn provides a potential for defamation allegations centred on the ACT.

1.2 Other factors also contribute to defamation actions being taken in the ACT. There is no provision in ACT law for jury trials in defamation actions. The view was put to the committee that defamation cases against the media by politicians in particular fare better without a jury and this generally appears to have been the case.

1.3 The committee was told that other advantages of using the ACT jurisdiction are the comparative speed with which actions are dealt with and that damages awarded are seemingly more generous than in other jurisdictions.

1.4 The legal justification for suing in the ACT is that the act of publishing in the ACT constitutes the commission of an action in the ACT and the offending publisher can be sued there even though not a resident of the Territory.

1.5 ACT defamation law is essentially derived from the common law of the United Kingdom, and subsequently inherited from NSW. Although this legislation no longer applies in NSW, it is still important in the ACT. The law in force in the ACT is the common law as modified by the Defamation Act 1901 (NSW) and the Defamation Amendment Act 1909 (NSW).

1.6 There is a concern about the irrelevancy of much of the present law in the ACT, delays in obtaining acceptable redress, and the high cost of defamation actions to individuals and the community.

1.7 Within the legal profession, the media and the community there is also a discernable concern for reform of the defamation laws.

1.8 That concern found expression in the ACT Attorney General referring to the ACT Community Law Reform Committee (CLRC) in September 1990 the question of reviewing the law of defamation in the ACT, with particular reference to moving for a uniform Australian law of defamation. When announcing this reference the

Attorney-General said "The laws in the ACT are old and do not adequately protect private and public rights. I would like to see a much more contemporary balance being struck between the competing rights to privacy and to information and freedom of speech"⁽¹⁾.

1.9 While the CLRC is concerned with the technicality of the law, the interest of this committee has been in the broader implications for the community of the present law and its operation and with the possible alternatives to litigation. This committee saw its work as complementary to that of the CLRC and indeed believes that both committees have benefited from exchanges of views over the past few months.

¹ ACT Attorney-General news release Sept 1990. See also CLRC Terms of Reference, Appendix 3.

2. THE INQUIRY

2.1 Advertisements inviting opinion from the public were inserted in The Canberra Times, The Chronicle and The Valley View, and approaches were made to specific organisations and groups. Submissions were received from a range of individuals and bodies including media representatives and legal practitioners. The submissions received are listed in appendix 1.

2.2 As the ACT Attorney-General had already referred defamation law to the CLRC he considered it inappropriate to make a formal submission to the committee, as this could be seen as pre-empting the work of the CLRC. However, the Attorney offered the assistance of the ACT Law Office and the committee benefited from informal contacts in that area.

2.3 The committee also consulted widely. Apart from contact with the ACT law Office, discussions were held with the CLRC, the Free Speech Committee of NSW, The Australian Press Council, the NSW Attorney-General and with members of the NSW Bar Council.

2.4 Public hearings were held on 5 February 1991 and 26 March 1991 at which 14 individuals gave evidence. Details are given in appendix 2.

2.5 In its public hearings especially, the committee had the benefit of evidence from a broad spectrum. The committee heard from sections of the print and electronic media, the recipients of writs, plaintiffs and the legal profession.

3. DEFAMATION LAW

3.1 Defamation law is a means of achieving the right balance between freedom of speech and the protection of an individual's good name and reputation. However, some argue that defamation law too often protects an individual at the expense of freedom of speech and the right of the community to be informed on matters of public importance or interest.

3.2 Defamation is essentially the publication of a statement to another person or persons of words or matter which impugns the reputation of another person.

3.3 A defamatory statement is one that is likely to cause ordinary reasonable people to think less of the person about whom the statement is made. A defamatory statement may be contained in a book, report, article, letter, note, picture or in spoken word.

3.4 ACT law does not allow for an action to be brought claiming a deceased person has been defamed. However, the law applies that a living person whose reputation is impugned by a defamatory statement concerning a deceased person may bring an action claiming defamation by the statement. A defamation action commenced by a deceased person does not survive for the benefit of that person's estate.

3.5 In the ACT, the person who claims to have been defamed may sue the person making the defamatory statement for compensation for the loss of reputation arising from the defamatory statement. Once the person claiming defamation has shown that the statement, words or image has a defamatory meaning, it is up to the person who made the statement to prove that it was true or to prove some other defence. It is not a defence to show that the defamation was not intended.

3.6 A defendant has recourse to several defences to a defamation action. These are categorised as:

- 1) Justification or truth. At common law this forms a complete defence. If the defendant can prove that the statement is true, then that statement is not defamatory. However, in the ACT the defendant must also prove that the statement was made for the public benefit.
- 2) Absolute Privilege. No action for defamation can be brought in respect of anything said in the course of Parliamentary proceedings, including Parliamentary committees, Court proceedings or in certain classes of document released by them.
- 3) Qualified Privilege. It is a defence where the person who makes a statement has an interest or duty to make it to a person having a corresponding interest or duty to receive it. At common law, this defence does not include the interest or duty of the media in reporting matters to the public. The maker of the statement loses this defence if motivated by malice or an improper motive.

- 4) Fair comment. Proof that a statement was published as fair comment on a matter of public interest is a defence to a defamation action, provided express malice is not shown. The defence generally extends to fair and accurate reports of the proceedings of the Legislative Assembly and its committees, the proceedings of the Federal and State parliaments and their committees, public Court proceedings, official inquiries, and official public service reports and notices.

3.7 The Committee is aware of a concern that distributors of publications may, in all innocence, be disseminating material which could lead to a defamation action.

4. PROPOSALS FOR UNIFORM DEFAMATION LAWS

4.1 Currently each State and Territory has different defamation laws. When an ACT television program, for example, crosses the border with NSW a new law applies. The TV broadcaster has to consider which particular words or parts of the program might breach which parts of the defamation law of the various States and Territories.

4.2 Uniform laws would help to solve this problem, and to that end there have been a number of studies and reports over the past 10 years. The Standing Committee of Attorneys-General (SCAG) produced a draft uniform Bill for consideration by the States.

4.3 The move for uniform laws was given new impetus with SCAG deciding in March 1990 to consider reinstating the matter on the agenda. The Attorneys-General of NSW, Queensland and Victoria subsequently announced their intention to re-examine the question of reform of defamation law within their respective States, and this led to the release of their first discussion paper on 26 August 1990 which advanced particular proposals for reform agreed upon by the three Attorneys as warranting review⁽²⁾. On the basis of responses to that paper, the Attorneys issued Discussion Paper No 2 in January 1991 for the purpose of gauging community concerns and expectations before proposals were considered by the respective governments.

4.4 The stated aim of the papers is to outline means of producing greater clarity in the law with an objective of removing unwarranted restrictions on the freedom of speech as a result of unnecessary technicality or uncertainty⁽³⁾. The Attorneys did not seek to canvass all the existing State variations in defamation law, but rather attempted to identify practical measures for possible implementation in NSW, Queensland and Victoria which, if effective, could form useful models for consideration by other States⁽⁴⁾.

