THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 8

Defamation: Privileged Reports

REPORT

AUGUST 1972

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REPORT ON
DEFAMATION: PRIVILEGED REPORTS

To the Hon. T.D. Evans, M.L.A.

ATTORNEY GENERAL

TERMS OF REFERENCE

1. As Project No. 8 of its first programme the Committee was asked to -

> "examine and make recommendations for amendment to the *Newspaper Libel and Registration Act 1884* and amendments and generally to consider whether any alterations are necessary or desirable in the law relating to civil defamation in Western Australia".

THE MOVEMENT FOR REFORM

2. The present movement for reform was in part initiated by the West Australian Newspapers Ltd which made representation to the then Minister for Justice (See C.L.D. file 889/67) requesting amendment of the *Newspaper Libel and Registration Act 1884-1957* to ensure that the privilege given to reports by s.6 of the 1888 amending Act (see paragraph 6 (b) below) should be enjoyed by all newspapers.

3. As at 12 June 1972 the register of newspapers maintained at the Supreme Court showed that sixteen newspapers currently published in this State were registered under this Act. None of the major daily or weekly newspapers was included because the provisions of the Act relating to registration do not apply to "joint stock companies" (see s.18 of the 1884 Act).

4. Although the movement for reform was initiated in this State with a view to extending the privilege granted to newspapers, the question of reform of the law of defamation has been considered on a wider plane in other jurisdictions, and the Committee accordingly sought and was given wide terms of reference.

5. The Committee however decided to divide the project into two parts: the first dealing with the law relating to the publication of reports, and the second with the law relating to civil defamation generally. This report is concerned with the first part only. There has been some

criticism of the Committee's decision to split the topic in this way. The criticism is discussed in paragraphs 83 to 85 below.

THE PRESENT LAW

6. In Western Australia at present the privilege accorded by statute to reports may be summarised as follows -

(a) Section 2 of the *Newspaper Libel and Registration Act 1884* confers on **any** newspaper a privilege for the publication, without malice and for the public benefit, of a fair and accurate report of the proceedings of a public meeting provided the newspaper has not refused to publish a reasonable letter or statement of explanation or contradiction.

(b) Section 6 of the 1888 amendment to 1884 Act (see Appendix 2 of the working paper for the full text) gives to a **registered** newspaper **absolute** privilege for a fair and accurate report of the proceedings in any court of justice, or at any State or municipal ceremonial, or political, municipal or public meeting. What the statute establishes, however, is a register of newspaper proprietors and not of newspapers. Who is to enjoy the absolute privilege is therefore uncertain. Moreover, if "registered newspaper" means a newspaper whose proprietor is registered, the privilege is not available to a newspaper owned by a company (see s.18 of the 1884 Act, and *Gobbart v. West Australian Newspapers Ltd.* [1968] W.A.R.113 at 119; and cf. *Hughes v. West Australian Newspapers Ltd. and Nicholl* (1940) 43 W.A.L.R. 12).

(c) Section 354 of the *Criminal Code* (see Appendix 3 of the working paper for the full text) protects the publication of the following if published in good faith for the information of the public -

(i) a fair report of Parliamentary proceedings;
(ii) copies of or extracts from papers published by order or under the authority of either House;

(iii) a fair report of the public proceedings of courts, unless prohibited by the court, or unless the matter published is blasphemous or obscene (cf. (b) above);

(iv) a fair report of the proceedings of any inquiry authorised by statute, Her Majesty or the Governor in Council;

(v) any notice or report issued by any Government Department, officer of State or the Police, published at the request of the issuing authority;

(vi) a fair report of the proceedings of any local authority, board or statutory body constituted for the discharge of public functions "so far as the matter published relates to matters of public concern" (cf. (b) above) .

(d) The same section of the Code also grants privilege to a fair report published in good faith for the information of the public of the proceedings of any public meeting "so far as the matter published relates to matters of public concern". It is evidence of want of good faith if the publication is in a periodical and the person defamed has been refused an opportunity to publish in the periodical a reasonable letter or statement by way of contradiction or explanation (cf. (a) and (b) above).

WORKING PAPER

7. The Committee prepared a working paper dated 11 July 1969 (copy of which is attached) and distributed copies to the Chief Justice and Judges of the Supreme Court, the Law Society, the Law School, the editors of *The West Australian, The Daily News, The Sunday Times, The Independent*, the proprietors of all newspapers registered under the *Newspaper Libel and Registration Act 1884-1957*, some legal practitioners and the other law reform bodies with which the Committee is in correspondence.

8. Comments upon the working paper were received from the Law Society, Mr. E.F. Downing, Q.C., Professor Payne and *The Sunday Times*.

