

Law Reform Commission

REPORT 11 (1971) – DEFAMATION

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REPORT 11 (1971) - DEFAMATION

Preface

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are

The Honourable Mr Justice Reynolds, Chairman.
Mr R. D. Conacher, Deputy Chairman.
Mr C. R. Allen.
Professor D. G. Benjafield.
Mr D. Gressier.
Mr T. W. Waddell, Q.C.

The Honourable Mr Justice Manning was Chairman of the Commission, and Professor W. L. Morison and Mr J. O. Stevenson were Commissioners, during part of the period of the Commission's work on the subject matter of this report.

The offices of the Commission are in the Goodsell Building, 812 Chifley Square, Sydney. The Secretary of the Commission is Mr R. J. Watt. Letters should be addressed to him.

This is the eleventh report of the Commission on a reference from the AttorneyGeneral. Its short citation is L.R.C. 11.

REPORT 11 (1971) - DEFAMATION

REPORT

Report on Defamation

To The Honourable K. M. McCaw, M.L.A.,
Attorney General for New South Wales.

1. You have made a reference to this Commission in the following terms

“To review the law and practices of the Courts in relation to Ebel and slander; and without limiting the generality of the foregoing, to enquire into the extent to which the Law and the practices of the Courts as at present existing in respect of Contempt, Libel, and similar legislation hamper the Press in publishing facts of public interest and in editorially commenting thereon within the limit of what is necessary for the protection of the liberty of the subject and the security of the State.”

2. This report deals only with the law and practice of the courts in relation to libel and slander. We leave for future consideration the remainder of the matters covered by the terms of reference.

3. We do not read our terms of reference as including blasphemous, seditious or obscene libels. Since, however, the Defamation Act, 1958, s. 42 (2), deals with a point of procedure relating to the offences of obscene and blasphemous libels, and since we propose the repeal of the Act of 1958, we propose, as an incidental matter, an amendment to the Crimes Act, 1900, inserting a new section 574A, to an effect similar to that of section 42 (2) of the Act of 1958.

4. Further, we do not read our terms of reference as including slander of title, slander of goods, and other cases of malicious falsehood. These are common law wrongs committed by the publication of a malicious falsehood whereby actual damage is caused to the person suffering the wrong. Save that these wrongs involve the publication of an imputation, they have no resemblance to the wrong of defamation.

5. Finally, so far as concerns the scope of this report, we are not concerned here with the protection of privacy nor with the protection of confidential information. Infringements of privacy, or disclosures of confidences, may also be defamatory, but the law of defamation was never intended to protect these interests and it is not a fit instrument for that task.

6. We therefore address ourselves in this report to the law of libel and slander, or defamation. One man defames another when he publishes to a third person an imputation harmful to the reputation of that other. The defamer may be liable in damages civilly at the suit of the person defamed and he may be liable to fine or imprisonment or both in a criminal prosecution. This report is concerned with the conditions of these liabilities, the defences open to the defamer, the procedures in civil actions and in criminal prosecutions, and the remedies and sanctions available.

7. The law of defamation is a matter of peculiar difficulty because it must take account of the conflict between the interest of freedom of speech on the one hand and the right to protection from attacks on reputation on the other hand. It is a subject on which much has been written and spoken and on which strong views are held. We have thus been led to make special efforts to get informed views from people interested, or experienced, in this field of the law, both in New South Wales and elsewhere.

8. Amongst published material, we note particularly the help we have had from the Report of the Committee on the Law of Defamation (the Porter Committee) published in 1948 (Cmd. 7536), the Report on The Law and the Press by the joint working party of the British Section of the International Commission of Jurists and the British Committee of the International Press Institute (the Shawcross Report) published in 1965. We gained further valuable help from papers presented under the auspices of the Council for Advanced Legal Studies of the New South Wales Bar Association.

9. We conferred with lawyers experienced in the law of defamation. We published notices in the press inviting assistance. There was a wide response to these notices, from lawyers, from the press, from civil liberties bodies, and from other people.

10. We published a working paper on the law of defamation in October, 1968. We sent the working paper to Members of Parliament and to lawyers and others who had indicated their interest or who we thought might be interested. The working paper led to further submissions being made to us and led to public discussion in the press and elsewhere. A symposium on the working paper was held by the Sydney University Law Graduates Association.

11. In the course of our work we were given help generously by many people. We do not list them by name, but we express our gratitude to all of them.

12. One difficulty about consulting people about the law of defamation is that prospective defamers are better organized and more articulate than prospective plaintiffs. A newspaper company knows where the shoe pinches and has the experience and resources to put its views persuasively. No one has put anything to us which is intentionally unfair to plaintiffs, but it is natural that the plight of a defendant should be seen in strong colours by people who have many times been defendants. Those that put to us the side of the plaintiff included lawyers with experience in defamation cases and those lawyers of course have no want of articulation or persuasiveness. Others, however, who put the case of the person defamed spoke from general feelings of justice and fairness or, sometimes, from feelings of outrage, rather than from their own experience of assaults on reputation. They have, given us little help on the central problem of drawing a line between protection of reputation and freedom of speech. In weighing the views which have been put to us, therefore, we have had to make allowance for the fact that these views give but an imperfect picture of those defects of the law which bear hardly on a defamed person.

13. The present law in New South Wales largely depends on the Defamation Act, 1958 (set out in Appendix A). That Act is "an Act to state and amend the law relating to defamation" it is in many respects a code of the law of defamation. In this the Act of 1958 departs from what was formerly the legislative policy in New South Wales and what was and still is the legislative policy in England and in most other common law countries.

14. The Act of 1958 has not been a satisfactory attempt at codification. In the minds of lawyers, the Act is held to be the source of formidable difficulties, both in substantive law and in procedure. Examples of difficulties in substantive law occur in relation to defences of privilege. We give particular mention to section 17 (c), concerning publications "made in good faith . . . for the public good", and section 17 (h), concerning publications "made in good faith . . . in the course of . . . the discussion of some subject of public interest, the public discussion of which is for the public benefit. Both these provisions raise problems of everyday importance problems which are as yet unresolved. The provisions have been the concern of the press and civil liberties bodies as well as lawyers.

15. Another consequence of the partial codification has, we believe, been a tendency to inhibit historical writing. Section 5 states the characteristics of a defamatory imputation, and states them in a way which is unexceptionable to a lawyer. But its words "any imputation concerning any person, or any member of his family, whether living or dead" have led to an apparently ineradicable misconception amongst historical writers. The misconception is that the Act may make the historian liable in damages simply because he has published an imputation disparaging the reputation of a dead person.

16. We could give further instances where the 1958 Act has not worked well, but there is no need to do so. One reason for the troubles with the Act is that, based as it is ultimately on the Indian Penal Code of 1860, it did not take into account nearly a hundred years of social change and judicial experience.

17. We think that the law of New South Wales ought not to persist in the kind of codification attempted by the 1958 Act. Accordingly we recommend that it should be repealed. Should we recommend a return to the common law, with statutory modification, or should we recommend a codification in some different form?

18. The variety of circumstances which give rise to questions relating to defamation are great. The risk that the draftsman of a code will overlook possible future cases is correspondingly great. We think that the risks of inadvertent injustice, inherent in any codification, are peculiarly serious in the law of defamation, and that in this field those risks outweigh the advantages of a code. The common law is, we believe, a more serviceable basis for the law of defamation. We recommend legislation along the lines of the proposed Bill in Appendix B to this

report. The proposed Bill would modify the common law in those respects only in which we find the common law itself defective.

19. Although we do not favour an attempt to make a general code of the law of defamation, there are parts of the law which have got into so difficult a condition as to call for restatement. One such part is, we believe, the law concerning fair comment on a matter of public interest. Sections 29 to 35 of the Bill take the common law concepts of "comment" and "matter of public interest" and, in general, the common law as to the material on which a defensible comment may be based and go on to erect a structure of statutory rules which would operate to displace the common law in other respects. These sections may be regarded as a partial codification.

20. We have put our more detailed comments on the proposed Bill in the notes which are Appendix D to this report. We draw attention here to the more important effects of the proposed Bill and refer to the relevant paragraphs of the notes.

21. As to the tort of defamation, that is, what facts will entitle a plaintiff to succeed, viewed apart from matters on which the defendant may rely in order to escape liability, the proposed Bill would substantially maintain the law as it has been in New South Wales since 1847. Briefly, slander is assimilated to libel, but otherwise the constituents of the tort are governed by the common law.

22. We go to defences in an action for defamation. The first group of defences dealt with by the proposed Bill are defences in which proof of truth of the imputation in question is an element. At common law truth is a defence in a civil action. This remains the law in England and many other countries. In New South Wales, however, since 1847 truth alone has not been a defence: it must also be shown that the publication complained of was for the public benefit. This is a jury question.

23. We propose that the requirement of publication being for the public benefit be dropped and a requirement put in its place that the matter published relate to a matter of public interest. The question whether this new requirement is satisfied would be for the judge and not the jury: this is in accordance with the common law rule that questions of public interest are questions for the judge. This is further discussed in paragraphs 65 to 70 of the notes in Appendix D.

24. We propose that truth should also be a defence where the matter complained of is published on an occasion of qualified privilege. There is a discussion of this proposal in paragraphs 71 and 72 of the notes in Appendix D. We propose also that there should be a defence based on the truth of what we have called "contextual amputations". This is discussed in paragraphs 73 and 74 of the notes in Appendix D.

25. There is under the Act of 1958 an absolute privilege for the publication of various matters in or connected with proceedings in Parliament, judicial proceedings and proceedings of official inquiries. See sections 11, 12, 13, 40. The proposed Bill would maintain the substance of these absolute privileges, but would allow some to be governed by the common law, and would alter the legislative expression of others. See paragraphs 75 to 87 of the notes in Appendix D.

26. As to qualified privilege, we recommend the abandonment of the list of cases in section 17 of the Act of 1958 and a return to the common law, subject to modifications in some respects. The subject is discussed in paragraphs 88 to 117 of the notes in Appendix D.

27. We come now to reports of parliamentary, judicial and other proceedings. Section 14 of the 1958 Act lists a number of reports and similar matters the publication of which, if in good faith, is defensible. The list is not exhaustive: there is still some room for the common law to operate pursuant to section 3 (2). This subject has for many years been dealt with by legislation in England and elsewhere. The legislatures have taken the lead to such an extent that there has been little consideration of the subject on common law principles: such common law doctrine as has emerged is not adequate to enable the court properly to attack new cases as they arise. There are indeed decisions of single judges which tend in the way which we think the law ought to go. Examples are *Webb v. Times Publishing Co. Ltd* ([1960] 2 Q.B. 535) and *Thompson v. Australian Consolidated Press Ltd* ((1968) 89 W.N. (Pt 1) 121). There has, however, been little consideration by appellate courts and the conservative views of the Porter Committee (in paragraph 108, page 26 of their report) do not encourage confidence that the decisions we have cited would be approved in appellate courts.

28. In these circumstances we propose a further statutory enlargement of the categories of protected reports. We propose, for example, that reports of proceedings in foreign courts be included: such reports were the subject of the cases cited in paragraph 27. We proposed this enlargement because we think that it may in general safely be presumed that the foreign proceedings in question are a matter of proper public interest in New South Wales and that the law ought to encourage rather than inhibit their discussion. Such proceedings are source material for debate and a knowledge of them is a condition of the attainment of enlightened views on current affairs. It will no doubt happen, if our recommendation on this point is accepted, that occasionally there will be unnecessary disparagement of reputation by the publication here of reports of foreign proceedings. But we think that the occasions will be rare, at least in comparison with the commonplace disparagement of reputation under privilege to which the community is accustomed in the case of reports of proceedings within New South Wales.

29. We propose the extension of the categories of Protected reports so as to embrace certain determinations of learned societies, professional and trade associations, and associations for the promotion of games and pastimes. Section 14 (1) (i) of the 1958 Act goes a little way in this direction by its protection of reports of some proceedings of the committee of the Australian Jockey Club. The real starting point by way of legislative precedent, however, is the English Defamation Act 1952 (section 7 and the Schedule to the Act). So also we propose a protection for reports of the proceedings of what may broadly be described as public companies having some connection with Australia: the legislative precedent is again in the provisions we have mentioned in the English Act of 1952.

30. There is a further discussion of our proposals regarding protected reports in paragraphs 118 to 148 of the notes in Appendix D.

31. We also propose extensions to the protection for the publication of court notices and official notices: see paragraphs 149 to 160 of the notes in Appendix D.

32. The next subject which we discuss is the body of rules relating to fair comment on a matter of public interest. It is here that the law of defamation faces one of its central tasks. That task is to balance the conflicting objectives of safeguarding freedom of opinion on the one hand and providing redress for attacks on reputation on the other.

33. The concepts of "comment" and "public interest" are, we think, adequately dealt with by the common law. So too, we think that, with two exceptions, the common law adequately identifies the material on which a defensible comment may be based. The real difficulty lies in the idea of fairness, or perhaps we should say that the difficulty lies in those aspects of fairness not concerned with the concepts and identification which we have just mentioned. The idea of fairness has been the origin of much of the law relating to comment, in a way comparable to that in which the idea of malice has been the origin of much of the law relating to qualified privilege. The judicial and other learned consideration of the subject during the last hundred years or so has analysed the idea of fairness to such an extent that it is possible by legislation to deal separately with the relevant aspects of fairness and to dispense altogether with the general concept.

34. It is good to do so because in the course of the development of the law on this subject a mass of difficult and sometimes discordant caselaw has arisen and there has been a tendency, noted both here and in England, to an overrefinement of doctrine. The subject is too important for the law to be left in this condition. We have therefore been led to propose a codification of much of the law as to fair comment.

35. In short, our proposal is that defamatory matter should be defensible as comment if, besides having the character of comment, it satisfies three tests. Two of the tests would be the same in all cases. The first is that the comment must be based on proper material, for example, statements of fact which are true, or a fair report of proceedings in Parliament. The second test is that the comment must relate to a matter of public interest. The third test would vary according to the identity of the author of the comment. If the author is the defendant or a servant or agent of his, the comment must represent the opinion of the author. If, however, the author is none of these, for example, the writer of a letter or article published in a newspaper, then the defendant must have published the comment in good faith for the information of the public or for the advancement of education or the advancement of enlightenment. The onus would be on the plaintiff to show that the third test was not satisfied.

36. Our proposals as to comment are put in legislative form in sections 29 to 35 of the Bill. There is a more detailed discussion of them in paragraphs 161 to 211 of the notes in Appendix D.

37. The next subject for discussion, in the sequence adopted by the proposed Bill, is that of reparation by apology and correction in cases of unintentional defamation. The relevant sections of the proposed Bill are sections 36 to 45.

38. Because defamation is a tort of strict liability it is from time to time committed unwittingly by reason of the existence of facts and circumstances unknown to the publisher. Liability attaches in these circumstances even where the existence of such facts and circumstances could not reasonably have been known to him. In cases where there is no intent to cause harm and no negligence, a plaintiff should be entitled to vindication of his character but in fairness no more should be expected of or demanded from the innocent defendant.

39. A section designed to alleviate the situation has proved so unsatisfactory that it has fallen into disuse. We refer to section 22 of the Act of 1958. A similar provision has been in force both in England and in New South Wales since the 1840's (Libel Act 1843, s. 2. Act 11 Vic. No. 13, ss.6, 7).

40. We have therefore been ready to avail ourselves of the scheme proposed by the Porter Committee and enacted in England in the Defamation Act 1952. It applies to cases where the words are published innocently, that is, without defamatory intent in relation to the prospective plaintiff and without negligence in relation to their possible defamatory effect upon him, In such case the prospective defendant may make an offer of amends (that is, apology and correction) supported by evidence showing innocence, acceptance of which will halt the proceedings. If the offer is not accepted then it is a defence in the action that the words were innocently published and that the offer was proper and promptly made.

41. Further comment on the provisions in the proposed Bill for offer of amends appears in paragraphs 212 to 221 of the notes in Appendix D.

42. We come now to the law relating to damages for defamation. Damages for defamation are almost always assessed by a jury and the jury has a wide range of choice in fixing the amount of the verdict. Damages may be either compensatory or exemplary. Exemplary damages, sometimes called "punitive" or "retributive" damages, are awarded, not to compensate the plaintiff for, the hurt caused by the publication complained of, but to punish the defendant for wanton wrongdoing and to mark the jury's sense of outrage at the conduct of the defendant. Quite apart from any question of punishment, compensatory damages may be aggravated, that is, enlarged, by reason of the malice or conduct of the defendant where that malice or conduct has increased the hurt suffered by the plaintiff. Evidence justifying the aggravation of compensatory damages may also be evidence justifying the award of exemplary damages. To justify an award of exemplary damages, it must appear that, in the commission of the wrong complained of, the conduct of the defendant was highhanded, insolent, vindictive or malicious, or in some other way exhibited contumelious disregard of the plaintiff's rights: *Uren v. John Fairfax and Sons Pty Ltd* ((1966) 117 C.L.R. 118, 129 (Taylor J.), 158 (Owen J.)). The conduct of the defendant in the period after the publication and before damages are assessed may be an indication that the publication was made in circumstances justifying exemplary damages: *Triggell v. Pheeney* ((1951) 82 C.L.R. 497).

43. We recommend that exemplary damages be abolished so far as concerns defamation. This is a question on which opinions are strongly held and are divergent. We must state our reasons with particularity.

44. Our first reason is simply that it is wrong that one person should profit by the punishment of another. Generations ago legislation allowing such profit was common: provision was made for actions by common informers. Such provisions had, no doubt, some justification in a society without the highly organized central government and police force which we have today. In the absence of such provisions rewarding the informer, offences would go undetected and therefore unpunished. Analogous thinking lies behind the present day cases where the authorities offer a reward to persons furnishing information leading to a conviction for some crime. But the common informer provisions are practically obsolete today: many have been repealed by the legislature and the courts have put obstacles in the way of enforcement of the provisions which remain.

45. Today the cases of defamation which call for punishment are almost always cases of defamation in a newspaper of large circulation. The offence is widely known, and the Crown authorities are well equipped to prosecute in proper cases.

46. One reason why, in a bygone age, exemplary damages were thought justifiable was that, unless the defamer were made to smart for the insult, the person defamed might attempt punishment outside the courts, for example, by challenge to a duel. That at least is not a real prospect today.

47. We think that to act on the view that the person defamed should not be entitled to profit by the punishment of the defamer is but to take another step along a road along which the law has been heading for generations.

48. Then, secondly, we think it wrong that punishment should be inflicted in civil proceedings, whether the proceeds of the punishment go to the person defamed or not. This is because civil proceedings do not provide the safeguards for the accused which a criminal prosecution provides. The defendant is liable to be ordered to disclose, before the trial documents which may help the plaintiff to succeed. After the commencement of the Supreme Court Act, 1970, the defendant in civil proceedings for defamation will be liable, as he is liable in most common law countries, to be ordered to answer questions on oath, before the trial, so that his answers may be used against him at the trial. At the trial, the standard of proof entitling the plaintiff to succeed, proof on the balance of probabilities, is lighter than the standard in criminal proceedings, that is, proof beyond a reasonable doubt. On the trial by a civil action, counsel for the plaintiff is not bound by the traditions of restraint and moderation which the Crown follows in a prosecution. Instances can be multiplied. We believe that the infliction of exemplary damages in civil proceedings is wrong because of these procedural and curial disadvantages to the defendant.

49. Thirdly, we think it wrong that it should be in the hands of a jury not only to find the defendant guilty but also to fix the amount of the punishment. We think that the defendant ought not to be punished except on the ordinary principles of criminal procedure, whereby the jury determines guilt and the presiding judge determines the amount of the penalty. This procedure not only places the quantum of punishment in the hands of a man experienced in dealing with matters of penalty, but also affords a procedural means whereby evidence of matters going to penalty can be taken separately from evidence going to guilt. For example, the wealth or poverty of the defendant is a matter relevant to the quantum of exemplary damages, but if a defendant put a case of poverty to a jury before verdict on liability he would take the risk of being taken to concede guilt.

50. One aspect of the assessment of exemplary damages by a jury calls for particular mention. Where the matter complained of has been published in a newspaper and the newspaper is one which habitually publishes matter which invades privacy or emphasizes matters of sex or brutality, the opportunity is there for the plaintiff or his counsel to speak of the newspaper as a scandal sheet or a yellow rag, or otherwise in terms of inflammatory execration. But the jury is drawn from that same community whose tastes determine the content of the newspaper. Men are prone to condemn in public what they enjoy in private. In these circumstances, a jury is tempted to yield to the error of punishing by exemplary damages, not the publication of the defamatory matter complained of, but the general standards of the newspaper, standards which the jury, as part of the reading public, have had a share in forming.

51. These, then, are the reasons which lead us to recommend the abolition of exemplary damages. We pass to some other considerations which bear on the question.

52. We have had discussions with many people on this question, and many people have put their views to us in writing. Amongst those who would prefer to see exemplary damages for defamation retained, the question tended to be examined in relation to defamatory matter in newspapers. A common approach was that many newspaper proprietors behaved badly in one way or another and that hence a newspaper did not merit any tenderness as regards damages for defamation. This approach went far beyond questions properly relevant to the measure of damages for defamation. Newspapers were charged with many vices: amongst them were invasions of privacy, shallow reporting, inaccurate reporting, slanted reporting, and appeals to the baser instincts of mankind in the shape of matter emphasising sex or brutality. We think also that there was an idea that hundreds of libels were published in newspapers for every one that led to an action for damages. It followed that occasional awards of exemplary damages still left the newspapers free of the full measure of their just deserts. These views, to the extent to which they may be well founded, go to the question of the propriety of punishing the newspaper publisher, not to the question of rewarding the person defamed, nor to the question of the proper procedure for punishment.

53. It is not our view that defamation should never be punished. It is our view that the question of punishment should be dealt with if necessary, in criminal and not in civil proceedings, and that, in common with other serious

offences, it should be for the Crown law authorities to determine whether a prosecution should be instituted. It is true that there have been few prosecutions by the Crown for criminal defamation in recent years. We do not know the reason. It may be that it has seemed better to the Crown law authorities to devote their resources to the punishment of crimes having more tangibly injurious consequences.

54. There are some points which we should make about the limited consequences of our proposals for the abolition of exemplary damages in defamation. Firstly, damages, although available only on the ground of compensation for harm, would still be "at large", in the sense that, except in the rare cases of proved special damage, damages will not be a matter of calculation. Thus a verdict for large damages given by a jury after proper directions by the judge will not be set aside on appeal unless grossly exorbitant. Secondly, conduct of the defendant which tends to aggravate the harm done by the defamation complained of, for example, conduct which tends to draw further public attention to the matter complained of, will still be a ground for enlargement of damages. Thirdly, it will still be right for a jury to award to the plaintiff such good sound substantial damages as will mark the jury's sense of the injury the plaintiff has sustained, and a jury may still properly think that a plaintiff who has been seriously defamed in a newspaper should have heavy damages by way of compensation, and quantify its verdict accordingly: *Australian Consolidated Press Ltd v. Uren* ((1966) 117 C.L.R. 185, 214 215. Windeyer J.).

55. On the question whether exemplary damages should or should not be permitted, some of those with whom we have discussed the matter have seen as relevant the income tax position of a person who publishes defamatory matter in the ordinary course of business. The suggestion is that the burden of exemplary damages is not so heavy as it may at first sight appear, because the damages will be an allowable deduction for the purposes of income tax: some ground for the retention of exemplary damages is seen in this situation. It appears to be the position that damages for defamation incurred in the course of carrying on a newspaper business are an allowable deduction, but that a fine imposed in criminal proceedings for defamation would not be an allowable deduction. Our views on this point are as follows. First, we do not think that the law of defamation in New South Wales ought to be influenced by the state for the time being of the income tax laws of the Commonwealth. Second (putting aside the first view for the moment), in so far as the income tax laws allow a deduction for exemplary damages, the punishment intended for the wrongdoer is borne in part by the general body of taxpayers, and the punitive purpose of exemplary damages is frustrated: a criminal punishment for defamation, on the other hand, will as a rule have to be borne by the defamer alone.

56. Apart from the abolition of exemplary damages, our recommendations also touch other questions concerning damages. These recommendations are expressed in sections 46 to 49 of the proposed Bill. They are concerned with damages where the defamed person has died, with the effect of the malice or other state of mind of the publisher, with the effect of his conduct in the court proceedings for defamation, with the relevance of reports of the proceedings, with the admissibility on the question of damages of evidence of the truth or falsity of the matter complained of, and with the significance of other recoveries for other publications of similar defamatory matter. These recommendations are further discussed in paragraphs 224 to 246 of the notes in Appendix D.

57. Criminal defamation is dealt with in Part V of the Proposed Bill that is, in sections 50 to 54. At present a prosecution for defamation is a rarity. If, however, our proposals for the abolition of exemplary damages are accepted, the criminal law will have a more important role in the punishment of wanton defamers. Our proposals as to the criminal law are discussed in paragraphs 247 to 261 of the notes in Appendix D.

58. Section 55 of the Bill, dealing with evidence of printing, production, publication or distribution, is based on sections 38 and 39 of the 1958 Act. There is some enlargement of the scope of the provisions. Section 55 is discussed in paragraphs 262 and 263 of the notes in Appendix D.

59. Section 56 would make an important change in the law of evidence as regards civil and criminal proceedings for defamation. Suppose A is convicted of murdering B, C publishes the imputation that A murdered B, A sues C for damages for defamation and C pleads a defence upon which an issue arises of the truth of the imputation. On the English authorities, the common law does not enable C to rely on the conviction as evidence of the truth of the imputation: *Hollington v. F. Hewthorn and Co. Ltd* ([1943] 1 K.B. 587): cf. *Jorgensen v. News Media (Auckland) Ltd* ([1969] N.Z.L.R. 961). The evidence of guilt has to be given again and C is at risk that witnesses will not be available and that memories have faded. Since the defamation proceedings may thus involve the litigation again of issues already determined between the Crown and A., the convicted man who is also plaintiff, and since in this respect the Crown is in truth the representative of the community at large, we regard this state of the law as

contrary to the interests of justice. We therefore propose the enactment of section 56, by which, on the facts postulated, the conviction of A for the murder of B would be conclusive evidence for C, the defendant in the defamation proceedings, of the truth of the imputation.

60. In recommending legislation along the lines of section 56 we follow in large measure a recommendation in the Fifteenth Report of the Law Reform Committee (1967; Cmnd. 3391) enacted in part by section 13 of the Civil Evidence Act 1968 in England. The Law Reform Committee also recommended, in the same report, legislation making conviction of a crime *prima facie* evidence of the commission of the crime for the purposes of civil proceedings generally, and section 11 of the Civil Evidence Act 1968 makes provision accordingly. Thus in England, by statute, a conviction is *prima facie* evidence of guilt in civil proceedings generally and, moreover, is conclusive evidence in civil proceedings for defamation.

61. We have a reference from you "to review the law of evidence in both civil and criminal cases". We expect that, when we report to you pursuant to that reference, we shall consider whether we should recommend the enactment of legislation along the lines of the provisions of the Civil Evidence Act 1968 other than section 13. So far as concerns proceedings for defamation, however, we, think that we should make our recommendation now, rather than wait until we deal more generally with the law of evidence.

62. There is a further discussion of section 61 in paragraph 264 to 276 of the notes in Appendix D.

63. Section 57 of the proposed Bill would abolish, in relation to civil proceedings for defamation, the privilege of a person to refuse to answer a question, or to produce any document or thing, on the ground that the answer or production might criminate him of an offence under section 51 of the proposed Bill. The section is discussed in paragraphs 277 to 279 of the notes in Appendix D.

64. We recommend that, if Parliament should legislate in the manner indicated by the proposed Bill, the Rule Committee under the Supreme Court Act, 1970, should be invited to consider making rules along the lines of the draft in Appendix C. The proposed rules are concerned with procedure and are therefore more appropriate for consideration by the Rule Committee than by the Parliament. The rules could, of course, be introduced into the rules of the Supreme Court by statute, but it seems to us inappropriate, in respect of this small body of rules, that Parliament should enact legislation which might be set aside at once by the Rule Committee. Another course would be to embody these procedural provisions as portion of a Defamation Act. Experience has shown, however, that statutory provisions as to procedure tend to get out of step with the general procedures of the court in question: see, for example the Defamation Act, 1958, ss. 14 (4), 22 (2), 23. Further, statutory provisions as to procedure which are appropriate to the Supreme Court would not be appropriate to the District Courts. On the other hand, rules made by the Rule Committee can readily be altered by the same Committee, whether the alterations are called for by change of circumstances or by the appearance of flaws in the existing rules; and rules for the District Courts can similarly be made, and changed, by the District Court judges.

65. The proposed rules of court are discussed in paragraphs 318 to 330 of the notes in Appendix D.

66. We have not drawn any rules of court for consideration by the District Court judges. We recommend, however, that if Parliament should legislate in the manner indicated by the proposed Bill, the District Court judges should be invited to consider making rules generally in accordance with the principles of the proposed rules in Appendix C.

67. Our recommendations in this report are based on the statute law as it was on the 1st January, 1970, except that we envisage that legislation founded on our recommendations should not commence before the commencement of the Supreme Court Act, 1970.

9th February, 1971.

R. G. REYNOLDS, Chairman.

R. D. CONACHER, Commissioner.

REPORT 11 (1971) - DEFAMATION

Appendix A - Defamation Act 1958

Act No. 39, 1958(1), as amended by Act No. 33, 1965(2).

An Act to state and amend the law relating to defamation; to repeal the Defamation Act, 1912, and certain other enactments; and for purposes connected therewith.

BE enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

1. This Act may be cited as the "Defamation Act, 1958". Short title

2. The Acts mentioned in the Schedule to this Act are to the extent therein expressed hereby repealed. Repeal

3. (1) (a) Any alteration of the law by this Act, whether by the repeal of an enactment or otherwise, does not affect- Savings
(i) a right, privilege, obligation or liability acquired, accrued or incurred before the commencement of this Act under the law that is so altered;
(ii) a penalty, forfeiture, or punishment incurred in respect of an offence committed against the law that is so altered;
(iii) a legal proceeding or remedy in respect of such a right, privilege, obligation, liability, penalty, forfeiture or punishment.
(b) Such a proceeding or remedy may be instituted, continued or enforced and such a penalty, forfeiture or punishment may be imposed and enforced as if the law that is so altered had not been altered.
(c) This subsection does not limit any saving in the Interpretation Act of 1897.

(2) Except where this Act deals with, and makes a different provision for., any protection or privilege existing by law immediately before the commencement of this Act, nothing in this Act is to be construed to affect any such protection or privilege.

(3) The repeal of any enactment by this Act shall not be construed as limiting the power of a court or judge to direct either party to an action to give particulars or further particulars of his claim or defence or of any pleadings or of the damages claimed.

4. In this Act, unless the context or subject matter otherwise indicates or requires- Definition

"Broadcasting station" means any station-

- (a) provided by the Postmaster-General and from which the Australian Broadcasting Commission broadcasts programmes and other services; or
- (b) in respect of which a person holds a license for a commercial broadcasting station under Part IV of the Broadcasting and Television Act 1942-1956 of the Parliament of the Commonwealth.

“Indictment” includes information presented or filed as provided by law for the prosecution of an offence.

“Jury” includes a judge of a district court sitting for the determination of questions of fact in an action in a district court.

cf. Act No. 32, 1912, s.3

“Licensee” means-

- (a) in relation to a broadcasting or television station referred to in paragraph (a) of the definition of “Broadcasting station” or in paragraph (a) of the definition of “Television station” - The Australian Broadcasting Commission;
- (b) in relation to a broadcasting or television station referred to in paragraph (b) of the definition of “Broadcasting station” or in paragraph (b) of the definition of “Television station” - the person who in respect thereof holds a license for a commercial broadcasting or television station, as the case may be, under Part IV of the Broadcasting and Television Act 1942-1956 of the Parliament of the Commonwealth.

“Periodical” includes any newspaper, review, magazine, or other writing or print, published periodically.

cf. Qld. 53 Vic. No. 12, s.3; Tas. 59 Vic. No. 11, s.3; Crim. Codes, Qld. s.365; Tas. s. 196; W.A. s.345.

