The Defamation Bill 1999

Report Number 14

Standing Committee on Justice and Community Safety

May 2001

Legislative Assembly for the Australian Capital Territory

Committee membership

Paul Osborne MLA (Chair)

John Hargreaves MLA (Deputy Chair)

Harold Hird MLA

Trevor Kaine MLA

Secretary: Fiona Clapin

Resolution of appointment

> That—
>
> The following general purpose standing committees be established to inquire into and report on matters referred by the Assembly or, matters that are considered by the committee to be of concern to the community...
>
> ...a Standing Committee on Justice and Community Safety to examine matters related to administration of justice, legal policy and services, registrar and regulatory services, electoral services, consumer affairs, corrective, emergency and police services and fair trading and any other related matter .

Terms of reference

Inquire into and report by the first sitting day in May February 2001 on the Defamation Bill 1999 with particular reference to:

1. whether the ACT should return to the common law formulation of the defence of truth (section 16);

2. whether the ACT should adopt a defence based on negligence (section 23); and

3. whether, under the proposed offer of amends provision (section 6), a plaintiff should be able to claim, not only recompense for expenses but also compensation for the damage done to a victim’s reputation and business.

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Executive Summary

The committee acknowledges that the ACT is not well served by the current defamation laws. These laws are particularly problematic for the media and for potential defamation plaintiffs.

As Mr Crispin Hull (Deputy Editor of *The Canberra Times*) submitted, the current laws encourage bad journalism instead of preventing it.

The current laws also do not favour the interests of people who feel they have been defamed. As Sir Lennox Hewitt and Sir David Smith submitted, the experience of firstly being defamed and then having to use the legal system to obtain redress for attacks on reputation is not only traumatic but time consuming and expensive.

The Defamation Bill 1999 attempts to address some of the problems with the current law.

The committee was tasked with considering three specific aspects of the Government's bill:

- whether the ACT should return to the common law formulation of the defence of truth (section 16);

- whether the ACT should adopt a defence based on negligence (section 23); and

- whether, under the proposed offer of amends provision (section 6), a plaintiff should be able to claim, not only recompense for expenses but also compensation for the damage done to a victim's reputation and business .

In general terms, media representatives supported the first two proposals and opposed the third while legal representatives opposed the first two proposals and supported the third proposal. The two defamation plaintiffs sided with the lawyers in opposing the Government's reforms.

The committee was faced with the challenge of trying to reconcile the positions of the two opposing positions (the media versus the lawyers) where both sides (and particularly the lawyers) did not want to concede any ground.

In the end, the committee decided it could not support the first two proposals referred as part of this inquiry in their current form. The Government's proposals would give the media too much power at the expense of defamation victims.

The first proposal - that defendants should only have to prove truth instead of the current requirement to prove both truth and the public interest - is unacceptable while the ACT does not have adequate laws to protect privacy.

The second proposal – that defendants could raise lack of negligence as a defence – is also not acceptable to the committee because it creates too many obstacles for a 'victim' to obtain redress for defamation. In addition legal organisations and the Australian Press Council pointed out problems with the current wording of this section of the bill.

In relation to the third part of the terms of reference, the committee believes those who have been defamed should be able to continue to obtain compensation for damage to their reputation and business. Payment of expenses, as the bill proposes is not sufficient.

While defamation victims are often thought of as well-paid, powerful public figures, this is not necessarily true. The recent case where a Maitland woman's photograph was mistakenly portrayed as someone who murdered her four children demonstrates that misrepresentation by the media can happen to ordinary people and have a devastating effect on their lives.

As Mr Hull acknowledged, the solution lies in changing the behaviour of the media in the first place.

In other inquiries into other subjects this committee has urged the Government to support early intervention and preventative measures to avoid long term social and economic damage and costs to the community.

Again the committee urges the Government to place more emphasis on prevention. It must be possible for the Government to take other steps to ensure the media does not make serious mistakes which damage a person's reputation in the first place. This is the only approach that will serve the interests of both the media and members of the public who are at risk of being defamed.

The committee notes that there is no strong community interest in defamation law reform, rather it seems to have only attracted interest from the media, lawyers and individuals who have had the unfortunate experience of being defamed.

It was significant that the two individuals who appeared before the committee with experience as defamation plaintiffs did not support the Government's bill. This was despite them both having very difficult, unsatisfactory and time-consuming experiences with the current defamation laws. If the Defamation Bill 1999 cannot appeal to such people with bad experiences of the current laws then it seems it is too heavily weighted toward the media and not suitably addressing the needs of those who may be defamed, that is both public figures and ordinary citizens.

In summary, the committee has not been convinced that a strong argument exists to support the tenets on which the bill rests.

The three parts of the bill referred to the committee together make up a significant part of the legislation.

If the Government accepts the committees' recommendations - (1) that public interest should remain as a requirement for the defendant to prove, (2) that an additional defence based on negligence should not be proceed with and (3) plaintiffs should continue to be able to claim compensation to damage done to a victim's reputation and business – then what is left of the bill is only a skeleton.

Under these circumstances, it therefore would be sensible for the Assembly to reject the bill as a whole and request that the Government revisit the issue through a more thorough and extensive consultation process involving not only peak legal and media bodies but a cross-section of individual defamation plaintiffs.

Summary of recommendations

Recommendation 1

The committee recommends that:

(i) the ACT should not return to the common law formulation of the defence of truth in the absence of legislation protecting the privacy of ACT citizens; and

(ii) section 16 of the Defamation Bill 1999 should be withdrawn.

Recommendation 2

The committee recommends that:

(i) the ACT should not adopt a defence based on negligence; and

(ii) section 23 of the Defamation Bill 1999 should be withdrawn.

Recommendation 3

The committee recommends that defamation law should ensure that a plaintiff is able to claim not only recompense for expenses but also compensation for the damage done to a victim's reputation and business.

Recommendation 4

The committee recommends that the Government develop further legislative proposals aimed at providing in-built incentives for the media to avoid damaging the reputations of people.

1. Introduction

1.1. On 31 August 2000 the Legislative Assembly referred the Defamation Bill 1999 to the committee.

1.2. The committee placed advertisements in local newspapers as well as writing to relevant community and professional organisations inviting submissions.

