Defamation

The timid tampers of public debate who defend our libel laws always argued that libel balances the conflicting interests of reputations and free speech.

What could be more reasonable? We the people give up part of our free speech and in return the protection of the law is thrown around our reputations.

This is the key to the libel debate: it is used by all defenders of the libel law. It is the common theme of judgments in all the Supreme Courts, of learned articles in the law journals, of seminars on media law.

It is accepted by Judge Graham Fricke of the Victorian County Court, in his recent book 'Libels, Lampoons and Litigants', and by Justice David Hunt of the New South Wales Supreme Court, who wrote the book's foreword.

But notwithstanding its universal acceptance by lawyers, the formula is false.

The first part is true: libel certainly means that we the people give up part of our free speech - the most interesting part, as it happens: the free speech which exposes a famous and powerful person, most often a politician, to 'hatred ridicule or contempt.'

Exposing a politician, particularly a New South Wales politician, to ridicule or contempt is of course very easy - which means that the censored area of our public discourse is huge. Rex Jackson, the former NSW Corrective Services Minister, for example, had 28 writs for libel out against Sydney newspapers when he went to trial charged with crimes associated with the early release of prisoners. When reporters exposed the NSW Government's payment of Jackson's legal fees, he issued still more.

So what is the balance? What do we get in return for surrendering the most important and interesting parts of our public debate to the curtain of silence?

What we get, at a substantial monetary - not to mention political, social and I believe psychological cost - is nothing at all.

Joe and Jill Average bring an insignificant number of libel actions - about one in fifty - and the lists are crowded with Federal and State Cabinet Ministers, Premiers, corporate heads like Kerry Packer, Alan Bond and Robert Holmes a Court, famed architects, lawyers and

END OF UNIFORM DEFAMATION LAW

On 2 May, 1985 the standing committees of Attorneys-General decided to abandon plans to develop a uniform defamation law for Australia.

Discussions had been underway for two years to establish a uniform law, but the key question of justification arose as the main area of disagreement. The States continued to disagree as to whether, the defence in defamation actions should be truth alone, truth plus public benefit or truth with protection for sensitive private facts.

sports figures and a variety of thugs and killers. Won more than

Very well. Does the law 'protect' the reputations of Premiers and Packers? Not a bit of it. Justice Jim Stamples of the 'Conciliation and Arbitration Commission' suggests that Sydney is 'the defamation capital of the world' - and every one of the multitude of writs is evidence not of the system's success, but of its failure.

Each one of the actions, that is, is designed to compensate the Premiers and Packers for reputations which have been damaged. A system designed to protect reputations would aim at minimising damage, not merely at giving dollars for damage after it has occurred.

There is such a system. It works already in the Australian parliaments and in our courts. It works in the United States under the First Amendment to the Constitution. It is the system called freedom of speech.

The evidence from these systems points consistently, as we would expect, in one direction: people's reputations are better protected than they are under our system of state regulated speech.

Although there are occasional 'abuses' of free speech in our parliaments, it is certainly not true that parliamentary debate is more careless, venomous and damaging to innocent reputations than debate outside the parliaments.

As for the U.S. example - even Gareth Evans when he was Attorney-General and rigidly defending the Australian libel

(Cont'd PAGE 25)

system acknowledged that public debate in the U.S. is much more scrupulous of personal reputation, and careful with the facts, than it is in more anxious jurisdictions like the U.K. and Australia.

Why, in the country of Patrick White and Thomas Keneally and David Williamson and Stephen Sewell do we put up with the State looking over our writers' shoulders?

Why does the recall and pulping of Ross Fitzgerald's "History of Queensland from 1915 to the Present" because of a complaint by the Chief Justice, Sir William Campbell, not provoke protests from academic believers in free scholarship?

Why do those great believers in individual creativity, the city architects, passively accept what Kevin Rice, president of the NSW chapter of the Royal Australian Institute of Architects, calls a debate on architectural standards 'stifled' by the laws of libel?

Why does one of the country's finest playrights, Alex Buzo, have to shell out to David Hill, head of the State Rail Authority, because Hill chose to identify himself as one of the less attractive characters in "Mackassar Reef"?

The assumptions running through our system of State regulated speech were well illustrated when the <u>National Times</u> published the story that Robert Askin when he was Premier of New South Wales had received \$100,000 a year in payments from organised crime figures.

There was a storm of abuse of the National Times, the reporter, David Hickie, and the then editor, David Marr. It was 'despicable', said the then leader of the NSW Liberal Party, Bruce McDonald. It was in 'appalling bad taste' said the National Party's expert in family morality, Ian Sinclair. Neville Wran said it was 'tasteless in the extreme.' Askin's widow, Molly, wept on ABC radio as she asked why Marr and Hickie 'had to be such utter curs to wait until he died.'

The grieving widow did not have the consolation of the huge damages which no doubt would have been hers if the story had been published when Askin was alive. But she did have some consolation. When Askin died he left an estate of \$1.8 million. When she died, Molly left \$3.4 million. From a Premier's Salary.

The question which no politician asked while heaping abuse on the <u>National</u> <u>Times</u> was the one James Fairfax, chairman of the Fairfax Board, asked when he read the story: 'Why was this not published when Askin was Premier?'

I think the answer to this and the other fundamental questions about out libel system is another question: why do we not trust ourselves?

Robert Pullan

In its directions, the Tribunal also commented on the question of relevance. It decided not to require production of a number of documents which the parties had requested because they were not sufficiently relevant.

The ABT noted that the enquiry was not a judicial enquiry but an administrative one. It differed from a Court dealing with a dispute in that:-

- (a) a Court had the benefit of issues being confined by pleadings, within a framework of established and well defined categories of forms of action, as well as a large volume of case law precedent;
- (b) the legal rules of evidence have the effect of excluding from the proceedings of Courts a large amount of material which would otherwise arguably be relevant. Pursuant to s25(2) of the Act the Tribunal is not bound by the rules of evidence;
- (c) the restraints of time and money which exert a natural break on prolixity in most proceedings of courts do not necessarily operate in proceedings before the ABT. In this regard the ABT noted that television markets of a size comparable to Perth were sometimes valued in the commercial world at over \$50 million. With such economic interests involved, it was only natural that some delay might be preferred.

Accordingly, the issues which had some relevance to the enquiry were very broad. The ABT considered that it was required by the Act to make practical judgments about the likelihood, as a matter of practical reality, of its being helped to make a decision about the licence by evidence which as to profitability logical relevance was not sufficient. Accordingly, detailed internal financial information about advertising revenue would be required. For the same reasons a meticulous comparison with other metropolitan markets such as Brisbane and Adelaide was not relevant.

The enquiry is still proceeding. Robyn Durie