“Proprietor in relation to a periodical, means as well the sole proprietor of the periodical, as also, in the case of a divided proprietorship, the persons who, as partners or otherwise, represent and are responsible for any share or interest in the periodical as between themselves and persons in like manner representing or responsible for the other shares or interests therein, and no other person.

cf. Act No. 32, 1912, s.3

“Television station” means any station-

- (a) provided by the Postmaster-General and from which the Australian Broadcasting Commission televises programmes a-iiid other services; or
- (b) in respect of which a person holds a license for a commercial television station under Part IV of the Broadcasting and Television Act 1942-1956 of the Parliament of the Commonwealth.

Defamation.

5. Any imputation concerning any person, or any member of his family, whether living or dead, by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise him, is called defamatory, and the matter of the imputation is called defamatory matter.

Defamatory matter.

cf. Tas. 59 Vic. No.11, s.4; Crim Codes, Qld. s.366; Tas. s.197; W.A. s.346

The imputation may be expressed either directly or by insinuation or irony.

6. The question whether any matter is or is not defamatory is a question of fact.

Functions of judge and jury.

The question whether any matter alleged to be defamatory is or is not capable of bearing a defamatory meaning is a question of law.

cf. Tas. 59 Vic. No. 11, s.5; Crim. Codes, Qld. s.367; Tas. s.198; W.A. s.347

7. A person who, by spoken words or audible sounds, or by words intended to be read either by sight or touch, or by signs, signals, gestures, or visible representations, publishes any defamatory imputation concerning any person is said to defame that person.

Definition of defamation.

cf. Tas. 59 Vic. No. 11, s.5; Crim. Codes, Qld. s.367; Tas. s.199; W.A. s.348

8. (1) Publication is, in the case of words spoken, or audible sounds made, in the hearing of a person other than the person defamed, the communication of the words or sounds to that other person by the speaking of the words or making of the sounds, and, in the case of signs, signals or gestures, the making of the signs, signals or gestures so as to be seen or felt by, or otherwise come to the knowledge of, any person other than the person defamed, and, in the case of other defamatory matter, the delivering, reading, exhibiting, or other communication of it, or the causing of it to be delivered, read, or exhibited to, or to be read or heard by, or to be otherwise communicated to, a person other than the person defamed.

Publication.

cf. Tas. 59 Vic. No. 11, s.7; Crim. Codes, Qld. s.369; Tas. s.200; W.A. s.349.

(2) The expressions "publish", "publishes" and publishing" have interpretations corresponding to that of publication.

9. It is unlawful to publish defamatory matter unless the publication is protected, or justified, or excused by law.

Publication of defamatory matter is prima facie unlawful.

cf. Tas. 59 Vic. No. 11, s.8; Crim. Codes, Qld. s.370; Tas. s201; W.A. s.350

10. The unlawful publication of defamatory matter is an actionable wrong.

Defamation actionable.

cf. Tas. 59 Vic. No. 11, s.9; Qld, 53 Vic. No. 12, s.9.

Absolute Protection.

11. (1) A member of either House of Parliament does not incur any liability as for defamation by the publication of any defamatory matter in the course of a proceeding in Parliament.

Privilege of Parliament.

cf. Tas. 59 Vic. No. 11, s.10; Crim. Codes, Qld. s.371; Tas. s.202; W.A. s.351.

(2) A person who presents, or secures the presentation of, a petition to either House of Parliament does not incur any liability as for defamation by the publication to that House of Parliament of any defamatory matter contained in the petition.

Petitions.

(3) A person does not incur any liability as for defamation by publishing, by order or under the authority of either House of Parliament, a paper containing defamatory matter.

Parliamentary papers.

The Government Printer is deemed to publish the reports of the debates and proceedings in the Legislative Council by order or under the authority of that Council and to publish the reports of the debates and proceedings in the Legislative Assembly by order or under the authority of that Assembly.

12. A person does not incur any liability as for defamation by publishing in the course of any proceeding held before or under the authority of any court of justice, or in the course of any inquiry made under the authority of any statute, or under the authority of Her Majesty, or of the Governor, or of either House of Parliament, any defamatory matter.

Privileges of judges, witnesses, and others in courts of justice,

&c. cf. Tas. 59 Vic. No. 11, s.11; Crim. Codes, Qld. s.372; Tas. s.203; W.A. s.352.

13. A person appointed under the authority of a statute, or by or

Reports of official inquiries.

under the authority of Her Majesty, or of the Governor, to hold any inquiry does not incur any liability as for defamation by publishing any defamatory matter in any official report made by him of the result of the inquiry.

cf. Tas. 59 Vic. No. 11, s.12; Crim. Codes, Qld. s.373; Tas. s.204
W.A. s.353.

Protection.

14. (1) It is lawful to publish in good faith for the information of the public-

Publication of matters of public interest.
cf. Tas. 59 Vic. No. 11, s.13; Crim. Codes, Qld. s. 374;
Tas. s.205; W.A. s.354.
Proceedings of Parliament.

(a) a fair report of the proceedings of either House of the Parliament of the Commonwealth or of the Parliament of this State or of either House or the House of Parliament of any other State of -Lhe Commonwealth;

Proceedings of parliamentary committees.

(b) a fair report of the proceedings of any committee of any such House as is referred to in paragraph (a) of this subsection or of any joint committee of both Houses of the Parliament of the Commonwealth or of the Parliament of this or any other State of the Commonwealth;

(c) a copy of, or an extract from or a fair abstract of, any report, paper, votes, or proceedings published by order or under the authority of any such House as is referred to in paragraph (a) of this subsection;

Parliamentary papers.

(d) a fair report of the public proceedings of any court of justice, whether the proceedings are preliminary or interlocutory or final, or of the result of any such proceedings, unless, in the case of proceedings that are not final, the publication has been prohibited by the court, but for the purposes of this paragraph matter of a defamatory nature ruled to be inadmissible by a court is not part of the public proceedings of the court;

Proceedings of courts of justice.

(e) a copy or a fair abstract of any default judgment, or of the entries relative to any default judgment, that are recorded in any books kept in the office of any court of justice;

Judgments of courts of justice.

(f) a fair report of the proceedings of any inquiry held under the authority of any statute, or by or under the authority of Her Majesty, or of the Governor-General in Council, or of the Governor, or an extract from or a fair abstract of any such proceedings, or a copy of, or an. extract from or a fair abstract of, an official report made by the person by whom the inquiry was held;

Proceedings of official inquiries.

(g) at the request or with the consent of a Government office or department, officer of State or officer of police, a notice or report issued by the office, department, or officer for the information of the public;

Public notifications by government.

(h) a fair report of the proceedings of any local authority, board, or body of trustees, or other persons, duly constituted under the provisions of any statute for the discharge of public functions, so far as the matter published relates to matters of public concern, except where neither the public nor any newspaper reporter is admitted;

Proceedings of local authorities.

(i) a fair and accurate report of the proceedings of the Committee of the Australian Jockey Club upon the hearing of any appeal to such Committee in accordance with the provisions of section thirty-two of the Australian Jockey Club Act 1873, as amended by subsequent Acts;

Certain proceedings of Australian Jockey Club.

(j) a fair report of the proceedings of any public meeting, so far as the matter published relates to matters of public

Public meetings.

concern.

“Public meeting” in this subsection means a meeting lawfully held for a lawful purpose, and for the furtherance or discussion in good faith of a matter of public concern, or for the advocacy of the candidature of any person for a public office, whether the admission to the meeting was open or restricted.

A publication is said to be made in good faith for the information of the public if the person by whom it is made is not actuated in making it by ill-will to the person defamed, or by any other improper motive, and if the manner of the publication is such as is ordinarily and fairly used in the case of the publication of news.

In the case of the publication in a periodical, or as part of a programme or service provided by means of a broadcasting or television station and intended for reception by the general public, of any report or matter referred to in paragraphs (b), (f), (g), (h), (i) and (j) of this subsection, it is evidence of want of good faith if the defendant has been requested by the plaintiff to publish in the manner in which the original publication was made a reasonable letter or statement by way of a contradiction or explanation of the defamatory matter and has refused or neglected to do so, or has done so in a manner inadequate or not reasonable having regard to all the circumstances.

(2) Nothing in the foregoing provisions of this section shall be construed as protecting the publication of any matter the publication of which is prohibited by law.

(3) Nothing in this section shall be construed as protecting the publication in a periodical, or as part of a programme or service provided by means of a broadcasting or television station and intended for reception by the general public, of any report of any such proceedings, or of the result of any such proceedings, as are referred to in paragraph (d) of subsection one of this section, unless the publication is made contemporaneously with the proceedings or with the result of the proceedings, as the case may be.

The foregoing provisions of this subsection do not apply to or in relation to the printing or publishing of any matter in any separate volume or part of any bona-fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law or in any publication of a technical character bona-fide intended for circulation among members of the legal profession.

(4) In any civil action, any matter of defence under this section may be pleaded specially with a plea of not guilty, or any other plea, without the leave of a judge.

15. It is lawful to publish a fair comment-

(a) respecting any of the matters with respect to which the publication of a fair report in good faith for the information of the public is by section fourteen of this Act declared to be

cf. Act No. 32, 1912, s.29(2).

Fair comment.

cf. Tas. 59 Vic. No. 11, s.14; Crim. Codes, Qld. s.375; Tas. s.206; W.A. s.355.

Public proceedings.

lawful;

(b) respecting the public conduct of any person who takes part in public affairs, or respecting the character of any such person, so far as his character appears in that conduct;

(c) respecting the conduct of any public officer or public servant in the discharge of his public functions, or respecting the character of any such person, so far as his character appears in that conduct;

(d) respecting the merits of any case, civil or criminal, that has been decided by any court of justice, or respecting the conduct of any person as a judge, party, witness, counsel, solicitor, or officer of the court, in any such case, or respecting the character of any such person, so far as his character appears in that conduct;

(e) respecting any published book or other literary production, or respecting the character of the author, so far as his character appears by the book or production;

(f) respecting any composition or work of art, or performance publicly exhibited, or respecting the character of the author or performer or exhibitor, so far as his character appears from the matter exhibited;

(g) respecting any public entertainment or sports, or respecting the character of any person conducting or taking part therein, so far as his character appears from the matter of the entertainment or sports, or the manner of conducting the entertainment or sports;

(h) respecting any communication made to the public on any subject.

Public conduct of public men.

Public conduct of public officials.

Proceedings in courts of justice.

Books.

Public exhibitions or performances.

Public entertainments.

Communications to the public.

Whether a comment is or is not fair is a question of fact. If it is not fair, and is defamatory, the publication of it is unlawful.

16. It is lawful to publish defamatory matter if the matter is true, and if it is for the public benefit that the publication complained of should be made.

Truth.

cf. Tas. 59 Vic. No. 11, s.17; Crim. Codes. Qld. s.377; Tas. s.207; W.A. s.356.

Qualified Protection.

17. It is a lawful excuse for the publication of defamatory matter if the publication is made in good faith-

(a) by a person having over another any lawful authority in the course of a censure passed by him on the conduct of that other in matters to which the lawful authority relates;

(b) for the purpose of seeking remedy or redress for some private or public wrong or grievance from a person who has, or whom the person making the publication believes, on reasonable grounds, to have, authority over the person defamed with respect to the subject matter of the wrong or grievance;

(c) for the protection of the interests of the person making the publication, or of some other person, or for the public good;

(d) in answer to an inquiry made (pursuant to contract or otherwise) of the person making the publication relating to some subject as to which the person by whom or on whose behalf the inquiry is made has, or is believed, on reasonable grounds, by the person making the publication to have, an interest in knowing the truth;

Excuse.

cf. Tas. 59 Vic. No. 11, s.17; Crim. Codes, Qld. s.377; Tas. s.208; W.A. s.357.

Censure by person in authority.

Seeking redress.

Interest.

Answer to inquiries.

(e) for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has, or is believed, on reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make his conduct in making the publication reasonable under the circumstances;

(f) on the invitation or challenge of the person defamed;

(g) in order to answer or refute some other defamatory matter published by the person defamed concerning the person making the publication or some other person;

(h) in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit and if, so far as the defamatory matter consists of comment, the comment is fair.

Information.

Challenge.

Defence.

Public discussion.

For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication do not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue.

Good Faith.

18. When any question arises whether a publication of defamatory matter was or was not made in good faith, and it appears that the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith, the burden of proof of the absence of good faith lies upon the party alleging the absence.

Burden of proof of good faith.

cf. Tas. 59 Vic. No. 11, s.18; Crim. Codes, Qld. s.378; Tas. s.209; W.A. s.358.

Relevancy and Public Benefit Questions of Fact.

19. Whether any defamatory matter is or is not relevant to any other matter, and whether the public discussion of any subject is or is not for the public benefit, are questions of fact.

Relevancy and public benefit questions of fact.

cf. Tas. 59 Vic. No. 11, s.19; Crim. Codes, Qld. s.379; Tas. s.210; W.A. s.359.

Defence in Case of Defamation by Words, Sounds, Signs, Signals or Gestures.

20. (1) In any case other than that of words intended to be read, it is a defence to an action or prosecution for publishing defamatory matter to prove that the publication was made on an occasion and under circumstances when the person defamed was not likely to be injured thereby.

Defence in case of defamation by words, sounds, signs, signals or gestures.

(2) The defence referred to in subsection one of this section may be set up under a plea of not guilty.

cf. Tas. 59 Vic. No. 11, s.20; Qld. 53 civ. No. 12, s.20; Crim. Codes, Qld. s.382; Tas. s.211; W.A. s.362.

Civil Proceedings.

21. In an action for defamation the defendant may (after notice in writing of his intention to do so duly given to the plaintiff at the time of filing or delivering the plea in the action) give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for the defamation before the commencement of the

Evidence of apology admissible in mitigation of damages.

cf. Act No. 32, 1912, s.6(1); Qld. 53 Vic. No. 12, s.21; Tas. 59 Vic No. 11, s.21.

action, or, if the action was commenced before there was an opportunity of making or offering the apology, as soon afterwards as he had an opportunity of doing so.

22. (1) In an action for the publication of defamatory matter in a periodical, the defendant may plead that the matter was published without actual ill-will to the person defamed or other improper motive, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the periodical a full apology for the defamation or, if the periodical was ordinarily published at intervals exceeding one week, offered to publish the apology in any periodical to be selected by the plaintiff.

(2) The defendant upon filing the plea may pay into court a sum of money by way of amends for the injury sustained by the publication of the defamatory matter.

(3) To the plea the plaintiff may reply generally denying the whole thereof.

23. The court or a judge, upon an application by or on behalf of two or more defendants in actions in respect of the same, or substantially the same, defamatory matter brought by one and the same person, may make an order for the consolidation of the actions, so that they shall be tried together; and after the order has been made, and before the trial of the actions, the defendant in any new action instituted in respect of the same, or substantially the same, defamatory matter may be joined in a common action upon a joint application being made by that defendant and the defendants in the actions already consolidated.

In an action consolidated under this section, the jury shall assess the whole amount of the damages (if any) in one sum, but a separate verdict shall be given for or against each defendant in the same way as if the actions consolidated had been tried separately; and if the jury find a verdict against the defendant or defendants in more than one of the actions so consolidated, the jury shall proceed to apportion the amount of damages so found between and against the said last mentioned defendants; and the judge at the trial, if the plaintiff is entitled to the costs of the action, shall make such order as he may deem just for the apportionment of those costs between and against those defendants.

24. At the trial of an action for the publication of defamatory matter the defendant may give in evidence, in mitigation of damages, that the plaintiff has already recovered, or has brought actions for damages, or has received or agreed to receive compensation in respect of other publications of defamatory matter to the same purport or effect as the matter for the publication of which such action has been brought.

25. The proprietor of a periodical may upon the written request of a person who has commenced an action in respect of defamatory matter contained in an article, letter, report, or writing in the periodical supply to that person the name and address of the person who supplied the article, letter, report, or writing to the periodical, and in default of compliance with the request the

Defamatory matter in periodical - plea of apology and of publication without ill-will and negligence.
cf. Act No. 32, 1912, s.9; Qld. 53 Vic. No.12, s.22; Tas. 59 Vic. No. 11, s.22.

Consolidation of actions.
cf. Act No. 32, 1912, s.11; Qld. 53 Vic. No. 12, s.12; Tas. 59 Vic. No. 11, s.23.

Compensation in other actions admissible in mitigation of damages.
cf. Act No. 32, 1912, s.6(2); Qld. 53 Vic. No. 12, s.24; Tas. 59 Vic. No. 11, s.24.

Disclosing name of writer of article.
cf. Act No. 32, 1912, s.12.

person who has commenced the action may apply to a Judge of the Supreme Court who may, if he sees fit, after hearing the proprietor, direct that the name and address be so supplied.

Criminal Proceedings.

26. Any person who unlawfully publishes any defamatory matter concerning another is liable, upon conviction on indictment, to imprisonment for any term not exceeding one year or a penalty of such amount as the court may award or both.

Unlawful publication of defamatory matter.
cf. Act No. 32, 1912, ss.14,15; Crim. Codes, Qld. s.380; Tas. s.212; W.A. s.360.

If the offender knows that the defamatory matter is false, he is liable, upon conviction on indictment, to imprisonment for any term not exceeding two years or a penalty of such amount as the court may award or both.

27. (1) Any person who-

Publishing or threatening to publish defamatory matter with intent to extort money, &c.
cf. Act No. 32, 1912, s.13; Crim. Codes, Qld. s.383; Tas. s.216; W.A. s.363.

(a) publishes or threatens to publish any defamatory matter concerning another, or

(b) directly or indirectly threatens to print or publish, or directly or indirectly proposes to abstain from printing or publishing, or directly or indirectly offers to prevent the printing or publishing of any matter or thing concerning another with intent-

(i) to extort any money or security for money, or any valuable thing from that other person or from any other person, or

(ii) to induce any person to confer upon or procure for any person any appointment or office of profit or trust,

is liable, upon conviction on indictment, to imprisonment for any term not exceeding three years.

(2) Nothing in this section alters or affects any law in force immediately before the commencement of this Act in respect of the sending or delivery of threatening letters or writings.

28. A person charged in criminal proceedings with the Unlawful publication of defamatory matter, who sets up as a defence that the defamatory matter is true and that it was for the public benefit that the publication should be made, shall plead the matter of the defence specially, and may plead it with any other plea, except the plea of guilty.

Defence of truth of defamatory matter to be specifically pleaded.
cf. Crim. Codes, Qld. s.599; Tas. s.213.

29. On the trial of a person charged with the unlawful publication of defamatory matter, the jury may give a general verdict of guilty or not guilty upon the whole matter in issue, in like manner as in other cases.

General verdict on charge of defamation.
cf. Crim. Codes, Qld. s.625; W.A. s.643.

30. In the case of a prosecution of any person by a private prosecutor on the information of the private prosecutor on a charge of the unlawful publication of any defamatory matter-

Costs in certain cases of defamation.
cf. Crim. Codes, Qld. s.661; W.A. s.675; Act No. 32, 1912, s.22.

(a) if the accused person is indicted and acquitted he is entitled to recover from the prosecutor his costs of defence, unless the court otherwise orders;

(b) if the accused person pleads that the defamatory matter

was true and that it was for the public benefit that the publication should be made, then, if that issue is found for the Crown, the prosecutor is entitled to recover from the accused person the costs sustained by the prosecutor by reason of that plea unless the court otherwise orders.

Those costs shall be taxed by the proper officer of the court before which the indictment for the offence was tried.

31. Where a person is charged before a stipendiary magistrate with an indictable offence respecting the unlawful publication of defamatory matter, the stipendiary magistrate may receive evidence as to any matter which may be given in evidence by way of defence by the person charged on his trial on indictment; and the stipendiary magistrate if of opinion after hearing the evidence, that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

Evidence of defences admissible in committal proceedings.
cf. Act No. 32, 1912, s.23.

32. Where a person is charged before a stipendiary magistrate with an indictable offence respecting the unlawful publication of defamatory matter, and the stipendiary magistrate is of opinion that, though the evidence for the prosecution is sufficient to put the person charged on his trial, the case is of a trivial nature, and that the offence may be adequately punished under this section, the stipendiary magistrate shall cause the charge to be reduced into writline and read to the person charged, and shall then address a question to him to the following effect, "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?"; and if the person charged consents to the case being dealt with summarily, the stipendiary magistrate may summarily convict him, and adjudge him to pay a fine not exceeding one hundred dollars.

Summary conviction for defamation.
cf. Act No. 32, 1912, s.24; Crim. Codes, Qld. s.389; W.A. s.369.
Amended, Act No. 33, 1965, s.4(2).

33. A criminal prosecution cannot be commenced against any person for the unlawful publication of any defamatory matter without the order of a Judge of the Supreme Court or of a District Court first had and obtained.

Order of Judge required for prosecution.
cf. Act No. 32, 1912, s.25.

Application for the order shall be made on notice to the person accused, who shall have an opportunity of being heard against the application.

Provisions with Respect to Publishers and Sellers of Periodicals and Sellers of Books, &c.

34. A proprietor, publisher or editor of a periodical is not criminally responsible for the unlawful publication in the periodical of defamatory matter if he shows that the matter complained of was inserted without his knowledge and without negligence on his part.

Liability of proprietor, publisher, and editor of periodicals.
cf. Crim. Codes, Qld. s.384; Tas. s.217; W.A. s.364.

General authority given to the person who actually inserted the defamatory matter to manage or conduct the periodical as editor or otherwise, and to insert therein what in his discretion he thinks fit, is not negligence within the meaning of this section, unless it is proved that the proprietor or publisher or editor when giving that general authority meant that it should extend to and authorise the unlawful publication of defamatory matter, or continued that

general authority, knowing that it had been exercised by unlawfully publishing defamatory matter in any number or part of the periodical.

35. A person does not incur any liability as to defamation merely by selling-

(a) any number or part of a periodical unless he knows that the number or part contains defamatory matter, or that defamatory matter is habitually or frequently contained in that periodical; or

(b) a book, pamphlet, print or writing, or other thing not forming part of a periodical, although it contains defamatory matter, if at the time of the sale he does not know that the defamatory matter is contained therein.

36. An employer is not responsible as for the unlawful publication of defamatory matter merely by reason of the sale by his servant of a book, pamphlet, print, or writing, or other thing, whether a periodical or not, containing the defamatory matter, unless it is proved that the employer authorised the sale, knowing that the book, pamphlet, print, writing, or other thing, contained defamatory matter, or, in the case of a number or part of a periodical, that defamatory matter was habitually or frequently contained in the periodical.

Provisions with Respect to Broadcasting and Television Stations.

37. A licensee, general manager or manager of a broadcasting or television station is not criminally responsible for the unlawful publication of defamatory matter as part of a programme or service provided by means of the broadcasting or television station, as the case may be, and intended for reception by the general public, if he shows that the matter complained of was included without his knowledge and without negligence on his part.

General authority given to the person who actually included the defamatory matter to manage or conduct the broadcasting or television station as general manager, manager or otherwise, and to include in programmes or services what in his discretion he thinks fit, is not negligence within the meaning of this section, unless it is proved that the licensee, general manager or manager when giving that general authority meant that it should extend to and authorise the unlawful publication of defamatory matter, or continued that general authority, knowing that it had been exercised by unlawfully publishing defamatory matter in a programme or service provided by means of the broadcasting or television station, as the case may be, and intended for reception by the general public.

Evidence.

38. Upon the trial of an action for unlawfully publishing defamatory matter that is contained in a book or periodical, the production of the book, or of a number or part of the periodical, containing a

Protection of innocent sellers of periodicals and books, &c.
cf. Tas. 59 Vic. No. 11, ss.32,33; Qld. 53 Vic. No. 12, ss.34,35; Crim. Codes, Qld. ss.385, 386; Tas. ss. 218, 219; W.A. ss.365, 366.

Protection of employers.
cf. Tas. 59 Vic. No. 11, s.34; Qld. 53 Vic. No.12, s.36; Crim. Codes, Qld. s.387; Tas. s.220; W.A. s.367.

Liability of licensee, general manager or manager of broadcasting or television station.

Prima facie evidence of publication of book or periodical.
cf. Qld. 53 Vic. No. 12, s.38; Tas. 59 Vic. No. 11, s.36.

printed statement that it is printed or published by or for the defendant, shall be prima facie evidence of the publication of the book, or of the number or part of the periodical, by the defendant.

39. Upon the trial of an action or prosecution for unlawfully publishing defamatory matter that is contained in a periodical, after evidence sufficient in the opinion of the court has been given of the publication by the defendant of the number or part of the periodical containing the matter complained of, other writings or prints purporting to be other numbers or parts of the same periodical previously or subsequently published, and containing a printed statement that they were published by or for the defendant, are admissible in evidence on either side, without further proof of publication of them.

Evidence on trial for defamation.
cf. Qld. 53 Vic. No. 12, s.39; Tas. 59 Vic. No. 11, s.37; Crim. Code, Qld. s.640.

Staying Proceedings.

40. (1) If the defendant in any civil or criminal proceeding commenced or prosecuted in respect of the publication by the defendant, or by his servants, of any report, paper, votes, or proceedings of the Legislative Council or of the Legislative Assembly, brings before the court in which the proceeding is pending, or before any judge thereof, first giving twenty-four hours notice of his intention to do so to the prosecutor or plaintiff in the proceeding, a certificate under the hand of the President or Clerk of the Legislative Council or the Speaker or Clerk of the Legislative Assembly, as the case may be, stating that the report, paper, votes, or proceedings, as the case may be, was or were published by the defendant, or by his servants, by order or under the authority of the Council or Assembly, as the case may be, or of a committee thereof, together with an affidavit verifying the certificate, the court or judge shall immediately stay the proceeding, and the proceeding shall be deemed to be finally determined by virtue of this section.

Papers and proceedings published by authority of Parliament.
cf. Act No. 32, 1912, ss.26,27; Qld. 53 Vic. No. 12, ss. 40, 41; Crim. Codes, Qld. s.699; Tas. ss.223, 224; W.A. s.733.

(2) The Government Printer is deemed to publish the reports of the debates and proceedings in the Legislative Council by order or under the authority of that Council and to publish the reports of the debates and proceedings in the Legislative Assembly by order or under the authority of that Assembly.

(3) If the defendant in any civil or criminal proceeding commenced or prosecuted in respect of the publication of any copy of such report, paper, votes, or proceedings as is or are referred to in subsection one of this section brings before the court in which the proceeding is pending, or before any judge thereof, at any stage of the proceeding the report, paper, votes, or proceedings, and the copy, with an affidavit verifying the report, paper, votes, or proceedings, and the correctness of the copy, the court or judge shall immediately stay the proceeding, and the proceeding shall be deemed to be finally determined by virtue of this section.

Laws Relating to Newspapers and Printing to be Observed.

41. (1) Notwithstanding the foregoing provisions of this Act a defendant in any proceeding, civil or criminal, shall not be able to avail himself of any of the benefits or advantages enacted by any of the provisions of sections twenty, twenty-one, twenty-two,

Benefits of certain sections not to extend to defendants if laws regulating printing, &c., have not been complied with.
cf. Act No. 32, 1912, s.34.

twenty-four and thirty-four of this Act unless at the time of the publication of the article complained of, if it is a printed article, all the provisions made by law for regulating the printing and publication of newspapers and papers of a like nature, or of the trade of printing generally, applicable to such a work as that in which the article is printed, have been complied with.

(2) Any specified non-compliance with any provision so made by law is a good answer to any pleading under this Act.

(3) The defendant is nevertheless bound by the other parts of this Act.

Slander of Title and Blasphemous, Seditious and Obscene Libels.

42. (1) Except as provided in subsection two of this section, nothing in this Act applies to the actionable wrong commonly called "slander of title" or to the misdemeanour of publishing a blasphemous, seditious or obscene libel.

Act not to apply to slander of title or blasphemous, seditious or obscene libels.

cf. Qld. 53 Vic. No. 12, s.46; Tas. 59 Vic. No. 11, s.42.

(2) It is not necessary to set out in an information, indictment, or criminal proceeding instituted against the publisher of an obscene or blasphemous libel the obscene or blasphemous passages; it is sufficient to deposit the book, newspaper, or other document containing the alleged libel with the information, indictment, or criminal proceeding, together with particulars showing precisely by reference to pages, columns, and lines in what part of the book, newspaper, or other document, the alleged libel is to be found; and those particulars shall be deemed to form part of the record, and all proceedings may be taken thereon as though the passages complained of had been set out in the information, indictment or proceeding.

cf. Act No. 32, 1912, s.16.

FOOTNOTES

(1) Defamation Act, 1958, No. 39. Assented to, 31st December, 1958.

(2) Decimal Currency Act, 1965, No. 33. Assented to, 20th December, 1965. Date of commencement of sec. 4, 14th February, 1966, secs. i (3), 2 (1) and the Currency Act 1965 (Commonwealth), sec. 2 (2).

SCHEDULE

Reference to Act	Title or Short Title	Extent of Repeal
No. 32, 1912	Defamation Act, 1912	The whole
No. 14, 1917	Defamation (Amendment) Act, 1917	The whole
No. 4, 1940	Defamation (Amendment) Act, 1940	The whole
No. 39, 1948	Racing (Amendment) Act, 1948	Section 4

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FIRST SCHEDULE.-Amendment of Acts.

SECOND SCHEDULE.-Proceedings of Public Concern and Official and Public Documents and Records.

A BILL

To amend the law relating to defamation; to repeal the Defamation Act, 1958; to amend the Newspapers Act, 1898, and other Acts; and for purposes connected therewith.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

PART I. - PRELIMINARY.

- 1. (1) This Act may be cited as the "Defamation Act, 1971".

Short title and commencement.

(2) This Act shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette.

2. This Act is divided as follows:

Division of Act.

PART I.-PRELIMINARY-SS. 1-6.

PART II.-GENERAL-ss. 7-9.

PART III.-DEFENCE IN CIVIL PROCEEDINGS-SS. 10-45.

DIVISION 1.-General-ss. 10-13.

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PART IV.-DAMAGES-ss. 46-49.

PART V.-CRIMINAL DEFAMATION-SS. 50-54.

PART IV.---SUPPLEMENTAL-SS.55-57.

SCHEDULES.

3. (1) The Defamation Act, 1958, is repealed.

Repeal of Defamation Act, 1958

(2) The law relating to defamation, in respect of matter published after the commencement of this Act, shall be as if the Defamation Act, 1958, had not been passed and the common law and the enacted law (except that Act) shall have effect accordingly.

(3) Notwithstanding subsection (2) of this section, the repeal by subsection (1) of this section of the Defamation Act, 1958, does not revive the enactments repealed by that Act.

4. Each Act specified in the First Column of the First Schedule to this Act is amended in the manner specified opposite that Act in the Second Column of that Schedule.

Amendments.
First Schedule.

5. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

The Crown.

6. (1) In this Act, "Territory of the Commonwealth" includes a territory governed by the Commonwealth under a trusteeship agreement.

Interpretation.
Cth. Act No. 2. 1901, s.17(p).

(2) For the purposes of this Act, an imputation or other matter is a matter of substantial truth if, but only if, in substance it is true or in substance it is not materially different from the truth.

(3) Where any right or liability of any person in respect of defamation passes to the executor of his will or to the administrator of his estate or to any other person, a reference in this Act which applies to the firstmentioned person extends, except in so far as the context or subject matter otherwise indicates or requires, to that executor, administrator or other person.

(4) Where by this Act an expression used in this Act is given a meaning or has a modified meaning, that expression has a corresponding meaning in any rules of court, pleading or other document in respect of proceedings to which this Act applies, except in so far as the context or subject-matter otherwise indicates or requires.

PART II. - GENERAL.

7. Slander is actionable without special damage, in the same way and to the same extent as libel is actionable without special damage.

Slander actionable without special damage.
Act No. 32, 1912, s.4.

8. An imputation alleged to be defamatory is not to be treated as false unless its falsity is admitted or proved.

No presumption of falsity.

9. (1) Where a person publishes any report, article, letter, note, picture, oral utterance or other thing, by means of which, or by means of any part of which, and its publication, the publisher makes an imputation defamatory of another person, whether by innuendo or otherwise, then, for the purposes of this section-

Causes of action.

(a) that report, article, letter, note, picture, oral utterance or thing is a "matter"; and
(b) the imputation is made by means of the publication of that matter.

(2) Where a person publishes any matter to any recipient, and by means of that publication makes an imputation defamatory of another person, the person defamed has, in respect of that imputation, a cause of action against the publisher for the publication of that matter to that recipient-

(a) in addition to any cause of action which the person defamed may have against the publisher for the publication of that matter to that recipient in respect of any other defamatory imputation made by means of that publication; and

(b) in addition to any cause of action which the person defamed may have against that publisher for any publication of that matter to any other recipient.