1.3. Ten submissions were received. Public hearings were held on 20 November 2000, 27 November 2000 and 20 February 2001. (See Appendix for details)

Scope of inquiry

1.4. The committee's terms of reference for this inquiry were very specific. While many submissions included general comments on defamation law, this report, apart from the section below is confined to making recommendations on these three aspects of the Bill:

- whether the ACT should return to the common law formulation of the defence of truth (section 16);

- whether the ACT should adopt a defence based on negligence (section 23); and

- whether, under the proposed offer of amends provision (section 6), a plaintiff should be able to claim, not only recompense for expenses but also compensation for the damage done to a victim's reputation and business

Community views on the bill as a whole

1.5. The inquiry attracted submissions from media representatives, peak legal groups, individual lawyers and plaintiffs.

1.6. On most issues the views of the lawyers and media representatives were diametrically opposed to each other.

1.7. In general terms, the lawyers and plaintiffs placed primary importance on protecting against false attacks on reputation whereas the media placed primary value on ensuring freedom of speech.

1.8. The **Australian Press Council** strongly supported the general thrust of the Bill. The Council argued that defamation law is a marked constraint on freedom of the press and on the public's safeguard against abuse of power. The Council sees the Bill as not ideal for everyone, but containing new ideas which, if found to work, could lead the way to a new approach across the country.

1.9. The Council pointed out that the Bill provides the opportunity for the ACT to become a leader in the debate on defamation and prompt the establishment of some balance in the freedom of speech in Australia.

1.10. According to the Council, there is a need for a uniform defamation law across Australia. Plaintiffs currently choose which jurisdiction to take action, and many chose the ACT because they can have a trial without a jury. This imposes a cost on the ACT legal system and the ACT community.

1.11. **Mr Crispin Hull**, Deputy Editor of *The Canberra Times* acknowledged there is a fair amount of agreement that the media behaves badly. He said it behaves badly under the present legal regime, including the defamation regime. It is apparent that the present defamation law does not prevent the media from behaving badly.

1.12. Mr Hull claimed the present defamation law encourages bad journalism instead of preventing it.

1.13. Mr Hull believes that their Australian Capital Territory now has an opportunity to address some of the major defects of the existing law and at the same time improve the standard of media conduct in Australia. Mr Hull said:

> It is too easy to point the finger at richer media barons and "irresponsible" journalists and say that defamation law should not be changed. A more responsible political position would be to say that if the media is misbehaving under the existing legal regime we should look at changing that regime in ways that will make the media behave better.
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> For too long will we have had platitudes that we do not like the cost and delay of defamation, that we want to only protect reputation, and that we're not interested in the money, that all we want are decent corrections and apologies when things go wrong. But too many people have too much to gain by keeping the law as it is. The public is ill-served by it. Large media organisations pass on the cost - via advertising charges and cover price -- to ordinary consumers. Or they reduce editorial service. (At present Canberra Times defamation costs

> in an average year would provide an extra Assembly report and an extra ACT court reporter.) Smaller community groups get intimidated into silence. Journalists involved in losing defamation actions shrug their shoulders and say it we knew it was true but we just could not prove it, thereby absolving themselves in a way not possible if they were found to be negligent. Meanwhile, down at the big end of town corporations and the wealthy can use defamation law to stifle debate and lawyers do well arguing arcane points about imputations and truth.

1.14. The **Law Society of the ACT** objected to all three proposals being considered in this inquiry. The Society also emphasised the importance of defamation law reform recognising the interests of plaintiffs. The Society contended that while the media could be considered to be an organised pressure group well represented in consultations, plaintiffs are not an organised pressure group and rarely have had more than one experience of defamation proceedings.

1.15. The **ACT Bar Association** also opposed all three proposals under consideration and their reasoning is included in the next three chapters.

1.16. On the suggestion of Mr Peter Hohnen, a defamation lawyer, the committee directly invited **Sir Lennox Hewitt** to provide evidence to the inquiry.

1.17. Sir Lennox advised he had been a plaintiff in eight court defamation actions. In his view law reform bodies in Australia have paid little or no attention to the interests of those who have been defamed.

1.18. Sir Lennox believes the bill takes away from the rights that now exist to seek a remedy for defamation and makes it more difficult to secure redress and more expensive to secure redress.

1.19. He noted that the Australian Press Council is a very powerful organisation but there is no organisation representing the interests of victims of defamation.

1.20. He regards the bill as inimical to the interests of those who are ‘monstered by the media’ and argued that the bill ‘takes away from what rights now exist to seek a remedy for defamation’ and makes it more difficult and more expensive to secure redress.

1.21. Mr Peter Hohnen also suggested it would be useful for the committee to receive evidence from **Sir David Smith**, another defamation plaintiff.

1.22. Sir David provided a written submission and oral evidence. He suggested that defamation law reform is usually driven by the media who have a monopoly on the defamation of others and therefore have a vested interest in reducing the effect of any consequences to themselves and their profession. While he believes we should have a more satisfactory and less costly method of dealing with defamation by the media, he thinks the media have a long way to go in putting their own house in order.[1]

1.23. Sir David further stated:

> Any attempt to reform the law of defamation needs to start by acknowledging that the media can and do defame innocent people; that such defamation is hurtful and needs to be discouraged; that it is often committed recklessly, even dishonestly; that such professional misconduct needs to be punished; and that the punishment needs to be effective and to act as a deterrent. Freedom of speech is not a license to hurt people who do not deserve to be hurt, or to damage reputations, specially professional reputations that do not deserve to be damaged. Any reform of defamation law must continue to protect such people.[2]

[1] Sir David Smith, Submission

[2] ibid

2. Should the ACT return to the common law formulation of the defence of truth?

2.1. Under current ACT law it is a defence to an action for defamation if a newspaper demonstrates that the matter published is true **and** that it is for the public benefit to disclose that information.

2.2. Originally at common law truth was the only defence. This common law defence was altered in NSW in the 19th century to protect the reputations of former convicts. The change required that not only must something be true it must be in the public interest. This became part of ACT law. [3]

2.3. At common law, the most important defence for defamation is truth (alone). This remains the case in most common law countries and a number of Australian states (particularly Victoria). In Victoria, it is sufficient to defeat a defamation assertion to show that the statements are true. There is no requirement to prove also that there is no public benefit in publication.

2.4. The bill proposes that the defence of truth should revert to its original common law from (ie in order to defend a matter, a matter must be true but it need not necessarily be in the public interest).

ACT Government

2.5. The Government claimed that the public benefit part of the law distorts the law by giving undue emphasis to privacy (privacy is irrelevant to the law of defamation). In their view, the removal of public benefit will simplify the law and contribute to a reduction of costs associated with these proceedings.[4]

2.6. While acknowledging that plaintiff lawyers oppose this provision because they believe the pubic interest qualification acts a deterrent to poor reporting and a discouragement to muckraking, the Government

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[3] The ACT 'public benefit' element of the ACT defence of truth is based on the NSW law as it was in 1901 but the NSW defence has since been altered a number of times and now is framed in terms of the 'public interest'.