9. In its study of the problems the Committee made use of the New South Wales Law Reform Commission's working paper on defamation. The Commission has now made its report (L.R.C. 11 of 1971) and the views there expressed differ in some respects from the

proposals made in its working paper. In the draft bill appended to this report, the Committee has adopted the general framework of the legislation proposed in the New South Wales report.

THE MAIN ISSUES

10. The main issues involved on the subject of the privilege to be granted to reports are discussed in paragraph 11 to 82 below.

These issues are -

(1) Whether and to what extent the classes of reports to which the privilege is granted should be extended (paragraphs 11 to 32). The classes of reports about which there are differences of opinion are of -

(a) foreign judicial and legislative proceedings (paragraphs 15 to 23);
(b) findings and decisions of associations (paragraphs 24 to 25);
(c) proceedings of meetings of local authorities and other statutory bodies (paragraphs 26 to 28);
(d) State and municipal ceremonies and political meetings (paragraphs 29 to 32).

(2) Whether the privilege should be restricted to newspapers (paragraphs 33 to 36).

(3) Whether and to what extent the following qualifications should apply (paragraphs 37 to 66) -

(a) lack of good faith (paragraphs 40 and 41);
(b) right of reply (paragraphs 42 to 53);
(c) public concern, public benefit, public information and education (paragraphs 54 to 63);
(d) fairness or fairness and accuracy (paragraphs 64 to 66).

(4) Miscellaneous matters (paragraphs 67 to 85) -

(a) registration or identification of publisher (paragraphs 67 to 74);
(b) security for costs (paragraph 75);

(c) period for limitation of actions (paragraphs 76 to 79);

(d) effect of apology (paragraphs 80 to 82);

(e) partial reform (paragraphs 83 to 85).

EXTENSION OF CLASS OF PRIVILEGED REPORTS

11. The United Kingdom Committee on the Law of Defamation (the Porter Committee) in its report in 1948 expressed the view that the matters, reports of which were entitled to privilege by the *Law of Libel Amendment Act 1888* (U.K.), were matters of interest to the public at the close of the nineteenth century. It agreed with the view put to it on behalf of the press that changes in social and administrative conditions since 1888, and the increasing interest in foreign affairs, had now made the scope of the privilege inadequate and accepted that the time was ripe for considerable extension (see Report, Cmd. 7536, paragraphs 106 and 107). As a consequence of the Porter Committee's recommendations the range of reports accorded privilege in the United Kingdom was considerably enlarged by the *Defamation Act 1952* (see the schedule to that Act, reproduced in Appendix 4 of our working paper).

12. Although similar representations have not been made in Western Australia, we nevertheless accept the view which was put to the Porter Committee. Indeed, interest in current affairs both of Australia and overseas is greater today than when the Porter Committee reported and the inadequacy of the law is correspondingly more marked.

13. We consider that the reports and matter referred to in the schedule to the United Kingdom *Defamation Act 1952* with the additions proposed in the United Kingdom Freedom of Publications Protection Bill 1966 (see paragraph 27 of our working paper), to the extent that they are not now privileged in Western Australia and with minor extensions and appropriate adaptation to take account of this State's position as a member of a Federation, should be afforded qualified privilege in this State. The draft bill attached as an Appendix to this report makes provision accordingly. The New South Wales Law Reform Commission in its report recommends similar provisions for that State (Report, L.R.C.11, paragraphs 27 to 31).

14. To the general proposal in our working paper that the range of reports at present in Western Australia should be extended there was no disagreement. In the following paragraphs (15 to 32) we discuss the reports or matters about which there are differences of opinion.

Foreign judicial and legislative proceedings

15. The New South Wales Law Reform Commission (Report, L.R.C.11, paragraph 28) supported its proposal to extend the privilege to reports of proceedings in foreign courts by saying -

> "We propose 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".

16. The Porter Committee had considered the question of extending the privilege to foreign judicial proceedings but decided against such extension on the ground that it could only be justified if a person defamed by the report was given a right of reply, but that a right of reply would be objectionable since it could lead to a "re-trial" of the foreign proceedings in an English newspaper.

17. Our view, like that of the New South Wales Law Reform Commission, is that the free reporting of overseas affairs is of importance to the proper functioning of a democratic society and possible difficulties over a right of reply should not inhibit the granting of privilege to such reports. In any case we think that fears about the abuses to which a right of reply could lead are exaggerated (see paragraphs 42 to 53 below).

18. Professor Payne in his comment has stated that he can see no justification for a blanket protection of reports of the proceedings of foreign legislatures. He has suggested that "protection should be confined to reports of foreign proceedings which are of some special legitimate interest to the (West) Australian public". We note incidentally that "special

legitimate interest" was the qualification imposed as the common law requirement for the reporting of foreign judicial proceedings by Pearson J. in *Webb v Times Publishing Co Ltd.* [1960] 2 Q.B. 535. Professor Payne also points out that the United Kingdom *Defamation Act 1952* 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" (s.7(3)).