(3) Where a person has brought proceedings (whether in New South Wales or elsewhere) for defamation against any person in respect of the publication of any matter, that person shall not bring further proceedings for defamation against the same defendant in respect of the same or any other publication of the same matter, except with the leave of the court in which the further proceedings are to be brought.

(4) Rules of court may prohibit or regulate the reliance by a plaintiff in proceedings for defamation on several imputations alleged to be made by means of the same matter published by the defendant, where the several imputations do not differ in substance.

(5) Notwithstanding subsection (2) of this section, where proceedings for defamation in respect of the publication of any matter are tried before a jury, the jury shall, unless the court otherwise directs-

(a) give a single verdict in respect of all the causes of action on which the plaintiff relies; and
(b) if they find for the plaintiff as to more than one cause of action, assess damages in a single sum.

(6) This section does not affect-

(a) any law or practice relating to special verdicts; or

(b) the powers of any court in case of vexatious proceedings or abuse of process.

PART III. - DEFENCE IN CIVIL PROCEEDING.

DIVISION 1.-General.

10. This Part deals with defences in civil proceedings for defamation, but not with defences in other proceedings.

Application.

11. The provision of a defence by this Part does not of itself vitiate diminish or abrogate any defence or exclusion of liability available apart from this Act.

Common law defence etc.
Act No. 39, 1958, s.3(2).

12. Where proceedings for defamation are tried before a jury, and there is a question whether, on the facts, anything relates to a matter of public interest for the purposes of this Act, that question is to be determined by the court and not by the jury.

Public interest a question for the court.

13. It is a defence that the circumstances of the publication of the matter complained of were such that the person defamed was not likely to suffer substantial harm.

Unlikelihood of harm.
Act No. 39, 1958, s.20(1).

DIVISION 2.-Truth

14. (1) For the purposes of this Division, an imputation is published under qualified privilege if, but only if-

Interpretation.

(a) the imputation is published on an occasion of qualified privilege and is relevant to the occasion; and

(b) the manner of publication is reasonable having regard to the matter published and to the occasion of qualified privilege.

(2) For the purposes of subsection (1) of this section, an occasion is one of qualified privilege if, but only if-

(a) it is such an occasion under the law apart from this Act; or

(b) the circumstances of the publication afford a defence of qualified privilege under Division Four of this Part.

15. (1) Notwithstanding section 11 of this Act, the truth of any imputation complained of is not a defence as to that imputation except as mentioned in this section.

Truth generally.
Act No. 32, 1912, s.7.

(2) It is a defence as to any imputation complained of that-

(a) the imputation is a matter of substantial truth; and

(b) the imputation either relates to a matter of public interest or is published under qualified privilege.

16. (1) Where an imputation complained of is made by the publication of any report, article, letter, note, picture, oral utterance or other matter and another imputation is made by the same publication, the latter imputation is, for the purposes of this section, contextual to the imputation complained of.

Truth: contextual imputations.

(2) It is a defence as to any imputation complained of that-

(a) the imputation relates to a matter of public interest or is published under qualified privilege;

(b) one or more imputations contextual to the imputation complained of-

(i) relate to a matter of public interest or are published under qualified privilege; and

(ii) are matters of substantial truth; and

(c) having regard to the publication of those contextual imputations, the imputation complained of does not materially injure the reputation of the plaintiff.

DIVISION 3.-Absolute Privilege.

17. (1) There is a defence of absolute privilege for the publication of a document by order or under the authority of either House, of Parliament.

Parliamentary papers.
Act No. 39, 1958, s.11(3).

(2) There is a defence of absolute privilege for the publication by the Government Printer of the debates and proceedings of either House of Parliament.

Act No. 39, 1958, s.11(3).

(3) There is a defence of absolute privilege for the publication of-

Act No. 39, 1958, s.40(3).

(a) a document previously published as mentioned in subsection (1) of this section or a copy of a document so published; and

(b) debates and proceedings previously published as mentioned in subsection (2) of this section or a copy of debates and proceedings so published.

18. There is a defence of absolute privilege for a publication in the course of an inquiry made under the authority of an Act or Imperial Act or under the authority of Her Majesty, or of the Governor, or of either House of Parliament.

Proceedings of inquiry.
Act No. 39, 1958, s.12.

19. Where a person is appointed under the authority of an Act or an Imperial Act, or under the authority of Her Majesty or of the Governor or of either House of Parliament, to hold an inquiry, there is a defence of absolute privilege for a publication by him in an official report of the result of the inquiry.

Report of inquiry.
Act No. 39, 1958, s.13.

DIVISION 4.-Qualified Privilege.

20. 1 For the purposes of this section-

Multiple publication.

(a) "multiple publication" means publication of the same matter or of copies of any matter to two or more recipients-

(i) at the same time;

(ii) by means of the publication in the ordinary course of affairs of numerous copies of a newspaper or other writing; or

(iii) otherwise in the course of the one transaction;

(b) matter is published under qualified privilege if, but only if, the matter-

(i) is published on an occasion of qualified privilege; and

(ii) is relevant to the occasion; and

(c) an occasion is one of qualified privilege if, but only if-

(i) it is an occasion of qualified privilege under the law apart from this Act; or

(ii) the circumstances of the publication afford a defence of qualified privilege under section 21 or section 22 of this Act.

(2) Where-

(a) a person makes a multiple publication of any matter; and

(b) the publication would, if made to some only of the recipients, be made under qualified privilege as regards those recipients-

there is a defence of qualified privilege for the publication to those recipients, notwithstanding that the publication is not made under qualified privilege as regards others of the recipients.

(3) Where.-

(a) a person makes a multiple publication of any matter;

(b) the publication would, if made to some only of the recipients, be made under qualified privilege as regards those recipients; and

(c) the manner of publication is reasonable having regard to the matter published and to the circumstances giving rise to the privilege-

there is a defence of qualified privilege as regards all of the recipients.

21. Where-

Mistaken character of recipient.

(a) the publication complained of is made in the course of a communication by the publisher to any person;

(b) the publication is made in circumstances in which there would be a defence of qualified privilege for that publication if that person bore some character; and

(c) the publisher believes, at the time of the communication, on reasonable grounds, that that person bears that character-

there is a defence of qualified privilege for that publication.

22. (1) Where, in respect of matter published to any person (in this section called the recipient)-

Information.
Act No. 39, 1958, s.17(d), (e).

- (a) the recipient has an interest or apparent interest in having information on some subject;
- (b) the matter is published to the recipient in the course of giving to him information on that subject; and
- (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances-

there is a defence of, qualified privilege for that publication.

(2) For the purposes of subsection k 1) 01 uuis section, a person has an apparent interest in having information as to some subject if, at the time of the publication in question, the publisher believes on reasonable grounds that that person has that interest.

(3) Where matter is published for reward in circumstances in which there would be a qualified privilege under subsection (1) of this section for the publication if it were not for reward, there is a defence of qualified privilege for that publication notwithstanding that it is for reward.

cf. *Macintosh v Dun* [1908] A.C. 390

23. Where proceedings for defamation are tried before a jury, and there is a question whether, on the facts, there is a defence of qualified privilege under this Division, that question is to be determined by the court and not by the jury.

Qualified privilege a question for the court.

DIVISION 5.-Protected Reports etc.

24. (1) In this section, "protected report" means a report of proceedings mentioned in Part 2 of the Second Schedule to this Act.

Protected reports.
Second Schedule.

(2) There is a defence for the publication of a fair protected report.

(3) Where a protected report is published by any person, there is a defence for a later publication by another person of the protected report or a copy of the protected report or of a fair extract or fair abstract from, or fair summary of, the protected report, if the second person does not, at the time of the later publication, have knowledge which should make him aware that the protected report is not fair.

(4) Where material purporting to be a protected report is published by any person, there is a defence for a later publication by another person of the material or a copy of the material or of a fair extract or fair abstract from, or fair summary of, the material, if the second person does not, at the time of the later publication, have knowledge which should make him aware that the material is not a protected report or is not fair.

25. There is a defence for the publication of-

Copies etc. of official and public documents and records.
Second Schedule.

- (a) a document or record mentioned in Part 3 of the Second Schedule to this Act or a copy of such a document or record; and
- (b) a fair extract or fair abstract from, or fair summary of, a document or record mentioned in that Part.

26. Where a defence is established under section 24 or section 25 of this Act, the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for the information of the public or for the advancement of education or the advancement of enlightenment.

Defeat of defence under ss.24, 25.

DIVISION 6.-Court Notices; Official Notices etc.

27. (1) There is a defence for the publication of a notice in accordance with the direction of a court of any country.

Court notices.
15 & 16 Geo.6 and 1 Eliz. 2, c.66,
s.7(1), Sch. para. 7.

(2) Where a defence is established under subsection (1) of this section, the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for the purpose of giving effect to the direction.

28. (1) There is a defence for the publication of any notice or report in accordance with an official request.

Official notices etc.
15 & 16 Geo. 6 and 1 Eliz. 2, c.66,
s.7, Sch. para. 12; Act No. 39,
1958, s.14(1)(g).

(2) Where a defence is established under subsection (1) of this section, the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for the purpose of giving effect to the request.

(3) Where there is an official request that any notice or report be published to the public generally or to any section of the public, and the notice or other matter is or relates to a matter of public interest, there is a defence for a publication of the notice or other matter, or a fair extract or fair abstract from, or a fair report or summary of, the notice or report.

(4) Where a defence is established under subsection (3) of this section, the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for the information of the public.

(5) This section does not affect the liability (if any) in defamation of a person making an official request.

(6) In this section "official request" means a request by-

(a) an officer of the government (including a member of a police force) of any Australian State, or of the Commonwealth, or of any Territory of the Commonwealth; or

(b) a council, board or other authority or person constituted or appointed for public purposes under the legislation of any Australian State, or of the Commonwealth., or of any Territory of the Commonwealth.

DIVISION 7.-Comment.

29. (1) The defence or exclusion of liability in cases of fair comment on a matter of public interest-

General.

(a) is modified as appears in this Division; and

(b) is not available except in accordance with this Division.

(2) This Division has effect notwithstanding section II of this Act.

30. (1) For the purposes of this section, but subject to subsection (2) of this section, "proper material for comment" means material which, if this Division had not been enacted, would, by reason that it consists of statements of fact, or by reason that it is a protected report within the meaning of section 24 of this Act, or for some other reason, be material on which comment might be based for the purposes of the defence or exclusion of liability in cases of fair comment on a matter of public interest.

Proper material.

(2) A statement of fact which is a matter of substantial truth is proper material for comment for the purposes of this section, whether or not the statement relates to a matter of public interest.

(3) The defences under this Division are available as to any comment if, but only if-

- (a) the comment is based on proper material for comment; or
- (b) the material on which the comment is based is to some extent proper material for comment and the comment represents an opinion which might reasonably be based on that material to the extent to which it is proper material for comment.

(4) There is no special rule governing the nature of the material which may be the basis of comment imputing a dishonourable motive or governing the degree of foundation or justification which comment imputing a dishonourable motive must have in the material on which the comment is based.

31. The defences under this Division are not available as to any comment unless the comment relates to a matter of public interest.

Public interest.

32. (1) Subject to sections 30 and 31 of this Act, it is a defence as to comment that the comment is the comment of the defendant.

Comment of defendant.

(2) A defence under subsection (1) of this section as to any comment is defeated if, but only if, it is shown that, at the time when the comment was made, the comment did not represent the opinion of the defendant.

33. (1) Subject to sections 30 and 31 of this Act, it is a defence as to comment that the comment is the comment of a servant or agent of the defendant.

Comment of servant or agent of defendant.

(2) A defence under subsection (1) of this section as to any comment is defeated if, but only if, it is shown that, at the time when the comment was made, any person whose comment it is, being a servant or agent of the defendant, did not have the opinion represented by the comment.

34. (1) Subject to sections 30 and 31 of this Act, it is a defence as to comment that the comment is not, and in its context and in the circumstances of the publication complained of did not purport to be, the comment of the defendant or of any servant or agent of his.

Comment of stranger.

(2) A defence under subsection (1) of this section is defeated if, but only if, it is shown that the publication complained of was not in good faith for the information of the public or for the advancement of education or the advancement of enlightenment.

35. Where the matter complained of includes comment and includes material upon which the comment is based, a defence under this Division as to the comment is not a defence as to the material upon which the comment is based.

Effect of defence.
cf. *Orr v. Isles* (1965) 83 W.N.
(Pt 1) 303.

DIVISION 8.-Offer of Amends.

36. For the purposes of this Division, where any matter is published by any person, and the matter is or may be defamatory of another person, the publication is innocent in relation to that other person if, but only if, at and before the time of publication, each of them, the publisher and his servants and agents concerned with the matter in question or its publication-

Innocent publication meaning.
15 & 16 Geo. 6 and 1 Eliz. 2, c.66,
s.4(5), (6).

- (a) exercises reasonable care in relation to the matter in question and its publication;
- (b) does not intend the matter in question to be defamatory of that person; and
- (c) does not know of circumstances by reason of which the matter in question is or may be defamatory of that person.

37. (1) Where any matter is published by any person and the matter is or may be defamatory of any other person but the publisher claims that his publication of that matter is innocent in relation to that other person, the publisher may make to that other person an offer of amends in accordance with this Division.

Offer of amends.
15 & 16 Geo. 6 and 1 Eliz. 2, c.66,
s.4(1).

(2) An offer of amends made pursuant to this Division-

15 & 16 Geo. 6 and 1 Eliz. 2, c.66,
s.4(2), (3).

(a) must be expressed to be so made

(b) must include an offer to publish, or join in publishing-

(i) such correction, if any, of the matter in question as is reasonable; and

(ii) such apology, if any, to the offeree as is reasonable; and

(c) where material containing the matter in question has been delivered to any person by the publisher or with his knowledge, must include an offer to take, or join in taking, such steps, if any, as are reasonable for the purpose of notifying the recipient that the matter in question is or may be defamatory of the offeree.

(3) In determining whether any and, if so, what correction, apology or steps are reasonable for the purposes of subsection (2) of this section, regard shall be had to any correction or apology published, or steps taken, by the publisher or any other person at any time before the occasion for determination arises.

38. (1) An offer made pursuant to this Division must be accompanied by-

Particulars in support of offer.
15 & 16 Geo. 6 and 1 Eliz. 2, c.66,
s.4(2).

(a) particulars of the facts on which the publisher relies to show that his publication of the matter in question is innocent in relation to the offeree;

(b) particulars of any correction or apology made or steps taken, before the date of the offer, upon which the publisher relies for the purposes of subsection (3) of section 37 of this Act; and

(c) a statutory declaration verifying the particulars mentioned in paragraphs (a) and (b) of this subsection.

(2) The statutory declaration mentioned in paragraph (c) of subsection (1) of this section must be made by-

(a) the publisher;

(b) where the publisher is a corporation aggregate, by an officer of the corporation having knowledge of the facts; or

(c) where, upon facts appearing in the statutory declaration, it is impracticable to comply with paragraph (a) or (b) of this subsection, by a person authorised by the publisher and having knowledge of the facts.

39. (1) Where an offer of amends made pursuant to this Division is accepted, the court may, on application by a party to the offer, determine any question as to the steps to be taken in performance of the agreement arising by acceptance of the offer.

Determination of questions.
15 & 16 Geo. 6 and 1 Eliz. 2, c.66,
s.4(4)(a).

(2) An appeal does not lie from a determination under this section.

Ibid.

40. Where an offer made pursuant to this Division is accepted and the agreement arising by acceptance of the offer is performed, the offeree shall not commence or continue any proceedings against the offeror for damages for defamation in respect of the matter in question.

Effect of acceptance and performance.
15 & 16 Geo. 6 and 1 Eliz. 2, c.66,
s.4(1)(a).

41. Where an offer made pursuant to this Division is accepted, the court may make an order for payment by the offeror to the offeree of-

Costs and expenses.
15 & 16 Geo. 6 and 1 Eliz. 2, c. 66,
s.4(4)(b).

(a) the costs of the offeree of and incidental to the acceptance and of the offer and the performance of the agreement arising by acceptance of the offer, including costs of an indemnity basis; and

(b) the expense of the offeree incurred in consequence of the publication of the matter in

question.

42. The powers given by section 39 or section 41 of this Act are exercisable-

Courts with powers under secs. 39, 41.
15 & 16 Geo.6 and 1 Eliz. 2, c.66, s.4(4).

- (a) if the offeree has brought proceedings against the offerer in any court for damages for defamation in respect of the matter in question, by that court in those proceedings; and
- (b) in a case to which paragraph (a) of this subsection does not apply, by the Supreme Court.

43. (1) Where an offer is made pursuant to this Division and the offeree does not accept the offer, it is a defence to proceedings by the offeror against for damages for defamation in respect to the matter in question that-

Offer not accepted.
15 & 16 Geo. 6 and 1 Eliz. 2, c.66, s.4(1)(b).

- (a) the publication by the offeror of the matter in question is innocent in relation to the offeree;
- (b) the offeror made the offer as soon as practicable after becoming aware that the matter in question is or may be defamatory of the offeree;
- (c) the offeror is ready and willing to perform an agreement arising by the acceptance of the offer upon acceptance by the offeree at any time before the commencement of the trial upon issues arising on a defence under this section; and
- (d) if the offeror is not the author of the matter in question, that the author was not actually by ill will to the offeree.

(2) For the purposes of a defence under this section, evidence of facts other than facts of which particulars are given under sections 38 of this Act is not admissible on behalf of the offeror, except with the leave of the court, to prove that the publication by the offeror of the matter in question is innocent in relation to the offeree.

Ibid. s.4(2).

44. (1) Where there are two or more publishers, whether joint or otherwise, of any matter, and one or more but not all of them makes an offer pursuant to this Division, this Division does not, by virtue of that offer, affect the liability of the other or others of them.

Other publishers.
15 & 16 Geo. 6 and 1 Eliz. 2, c.66, s.4(1)(a).

(2) Subsection (1) of this section does not affect the admissibility in mitigation of damage of any correction, apology or other thing.

45. An agreement arising by the acceptance of an offer made pursuant to this Division does not have any effect in law except as specified in this Division and except so far as a contrary intention appears by the agreement.

Limited effect of agreement.

PART IV.-DAMAGES.

46. (1) In this section "relevant harm" means, in relation to damages for defamation-

General.

- (a) harm suffered by the person defamed; or
- (b) where the person defamed dies before damages are assessed, harm suffered by the person defamed by way of injury to property or financial loss.

(2) Damages for defamation shall be the damages recoverable in accordance with the common law, but limited to damages for relevant harm.

(3) In particular, damages for defamation-

- (a) shall not include exemplary damages; and
- (b) shall not be affected by the malice or other state of mind at the time of the publication complained of or at any other -time, except so far as that malice or other state of mind affects the relevant harm.

47. Notwithstanding section 46 of this Act, in proceedings, for defamation, damages shall not be enlarged by reason of words or conduct in the course of the proceedings or by reason of the publication of any report of the proceedings or of any words or conduct in the course of the proceedings.

Conduct of proceedings; reports of proceedings.

48. Where evidence that the imputation complained of was or was not true or a matter of substantial truth is relevant to the question of damages, evidence on that subject may be adduced by the defendant, whether or not evidence on that subject is adduced by the plaintiff.

Truth or falsity of imputation.

49. In proceedings for damages for defamation in respect of the publication of any matter, evidence is admissible on behalf of the defendant, in mitigation of damages, that the plaintiff-

Other recoveries.
Act No. 39, 1958, s.24.

- (a) has already recovered damages;
- (b) has brought proceedings for damages; or
- (c) has received or agreed to receive compensation-

for defamation in respect of any other publication of matter to the same purport or effect as the matter complained of in the proceedings.

PART V.-CRIMINAL DEFAMATION.

50. (1) The common law misdemeanour of criminal libel is abolished.

Common law criminal libel abolished.

(2) This section does not affect the law relating to blasphemous, seditious or obscene libel.

51. (1) A person shall not, without lawful excuse, publish matter defamatory of another existing person-

Offence.

- (a) with intent to cause serious harm to any person (whether the person defamed or not) ; or
- (b) where it is probable that the publication of the defamatory matter will cause serious harm to any person (whether the person defamed or not), with knowledge of that probability.

Penalty : Imprisonment for a term not exceeding three years or a fine of such amount as the court may award or both.

(2) In subsection (1) of this section "publish" has the meaning which it has in the law of tort relating to defamation.

(3) An offence under this section is an indictable misdemeanour.

52. (1) A person accused of an offence under section 51 of this Act in respect of the publication of matter defamatory of another person has lawful excuse for the publication where, but only where, if that other person brought proceedings against the accused for damages for defamation in respect of the publication of that matter, the accused would be entitled to succeed in those proceedings, having regard only to the events happening before and at the time of the publication.

Lawful excuse.

(2) Where an information or other statement of a charge of an offence under section 51 of this Act alleges that the accused published the matter in question without lawful excuse, it is not necessary to negative, in the information or other statement, any thing which would amount to lawful excuse under subsection (1) of this section.

(3) At the trial of a person accused of an offence under section 51 of this Act, it is not necessary for the prosecution to negative any thing which would amount to lawful excuse under subsection (1) of this section, unless an issue respecting that thing is raised by evidence at the trial.

53. Section 6 of the Imperial Act called the Australian Courts Act 1828 does not apply to an offence under section 51 of this Act.

Criminal informations excluded.
9 Geo. 4, c.83, s.6.

54. On a trial before a jury of an information for an offence under section 51 of this Act, where it appears to the Judge that the matter complained of is capable of bearing a defamatory meaning-

Defamatory meaning; verdict.
32 Geo. 3, c.60, s.1; Act No. 39,
1958, ss.6, 29.

(a) the question whether the matter complained of does bear a defamatory meaning is a question for the jury; and

(b) the jury may give a general verdict of guilty or not guilty on the issues as a whole in like manner as in other cases.

PART VI.-SUPPLEMENTAL.

55. (1) This section applies to civil proceedings for defamation and to proceedings for an offence under section 51 of this Act.

Evidence of publication etc.
Act No. 39, 1958, ss. 38, 39.

(2) Where a document appears to be printed or otherwise produced by a means adapted for the production of numerous copies, and there is in the document a statement to the effect that the document is printed, produced, published or distributed by or for any person, the statement is evidence that the document is so printed, produced, published or distributed.

(3) Evidence that a number or part of a document appearing to be a periodical is printed, produced, published or distributed by or for any person is evidence that a document appearing to be another number or part of the periodical is so printed, produced, published or printed.

(4) In subsection (3) of this section, "periodical" includes any newspaper, review, magazine or other printed document of which numbers or parts are published periodically.

Act No. 39, 1958, s.4.

56. (1) This section applies to civil proceedings for defamation and to proceedings for an offence under section 51 of this Act.

Evidence of criminal offence.
1968 c.64,s.13(1).

(2) Subject to subsection (4) of this section, where there is a question of the truth of an imputation concerning any person, and the commission by that person of a criminal offence is relevant to that question, proof of the conviction by a court of that person for that offence is-

(a) if the conviction is by a court of an Australian State, or of the Commonwealth, or of a Territory of the Commonwealth, conclusive evidence that he committed the offence; and

(b) if the conviction is by a court of any other country, evidence that he committed the offence.

(3) For the purposes of subsection (2) of this section-

(a) an issue whether an imputation was a matter of substantial truth; or

(b) a question whether an imputation was true or a matter of substantial truth, being a question arising in relation to damages for defamation-

is a question of the truth of the imputation, but no other question is a question of the truth of an imputation.

(4) Subsection (2) of this section does not have effect if it is shown that the conviction has been set aside.

1968, c.64, s.13(3).

(5) For the purposes of this section the contents of a document which is evidence of conviction of an offence, and the contents of an information, complaint, indictment, charge sheet or similar document on which a person is convicted of an offence, are admissible in evidence to identify the facts on which the conviction is based.

Ibid., s.13(2).

(6) Section (5) of this section does not affect the admissibility of other evidence to identify the facts on which the conviction is based.

Ibid.

(7) In this section "conviction" includes-

- (a) in the case of a court-martial within the meaning of the Courts-Martial Appeals Act 1955, a conviction which is or is deemed to be a conviction of a court-martial for the purposes of that Act;
- (b) in the case of the Courts-Martial Appeals Tribunal constituted under that Act, a finding of guilty under section 25, 26 or 27 of that Act;
- (c) in the case of a court-martial constituted under the Imperial Act called the Army Act 1955 or under the Imperial Act called the Air Force Act 1955, a finding of guilty which is, or falls to be treated as, a finding of the court duly confirmed; and
- (d) in the case of a court-martial constituted under the Imperial Act called the Naval Discipline Act 1957, a finding of guilty which is, or falls to be treated as, the finding of the court-

1968, c.64, s.11(6).

Ibid.

and "convicted" has a corresponding meaning.

57. (1) Where, in civil proceedings for or in respect of the publication of defamatory matter, a question is put to any person or any person is ordered to discover or produce any document or thing, he is not excused from answering that question, or from discovering or producing that document or thing, by reason that to do so may criminate him or his spouse of an offence under section 51 of this Act in respect of the publication of that matter.

Criminating answer etc.
cf. 1968, c.60, s.31(1).

(2) The answer made by a person to any question, or the discovery or production by a person of any document or thing pursuant to an order, in civil proceedings for or in respect of the publication of defamatory matter, is not admissible in evidence on a prosecution of him or his spouse for an offence under section 51 of this Act in respect of the publication of that matter.

(3) In this section, in relation to an answer, discovery or production by any person, "spouse" means his spouse at the time of the answer, discovery or production, as the case, requires.

FIRST SCHEDULE.

Sec. 4.

AMENDMENT OF ACTS.

Reference to Act.	First Column Subject.	Section, etc., to be amended.	Second Column Amendment.
No. 23, 1898	Newspapers	Section 19	Omit the section.
No. 40, 1900	Crimes		Next after section 100, insert the following section: 100A. (1) Whosoever with intent to cause gain for himself or any other person, or with intent to procure for himself or any other person any appointment or office, or with intent to cause loss to any person- (a) makes any unwarranted demand; and (b) supports that demand by making- (i) any unwarranted threat to publish; (ii) any unwarranted proposal to abstain from publishing; or (iii) any unwarranted offer to prevent the publication of- any matter or thing concerning any person (whether living or dead) shall be liable to penal servitude for ten years.

(2) For the purposes of this section-

(a) "publish" means communicate to any person;

(b) a demand is unwarranted unless the person making it does so in the belief that he has reasonable grounds for making it;

(c) threat, proposal or offer in support of a demand is unwarranted unless the person making it does so in the belief that it is a proper means of supporting the demand;

(d) "gain" means gain in money or other property, whether temporary or permanent, and includes a gain by keeping what one has, as well as a gain by getting what one has not; and

(e) "loss" means loss in money or other property, whether temporary or permanent, and includes a loss by not getting what one might get, as well as a loss by parting with what one has.

Section 400

Omit the proviso.

Next after section 574, insert the following section:

574A. (1) It shall not be necessary to set out in an information, indictment or criminal proceeding instituted against the publisher of an obscene or blasphemous libel the obscene or blasphemous passages.

(2) It shall be sufficient to deposit the book, newspaper or other document containing the alleged libel with the information, indictment or criminal proceeding, together with particulars showing precisely, by reference to pages, columns and lines, in what part of the book, newspaper or other document the alleged libel is to be found.

(3) The particulars under subsection (2) of this section shall be deemed to form part of the record.

(4) All proceedings may be taken thereon as though the passages complained of had been set out in the information, indictment or proceeding.

Subsection
(3) of the
section 568.

Next after "1955" insert", and other than an offence under section 51 of the Defamation Act, 1971".

Section 579

Next after subsection (3), insert the following subsection:

(4) This section does not affect the operation of section 56 of the Defamation Act, 1971, or the operation of section 23 of the Evidence Act, 1898, for the purposes of section 56 of the Defamation Act, 1971.

No. 24, 1912

Inebriates

Section 26

Omit the section ; insert the following section:

26. Any person who publishes a report of any proceedings under this Act, except by permission of the Judge, Master or magistrate adjudicating, shall be liable to a penalty not exceeding one hundred dollars.

No. 46, 1918

Venereal
Diseases

Section 29

Omit the section.

No. 28, 1944

Law Reform
(Miscellaneous
Provisions)

Section 2

In subsection (1)-

omit "defamation or"; omit "or to claims under section fifty-two of the Matrimonial Causes Act 1899, as amended by subsequent Acts, for damages on the ground of adultery."

SECOND SCHEDULE - PROCEEDINGS OF PUBLIC CONCERN AND OFFICIAL AND PUBLIC DOCUMENTS AND RECORDS.

Secs. 24(1), 25(a).

PART I.-Preliminary.

1. In this Schedule-

"country" includes a federation, and a state, province or other part of a federation, and includes a territory governed under a trusteeship agreement.

"court", except in paragraph 5, means a court of any country.

"parliamentary body" means-

- (a) a parliament or legislature of any country;
- (b) a house of a parliament or legislature of any country;
- (c) a committee of a parliament or legislature of any country;
- (d) a committee of a house or houses of a parliament or legislature of any country.

PART 2.-Proceedings of Public Concern.

2. Proceedings in public of a parliamentary body.

Act No. 39, 1958, s.14(1)(a), (b), 15 and 16 Geo. 6 and 1 Eliz. 2, c.66, Sch. para. 1.

3. Proceedings in public of an international organization of any countries or of governments of any countries.

16 and 16 Geo. 6 and 1 Eliz. 2, c.66, Sch. para. 2.

4. Proceedings in public of an international conference at which governments of any countries are represented.

Ibid.

5. Proceedings in public of the International Court of Justice or of any other judicial or arbitral tribunal for the decision of any matter in dispute between nations or of any other international judicial or arbitral tribunal.

15 & 16 Geo. 6 and 1 Eliz. 2, c. 66, Sch. paras. 3, 13.

6. Proceedings in public of a court.

Act No. 39, 1958, s.14(1)(d), (e); 15 and 16 Geo. 6 and 1 Eliz. 2, c.66, Sch. para. 4.

7. Proceedings in public of an inquiry held under the legislation of any country or held under the authority of the government of any country.

Act No. 39, 1958, s.14(1)(f); 15 and 16 Geo. 6 and 1 Eliz. 2, c.66, Sch. paras. 5, 10(c).

8. Proceedings in public of a council, board or other authority constituted for public purposes under the legislation of any Australian State or of the Commonwealth or of a Territory of the Commonwealth, so far as the proceedings relate to a matter of public interest.

Act No. 39, 1958, s.14(1)(h); 15 and 16 Geo. 6 and 1 Eliz. 2, c.66, Sch. para. 10.

9. (1) So much of the proceedings of an association to which this paragraph applies or of a committee or governing body of an association to which this paragraph applies (being proceedings pursuant to the specified objects) as comprises a finding or decision relating to a member of the association or to a person subject by contract or otherwise by law to control by the association, being a finding or decision-

15 and 16 Geo. 6 and 1 Eliz. 2, c.66, Sch. para. 8.

- (a) made in Australia or in a Territory of the Commonwealth; or
- (b) having effect, by law or custom or otherwise, in any part of Australia or of a Territory of the Commonwealth.

(2) This paragraph applies to an association whether incorporated or not and wherever formed being-

(a) an association-

(i) having amongst its objects the following objects (in this paragraph called the specified objects), namely, the advancement of any art, science or religion or the advancement of learning in any field; and

(ii) empowered by its constitution to control or adjudicate upon matters connected with the specified objects;

(b) an association-

(i) having amongst its objects the following objects (in this paragraph called the specified objects), namely, the promotion of any calling, that is to say, any trade, business, industry or profession or the promotion or protection of the interests of persons engaged in any calling; and

(ii) empowered by its constitution to control or adjudicate upon matters connected with the calling, or the conduct of persons engaged in the calling;

(c) an association-

(i) having amongst its objects the following objects (in this paragraph called the specified objects), namely, the promotion of any game, sport or pastime to the playing or exercise of which the public is admitted as spectators or otherwise or the promotion or protection of the interests of persons connected with the game, sport or pastime; and

(ii) empowered by its constitution to control or adjudicate upon matters connected with the game, sport or pastime.

10. (1) Proceedings at a general meeting held in Australia or in any Territory of the Commonwealth of a company, wherever its place of incorporation or of origin.

15 and 16 Geo. 6 and 1 Eliz. 2, c.66,
Sch. para. 11.

(2) Proceedings at a general meeting wherever held of a company having its place of incorporation or of origin in Australia or in a Territory of the Commonwealth.