4.5 A number of issues canvassed by the Attorneys are therefore relevant to the ACT both because of the proximity of the ACT to those States, especially in terms of the pervasiveness of media reports, and forum shopping whereby plaintiffs may choose which jurisdiction to apply to for the prosecution of an action.

² Discussion Paper on Reform of Defamation Law, The Attorneys General of New South Wales, Queensland and Victoria, 26 Aug 1990

³ Reform of Defamation Laws, Discussion Paper (No.2), Attorneys-General of Queensland, New South Wales and Victoria, January 1991, para 1.3

⁴ Discussion Paper on Reform of Defamation Law, op cit, para 1.6

4.6 In their second discussion paper, the Attorneys agreed on five issues, and stated that they had received support in principle from the South Australian and Western Australian Attorneys-General. The points of agreement were:

- 1) That defamation actions must be brought within six months of the date when the plaintiff first learned of the publication, with an absolute limitation period of three years.
- 2) The criminal defamation offence will be retained subject to the discretion of the relevant State Directors of Public Prosecutions.
- 3) Truth alone will be a defence against defamation except where the publication is an invasion of privacy. In that case, publication will only be justified if it is in the public interest.
- 4) A system of Court-recommended correction statements will be established as an intermediate proceeding.
- 5) Contempt laws will be the subject of a separate review.

4.7 One outstanding area of disparity between the three States was the determination of the quantum of damages. New South Wales and Queensland agreed to allow the question of liability to be put to the jury with the question of damages to be determined by a judge. Victoria said it would continue to allow the jury to decide both matters.

4.8 The committee noted that aspects of the agreed position by the Attorneys drew a mixed response from the legal profession and from the media in particular. While welcoming clarity and consistency as an outcome of the discussion paper and the introduction of procedural uniformity to prevent forum shopping, sections of the media clearly see the move to uniformity as leaning towards more effective censorship than freer expression of public speech⁽⁵⁾.

The Current Position on the Proposed Law Changes

4.9 The current legal position in the three States and in the ACT in respect of the relevant points of agreement set out by the three Attorneys in their decision paper No.2 is:

. Limitation Period

New South Wales, Victoria, Queensland and the ACT have a six year limitation period in bringing proceedings for defamation. This is in line with limitation periods for actions in libel currently applying in other States with the exception of the Northern Territory which has a three year limitation period. In Western Australia an action in libel

⁵ Australian Financial Review 22 January 1991

against a newspaper cannot be brought after the expiration of twelve months from the date of publication.

. **Criminal Defamation**

Criminal prosecution for publication of defamatory material is very rare. In NSW the offence is not committed unless the publisher intended to cause serious harm to a person, or knew that it was provable serious harm would be caused. In that State proceedings for an offence are instituted with the consent of the Attorney-General. In Victoria the Director of Public Prosecutions has sole discretion in the filing of presentments. In Queensland, criminal prosecutions are subject to the leave of the court under the Queensland Criminal Code.

. **Justification**

The common law rule, which applies in some jurisdictions, is that it is defamatory to publish material which exposes a person to hatred, ridicule or contempt, or which will cause him or her to be shunned or avoided by others. Where truth alone is a defence, material which leads to such a result can be published without adverse legal consequences.

However some States currently provide a defence of truth and public benefit.

In NSW the common law has been replaced by a statutory defence which requires the defendant to establish that the imputation complained of is a matter of substantial truth and the imputation relates to a matter of public interest.

There has been criticism by the media of this statutory requirement. Critics have argued that the historical basis of the action has over emphasised protection of "magnates of the realm" in a way which is wholly inappropriate in a modern democratic political environment.

The defence under the Queensland code is truth and public benefit. In Victoria, the common law provides that truth is an absolute defence to an otherwise defamatory statement, and ACT law provides that in any action for defamation the truth of the matters charged is not to amount to a defence unless it was for the public benefit that those matters should be published.

. **Court Ordered Correction Statements**

At present there are no provisions in New South Wales, Queensland, Victoria or ACT law for court-ordered correction statements.

Subsequent Agreement between the Three Attorneys-General

4.10 On 19 April 1991 the three Attorneys agreed (ref joint release 19 April) to take a draft Bill to a meeting of SCAG in July. Uniform Bills are to be taken to the three State Cabinets and the expressed intention of the Attorneys is to proceed whether or not the other States become involved.

4.11 The agreed position by the Attorneys on the five issues agreed upon in their discussion paper No 2 is now:

- 1) Defamation actions to be brought within six months.
- 2) Criminal defamation to remain an offence.
- 3) The defence of justification will consist of truth alone except where publication is an unwarranted invasion of privacy.
- 4) A system of court-recommended correction statements will be established as an intermediate proceeding.
- 5) Contempt laws to be subject to separate review.

4.12 The Attorneys left for the discretion of each of the States the issue of juries deciding damages. They expressed the view that forum shopping between jurisdictions would also be substantially reduced.

Relationship with ACT Law

4.13 There is a view in the ACT that ACT law should at least be in uniformity with NSW⁽⁶⁾. In a letter to the committee, the Attorney endorsed reform efforts towards more uniform defamation laws, and advised that it would be desirable for ACT law to seek uniformity with the three States where possible. He drew particular attention to the ACT being a "popular" jurisdiction for plaintiffs and indicated that a uniform law on forum shopping would prevent plaintiffs from commencing actions where defamation is more difficult to defend.

4.14 The President of the ACT Law Society was reported as saying it would be a retrograde step for the ACT to ignore the developments in NSW, Victoria and Queensland⁽⁷⁾. He was further quoted as saying "Media communications, whether electronic or print, do not stop at the border gates... There is a substantial cost in lack of uniformity for any litigant, as well as publishers who need simple, understandable law which applies wherever they publish".

4.15 Other views noted by the committee in connection with the opening of the ACT Law Week⁽⁸⁾, were suggested areas of possible reform including:-

- a declaration of the freedom to hold an opinion and a qualified freedom to express it
- a declaration of the media's duty to be honest and thorough

⁶ The Canberra Times, 20 Feb 1991, and ACT Attorney-General news release Sept 1990

⁷ The Canberra Times, 1 May 1991

⁸ The Canberra Times, 1 May 1991

- a statutory right of reply for persons reported on adversely.

4.16 These ideas do not appear to be incompatible with the broader thrust of defamation law reform.

ACT Position on Uniformity

4.17 The committee welcomes the moves towards uniformity of defamation laws in Australia, and is broadly supportive of those proposals which will give greater clarity in the law. Where this will clearly be the case so far as the law of the ACT is concerned, the committee sees certain of the proposals as appropriate for incorporation into the ACT law. The committee notes that other matters relating to forum selection, contempt, parliamentary privilege, public figure test and damages are not part of the moves for reform at this time, but does not consider that any separate action in respect of these by the ACT would conflict with the reforms already agreed upon by the Attorneys.