19. We however, for the same reasons as are applicable to foreign judicial proceedings (paragraphs 15 to 17), would not favour the suggested qualification. The question of public concern and public benefit are discussed below in paragraphs 54 to 63.

20. The question remains whether the privilege should be confined to reports of proceedings of legislative and judicial bodies which are public proceedings. Although we have raised this matter in the context of foreign proceedings, the problem is a general one. The question, as far as we are aware, has not been discussed elsewhere. The draft bill attached to the New South Wales Commission's report grants the privilege to reports of the public proceedings only of judicial and legislative bodies, whether Australian or foreign. The Commission gives no reason for the limitation. Following the recommendations of the Porter Committee (which also gave no reason) the United Kingdom *Defamation Act* grants the privilege to reports of proceedings of legislative and other bodies outside the United Kingdom only if they are public proceedings. Reports of judicial proceedings within the United Kingdom are privileged only if held in open court, but on the other hand reports of all proceedings of the United Kingdom Parliament, whether open to the public or not, are privileged.

21. In Western Australia at present, although reports of all proceedings of our Parliament are privileged under s.354 of the Code, the section confines the privilege to reports of public proceedings in our courts. Under s.6 of the *Newspaper Libel and Registration Act 1884 Amendment Act 1888*, reports of "the proceedings in any court of justice" are privileged if published in a registered newspaper (see paragraph 6(b) above). However it was held in *Gobbart v. W.A. Newspapers* [1968] W.A.R. 113 that because of the context these words refer only to proceedings in open court.

22. Our view is that proceedings in camera of legislative and judicial bodies, whether in Australia or elsewhere, could be of legitimate public concern to people in this State, and that

it is wrong to assume that the public interest, which is the purpose of granting the privilege, is best served by confining the privilege to reports of public proceedings. Our recommendation is that privilege should extend to all proceedings of these bodies whether or not they are public, unless such publication is prohibited by the court or by law.

23. We hold a similar view in respect of reports of meeting of local authorities and other statutory bodies (see paragraph 27 below).

Findings and decisions of associations

24. The United Kingdom *Defamation Act 1952* (see Part II of the schedule to that Act, paragraph 8) grants privilege, subject to conditions, to the publication of a fair and accurate report of the findings or decision of the following associations, or of their committees or governing bodies -

(a) an association for promoting or encouraging any art, science, religion or learning;
(b) an association for promoting or safeguarding the interests of any trade, business, industry or profession;
(c) an association for promoting or safeguarding the interest of any game, sport or pastime to the playing or exercise of which members of the public are invited or admitted.

The privilege does not apply unless -

(d) the association was formed in the United Kingdom;
(e) the association is empowered by its constitution to exercise control over matters of interest to the association, or over the conduct of any person subject to such control;
(f) the decision relates to a member of the association or to a person subject under a contract to the control of the association.

The privilege is also subject to the right of any person defamed to have published an explanation or contradiction.

The New South Wales Commission's report generally follows the United Kingdom Act, but makes the privilege available to reports of findings or decisions of associations wherever formed, provided the finding or decision is made in Australia or has effect in Australia.

25. In our working paper (paragraph 29) we expressed doubts whether such reports should be accorded privilege. On reconsidering the matter in the light of the comments received we now consider that privilege should be accorded to them and adopt the New South Wales proposal. With regard to sporting bodies (see subparagraph (c) in the previous paragraph) the requirement that the playing or exercise of the sport must be open to the public would exclude purely private clubs. In any event the privilege should only extend "so far as the matter published relates to matters of public concern" (see paragraph 58 below).

Proceedings of meetings of local authorities and other statutory bodies

26. The United Kingdom *Defamation Act 1952* (see paragraph 10 of Part II of the schedule) grants privilege to reports of proceedings of meetings of local authorities and other statutory bodies subject to -

(a) a right of reply in explanation or contradiction; and
(b) a requirement that the meeting was one to which the public and press were admitted.

The *Criminal Code* s.354(6) (see paragraph 6(c) above) covers a similar area but is not subject to either of these qualifications.

27. The present law, which grants the privilege whether or not the meeting was a public one should, in our view, be retained for the same reason as expressed in paragraph 22 above relating to reports of legislative and judicial bodies. In the case of local authorities and statutory bodies however, we would recommend as an additional safeguard the retention of the present qualification that the report be privileged only "so far as the matter published relates to matters of public concern" (see paragraph 58 below).