(3) Proceedings at a general meeting wherever held of a company wherever its place of incorporation or of origin, if-

(a) the company carries on any part of its business or affairs in Australia or in a Territory of the Commonwealth; or

(b) the company is listed on a stock exchange in Australia.

(4) In this paragraph, "company" mean-

(a) a corporation aggregate; or

(b) an unincorporated society, association or other body which under the law of its place of origin may sue or be sued or held property in the name of its secretary or other officer appointed for that purpose;

"Foreign company".
Act No. 71, 1961, s.5(1).

(5) This paragraph does not apply to-

(a) an exempt proprietary company within the meaning of the Companies Act, 1961;

(b) a foreign company within the meaning of that Act, being a foreign company to which any of paragraphs (a), (b), (c), (d) and (e) of subsection (5) of section 348 of that Act applies; or

(c) a company not formed for the purpose of carrying on any business which has for its object the acquisition of gain by the company or its members.

Act No. 71, 1961, s.14(3).

11. (1) Proceedings on an appeal to the Committee of the Australian Jockey Club under section 32 of the Australian Jockey Club Act 1873.

Act No. 39, 1958, s.14(1)(i).

(2) This paragraph does not limit the operation of any other paragraph of this Part.

12. (1) Proceedings of a public meeting in Australia or in a Territory of the Commonwealth, so far as the proceedings relate to a matter of public interest including the advocacy or candidature of any person for a public office.

Act No. 39, 1958, s.14(1)(j).

(2) A meeting is a public meeting for the purposes of subparagraph (1) of this paragraph if it is open to the public, whether with or without restriction.

PART 3.-Official and Public Documents and Records.

13. Any report, paper, votes or proceedings published in any country by order or under the authority of a parliamentary body for that country.

Act No. 39, 1958, s.14(1)(c).

14. The debates and proceedings of either House of Parliament published by the Government Printer.

Act No. 39, 1958, s.40(3).

15. (1) A document which is-

Act No. 39, 1958, s.14(1)(e).

(a) a judgment of a court; or

(b) a record of a court relating to-

(i) a judgment of the court; or

(ii) the enforcement or satisfaction of a judgment of the court.

(2) In this paragraph "judgment" means a judgment, decree or order in civil proceedings.

16. A record or document kept by a government or statutory authority or court of any Australian State or of the Commonwealth or of a Territory of the Commonwealth or kept in pursuance of the legislation of any Australian State or of the Commonwealth or of a Territory of the Commonwealth, being a record or document which is open to inspection by the public.

15 and 16 Geo. 6 and 1 Eliz. 2, c.66,
Sch. para. 6.

Appendix C - Proposed Rules of Court

Part 67.

DEFAMATION.

Proposed Amendments.

Arrangement.

- Rule 1.-New Division heading.
- 2.-Substituted Rule 1. (Application)
- 3.-New Division 2.

DIVISION 2.-Proceedings of matter published after 1970.

- Rule 9.-Application.
- 10.-Interpretation.
- 11.-Consolidation.
- 12.-Statement of Claim.
- 13.-Particulars: publication and innuendo.
- 14.-Defence generally.
- 15.-Truth generally.
- 16.-Truth: contextual amputations.
- 17.-Qualified privilege.
- 18.-Comment.
- 19.-Particulars of defence.
- 20.-Malice etc.: reply and particulars.
- 21.-Interrogatories.
- 22.-Statement in open Court.
- 23.-Offer of amends: determination of questions.

Part 67 of the Supreme Court Rules, 1970, is amended as follows:-

1. After the heading "DEFAMATION" and before rule 1, insert the following-

New Division heading.

DIVISION 1.-Proceedings for matter published before 1972.

2. Omit rule 1, insert in its place the following:

1. This Division applies to proceedings for defamation in respect of matter published before the commencement of the Defamation Act, 1971.

Substituted Rule 1.
(Application.)
New Divisions 2.

3. After rule 8, insert the following Division:-

DIVISION 2.-Proceedings for matter published after 1971.

9. This Division applies to proceedings for defamation in respect of matter published after the commencement of the Defamation Act, 1971.

Application.

10. (1) In this Division, unless the context or subject-matter otherwise indicates or requires, "defence" includes any matter of privilege, protection, justification or excuse.

Interpretation.

(2) In this Division, "imputation in question", in relation to any defence, means the imputation as to which the defence is pleaded.

11. (1) Where several proceedings are pending in respect of the same, or substantially the same, defamatory matter, the Court may, on terms, order that proceedings be consolidated or may order that they be tried at the same time or one immediately after another or may order that any of them be stayed until after the determination of any other of them.

Consolidation. cf. Act No. 39, 1958, s.23;
R.S.C. (Rev. 1965, O.4 r.10.

(2) This rule does not limit the operation of Part 12 rule 2.

12. (1) A statement of claim shall not include any allegation that the matter complained of or its publication was false, malicious or unlawful.

Statement of claim.

(2) A statement of claim-

(a) shall, subject to subrule (3), specify each imputation on which the plaintiff relies; and
(b) shall allege that the imputation was defamatory of the plaintiff.

(3) A plaintiff shall not rely on two or more imputations alleged to be made by the defendant by means of the same publication of the same report, article, letter, note, picture, speech or thing, unless the imputations differ in substance.

(4) Subject to rule 13 (c), a statement of claim need not show how the matter complained of bore the sense of any imputation on which the plaintiff relies.

cf. Act No. 21, 1899, s.72; 46 and 47
Vict. c.49, s.5(b).

13. The particulars required by Part 16 rule 1 in relation to a statement of claim shall include-

Particulars: publication and innuendo.

(a) particulars of any publication on which the plaintiff relies to establish his cause of action, sufficient to enable the publication to be identified;
(b) particulars of any publication, circulation or distribution on which the plaintiff relies on the question of damages, sufficient to enable the publication, circulation or distribution to be identified; and
(c) where the plaintiff alleges that the matter complained of had a defamatory meaning other than its ordinary meaning, particulars of the facts and matters on which he relies to establish that defamatory meaning.

cf. R.S.C. (Rev.) 1965, 0.82 rr.2, 3(1).

14. (1) Subject to rules 15 to 18, a defendant shall plead any defence specifically.

Defence generally.
cf. General Rules of the Court, 0.30 r.30A.

(2) Where a plaintiff relies on two or more alleged defamatory imputations, a defence shall specify to what alleged imputation or imputations it is pleaded.

15. Subject to rule 14 (2), a defence under section 15 (2) of the Defamation Act, 1971, is sufficiently pleaded if it alleges-

Truth generally.

(a) that the imputation in question was a matter of substantial truth; and
(b) either-
(i) that the imputation in question related to a matter of public interest; or
(ii) that the imputation in question was published under qualified privilege.

16. Subject to rule 14 (2), a defence under section 16 of the Defamation Act, 1971, is sufficiently pleaded if it-

Truth: contextual imputations.

(a) alleges either-
(i) that the imputation in question related to a matter of public interest; or
(ii) that the imputation in question was published under qualified privilege;

- (b) specifies one or more amputations on which the defendant relies as being contextual to the imputation in question;
- (c) as to each imputation on which he so relies-
 - (i) alleges either that it related to a matter of public interest or that it was published under qualified privilege; and
 - (ii) alleges that it was a matter of substantial truth; and
- (d) alleges that, having regard to the publication of the amputations on which he so relies, the imputation in question did not materially injure the reputation of the plaintiff.

17. (1) This rule applies-

Qualified privilege.

- (a) to a defence under Division 4 of Part III of the Defamation Act, 1971; and
- (b) subject to subrule (2), to any other defence of qualified privilege.

(2) This rule does not apply to a defence under Division 5 of Part III of that Act (which Division relates to protected reports, etc.) or under Division 6 of that Part (which Division relates to court notices, official notices, etc.) or under Division 7 of that Part (which Division relates to comment).

(3) Subject to rule 14 (2), a defence is sufficiently pleaded if it alleges that the imputation in question was established under qualified privilege.

18. (1) This rule applies to a defence under Division 7 of Part III of the Defamation Act, 1971.

Comment.

(2) Subject to rule 14 (2), a defence is sufficiently pleaded if it -

- (a) either-
 - (i) alleges that the imputation in question was comment based on proper material for comment and upon no other material; or
 - (ii) alleges that the imputation in question was comment based to some extent on proper material for comment and represented an opinion which might ,reasonably be based on that material to the extent to which it was proper material for comment;
- (b) alleges that the imputation in question related to a matter of public interest; and
- (c) either-
 - (i) alleges that the imputation in question was the comment of the defendant;
 - (ii) alleges that the imputation in question was the comment of a servant or agent of the defendant; or
 - (iii) alleges that the comment was not, and its context and in the circumstances of the matter complained of did not purport to be, the comment of tht defendant or of any servant or agent of his.

cf. G.R.C., 0.14 r.18A (1)(i), (ii).

(3) The particulars required by Part 16 rule 1 shall include-

- (a) particulars identifying the material upon which it is alleged that the imputation in question was comment and identifying to what extent that material is alleged to be proper material for comment;
- (b) as to material alleged to be proper material for comment, particulars of the facts and matters on which the defendant relies to establish that allegation.

(4) Subrule (3) (b) does not extend to particulars of the facts and matters on which the defendant relies to establish that any material was true or was a matter of substantial truth.

(5) Where a defendant relies on a defence under section 33 of the Defamation Act, 1971 (which section relates to comment of a servant or agent of the defendant), the particulars required by Part 16 rule I shall include particulars identifying the servant or agent of the defendant whose comment the imputation in question is alleged to be.

(6) Subrules (3), (4) and (5) do not limit the operation of rule 19.

19. (1) The particulars of defence required by Part 16 rule 1 shall include particulars of the facts and matters on which the defendant relies to establish that-

Particulars of defence.

- (a) any imputation or material was or related to a matter of public interest;
- (b) any imputation was published under qualified privilege.

cf. G.R.C., 0.14 r.18A(2)(i).

(2) Where a defendant intends to make a case in mitigation of damages by reference to-

- (a) the circumstances in which the publication complained of was made;
- (b) the character of the plaintiff;
- (c) any apology for, or explanation or correction or retraction of, any imputation complained of;
- (d) any recovery, proceedings, receipt or agreement to which section 49 of the Defamation Act, 1971, applies-

cf. R.S.C. (Rev.) 1965, 0.82 r.7.
cf. *ibid.*

he shall give particulars of the matters on which he relies to make that case.

(3) Where a defendant intends to show, in mitigation of damages, that any imputation complained of was true or was a matter of substantial truth, he shall give particulars identifying the imputation and stating that intention.

(4) The particulars required by subrules (2) and (3) shall be set out in the defence or, if that is inconvenient, shall be set out in a separate document referred to in the defence and that document shall be filed and served with the defence.

(5) The powers of the Court under Part 16 rule 7 shall extend to orders in relation to particulars of the facts and matters on which the defendant relies to establish that any imputation or material was true or was a matter of substantial truth.

cf. G.R.C., 0.14 r.18A(1)(iii), (2)(ii).

20. Where a plaintiff intends to meet any defence by alleging that-

Malice etc.; reply and particulars.

- (a) the defendant was actuated by express malice in the publication of the imputation in question;
- (b) the publication by the defendant of the imputation in question was not in good faith for public information or the advancement of education or the advancement of enlightenment; or
- (c) the imputation in question did not, at the time of the publication complained of, represent the opinion of the defendant or a servant or agent of his, being a person alleged by the defendant to be the author, or an author, of the imputation in question-

cf. R.S.C. (Rev.) 1965, 0.82 r.3(3).

-then-

- (d) the plaintiff shall plead that allegation by way of reply; and
- (e) the particulars required by Part 16 rule 1 in relation to the reply shall include particulars of the facts and matters on which the plaintiff relies to establish that allegation.

21. Interrogatories as to the sources of information or grounds of belief of a defendant shall not be allowed on an issue arising on an allegation made in reply in accordance with rule 20.

Interrogatories.
cf. R.S.C. (Rev.) 1965, 0.82 r.6.

22. Where-

Statement open in Court.

- (a) a plaintiff accepts money brought into Court under Part 22 in satisfaction of a cause of action for defamation; or
- (b) proceedings for defamation are settled-a party may, with the leave of the Court, make in open Court a statement approved by the Court in private.

cf. R.S.C. (Rev.) 1965, 0.82 r.5.

23. The Court may hear an application and determine any question pursuant to section 39 of the Defamation Act, 1971, in the absence of the public.

Offer of amends; determination of questions.
cf. R.S.C. (Rev.) 1965, 0.82 r.8(1).

Appendix D - Notes on Proposed Bill and Rules

Section 1: Short title and commencement

1. Section 1 (2) provides for the commencement of an Act founded on the Bill on an appointed day. Apart from anything else, some time will be required before commencement so as to enable any necessary rules of court to be formulated.

Section 3: Repeal of Defamation Act, 1958

2. The Bill would repeal the Defamation Act, 1958. That Act represents a break with the legislative policy previously followed in New South Wales. The first New South Wales Act on the subject of defamation, or at least the first Act leaving any trace on the present law, was the Act 8 Geo. 4 No. 2, passed in 1827 (see especially section 15, now consolidated and appearing as section 19 of the Newspapers Act, 1898). From that year until the commencement of the Act of 1958 the legislation altered the law in a number of particulars, but the law of defamation remained basically a body of law established by judicial decision. The former legislation was last consolidated in 1912 and the Act of 1912 was amended on three occasions before 1958.

3. The Act of 1958 repealed the Act of 1912 and the enactments amending it. Taken largely from the statute law of Queensland, it broke new ground (so far as New South Wales was concerned) by endeavouring largely to codify the substantive law and to supersede the common law. It was an Act which, in the words of its title, was not only to amend, but also "to state . . . the law relating to defamation

4. This is not the place to consider generally the advantages and disadvantages of codification. It is, however, our opinion that the measure of codification of the law of defamation attempted by the Act of 1958 has not been a success. Is the present the time to make a second attempt? The variety of circumstances which give rise to questions relating to defamation is great and the risk of overlooking possible future cases is correspondingly great. The codifier must perceive the future with some clarity if his code is not to lead to injustice on too high a scale. We think that the risks of inadvertent injustice which are inherent in any codification are peculiarly serious in the law of defamation, and that in this field those risks outweigh the advantages of a code. The general approach of our recommendations is, therefore, a return to the common law subject to statutory modification in a number of particulars.

5. Section 3 (2), (3) of the proposed Bill is intended to revive the common law, subject to statute law (except the Act of 1958 and except enactments repealed by that Act), and subject of course to the provisions of the Bill. Numerous other Acts affect the law of defamation in one way or another. An example occurs in section 16 of the Pure Food Act, 1908. The wording of section 3 (2) of the Bill leaves room for the continued operation of these other Acts.

6. The Bill would not repeal section 72 of the Common Law Procedure Act, 1899. In making our report under this reference, we have assumed that an Act passed pursuant to our recommendations would not commence before the commencement of the Supreme Court Act, 1970. That Act will repeal section 72 of the Common Law Procedure Act. The present Bill therefore does not repeal that section. The rules of court which we now propose would require a plaintiff to give particulars of the facts and matters on which he relies, to establish any defamatory meaning of the matter complained of other than its ordinary meaning (Rule 13 (c) in Appendix C to this report).

Section 4: Amendments

7. We propose that the Newspapers Act, 1898, be amended by omitting section 19. This section is as follows-

"If any person files any statement of claim in the Supreme Court for the discovery of the names of any persons concerned in the property of or in any newspaper as printers, editors, or publishers, or otherwise of any matters relative to the printing or publishing thereof, in order to enable him the more effectually to bring

or carry on any suit or action for damages by him alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such statement of claim, but he shall be compellable to make the discovery thereby required:

Provided nevertheless that such discovery shall not be made use of as evidence or otherwise in any other proceeding than that in aid of which the discovery is made.”

8. Section 19 of the Newspapers Act is taken from section 15 of the Act 8 Geo. 4 No. 2, which in turn was taken from section 28 of the English Act 38 Geo. 3, c. 78. Similar legislation remains in force in the English Newspapers, Printers, and Reading Rooms Repeal Act 1869, s. 1. There is a similar section in the Victorian Printers and Newspapers Act 1958, s. 19. No doubt there are other counterparts elsewhere. The English legislation has given rise to a few reported cases: *Hillman's Airways Ltd v. Société Anonymed Editions d'Éditions Aéronautiques Internationales* ([1934] 2 K.B. 356) is the most recent. There is no reported case on the New South Wales legislation and only one on the Victorian: *Starer v. Smith's Newspapers Ltd* ([1939] V.L.R. 347).

9. Although Spencer Bower described this section as an exceedingly useful one (*Actionable Defamation* (2nd edn, 1923), p. 197), it was the closing words restricting the use of the discovery which he regarded as the most important provision (p. 198). This was because those words precluded an objection on the ground of a tendency to criminate. Our proposals deal with objections to discovery, and objections to evidence on this ground, in a more general way (see section 57 of the proposed Bill and paragraphs 277 to 279 of these notes).

10. The remaining object of the section, to enable a defamed person to obtain the names of those answerable for defamation in a newspaper, and to obtain matter relating to the printing and publishing of the newspaper, is sufficiently met by Part 3 of the Supreme Court Rules under the Supreme Court Act, 1970. These are our reasons for proposing the omission of section 19 of the Newspapers Act.

11. We propose that the Crimes Act be amended by inserting a new section 100A, dealing with “blackmail by threat to publish, etc.”, as the marginal note puts it. The new section 100A would take the place of section 27 of the Defamation Act, 1958. Section 27 creates offences concerned with threatening to publish matter with intent to extort or to procure an appointment. Its ultimate source is section 3 of the Libel Act 1843 (6 & 7 Vict. c. 96). In England there was until recently a similar provision in section 31 of the Larceny Act 1916, but it was repealed and replaced by a more general provision as to blackmail in section 21 of the Theft Act 1968. The change in England was made on the recommendation in 1966 of the Criminal Law Revision Committee in its eighth report (on theft and related offences; Cmnd. 2977).

12. We think that the proposed section should go in the Crimes Act and not in a Defamation Act because it is not confined to threats, etc., as to defamatory matter. We think that it ought to come after section 100 because that and the preceding sections deal with cognate offences. The new section follows the Larceny Act 1916, in that a threat, etc., as to some matter or thing concerning a dead person will fall within its terms. The new section follows the Theft Act 1968, in the subjective tests involved in the word “unwarranted” and in enlarging the scope of the intent. The proposed section speaks of a penalty of penal servitude for ten years. We do not think it our concern under this reference to make recommendations on questions of penalties: in this respect the proposed section makes no more than a suggestion. We choose ten years because of the analogy in section 100 of the Crimes Act. The maximum penalty in section 21 of the Theft Act 1968, is imprisonment for fourteen years.

13. We propose that the Crimes Act be further amended by omitting the proviso to section 400, concerning the practice as to entering the dock. We think that the main provisions of the section are adequate and that the proviso, making special provision for particular crimes (including libel), is obsolete. In making this proposal, for the omission of a proviso which relates not only to libel but also to assault, we may go beyond our terms of reference as to defamation. So far as we do, we call in aid the reference you have made to the Commission to review the statute law generally.

14. We propose that the Crimes Act be further amended by inserting a new section 574A, concerning informations, etc., for obscene or blasphemous libels. The provision is taken in substance from section 42 (2) of the Defamation Act, 1958. The proposed Bill does not deal with obscene or blasphemous libel, but the effect of section 42 (2) should be retained.

15. We propose that section 568 (3) of the Crimes Act be amended so as to exclude prosecutions under section 51 of the Bill from the jurisdiction of courts of quarter sessions. At present a court of quarter sessions has jurisdiction in respect of an offence against section 26 or section 27 of the Defamation Act, 1958: Crimes Act, 1900, s. 568 (3). We have not, however, come across any instance of a trial for these offences, or for any form of criminal libel, in quarter sessions.

16. Whatever the practice may have been in the past, we think that prosecutions for offences under section 51 of the Bill should be confined to the Supreme Court. We think that these prosecutions should be so confined - because of the importance of the interests which may call for reconciliation in a prosecution for criminal defamation, the interests, that is to say, of freedom of speech and of protection of reputation, and because of the pecuniary penalty which the Bill would allow to be inflicted without limit of amount (Bill, s. 51 (1)).

17. In England prosecutions for criminal libel have for many years been excluded from the jurisdiction of courts of quarter sessions: Quarter Sessions Act 1842, s. 1. In Victoria there was a similar Such cases are not, however, excluded from the criminal jurisdiction exclusion for many years: see the Justices Act 1958, s. 191 (v). given to Victorian County Courts by the recent County Court (Jurisdiction) Act 1968, s. 36A.

18. Finally as to the Crimes Act, we propose that section 579 be amended by the insertion of a new subsection (4). Because section 56 of the Bill makes important changes in the law of evidence as to the probative effect of the proof of a conviction it is necessary to ensure that the provisions of section 579 of the Crimes Act would not, in certain circumstances, nullify the provisions of the Bill. The legislative policy of section 579 seems directed to different considerations.

19. If what a man did constituting a criminal offence over 15 years past is in issue, section 579 does not operate to forbid proof of what he did. If what was done is properly in issue it should be proved by the best and shortest method.

20. It also is desirable that the method of proof dealt with in section 23 of the Evidence Act should be available for the purposes of section 56 of the Bill and that judges and court officers should not be inhibited by the generality of the words of section 579 from bringing into existence the required document or certification.

21. For these reasons and for these purposes we propose the insertion of the new subsection (4) of section 579 of the Crimes Act.

22. We propose the omission of section 26 of the Inebriates Act, 1912, and the insertion of a new section in its place. It is enough, we think, to put a penalty on the unauthorized publication of a report, without withdrawing what protection the publisher might otherwise have in the law of defamation. See, for a similar approach, the Adoption of Children Act, 1965, s. 53, See also paragraphs 135 to 137 of these notes.

23. We propose the omission of section 29 of the Venereal Diseases Act, 1918. There are difficulties in ascertaining the present effect of the section. Whatever its effect may be, it would be rendered unnecessary by the enactment of section 51 of the proposed Bill.

24. We propose amendments to section 2 of the Law Reform (Miscellaneous Provisions) Act, 1944. This section deals with the effect of death on certain causes of action. Under the present law, where a man has been defamed in his lifetime, the cause of action for defamation does not survive the death of the defamer or the death of the person defamed. This was the common law and the common law is preserved in this respect by the proviso to section 2 (1) of the Act of 1944.

25. As to the death of the defamer, if the rules as to damages for defamation are modified as appears in Part IV of the proposed Bill, there is no reason why the death of the defamer should affect the rights of the defamed person. Where it is the person defamed who has died, section 46 of the Bill would limit the measure of damages to injury to property and financial loss. With the measure of damages thus limited, there is no reason why the cause of action should not survive the death of the person defamed.

26. We propose, therefore, that the proviso to section 2 (1) of the Act of 1944 be amended so as to drop the exclusion of defamation from the general operation of the subsection. Having regard to the controversy which has arisen under the 1958 Act concerning defamation of the dead, we wish to state quite positively that this

amendment does not affect the position, which is the law, that there is no liability for damages for defamation except where the person defamed is living at the time of publication of the matter complained of. As an incidental amendment, we propose the omission of the matter relating to section 52 of the Matrimonial Causes Act, 1899. This matter is spent.

27. The express reference in section 11 of the Law Reform Commission Act, 1967, to the Defamation Act, 1958, needs to be changed to refer to this Bill in view of the repeal of the 1958 Act.

28. The liability of the Crown in proceedings under the Claims against the Government and Crown Suits Act, 1912, for a tort committed by its servant or agents is the same, as nearly as possible, as the liability of an ordinary person for a like tort committed by his servant or agent. This is so whether the tort is one at common law, or is one arising under the common law as modified by statute, or is one arising from breach of a statutory duty. And, in the case of a tort arising under the common law as modified by statute, or a tort arising from breach of a statutory duty, the liability of the Crown is as stated above, notwithstanding that the statute in question does not of itself bind the Crown. These are the consequences of section 4 of the Act of 1912: *Williams v. Downs* ((1971) 92 W.N. 601). It is better however, for the sake of clarity in cases where the Act of 1912 applies, and for the purposes of cases where that Act does not apply, that the proposed Bill should bind the Crown by its own force. The publication of defamatory matter by servants or agents of the Crown will often be in circumstances giving a privilege, absolute or qualified, under the proposed Bill or under the common law, but otherwise we think that the law of defamation should be the same in cases involving the Crown as in other cases.

29. The terms of section 5 follow previous recommendations of this Commission in that the section expressly extends to the Crown in all its capacities, so far as the legislative power of Parliament permits. Without such an extension, the section might be construed as applying only to the Crown in right of New South Wales: *Commonwealth v. Bogle* ((1953) 89 C.L.R. 229, 259, 260). There is no reason why the Bill should put the Crown in other rights in a better or worse position than that of the Crown in right of New South Wales.

Section 6: Interpretation

30. Section 6 (2) provides a definition of a "matter of substantial truth" for the sake of drafting convenience. It is not designed to effect an alteration in the common law.

31. It is, however, intended to dispel any notion of a rigid rule to be deduced from the old cases cited in Gately on Libel and Slander (6th edn (1967) paragraph 354) and to enable a jury, subject to proper judicial control, to pass upon the materiality of any discrepancy between a defamatory imputation and the facts proved. The subsection is a statutory affirmation of what Lord Shaw said in *Sutherland v. Stopes* ([1925] A.C. 47, 79)- "If I write that the defendant on March 6 took a saddle from my stable and sold it the next day and pocketed the money all without notice to me, and that in my opinion he stole the saddle, and if the facts truly are found to be that the defendant did not take the saddle from the stable but from the harness room, and that he did not sell it the next day but a week afterwards, but nevertheless he did, without my knowledge or consent, sell my saddle so taken and pocketed the proceeds, then the whole sting of the libel may be justifiably affirmed by a jury notwithstanding these errors in detail".

32. The amendment of the Law Reform (Miscellaneous Provisions) Act, 1944, the effect of which is to allow survival of causes of action in defamation (subject to the limitation in section 46 (1) (b) of the Bill) makes it desirable that subsection (3) of section 6 be introduced. The subsection will also apply in some cases of bankruptcy (see Gately paragraphs 858, 859), subject to any question of constitutional validity.

Section 7: Slander actionable without special damage

33. The common law of defamation draws a distinction between libel and slander. Broadly speaking, libel is written defamation and slander is oral defamation. At common law libel is actionable without special damage, but slander is, as a rule, not actionable without special damage. "Special damage" here means some actual temporal loss, such as loss of a job or a refusal of credit.

34. In New South Wales slander was almost wholly assimilated to libel in 1847 by the Act 11 Vict. No. 13. We say "almost wholly" because of the legislation discussed in the notes to section 13 of the Bill (paragraph 60 below).

Successive Acts have maintained this position. Section 7 of the Bill says directly what the former Acts have said by an obscure historical allusion (e.g., 1912 Act s. 4 (1)) or by inferential reference (1958 Act s. 10).

Section 8: No presumption of falsity

35. Where the truth of a defamatory imputation is in issue, the onus of proof is on the defendant. This situation has produced an assertion, if not a doctrine, that there is a presumption of falsity of a defamatory imputation. See, for example, Gately, paragraph 351. Such a presumption is not useful and may be mischievous. It may be mischievous in that it gives a foothold in a fiction for the magnification of damages. It may be mischievous in other ways because no one can foretell what will be the consequence of treating as a fact something which may or may not be a fact.

Section 9: Causes of action

36. There are difficult distinctions, unserviceable distinctions, and areas of doubt on the identification of the cause or causes of action which arise where one man defames another. It is unavoidable, except by drastic changes in the law, that there will often be a multitude of causes of action. Thus, if a man prints and sells by retail a defamatory book, there will be a cause of action for each sale of the book. The purpose of section 9 is to put the matter on a rational basis and to meet the difficulties which inhere in the multiplicity of causes of action.

37. It is useful to look briefly at the present law. Firstly, there may be more than one cause of action because publication is made to more than one person. Speaking of defamation by a letter, Lord Esher said that publication is "the making known the defamatory matter after it has been written to some person other than the person of whom it is written" (*Pullman v. Hill & Co.* [1891] 1 Q.B. 524, at p. 527). In that case the letter was seen by two servants of the defendant before posting and, after delivery in the post, was read by three servants of the plaintiffs: Lord Esher held that there were two publications, one to the servants of the defendant and one to the servants of the plaintiff. Five recipients and, it seems, at least two causes of action. Compare *Russell v. Stubbs Ltd* ([1913] 2 K.B. 200 (note) at p. 205), where Kennedy L.J. said that, once publication to any person was proved, publication to other persons merely went to damages. See also *McLean v. David Syme & Co. Ltd* ((1971) 92 W.N. 611), *Emmerton v. University of Sydney* (3.9.70, Court of Appeal, unreported).

38. Then there is the case of a newspaper proprietor who prints and distributes many copies of a newspaper, putting aside cases where he delivers a number of copies to one person, for example, an independent distributor, there will be a separate publication, and hence a separate cause of action, for each copy which he puts out. See *Duke of Brunswick v. Harmer* ((1849) 14 Q.B. 195; 117 E.R. 75); *McCracken v. Weston* ((1904) 25 N.Z.L.R. 248); *McLean v. David Syme & Co. Ltd* ((1971) 92 W.N. 611).

39. In *Ogden on Libel and Slander* (6th Edn (1929) pp. 132, 133) a distinction is drawn between libel and slander. "Every publication of a libel is a distinct and separate act, and a distinct and separate cause of action But the uttering of a slander is one act and one cause of action, whether one person or one hundred persons hear the words". Where one act of publication communicates a defamatory imputation to many persons, there are no doubt grounds for saying that there is but one cause of action, but we doubt that the line should be drawn between libel and slander. A defamatory writing on a blackboard before a group of students is as much a single act of publication as is an oral utterance. The view taken by *Ogden* is interesting, however, because, for the purpose of identifying the cause or causes of action, it looks to the wrongful act of the publisher rather than its effect in communicating the defamatory matter to one or more than one recipient. This view faces the difficulty, however, that defamatory matter published to several recipients may carry different innuendoes, depending on the extraneous knowledge of the recipient.

40. In the United States of America a number of States have adopted a "single publication rule". This rule is discussed in *Harper & James on the Law of Torts Vol. 1* (1956) at pp. 394-398. In some States the adoption has been by judicial decision and in some States it has been by statute. The model statute is the Uniform Single Publication Act approved in 1952 by the Conference of Commissioners on Uniform State Laws.

The Commissioners' prefatory note is as follows (Uniform Laws Annotated Vol. 9c, pp. 171, 172)-

"This Act is intended to make uniform the law as to causes of action for any tort arising out of a single publication, as described in section 1. The common law rule, which originated in 1849 with *Duke of*

Brunswick v. Harmer, 14 Q.B. 185, 177 Eng. Rep. 75, was that each sale or delivery of a single copy of a newspaper or magazine was a distinct and separate publication of a libel therein contained. This rule still is followed by several American jurisdictions. It means that when defamation is published in a magazine with national circulation, the person defamed may have as many as 3,900,000 possible causes of action for separate torts, based on the publication to each individual reader. The sum total of the causes of action so arising would be more than three times the estimated number of all the reported decisions in the English language, and the lifetime of one generation would not suffice to try them.

Other jurisdictions have adopted the single publication rule, under which any single integrated publication, such as one edition of a newspaper or magazine, or one broadcast, is treated as a unit, giving rise to only one cause of action. The difference in the two rules leads to further difficulties when a publication crosses state lines. A late case which illustrates the problem is Hartmann v. Time, Inc. 166 F. 2d 127 (3d Cir. 1948), where the action was returned to the trial court with directions to ascertain the law of each of the states, and apply one rule or the other according to the jurisdiction in which the magazine was read.

This Act adopts the single publication rule for defamation, invasion of privacy, or any other tort such as slander of title, disparagement of goods, injurious falsehood or the like, which is founded upon a single integrated publication. The intention is to adopt the rule as it has been developed at common law in the states which have accepted it. The Act is not intended to have any application to the causes of action of two or more separate plaintiffs who are defamed in the same publication, or to the causes of action of one plaintiff against two or more separate defendants, each of whom has published the same statement or taken part in the same publication.”

The relevant sections of the Act are sections 1 and 2 which are as follows:

“1. [Limitation of Tort Actions Based on Single Publication or Utterance Damages Recoverable].-No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

2. [Judgment as *Res Judicata*].-A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance as described in section 1 shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.”