4.18 Of the three substantive issues mentioned in paragraph 4.11 of this report where agreement has been reached between the Attorneys on uniformity, those concerning time limitations and Court-recommended corrections are covered in sections 7 and 8 of this report. The issue of justification or truth as a defence is discussed in the immediately following section of this report.

Truth as a Defence

4.19 The committee notes that the three State Attorneys consider that privacy and reputation are inextricably linked even though they noted argument that the historical basis of the action has over-emphasised protection of "magnates of the realm"⁽⁹⁾.

4.20 The committee noted there was little support for retention of the public interest as an element of a defence of truth. This is the present position with the ACT law and it appears to be one of the reasons for the popularity of the ACT jurisdiction with non-ACT litigants, especially from those States such as Victoria, South Australia, Western Australia and the Northern Territory where the common law defence of truth alone applies.

4.21 In their discussion paper No 2 the three Attorneys acknowledged that many submissions argued strongly that defamation and privacy are separate issues and should be dealt with separately⁽¹⁰⁾. It was put to the committee that the protection of privacy is a laudable aim, but to maintain the public interest requirement is to confuse the object of defamation laws in protecting good name and reputation with a different object, namely the protection of privacy. It was argued that the end result is that the public interest requirement is just one more obstacle to free speech without adequately protecting the privacy of individuals⁽¹¹⁾.

⁹ Discussion Paper on Reform of Defamation Law, op cit, p 22

¹⁰ Reform of Defamation Laws Discussion Paper (No2), op cit, pp 10,11

¹¹ Submission No 7. p3

4.22 The Law Institute of Victoria took the view that as well as being right in principle, truth alone is a far simpler, clearer and easier to apply defence than truth plus public interest or privacy. The Institute accepted that the three Attorneys wished to provide some protection for privacy but as with the witness referred to above, believed that protection of privacy and protection of reputation are completely different issues, and that a law concerned with one of these aims may not be an ideal vehicle for protecting the other⁽¹²⁾.

4.23 The three Attorneys said they were mindful of the philosophy behind truth alone as a defence, and equally mindful of the need to encourage responsible journalism and discourage sensationalist reporting or muckraking expeditions. Summarising their position they said they were unable to accept that defamation and (published) privacy are separate matters, and thus retained an agreed position that truth alone would be a defence provided that appropriate measures are introduced to ensure that individuals are protected from unjustifiable revelations about a limited number of essentially private matters⁽¹³⁾.

4.24 The Attorneys' position was supported by some groups and individuals at the receiving end of media publicity. The ACT Branch of the Australian Medical Association (AMA) which appeared before the committee stated that the medical profession was constantly the subject of considerable media comment, with much criticism directed at individual doctors, that many press articles were sensational, frequently inaccurate in fact and sometimes personally defamatory. The result of this was that trust between patients and doctors was sometimes being damaged through the invasion of professional privacy⁽¹⁴⁾.

4.25 In another case, the committee received evidence, in camera, of unwarranted scrutiny and public speculation about the private life of an Australian resident by an overseas newspaper. The publicity had no relevance to this person's professional responsibilities. The purpose of the newspaper's actions could only be regarded as pandering to salacious gossip.

4.26 While there can be no doubt as to damage caused by unwarranted intrusion into the private lives of individuals, the committee notes that the Australian Law Reform Commission (ALRC) has observed that the number of privacy-invading publications in Australia appears to be small and that journalists are sensitive to privacy issues⁽¹⁵⁾.

4.27 The committee considers that the simpler truth alone defence except where publication is an unwarranted invasion of privacy

¹² Submission No11, p11

¹³ Reform of Defamation Laws Discussion paper (No2), op cit, pp 13,14

¹⁴ Submission No8, and transcript pp 72,84

¹⁵ Reform of Defamation Laws, Discussion Paper (No2), op cit, p13

adopted by the three Attorneys is a reasonable compromise between the public need to know and the private rights of individuals, provided that there is a limited definition of unwarranted invasion of privacy. The committee considers that legislation should be specific on this point and that it should not be used to prevent legitimate discussion and the airing of issues of public interest.

4.28 The committee recommends that

- a) The Government support the points of agreement between the three State Attorneys-General on achieving uniform defamation law to enable it to initiate the changes which would be required to ACT law to make it compatible with the draft Bill to be considered by SCAG in July 1991.
- b) Irrespective of the terminology of the draft SCAG Bill, the changes to ACT law :-
 - i) require that truth alone form a complete defence in defamation except where publication is an unwarranted invasion of privacy,
 - ii) define a limited number of essentially private matters which would prevent recourse to the defence of truth in a defamation action, and
 - iii) provide for justification of publication of defined private matters where this can be shown to be in the public interest.

5. THE INCIDENCE OF DEFAMATION LITIGATION IN THE ACT

5.1 In any one year there are about 50 writs for damages for defamation filed with the Supreme Court of the ACT. After 1985 there was an upsurge in both the numbers of writs filed and in the numbers of court prosecutions. Twelve writs were filed and 5 cases brought to court in 1985, 66 writs and 24 court cases in 1986, 50 writs and 12 court cases in 1989 and 22 writs in 1990. On average, about 5 writs each year are withdrawn after six months.

5.2 Comparison is made between the numbers of defamation writs filed and writs taken out for all civil actions. In 1989 there were 706 civil writs of all kinds and 735 in 1990. In 1989 76 civil matters were settled including seven defamation matters, and in 1990 there were 39 settlements including part of a defamation matter. Settlements were either by consent or by the plaintiff discontinuing the action.

5.3 The committee found no particular correlation between the number of defamation writs filed in any one year and the number which are withdrawn or brought to court in the same year. It may take several years from the filing of a writ before a matter comes to court and, as already noted, a significant number of writs are withdrawn each year. In the experience of one media witness, the average time between the filing of a writ and the finalisation of a case which goes to court is two years⁽¹⁶⁾. The committee notes that this puts a significant brake upon the media and others in commenting on the issues in dispute while the writs remain extant. While a writ remains in force, and it may be in force indefinitely, the matter or matters concerned with the writ are sub judice and cannot be discussed in any public forum.

5.4 In discussions with a wide range of people involved in defamation law and the media, the committee was given strong anecdotal evidence that defamation writs are frequently resorted to as a means of preventing public debate and discussion on matters of sensitivity to the individual filing the writ. This can be especially the case where the individual is prominent in public life.

5.5 One publisher informed the committee that his magazine attracted 13 writs during its relatively short life of 18 months, and was threatened with a further five or six. Only two went to court, with one of these being withdrawn. In one case, a plaintiff threatened to sue the newsagents as well. The magazine saw this activity as directed towards putting it out of business which is what eventually happened⁽¹⁷⁾.