[4] ACT Government, Submission

considers lawyers did not address the core issue- is it a deterrent to telling the truth good public policy?[5]

2.7. The Government was surprised at the scant support for this provision from media. Some believe its of no moment- others argue that defence of truth is ineffectual because of the inherent difficulty of establishing the truth of complex events before a court.[6]

2.8. The Government claims linking reputation and privacy is not appropriate as these concepts are distinct. In the Government's view, the development of a hybrid defence that attempts to cater for both concepts has been one reason for the present complexity of this area of law. While the Government acknowledged there may be some justification for separate consideration of the issue of privacy it is not appropriate to do it here and not now.

2.9. In summary the Government supports this section because (1) the public benefit test distorts the law of defamation by giving emphasis to privacy which is irrelevant to reputation central to defamation and (2) removal of the test will simplify the law.

Community views

Australian Press Council

2.10. The Press Council supports truth alone as a defence. The Council argued that if a statement accurately and fairly presents information to the public, there should not be further constraints. The Council stated:

> 'people should be prepared to live with true statements about them. The press has the ability to judge whether what it is saying is correct. It has much greater difficulty in assessing whether the information that it wishes to present is for the public benefit. This need to guess what the view of a judge or jury might be on the issue of public benefit, many years after the event, acts a significant constraint on selecting what can be conveyed to the public. Barriers of this kind

[5] ibid

[6] ACT Government , Submission

placed in the path of communication serve to constrain the exchange of information that is essential in open democracies.'[7]

2.11. The Council also supports a defence to the publication of material that is in the public interest that it be disclosed. In their view, this prevents governments using excuses such as cabinet secrecy and commercial in confidence as a ground for hiding information for public consideration.

Mr Crispin Hull (Deputy Editor of *The Canberra Times)*

2.12. Mr Hull supports section 16, from a publisher's point of view. However he acknowledged a public frustration with unnecessary intrusiveness by the media into private matters. In the absence of a tort of privacy, he has no difficulty with the present requirement that publication have a public interest test as well as a truth test. In his view the courts have rightly interpreted the public interest very broadly. He noted that very few cases ever turn on this point yet it has been the sticking point between Victoria and NSW in attempts to get uniform law. [8]

2.13. Mr Hull advised he would not like to see the bill fail because of this clause and wants to see it abandoned if it meant achieving other valuable reforms.[9]

2.14. Following his appearance at the public hearing, Mr Hull submitted a supplementary submission which included arguments rebutting the arguments of those who say truth is a reasonable basis for defence in defamation.[10] The issues raised in this submission are addressed in chapter 5.

Law Society of the ACT

2.15. The Law Society does not support the removal of public benefit until a separate tort of infringement of privacy has been enacted. The

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[7] Australian Press Council, Submission, p3.

[8] Mr Crispin Hull, First submission

[9] ibid

[10] Mr Crispin Hull, Supplementary Submission

Society submitted that the appropriate time to remove the requirement of public benefit would be when such privacy legislation is introduced.[11]

2.16. The Law Society claimed that the current law serves a valuable purpose in discouraging muckraking. In their view, truth alone should not be the defence because the change would permit the publication of stale or irrelevant criminal convictions or youthful discretion's. The Society believes publishers should not be allowed to dredge up material irrelevant to the public discussion of a matter of public interest even if it happens to be true.

2.17. The Law Society disputed the Government's argument that the change is justified by complexity and cost in preparation for trials and noted it is many years since the issue arose at trial.

2.18. The Law Society contended there is no justification for the explanatory memorandum's statement that the public benefit test has a distorting effect on the law of defamation by shifting the issue from reputation to privacy. The Society questioned why should defamation law not continue to protect privacy and reputation as it has done for a century and a half-the protection is limited but valuable.

2.19. The Society challenges the explanatory memorandum suggestion that because there are few recorded decisions on that point the protection is ineffectual-instead this may well be a sign that the law has deterred conduct which would in any event be a breach of the journalists' code of conduct

2.20. The Law Society also says that as the ACT Community Law Reform Commission has said it is desirable that the law on this subject should be the same in the ACT as NSW.

The ACT Bar Association

2.21. The Bar Association strongly opposes the proposal and argued that truth alone should not be an unqualified defence. In their view, there should be an additional requirement that it be on an occasion of qualified privilege or that it be in the public interest. According to the Bar Association, free speech should not extend to publishing matter that ruins a person's reputation for no reason. The public's right to know must be balanced by some genuine need to know.

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[11] Law Society of the ACT, First submission

2.22. The Bar Association contended that individuals are entitled not only to privacy but to the right to achieve happiness without fear that they may be embarrassed or shamed by gratuitous reference to past misdemeanours. The Association explained part of the reason for the law of defamation is to protect people from hurt and dishonour which is unwarranted.

2.23. The Bar Association claimed that the asserted lack of cases on the issue of public benefit is irrelevant and does not mean that a qualified defence is ineffectual. In their view, it is effectual because it prevents the media from publishing gratuitous truths so that cases do not arise usually.

2.24. The Bar Association noted that aggravated damages may sometimes be available where the defence of truth and public benefit is pleaded. The bar Association claimed the explanatory memorandum is incorrect saying that exemplary damages would be available. Rather aggravated damages are awarded because pleading the alleged truth and public benefit serves to aggravate the hurt to the plaintiff in circumstances where the defence is not made out.

2.25. Furthermore, the Association claimed there is no substantial body of law in NSW as to public interest and there is no doubt about what it means.

2.26. According to the Bar Association, the real apprehension of the media in not publishing matters it thinks we should know and believes are true, but is its inability to prove the truth. This difficulty would continue with the defence even if it were unqualified.

Sir Lennox Hewitt

2.27. Sir Lennox Hewitt told the committee that in his view a return to common law formulation for the defence of truth and elimination of the public interest requirement would be the wrong step to take at this time as there is no privacy legislation in place.

Mr Peter Hohnen

2.28. In Mr Hohnen's view, the proposal that truth alone should be a defence has the potential to affect the basic human rights of Canberra citizens. It is his unequivocal view that the defence of truth and public benefit has been an effective deterrent against media scandals, for a very long time. He notes it is still the law in Queensland, NSW and Tasmania.

2.29. Mr Hohnen submitted he had never seen a rational explanation from the media justifying truth alone as a defence. In his view privacy laws are an entirely different concept and should not be confused with this defence as it presently stands in the ACT.