28. One section of the press raised the question of whether the publication of a statement given by the chairman after a local authority meeting from which the press and public had been excluded should be protected, even though the statement was not accurate. We are of the

view that this goes too far. In this State the press will however continue to be protected when reporting proceedings of meetings which are not public, a privilege not accorded them in England.

State and municipal ceremonials and political meetings

29. The 1888 amendment to the *Newspaper Libel and Registration Act 1884* grants privilege to reports of proceedings at "any state or municipal ceremonial", and at any political meeting. There is no counterpart in the legislation of any of the other jurisdictions we have studied.

30. The precise scope of a "state or municipal ceremonial" has not been judicially determined nor indeed does the question of privilege in this context seem to have arisen. No comments were received on this matter. Reports of state or municipal ceremonials are probably protected sufficiently by the provisions relating to reports of proceedings of Parliament, of local authorities and other statutory bodies and of public meetings, and we think that express statutory provisions dealing with them are unnecessary.

31. The exact scope of the term "political meeting" is also not clear. But since the report of a public meeting is also privileged under the 1888 amendment, it presumably was intended to protect political meetings even if they were not public.

32. We are however of the view that reports of political if meetings which are not public meetings should not be protected. This is also the view of Mr. Downing.

WHETHER THE PRIVILEGE SHOULD BE RESTRICTED TO NEWSPAPERS

33. The protection given by the *Newspaper Libel and Registration Act* and its amendments is restricted to newspapers. This was the principle upon which the parent legislation of the United Kingdom of 1881 was based (see 1881) 261 Parl. Deb. (U.K.) 219). Section 354 of the *Criminal Code* (see paragraph 6(c) and (d) above) which reflects the view of Sir Samuel Griffith (the draftsman of the Queensland Defamation Law of 1889 which in substance was incorporated into the *Criminal Code*) applies alike to everyone (see 1889) 57 Parl. Deb. (Qld) 734).

34. The principle of restricting the privilege to reports published in newspapers is followed in the United Kingdom (*Defamation Act 1952*- see Appendix 4 of our working paper); Victoria (*Wrongs Act 1958*, s.5) and South Australia (*Wrongs Act 1936*, s.7). Apart from Queensland and Western Australia, what may be termed the Griffith view prevails in New South Wales (*Defamation Act 1958*, s.14), and Tasmania (*Defamation Act 1957*, s.13). The Law Reform Commission of New South Wales in its working paper on defamation (paragraphs 134-135) inclined to the view that the Griffith view should be continued in any proposed new defamation law. This view is adopted, without discussion, in its report.

35. Our view (indicated in paragraph 19 of our working paper) is that the privilege should not be confined to newspapers. In modern times with means of reproduction far more readily available there exist, apart from newspapers, a wide range of books, periodicals and other publications containing information and discussion on proceedings in Australia and elsewhere, and there seems no justification for discriminating between newspaper proprietors and other persons who may wish to publish. This view is shared by the Law Society and Professor Payne. No commentator disagreed. *The Sunday Times* confined its comment to suggesting that there should be no distinction drawn between company-owned and privately-owned newspapers.

36. Although most of the discussion above relates to publication in newspapers and other documents, the word "publish" has a wider meaning and includes publication by radio broadcasts and television, and publication by those means would also be privileged.

QUALIFICATION TO THE PRIVILEGE

37. Western Australia is alone in that it grants, but only to "registered" newspapers (see paragraph 6(b) above), an absolute privilege, unqualified except by the requirement that the report be fair and accurate.

38. The special circumstances existing in Western Australia in 1888 which it was then submitted justified the granting of this special protection to newspapers are set out in the evidence given to the Select Committee on whose report the 1888 amendment was introduced (see 1888) Votes and Proceedings of the Legislative Council, Doc. A10, p.8) and may be summarised as follows -

(a) The great poverty of the colony rendered local newspapers unable financially to stand strain of libel actions.

(b) The condition of party feeling in the small community made an action at law where juries were empanelled a peculiarly precarious matter.

(c) The poverty of the colony at the time begat a class of speculators in libel actions.

(d) The constitution of the Supreme Court at the time meant that there was virtually no appeal from a decision of a single judge.

39. These circumstances do not exist today. We are of the view that there is no justification for departing from the generally accepted principle of requiring that certain conditions be complied with. In addition, if, as has been suggested in paragraph 35 above, the privilege is to be available to all persons and not only to newspapers, there would appear to be all the more reason for imposing a qualification of good faith or the absence of ill-will. With this view of the Committee, Professor Payne expressed agreement and no commentator disagreed.

Lack of good faith

40. In all the legislation examined by us, other than the 1888 amendment to the *Newspaper Libel and Registration Act*, the privilege depends on a requirement that the publication was in good faith or without malice. The burden of proof however, is on the party who alleges the malice or absence of good faith (see e.g. *Criminal Code* s.358, but cf. Law Reform Commission of New South Wales' working paper, paragraphs 212-216), and we recommend that this should continue to be the law.