¹⁶ Transcript pp 12,13

¹⁷ Transcript pp 60,61

5.6 The editor of The Canberra Times put the view that the cases coming to the court were only the tip of the iceberg, and that in his experience fewer than one in twenty actions which started with a writ or statement of claim would go to trial. He said that looking at the earlier stage of the process, cases which start with some sort of lawyer activity such as a letter or lawyer's phone call where someone is represented, some 80 per cent are cleared up without any court action being started⁽¹⁸⁾.

5.7 A similar estimate of cases involving some sort of legal activity but do not reach the courts was given by the Australian Broadcasting Corporation (ABC) representative. However, of 42 defamations commenced against the broadcaster in 1990, eight commenced in the ACT⁽¹⁹⁾.

5.8 The ABC observed that while there has been a slight increase in the numbers of defamation matters across Australia in recent years, there has been proportionally a much greater increase in ACT litigation. In the years up to and including 1988 the plaintiffs were predominantly figures on the Federal scene residing in the ACT. However, in the last two years with the introduction of self government in the ACT and the resulting increased reporting of local politics and issues there has been a marked upsurge in defamation cases initiated by ACT public figures. The ABC commented that an apparent concomitant of public life and public figures in Australia is that defamation proceedings are resorted to rather than use being made of the public forum available to those public figures to respond⁽²⁰⁾.

5.9 It has not been possible for the committee to obtain sufficient material to make detailed comparisons with other jurisdictions on the incidence of defamation. However, NSW data indicates that on a per capita basis many more defamation writs have been issued in the ACT in recent years than in NSW. In the two years 1988/89 the ratio of writs issued to population was approximately 24 per 100,000 people in the ACT and nine per 100,000 in NSW.

Forum Selection

5.10 The committee was told that the ACT is a popular jurisdiction for defamation actions. The reasons given were that ACT law requires in addition to proving that a statement is true, a defendant must also prove that it was made for the public benefit. Because there are no juries in ACT defamation actions, matters are heard more quickly and the outcomes are more predictable, politicians and other public figures may feel that they get a more sympathetic hearing before a judge than a jury and awards for costs are more generous⁽²¹⁾.

¹⁸ Transcript p2

¹⁹ Transcript p25, p30

²⁰ Submission No 3, p2

²¹ Defamation, Issues for Consideration by the ACT Community Law

5.11 The three Attorneys recognised that forum selection or forum shopping for the jurisdiction which gives plaintiffs the best tactical advantage needed to be curtailed. (ref disc paper 2 p50). At present, the plaintiff can choose the jurisdiction. Where a publication is nationwide, the defamed person may sue in any jurisdiction in which the publication occurs, including the ACT. A defamed person can thus sue in the court that best suits their interest. The ACT Courts apply the law of each State and also determine damages on that basis⁽²²⁾.

5.12 Because the ACT is in close proximity to NSW and Victoria with regard to the cross border circulation of newspapers and radio and television it is an attractive jurisdiction of choice when the other considerations of ACT law are taken into account. A number of witnesses put the view that defences in the ACT are less adequate than those in other States, and that ACT law presumes that everything anyone says or writes or puts on film is false until it is proven true⁽²³⁾.

5.13 Of the 72 defamation writs filed with the ACT Supreme Court in 1989 and 1990 there were some 24 instances where the plaintiff's only apparent connection with the ACT was that the alleged defamatory material was published in the ACT. Of these, eight writs were taken out by Federal politicians from outside the ACT.

5.14 The question of the most appropriate choice of law rule is addressed in the Australian Law Reform Commission Report on Choice of Law Rules (DP 44 1990) The report concludes that:

"The practical difficulties of applying the law of eight separate jurisdictions if the publication is made Australia wide suggests that a simpler rule, such as the place of residence or place of primary loss, may be more appropriate than a place of publication rule. The application of a place of residence rule would enable the media to predict the law which will apply to any particular publication and would also be fair to plaintiffs because, at least where the material was also published in the State of residence, it would apply the law of the place where an enquiry to reputation generally has the greatest impact. A place of primary loss rule would ensure that the court only had to apply one law and would also curtail forum shopping"⁽²⁴⁾.

5.15 The three State Attorneys have decided to review the rules as to jurisdiction and choice of law in defamation actions. They believe further work is required before the exact content of reform can be formulated⁽²⁵⁾. However, for the present the

²¹ Cont. Reform Committee, Dept of Justice & Community Services Sept 1990

²² Defamation. ibid, pp 20,21

²³ Submission No 5, p3

²⁴ Discussion Paper on Reform of Defamation Law, op cit, p45

²⁵ Reform of Defamation Laws, Discussion Paper (No2), op cit,
17

committee understands that the Attorneys will be looking to the agreed changes leading to uniformity in defamation laws as being a sufficient basis for reducing forum shopping.

5.16 The committee found support for curtailing forum shopping especially from media representatives and also from the Law Institute of Victoria which recommended that the plaintiff should only be permitted to bring defamation proceedings in a jurisdiction which is the principal place of publication and/or the principal place of residence of the plaintiff and/or the principal place of damage to reputation⁽²⁶⁾.

5.17 On the other hand, the committee also heard the views of lawyers practising in the ACT. Their basic view was that the issue of forum shopping has been overstated and that it is unnecessary to have special rules to prevent the choice of jurisdiction⁽²⁷⁾. A further view, that of The Law Society of NSW, is that only when the States have uniform laws would it be appropriate to restrict forum selection and that it would be unjust if publication in one State affected a plaintiff resident in another State with particularly archaic defamation laws. In any event, the Society saw the cross-vesting legislation as applying rules based on the most convenient forum⁽²⁸⁾.

5.18 A further view put to the committee by an ACT solicitor was that in defamation proceedings the plaintiff should be able to commence an action in a jurisdiction where it is convenient for him to do so. This witness argued that as the law now stands there are mechanisms whereby abuse of the system can be dealt with⁽²⁹⁾.

5.19 To the extent that forum shopping imposes a cost on the ACT community both in terms of actual court expenses and in tying up the time of the courts, the committee sees a benefit to the community in steps being taken to limit access to ACT courts by plaintiffs who do not have a viable connection with the ACT.

5.20 The committee recommends that

the Government investigate the possibility of, and the implications arising from, restricted access to the courts for defamation actions by plaintiffs who are unable to demonstrate that the ACT is their principal place of residence or the principal place of their reputation.

²⁶ Submission no 11, p41

²⁷ Submission No 1, p3

²⁸ Submission No 12, p11

²⁹ Transcript, p99

6. THE FINANCIAL COSTS OF DEFAMATION LITIGATION IN THE ACT

6.1 The cost of any litigation including defamation litigation can be considerable. Disputation is necessarily a labour intensive activity and the adversary system of dispute resolution is doubly so. Until a better way of arriving at the truth and of satisfying the parties that they have had a fair hearing is developed litigation will remain the best available system⁽³⁰⁾.