41. We do not propose the adoption of the single publication rule. We think that even where the rule applies it still leaves room for a multitude of causes of action, for example, where a motion picture is screened many times in many places. We think also that an attempt should be made to deal with the related problem of a multiplicity of causes of action by reason of a multiplicity of defamatory imputations conveyed by means of a single report, article, speech or other matter. We go on to consider this problem.

42. For the purpose of dealing with the problem of a multiplicity of imputations, it is necessary to draw two distinctions. The distinctions are, we think, unreal, but they are basic to a discussion of the case law. The first distinction is between, on the one hand, the direct meaning of the matter published and, on the other hand, an inference or conclusion which might be drawn from the matter published, without reference to extraneous facts or circumstances. Thus if the matter published is- “The police Fraud Squad is inquiring into the affairs of the X Company”, the direct meaning is that the Fraud Squad is so inquiring. The inference or conclusion may be drawn, however, that the affairs of the company have been conducted in such a way that the police suspect fraud. See *Lewis v. Daily Telegraph Ltd* ([1964] A.C. 234). Such an inference or conclusion, not depending on extraneous facts or circumstances known to the recipients of the publication, has been called a “false innuendo”. The name, in some ways unfortunate, is a convenient tag and we shall use it. Both the direct meaning of the matter published and any false innuendos which it bears are comprehended within the “natural and ordinary meaning” of the matter published.

43. The second distinction is between the direct meaning and a false innuendo on the one hand and a true innuendo on the other hand. A true innuendo is an inference or conclusion which may be drawn by a recipient of

the matter published from that matter, together with extraneous facts or circumstances known to the recipient. For example, the matter published may be "Jones' advertising is vulgar": if Jones is a doctor and a recipient of the publication knows that fact, the recipient may infer or conclude that Jones is guilty of professional misconduct. That is a true innuendo.

44. The publication to one recipient of a defamatory statement may support more than one cause of action. There is one cause of action if the statement is defamatory in its natural and ordinary meaning, that is, in its direct meaning together with any false innuendoes. There is another cause of action for each defamatory imputation arising by true innuendo. It is unnecessary to say how far this was so at common law: it is established that it is so in the presence of legislation in the terms of section 72 of the Common Law Procedure Act, 1899. See *Harvey v. French* ((1832) 1 C. and M. 11; 149 E.R. 293), *Watkin v. Hall* ((1868) L.R. 3 Q.B. 396), *Sim v. Stretch* ([1936] 2 All E.R. 1237), *Grubb v. Bristol United Press Ltd* ([1963] 1 Q.B. 309), *Lewis v. Daily Telegraph Ltd* ([1964] A.C. 234), *Pedley v. Cambridge Newspapers Ltd* ([1964] 1 W.L.R. 988).

45. We pass to another question. Suppose that the matter published makes two distinct defamatory imputations in its direct meaning, suppose for example, that the words published are "X is a liar and X is a thief". Does this give X one or two causes of action? One view is that the wrongful act is the publication of the report, article, speech or other matter as a whole. On this view it is necessary, in order to establish a cause of action, that there is some defamatory imputation, but one is enough: other defamatory imputations would go to damages, not to the establishment of other causes of action. This is the view inherent in the judgment of Fry L.J. in *Macdougall v. Knight* ((1890) 25 Q.B.D. 1, at p. 10).

46. The other view is that each distinct defamatory imputation arising on the direct meaning of the matter published gives rise to a separate cause of action. This view, for which we have found no direct authority, must be a tacit assumption lying behind the authorities on the question whether the plaintiff can be required to put in evidence the whole of the report, article, speech or other matter published. If he had but one cause of action for the publication of the whole, one would expect that he would fail unless the whole were put in evidence. But the authorities approach the question differently: as a rule the whole matter must be put in evidence, not because the publication of the whole is the wrongful act, but because the words complained of may have an effect when seen in their context different from their apparent effect in isolation. See Gatley, paragraph 1230. We need not make a firm choice between these views so far as the present law is concerned, but it is a matter which we must take into account in attempting to clarify the position as to causes of action.

47. If it is right that there is a separate cause of action for each distinct defamatory imputation arising on the direct meaning of the matter published, a problem will arise where two or more such imputations are the ground for an imputation by false innuendo. Under which cause of action is that false innuendo to be litigated? We do not know what answer the present law would give.

48. We think that the law reviewed in paragraphs 37 to 47 is unsatisfactory. First, there is the distinction between separate publications to each recipient, as in the case of a newspaper, and a single publication to numerous recipients, as in the case of a speech to a numerous audience. We do not think that the distinction is useful, and it may be troublesome in borderline cases. The concept of a single publication to a numerous audience may itself be troublesome where the matter published may carry a variety of true innuendoes depending on the various facts and circumstances known to the recipients. Further, there may be a defence, for example, of qualified privilege as to some recipients but not as to others: see section 20 of the proposed Bill.

49. There are also difficulties in the distinction between the natural and ordinary meaning of the matter published (that is, the direct meaning with any false innuendoes) and the true innuendo. Sometimes the distinction is clear enough, as where A and B are, and are living as, man and wife, and a newspaper reports that A is engaged to be married to C. The report will bear a meaning defamatory of B only to those recipients who know that A and B are living as man and wife. But in other cases the distinction is unreal. Suppose the words complained of are "X is a Casanova", and it is alleged that the words carry the imputation that X is a libertine. On one view, the associations of the word "Casanova" are so much a matter of common knowledge that the imputation is the natural and ordinary meaning of the words. Others might think that the case called for evidence of the reputed exploits of the eighteenth century adventurer, on the view that the words would bear that meaning only to those recipients who know of that reputation. The meaning of any communication depends in part on what is in the mind of the recipient. To make the existence of a separate cause of action depend on whether the extraneous

facts are common knowledge or not is bad because to do so is to found a distinction on something inherently unascertainable.

50. We think that the solution most likely to promote an analysis which will lead to just results, is to provide that a person defamed has a separate cause of action for each defamatory imputation published of him and for each person to whom the publication is made.

51. The solution proposed in paragraph 50 shares, and indeed, aggravates, the defects of the present law, arising because of the multiplicity of causes of action which may attend the dissemination of defamatory matter. The defects include problems of the extent to which more than one action can be brought against the same defendant in respect of the same, report, article, speech or other problems of prolixity in pleadings, and problems relating to verdicts and assessment of damages.

52. We, think that a person defamed should not have an uncontrolled liberty to sue a defendant whom he has already sued in respect of the same report, article, speech or other matter. The law as to *res judicata* is not fitted to impose the appropriate restraint, either under the present rules as to causes of action or under the solution which we propose. Thus, if defamatory matter is published in a newspaper, judgment in an action for publication to residents of Sydney would not bar a second action for publication to residents of Newcastle. The second action might be stayed as vexatious, but it is perhaps a strong use of that power to stay proceedings on an undoubted cause of action which has not been litigated. We do not, however, think that second action should automatically be barred: the first action might have been for what was a very limited dissemination and the second for a general dissemination to the public, perhaps not occurring until after the first action was brought. We propose that a second action should not be brought except by leave of the court.

53. We think that the restriction proposed in paragraph 52 should have effect whether the first action was brought in New South Wales or elsewhere, Although problems of the conflict of laws have not hitherto been common in defamation cases in Australia (but see *Meckiff v. Simpson* [1968] V.R. 62), we have the advantage of seeing the American experience as discussed, for example, in Harper and James on the Law of Torts (Vol. 1 (1956) at pp. 394-398). If an action is brought in another State or in a Territory of the Commonwealth for defamation in a journal circulating widely in Australia, we do not think that the same plaintiff should have an uncontrolled liberty to sue the same defendant in respect of the publication of the same journal in New South Wales. We have chosen an Australian example because the possibility is readily seen in local terms, but there is no reason why the same considerations should not apply where the first action is brought in a place more distant from New South Wales.

54. The problem of prolixity of pleadings is one to which an answer is attempted in the proposed rules of court in Appendix C to our report (see the proposed rule 12 (3)). We remark here, however, that pleading in defamation has traditionally departed from the ordinary rules of pleading. Thus it is usual to allege numerous publications of a libel in a form which suggests that there is but one cause of action for all the publications (see *McLean v. David Syme & Co. Ltd* ((1971) 92 W.N. 611), *Emmerton v. University of Sydney* (3.9.70, Court of Appeal, unreported). And it is necessary to plead the actual words or other matter alleged to have been published, in contrast to other causes of action, where proper pleading requires that only the substance and effect of the words or other matter is pleaded. The actual words or matter relied on would ordinarily be matter for particulars rather than pleading.

55. Another problem posed by a multiplicity of causes of action is that, theoretically at least, a verdict should be taken separately on each cause of action on which the plaintiff relies. This has not been carried to its ultimate conclusion by requiring, for example, a separate verdict in respect of each person to whom a libel is published, but it has been said that separate verdicts ought to be taken where a plaintiff complains of the natural and ordinary meaning of the matter published and also of a true innuendo (*Lewis v. Daily Telegraph Ltd* [1964] A.C. 234). In *Pedley v. Cambridge Newspapers Ltd* ([1964] 1 W.L.R. 988, at p. 992), however, Denning M. R. said that when it comes to summing up to the jury the judge could put the technicalities on one side. The judge was not bound to ask the jury to find separate verdicts in respect of separate causes of action, and make separate awards of damages. He could, if he thought fit, ask them to find one verdict and make one award of damages.

56. We would go a step further: we think that the general rule ought to be that there should be a single verdict and single award of damages in respect of all publications by the one defendant of, and imputations made by, the same report, article, speech or other matter. The trial judge should, however, have power to take separate verdicts and separate awards of damages: cases for exercise of the power would include cases where a true

innuendo would be inferred by some only of the recipients and cases where there is a defence of privilege as to some only of the recipients.

Section 10: Application of Part III

57. This section is here so as to avoid repetition in other sections in the Part. Notwithstanding the reference in section 10 to civil proceedings, section 52 (1) of the Bill gives the Part a qualified application in proceedings for an offence under section 51.

Section 11: Common law defences etc.

58. The Bill leaves to the common law large parts of the law of privilege and is intended to leave room for defences under other Acts and for such general defences in the law of tort as leave and licence and accord and satisfaction. Section 11 has these objectives in view. Its effect is cut down as regards the defence of truth (section 15 (1)) and as regards the law relating to comment (section 29 (2)). In these fields the Bill embarks upon a partial codification.

Section 12: Public interest a question for the court

59. The Defamation Act, 1958, uses the expressions "public benefit", "public interest", "public concern" and "public good". These exemplify a tendency towards a proliferation of conceptions all related to public interest but differing in formulation. They do not necessarily differ in substance but they do call for exploration to determine questions of possible differentiation. The complexity so caused is not justified by considerations of substance. The reasons for the variety appear to be rather historical than substantial. The Bill selects as a general criterion "Public interest". Whether a matter is of public interest has at common law been a matter for the court. Section 12 provides that it shall remain so.

Section 13: Unlikelihood of harm

60. When New South Wales in 1847 made slander actionable without proof of special damage, doubtless it was thought desirable at the same time to discourage trivial actions for slander. The means adopted was to provide by section 2 of the Act 1 Vic. No. 13 for a defence to an action for slander where the words complained of did not impute an indictable offence and were spoken on an occasion when the plaintiff's character was not likely to be injured. This defence remained part of the law of New South Wales up to 1959 when a generally similar section derived from a Queensland variant was introduced (Defamation Act, 1958, s. 20 (1)). Under present-day conditions there is no reason why there should be a difference between written and spoken words. In the proposed section 13, tests of injury to character or reputation are abandoned in favour of a more general test: was the person defamed likely to suffer substantial harm? The question whether the matter complained of imputes an indictable offence is immaterial under the 1958 Act and would be immaterial under section 13 of the Bill. The section confers upon juries a useful reserve power and its existence tends to discourage trivial actions.

Sections 14-16: Truth

61. At common law it is a defence that the imputation complained of was true in substance and in fact; and this defence is available whether or not the defendant was actuated by malice. It is also a defence at common law that the imputation complained of, whether true or false, was published on an occasion of qualified privilege; but this defence is defeated if the defendant was actuated by malice. This remains the law of England, of New Zealand, of Victoria, of South Australia and of many other places.

62. In New South Wales there have been statutory alterations of the law relating to these defences. The statutory alterations relating to qualified privilege are beside the point for the present; but the statutory alterations to the defence of truth must be noticed.

63. In 1847, by section 4 of the Act 1 Vic. No. 13, it was enacted that the truth of the matters charged should not be a defence unless it was for the public benefit that the matters charged should be published. The jury were to decide both the questions of truth and of publication for the public benefit. The legislation remained to this effect until the commencement of the Act of 1958. By section 16 of that Act, it is lawful to publish defamatory matter if the matter is true, and it is for the public benefit that the publication complained of should be made. The Act of

1958 does not expressly make the question of public benefit in this context a question for the jury, but it is treated, no doubt rightly, as a jury question.

64. One cannot in 1971 be sure about the reasons which led the legislature to enact in 1847 section 4 of the Act II Vic. No. 13, or afterwards to maintain the law in the state in which it was put by that Act. One reason may have been the recognition of the feelings of transported convicts and of emancipists (note the reference to amputations of indictable offences in section 2 of the same Act, and see the article by Windeyer J. (1935) 8 A.L.J. 319). A second reason may have been an expression of the more general idea that gratuitous destruction of reputation is wrong, even if the matter published is true. The second reason is sufficient, in our view, to justify the view that it is only in certain circumstances that truth should be a defence.

65. We think that the present state of the common law as altered by section 16 of the Act of 1958 calls for alteration in three ways. Firstly, we think that a test of truth and public benefit should give place to a test based on truth and public interest. Secondly, We think that the question whether that test is satisfied in respect of public interest should be for the judge and not for the jury. Thirdly, we think that if a man publishes the truth on an occasion of qualified privilege (whether or not the imputation relates to a matter of public interest) he should have a defence, which is not defeasible by proof of malice. We go on to discuss each of these proposals in turn.

66. First we deal with the substitution of a test relating to public interest for the present one of publication for the public benefit. There is perhaps little ultimate difference between the two tests. However, the concept of public interest in the law of defamation is well understood, especially in relation to comment. We would not propose retention of the test of publication being for the public benefit unless we could see that the test had some merit, not shared by the test of public interest, which would justify continuance of the diversity. We see no such merit. Indeed we think that common considerations of policy underlie the restraint of the defence of truth to cases of publication for the public benefit and the restraint of the law of fair comment to cases where the comment is on a matter of public interest. Those common considerations of policy should have a similar expression both as regards truth and as regards comment.

67. The second alteration which we propose concerns the functions of judge and jury. The question whether the publication was for the public benefit is a question for the jury under the present law. Under the proposed Bill the question whether, on the facts, the imputation relates to a matter of public interest would be a question for the judge (Bill ss. 12, 15, 16). Thus the proposed Bill would take one question away from the jury and create a new question for determination by the judge: the powers of the judge would be enlarged and the powers of the jury would be diminished.

68. We propose this change because we think that, if, as we propose, there should be a reversion to the common law for the general principles of qualified privilege, there would be an irrational diversity of function as between the defence of truth on the one hand and the defence of qualified privilege on the other hand. At common law it is for the judge to determine whether the matter complained of was published on an occasion of qualified privilege. The questions of duty and interest which arise in relation to qualified privilege are analogous to, and in some respects identical to, those which arise on an issue whether the matter complained of relates to a matter of public interest. We think that these questions are more fit for determination by a judge than by a jury. Accordingly we would resolve the diversity by assigning all these questions to the judge, subject to the jury's determination of any relevant disputed facts.

69. The assignment of these questions to the judge has the advantage that the questions will be determined by reference to well-known criteria. It should therefore be easier for a man to know beforehand whether what he proposes to publish will be defensible if he is sued for defamation. Under the present law, once the judge has ruled that there is evidence on which the jury might find that publication was for the public benefit, the jury is at liberty to decide the question one way or the other without giving reasons and, of course, without giving any guidance for future cases.

70. The assignment of these questions to the judge would avoid a curious anomaly in cases where a defendant relies not only on truth (together with whatever additional requirements may be necessary for that defence) but also on an alternative case (such as fair comment) which depends on the matter published being of public interest. Under the present law, the jury would have to decide, in relation to the defence of truth, whether the publication was for the public benefit, but the judge would have to decide, on the alternative case, whether the

matter published was of public interest. The anomaly is that virtually the same question is assigned to different tribunals.

71. The third alteration which we propose is that proof of malice should not defeat a defence that the defamatory imputation was published on an occasion of qualified privilege and the imputation was true. For the present purposes an occasion of qualified privilege at common law is adequately stated as being an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it: *Adarn v. Ward* [1917] A. C. 309, 334. For example, a teacher may say to the parents of a schoolboy in his charge that the boy has been caught stealing. The duties and interests of the teacher and the boy's parents are such as to give an occasion of qualified privilege for the statement. If the statement is proved to be true, that should, so far as the law of defamation is concerned, be an end to the matter.

72. The law of qualified privilege provides a ready set of rules for determining the occasions on which publication to a limited audience ought to be defensible. Truth should be a defence where the matter complained of is published on an occasion of qualified privilege and, we think that, as in other cases where truth is a defence, the defence ought not to be defeasible by proof of malice in the defendant. The range of material on which a jury may infer malice is wide and the question whether an inference of malice should be drawn is, as a rule, very much a matter of opinion. We do not think that the defence should be subjected to this measure of insecurity.

Section 16: Truth: contextual amputations

73. Suppose that the defendant has published an imputation that the plaintiff has been convicted of simple larceny and an imputation that the plaintiff has been convicted of fraudulently converting trust property to his own use. Suppose that the first imputation is false but the second is true. If the plaintiff sues for damages for defamation in respect of both amputations a defence of truth will fail because the truth of both charges cannot be proved. In England the effect of the Defamation Act 1952, section 5, is that in such a case a defence of truth will succeed if the first imputation did not materially injure the plaintiff's reputation having regard to the truth of the second imputation. We agree with the object of this section, as far as it goes.

74. But if on facts such as these the plaintiff sues only in respect of the first imputation he will still succeed notwithstanding a provision along the lines of section 5 of the English Act of 1952: *Plato Films Ltd v. Speidel* ([1961] A.C. 1090). A Bill (the Freedom of Publication Protection Bill) was introduced in Parliament at Westminster in 1966 with a view, amongst other things, to substitute a new section for section 5 of the 1952 Act. The new section would have embraced the case where the plaintiff sues on such amputations only as cannot be proved to be true. We agree also with the object of this proposed substitution. Section 16 is intended to carry this object into effect. Its expression has to be more elaborate than that of the English proposals because place must be given to questions of public interest and qualified privilege. The Freedom- of Publication Protection Bill was not passed: this was, we believe, because of the controversial nature of other provisions of the Bill.

Part III, Division 3: Absolute privilege

75. It has long been established by the common law that there is an absolute privilege for amputations made by a member of the Parliament of New South Wales in the course of proceedings in Parliament: *Gipps v. McElhone* ((1881) 2 L.R. (N.S.W.) 18). Statutory provision to this effect was made in New South Wales for the first time by section 11 (1) of the Act of 1958. We think that the common law in this respect is adequate and, indeed, is more serviceable than the statutory provision. It is more serviceable because, if a new case arises, for example, whether there is an absolute privilege for something said in the proceedings of a select committee of a House of Parliament, the question can be decided by reference to the real interests involved rather than by a process of statutory construction: cf. s. 12 of the 1958 Act; *Goffin v. Donnelly* (1881) 6 Q.B.D. 307. We therefore have not included in the Bill any provision along the lines of section 11 (1) of the 1958 Act.

76. The common law also gives adequate protection to a petition to Parliament: *Lake v. King* (1680) 1 Wms. Saund. 131; 85 E.R. 137). The Bill therefore has no equivalent to section 11 (2) of the 1958 Act.

77. For similar reasons we think it better that the privilege for amputations published in the course of proceedings in a court should be left to the common law. Although there is a decision in New South Wales that a witness giving evidence in court has only a qualified privilege (*Smith v. Nash* (1850) Legge 594), it has never been

questioned that the common law is the same here as in England and it is well established in England that there is an absolute privilege for publications published in the course of proceedings of a court. The Bill, therefore, does not reproduce the matter as to courts of justice in section 12 of the Act of 1958.

78. Section 11 (3) of the Act of 1958 ought to be considered with section 40 of the same Act. Section 40 has its origin in sections 1 and 2 of the Parliamentary Papers Act 1840 (3 & 4 Vict. c. 9) of the United Kingdom. The Act of 1840 was passed to resolve an acute constitutional controversy. The decision of the Court of Queen's Bench in *Stockdale v. Hansard* ((1839) 9 Ad. & E. 1; 112 E.R. 1112) was an episode in that controversy: it led to a collision between the Court of Queen's Bench and the House of Commons. It was an action for damages for defamation. The plea of the defendant was to the effect that he had published the matter complained of under the authority of the House of Commons. The plaintiff demurred to, the plea. The Court held, in a decision contrary to a resolution of the House of Commons, that the plea did not show any privilege, and gave judgment for the plaintiff on the demurrer.

79. At least four other actions were brought by Stockdale against the same defendants for the same defamatory matter. In one of these actions the declaration was filed on the 9th of March, 1840, and interlocutory judgment was signed on the 18th of March. On the 14th of April assent was given to the Act of 1840; on the 20th of April the Speaker of the House of Commons gave a certificate under the Act and on the 25th of April the defendant obtained an order under the Act that the proceedings in the action be stayed. See *Stockdale v. Hansard* ((1840) 11 Ad. & E. 297; 113 E.R. 428).

80. The Act of 1840 did not in terms create a privilege for a publication under the authority of a House of Parliament. What it did was provide a summary procedure whereby a defendant in such a case was entitled to a stay of proceedings. The explanation for this course of legislation may be that Parliament thought that legislation creating a privilege might appear to be inconsistent with the repeated resolutions of the House of Commons to the effect that there already was such a privilege. The explanation may be that Parliament wished to bring pending proceedings to a halt notwithstanding the entry, before assent to the Act, of judgment on liability. Or the explanation may be that to provide a statutory defence of privilege would be inconsistent with other resolutions of the House of Commons directing Hansard not to defend such actions (see the note at 11 Ad. & E. 274; 113 E.R. 419, 420).

81. At all events, however appropriate it may have been to legislate in this way in England in 1840, we do not see why, at the present time, this single case of privilege should have a special procedure to support it, a procedure which Parliament has not provided in support of other cases of absolute privilege, for example, the privilege of its own members, and the privilege of those taking part in court proceedings.

82. The Act of 1840 has been treated as creating a privilege in such cases (Gatley paragraph 421): whether this is correct or not, we think that the 1958 Act took the right course in providing expressly for the privilege in section 11 (3). The substance of this subsection appears in section 17 (1), (2) of the Bill.

83. The English Act of 1840 gave a somewhat similar procedure by way of stay of proceedings for the protection of a person who publishes a copy of a document published under authority of a House of Parliament. There is an equivalent in section 40 (3) of the 1958 Act, but the 1958 Act does not expressly provide a privilege for such a publication. We think that there should be such an express provision and section 17 (3) of the Bill has this for its purpose.

84. For the reasons we have given, we do not think that there is any need today for the special procedures for stay of proceedings which now appear in section 40 of the 1958 Act. There is therefore no such provision in the Bill. Where there is a clear case of absolute privilege a court may put an end to the proceedings under its inherent powers as to vexatious proceedings or under such a rule as rule 5 of Part 13 of the rules in the Fourth Schedule to the Supreme Court Act, 1970. See *Merricks v. Nott-Bower* (1965) 1 O.B. 57). We think that this power is adequate for the control of such cases.

Section 17: Parliamentary papers

85. We have discussed this section in the general notes on Division 3 of Part III of the Bill (paragraphs 78 to 83 above). We add that section 17 (2) would give to the Government Printer a privilege similar to that which he has

under section 11 (3) of the 1958 Act. Section 17 (2) is, however, drawn so as to operate directly rather than by a fiction.

Sections 18, 19: Proceedings and reports of inquiries

86. Section 18 takes the substance of section 12 of the Act of 1958, except so far as concerns courts of justice. Section 19 takes the substance of section 13 of the Act of 1958. Each of 66 the new sections speaks of an Act or an Imperial Act rather than a statute". "Statute" may or may not be confined to an Act of New South Wales.

87. No provision is made in sections 18 and 19 for an inquiry under a foreign statute or under foreign executive or parliamentary authority, because the sections are concerned only with publications in New South Wales. No provision is made for an inquiry under a Commonwealth Act or under Commonwealth executive or parliamentary authority because we think that questions of privilege in such a case are more appropriately left to Commonwealth laws.

Part III, Division 4: Qualified privilege

88. Subject to exceptions to be noticed in paragraphs 97 to 109 below, the Bill leaves to the common law the question whether an occasion is one of qualified privilege and the question whether a publication made on such an occasion is entitled to protection.

89. The structure of section 17 of the Act of 1958 makes difficult the separation of three matters: matters going to the existence of an occasion of privilege, matters going to the nature of the imputations which are protected on such an occasion, and matters showing want of good faith and thus destructive of the protection. For example, the section relies on a distinction between motive (as an element in good faith) and purpose (as a matter relevant to the existence of an occasion for protection: see paragraphs (b), (c), (e), (g), (h)). The distinction, or supposed distinction, between motive and purpose is as intractable as any known to the law. Purpose and motive are, we believe, two aspects of a single complex state of mind. The search for, or imposition of, a line between these aspects has made a significant contribution to the complexity of the law under the Act of 1958.

90. The matters to which we have referred in paragraph 89 need to be separated because some are for the judge and others are for the jury. We think that the common law has made a clearer and more serviceable separation than does the Act of 1958.

91. Section 17 of the Act of 1958 sets out in eight paragraphs a list of cases in which there is a qualified protection. Each paragraph is open to criticism and, subject to a few points to which we shall come presently (paragraphs 100 to 109 below), we think that the attempt by section 17 to formulate a list of cases of qualified privilege is less serviceable than the more general concepts of the common law. The concepts of the common law are better because they are concepts, not verbal formulae, and because they have the flexibility of common law doctrines, and are thus capable of growth, change and fresh formulation.

92. Section 17 (h) of the 1958 Act calls for more particular discussion. It gives a qualified protection where the publication is made "in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit and if, so, far as the defamatory matter consists of comment, the comment is fair".

93. The confinement of the protection, as regards comment, to comment which is fair seems at once, on the one hand, to recognize the apparent breadth of section 17 (h) and, on the other hand, to go far beyond the detailed provisions of section 15, which deals with fair comment generally. We prefer to treat special protection for comment as a matter separate from defences of qualified privilege and accordingly would drop that part of section 17 (h) which deals specially with comment.

94. Section 17 (h) has been the source of great difficulty and many of its problems remain unresolved. But we think that, at least in the context it would have in the proposed Bill, a provision along the lines of section 17 (h) would give too extensive a privilege.

95. Under the Bill, defences of truth are more widely available, a much greater range of reports may be published with impunity, provision is made for escape from liability in the case of "innocent" defamation, and exemplary

damages are abolished. In this context, a man having no other defence should not, we think, be given a defence by reference merely to the tests of good faith, public interest and public benefit under section 17 (h). The Bill therefore has no counterpart of this paragraph.

96. For the same reasons, we do not recommend adoption of the proposal of Lord Shawcross's Committee (at pp. 43-44 of its report), that "there should be a statutory defence of qualified privilege for newspapers in respect of the publication of matters of public interest where the publication is made in good faith without malice and is based upon evidence which might reasonably be believed to be true, provided that the defendant has published upon request a reasonable letter or statement by way of explanation or contradiction and withdrawn any inaccurate statements with an apology if appropriate to the circumstances."

Section 20: Multiple publication

97. This section deals with two problems which arise where the matter complained of is published to numerous recipients and the publication, if made to some only of the recipients, would be protected by qualified privilege. The state of affairs described in the definition of "multiple publication" in section 20 (1) (a) is common to the cases where the problems arise.

98. Section 20 (2) deals with cases where the multiple publication is excessive in part. Where publication is excessive in reference to an occasion of qualified privilege, it appears to be commonly assumed that the defence of privilege fails altogether. It fails, that is to say, not only as regards publication to those outside the privilege but also as regards those within it. See, for example, *Chapman v. Lord Ellesmere* ([1932] 2 K. B. 431). This must be wrong in principle, because the plaintiff has a separate cause of action for the publication to each person to whom it is made and the defendant must therefore be entitled to defend separately as to each person to whom publication is made. The point will no doubt cause little practical difference, but the extent of publication is relevant to the measure of damages and publication within the privilege ought to be disregarded for this purpose. Section 20 (2) would not affect the evidentiary significance of excessive publication on an issue of malice.

99. Section 20 (3) states what we understand to be the law. The main purpose of including the section is to negate what we regard as an heretical view which has received some countenance in relation to newspapers of wide distribution. This view is that, as a matter of law, there can be no privilege for matter published in a national newspaper where the relevant duties and interests only affect a section of the readers of the newspaper. We think that this view is a conclusion improperly drawn from cases where, on the facts, publication in a national newspaper went beyond what was reasonable in the circumstances. It may not have been reasonable, at the times and places concerned, to publish in national newspapers the libels in question in *Duncombe v. Datue* ((1837) 8 C. & P. 222); 173 E.R. 470) and *Chapman v. Lord Ellesmere* ([1932] 2 K.B. 431), but we do not think that the decisions on the facts in those cases should conclude cases arising in the future.

Section 21: Mistaken character of recipient

100. Section 21 is intended to give effect to the view that a man should be able to determine whether he has a privilege to speak on the basis of the circumstances as they reasonably appear to him. If he is held liable when a reasonable man in his position would have considered it his right or duty to speak, the use of occasions of privilege will be discouraged and hence there will be diminished protection for the interests in respect of which the law creates the privilege. The Defamation Act, 1958, recognizes this principle in section 17 (b), (d) and (e).

Section 22: Information

101. The general rule of the common law is that there is an occasion of qualified privilege only where the publisher of the matter in question has an interest or duty to publish it to the recipient and the recipient has a corresponding interest or duty to receive it. See paragraph 71 of these notes.

102. The Act of 1958, however, gives a qualified privilege in two cases where there is not, or may not be, any interest or duty in the publisher. Section 17 of that Act provides that "It is a lawful excuse for the publication of defamatory matter if the publication is made in good faith-

(d) in answer to an inquiry made (pursuant to contract or otherwise) person making the publication relating to some which the person by whom or on whose behalf the inquiry is made has, or is believed, on reasonable grounds, by the person making the publication to have, an interest in knowing the truth;

(e) (e) for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has, or is believed, on reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make his conduct in making the publication reasonable under the circumstances;”.

These provisions are (excepting the parenthesis in paragraph (d), referred to again in paragraph 106 of these notes) in substance identical with part of section 16 of the Queensland Defamation Law of 1899. This part of the Queensland section was intended to state the common law (57 Queensland Parliamentary Debates (1889) 737, 738; and see *Dun v. Macintosh* (1906) 3 C.L.R. 1134, 1147; *Howe v. Lees* (1910) 11 C.L.R. 361, 370).

103. We need not say whether paragraphs (d) and (e) of section 17 do indeed state the common law, because we think that in any event there should be a qualified privilege in these cases. Take, for example, the case where one person proposes to enter into a relation-ship with another and has reason to believe that a third person may have information concerning that other, which may affect his course of action. The common law has dealt with this situation by enquiring whether the giver of the information had, in the circumstances, a duty to answer. This test is artificial. It is also insufficiently wide to cover many of the cases where protection should be afforded.

104. Section 22 makes the interest or apparent interest of the recipient the determining factor. If there is an appropriate interest or apparent interest, and the conduct of the publisher in publishing the matter in question is reasonable, then the section would give a qualified privilege. The section puts a test of reasonableness in the place of the common law doctrines of interest or duty in the publisher. The section is intended to supplement the common law in this field and not to hinder its development by judicial decision.

105. The requirement of reasonableness in section 22 (1) (c) will allow a wide range of matters affecting the publisher to be considered. For example, in appropriate cases, we contemplate that the requirement would let in evidence of such matters as the following-

(a) the care taken by the publisher that the matter published, where it expresses or purports to express the opinion of the publisher, is fair to the person defamed;

(b) where the matter published expresses or purports to express the opinion of the publisher, the care taken that the recipient of the matter is not likely so to be misled thereby as to the extent or source of the knowledge of the publisher of any facts (including the opinion of a person other than the publisher) relevant to the forming by the publisher of the opinion, as to cause the recipient to overrate the reliability of the opinion;

(c) where the matter expresses or purports to express the opinion of the publisher, the care taken by the publisher to disabuse the recipient, where the publisher is aware or has cause to suspect that the recipient is likely to overrate the reliability of the opinion, of the cause of that misconception, if any.