41. This qualification appears in several different forms in the statutes. The phrase used in s.354 and several other sections of the *Criminal Code* is "in good faith" and we can see no reason to depart from this formula.

However, following the New South Wales Law Reform Commission's report (see Report, L.R.C.11, paragraphs 148 and 285 of Appendix D), we recommend that the attempt in s.354 of the Code to define good faith by reference to the absence of "ill-will ...or any other improper motive" be dropped. The concept of good faith is sufficiently known to the law, and the definition of the terms "ill-will" and "improper motive" are not helpful and may be too

restrictive. The cognate question of the purpose of the publication is dealt with in paragraphs 59 to 63 below.

Right of reply

42. The United Kingdom *Law of Libel Amendment Act 1888* denied privilege to a newspaper which had been requested to publish a reasonable letter or statement by way of contradiction or explanation of a defamatory report and had refused or neglected to do so.

43. In Western Australia, right of reply provisions are included in s.2 of the *Newspaper Libel and Registration Act 1884* but the privilege under this Act applies only to reports of proceedings of public meetings (see paragraph 6(a) above). Section 354 of the *Criminal Code* also contains a right of reply (see paragraph 6(d) above), again given only in respect of reports of proceedings of public meetings. Moreover it is restricted to cases in which the publication complained of was in a periodical, and the refusal or neglect to publish the contradiction or explanation operates not directly to deny the privilege but indirectly, as evidence of want of good faith.

44. Sir Samuel Griffith, who framed the original of the Code provisions, considered that the failure to publish the reply was not necessarily conclusive of want of good faith and that it would be fairer to make it merely evidence of such (see (1889) 57 Parl. Deb. (Qld.) 736).

45. We are of the view that difficulties could arise with the Code provision which makes the failure to publish the reply merely evidence of want of good faith. If right of reply provisions are to be included, the privilege should be denied if the right has not been afforded.

46. The Porter Committee considered that the right to the insertion of a statement in reply was valuable and ought generally to be retained but was unsuitable in the case of reports of meetings of bodies such as Dominion or foreign legislatures, and international bodies of which the United Kingdom is a member (see Report, Cmd, 7536, paragraph 110, and see paragraph 17 above). The Committee therefore divided reports into two categories -

(a) statements privileged without explanation or contradiction; and
(b) statements privileged subject to explanation or contradiction.

These recommendations were given effect to in the schedule to the United Kingdom *Defamation Act 1952* (see Appendix 4 of our working paper for the relevant extracts from that Act).

47. In its report the New South Wales Commission has recommended against any right of reply (see Appendix D to report, paragraphs 142 and 143), mainly because it considers it unfair to require a publisher to publish a statement drawn by someone else, and because it thinks that the right has been seldom exercised.

48. On balance we favour the English view and recommend that a right of reply should in general be afforded. It would give the person defamed by the publication of the report an opportunity to retrieve his reputation, and it does not seem unreasonable to oblige the publisher of the report to help attain this end as a condition of retaining the privilege.

49. We would however not grant a right of reply in cases in which the defamatory matter is contained in a report of legislative or judicial proceedings within Australia because this could result in an undesirable "re-trial" in a newspaper of issues already decided in an Australian court or debated upon in Parliament. However we think that fears of similar abuse in other areas are probably unfounded (see paragraph 17 above). A wide right of reply has existed in New Zealand since 1954 (*Defamation Act 1954* (N.Z.) 1st Schedule) without apparent harm. We recommend a similar provision here (see provision 6 (1) of the suggested legislation set out in the Appendix to this report).

50. The onus would be on the plaintiff, the person defamed, to prove that the defendant, who had published the defamatory matter, had been requested to publish a reasonable explanation or contradiction and had "refused or neglected to do so, or [had] done so in a manner not adequate or not reasonable having regard to all the circumstances" (*Defamation Act 1952* (U.K.)s.7(2)).

51. If the publication has been in a newspaper or periodical or in a radio or television broadcast the reply can of course be published in a subsequent issue or broadcast. If however the publication is not in a newspaper, periodical, or broadcast the question of the adequacy and reasonableness of the manner in which the reply was published, will arise.

52. We are of the view that publication in a daily newspaper circulating in the district or area in which the defamatory matter was published would be sufficient to satisfy the requirements on this issue.

53. The Law Society, in its comments, requested that we consider defining "reasonableness". We doubt the wisdom or usefulness of attempting such a definition. What is reasonable must always be decided in the light of all the circumstances of the particular case.