2.30. Mr Hohnen referred to Justice Hunt's ruling in the Greg Chappell 1988 case in support of his argument. The judge in that case, Justice David Hunt, then Chief Judge of the Common Law Division of the NSW Supreme Court, issued an injunction to stop Channel Nine running a highly sensational program about an alleged affair that Greg Chappell was supposed to be having. His reasoning was that TCN Nine could never satisfy a truth and public interest defence, for these reasons:

> The private behaviour or character of a public figure can only become a matter of public interest in one of two ways:
>
> (a) because it has some bearing upon his capacity to perform his
>
> public duties
>
> or
>
> (b) because he makes it such a matter himself, (that is, by his own conduct)

2.31. Mr Hohnen also cited Lord Nicholls[12], Lord Hobhouse[13] and a leading London Barrister, Sir Sydney Kentridge QC[14] in support of his position.

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12 Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputation of others.

13 The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information, not misinformation, which is the subject of this liberty. There is no human rights to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed, not misinformed. Misleading people and the purveying as facts, statements

2.32. Mr Honen claimed that Canberra citizens should be able to live down and overcome: past misdemeanours, business misfortunes, family tragedies and human shortcomings and indiscretions that can affect the private lives of people continually in the public spotlight.

Mr Ric Lucas

2.33. Mr Lucas, a Canberra defamation lawyer, argued against the proposal to remove the public benefit requirement until a separate tort of infringement of privacy has been enacted. He argued the removal of the public benefit requirement should only occur when privacy legislation is enacted.

2.34. According to Mr Lucas, the current law serves a valuable purpose in deterring muckraking and the lack of a public benefit requirement in Victoria is probably why *The Truth* newspaper has survived. He further stated the lack of a public interest requirement allows a defence for the unfair and very damaging publication of stale and irrelevant criminal convictions, of youthful indiscretions.

2.35. Mr Lucas also countered the argument that the change is justified by complexity and cost in preparation for trials as far fetched noting it is many years since the issue arose at trial. He said Mr Humphries' argument that the lack of cases based on the public benefit shows the ineffectual nature of defamation to protect privacy is specious- you could

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which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations.

[14] In England freedom of speech, important though it is, is not the primary right. There are those who think it ought to be. It should, of course, at once be made clear that notwithstanding the "primacy" of the right of freedom of speech in some countries, in no constitution is the right absolute. Freedom of speech and the press are always to be balanced against other legitimate interests. In some constitutional instruments the balancing of the right of free speech against other interests is expressly provided for.

A person who goes into public life must expect robust and often unfair criticism That is part of the price of going into public life. But it does not follow that it is necessary to deprive him or her of any right to reputation. There are surely some libels so gross and offensive that they should be punishable only on condition that they are proved to be true. If it is said of a cabinet minister or a judge that he takes bribes, would he grin and bear it because he cannot prove that the falsehood was a knowing falsehood? There is a public interest in the good repute of politicians. Are the standards of public life raised by the liberty to savage the reputations of those in public life, presently enjoyed by the media in the United States?

just as easily argue that the law is working so well journalists are afraid to engage in muckraking.

Committee conclusions

2.36. In considering the arguments for and against returning to a common law formulation of the defence of truth the committee decided the arguments in favour of the change were not compelling enough to warrant the change.

2.37. Essentially the arguments in favour of returning to a truth only defence by removing the public benefit requirement (as presented by the Government and the Australian Press Council) are:

- ACT defamation law is currently distorted by shifting the emphasis from reputation to privacy but privacy is 'irrelevant to reputation';
- the lack of cases based on the public benefit shows the ineffectual nature of defamation law to protect privacy;
- people should be prepared to live with true statements about them;
- the requirement that the media meet the public benefit test (which means guessing what a judge and juries' views might be on public benefit many years after the event) is a significant constraint on the media and the exchange of information that is essential in open democracies; and
- removal of the test will simplify the law and reduce costs involved in defamation cases.

2.38. The arguments against making this change (mainly presented by the Law Society of the ACT, the ACT Bar Association, individual plaintiff lawyers and plaintiffs) are:

- the ACT would need privacy laws before such a change would be acceptable;
- the truth only defence in Victoria (where there is no requirement to satisfy a public benefit test) has resulted in muckraking journalism such as The Truth newspaper;

- a truth only defence would result in the publication of stale or irrelevant criminal convictions or youthful indiscretions;

- rather than assuming the lack of cases decided on the public benefit indicates that part of the law is ineffectual, it could be that this provision has acted as an effective deterrent to the media publishing 'gratuitous truths' so cases do not arise in the first place;

- the media's real difficulty in publishing material it believes the public should know is the difficulty in proving truth, not public benefit; and

- the Government's argument that the change is justified to limit the cost and complexity in trial preparation is not substantiated by any evidence.

2.39. In the view of the committee, the Government has not provided sufficient evidence to support the argument that removal of the test will simplify the law and reduce costs. The committee is not convinced that the lack of cases based on the public benefit indicates the inability of current defamation law to protect privacy. Rather it seems more likely that the public benefit requirement has acted as a deterrent to the media publishing irrelevant and gratuitous information about public figures and others.

2.40. The committee is concerned that public figures and members of the public will not have sufficient protection against muckraking journalism and gratuitous invasions of privacy if this change is enacted while ACT citizens do not have the protection of appropriate privacy laws.

2.41. The committee also noted that the Law Reform Committee concluded that privacy of the individual is deserving of protection and this should be developed as separate legislation.

2.42. It was also noteworthy that the Deputy Editor of *The Canberra Times* did not see this provision as essential to the reform of defamation laws. While Mr Hull supported the proposed change from a publisher's point of view, he stated he would not like to see the bill fail because of this clause and would not object to it being abandoned if it meant achieving other valuable reforms.

2.43. The committee concluded it could not support the provision in the bill which provides for the ACT to return to the common law formulation

of the defence of truth and removes the public benefit test at the present time. It is suggested that this legislative change could be re-considered by the Assembly in the future if and when the Government develops appropriate privacy legislation.

Recommendation 1

The committee recommends that:

(i) the ACT should not return to the common law formulation of the defence of truth in the absence of legislation protecting the privacy of ACT citizens; and

(ii) section 16 of the Defamation Bill 1999 should be withdrawn.

3. Should the ACT adopt a defence based on negligence?

3.1. The Bill proposes that the ACT adopt a new defence based on the absence of negligence. This defence will allow the defendant to prove that he or she did not act negligently. It will allow a defendant to raise innocence or the lack of fault as a defence. Unlike the existing law, a defendant would not need to negate malice nor make a payment for amends.