(d) the care taken by the publisher that the matter published, where it expresses or purports to express fact (including the opinion of a person other than the publisher) accurately conveys to the recipient the truth as it is within the knowledge of the publisher;

(e) the care taken by the publisher fairly to inform the recipient of the uncertainty, if any, of the publisher of the truth of the matter published, where it expresses or purports to express fact (including the opinion of a person other than the publisher).

106. Section 22 (3) deals with the case of publication for reward. Legislation on this point was first enacted in New South Wales in 1909 (Defamation (Amendment) Act, 1909, s. 6), soon after the decision of the Privy Council in *Macintosh v. Dun* ([1908] A.C. 390; 6 C.L.R. 303). That decision denied a qualified privilege to a mercantile agency for an answer to an inquiry concerning the commercial and financial standing of a firm of merchants. The privilege was denied because, in the words of the headnote in the Commonwealth Law Reports, “the defendants were acting from motives of self-interest, and not from a *bona fide* sense of duty or for the general interest of society, in publishing the libel.” The subsequent legislation has been section 30 of the Deiamation Act, 1912, and the parenthesis “(pursuant to contract or otherwise)” in section 17 (d) of the, Act of 1958.

107. The existence of mercantile agencies and credit bureaux calls for special consideration in the law of defamation. Some such bodies are formed and operated on a co-operative basis by businessmen interested in

the information which the body provides. Others provide information for reward. They are an established part of the machinery of commerce, and they should have some, measure of defined qualified protection. The function of such bodies is not necessarily confined to the storage and supply of matters relating to character, credit or commercial solvency, but can and, with the advance of computers, will increasingly include the storage and supply of other information concerning a person. Where the information supplied by one of these bodies is true but is defamatory, and the occasion is not one of privilege, a defence based on truth will rarely be available, because the necessary conditions of public benefit (under the Act of 1958) or public interest (under the proposed Bill) will as a rule be absent. In many cases it is not easy to find an occasion of privilege, because it is not easy to fit the giver of the information into a category of persons who has a duty reciprocal to the interests of the recipient. Whilst it may be clear enough that the former employers of an applicant for employment has a sufficient duty or interest to convey defamatory information to his prospective employer, it is more difficult to find such duty and interest in the case of an independent custodian of the very same information.

108. The realities of the situation are, we think, as follows. Suppose Jones proposes to employ Smith, or proposes to give credit to Smith. Jones can make inquiries of the people who have employed Smith in the past or have given Smith credit in the past. The answers to the inquiries will have a qualified privilege. If Jones is diligent enough, and if the people of whom he inquires are responsive enough, Jones can build up a body of information about Smith similar to that which he could get from a credit bureau. If Brown has similar proposals he can make similar inquiries and build up a similar body of information. But all this is wasteful. If a credit bureau can have a qualified privilege to give the relevant information, business efficiency is promoted and Smith is no worse off. Indeed, in some ways Smith will be better off, because Jones and Brown will be able to make up their minds more quickly.

109. We think that persons supplying information for reward, of whom mercantile agencies and credit bureaux are important examples, may safely be given the qualified privilege given by section 22, safe guarded as that privilege is by the provisions as to the interest of the recipient and as to reasonableness in paragraphs (a) and (c) of section 22 (1).

Section 23: Qualified privilege a question for the Court

110. At common law, where there is a defence of qualified privilege, it is for the judge to say whether the imputation complained of was published on an occasion of qualified privilege, whether the imputation was relevant to the occasion, and whether the publication was excessive. There is the qualification that, if any of the facts necessary for the determination of these questions is in dispute, that dispute must be resolved by the jury. If the judge determines that the imputation was published on such an occasion and was relevant to the occasion, and that the publication was not excessive, the defence of qualified privilege is established. If the plaintiff relies on malice to defeat the defence, it is for the judge to say whether there is evidence on which the jury might find malice, and for the jury to say whether there was malice in fact.

111. This division of function between judge and jury is well understood and has worked well. On the other hand, the division of function required by the 1958 Act has been and still is a matter of controversy and difficulty. We do not catalogue the instances where the 1958 Act has been troublesome: we are convinced, however, that the better course is to return to the common law.

112. The Bill, therefore, says nothing about the division of function in cases where the qualified privilege arises under the common law. It seems best, however, to make explicit provision on the subject in respect of the qualified privileges arising under sections 20, 21 and 22 of the Bill.

Defeat of qualified privilege

113. A defence of qualified privilege arising by the common law is defeated if it is shown that, in publishing the matter complained of, the defendant was actuated by malice. "Malice" here means ill-will or spite or any indirect or improper motive in the mind of the defendant at the time of publication: Halsbury's Laws of England 3rd edn Vol. 24 (1958) p. 79.

114. Section 17 of the 1958 Act excuses the publication of defamatory matter "in good faith", subject to satisfaction of the other requirements of the section. The section concludes with the following paragraph-

“For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication do not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue.”

115. We think it better not to try to spell out in an Act what is involved in “malice” or in its opposite, “good faith”. We think so because there is too great a risk of inadvertently doing an injustice. Consider, for example, the closing words of the paragraph quoted from section 17: “and does not believe the defamatory matter to be untrue”. In the general run of cases it would be weighty evidence of malice that the defendant knew what he had published was untrue. “Though it is sufficient as a rule for the plaintiff to show that the defendant made the statement without honestly believing it to be true, yet there may be occasions where a person is under a duty to communicate a statement made to him, or a rumour which he has heard, to another who has a duty to receive it, although it contains matter defamatory of the plaintiff which the person whose duty it is to communicate it knows or believes to be untrue. In such a case the person making the communication makes it honestly, and in the performance of the duty which creates the privileged occasion, although he has no belief in its truth, or may even know it to be untrue, and therefore in such a case the statement is not made with actual malice”: Halsbury’s Laws of England 3rd edn Vol. 24 (1958) p. 80.

116. The English Defamation Act 1952 uses a different method. By section 7 (1) of that Act a publication in specified circumstances shall be privileged unless the publication is proved to be made with malice”. This method no doubt makes it clear enough that the statutory privilege is defeasible on grounds similar to those on which a common law qualified privilege is defeasible. We prefer not to adopt it, however, because of its use of the word “malice”. That word has been a fertile source of doctrine in the law of defamation but it suffers from a diversity of senses commensurate with that fertility. Many of its senses, especially the leading sense of a motive foreign to the purpose for which the privilege is given, are not the senses which the word bears in ordinary language. The word is thus misleading to a man who has not made a study of the law of defamation. “Malice” does not occur in the 1958 Act and that is, we think, a model which ought to be followed.

117. The means we choose to indicate that the privileges under sections 20, 21 and 22 should be defeasible in ways analogous to the ways in which qualified privileges at common law are defeasible is simply to say that the privileges under those sections are qualified privileges. The idea of qualified privilege is so well known to the law that we think that that description of the statutory privileges will suffice to render them defeasible in appropriate circumstances by analogy to the common law.

Section 24: Protected reports

118. We have coined the expression “protected report” to denote a report of proceedings mentioned in Part 2 of the Second Schedule to the Bill. The list of proceedings in that Part represents a considerable widening of categories and removes or relaxes the geographical limits which apply in a number of instances to proceedings referred to in section 14 of the Defamation Act, 1958. The extensions made by section 7 of the English Defamation Act 1952 have been incorporated and extended. The proposals made in 1965 by the joint working party under the chairmanship of Lord Shawcross upon “The Law and the Press” (paragraph 124), as to foreign parliamentary and judicial proceedings, have been largely adopted.

119. In summary, the effect of the proposals is that the subject matter of these proceedings is assumed to be of public interest so that a fair report of the proceedings is not actionable, nor is a genuine opinion expressed about them, so long as the opinion itself concerns a matter of public interest in the common law sense.

120. The history of the law as to reports has been one of occasional recognition by the common law of new heads of privilege but, more importantly, it has been one of repeated broadening by statutory provision of the categories of reports and of the categories of publishers entitled to protection.

121. This Bill goes further than any existing legislation in British Commonwealth countries of which we are aware: it goes further, in particular, by relaxing or eliminating geographical limitations. The provisions are based upon the view that protection to the reporting of legal and political matters should be given because of the educational and cultural importance of openness about the workings of political society, and the manner in which freedom of such reporting contributes to the ideal of an open society as well as because of the importance which a particular item

of news might have for the taking of future political or economic action. The proceedings in question are the source material for information and discussion on current affairs, whether matters of politics, law, finance, or other public concern.

122. Libraries contain large amounts of foreign legal materials. It is not desirable that persons involved in or referred to in European or American litigation should be able to take action against those in charge of the libraries for publishing the material in New South Wales. There may be this liability under the present law: it would be put that the subject matter of the foreign case was not such as to make such publication of the report a matter of public concern in New South Wales. A necessity for internal censorship in such circumstances would be oppressive. Similar considerations apply in respect of journals in other fields of current affairs.

123. In respect of a public meeting, the Bill (Second Schedule, para. 12) departs from previous legislation in that there is no requirement that the meeting should be lawfully held for a lawful purpose. Such a requirement puts too heavy a burden on the reporter: how is he to know that the meeting is lawfully held or that it is held for a lawful purpose? Further, we think that a report of the proceedings of an unlawful meeting is likely to be a matter of such legitimate public interest as to make it right to drop the restriction as to lawfulness.

124. By section 24 (2), there is a defence for the publication of a protected report if the report is "fair". The common law gives a defence to certain reports if "fair and accurate". See for example *Wason v. Walter* ((1868) L.R. 4 Q.B. 73). In England and, before 1959, in New South Wales statutory defences for reports have as a rule been confined to reports that are "fair and accurate". See for example the Defamation Act, 1912, s. 29.

125. With one exception, the 1958 Act dropped accuracy as a requirement additional to fairness. See section 14 (1). The exception is in section 14 (1) (i) which speaks of a "fair and accurate" report of certain proceedings of the committee of the Australian Jockey Club. The exception is, we think, to be explained by the fact that section 14 (1) (i) is taken almost word for word from section 29 (1) (i) of the 1912 Act. It is a mere anomaly.

126. We think that the 1958 Act is right in not requiring accuracy in addition to fairness. To be fair a report must achieve a standard of accuracy. "The report need not be verbatim, but to be privileged it must accurately express what took place. Errors may occur; but if they are such as not substantially to alter the impression that the reader would have received had he been present at the trial, the protection is not lost. If, however, there is a substantial misrepresentation of a material fact prejudicial to the plaintiff's reputation, the report must be regarded as unfair . . .": *Thom v. Associated Newspapers Ltd* ((1964) 64 S.R. 376, at p. 380).

127. Section 24 (3) of the Bill makes an innovation. "Protected reports" in newspapers and other journals, and broadcast reports, are a large part of the material upon which informed discussion of matters of public interest must be based. Such discussion must involve repetition of the reported matter or publication of the substance of the reported matter, in whole or in part. The law should not inhibit such discussion. But it would do so if a person engaging in the discussion were at risk in defamation in case of some bidden unfairness in a protected report previously published by some one else. Section 24 (3) therefore gives a defence to a person who publishes matter in reliance on a protected report which he does not have grounds for knowing to be unfair, being a protected report previously published by some one else.

128. Section 24 (4) is analogous to section 24 (3), but deals with the case of publication of matter in reliance on what purports to be a protected report but in fact is not. In the cases dealt with by s.24 (3), (4), the real author of the harm to the plaintiff is the original publisher of matter bearing a deceptive appearance. A victim of the deception who republishes the material for a proper purpose ought not to be liable in defamation.

Section 25: Copies, etc., of official and public documents and records

129. Section 25 gives a defence for the publication of matter based on the official and public documents and records mentioned in Part 3 of the Second Schedule. It will be useful to comment on some of the items in that Part.

130. Paragraph 13 in the Second Schedule covers parliamentary papers. Section 14 (1) (c) of the 1958 Act covers papers of parliaments of the Australian States and of the Commonwealth. However, by the definitions in paragraph 1 of the Second Schedule, "parliamentary body" embraces any parliament or legislature in the world. It is a question on which minds may differ, but we think that the extension is justified by the importance of informed

discussion of public affairs, including foreign affairs, and the removal of obstacles to the receipt and use of foreign journals.

131. As to reports, etc., of the Parliament of New South Wales, paragraph 13 overlaps section 17 (3) of the Bill. Section 17 (3) gives an absolute privilege for republication of official reports, etc., and for publication of copies of official reports, etc.; paragraph 13 (read with section 26) gives a qualified defence for such publications. The difference is that section 26 covers fair extracts, fair abstracts and fair summaries but section 17 (3) does not.

132. Paragraph 14 deals specially with the official reports of the debates and proceedings of the Parliament of New South Wales. The paragraph would make it unnecessary to show that these reports are published by order or under the authority of the Council or the House as the case may be.

133. Paragraph 14 in the Second Schedule also overlaps section 17 (3): see the notes on paragraph 13 (paragraph 131 of these notes).

134. Paragraph 15 is based on section 14 (1) (e) of the 1958 Act. It reverts to the law before the 1958 Act in not being confined to "default" judgments. It is extended so as to embrace decrees and orders as well as judgments. It is also extended so as to apply to the judgments, etc., and records of any court anywhere in the world. Provisions along these lines are no doubt enacted for the protection of credit bureaux. We do not see any reason for limiting it to courts of New South Wales, as presumably section 14 (1) (e) of the 1958 Act is limited by section 17 of the Interpretation Act, 1897.

135. Paragraph 15 is not expressed to exclude judgments, etc., the publication of which the court has forbidden, or is otherwise unlawful. For example, an order of adoption may contain matter the publication of which is prohibited by section 53 of the Adoption of Children Act, 1965.

136. We take the view that any legal restraint on publication will have its own sanction, for example, the penalty in section 60 of the Adoption of Children Act, and the powers for the punishment of contempt of court. It should not have an additional indeterminate penalty in the shape of damages for defamation.

137. There is the competing view that material such as that in question ought not to be regarded by the law of defamation as fit material for public discussion and therefore its be privileged. This competing view has force, courts of our own country, but we think that be wrong, and seriously wrong, as to courts of share our practices concerning the publicity of balance, we think that the exclusion ought not be made.

138. Paragraph 16 describes matter for the publication of which there is a qualified privilege at common law (Gatley on Libel & Slander 6th edn (1967) paragraph 605), at least so far as concerns matter on public record in New South Wales, or on public record pursuant to the laws of the Commonwealth. We are led to include the paragraph partly because in doing so we adopt a step taken in England in 1952 and partly because we think it desirable to extend the privilege to the publication of matter on public record in other Australian States and in the Territories of the Commonwealth. We do not recommend that matter on public record in other countries be included: the matter in question is of comparatively minor importance and, while are not disposed to include all countries, we do not see how a satisfactory line can be drawn otherwise than as appears in the paragraph.

Section 26: Defeat of defence under ss. 24, 25

139. This section is cast in a form which should make it clear that a case under the section is one to be raised by the plaintiff in reply and one on which he carries the onus of proof. The section follows the 1958 Act in not using the word "malice" and in stating the purpose or motive the absence of which will defeat the defence.

140. The English Defamation Act 1952, following the scheme originated by the Law of Libel Amendment Act 1888, s. 4, takes away the statutory protection for some reports and other material if it is proved that the defendant is in default in that he has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances. In New South Wales there has since 1909 been legislation (based on a Queensland model) by which similar default is evidence of a want of good faith (1909 Act s. 5 (1), 1912 Act s. 29 (1), 1958 Act s. 14 (1)).

141. Our proposals adopt neither of these schemes. We dislike the default being evidence of a want of good faith, because it gives an artificial probative effect to something which may in the circumstances have no probative value. The common law concepts of good faith, and of relevance in the law of evidence, are, we think, adequate to deal justly with the case to which these provisions are addressed.

142. We reject also the scheme of the English legislation, where-by the statutory protection is defeated if the default is proved. We do so for several reasons. First, we think that, for the purposes of defence, the default should not be more than evidence tending to negative good faith. Second, we do not think that a newspaper publisher or other defendant ought to be obliged to publish a statement drawn up by somebody else (see *Khan v. Ahmed* ([1957] 2 Q.B. 149)) as the price of escaping liability in damages for what must in any case have been a fair report. Third, although in 1948 the Porter Committee spoke (at page 26 of their report) of the right to the insertion of a statement in contradiction or explanation as valuable in the case of some reports, we think that the provisions in question have had little use: indeed there are, so far as we know, but two reported cases on the provisions (*Khan v. Ahmed* (above) and *Hansen v. Nugget Publishers Ltd* ([1957] 4 D.L.R. 791)) and in neither of those cases was there a real attempt by the plaintiff to make the appropriate request. Further, although the English provisions appear to call for pleading by reply, Gatley, the leading text book on defamation, gives no form of such a pleading, nor does Bullen and Leake's *Precedents of Pleadings* (11th edn, 1959). One reason for the apparent absence of use of the provisions is the wellknown counsel of prudence, that a man who is attacked by a newspaper is well advised not to attempt to reply to the attack in the same newspaper. See the vigorous denunciation of the provisions in Spencer Bower at pp. 409, 410.

143. Our conclusion is that a default of the kind under discussion is best left to such relevance to good faith as it may have, at common law.

144. Section 14 (1) of the 1958 Act speaks of publication "in good faith for the information of the public". Section 26 of the Bill adds "or the advancement of education or the advancement of enlightenment". These words are added because we think that questions may arise whether matter published to limited audiences is published for the information of the public. We have in mind as examples publication in the course of the activities of universities and other educational institutions and publication in the course of the activities of learned societies. Section 26 will also extend to republications for the purpose of discussion.

145. Our proposal for the use of the word "enlightenment" calls for justification. The word may, to some readers, carry emotional overtones. It may carry the idea, for example, of patronizing instruction to the ignorant; it may even carry the idea of brainwashing. We do not think that the word properly bears these meanings and we are reluctant to discard an otherwise useful word on the ground that it has sometimes been abused. The sense which we think that the word ought to bear in its context is a sense corresponding to part of the fifth sense in the Oxford Dictionary of the word "enlighten", namely, "to supply with intellectual light; to impart knowledge or wisdom to; to instruct."

146. A section speaking of publication "for" the information of the public or "for" anything else is bound to raise questions of mixed motives or purposes. Suppose a writer of an article wishes to illustrate some point he is making by reference to cases in the courts. Suppose there are many cases which would serve his purpose but one case is reported in a way which is defamatory of a person to whom the writer bears illwill. Suppose further that the writer chooses that report for repetition in his article. Let it be that he publishes the article for the information of the public but he also intends to harm the reputation of that person. Do the facts fall within section 26 or not?

147. On our understanding of the common law of qualified privilege,, the privilege is lost if the defendant had any appreciable improper motive or purpose, whether or not he also had some proper motive or purpose, and it does not matter how far any of his motives or purposes were dominant. We think that the same result flows from the use of the words "in good faith" in section 14 (1) of the 1958 Act. These words appear to us to import concepts of singleness of motive or purpose and to involve the idea that the Publication was for the stated motive or purpose and not for any other. No other motive or purpose must have influenced the publication at all. Motive or purpose in this context looks to the effect which the defendant intended the matter to have on the minds of its recipients: it does not look to other things which the defendant might hope to achieve by the publication, for example, earning his living, or increasing the circulation of his newspaper.

148. We draw the significance we have mentioned from the words “in good faith” in their immediate context in section 14 (1) of the 1958 Act. This view of the effect of the words is much strengthened by the provision later in section 14 (1) that “a publication is said to be made in good faith for the information of the public if the person by whom it is made is not actuated in making it by illwill to the person defamed, or by any other improper motive We do not propose a similar provision in the present Bill because we think that the provision gets rid of one problem by creating another problem. The new problem is: What is an improper motive? The truth is that, in reference to states of mind, the less said by legislation the better.

Section 27: Court notices

149. In England there is a statutory qualified privilege for the publication in a newspaper of “a notice or advertisement published by or on the authority of any court within the United Kingdom or any judge or officer of such a court”, but the privilege does not protect the publication of “any matter which is not of public concern and the publication of which is not for the public benefit”: Defamation Act 1952, s. 7 (1), (3), Sch. para. 7. Section 27 of the Bill applies to the direction of any court in the world. It would clearly be unsatisfactory to confine the privilege to cases where the direction is by a court of New South Wales: at the least all Australian courts should be included. But we think that the courts of many other countries should be included. The United Kingdom and New Zealand come immediately to mind. We see no possibility of making a satisfactory discrimination amongst the countries of the world and we think that the prospect of unnecessary defamation by a notice of a foreign court is so small that it may safely be disregarded.

150. We do not propose the adoption of the further requirements of the English Act relating to public concern and public benefit. As to Australian courts, we think that the fact that the publication is directed by the court is a sufficient safeguard for propriety. As to foreign courts, it would be rare for the notice to be of public concern in New South Wales and the publication would rarely be for the benefit of the public in New South Wales: the requirement would destroy the utility of the section.

151. While the notices concerned will usually be published in a newspaper, we do not think that section 28 ought to be confined to publication in this way.

152. If the manner of publication is exorbitant (a fanciful example would be a full page advertisement of a divorce notice in a national newspaper), that would be matter tending to defeat the defence pursuant to section 27 (2).

Section 28: Official notices

153. This section is based on section 14 (1) (g) of the 1958 Act and on the English Act of 1952, s. 7 and Schedule paragraph 12. The English provisions apply to, amongst others, notices issued by local authorities (in a defined sense): this has led us to incorporate subsection (6) (b) in section 28.

154. The English provisions apply also to a “fair and accurate report or summary” of an official notice. This has led us to incorporate subsections (3) and (4) of section 28. Otherwise, we have taken section 14 (1) (g) of the 1958 Act as our starting point.

155. The 1958 Act qualifies the protection given to the publisher of an official notice or report. First, the publication must be in good faith for the information of the public. Where the notice or other matter is published in accordance with the official request and is published as a whole (that is, not by way of extract, abstract or summary or other report), we think that the defence ought not to be defeated unless it appears that the publication was not for the purpose of giving effect to the request. Subsections (1) and (2) of section 28 so provide.

156. Where, however, the defendant is not able to put the matter complained of, or its publication, squarely within the terms of the official request, we think that the defendant should face the stricter requirements, including a requirement as to public interest, which appear in subsections (3) and (4) of section 28. Section 28 (3) uses “fair” in place of “fair and accurate” in the English Act: see paragraphs 124 to 126 of these notes.

157. The second qualification under the 1958 Act is that the notice or report must have been issued by the government office, etc., “for the information of the public”. We think that, where a person is requested by an appropriate official or authority to publish the notice or report, it is putting an unnecessary burden on the publisher

to require him to see whether and by whom the notice or report was issued and with what motive or purpose it was so issued.

158. The third qualification under the 1958 Act is that the protection is conditioned by the provisions as to contradiction and explanation at the end of section 14 (1). We deal in paragraphs 140 to 143 of these notes with general significance of contradiction and explanation in relation to reports and similar matter. But we note here that these provisions are singularly inappropriate to the notices and reports in question: if there is to be any contradiction or explanation, that should be by the originator of the notice, not by a mere publisher.

159. Section 28 (5) states what might otherwise be a matter for controversy: the section would not protect the officer, etc., requesting the publication. Commonly he would have some separate defence of privilege.

160. Section 28 is made to extend to requests by officers, etc., of any State, of the Commonwealth, or of any Territory of the Commonwealth. This seems right having regard to the present day ease of travel and communication, but we do not think that the section can safely be extended to officers, etc., of the governments of other countries.

Part III, Division 7: Comment

161. Division 7 of Part III of the Bill leaves untouched the common law concept of comment. The Division also leaves room for the application and development of the common law concerning the material which may be a proper basis for comment, subject to three qualifications (see section 30 (2), (3), (4) of the Bill). Otherwise, the Division attempts a codification of a defence as to comment, and is intended to take the place of the common law as to fair comment and the place of section 15 of the Act of 1958.

162. The task of codification has many dangers. We should have, preferred not to have attempted it even in this limited field. We believe, however, that the law as to fair comment is defective in several respects and that these defects cannot be removed except by a basic reconstruction. These defects include uncertainty as to the test of fairness and uncertainty as to the onus of proof on the question or questions arising under the heading of fairness. There is uncertainty how far a defendant's success on a case of fair comment relieves him from liability for other defamatory matter published by him with the comment and made the basis of the comment. There is the further uncertainty whether it is right to speak of a "defence" of fair comment at all. These defects are aggravated by the form of pleading by a defendant called the rolled up plea.

163. Division 7 of Part III attempts to formulate a rational framework in which questions relating to comment can be dealt with. In brief and not fully accurate summary, the scheme of the Division is that there should be a defence as to any imputation complained of that the imputation is comment upon proper material for comment and relates to a matter of public interest. The Division picks up the common law as to what material is proper material for comment, subject to a relaxation of the requirements as to truth. If that defence is established, it can be defeated by the plaintiff showing, for example, in the case where the defendant is the author of the comment, that the comment did not represent the opinion of the defendant.

Functions of judge and jury

164. Where a defence of comment is raised then, unless it is conceded by the plaintiff that the matter in question is comment, there will generally be an issue of law for the judge as to whether it is capable of being construed as comment.

165. As a step towards determining this issue the judge must decide whether the material relied upon to base the comment is sufficiently indicated. This is because a jury could not reasonably construe a statement as comment unless there were such indication: the freedom to comment which the law permits involves that the person to whom the comment is made is allowed a choice to accept or reject the opinion expressed by the comment.

166. The judge's task may also involve a consideration by the judge of whether the inference could be drawn or the opinion be expressed upon, the material relied upon. This is because a jury could not reasonably construe a statement as comment if the statement could not possibly be an opinion based on the indicated material. There must be some rational relationship between it and the material on which it is based.

167. The judge must determine whether a man could possibly hold such an opinion on such material. The test is not whether a reasonable man, an honest man or a fairminded man could do, so. It is in applying this test that the judge must make allowance for prejudiced, biased and extreme views. It is not helpful to ask whether an honest man could have held such a view: honesty is not in question at this stage. And where the statement in question appears to express an extreme or prejudiced opinion, it is not sensible to ask whether a reasonable or fairminded man could have held such an opinion: a reasonable man does not hold extreme opinions and is not prejudiced. See also paragraph 198 of these notes.

168. If these questions are resolved by the judge in favour of the defendant, then it is for the jury to say whether, in fact, the words are to be construed as comment or not. The jury have to determine whether, in the circumstances of the publication, the ordinary reader or hearer would understand that the person publishing the words intended that they should be received as an expression of opinion upon the material relied upon. In determining this, the jury must take into account such matters as the form of the words, the context, tone of voice or method of presentation and the relationship between the material relied upon and the alleged comment. The degree of rational relationship between the alleged comment and the factual material will no doubt be relevant to the question whether the alleged comment was intended to be presented as a comment or as an assertion or repetition of another fact.

169. Where the author of the comment is the defendant or his servant or agent, if it is found to be the author's comment (*ex hypothesi* relating to a matter of public interest), then the defendant is entitled to succeed on the defence unless the plaintiff has pleaded and established that the defendant did not hold the opinion he expressed (Bill ss. 33, 34). If it is the comment of another relating to a matter of public interest, then the defendant is entitled to succeed unless the plaintiff has pleaded and established that the defendant's motive in publishing it was not proper in accordance with the Bill (s. 35).

Section 29: Comment generally

170. This section states the relationship between the common law as to fair comment on the one hand and the provisions of Division 7 on the other hand.

Section 30: Proper material

171. By the common law, in order that defamatory matter may be defended as comment, the material on which the comment is based must satisfy certain tests. The common case is where the matter published by the defendant comprises statements of fact and a comment based on those statements: in such a case he must, in order to defend the comment, prove the truth of the statements of fact.

172. A second kind of case is that where some work or conduct of the plaintiff has become common knowledge amongst the public: examples include a publisher of a newspaper, and a statesman whose conduct in negotiations with a foreign power has become a matter of public controversy. In this sort of case, it is not necessary that the comment should be coupled with a statement of the facts on which it is based. The basis of the comment must, however, be identified, so that it can be taken that a recipient will know the facts, or can ascertain them. The identification may be in the matter published by the defendant, or may rest in an inference drawn from the nature of the comment and the notorious circumstances in which it is made. Somervell L.J. gave an example of the last in *Kemsley v. Foot* "Many people regarded those who negotiated the Treaty of Utrecht as having betrayed their country. A bare comment on the loyalty of one of the negotiators might so obviously be understood as referring to the fact of the treaty and the negotiator's part in it that I would hesitate to say that the writer would be shut out from the plea of fair comment although there was no express reference to the treaty". ([1951] 2 K.B., at pp. 42, 43). In these cases the defendant must prove the work or conduct in question, or at least so much of the work or conduct as is the basis of the comment.

173. Then there is a third class of case which appears to have attracted ideas analogous to the law of estoppel. Where a play is performed in public, a critic may publish his disparaging opinion of the playwright, the producer or the actors without specifying the features of the play or its performance which are the basis of his opinion. Those concerned have put their work before the public and it does not lie in their mouths to say that their work is not known to the public sufficiently to warrant comment in this form. See the discussion of this class of case in *Kemsley v. Foot* in the Court of Appeal in England ([1951] 2 K.B. 34, at pp. 41, 42, 50).

174. In cases of the second and third classes the defendant must show the existence of the facts on which he has based his comment, but questions of truth do not arise in the way in which they arise in the first class.

175. There is a fourth class of case, where the defendant has based his comment on a report the publication of which is defensible. This class of case has not been fully explored in the courts. The cases which have arisen have been cases where the defendant has published in a newspaper a report of parliamentary or judicial proceedings and has made a comment based on the report. It seems that if the report and the circumstances of its publication by the defendant are such that matter in the report defamatory of the plaintiff is defensible, then the report is matter which may be a proper basis for comment by the defendant defamatory of the plaintiff. The leading authorities are *Mangena v. Wright* ([1909] 2 K.B. 958), *Thompson v. Truth and Sportsman Ltd (No. 4)* ((1932) 34 S.R. 21), *Bailey v. Truth and Sportsman Ltd* ((1938) 60 C.L.R. 700), *Grech v. Odhams Press Ltd* ([1958] 1 Q.B. 310; [1958] 2 Q.B. 275), and *Orr v. Isles* ((1965) 93 W.N. (Pt 1) 303).

176. Differences of judicial opinion have arisen on the question whether it is open to the defendant to make his comment on the assumption of the truth of some statement in the report, for example, a statement made by a witness in court, or made by a member of Parliament in Parliament. See, on the one hand, Dixon J. in *Bailey v. Truth and Sportsman Ltd* (at pp. 721-724) and, on the other hand, Starke J. in the same case (at pp. 717, 718) and Donovan J. in *Grech v. Odhams Press Ltd* ([1958] 1 Q.B. at p. 313). The problem discussed in a note at 21 M.L.R. 674.

177. We venture the view that a comment made on the assumption that such a statement is true is a comment based not only on the statement but based also on some extraneous matter. The extraneous matter might be, for example, the reputation for reliability of the author of the statement, as where a distinguished engineer gives evidence of his opinion as to the reasons for the collapse of a dam wall. Again, the extraneous matter might be the fact that, as in the case of a statement consisting in the verdict of a jury, the authors of the statement are persons charged by law with the duty of determining the facts. On this view, the comment would not be defensible unless the extraneous matter satisfied the appropriate tests as discussed in paragraphs 171 to 174 of these notes.

178. Whatever course the law may take on this question, there is room for caution in the fixing of rules of law, and we think that it is a field in which just results are more likely to flow from judicial development than from legislation. We therefore abstain from proposing legislation to prescribe the kinds of report which should be a sufficient basis for defensible comment or to prescribe what sort of comment on such a report should be defensible. Our proposal is that New South Wales should continue to rely on the common law for the identification of the material upon which a defensible comment may be based, including the common law rule by which privileged reports may be made the basis of defensible comment (see paragraph 175 above).