Public concern, public benefit, public information and education

54. The United Kingdom *Defamation Act 1952*, s.7(3), denies the privilege to the publication of any matter which is not of public concern and the publication of which is not for the public benefit.

55. The New South Wales Law Reform Commission was against adopting such a limitation in New South Wales. In its working paper (paragraph 137) the Commission said that s.7(3) of the United Kingdom *Defamation Act* -

> "… could convey the impression that the protection was restricted to information supplied for its bearing on possible political action which might at some stage be demanded. We have referred … to the limited protection which the law has in the past given to freedom of speech on cultural and educational grounds as distinct from political grounds. We think that protection to reporting of legal and political matters should be given because of the educational and cultural importance of openness about the workings of political society, 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 action".

To illustrate one aspect of the problem the Commission in the same paragraph drew attention to difficulties facing libraries. It said -

> "… at the present time libraries contain growing amounts particularly of foreign legal materials and it is intolerable to think that persons involved in American or European litigation might take action against the libraries concerned for publishing the material here on the ground that the subject matter of the particular case was not such as to make publication of the facts here of public importance".

The Commission confirmed these views in its report (see Report, paragraph 28 and paragraphs 121 and 122 of Appendix D).

56. Professor Payne was inclined to think that the problem could be met by giving special protection to libraries. However this would not be satisfactory. The New South Wales Commission's reference to libraries served merely to illustrate the general question, and in any event the definition of what libraries were to be protected would be difficult.

57. In Western Australia, the *Newspaper Libel and Registration Act 1884* does require that the publication should have been "for the public benefit". The *Criminal Code* section (s.354) contains no such limitation but does provide, though only with regard to reports of proceedings of local authorities, statutory boards and public meetings, that they should be privileged only "so far as the matter published relates to matters of public concern" (see paragraph 6(c) and (d) above).

58. After reconsideration and considerable discussion we have decided to adopt the stand taken by the New South Wales Commission in its working paper (paragraph 137) and in its report (paragraph 23), and we recommend that the limitations of public concern and public benefit be not included, except in relation to reports of proceedings of local authorities, statutory bodies, associations, public meetings and company meetings, which are in our view, "local" in nature. The privilege should only be allowed to reports of such proceedings "so far as the matter published relates to matters of public concern". (This is the formula used in the *Criminal Code* s. 354(6) and (7) , and see paragraph 57 above).

59. Section 354 of the Code limits its privilege to publications that are "for the information of the public". In the terms of the section a publication is "in good faith, for the information of the public, … if the manner of the publication is such as is ordinarily and fairly used in the case of the publication of news".

60. The importance placed by the New South Wales Commission upon the maintenance of an open society led it to suggest (see its working paper, paragraph 138) that it was not only protection as "news" that should be covered but also "protection as material for discussion even though as news it may be stale". It therefore put forward (paragraph 153) the following

formula: "It is privileged to publish in good faith for public information or for the furtherance of the objective of public enlightenment".

61. Professor Payne commented that the "objective of public enlightenment" was "a somewhat loose phrase to find in a statute" and that it "would protect a far wider range of matters than the English qualification, which is consistent with the general requirement in cases of privilege that the hearer should have a legitimate interest in the subject matter of the communication going beyond mere vulgar interest in the affairs of others".

62. The New South Wales Commission in its report (see paragraphs 144 and 145 of Appendix D) has used a somewhat different formula: "... in good faith for the information of the public or the advancement of education or the advancement of enlightenment".

63. We agree with the objectives of the New South Wales Commission but we are not satisfied with either formula suggested by it, and prefer the following -

"…in good faith for public information or education".

The reference to education sufficiently protects reports used as material for discussion, and there is no need to introduce the vague concept of "enlightenment" about which the New South Wales Commission appears to have misgivings (see Report, paragraph 145 of Appendix D).

Requirement that the report be "fair" or "fair and accurate"

64. The United Kingdom *Defamation Act 1952* requires that the report be "fair and accurate". The *Newspaper Libel and Registration Act 1884* of Western Australia and its amendments have the same requirement. The requirement under s.354 of the Code is merely that the report be "fair".

65. We are of the view that the essential requirement is fairness. A materially inaccurate report would be unfair, and a report inaccurate to a degree which is neither material nor prejudicial should not deprive the publisher of the protection. No commentator dissented from our suggestion on the issue in the working paper (paragraph 36).

66. However, we now consider that, for reasons of caution, it may be wise to require that the report be both fair and accurate and recommend accordingly.

MISCELLANEOUS MATTERS

Registration or identification of publisher

67. The registration provisions of the *Newspaper Libel and Registration Act 1884* were designed to facilitate the identification of the proprietor of a newspaper against whom action was contemplated, (see 1884) 9 Parl. Deb. (W.A.) 141).