6.2 The filing fee for a writ taken out from the ACT Supreme court for defamation or any other matter is \$300. Once an action is commenced, a party can file other documents as necessary without the payment of additional fees. However, as with any litigation, the solicitor/client and party/party costs can be very substantial.

Community Costs

6.3 There are significant costs to the community as well as the litigants. The costs of providing court services and equipment, court staff, judges and judge's staff are met by the taxpayer. The relevant costs are not disaggregated for defamation cases, but they are believed to be substantial. It is not uncommon for defamation actions to be settled on the door of the court and this is costly in terms of the loss of opportunity for the court to schedule other cases for hearing.

6.4 In evidence to the committee it was claimed that fewer than half of the defamation cases in the ACT Supreme Court are Canberra cases, and in respect of these the ACT community will in due course be funding the associated court costs⁽³¹⁾. However, as noted in paragraph 5.13 above, the committee identified about 34 per cent of the defamation writs filed in 1989 and 1990 as originating from persons resident outside the ACT. This is nevertheless a large percentage of the writs. It was put to the committee that defamation actions clog the courts and waste valuable court time⁽³²⁾.

6.5 Another view was that if the ACT offers procedural advantages and a swifter hearing that is probably a benefit to the ACT community in that it forms part of the ACT's "invisible" trade⁽³³⁾.

6.6 If defamation litigation is attracted to the ACT because of the advantages ACT law offers plaintiffs, the question arises as

³⁰ Submission No1, p3

³¹ Transcript, p13

³² Submission No5, p1

³³ Submission No1, p2

to whether the ACT community, apart from the legal profession, should derive some tangible benefit also. The most equitable means of obtaining a community benefit may be to consider a modified "user pays" principle in respect of such cases to partly offset the costs to the taxpayer of providing court services where the plaintiff has the option of choosing the jurisdiction and selects the ACT for tactical reasons.

Costs to Individuals

6.7 A legal practitioner informed the committee that the legal costs and risks associated with defamation actions is a disincentive for plaintiffs and that nearly all the people who believe they are defamed and who think they have strong prospects of recovering damages tend to be people on higher incomes. This witness also said he did not see a lot of examples of people who he judged to have a good case withdrawing because of (legal) costs⁽³⁴⁾.

6.8 Members of the medical profession felt they were no doubt representative of the position faced by many professions which are concerned about the costs involved in defending reputations which are vital in maintaining their practices and economic viability. A representative of the ACT Branch of the Australian Medical Association said however that in many instances where a doctor feels he is being defamed, it is not possible to push on because of the heavy costs involved. Doctors were not funded for defamation cases by the Medical Defence Union of NSW⁽³⁵⁾.

6.9 If this is the situation with professional people who, admittedly, are possibly more likely than others by virtue of the nature of their professional work to attract controversy about their activities, the cost implications for "ordinary" people who may wish to seek redress for defamation become obvious.

6.10 A further discouragement for individuals in pursuing a defamation action is that where a potential action would be directed at the media, that organisation will normally have far greater financial resources available to defend an action. The implications are that the individual would be obliged to seek to match those resources.

6.11 In essence, redress for defamation so far as costs are concerned differs little if at all from the position with other civil actions. One ACT resident suggested that the introduction into the Australian legal system of award sharing such as is practised in the United States, whereby the plaintiff if successful shares the award with the lawyer or, if unsuccessful, the lawyer goes unpaid would go a long way towards reducing the cost risk for plaintiffs and the law lists⁽³⁶⁾.

³⁴ Transcript, p20

³⁵ Transcript, pp77,78

³⁶ Submission No9

6.13 Informal advice provided by the Legal Aid Commission was that while it has a discretionary power to grant legal aid, this discretion did not relate specifically to defamation actions. The criteria of public importance is contained in the Commission's guidelines as to whether or not to grant legal aid, and aid for defamation cases has been rare. So far as other civil actions are concerned, the Commission has either funded or directly represented certain claims. Legal aid is subject to means test and the view of the committee is that it could not be a realistic avenue for assisting those individuals who are most likely to be in need of legal redress against defamation but are precluded by reasons of cost from taking legal action.

6.14 While acknowledging the cost difficulties faced by individuals in having recourse to legal remedies, the committee is nevertheless of the view that individuals are primarily responsible for preserving, and acting to protect, their own reputations, and that it is for the law to provide the legal means for seeking redress against defamation. The committee considers it a matter for individual judgement as to whether redress can be obtained and the cost-effectiveness of any action taken to achieve this.

6.15 There are alternative and minimal cost means of dispute resolution which could be pursued by individuals, and these are discussed in section 8 of this report.

Survival of Actions

6.16 Like most Australian States, ACT law does not allow a defamation action to survive the death of a party to the action. However, this is not the case with other civil actions. For example, actions in negligence or contract survive against or, as the case may be, for the benefit of the estate of a deceased person.

6.17 Since 1935 in Tasmania the law has provided that on the death of any person all causes of action subsisting against the person shall survive against the estate and those vested in the person shall survive for the benefit of the estate. The Australian Law Reform Commission in 1979 (ALRC Report No 11 para 107) recommended that defamation actions generally should survive the death of either party. The recommendation was not adopted by any State or Territory.

6.18 Although the committee took no direct evidence on this matter, it considers that the absence of a provision for survival of actions in defamation can impose hardship on the family of a plaintiff who dies during the course of a defamation action especially where substantial legal fees have been incurred without a resolution of the issue in dispute. Similarly, the committee considers that the death of the defendant can also cause hardship for the plaintiff.

Costs to Organisations

6.19 From evidence given to the committee it is apparent that some organisations incur considerable costs in defamation actions.

6.20 The ABC did not provide a dollar figure on defamation actions, but stated that there had been a slight increase in the number of defamation matters across Australia which was attributable to a conscious decision by the ABC to increase the amount and content of current affairs reporting, especially investigative journalism⁽³⁷⁾. The ABC said that while it will defend actions to the hilt if the defences are strong, sometimes it is faced with whether to make a commercial decision because of the costs involved⁽³⁸⁾.

6.21 The Canberra Times estimated that defamation matters cost it between \$100,000 and \$200,000 a year, (ref trans p 9) translating to an addition of nearly one cent to the cover price of the paper. Like all costs, defamation costs are passed on to the consumer⁽³⁹⁾.

6.22 The editor of The Canberra Times said that the paper has a policy to be fair and accurate in its journalism and that if someone can show that they have been unfair or inaccurate their policy is to make a correction and apologise. The paper, like most others in Australia, carries no defamation insurance⁽⁴⁰⁾. The committee was informed that The Canberra Times recently adopted a change of attitude in respect to defamation actions, stating:

"... In the past there has been a few try on cases where people have not got a good case, they have got a fairly weak case. When lawyers look at that as an individual case, they will say something like, "well, this bloke has got about a 10 to 20 per cent chance of winning. If he or she wins it will be, say, \$20,000 damages. So let us save the cost. They will probably take a thousand or two, or \$5,000, and let us clean it up".