179. We make one qualification to our proposal in the last paragraph. The usual description of the common law defence is "fair comment on a matter of public interest". This description is ambiguous in that it does not say whether it is the material on which the comment is based, or the subject of the comment itself, or both, which must be a matter of public interest. Suppose the defendant publishes of the plaintiff facts which are true but do not relate to a matter of public interest and a comment (based on those facts) which does relate to a matter of public interest. Is the comment defensible as fair comment, at least so far as questions of public interest are concerned?

180. So far as we are aware, the question has not arisen directly for decision: as a matter of public interest or neither is a matter of public interest. There are judicial dicta supporting the view that the quality of public interest must attach to the material on which the comment is based (e.g., *Bailey v. Truth and Sportsman Ltd* ((1938) 60 C.L.R. 700, at p. 722, Dixon J.)) and the view that it is the comment which must have that quality (e.g., *Goldsborough v. John Fairfax & Sons Ltd* ((1934) 34 S.R. 524 at pp. 533, 534, Jordan C.J.)).

181. The common forms of rolled up plea allege that the basic material, rather than the comment, is a matter of public interest (Gatley on Libel and Slander, 6th edn, 1967, pp. 680, 681; Rath on Principles and Practice of Pleading, 1961, P. 141), but the plea in *Orr v Isles* ((1965) 93 W.N. (Pt 1) 303, at p. 306) seems to allege that both the basic material and the comment were matters of public interest, and the plea attracted no criticism on that account. Whatever the true state of the common law is, or may be found to be, we think that a comment

which relates to a matter of public interest ought to be defensible whether or not the basic material is of public interest.

182. But is it necessary to legislate on the subject? It might be said that the common law has managed well enough without reaching any settled rule on the point and that legislation will not produce any practical advantage. There is, however, a peculiar situation in New South Wales which supports the view that legislation is necessary. Under the law as it is today and has been for upwards of a century, truth is not a defence unless it is shown that the publication complained of was for the public benefit (Defamation Act, 1958, s. 16).

183. There is substantial judicial support for the view that, where the defendant publishes defamatory statements of fact and also defamatory comment based on those facts, he cannot succeed on a defence of fair comment unless he proves that the publication of the defamatory statements of fact was for the public benefit. The latest reported case on the subject is *Orr v. Isles* ((1965) 83 W.N. (Pt1) 303) where the earlier authorities are reviewed and a majority of the Full Court decided against this view. But notwithstanding *Orr v. Isles* the question cannot be regarded as finally settled; see the neutral treatment of the subject by Jacobs and Mason J.J. in *O'Shaughnessy v. Mirror Newspapers Ltd* ((1970) 91 W.N. 738, 750 CD).

184. Our Proposal as to the defence of truth is that the requirement of publication for the public benefit should be dropped and that there should be a substituted requirement that the imputation in question should relate to a matter of public interest. See paragraph 23 of our report, sections 15 and 16 of the proposed Bill and paragraph 66 of these notes. If this proposal is carried into law, the reasoning which would today require that publication of the basic material, if defamatory, must have been for the public benefit would under the new law require that that material be of public interest. There is thus the possibility that the question which we have been discussing would be resolved, as it were, by a side wind, and resolved in a sense which would, in our view, unduly inhibit freedom of comment. We therefore propose legislation in the terms of section 30 (2) of the Bill.

185. There is in section 30 (3) of the proposed Bill a second qualification which we propose concerning the common law as to the description of material which may be the basis of comment. As we have noted, where the defendant has published statements of fact and defamatory comment based on those statements of fact, it is a condition of the defence of fair comment that the statements of fact be proved to be true. The defence fails if that proof fails even in some minor detail; *Gooch v. N.U. Financial Times (No. 2)* ([1933] N.Z.L.R. 257).

186. The Porter Committee recommended that the law be amended so that a defendant relying on fair comment would prove truth of the basic material sufficiently if he proved the truth of so much of the defamatory statements of fact contained in the alleged libel as to justify the court in thinking that any remaining statement not proved to be true did not add materially to the injury to the plaintiff's reputation (paragraph 90 of the report). The report of the Porter Committee was the forerunner of the Defamation Act 1952, but that Act did not altogether adopt the recommendation we have mentioned. Section 6 of that Act is as follows:

"In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

There is a similar provision in section 8 of the Defamation Act 1954 of New Zealand. The provisions have been considered in *Truth (N.Z.) Ltd v. Avery* ([1959] N.Z.L.R. 274), *Broadway Approvals Ltd v. Odhams Press Ltd* ([1964] 2 Q.B. 683) and in *Broadway Approvals Ltd v. Odhams Press Ltd (No. 2)* ([1965] 1 W.L.R. 805).

187. While we think that a provision along these lines would probably work well in the majority of cases, we have an objection in principle to the scheme of the provision. To illustrate our objection, suppose that the defendant has published a statement that the plaintiff has been convicted a dozen times of specified offences and, on the basis of that statement, comments that in the defendant's opinion the plaintiff is unfit for some public office. Suppose that a defence of fair comment being pleaded, the truth of the statement is proved as to eleven only of the alleged offences. Section 6 of the English Act of 1952 would call for an answer to the question whether the expression of opinion was fair comment having regard to the eleven offences. Our objection is that in the nature of the case the comment is based on the whole of the statement, not on so much only of it as is afterwards proved to be true. It cannot be comment, fair or otherwise, on so much only of the statement as are proved to be true.

188. Being thus disinclined to propose the adoption of a provision similar to section 6 of the English Act of 1952, we look again at the recommendation of the Porter Committee. Here too we have an objection in principle which leads us not to make a similar recommendation.

189. The problem is, of course, the question how far a defence as to the comment should be allowed to succeed notwithstanding failure to prove the truth of all the statements on which the comment is based: the defence of those statements, if they are defamatory, is a distinct problem (see sections 14 to 16 of the proposed Bill). Suppose the defendant has published the following, each defamatory of the plaintiff: (a) a true statement of fact; (b) a statement of fact not proved to be true; and (c) a comment based on statements (a) and (b). As we understand it, the recommendation is that (subject to questions of public interest and honesty) a defence of fair comment as to (c) is not to fail if the court thinks that, having regard to the truth of statement (a), statement (b) did not add materially to the injury to the plaintiff's reputation. This appears to be the recommendation, however illfounded the comment turns out to be by reason of the failure to prove the truth of the statement (b), and however injurious the comment is to the reputation of the plaintiff. The test involved in the recommendation does not seem to us to be relevant to the problem.

190. We think that comment ought in some cases to be defensible notwithstanding failure to some extent to prove the truth of the statements on which the comment is based. To say that comment should be defensible by reference to a state of facts which is not the state of facts on which the comment was actually based involves that the test should be to some extent hypothetical. The solution we propose is that if the matter defended as comment is comment on a statement of facts and that matter represents an opinion which a reasonable man might have held on so much of the statement as is proved to be true, the defence ought not to fail by reason that the statement of facts is not proved to be wholly true.

191. We have discussed this problem of comment based partly on defective materials by reference to the common case where the defendant has published both a statement of facts and a comment based on that statement. As a matter of legislative expression, however, we prefer that the provision we proposed should extend to any defective materials on which a comment is partly based. Thus if the defendant publishes reports of three court cases in which the plaintiff is disparaged, and two of the reports are fair but the third is not, the defensibility of his comment based on the three reports should be determined on similar principles. For these reasons we recommend legislation in the terms of section 30 (3) of the proposed Bill.

Imputation of dishonourable motive

192. There is ground in the English authorities for a view that a comment which imputes to the plaintiff dishonourable motives requires for its defence an element which is not required for the defence of other comment. Such a comment must be "not without foundation" in fact (*Campbell v. Spottiswoode* ((1863) 3 B. & S. 769 at p. 776; 122 E.R. 288 at p. 290)) or must be "warranted by the facts" (*Campbell v. Spottiswoode* (above) at p. 778; 291; *Joynt v. Cycle Trade Publishing Co.* ([1904] 2 K.B. 292); *Dakhyl v. Labouchere* ((1907) [1908] 2 K.B. 325 (note) at p. 329)), or must be "a reasonable inference from those facts" (*Dakhyl v. Labouchere*, at p. 329), or "a conclusion which ought to be drawn from those facts" (*Hunt v. Star Newspaper Co. Ltd* ([1908] 2 K.B. 309, at p. 321)). These phrases seem to describe positions intermediate between the cases of ordinary comment (Does the matter complained of express an opinion which an honest man might hold on the facts?) and cases of justification (Is the matter complained of true in substance and in fact?). The reasons for this view are not easy to extract from the cases, but appear to be twofold: first, where there is defamation of so serious a character, the person defamed ought to be able to vindicate himself by reference to the true facts, and, second, the existence of dishonourable motives is commonly not a matter of public interest.

193. Although in 1948 the Porter Committee recommended the continuance of this special rule (Cmd. 7536, page 23, paragraph 91), it has more recently been spoken of with at least implicit disapproval (*Kemsley v. Foot* [1951] 2 K.B. 34, at p. 47; [1952] A.C. 345, at pp. 355, 358). Section 30 (4) is intended to exclude this special doctrine in cases of comment imputing base or sordid motives. We think it right that the doctrine should be dropped not only on the general considerations adverted to in *Kemsley v. Foot* (above) but also by reason of the provision of the proposed Bill whereby the comment itself must relate to a matter of public interest (s. 31). In general, the truth or falsity of the imputation will at least be relevant to the amount of damages, so that the plaintiff will have the opportunity to vindicate himself by reference to the true facts.

Section 32: Public interest

194. Section 15 of the Act of 1958 sets out in eight paragraphs a list of matters respecting which it is lawful to publish a fair comment. The list is extensive, though perhaps not exhaustive: see section 3 (2) of the Act. The statutory specification of such a list is troublesome in that it invites a minute analysis of the statutory wording and stultifies the common law by, at best, distracting attention from larger matters of principle and, at worst, operating with section 3 (2) so as to exclude some aspect of the common law where the section deals with and makes a different provision for some common law protection or privilege. As in the case of section 17 of the 1958 Act (qualified protection: see paragraph 91 of these notes), we prefer the common law concept of public interest to the verbal formulae of section 15. The proposed Bill therefore does not attempt an enumeration of matters of public interest for the purposes of the defence of comment.

195. We have referred in paragraphs 179 to 181 of these notes to the unsatisfactory state of the authorities on the requirement as to public interest in the defence of fair comment. We have proposed a provision whereby a statement of fact which is a matter of substantial truth would be proper material for comment, whether or not the statement relates to a matter of public interest (section 30 (2) of the proposed Bill). Section 31 puts the requirements as to public interest where we think it should be, as a quality of the comment rather than as a quality of the material on which the comment is based. The result would be, where the defendant has published of the plaintiff (not on an occasion of privilege) defamatory statements of fact and defamatory comment based on those statements, he must, in order to defend the statements of fact, show that the statements relate to a matter of public interest (sections 15, 16) and, in order to defend the comment as comment, show that the comment relates to a matter of public interest (section 31).

Section 32: Comment of defendant

196. Subsection (1) states the remaining element of the defence of comment in a case where the author of the comment is the defendant himself. This element is simply that he is the author of the comment. The defendant is not required to plead or to prove that the comment was "fair". It is difficult to reconcile the authorities on the meaning of "fair" in this part of the law. We think, however, that the authorities justify, or at least tend towards, the view that the notion of fairness bears at least three distinct aspects.

197. One aspect concerns the material on which the comment is based: "if the defendant makes a misstatement of any of the facts upon which he comments, it at once negatives the possibility of his comment being fair": *Digby v. Financial Iqews Ltd* ([1907] 1 K.B. 502 at p. 508, Collins M.R.). This aspect is covered by section 30 of the Bill.

198. A second aspect is, we think, no more than an emphasis that the matter defended as comment must have the character of comment. The matter so defended has that character if it purports to be the expression of an opinion based on some other material, and if the opinion is one which an honest man might hold on the basis of that material. Here we adopt the view preferred by Jacobs and Mason J.J. in *O'Shaughnessy v. Mirror Newspapers Ltd* ((1970) 91 W.N. 738, 750 CE). Since we think that this aspect of fairness is mere emphasis, we take the view that it has no place in an Act. The word "comment" is sufficient by itself to carry its own meaning.

199. The two aspects of fairness which we have discussed deal with matters which a defendant must prove in order to make out a defence of fair comment. The third aspect deals with a matter which the plaintiff may rely on to defeat the defence. This third aspect, in its bearing on a case, where the defendant is the author of the comment, concerns the mental state of the defendant when he published the comment. The defence is defeated if the plaintiff shows that the comment was not an honest expression of the opinion of the defendant: *Falcke v. The Herald and Weekly Times Ltd* ([1925] V.L.R. 56); *O'Shaughnessy v. Mirror Newspapers Ltd* ((1970) 91 W.N. 738, 750G).

200. Section 32 (2) deals with this aspect of the common law concerning fairness. The word "honest", apt enough in judicial reasoning, is we think out of place in a statutory provision as to the defeat of the defence. Section 32 (2) invites a comparison of what the defendant published as his opinion with what was in fact his opinion. If they do not correspond, the defence is defeated. The form of section 32 (2) is designed to make it clear that a case under the subsection is one for the plaintiff to raise in reply and one on which the plaintiff bears the onus of proof.

201. There is some ground for the view that, at common law, the state of mind of the defendant may give the plaintiff other grounds for defeating a defence of comment. Grounds, that is to say, other than that the comment

did not represent the opinion of the defendant. He may, it is said, show that the opinion of the defendant, though truly expressed in the comment, was distorted by malice, or was the product of a judgment warped by malice (*Thomas v. Bradbury, Agnew & Co. Ltd* [1906] 2 K.B. 627, at pp. 638, 642, Collins M.R.). Further, the plaintiff may, it is said, show that the comment was malicious in the sense that the writer was prompted by some purpose other than the purpose of communicating to the interested public the commentator's genuine opinion (*O'Shaughnessy v. Mirror Newspapers Ltd* (1970) 91 W.N. 738, 741F, Herron C.J.).

202. The doctrines mentioned in paragraph 201 have, as their main foundation in judicial authority, the decision of the Court of Appeal in *Thomas v. Bradbury, Agnew & Co. Ltd* ([1906] 2 K.B. 627). Before that decision it was probably the better view that express malice did not defeat a defence of fair comment. See the judgments of Crompton and Blackburn JJ. in *Campbell v. Spottiswoode* ((1863) 3 B. & S. 769, 778781; 122 E.R. 288, 291, 292).

203. In paragraphs 201 and 202 we have discussed the common law. The position may be different under section 15 of the Defamation Act, 1958. By that section "it is lawful to publish a fair comment" respecting certain matters. The section has no requirement of good faith, except so far as such a requirement may be implicit in the word "fair". The section is to be contrasted with sections 14 and 17, which deal with the publication "in good faith" of fair reports and similar material (s. 14) and the publication "in good faith" of matter on occasions of qualified privilege. Section 15 has its origin in sections 14 and 15 of the Defamation Law of Queensland, 1889. These sections were enacted in the days when *Campbell v. Spottiswoode* ((1863) 3 B. & S. 769; 122 E.R. 288) was the leading authority on the subject. It may be, therefore, that section 15 is intended to embody the view of the common law taken by Crompton and Blackburn JJ in that case; is intended, that is to say, to state the law in such a way that express malice does not defeat a defence of fair comment. See Sykes: Some Aspects of the Queensland Civil Defamation Law (1951) 1 U. Qld. L.J. No. 3 19, 24; Brett: Civil and Criminal Defamation in Western Australia (1951) 2 Annual L. Rev. 43, 51; Fleming on Torts, 3rd edn (1965), 559.

204. On this question we may put aside cases where spite or other malicious state of mind has led the defendant to publish in the shape of comment something which is not comment at all. In such a case the defence fails, not because there was malice, but because the matter published was not comment. See *Merivale v. Carson* ((1887) 20 Q.D.B. 275, 281, 282, Lord Esher, M.R.). We may put aside also cases where spite or other malicious state of mind has led the defendant to publish as his comment something which is not his opinion. We may put aside the latter cases because there the defence is defeated whether there is malice or not.

205. We are left, then, with cases where the defendant has based his comment on proper material, his comment relates to a matter of public interest, and does represent his opinion. Should his defence fail simply because he was actuated by spite or other malicious state of mind? We think not. "If there are two criticisms of a book by different writers, both couched in similar terms, and each being on its face fair comment, it seems difficult to say that one exceeds the limit of fair comment because the writer of it is actuated by malice against the author, whereas the other does not exceed those limits because the writer is not so actuated": Salmond on Torts, 15th edn (1969) 233. "The truth is that the burden on the defendant who pleads fair comment is already hard enough. If he proves that the facts were true and that the comments, objectively considered, were fair, that is, if they were fair when considered without regard to the state of mind of the writer, I should not have thought that the plaintiff had much to complain about; nevertheless it has been held that the plaintiff can still succeed if he can prove that the comments, subjectively considered, were unfair because the writer was actuated by malice": Denning L. J. in *Adams v. Sunday Pictorial Newspapers (1920) Ltd* ([1951] 1 K.B. 354, 359, 360).

206. We think that the freedom to publish comment relating to matters of public interest is a freedom of such importance that it ought not to be imperilled by the wideranging inquiry which would be open if malice were a separate ground for defeating the defence. The proper analogy is, we think, not with privilege, but with truth: that, once the tests of public interest and either truth or comment on proper material are satisfied, malice ought to be irrelevant. The proposed Bill therefore leaves no room for defeat of a defence of comment on the ground merely that the defendant's judgment was distorted by malice or that he was otherwise actuated by malice. We repeat that there are substantial grounds for supposing that this is the law in New South Wales today (see paragraph 203 above).

Section 33: Comment of servant or agent of defendant

207. It has not often been necessary for the courts to examine the position where the comment published by the defendant is not his, but that of a servant or agent of his. Such an examination was made by the Full Court of the Supreme Court of Victoria in *Falcke v. The Herald and Weekly Times Ltd* ([1925] V.L.R. 56) and section 33 is in general accord with the lucid exposition by McArthur J. in that case.

Section 34: Comment of stranger

208. Another little explored part of the common law as to fair comment is that governing the case where the comment published by the defendant is the comment of a stranger. Such a case was, however, considered by the Court of Appeal in England in *Lyon v. The Daily Telegraph Ltd* ([1943] 1 K.B. 746). The matter complained of in that case was a letter published in the correspondence columns of the defendant's newspaper. The writer of the letter was unknown to the defendant. All the elements of the defence of fair comment were present, but there was no evidence on the question whether the comment represented the opinion of the writer. Scott L.J. gave the leading judgment. It seems to have been his view that in such a case the newspaper's defence of fair comment is established if the matter complained of is fair comment on a matter of public interest and the newspaper published it solely as a matter of public interest. If it were proved that the comment did not represent the opinion of the writer, a question might arise how far that fact would affect the defence of the newspaper, but that proof was lacking.

209. There is a passage in the judgment of Scott L.J. which has given us some concern. He is reported as saying (at p. 751) that "there is no question but that the comment contained in the letter represented the honest opinion of the *Daily Telegraph* . . ." In their context, these words seem to mean that it was clear beyond argument that the comment represented the honest opinion of the *Daily Telegraph*. These words in the report (and they appear also in the collateral reports) must we think be a mistake: there is no suggestion anywhere of any admission, concession or evidence to that effect, and we do not see how the fact, if it was a fact, was relevant. However this may be, we think that there should not be any foothold for the notion that a newspaper proprietor is safe in publishing the comment of a stranger only if the newspaper proprietor agrees with the opinion expressed in the comment.

210. Subject to what we have said in paragraph 209 we are in general agreement with the view of Scott L.J. in *Lyon's* case. The publication of letters in this way, and other means whereby one man publishes what is composed by another, are valuable avenues of public discussion. In such cases, we think that section 34, in its context, puts adequate safeguards in the way of improper defamatory comment. For the defence to succeed, the matter in question must be comment, it must be based on "proper material for comment", it must relate to a matter of public interest, it must not be (and not purport to be) the comment of the defendant, and the publication must be in good faith for the stated purposes.

Section 35: Effect of defence

211. There is at present support for the view that, where the defendant has published matter defamatory of the plaintiff and has published comment based on that matter also defamatory of the plaintiff, a case raised by the defendant that the comment is fair comment is an answer as to the whole of the defamatory matter and not merely as to the comment. See *Orr v. Isles* ((1965) 83 W.N. (Pt 1) 303). We think that this view, whether or not it is truly the common law, has been a major contributor to the difficulties of the law relating to fair comment. Section 35 is intended to produce the contrary result.

Part III, Division 8: Offer of amends

212. This Division is based on section 4 of the English Defamation Act 1952, which section is in turn based on the recommendations of the Porter Committee in 1948 (Cmd. 7536; pp. 16-20). It proceeds on the view that, in the case of defamation which is unintentional and not careless, the defamed person is sufficiently vindicated by the publication of a correction or apology and that, if steps are taken to stop further dissemination of the defamatory matter and the costs and expenses of the defamed person are paid, he ought not to be entitled to damages.

213. Typical cases for the application of the Division would be cases on facts similar to those in *Hulton v. Jones* ([1910] A.C. 20), *Newstead v. London Express Newspaper Ltd* ([1940] 1 K.B. 377) and *Cassidy v. Daily Mirror Newspapers Ltd* ([1929] 2 K.B. 331).

Section 36: Innocent publication: meaning

214. It is essential to the application of the Division that the publication should have been innocent, that is, without intention to defame and not careless. The test of innocence is a severe one. We think it should be, because the Division makes a major inroad upon the general strict liability for defamation at common law.

Section 37: Offer of amends: Section 38: Particulars in support of offer

215. These sections are, we think, self explanatory. There are minor departures from the English model: the reasons for these will be evident on a comparison with the latter.

Section 39: Determination of questions

216. This section provides in effect that a court may act as arbitrator in the settlement of questions arising under an agreement made pursuant to the Division. Subsection (2) excludes an appeal because it is essential to the scheme of the Division that the correction and so on should be made speedily and without undue expense.

217. It is not unjust to exclude an appeal, because the section does not give power to enforce the agreement, because neither party is obliged to make the agreement, and because the defamer, if he thinks that a determination by a court under the section will lead him to incur unreasonable trouble or expense, may decline to perform the agreement and leave his liability, if any, under the general law of defamation to be determined under the general law. He will not be otherwise liable for breach of an agreement made pursuant to the Division, unless he expressly assumes liability: see section 45.

Section 40: Effect of acceptance and performance

218. The intention of this section is that, where an offer has been accepted and the agreement so arising has been performed, pending proceedings, or proceedings afterwards brought, will be liable to be stayed without the necessity of going to trial. No doubt it could be relied on as a defence, but its main object is to bring proceedings speedily to a halt.

Section 41: Costs and expenses: Section 42: Courts with powers under sections 39, 41

219. These sections are also, we think, self explanatory. Again there are minor departures from the English model, the reasons for which will be evident by comparison with the latter.

Section 43: Offer not accepted

220. Where an offer is made pursuant to the Division but is not accepted, a defence arises under section 43 and the issues under the defence will be issues at the trial. The structure of the English model for subsection (2) is relaxed by the words about the leave of the court. These words will enable justice to be done in case, for example, some fact is overlooked in the original particulars but is notified to the plaintiff well before the trial and while it is still not too late for correction and so on to be effective.

Section 44: Other publishers: Section 45: Limited effect of agreement

221. These sections are, we think, self explanatory.

Section 46: Damages generally

222. We have in paragraphs 42 to 55 of our report given our reasons for thinking that damages for defamation should be limited to compensatory damages and that, in particular, exemplary damages for defamation should be abolished.

223. Under the common law, damages may be recovered not only for the publication relied upon as constituting the cause of action, but also for other circulation or distribution of the matter complained of: *McLean v. David*

Syme & Co. Ltd ((1971) 92 W.N. 61 1). Tidiness would favour a rule that damages should only be allowed for the publication relied on as constituting the cause of action. But we think that such a rule would impose on a plaintiff difficulties of proof which would often be insurmountable in cases, for example, of defamatory matter published in a newspaper. We have drawn section 46 (2), therefore, with the intention of leaving the common law rule undisturbed. For this reason, the section refrains from speaking of the harm caused by the publication complained of.

Death of person defamed

224. Section 4 of the Bill, read with the First Schedule, would amend section 2 of the Law Reform (Miscellaneous Provisions) Act, 1944, with the effect that a cause of action for defamation would survive the death of either party to the cause of action. See these notes to section 4 of the Bill (paragraph 24 to 26 above). If exemplary damages are abolished, that is, if damages are compensation for harm suffered rather than a weapon for punishment, there is no reason why the death of the defamer should affect the measure of damages. Where, however, it is the defamed person who has died, the damages will go to his estate and the damages should be confined to making good harm in the shape of injury to property and financial loss. Section 46 (1) (b) so provides. Section 6 (3) of the Bill would have the effect that section 46 (1) (b) would embrace harm of this nature to the estate of the person defamed.

Malice or other state of mind of publisher

225. Section 46 (3) (b) states a particular consequence of section 46 (2) and is intended to rationalize and confine within proper limits the significance in relation to damages of malice and other states of mind of the publisher of defamatory matter. If the malice or other state of mind is made manifest and operates to affect the harm caused by the publication complained of, then it is relevant to damages on the ordinary principles of causation in the law of tort. We think that this is what the law should be.

226. But the malice or other state of mind of the publisher has been treated as affording grounds for enhancing or aggravating damages even where it has not been shown to have increased the harm suffered by the plaintiff. An enhancement or aggravation of damages in these circumstances comes close to the allowance of exemplary damages. We think that it ought not to be allowed. Hence we supplement section 46 (2) by the explicit statement in section 46 (3) (b).

Section 47: Conduct of proceedings: reports of proceedings

227. The common law is definite that the conduct of the defendant right up to the time of the retirement of the jury, including his conduct of the trial, may be taken into account on the issue of damages: *Praed v. Graham* ((1889) 24 O.B.D. 53, 55, Esher M.R.). The reported cases give some countenance to the proposition that such conduct is relevant to the measure of damages whether or not it affects the harm suffered by the plaintiff as a consequence of the defamation complained of: *Triggell v. Pheeney* ((1951) 82 C.L.R. 497).

228. We think that the common law has cast its net too widely in evolving this rule and that conduct of the defendant which does not affect the harm suffered by the plaintiff is, in principle, irrelevant on the issue of damages. The common law rule seems to have had its first clear definition in the judgment of Lord Esher in *Praed v. Graham* (above). The High Court of Australia was conscious of what seems a departure from principle when it was said by Dixon, Williams, Webb and Kitto JJ. in *Triggell v. Pheeney* ((1951) 82 C.L.R. 497, 513):

“In point of principle much perhaps might be said for the view that the ultimate matter for consideration is the character of the tort and the *quo animo* and other circumstances of its commission, and that subsequent events are to be used only as evidentiary of the defendant's then state of mind and conduct. But that is not the view of the law taken by this Court . . .”

229. We think that damages recoverable in a defamation action should not exceed what is commensurate to the harm sustained by the plaintiff.

230. We think further that the common law rule, that in a defamation action the way in which the trial is conducted on behalf of the defendant can increase the damages recoverable from him in that action, cannot be reconciled with a principle of public policy. This principle is that the ascertainment of truth is a paramount consideration in

litigation. To this consideration must be subordinated any harm which may result to a litigant from the judicial processes for arriving at the truth.

231. It is a function of the judge who presides at the trial of a civil action with a jury not only to rule on the relevance of testimony and to give directions on matters of law, but also to control the proceedings generally so that they are directed to their proper purpose, that is, the ascertainment of the truth of the relevant matters. If counsel for the defendant oversteps the limits of a vigorous advocacy, or, without a reasonable foundation, suggests by his cross-examination improper conduct on the part of the plaintiff, or if in the course of the proceedings the occasion of the trial is otherwise abused, the judge may discharge the jury and, with appropriate orders as to costs, direct that a new trial be had. But these powers are not designed to impede the search for truth: they are designed to facilitate it.

232. Public policy requires that counsel and solicitors, observing the ethical standards of their profession, be otherwise uninhibited in the presentation of the defendant's case. A plaintiff who brings civil proceedings for damages must accept that he exposes himself to publicity, and that the publicity may be harmful to him. This is a necessary incident of the processes for ascertainment of truth in the public proceedings which the plaintiff has instituted. The plaintiff cannot expect that the defendant, who is subjected to his forensic attack, should be more fettered in his defence than is the plaintiff in making the attack. Where the forensic attack upon the defendant fails, the defendant is not entitled to recover from the plaintiff any damages for harm which he has sustained because of the conduct of the proceedings and attendant publicity. Justice requires that the plaintiff be in no preferred position where the defendant fails to make out defences to the attack upon him.

233. It is pertinent to look at what happens in cases other than plaintiff claims damages defamation cases. Assume these facts. The defendant obtained property from him by fraud. His action fails, The defendant's reputation may suffer by reason of the conduct of the proceedings and the publicity given to them, notwithstanding that in the end the action fails. Yet he has no redress against the plaintiff, not even in defamation, because of the absolute privilege in respect of court proceedings. Now assume these facts. The plaintiff sues for damages for conversion of goods. The defendant counterclaims for damages for fraud. The counterclaim fails. The plaintiff recovers only the same damages for the conversion as he would have recovered if the counterclaim had not been made and unsuccessfully pursued. He has no further redress against the defendant, not even in defamation, for any harm which the proceedings have caused to his reputation.

234. Harm that flows from the conduct of proceedings between the parties, whether suffered by the plaintiff or by the defendant, is not compensable. It is not harm tortiously caused. It is an incident of the public judicial determination of legal rights and liabilities. A defendant should not be inhibited from raising legitimate defences, seeking to establish them, or advocating their acceptance, for fear that he may be visited by an increased award of damages if he fails.

235. This principle of public policy ought not to admit of an exception in favour of a plaintiff in defamation. The exception has led to undesirable practices. It is commonplace for juries to be addressed upon the propriety of the defences raised, the propriety of counsel's questions and the propriety of the manner and content of his address. In particular, it is commonplace for an attack to be made upon the defendant for failing to establish a plea of justification or for filing it and then abandoning it: cf. *Allen v. Australian Consolidated Press Ltd* 16-12-70, Court of Appeal, unreported). All this is remote from the real purpose of the trial.

236. The present law of defamation, moreover, allows the propriety or otherwise of the conduct of the litigation by the defendant and by his advisers to be submitted to the determination of a jury, a body singularly ill-qualified to determine such questions. A jury cannot be expected to draw correct inferences upon questions relating to the conduct of litigation, or to the relationship between client, solicitor and counsel; nor should a jury be called upon to decide such an issue as whether a defence was raised or persisted in upon reasonable grounds, particularly when a full inquiry might involve a trespass upon the defendant's privilege for communications amongst solicitors counsel and client.

237. There is a further injustice which a defendant may suffer in a defamation case, arising out of the present exception in such a case to the general principle that harm to a litigant which flows from the conduct of the litigation is not compensable. There are authorities suggesting that the conduct of counsel must, in law, be attributed to his client, e.g., *Lamb v. West* ((1894) 15 N.S.W.L.R. 120). While this must be so for many purposes, we do not think that it should be so for the purposes of the enlargement of damages. It is quite unrealistic to

assume a defendant's control of what his counsel may say or do at the trial. Counsel has an absolute privilege for what he says, yet, under the present law of defamation, the client may, nevertheless, become liable, by the act of his counsel, to pay increased damages.

238. We recommend that, in proceedings for defamation, damages shall not be enlarged by reason of words or conduct in the course of the proceedings or by reason of the publication of any report of the proceedings or of any words or conduct in the course of the proceedings. This would not prevent the defendant, by apology or other thing in the course of the proceedings, seeking to mitigate the harm which the plaintiff has suffered as a result of the tort. The plaintiff, on our recommendations, would not be entitled to recover any greater sum than what is commensurate to the harm which he has sustained.

239. We do not overlook the fact that it is conceivable that occasionally a defendant may, by the defences he raises and by his instructions given and accepted by counsel, consciously seek to increase the harm and affront to a plaintiff by further disparaging his reputation in the course of a trial. Experience shows that these cases are rare indeed. (See the summing up by Herron J., as he then was, in *Triggell v. Pheene* (1951) 82 C.L.R. 497, 501). The possibility of this course of conduct is not peculiar to actions for defamation. We are of the view that it is better on balance to make it clear that public policy requires that litigants should be free to conduct their defences without the fear of what amounts to punishment if they fail.