68. In our working paper (paragraphs 38 to 40), three possibilities were canvassed -

(1) the extension of the present registration provisions to all newspapers (including company owned);
(2) the enactment of provisions requiring all newspapers to carry particulars to identify the proprietor, the editor and the printer;
(3) the enactment of similar provisions requiring all publications containing reports for which privilege could be claimed to carry similar particulars.

There are of course two further possibilities - the retention of the existing law, or the abandonment of any requirement of registration or identification.

69. The Council of the Law Society favoured the second of the possibilities, namely the enactment of provisions requiring all newspapers to carry the particulars. The Council also expressed the view that failure to comply with the requirement should be penalised by a fine (as a failure to register is, in the existing statute) and not by deprivation of the privilege.

70. Professor Payne was "inclined to think that it would be impracticable to require a publication to contain particulars of the publisher and editor only if it contains a report for which qualified privilege is claimed".

71. In our view, since the privilege is to be enjoyed by publishers other than newspaper proprietors, measures to facilitate identification of the publisher should not be confined to newspapers. It would be impracticable however, to subject to a fine every person concerned

with the publication of a document which happened to contain a report of the type dealt with in the statute, merely because the document did not bear the particulars of the publisher.

72. We would therefore suggest that registration be not required but that the privilege be denied to any document produced by mechanical or photographic means if the document did not bear the necessary particulars. It would seem to us no great hardship to require persons who claim the privilege to have first ensured that the grounds on which the privilege could be claimed had been properly laid.

73. We realise that such a requirement would be limited in its effectiveness since it would not apply to publishers of matters other than privileged reports, but we think it would not be desirable to go further.

74. We have not suggested that a similar requirement apply to radio or television broadcasts because compliance would be impracticable and in any event, the broadcasters would be easily identifiable.

Security for costs

75. The 1888 amendment to the *Newspaper Libel and Registration Act* introduced a provision enabling a newspaper defendant to obtain security for costs in circumstances which would probably not enable an individual defendant to do so. It was thought necessary at the time to protect newspapers from speculative libel actions (see working paper paragraphs 41 and 42). There are provisions in the *Rules of the Supreme Court 1971* (see 0.25) empowering the court generally to order security for costs to be given and there seems no reason to place newspapers in a special category. In any event the provision in the 1957 amendment to the Act which limits the sum which may be demanded as security to $200 is no real protection. No submission was made to us to retain it and we recommend its abolition.

Limitation period

76. The 1888 amendment to the *Newspaper Libel and Registration Act* imposed a limitation period of four months from the date of the publication of the libel for the bringing of actions against the newspaper (s.5). This period was extended to twelve months by the

amending Act of 1957 (No. 24 of 1957, s.4). The limitation period for actions in defamation where the defendant is not a newspaper are -

(a) in actions for slander when the words are actionable *per se*: Two years (*Limitation Act 1935- 1954,* s.38 (1) (a) (ii));
(b) in other cases of slander and for libel: Six years (*Limitation Act 1935- 1954,* s.38 (1) (c) (vi)) .

In our working paper we questioned whether there was a case for the special shorter period of limitation applicable to newspapers and invited comment.

77. *The Sunday Times* in its comment supported the continuation of the twelve month period. It was also concerned that the period of limitation could be defeated by the republication of an old issue of a newspaper. We have not considered the latter question and have no recommendations on it. The matter is not covered in any of the statutes we have studied. If there is no change the common law will continue to apply.

78. Mr. Downing in his comments also favoured the retention of the twelve month limitation period. He said that newspapers were under pressures of immediate publication and may often be unable to check the accuracy of the source of their information after a certain period.

79. The question of limitation is a difficult one. It could possibly be argued that the period of twelve months seems too short: a person defamed may not hear of the defamation until such time had elapsed but the injury to his reputation may well persist beyond this period. On the other hand, the limitation period of six years could seem unduly long, not only for libel actions, but generally we are however reluctant to suggest at this stage any variation in limitation periods and recommend that the present limitation periods continue to apply until a general review is made. In other words, the present provisions of the *Newspaper Libel and Registration Act* would continue to apply to newspapers but would not apply to other publications.

Effect of apology

80. Lord Campbell's *Libel Act 1943* provided for a plea of apology if the libel had been published in a "newspaper or other periodical publication without actual malice and without gross negligence", and gave the plaintiff liberty to make a payment into court by way of amends for the injury. In 1845 the Act was amended by providing that the payment into court was a necessary condition of such a plea. After the *Judicature Act* was passed in 1873 the plea was seldom resorted to because a defendant could then pay money into court under the ordinary rules and plead the apology in mitigation of damages. He is better off doing this as he does not have to prove that the publication was "without actual malice and without gross negligence".