"... our new attitude is to look more carefully at cases which we think we can win; and to run the risks of the costs, and now take them to court.. where we think we have got an 80 per cent chance of winning, we really must run the case..."⁽⁴¹⁾.

Summary

6.23 On the basis of views put to the committee in hearings, submissions and in discussions, the committee considers that greater accountability needs to be exercised in relation to court access for plaintiffs in issuing defamation writs and in bringing cases to trial. This view is separate from questions of reform and unification of defamation laws, and is not a reflection on the rights of any person to seek redress for perceived damage to

³⁷ Submission No3, p2

³⁸ Transcript. p31

³⁹ Submission No5, p1

⁴⁰ Transcript, p6

⁴¹ Transcript, pp6,7

reputation. It is formed solely on the basis that individuals are responsible for protecting their reputations and should be prepared to do so without being subsidised by the community at large.

6.24 The committee recommends that

- a) The Government review the current writ filing fee to determine if it is appropriate having regard to the costs incurred by the courts,
- b) The Government review the use of the ACT Supreme Court for defamation actions brought by persons who do not have the ACT as their principal place of residence or the principal place of their reputation, including consideration as to whether an additional charge is appropriate for the use of the Court in these situations, and
- c) ACT law be amended to provide that defamation actions survive the death of either party to the action against the estate of the deceased person or, as the case may be, for the benefit of the deceased person's estate.

7. TIME TAKEN FOR DEALING WITH DEFAMATION ACTIONS

7.1 As stated in section 5 of this report there is no correlation between the number of writs standing in the ACT Supreme Court and the number which are heard by the court in any year. Informal advice given to the committee was that some writs are extant for many years while others are withdrawn only upon the death of the plaintiff. Yet other cases are settled before the action reaches the court.

7.2 ACT law allows the plaintiff up to six years from the date the cause of the action first accrues to commence an action against the publisher of the offending statement.

7.3 Evidence given to the committee indicated that cases are rarely decided within two years of filing of the writ and on occasions much longer. By the time such cases are brought on, nearly everyone in the community has forgotten about the publication and the plaintiff is carrying on with his or her normal life. It was argued that by this time reputation is a non-issue, the real issue being a question of money⁽⁴²⁾.

7.4 Media representatives appearing before the committee regarded the six year rule in the ACT as oppressive. They stated they are obliged to keep all the evidence for everything published during this period and keep tabs on all witnesses as the burden of proof in defamation cases rests heavily on the defendant.

7.5 However, the time taken in bringing any action to the court is relative. In evidence to the committee, one solicitor said that statements of claim, the defence, particulars, a reply and interrogatories are all appropriate to these proceedings when they are heard within a reasonable space of time unless there are external factors and agreement between the parties for delay⁽⁴³⁾.

7.6 The agreement of the Attorneys-General of NSW, Queensland and Victoria to limit the period for defamation actions to six months from when the plaintiff first learned of the publication, with an absolute limitation of three years is intended to ensure that persons take action to restore their reputation as soon as becoming aware of the defamatory publication. The Attorneys considered that any further delay could result in problems in obtaining evidence and impose unnecessary hardship on publishers.

7.7 Introduction of a shorter limitation period is also intended to alleviate the problem experienced by media proprietors who, once a writ is received, feel or believe that they are inhibited from publishing further reports involving the person alleging

⁴² Submission No5, p1

⁴³ Submission No1, p4

defamation for fear of exacerbating damages. The intention is that stop writs would be less potent if a case had to be brought on and particulars filed expeditiously.

7.8 As a matter of policy, the Attorneys stated that the law should encourage a person whose reputation has been impaired to attempt to clear their reputation at the earliest possible opportunity⁽⁴⁴⁾.

7.9 An argument against a six month limitation period is that there would be insufficient time to assess the impact of damage, which may be considerable even twelve months after the initial statement. However, the underlying reason for limitation periods is to provide a balance between the rights of a claimant and the need for a "wrong doer" to be protected from claims brought long after the damaging statement takes place⁽⁴⁵⁾.

7.10 The committee found strong support for the six months limitation as proposed by the Attorneys, and believes that the ACT law should be uniform in this respect. The committee believes that in nearly all circumstances this timing would be appropriate, the exceptions being special cases where a person could not reasonably act within this time frame.

7.11 The committee noted also that the ALRC in 1979 considered the limitation period in cases where the defamed person died after being defamed but prior to commencing an action. The Commission considered that the limitation period in such a case be short but did not specify an appropriate time limitation. The committee believes that there should be provision in ACT law in these circumstances for a defamation action to be commenced on behalf of a deceased person within a limited period.

7.12 One further aspect contributing to the time taken for dealing with defamation actions is the time between the issue of a writ and a subsequent statement of claim in relation to the alleged defamation. Informal discussions with members of the legal profession and others indicated to the committee that the general practice of presenting a statement of claim after the writ is taken out, and in some cases a considerable time later, could well be used as a means of stifling public comment on the issues in dispute. The committee believes there is scope for examining the feasibility of minimising the time.

7.13 The committee recommends that

- a) ACT law be amended to provide that defamation actions be brought within six months of the date of publication, except in special circumstances such as where the complainant could not reasonably have learned of the publication, with an absolute limitation of three years,

⁴⁴ Discussion Paper on Reform of Defamation Law, op cit, p10

⁴⁵ Submission No11, pp37,38

- b) ACT law be amended to provide that where a person is defamed but dies prior to the commencement of a defamation action, an action may be commenced on that person's behalf within six months of the date of publication, and
- c) The Government review the procedures for issuing writs and statements of claim.

8. ALTERNATIVES TO LITIGATION

8.1 One of the most challenging issues confronting those who seek to reform the ways in which defamation laws affect the community is the question of alternatives to defamation litigation. At issue is the effectiveness of alternatives in delivering satisfaction for those who believe their reputations have been impugned or damaged by publications and those advocating free speech.

8.2 The committee noted concerns expressed within the media and the Free Speech Committee that structural changes are needed to take the "bombs" out of the system, whereby plaintiffs can settle for substantial sums of money without any public recognition of their restored reputation, while the media is in a state of uncertainty as to what it can publish without incurring major costs⁽⁴⁶⁾. One witness suggested to the committee that the prospect of huge damages will always lure some no matter what alternatives are offered⁽⁴⁷⁾.

8.3 An opposing view put by a legal practitioner and representative of similar opinions expressed to the committee was that many in the media tend to get tunnel vision, and some journalists seem to have no concept that they can actually harm someone very badly when they write an article. This witness made the point that media organisations were commercial operations and if they injure someone's reputation in the process of making money where that person did not ask to be the subject of debate they should be prepared to compensate the person⁽⁴⁸⁾.