3.2. In defamation law, generally, liability is imposed without fault (ie liability is imposed whether or not a person intended a particular result or was negligent). As such a plaintiff need only prove that the matter was published and that it gave rise to a defamatory imputation.

ACT Government

3.3. According to the Government, continued reliance on the imposition of liability without fault sits uneasily with modern concepts of personal responsibility and fairness.

3.4. The bill provides for a defence based on negligence to both civil and criminal proceedings. However the defence is not available where there is an imputation of criminal behaviour. The defence is made out if the defendant proves to the civil standard that they were not negligent in publishing the defamatory matter relying on the ordinary legal approach to negligence when it is a basis for liability.

3.5. According to the explanatory memorandum, the new defence would make it difficult to sue an "innocent publisher" such as a telecommunications or mail utility, an internet service provider and in relation to an owner, the use of publishing equipment by a third party. According to the explanatory memorandum, the adoption of the new defence would lend a desirable degree of certainty to the existing law and advances the "freedom of the press" by significantly protecting channels of distribution. It also allows the case-based extension of the concept of fault to other situations and is more in accord with modern perceptions of personal liability.

3.6. The Government notes that while the provision is a significant departure from the present law in the Territory and other Australian jurisdictions, it is consistent with overall trends in law.

3.7. The Government acknowledged that this provision was opposed by plaintiff solicitors as they see it as to great a concession to publishers.

3.8. The Government claims this provision would lead to a beneficial change in the culture of reporting.

Community views

Australian Press Council

3.9. The Press Council believes the basis for the defence is argued cogently in the explanatory memorandum. The Press Council notes the adoption of this defence would be novel in Australia.

3.10. However the Press Council sees problems in its execution. The Council says it first needs to be made clear that the establishment of a duty of care to the plaintiff must be a responsibility that lies on the plaintiff. He Council claims this is not something that lies within the capacity of the newspaper to establish. The nature of that duty will need to be established by the courts and this will lead to a period of uncertainty.[15]

3.11. The Council believes the defence of no negligence must also not impinge on the defences that are otherwise available to a publisher. In the Council's view, a failure to make out the defence should not mean that other defences are not available. In particular, the defence of taking reasonable steps to ensure the accuracy of the publication should not limit the publishers' ability to argue that it acted reasonably and that what it published was true or in the public interest. Nor should such a failure to establish the defence be read as an establishment of the reverse - that the paper or its employees have been negligent. The Council is attracted by the general notion of a no negligence defence but thinks that its detail needs more spelling out than is at present to be found in the Bill.[16]

Mr Crispin Hull

3.12. Mr Hull believes this section(s23) will go a long way to preventing expensive, drawn-out litigation. He noted that at present, the law assumes

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[15] The Australian Press Council, Submission, p4.

[16] The Australian Press Council, Submission, p4.

that everything published is false and damaging until proven to the contrary and that this reverse onus on the defendant runs counter to every other area of law.[17]

3.13. Mr Hull wants truth to be replaced by negligence as the main defence. If the publication is negligent and damage flows, then the publisher should be liable. Mr Hull claimed that proving truth gives rise to huge costs and delays.[18]

3.14. He believes that under section 23(2c) it is likely that the sorts of tests laid down in *Theophanous* would apply. He thinks these strike a good balance between freedom of expression and reputation.[19]

3.15. Mr Hull thinks that the requirement that publishers would still be required to prove truth of assertions of breaches of the criminal law is consistent with other areas of the law (tort, trust and contract) where the courts require higher burdens of proof to sustain allegation of fraud.[20]

3.16. Mr Hull claims the negligence test will not open the floodgates for irresponsible journalism, quite to the contrary, rather it will put journalists' conduct under the spotlight. Mr Hull explained that:

> under present law, the general principle is that you publish at your peril. The law presumes that everything you publish is false until you prove it is true. The law presumes that publication is damaging. The law gives a right to damages to anyone about whom a publication refers in a way that is likely to lower their esteem in the eyes of right-thinking people. The range of things that the law says are defamatory is very wide indeed. It includes things like doing a poor job, or not having care for customers or having an arrogant disregard for electors, or not being diligent in one's duty, and so on. Indeed, the slightest disparaging remark can found a defamation action. Most defamation actions do not involve allegations of criminal or highly immoral conduct.
>
> Our law has a further complication. Publishers have to prove the truth of the defamatory imputations which arise out of the publication, not the publication itself. For example, if 1 publish a statement that the managing director of a company was late for a shareholders' meeting,

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[17] Mr Crispin Hull, First submission

[18] ibid

[19] ibid

[20] ibid

1 might end up having to prove the truth of the defamatory imputation that the managing director has an arrogant disregard for shareholders.[21]

3.17. Mr Hull further submitted that:

A lot of legal time and money goes into the theoretical question of whether the defamatory imputations alleged are capable of arising out of the published material. Most defamation actions involve a lot of the theoretical argument about this and the only people who benefit are the legal profession.

The combination of the presumption of falsity, the presumption of damage, the huge range of things which can be deemed defamatory by the law, the high cost of proving the truth of anything before Australian courts and high damage awards make the business of publishing a very risky one. The law actively discourages publication.

Large-scale publishers with a lot of resources can defend some defamation actions. Small scale publishers, or community groups that want to contribute to community debate cannot possibly defend defamation actions and so can be intimidated into silence or intimidated into public retractions which they do not believe in. Also, large-scale publisher are often the only effective medium voice for protest and other community groups. Defamation law makes these publishers wary for publishing the view of protest and community groups and whistle-blowers. The publication of these (after proper checking) would be in the public interest, but if you have to prove the truth of every imputation that might arise it becomes prohibitive.

Much use made of striking the right balance between reputation and freedom of speech. Present law gives very little towards freedom speech. It says that if you can prove the truth of everything you publish you are free to publish. That is no balance at all. The scales are loaded totally in favour of reputation. It allows for no honest, reasonable error. Present law gives no concession at all to freedom of speech. It means people in public positions and large corporations can fire off defamation writs to prevent public discussion of matters of public importance. Corporations are increasingly using the defamation law to prevent people from questioning their conduct.

The legal profession, by and large, is in favour of the existing system because if you set out on any inquiry to prove the truth of something in Australian courts it is often a very long and costly operation. The legal profession is that the greatest beneficiary of this.