240. Of course, litigation, if reported in the press, often has the effect of republishing defamation long after its original publication. This is a prospect which every plaintiff weighs before embarking upon litigation, whether for defamation or anything else. If the publisher of a newspaper is the defendant it lies in his power to give the proceedings such publicity as he chooses in his newspapers. It is sometimes said that the rule as to aggravation of damages by the defendant's conduct during the trial is a salutary rule to discourage newspapers from further attacking an injured plaintiff and giving publicity to the proceedings to increase circulation at the expense of the plaintiff's reputation.

241. Reports of court proceedings are defensible only if published for proper purposes (Bill s.26). The extent of the publicity, the method of presentation and the emphasis given are capable of affording evidence of improper motive. A plaintiff so treated would not lack remedy for the new wrong committed by such unwarranted publication. If solicitor or counsel or both assisted in such conduct they would face sanctions for professional misconduct. We do not think that fears of such conduct warrant retention of what we regard as an unacceptable rule.

Section 48: Truth or falsity of imputation

242. The truth or falsity of the imputation complained of may affect the harm suffered by the plaintiff in the shape of mental distress or injury to property or financial loss. A plaintiff cannot suffer mental distress, but it can suffer loss of good-will, a form of injury to property or financial loss: *Lewis v. Daily Telegraph Ltd* ([1964] A.C., 234, 262, Lord Reid). Where the defamed person dies before assessment of damages the effect of section 47 of the Bill would be that damages are recoverable only for injury to property or financial loss, but here again the truth or falsity of the imputation may affect the extent of that injury or loss.

243. In England, where truth is of itself a defence, evidence of truth is not admissible in mitigation of damages. The defendant must plead truth as a defence. See generally Lord Denning's speech in *Plato Films Ltd v. Speidel* ([1961] A.C. 1090, 1133-1134). In New South Wales, however, where truth by itself is not a defence, it has long been accepted that, even where there is no defence relying on truth, a plaintiff may adduce evidence of the falsity of the matter complained of and that, if the plaintiff does so, the defendant may adduce evidence of truth. There are grounds for saying that a defendant may do this even if the plaintiff has not adduced evidence of falsity, but this last point is not settled. See generally the reasons for judgment of Windeyer J. in *Australian Consolidated Press Ltd v. Uren* ((1966) 117 C.L.R. 185, 204-206) and of Walsh, J. A., in *Rigby v. Associated Newspapers Ltd* ([1969] 1 N.S.W.R. 729, 734-739).

244. We think that, where the truth or falsity of the imputation is relevant to damages, the defendant should be entitled to adduce evidence on the subject, whether or not the plaintiff has done so. Section 48 makes provision to this effect.

245. In most defamation cases the plaintiff is a living natural person complaining of, amongst other things, mental distress. In the remaining cases, truth or falsity may be otherwise relevant to damages. In all these cases it is a useful consequence that it is open to a plaintiff to assert in a public forum that the defamatory matter published of him is a lie. Thus the law of defamation is able to achieve to some extent the objective of vindication of reputation, notwithstanding that truth alone is not a defence.

Section 49: Other recoveries

246. Section 49 reproduces the substance of section 24 of the Act of 1958. The provision raises many problems: see the discussion in *Uren v. John Fairfax & Sons Pty Ltd* ((1965) 66 S.R. 223). However, short of some such solution as the Draconian one of imposing a very short limitation period and giving a right to consolidation of actions, no alteration of the provision has commended itself to us. The Draconian solution would itself produce many difficulties. We think that the best thing is simply to retain the substance of the present section.

Section 50: Common law criminal libel abolished

247. Before the commencement of the Act of 1958 there was a common law misdemeanour of libel. Defamatory libel was a species of the misdemeanour. Blasphemous, seditious and obscene libels were other species. The law relating to this misdemeanour was modified, as regards defamatory libels, by section 15 of the Act of 1912 and perhaps by section 14 of that Act. See *Boaler v. The Queen* ((1888) 21 Q.B.D. 284), *R. v. Munslow* ([1895] 1 Q.B. 758), Russell on Crime 12th edn Vol. 1 (1964), pp. 780, 781.

248. It may be that the 1958 Act abolished the common law misdemeanour as regards defamatory libel. If the 1958 Act had that effect, it may be that the repeal of that Act would operate to revive the common law: *Marshall v. Smith* ((1907) 4 C.L.R. 1617). To overcome these problems, section 50 of the Bill would abolish the common law misdemeanour save as regards blasphemous, seditious or obscene libels.

Section 51: Offence

249. This section would take the place of section 26 of the Act of 1958 and take the place of the common law misdemeanour as regards defamatory libel. The scheme of section 51 and section 52 is to allow a criminal sanction to be applied in a case where the accused would be liable in civil proceedings for damages but only where the mental state of the accused satisfies paragraph (a) or (b) of section 51.

250. This requirement of a particular mental state is a departure from what has been said to be the common law (*R. v. Wicks* [1936] 1 All E.R. 384, at p. 387; compare Spencer Bower on Actionable Defamation 2nd edn (1923) pp. 425, 426 and *R. v. Wegener* (1817) 2 Stark. 245; 171 E.R. 634). The requirement is also a departure from section 26 of the Act of 1958. However, we believe that there is no ground for making this offence an exception to the general rules of the criminal law as to the need of a guilty mind. Paragraphs (a) and (b) of section 51 (1) state what we think is appropriate.

251. Section 51 (1) extends as well to slander as to defamatory libel. In this the section departs from the common law but follows section 26 of the Act of 1958.

252. Section 51 (1) speaks of matter defamatory of another *existing* person. We use the word "existing" because we think that in the criminal law, as in the law of tort, there should be no liability for defamation of the dead. The common law appears to be otherwise: Russell on Crime 12th edn, Vol. 1 (1964), pp. 779, 780.

253. Section 51 (2) gives the word "published" the meaning which it has in the law of tort. Thus communication to the person defamed would not be "publication". The reverse is the case in criminal libel at common law: *R. v. Adams* ((1888) 22 Q.B.D. 66). Section 51 (2) maintains the law as it is under section 8 of the 1958 Act.

254. The penalty in section 51 (1) is more severe, as regards imprisonment, than that in section 26 of the Act of 1958. Matters of penalty are matters on which we do not feel called upon to make positive recommendations, but we think justification for the greater severity may be found in the guilty mind which would be, an ingredient of the offence and in our proposal for the abolition of exemplary damages.

255. The Bill does not have any provision like section 33 of the Act of 1958. By that section, a criminal prosecution for defamation is not to be commenced without the prior order of a judge. The section is indirectly derived from section 3 of the English Newspaper Libel and Registration Act 1881. The authorities on the English section indicate that the prohibition in section 33 is of the commencement by a private prosecutor of committal proceedings before a magistrate not of the commencement of a criminal prosecution in the Supreme Court or in quarter sessions by the presentment of an indictment or the exhibiting of an information, whether by a Minister or officer of the Crown or by a private prosecutor: *R. v. Yates* ((1883) 11 Q.B.D. 750); *Yates v. The Queen* ((1885) 14 Q.B.D. 648).

256. The need for some restraint on the commencement of committal proceedings is clear enough where, as by section 26 of the 1958 Act, the offence is committed by the mere publication of defamatory matter. The need disappears, in our view, where the offence has the requirements of a guilty mind as proposed in section 51 (1) of the Bill. It is also to be borne in mind that a magistrate is now authorized to order an informant to pay costs to a defendant in committal proceedings where the defendant is discharged: Justices Act, 1902, s. 41A.

Section 52: Lawful excuse

257. The purpose of section 52 (1) has been indicated in paragraph 249 of these notes. The temporal restriction at the end of the subsection would exclude such matters as accord and satisfaction and the expiration of a limitation period.

258. Section 52 (2) will be self explanatory.

259. Section 52 (3) is an innovation, at least in part. It is a defence by statute that the matter charged was true and that the publication was for the public benefit: 1958 Act, s. 16, but the defence must be pleaded specially: s. 28. These statutory provisions have their origin in the English Libel Act 1843, s. 6. Other affirmative defences, privilege for example, may be raised under a plea of not guilty. Special pleas are rare in criminal proceedings and, we think, unnecessary in the case of a defence relying on truth. Section 52 (3) would make a special plea unnecessary and would put the evidentiary and procedural matters in relation to "lawful excuse" in their ordinary situation in criminal trials.

Section 53: Criminal informations excluded

260. Section 6 of the Australian Courts Act 1828 is the provision which enables a private person, by leave of the Supreme Court, to commence criminal proceedings in the Supreme Court. The section is probably altogether obsolete, but in any case we think it ought not to apply to a prosecution for criminal defamation. As we see it, the only course for a private prosecution ought to be the institution of committal proceedings under the Justices Act.

Section 54: Defamatory meaning: verdict

261. This section retains as much as appears necessary to do the work done by sections 1 and 2 of the Libel Act 1792 and, as to criminal defamation, by sections 6 and 29 of the Act of 1958.

Section 55: Evidence of publication, etc.

262. Section 55 (2) is based on section 38 of the 1958 Act. Section 38 is confined to civil actions. Since, however, the provision relates to a matter peculiarly within the knowledge of the alleged publisher, gives effect to ordinary expectations of regularity, and only constitutes *prima facie* evidence, we think that it can safely be applied to a prosecution for an offence under section 51 of the Bill. Section 55 (2) is wider than the present section 38 in several respects which will be apparent on comparison.

263. Section 55 (3) is based on section 39 of the 1958 Act. The present section 39 applies to prosecutions as well as to civil actions. Section 55 (1) of the Bill would continue this application. Section 55 (3) is also somewhat wider than the present section 39.

Section 56: Evidence of criminal offence

264. Section 56 is based on section 13 of the English Civil Evidence Act 1968. The English provision substantially adopts a recommendation in the Fifteenth Report of the Law Reform Committee (1967: Cmnd. 3391). The English provision must be read in the context of section 11 of the same Act, whereby (in outline) the fact that a person has been convicted of an offence is evidence in civil proceedings generally that he committed the offence, where relevant to an issue in the proceedings.

265. The English section 11 is concerned with the law as it was decided to be in *Hollington v. Hewthorn & Co. Ltd* ([1943] 1 K.B. 587), which was the reverse of the effect of section 11 as outlined in paragraph 264. The English section 13 goes a step further in relation to civil proceedings for defamation: it makes the conviction conclusive evidence of the commission of the offence.

266. In the part of its report dealing with convictions in relation to defamation, the Law Reform Committee considered *Hinds v. Sparks* ((1964) *The Times*, July 28, 30). Hinds was convicted of robbery. Afterwards Sparks published a statement that Hinds was guilty of the robbery. Hinds sued Sparks for damages for defamation. Sparks pleaded truth. Sparks failed on the issue of truth and Hinds succeeded in the action.

267. The Committee thought that the real purpose of such an action was to obtain a re-trial of the criminal proceedings by a civil court. They thought that a civil court ought not, in an action to which the Crown was not a party, retry, upon a different standard of proof, the precise issue of guilt of a criminal offence which has already been tried and determined by a criminal court. They thought that a person ought not to be at risk of incurring civil liability for stating that another person was guilty of an offence of which he was convicted, the conviction not having been set aside on appeal.

268. The Committee summarized their recommendation on this point by saying that, "in defamation actions, where the statement complained of alleges that the plaintiff has been guilty of a criminal offence, proof that he has been convicted of that offence and that the conviction has not been set aside should be conclusive evidence of his guilt" (p. 18). The Committee's recommendations were embodied in draft clauses set out in an annex to the report: clause 3 (1) in the annex runs". In an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, that person stands convicted . . . of that offence shall be conclusive evidence that he did . . . commit that offence . . ." (p. 22). The Civil Evidence Act 1968 s. 13 (1) takes this wording, with an immaterial alteration.

269. The enactment appears to go beyond the occasion for the recommendation and its supporting reasoning in two respects. First, the order of events which has given rise to the problem is (1) conviction, (2) publication complained of: the section would apply to the reverse order. We are content that our recommendation should follow the English enactment in this respect. We think that the reasons of policy against re-trial apply equally in both cases.

270. Secondly, the English enactment goes beyond making a conviction evidence in support of a defence of truth. It applies wherever guilt or innocence of the offence is relevant to an issue. Thus suppose A was murdered and B was convicted of the murder and the facts on which the conviction was based were consistent only with there being but one man guilty of the murder. Then let it be that C publishes a statement that D was guilty of the murder. D sues C for damages for defamation. C pleads a defence alleging the truth of the statement and issue is joined on that statement. It seems to us that the English provision would allow D to use the conviction and the facts on which it was based as conclusive evidence in destruction of the defence based on truth, and to exclude evidence, however compelling, that the statement was true.

271. The action by D against C could hardly be imputed to a purpose of obtaining a re-trial in a civil court of the criminal proceedings against B. Nor do the postulated facts involve the risk of a person incurring civil liability for stating that another person is guilty of an offence of which he has been convicted. The action by D against C may be thought to involve a civil court trying, in the absence of the Crown, the issue of guilt of a criminal offence which has already been tried and determined in a criminal court. But the real vice of the *Hinds v. Sparks* kind of action is, we think, that the convicted person is allowed to re-open the question of his guilt in a civil action for defamation. The legislation need not, we think, go further than is necessary to prevent this. In short, we prefer the recommendation of the Law Reform Committee to the draft clause annexed to their report and to the English section 13 which closely follows the draft clause.

272. We are strengthened in this preference by the consideration that, if the provision is so worded as to go in aid only of a defence based on truth, the provision can properly be applied to criminal proceedings for defamation as well as to civil proceedings.

273. We have therefore chosen the wording of section 56 with this end in view, and, by subsection (1), have provided that it should apply not only in civil proceedings but also in proceedings for an offence under section 51.

274. Section 56 (2) is so worded as to embrace not only an issue of the truth of the imputation complained of but also an issue of the truth of a contextual imputation (section 16 of the Bill). The section also expressly embraces a question of truth arising in relation to damages (section 48 of the Bill).

275. As to the effect of evidence of conviction, we think it appropriate that a conviction by a court of any country should be admissible in evidence, and that where, to put it shortly, the conviction is in an Australian court, the conviction should be conclusive. Section 56 (2) so provides.

276. Section 56 (4) would put the onus on the plaintiff or prosecutor to show that the conviction has been set aside. The onus appears to be on the defendant or accused under the English provision. It will be rare for reliance to be placed on a conviction which has been set aside and it would be troublesome to require proof in every case of the negative proposition that it has not been set aside. Further, if the conviction has been set aside, that fact is likely to be known to the plaintiff or prosecutor.

Criminating answer, etc.

277. Section 57 deals with the matter of criminating answers to questions, and self-criminating by discovery or production of documents or other things. We have referred in paragraphs 7 to 10 of these notes to section 19 of the Newspapers Act, 1898, and to the operation of that section to override, in cases to which it applies, objections on grounds of tendency to criminate. Section 25 of the Defamation Act, 1958, enables the court to order the proprietor of a periodical to give the name and address of the person who supplied an article, etc., in the periodical: we conceive that objection on grounds of tendency to criminate would not prevail against an order under the section. There are thus two provisions in the present legislation which encroach on the general privilege against self-crimination.

278. Since the facts constituting the civil wrong of defamation are also essential to the establishment of the offence under section 51 of the Bill, the cases will be numerous where a defamer can, by assertion of this privilege, defeat the ordinary procedural rights of the person defamed as to discovery of documents, as to interrogatories, and as to questioning the defamer as a witness. This will be so even if prosecutions for criminal defamation are as infrequent in the future as they have been in the recent past: *Triplex Safety Glass Co. Ltd v. Lancegaye Safety Glass (1934) Ltd* ([1939] 2 K.B. 395). The extent of the coincidence of the ingredients of the tort and the crime are, we think, a justification for adding the cases dealt with by section 57 to the cases, already numerous and important, where an objection on grounds of tendency to criminate is not allowed. The existing cases include those provided for by the Crimes Act, 1900, s. 178, the Royal Commissions Act, 1923, s. 17, the Companies Act, 1961, s. 250 (7) and the Bankruptcy Act 1966, s. 69.

279. Section 57 (2) maintains the safeguard common where this privilege is taken away, that the answer or other conduct of the person concerned is not to be used in evidence against him or his spouse in a prosecution. Section 57 is based on section 31 (1) of the English Theft Act 1968, but there is much change in wording.

Particular provisions of the 1958 Act

280. This and paragraphs 281 to 316 deal with the extent to which particular provisions of the Act of 1958 are adopted or rejected in our proposals. Sections 1 to 4 of the Act of 1958 do not of themselves affect the substance of the law and call for no further notice here.

281. As to sections 11, 12 and 13 of the 1958 Act, dealing with absolute privilege, see paragraphs 75 to 87 of these notes.

282. Section 14 of the 1958 Act deals with reports and similar material. See sections 24 to 28 of the Bill and paragraphs 118 to 160 of these notes.

283. Section 14 (1) (d) of the 1958 Act gives a protection for a report of the public proceedings of a court of justice or of the result of any such proceedings, “unless, in the case of proceedings that are not final, the publication has been prohibited by the court”. The words quoted appear to state the common law: Gately, paragraph 615. However, where the court has prohibited the publication, the court will have its own means for punishing disobedience to its order: we do not think that there should be an added indeterminate liability in the shape of damages for defamation. See also paragraphs 135 to 137 of these notes.

284. Section 14 (1) (d) of the 1958 Act also has a provision that “for the purposes of this paragraph matter of a defamatory nature ruled to be inadmissible by a court is not part of the public proceedings of the court”. This provision, apparently peculiar to the law of New South Wales, has its origin in section 5 (1) (d) of the Defamation (Amendment) Act, 1909. The provision appears to us to be inconsistent with the reasons for allowing a privilege for a report of the public proceedings of a court, namely that the administration of justice is a matter of public interest and that such a report conveys no more than what the reader could ascertain for himself by being in the court while the proceedings were in progress. At all events, the provision goes against the judicial tendency to give a wide ambit to the statutory privilege. (See, for example, *Farmer v. Hyde* ([1937] 1 K.B. 728). We think that there is no need for the provision and that it ought to be dropped.

285. The protection given by section 14 (1) of the 1958 Act applies only where the matter in question is published “in good faith for the information of the public”. The subsection provides that a publication is made in good faith for the information of the public if two conditions are satisfied. The first condition is that the person making the publication “is not actuated in making it by ill-will to the person defamed, or by any other improper motive”. The corresponding provision in the proposed Bill speaks of publication in good faith for specified purposes, without specifying the indicia of good faith (section 26). We think that this more general statement in the proposed Bill is better fitted to pick up the common law ideas of good faith. We think also that in point of form the 1958 Act is misleading in prescribing, as a test of the presence of one state of mind, the absence of another state of mind, the two states of mind not being mutually exclusive.

286. The second condition in section 14 of the 1958 Act as to publication in good faith for the information of the public is that the manner of the publication must be “such as is ordinarily and fairly used in the case of the publication of news”. We dislike this condition because it gives an artificial test of good faith and because it practically confines the protection of the section to newspapers and other mass media.

287. Section 14 (1) of the 1958 Act also provides that, in respect of some of the reports, etc. to which the subsection gives a privilege, it is evidence of want of good faith if the defendant fails to publish on request a contradiction or explanation of the defamatory matter. This provision is discussed in paragraphs 140 to 143 of these notes.

288. Section 14 (2) of the 1958 Act withdraws from the protection of the section “the publication of any matter the publication of which is prohibited by law”. We dislike this provision for reasons similar to those which lead us to propose dropping the restriction of reports of judicial proceedings in cases where publication has been prohibited by the court (paragraph 283 above). The legal prohibition referred to in section 14 (2) will have its own sanction, and damages for defamation ought not to be an added deterrent. Further, we do not see why it is only the reports and so on mentioned in section 14 (1) which have their protection curtailed in this way. The grounds for the curtailment appear to us to be as good, or as bad, for all kinds of defamatory matter.

289. Section 14 (3) of the 1958 Act restricts the protection of section 14 (1) (d), for reports of judicial proceedings, to reports which are published contemporaneously with the proceedings or the result of the proceedings. The requirement of contemporaneity has its origin in England in the Law of Libel Amendment Act 1888, s. 3, which appears to give an absolute privilege to a fair and accurate newspaper report of public proceedings of a court, if the report is published contemporaneously with the proceedings. The requirement was not introduced in New South Wales until 1958, when it was made a condition of a qualified protection, not an absolute privilege. We think that a lapse of time between the proceedings reported and the publication of the report may sometimes be relevant to good faith, but that the common law is well fitted to discriminate between cases where it is relevant and cases where it is not. Accordingly we think that the effect of section 14 (3) ought not to be continued.

290. Section 14 (4) of the 1958 Act deals with a point of procedure: it is now unnecessary.

291. Section 15 of the 1958 Act deals with fair comment. We have stated in paragraph 194 of these notes our reasons for omitting from our proposals a list of cases of imputed public interest for the purposes of the defence of comment. Section 15 concludes with two short sentences—"Whether a comment is or is not fair is a question of fact. If it is not fair, and is defamatory, the publication of it is unlawful". The first sentence gives a misleading appearance of simplicity to a complex corner of the law. The second sentence is irreconcilable with other provisions of the Act: section 16 is such a provision.

292. Section 16 of the 1958 Act deals with the defence of truth and public benefit. We have discussed the section and our proposals for its replacement in paragraphs 61 to 74 of these notes.

293. Section 17 of the 1958 Act deals with cases of qualified privilege. In this field, as in the case of comment, we prefer that the common law principles should be restored, rather than attempt a statutory formulation of a list of occasions of qualified privilege. We think too that the common law is well equipped to deal with the questions to which the final paragraph of section 17, and sections 18 and 19 are addressed.

294. Section 20 (1) of the 1958 Act, dealing with trivial cases, would be replaced by section 13 of the proposed Bill, which is to a similar effect. Section 20 (2) deals with a point of pleading in a way inconsistent with the principles of pleading under the Rules of the Supreme Court under the Supreme Court Act, 1970.

295. Section 21 of the 1958 Act deals with apology, or offer of apology, in mitigation of damages. The authorities are meagre, but it seems that evidence of an apology or an offer of apology is admissible in mitigation of damages at common law (Gatley paragraph 1359). This view seems to us clearly right in principle. The questions whether and if so how and when notice ought to be given are questions of procedure more properly governed by rules of court. See the proposed rule 19 of Part 67 in Appendix C. In these circumstances there is no need to retain the section.

296. Section 22 of the 1958 Act deals with an apology which, coupled with other matters (including payment into court) may operate as a defence. The section is obscurely worded and offers no advantages over the general procedural provisions for payment into court. We do not propose its continuance.

297. Section 23 of the 1958 Act deals with consolidation of actions. The rules under the Supreme Court Act, 1970 (in particular Part 12 rule 2), together with the proposed rule 11 of Part 67 in Appendix C, will be adequate.

298. Section 24 of the 1958 Act, as to other recoveries for similar defamatory matter, is reproduced in substance in section 49 of the proposed Bill.

299. Section 25 of the 1958 Act, as to disclosure of the name of the author of defamatory matter, is rendered unnecessary by Part 3 of the rules under the Supreme Court Act, 1970.

300. Section 26 of the 1958 Act deals with criminal defamation. Section 51 of the proposed Bill states in a modified form what we think should be the ingredients of the offence, and contains proposals as to penalty.

301. Section 27 of the 1958 Act, concerned with blackmail, not necessarily by means of defamatory matter, would on our proposals be replaced by a new section 100A of the Crimes Act, 1900. See section 4 of the proposed Bill and the First Schedule.

302. Section 28 of the 1958 Act requires a special plea of truth and public benefit in criminal proceedings. Special pleas in criminal cases are practically obsolete and we would drop the section.

303. Section 29 of the 1958 Act re-enacts part of section I of the Libel Act 1792. It deals with the power of a jury to give a general verdict on the whole matter in issue. See section 54 of the proposed Bill.

304. Section 30 of the 1958 Act deals with costs in private prosecutions for defamation. We think that there is no ground for a special provision as to costs in these cases. We propose that section 30 be repealed and not re-enacted. See also section 41A of the Justices Act, 1902.

305. Section 31 of the 1958 Act deals with a point in committal proceedings before a magistrate. See *R. v. Carden* ((1879) 5 Q.B.D. 1). There will be no need for such a section if section 28 of the 1958 Act is dropped and sections 51 and 52 of the proposed Bill are enacted.

306. Section 32 of the 1958 Act allows a magistrate to hear and determine trivial cases of criminal defamation, with the consent of the accused, instead of committing him for trial. Such a provision has no place in the proposed Bill because the offence under section 51 can never be trivial.

307. Section 33, of the 1958 Act, dealing with leave to commence a criminal prosecution, has no counterpart in the proposed Bill. See paragraphs 255 and 256 of these notes.

308. Section 34 of the 1958 Act relieves a proprietor, publisher or editor of a periodical from criminal liability if he shows that the matter complained of was inserted without his knowledge and without negligence on his part. The section is objectionable on general grounds because it puts an onus of proof on the accused. It is, moreover, unnecessary having regard to the provisions as to intention in section 51 of the proposed Bill.

309. Section 35 of the 1958 Act gives a special protection to an innocent seller of defamatory matter. It modifies the common law by relieving the defendant of the onus of showing that his ignorance of the defamatory nature of the matter complained of was not due to his negligence. The section has its origin in the Defamation Law of Queensland of 1889 and was a novelty in New South Wales when enacted in 1958. In the context of the proposed Bill, such a section would be relevant to civil liability, not to criminal liability: see the requirements as to intention for the offence under section 51 of the proposed Bill. The Queensland original of section 35 was enacted a few years after the decision of the Court of Appeal in *Emmens v. Pottle* ((1885) 16 Q.B.D. 354), the source of the common law on this subject. It may have been thought in 1889 that that decision would have more serious consequences than in fact have occurred. Experience both here and in England has not disclosed a need for such a section. We think that this is because a jury would be unlikely to award substantial damages against an innocent seller of defamatory matter. If the section were retained, there would be room for an extension of its protection to innocent disseminators other than sellers, for example, librarians. But we think that experience since the decision in *Emmens v. Pottle* (above) has not shown a need for the section and we propose its repeal without re-enactment.

310. Section 36 of the 1958 Act protects a master whose servant sells a defamatory book or other matter, unless the master authorized the sale knowing that the book or other matter contained or was likely to contain defamatory matter. The section goes against well established rules as to the vicarious liability of a master. Again, in the context of section 51 of the proposed Bill, such a section would not be relevant to criminal liability. We propose that section 36 be repealed without re-enactment.

311. Section 37 of the 1958 Act excuses from criminal liability a licensee or manager of a broadcasting or television station who shows that the matter complained of was put out without his knowledge and without negligence on his part. There is no need for such a section, having regard to the provisions as to intention in section 51 of the proposed Bill.

312. Section 38 and 39 of the 1958 Act, relating to evidence, would be re-enacted with modifications in section 55 of the proposed Bill. See paragraphs 262 and 263 of these notes.

313. Section 40 of the 1958 Act, giving special procedures in support of absolute privileges as to Parliamentary papers, would be repealed without re-enactment. See paragraphs 75 to 84 of these notes.

314. Section 41 of the 1958 Act denies to the defendant in a civil action, and to the accused in a prosecution, the benefits of specified sections of the Act in case of non-compliance with the laws relating to the printing and publication of newspapers and other laws described in the section. The section has its origin in the Act 11 Vic. No. 13, passed in 1847. It is a relic of the early days of the Colony. It imposes a kind of outlawry. It is unjust and ought to be repealed and not re-enacted.

315. Section 42 (1) of the 1958 Act excludes specified torts and crimes from the general operation of the Act. The scheme of the proposed Bill does not require a similar exclusion.

316. Section 42 (2) of the 1958 Act deals with points of procedure in prosecutions for obscene or blasphemous libel. We propose that provision to a similar effect be put in the Crimes Act, 1900, as section 574A. See section 4 of the proposed Bill and the First Schedule.

Proposed Rules of Court.

317. We go on to discuss the proposed rules of the Supreme Court in Appendix C. The provisions prior to the proposed rule 12 of Part 67 do not call for comment.

Rule 12: Statement of Claim.

318. The allegations forbidden by rule 12 1 in a statement of claim are at best premature and at worst inflammatory of juries. See as to the present law *Motel Holdings Ltd v. The Bulletin Newspaper Co Pty Ltd* ([1963] S.R. 208, *Clines v. Australian Consolidated Press Ltd* ((1965) 66 S.R. 321).

319. Rule 12 (2) (a) is an innovation. At present, in the common case of defamation by words, the plaintiff must, as a rule, specify in his declaration the words complained of and, if he relies on a true innuendo (that is, a sense depending on extraneous facts and circumstances: see paragraphs 42 and 43 of these notes) he must specify that sense. If he relies on a false innuendo he may, but need not, specify the false innuendo in his declaration. Rule 12 (2) would take a step in working out the principle of section 9 (2) (a) of the proposed Bill. Under that subsection, each defamatory imputation would support a separate cause of action. It is therefore appropriate that each defamatory imputation should be specified in the statement of claim.

320. Common forms of pleading do not include an allegation that the imputation of which the plaintiff complains was defamatory of him. See *Gatley on Libel and Slander* (6th edn 1967) pages 666 to 675; *Rath on Pleading* (1961) page 113. One course which a defendant can take is to dispute that the matter or imputation is defamatory: he can do so now under a plea of not guilty. The rules under the Supreme Court Act, 1970, do not allow a defence of "not guilty". It seems to us to put matters on a proper footing to require the plaintiff to allege that the imputation of which he complains was defamatory of him, so that the defendant can traverse or admit the allegation. This is the purpose of rule 12 (2) (b).

321. Rule 12 (3), which is contemplated by section 9 (4) of the proposed Bill, would control the multiplication of innuendos (true and false) which sometimes occurs under the present law and which might otherwise be warranted by section 9 of the proposed Bill and rule 12 (2).

322. Rule 12 (4) would take the place of section 72 of the Common Law Procedure Act, 1899. This subrule, and rule 13 (c), have the effect that the extraneous facts and circumstances supporting a true innuendo would be a matter for particulars rather than pleading. This is the position in England, and appears to be convenient.

Rule 13: Particulars: publication and innuendo

323. The reasons for judgment in the Court of Appeal in *McLean v. David Syme & Co. Ltd* ((1971) 92 W.N. 61 1) draw attention to the curious position that, once some publication has been proved so as to establish a cause of action, other publications, and other circulation and distribution, of the matter complained of or copies of it may be relied on for the purpose of the assessment of damages. We think that Part 67 rule 2 (a), and the English rule which it follows, may be read either as confined to the publication relied on to establish the cause of action, or as embracing not only that publication but also other publications, etc., relied on in relation to damages. We think that the plaintiff ought to give particulars of both, and have drawn paragraphs (a) and (b) of rule 13 so as to state this requirement distinctly.

324. We have dealt in paragraph 322 of these notes with the effect of rule 13 (c).

Rule 14: Defence generally

325. Until recently a defendant was able to raise a case of privilege or of fair comment under a plea of not guilty. So far as concerns the defences arising under the proposed Bill, the form of the relevant sections is probably sufficient to indicate that the defences call for specific pleading, but it is as well to make the position clear. Rule 14 (1) sets out to do so.

“Defence” is given an enlarged meaning by rule 10 (1). The meaning thus enlarged will also be wide enough to embrace cases of privilege at common law.

326. Rule 14 (2) calls for no comment beyond a reference to rule 12 (2) (a) and to paragraph 319 of these notes.

Rule 15: Truth generally

Rule 16: Truth: contextual amputations

Rule 17: Qualified privilege

327. These rules do not call for comment.

Rule 18: Comment

328. We expect that rule 14 (2) and rule 18 would in practice do away with anything in the nature of the rolled up plea.

Rule 19: Particulars of defence

329. The present General Rules of the Court (0.14 r.18A (1) (iii), (2) (ii)) enable an order to be made for particulars of the facts and matters relied on to establish truth as part of a case of truth and public benefit or as part of a case of fair comment. The English Supreme Court Rules, 1965, 0.82 r.3 (2), require such particulars to be given without order under a case of fair comment, but not under a defence of truth. We think that such particulars ought not to be required unless ordered: the statement in question may not leave room for particulars, e.g., “John Smith was convicted of murder at the Central Criminal Court on Thursday last”. See the English Supreme Court Practice 1967, p. 253. We therefore follow (in rule 19 (5)) the present rules in New South Wales in this respect.

Rule 20: Malice, etc.: reply and particulars

Rule 21: Interrogatories

Rule 22: Statement in open Court

Rule 23: Offer of amends: determination of questions

330. These rules do not call for comment.

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