8.4 One media representative told the committee that some court judgements on damage in recent times may have generated expectations of monetary compensation on the part of plaintiffs which have tipped the balance away from legitimate free expression of views in the media⁽⁴⁹⁾.

8.5 In the area of compensatory damages for injured reputations the committee sees no feasible alternative to court judgements.

⁴⁶ Defamation Law in New South Wales, Proposals for Reform, The Free Speech Committee, Sept 1990

⁴⁷ Submission No5, p1

⁴⁸ Transcript, pp 88,89

⁴⁹ Transcript, p11

8.6 If the stated aim of defamation proceedings is the protection of good name and reputation there will be times when damages do not provide an appropriate or sufficient remedy. A submission to the committee offered the view that the legal system does not properly reward remorseful defendants who print apologies or retractions, and that sincere and genuine attempts to rectify errors at an early stage ought to operate to significantly reduce non-economic loss⁽⁵⁰⁾.

8.7 This leads to one aspect of the agreement between the three State Attorneys-General, namely the proposal for a system of court-recommended correction statements.

Court Recommended Correction Statements

8.8 The committee found limited support for court recommended correction statements in submissions and in discussions with media and legal representatives.

8.9 In their discussion paper no 2, the three Attorneys questioned the effectiveness or relevance of monetary damages for injury to reputation in the light of unprecedented awards in some jurisdictions over recent years, and concluded that correction statements promptly inserted or broadcast by a publisher may be very effective in partially, or even in some cases fully, restoring reputation and assuaging damaged feelings. Accordingly, the Attorneys agreed to a system of court recommended correction statements, but recognised that "the right not to publish is as important as the right to publish" in the context of freedom of expression. The Attorneys noted that a publisher will have the election of publishing or not publishing in accordance with the court recommendation, but that the effect of any such election will influence any final determination of damages⁽⁵¹⁾.

8.10 The Attorneys propose that this system be a "fast track" procedure, the idea being that after a writ of defamation is issued, any party can apply as a matter of urgency to a Supreme Court Judge in Chambers for a court recommended correction statement⁽⁵²⁾.

8.11 The ABC told the committee that it opposed court ordered retractions or apologies, its view being that there are numerous occasions when a publisher knows that what it published is true in substance but is unable to prove the truth of the imputations pleaded by the plaintiff⁽⁵³⁾. Print media representatives put a similar view. However, one said that if the law were changed so

⁵⁰ Submission No7, p6

⁵¹ Reform of Defamation Laws, Discussion Paper (No2), op cit, pp35,36

⁵² ibid, p36

⁵³ Submission No3, p4

the plaintiff had to show negligence or recklessness then it would follow that the defendants could have no objection to court-ordered corrections⁽⁵⁴⁾.

8.12 It was also put to the committee in informal discussions with members of the NSW legal profession that the media in particular and the community in general might well consider court-recommended corrections as interference with the editorial independence of the media and that this would have serious implications for the freedom of the media to publish according to its judgement of issues. Their view was that the media stands or falls on what it publishes, but a fundamental tenet was that the community should be confident that the media is independent and not managed by external sources.

8.13 While recognising the general reservations about court recommended correction statements, the committee considers the views of the three Attorneys that such a system, which would be available to be used by the courts and accepted or not by the publisher, should go a considerable way towards providing a satisfactory basis for plaintiffs to achieve restoration of injured reputations.

Retractions and Apologies

8.14 In the ACT, as in other States, publication of an apology or retraction in response to an allegation of defamation generally only mitigates or lowers damages if defamation is found. It does not cure the defamation.

8.15 There was some support for amendment of the law to specifically state that the nature, extent, form, manner and the time of publication of any correction, retraction or apology by the defendant be considered in assessing damages. The ABC told the committee that where a complainant and a publisher agree on the wording of a retraction or apology and such retraction or apology is published as soon as possible after publication of the matter complained of, a complainant would be limited to recovering damages for actual economic loss⁽⁵⁵⁾.

8.16 A different perspective was given in evidence to the committee by a barrister who said that generally, an apology or retraction only mitigates damage and does not eliminate it. He said that legal costs are lowered if defendants make an unjustifiable mistake, have the courage to admit the error, and take the consequences, compensating the plaintiff for the harm done, whether by agreement or by simply letting a case run on the assessment of damages. He said further that certain sections of the media are reluctant to apologise because they feel it may be held to be an admission⁽⁵⁶⁾. The committee also noted the view of another barrister that the parties no doubt appreciate that

⁵⁴ Submission No5, p5

⁵⁵ Submission No3, p4

⁵⁶ Submission No10, pp16,17

apologies may be read, sometimes mistakenly, as constituting an admission of liability and properly take that into account in deciding whether or not there should be any publication and, if so, the form of apology⁽⁵⁷⁾.

8.17 Another opinion expressed to the committee was that apologies are often inadequate and mean⁽⁵⁸⁾. This was exemplified by the experience of one witness who was defamed by a magazine article. In seeking modest damages and an apology, he achieved both. However, the magazine in publishing the apology managed to compound the original defamation⁽⁵⁹⁾.

8.18 The committee considers that viable alternatives to litigation exist in the form of corrections and apologies which are published voluntarily and quickly by the offending media organisation.

8.19 In evidence to the committee, the ABC in commenting on the recourse available to people who did not necessarily want to go to court but wanted a retraction or satisfaction for an alleged mis-reporting or defamation, said that if the organisation was wrong, there was either an apology to air, a right of reply, or sometimes a letter of apology which the plaintiff could use as they saw fit. The ABC said it tried to make apologies on the same day and on the same program⁽⁶⁰⁾.

8.20 The committee noted different views about where apologies and corrections should be printed in relation to an offending publication. Publishers generally consider that an offending page one story, for example, does not necessarily require a page one retraction. Where the retraction, correction or apology appears is considered to be a matter of judgement for the publisher having regard to the relationship of the offending statement to the published material as a whole. The Canberra Times has a correction column at the bottom of page two, but will usually accede to a request to place a correction in the same place as where the original story was, say, on the restaurant review or the courts pages⁽⁶¹⁾.

8.21 With regard to publications, the committee sees merit in apologies appearing on a regular page and would like to see them listed as part of the contents index for the publication.

Australian Press Council

⁵⁷ W.H.Nicholas, Q.C., Defamation Law Reform, "A Practitioner's Perspective", paper to Defamation Law Reform Seminar, Sydney, October 1990

⁵⁸ Submission No10, p18

⁵⁹ Transcript, p53

⁶⁰ Transcript, pp29,30

⁶¹ Transcript, p8

8.22 A basis for an alternative to litigation already exists in the Australian Press Council and there may well be numbers of alleged defamations by the media which should be referred to it but are not.