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[21] Mr Crispin Hull, Second submission

The present system does not inquire into the conduct of the parties. Defamation actions centre around an expensive, elusive search for the truth. It does not matter whether the journalist behaved badly and did not give it the other party a chance to put their view. all that matters is whether the imputation arises out of the published material and whether it is true or false is true or false. It does not matter whether the person or corporation being written about refuses to say anything other than publish one word and we'll see you. Nor, on the other hand, does it matter that the journalist and publisher have gone to extraordinary lengths to give the other side the opportunity to put their view and have got material that on its face ought to go into the public domain.

A negligence test on the other hand, would focus on the conduct of the publisher and journalists. One of the most common complaints about this straight in media is that they do not seek it out the comments of people they are writing about - that they race into to print or broadcast. Or, having sought the other side's view, it has not been put fairly or when the other side's view it has been convincing that a story has still been run when there should have been a negligence test would go some way to curing this. Under a negligence test -as in the United States - -if you do not give it the other side an opportunity to respond you are dead in the water as a publisher. If you do not seek the views of the people you are writing about you will be held negligent every time. If having sought their view you do not put it fairly in publication you will be held negligent. If having sought their view and they put matters to you as a journalist or a publisher that would make any reasonable person disbelieve the allegations you will be held negligent. Under the negligence test a publisher has to have an honest belief on reasonable grounds that the matter being published is true.

These requirements are more than adequate safeguards for reputation. And they are beneficial for the public good in a way that the existing law falls. The negligence test positively encourages better journalism. Editors throughout the country will ask the question had used sought the other side's view. Had you put it fairly or what is the other side's view so convincing that no story should be run at all.

How much better it would be to have a law which focused on media and journalists behaviour and gave quicker remedies in the form of corrections and apologies and made greater allowance for public debate about matters of public importance.[22]

3.18. Mr Hull urged this committee not to abandon the negligence defence option, in the face of two decades of criticism of the present law

[22] Mr Crispin Hull. Second submission

and widespread acknowledgement that it is unsatisfactory. He said it may need modifying or restricting to public acts. It certainly should be available as a defence in cases involving corporations. Corporations (with tax deductible legal expenses) are increasingly using defamation law, to silence critics. He questions why a corporation should have access to defamation law at all. Defamation is supposed to be about individual reputation. If a corporation's trade is affected by publicity, it has many more suitable remedies under the *Trade Practices Act.*

3.19. He urged this committee to at least take on board some of the recommendations in the proposed Bill about widening the range of documents and statements that can attract qualified privilege. Under qualified privilege a publisher has to prove that the publication is a fair and accurate summary of the original publication rather than have to prove the truths of all the elements in the original publication. For example, if the liquor licensing board says that a tavern had inadvertently served under aged drinkers a publisher would not have to prove that that under age drinkers were served but merely that the liquor licensing board said they had been served and a fair report would have to say they had been served inadvertently. If a publisher left off that last fact qualified privilege would be lost and the publisher would lose a defamation action.[23]

The Law Society of the ACT

3.20. The Law Society claimed that section 23 is unnecessarily complex and likely to produce a great deal of time-consuming and pointless litigation. The Society claims it is not clear what it means or what will be its consequences.

3.21. The Society prefers the test proposed by the High Court in Lange v ABC. That test simply requires the defendant to show that its conduct in publishing the defamatory material was reasonable.

The Bar Association of the ACT

3.22. The Bar Association claims section 23 proposal raises what are probably unintended problems. Like the Law Society the Bar Association preferred the test proposed by the High Court in Lange v ABC.

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[23] ibid

Mr Ric Lucas

3.23. Mr Lucas suggested that the drafting of section 23(1) might be improved as it currently appears to provide if any non-criminal allegations are made, lack of negligence will be a complete defence for both criminal and non-criminal allegations. He did not think this was what was intended.

3.24. Mr Lucas thought section 23(2)(a) raises extraordinary obstacles for the plaintiff, which will greatly lengthen trials. He sees problems in defining the special nature of the relationship necessary between publisher and victim. He questioned why this had to be imported into the law when the High Court has given a far simpler formulation in *Lange v ABC.*

3.25. It was Mr Lucas's contention that section 23(2)(a) may also mean that no plaintiff can ever succeed in a defamation action. He interprets it as no action for negligence being available so section 23 would provide a complete defence, regardless how serious the defendant's conduct was. He suggests the Government read the case *Sattin v Nationwide News (1996)* to appreciate the sheer complexity of the Government's proposal.

Committee conclusions

3.26. The committee gave careful consideration to the Government's proposal to adopt a new defence based on negligence.

3.27. The arguments put in favour of this defence came from the Government and *The Canberra Times.* The Australian Press Council indicated some support for the provision although it identified potential problems with the current wording.

3.28. In summary this new defence was justified on the following grounds:

- continued reliance on the imposition of liability without fault (reverse onus on the defendant) sits uneasily with modern concepts of personal responsibility and fairness and the proposed changes are consistent with overall directions in law;

- it would become more difficult to sue an 'innocent publisher' such as an internet service provider;

- it would lend a desirable degree of certainty to the existing law;

- it advances ‘freedom of the press’ by significantly protecting channels of distribution;

- it will prevent expensive, drawn-out litigation;

- it would encourage better journalism by changing the behaviour of journalists as ethical behaviour would be rewarded

3.29. The arguments against the provision of a new negligence defence included:

- it is unnecessarily complex and likely to produce a great deal of time-consuming and pointless litigation;

- the meaning is not clear;

- it raises unintended problems;

- the current wording of section 23(1) seems to offer a complete defence for criminal allegations as well as for non-criminal allegations probably not was intended

- section 23(2)(a) may mean no plaintiff can ever succeed in a defamation action.

- the test proposed in Lange v ABC is preferred;

3.30. The committee concluded that there was merit in both sides of the argument. As the explanatory memorandum explains, introducing the negligence defence represents a significant change to the law. While it would be desirable to remove the imposition of liability without fault, prevent expensive drawn-out litigation, influence the behaviour of journalists and to protect some channels of distribution through this type of provision, it could still impact negatively on the rights of those who feel defamed. There also appear to be problems with the current wording, as even the Australian Press Council identified problems here.

3.31. The potential for this defence to impact negatively on the rights of those who feel they have been defamed gives the committee reason to have serious concern about the negligence defence. For this reason, the committee cannot support the proposal to adopt a new defence based on negligence.

3.32. While the committee spoke to two plaintiffs, Sir Lennox Hewitt and Sir David Smith, it aware that other plaintiffs are not necessarily

public figures. *The Canberra Times* provided the committee with a list of plaintiffs who have taken defamation action against that newspaper and it includes a broad cross-section of the community.[24] The committee suggests that, in undertaking any further consultation with plaintiffs, the Government actively seek out the views of a wide range of people who have had experience with defamation proceedings. This should include those who have felt their reputation has been defamed but were deterred from taking legal action because of the barriers under the current system.

Recommendation 2

The committee recommends that:

(i) the ACT should not adopt a defence based on negligence; and

(iii) section 23 of the Defamation Bill 1999 should be withdrawn.

[24] Mr Crispin Hull, Second submission

4. Should a plaintiff be able to claim compensation for the damage done to a victim's reputation and business?

ACT Government

4.1. The Government claimed the bill was framed to provide a clear and real benefit to defendants using the amends option rather than, as present, fighting claims to a stalemate.

4.2. According to the Government the proposed process is an attempt to change a particularly undesirable aspect of the present existing media and legal culture.

4.3. In the Government's view, existing correction processes do not work because there is little or no incentive for media defendants to promptly and accurately correct a matter. Instead, in order to pursue a correction, claimants initially proceed by way of the costly and cumbersome medium of a lawyer's letter of demand. Letters of demand generally introduce new issues relating to damages and costs, making disputes even more difficult to resolve. According to the Government, parties are often unable to form an accurate view of what a claim should be settled for because of the wide range of damage orders that have been made.

4.4. The Government stated that the existing adversarial treatment of disputes tends not to focus on the protection of reputation or the promotion of truth and that often the original incident has long faded by the time a person's reputation is vindicated.

4.5. The Government believes the bill provides a 'simple and quick mechanism for correcting reputation'. Only where the mechanism fails will cases proceed to court.

4.6. The Government acknowledged the concerns of plaintiff lawyers that with monetary offers limited to expenses, their clients would be denied the opportunity to seek damages done to a victim's reputation/business commensurate with the damage done. The Government conceded that under the provisions, some deserving cases will only obtain the benefit of a prompt and accurate correction.

4.7. The Government also noted that previous amends provisions have failed without the inclusion of a significant incentive for media use. These changes, according to the Government, will ensure quick redress and perhaps enhance the quality of reporting.

4.8. The Government also acknowledged the problem with inequality of bargaining power with the media being in the stronger position compared with the media defendant. But the Government claims because the media defendant's cannot know in advance which offers will be accepted and which will be rejected they'll need to adopt a fair approach to all offers.

Community views

The Australian Press Council

4.9. The Australian Press Council of the strong view that it should **not** be possible for a person to seek damages in addition to recompense for expense in relation to an offer of amends. They argued such a provision would almost certainly negate the efficacy of the offer of amends procedure. A potential defendant would be obliged to wait and see what damage a claimant had suffered before considering whether to publish an apology or clarification if damages were to be an integral part of the remedy. The basic concept of an amends procedure is that it is a substitute for an award of damages. It is said to recognise that it is the plaintiff's reputation that is being vindicated. The award of damages for a claimed economic loss is not compatible with this approach to resolution of defamation claims.

4.10. The Council also suggested the offer of amends procedure has inherent problems for a paper where it is possible to bring actions in more than one jurisdiction relating to the same publication. An apology published for the purpose of one jurisdiction can be used as an admission of guilt in an action brought in another. The Council thinks the proposed procedure could only work if it were accompanied by an undertaking by the plaintiff that no other action would be brought in relation to the claimed defamation.

Mr Crispin Hull

4.11. Mr Hull thinks section 6 is ideal to him as a publisher. However he recognises that many people in the community would not accept a situation where all a publisher had to do was to publish a correction and

apology and pay expenses to escape all other liability, particularly if the publication made unfounded accusations of criminal conduct.

4.12. Mr Hull therefore suggests it might be better to amend Section 10, so that the offer did not constitute a complete defence. Rather, if the plaintiff did not accept the offer to make amends, the defendant's liability would be limited in terms of both damages and costs.

4.13. With respect to damages, Mr Hull suggested that monetary limits placed might be different according to whether the imputations published asserted criminal conduct or something lesser. The monetary limits set would be adjusted for inflation. Different limits could be set for broad or narrow publication. He says the advantage of this approach would be to give some certainty to both parties. At present guessing what damages a court would award is just a guess. It means plaintiffs and defendants have to gamble. This is different to personal injury cases where insurers and solicitors have a fairly precise idea of the range of the damages and this has resulted in reduced litigation.

4.14. Mr Hull welcomes the focus on corrections and apologies as the remedy for defamatory publication.

ACT Law Society

4.15. The Law Society opposes the proposal in the bill that a plaintiff's rejection of a reasonable offer of amends should result in a complete defence. The Society sees this as 'draconian' and that it will produce uncertainty and risk. It sees this provision as punishing the victim of the libel, and may be completely disproportionate to the plaintiff's failure to mitigate their damages.

4.16. The Society notes that no similar penalty applies to a defendant who rejects a reasonable settlement proposal.

4.17. The Law Society considers the bill artificially limits what may be included as a reasonable offer of amends, to the substantial disadvantage of plaintiffs. The Society stated:

> In many cases, a plaintiff has suffered very serious injury, through the negligence or malice of the defendant, and would be entitled to substantial damages. Yet an offer of amends is legislatively defined

> as reasonable even though it does not include compensation. Only an offer of **expenses** may be made.[25]
>
> Thus a person could be falsely labelled a paedophile on the front page, and later be offered a complete apology and 'expenses'. Under the proposal as drafted, this would constitute a complete defence. The plaintiff would be left without any other remedy.[26]

4.18. The Society considers there is no real incentive for the press to exercise proper care before publication.

4.19. The Law Society believes that as an incentive for early settlement, rules should be introduced which parties at greater risk for indemnity costs orders if they fail to settle when a reasonable settlement offer is made. The Society believes an order for indemnity costs is an appropriate penalty for failing to accept a reasonable offer of amends.

ACT Bar Association

4.20. The Bar Association agrees with the general sentiments in the Explanatory Memorandum seeking provision for a more effective offer of amends but wishes to add provision for an offer to pay damages incurred by the aggrieved person.

4.21. The Bar Association considers irreversible damage may have already been suffered. The Association stated that further general damages in defamation cases is intended to compensate the plaintiff for injury to feelings as well as vindicating reputation. The offer of amends no doubt is designed to assist in vindicating reputation but may not always be sufficient and it cannot undo the injury to feelings already suffered up until the offer of amends is performed.

Mr Ric Lucas

4.22. Mr Lucas considers this section of the bill is heavily slanted in favour of media defendants. No provision has been made for victims to recover indemnity costs against a defendant who fails to make a reasonable offer of amends.