8.23 The Council's basic charter is to promote a better newspaper industry, to improve relations between the industry and the public, and to defend press freedom and thereby the public's right to know⁽⁶²⁾. The Council's complaints procedure provides, inter alia, a first step approach to the publication for a correction or explanatory letter for publication. If there is no satisfaction, an approach should be made to the Council within three months of the offending publication. If the Council accepts the response it will adjudicate the matter. Although the Council has no power to penalise a publication, or to order it to do anything, the publication is expected to publish an adverse adjudication.

8.24 The committee considers that the Council's adjudicatory process is appropriate for dealing with those allegedly defamatory matters which cannot be resolved by direct negotiation with the newspapers concerned. The limitations of this body so far as seeking to resolve defamation complaints are that it deals only with newspapers, and is concerned with a much wider range of matters than defamation.

Compulsory Mediation Process

8.25 A possible avenue for redress put to the committee was for the law to be amended to provide for a compulsory mediation process as an alternative to the courts for resolving defamation claims. Such a system would involve a panel of independent non-legal mediators funded by the media.

8.26 Under this proposal the parties would be obliged to endeavour to resolve the matter without going to a mediator in the first instance, but be obliged to refer the matter to a mediator before proceeding to litigation. The mediator would be able to make recommendations concerning further negotiation, correction, right of reply or apology. In the event that mediation failed, the mediation proceedings would be inadmissible in any subsequent court proceedings⁽⁶³⁾.

Recourse to Lesser Courts

8.27 Although it may seem contradictory to canvass recourse to another, lesser court, as an alternative to litigation in the ACT Supreme Court, it seems to the committee that the lesser courts do in fact provide a basis for substantially less expensive court sanctioned means of seeking redress for those who claim they have been defamed.

⁶² The Australian Press Council, Aims, Principles, Constitution and Complaints Procedure

⁶³ Submission No3, pp4,5

8.28 The committee was told by a witness that he had successfully sued for defamation in the ACT Small Claims Court, winning a modest award⁽⁶⁴⁾. This case serves to show that there is a feasible and far less costly alternative available to what might be termed "ordinary" people in the sense that they are not prominent in the community but who may nevertheless be defamed but lack the resources to sue a publication through the Supreme Court. The committee was also told that County Court actions for defamation in Victoria can be and are brought on in a very short period of time at modest expense⁽⁶⁵⁾.

8.29 The committee recommends that:

- a) ACT law be amended to provide for court-recommended correction statements,
- b) ACT law provide that where the form and timing of corrections and apologies mitigates a defamation, the plaintiff will be limited to receiving damages for economic loss,
- c) Plaintiffs be encouraged to use the ACT Small Claims Court in pursuing defamation actions, and
- d) The Government encourage the print media to ensure that apologies appear on a regular page and that this be listed as part of the contents index for the publication.

⁶⁴ Transcript, pp54-56

⁶⁵ Submission No10, p19

RECOMMENDATIONS

The committee recommends that:

1. a) The Government support the points of agreement between the three State Attorneys-General on achieving uniform defamation law to enable it to initiate the changes which would be required to ACT law to make it compatible with the draft Bill to be considered by SCAG in July 1991.
- b) Irrespective of the terminology of the draft SCAG Bill, the changes to ACT law :-
 - i) require that truth alone form a complete defence in defamation except where publication is an unwarranted invasion of privacy,
 - ii) define a limited number of essentially private matters which would prevent recourse to the defence of truth in a defamation action, and
 - iii) provide for justification of publication of defined private matters where this can be shown to be in the public interest.

Paragraph 4.28

2. the Government investigate the possibility of, and the implications arising from, restricted access to the courts for defamation actions by plaintiffs who are unable to demonstrate that the ACT is their principal place of residence or the principal place of their reputation.

Paragraph 5.20

3. a) The Government review the current writ filing fee to determine if it is appropriate having regard to the costs incurred by the courts,
- b) The Government review the use of the ACT Supreme Court for defamation actions brought by persons who do not have the ACT as their principal place of residence or the principal place of their reputation, including consideration as to whether an additional charge is appropriate for the use of the Court in these situations, and

- c) ACT law be amended to provide that defamation actions survive the death of either party to the action against the estate of the deceased person or, as the case may be, for the benefit of the deceased person's estate.

Paragraph 6.24

- 4. a) ACT law be amended to provide that defamation actions be brought within six months of the date of publication, except in special circumstances such as where the complainant could not reasonably have learned of the publication, with an absolute limitation of three years,
- b) ACT law be amended to provide that where a person is defamed but dies prior to the commencement of a defamation action, an action may be commenced on that person's behalf within six months of the date of publication, and
- c) The Government review the procedures for issuing writs and statements of claim.

Paragraph 7.13

- 5. a) ACT law be amended to provide for court-recommended correction statements,
- b) ACT law provide that where the form and timing of corrections and apologies mitigates a defamation, the plaintiff will be limited to receiving damages for economic loss,
- c) Plaintiffs be encouraged to use the ACT Small Claims Court in pursuing defamation actions, and
- d) The Government encourage the print media to ensure that apologies appear on a regular page and that this be listed as part of the contents index for the publication.

Paragraph 8.29

Bill Stefaniak
Chairman

21 June 1991

APPENDIX 1

LIST OF SUBMISSIONS RECEIVED

- | | |
|----------------------------------|-------------------------------------|
| 1. Ric Lucas | Partner, Colquoun Murphy |
| 2. Robert Swan | Robert Swan Media Services |
| 3. Michael Berg | Australian Broadcasting Corporation |
| 4. Leah Day | Church Legal Reform Group |
| 5. Crispin Hull | The Canberra Times |
| 6. Jim Coates | |
| 7. Australian Labor Party | ACT Branch |
| 8. Australian Medical Assn. | ACT Branch |
| 9. Arthur Hoyle | |
| 10. Bruce Connell | Blackstone Chambers |
| 11. Law Institute of Victoria | |
| 12. The Law Society of NSW | |
| 13. The Australian Press Council | |

APPENDIX 2

LIST OF WITNESSES AT PUBLIC HEARINGS

Crispin Hull	The Canberra Times
Ric Lucas	Partner, Colquoun Murphy
Judith Walker	Australian Broadcasting Corporation
Jim Coates	
Patrick O'Halloran	Church Legal Reform Group
Leah Day	Church Legal Reform Group
Arthur Burns	
Robert Swan	Robert Swan Media Services
Grahame Bates	Australian Medical Assn. ACT Branch
Robert Allan	Australian Medical Assn. ACT Branch
Bruce Connell	Barrister, Blackstone Chambers
Graham Rice	Macphillamy Cummins and Gibson
Bill Redpath	Australian Labor Party, ACT Branch
Veronica Laletin	Australian Labor Party, ACT Branch