4.23. He believes a proposal for a defence for rejection of a reasonable offer of amends will severely punish plaintiffs who seek more generous

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[25] Law Society of the ACT, Submission

[26] ibid

apology than that offered by the defendant, and in their state of hurt and humiliation refuse to concur in a reasonable apology proposed by the defendant.

4.24. Furthermore, he believes there will be risk and uncertainty from the difficulty in predicting how the evidence will emerge at trial and accordingly what is the appropriate from of apology and likely award of damages. He believes to provide a complete defence may be completely disproportionate, to the plaintiff's failure to mitigate their damages.

Sir Lennox Hewitt

4.25. Sir Lennox informed the committee of his objections to this section at a public hearing. He saw it as biased against the involuntary victim. He noted that in each of his eight defamation cases the first document on the file was a letter seeking an apology or an offer to make amends and at no time did he receive this.

4.26. He found the second clause of the bill, (clause 9-False or misleading statement in correction), to be 'the most extraordinary clause of the bill' because the penalty of $10,000 is too light.

4.27. He has serious objections to clause 10 which requires that the aggrieved person may be liable for costs if they do not promptly accept an offer of amends. He felt this is 'a wicked thing to put into legislation'.

4.28. Sir Lennox also referred to the statement in the Explanatory Memorandum which states:

> Government has agreed that a new statutory scheme should provide guidance to a court for the test of 'reasonableness' which will emphasise the desirability of a proportional (ie the equal prominence of an apology in comparison to the defamatory publication) and timely response.

4.29. He noted that these guidelines were not yet available for public comment.

4.30. Sir Lennox provided a graphic illustration of the current problems faced by defamation victims with a newspaper cutting which showed the

difference in the size of an original article and the corresponding correction.[27]

Committee conclusions

4.31. The committee agrees with legal representatives that this section of the bill is heavily slanted in favour of media defendants.

4.32. It is a serious defect in the bill that no provision has been made for victims to recover indemnity costs against a defendant who fails to make a reasonable offer of amends.

4.33. The committee believes that the limitation in offer of amends to a complete apology and payment for 'expenses' is not sufficient from the point of view of the victim. Even the Government has acknowledged that some deserving cases will be denied the opportunity to seek damages done to a victim's reputation/business commensurate with the damage done.

4.34. The committee concluded that a plaintiff should be able to claim compensation for the damage done to a victim's reputation and business as well as recompense for expenses.

4.35. The committee does acknowledge that Mr Hull has made some suggestions which modify the harshness of the Government's proposals for the victim. The Government may wish to give these suggestions further consideration.

Recommendation 3

The committee recommends that defamation law should ensure that a plaintiff is able to claim not only recompense for expenses but also compensation for the damage done to a victim's reputation and business.

4.36. The committee also sympathised with the concerns raised by Sir Lennox about this part of the bill. While the Government's underlying objective, to provide improved incentives for the media to promptly and

[27] Original Article 'Phelps fails to hire her partner' (The Australian 2-3 September 2000) was followed by a minutely-sized apology completely at odds with the prominence and size of the original article.

accurately correct a matter, is very much supported by the committee, this part of the bill still needs further work.

4.37. Sir Lennox is quite right in identifying a problem with the fact the guidelines for corrections have not been released for public comment. The Government needs to develop and release the guidelines for public comment.

4.38. He believes a proposal for a defence for rejection of a reasonable offer of amends will severely punish plaintiffs who seek more generous apology than that offered by the defendant, and in their state of hurt and humiliation refuse to concur in a reasonable apology proposed by the defendant.

4.39. It is suggested that the Government make stringent efforts to consult with a wide range of individual plaintiffs when undertaking further work on this section, in addition to consulting with peak media and legal organisations.

Recommendation 4

The committee recommends that the Government develop further legislative proposals aimed at providing in-built incentives for the media to avoid damaging the reputations of people.

Paul Osborne MLA

Chair

30 April 2001

Appendix

Submissions

1. Mr Ric Lucas
2. The Law Society of the ACT
3. Australian Press Council
4. ACT Bar Association
5. Mr Crispin Hull
6. ACT Government
7. The Law Society ACT (supplementary)
8. Sir David Smith
9. Mr Crispin Hull (supplementary)
10. Mr Peter Hohnen

Public hearings

20 November 2000

Sir Lennox Hewitt

27 November 2000

Mr Ric Lucas (Law Society of the ACT)

Mr Peter Hohnen

Mr Chris McLeod (Australian Press Council)

Sir David Smith

Mr Crispin Hull (The Canberra Times)

20 February 2001

Mr Bill Stefaniak (Attorney-General)

Mr Peter Quinton (ACT Department of Justice and Community Safety)

Dissenting Report of Mr Harold Hird MLA to the Report of the Standing Committee on Justice and Community Safety in relation to the Defamation Bill 1999

I reject the Committee's report, and base this rejection on the following grounds:

The first point of rejection relates to the common law formulation of the defence of truth. The Committee conceded to the arguments of members of the legal profession rejecting the government proposal that "truth alone" should be a defence.

In part it seems to have done so in the demonstrably wrong belief that in jurisdictions where "truth alone" exists (eg, Victoria and the UK) mudraking is rife.I urge Government to retain this aspect of the Bill.

The existing qualifications to the law add to the undesirable complexity of the law, and importantly it adds additional cost to defamation proceedings.

Secondly, should the ACT adopt a defence based on negligence?

The Committee has not been able to make up its mind on this issue. It concluded that there was merit on both sides of the argument and thus it would not like to see the provision abandoned.

It suggests that the provision be reworded but makes no suggestion about how this might be achieved. Instead the Committee has suggested that the Government engage in further discussion even though defamation law has been the subject of different consultative processes since the early years of self-government.

I urge the Government to carefully examine the Committee's report with a view to simplifying the provision.

Given the exhaustive consultation processes already undertaken by the ACT Law Reform Commission, the Government and now the Committee, I am not persuaded that further delay is in anyone's interest.

Finally should a victim be able to claim compensation for general damage done to a victim's reputation in the "offer of amends" process?

I am disappointed by the Committee's recommendations here. I don't think that Committee members took the time to understand the issues in question here – their comments seem directed to the general issue of damages, which are really not in question.

I urge the Government to retain incentives to encourage the early resolution of disputes. This aspect of the Government's Bill is essential to meet the objective (repeated in the preface to the report) of achieving early intervention and preventative measures to avoid long term damage.

In conclusion I recommend that the Government brings forward a revised Bill as soon as possible for debate.

This process has dragged on for far too long – the interests of people in the ACT are not served by further delay.