81. In Western Australia, Lord Campbell's *Libel Act of 1843* was adopted in 1847 by the *Imperial Act Adopting Ordinance 1847*, but the 1845 amendment was not. In effect this has meant that the payment into court has not been essential to the plea. The plea however is not likely to be used for reasons similar to those mentioned in the previous paragraph.

82. We recommend that the *Imperial Act Adopting Ordinance 1847* be repealed on the grounds of obsolescence. The ordinary rules regarding payment into court and the law regarding apology in mitigation of damages would continue to apply.

Whether the amendment of the law relating to reports should await reformation of the whole of the law of defamation

83. Professor Payne pointed out that it is a little strange that the Committee being concerned with the incidence of civil liability for defamation should propose to reform the law by amending the *Criminal Code*, and that there is doubt about the application of other provisions of the chapter (Ch. 35) of the Code dealing with defamation to civil liability. He has suggested that the Committee "should not attempt to deal with the amendment of the *Newspaper Libel and Registration Act 1884* separately from the law of defamation generally, but should deal with the whole of the law of defamation in one report".

84. The Committee concedes that ideally the whole subject should be dealt with at the one time but the task would be a large one, and in the Committee's view the parts of it dealt with in this report are more pressing and are capable of being dealt with separately.

85. The Committee also recognises that it is unusual to deal with a civil branch of the law in a criminal code but it accepts as a fact that this has been the position in Western Australia since the Code was enacted. Until a separate defamation statute is enacted the Committee is of the view that reformation of the law can be best dealt with within chapter 35 of the *Criminal Code*, but at the same time the Committee would recommend an amendment to s.357 of the Code to ensure that it applies civilly.

RECOMMENDATIONS

86. The Committee therefore recommends that the *Newspaper Libel and Registration Acts of 1884*, 1888 and 1957 (with the exception of the provisions dealing with limitation) and the *Imperial Act Adopting Ordinance 1847* be repealed and that s.354 of the *Criminal Code* be replaced by provisions along the lines suggested in the Appendix to this report. We intend the Appendix to be merely instructions to the draftsman and have included all matters of substance which we think should be contained in the legislation though not expressly mentioned in the body of the report. We would be happy to co-operate with the draftsman in the preparation of any bill to give effect to the recommendations.

In broad summary, the main changes proposed are -

(a) An extension to the class of privileged reports to include -

(i) reports of legislative and judicial proceedings and official inquiries elsewhere in Australia and overseas;
(ii) reports of international conferences;
(iii) reports of proceedings of local bodies elsewhere in Australia;
(iv) reports of general meetings of companies within Australia;
(v) reports of proceedings of certain voluntary associations within Australia, or having effect within Australia;
(vi) extracts from official records kept in Australia, and statements published at the request of Government officials elsewhere in Australia.

(b) The privilege attached to reports and documents referred to in (a) above would depend on the report being published in good faith for public information or education and,

except for reports of legislative or judicial proceedings within Australia, on the publisher affording a person defamed a right of reply.

(c) The abolition of the absolute privilege at present accorded to registered newspapers in relation to the publication of certain reports.

CHAIRMAN
E.J. Edwards

MEMBER
C. le B. Langoulant

MEMBER
B.W. Rowland

3rd August, 1972

APPENDIX

Provisions to be included in amendment to replace s.354 of the *Criminal Code*.

1. For the purposes of these provisions -

"country" includes a federation, and any state, province or other part of a federation, and any territory of a 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.

2. It is lawful to publish in good faith for public information or education, a fair and accurate report of the proceedings of -

(1) a parliamentary body;
(2) an international organisation of any countries or of governments of any countries;
(3) an international conference at which any countries or governments of any countries are represented;
(4) the International Court of Justice or of any other judicial or arbitral tribunal for any decision of any matter in dispute between countries;
(5) a court of any country; but for the purpose of this paragraph defamatory matter rules by a court prior to the time of publication to be inadmissible is not part of the proceedings of the court;
(6) an inquiry held under the legislation of any country or held under the authority of the government of any country.

3. For the purposes of provision 4 below -

"association" means -

(a) an association having as an object the advancement of any art, science, religion or learning and empowered by its constitution to control or adjudicate upon matters connected with the object;

(b) an association having as an object the promotion or protection of the interests of any trade, business, industry or profession or of the persons engaged in any such calling and empowered by its constitution to control or adjudicate upon matters connected with the calling, or the conduct of persons engaged therein, or

(c) an association having as an object 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 empowered by its constitution to control or adjudicate upon matters connected with the game, sport or pastime or the conduct of persons connected with or taking part therein;

"company" means a corporation, or an unincorporated association which under the law of its place of origin may sue or be sued or hold property in the name of one of its officers, but does not apply to -

(a) a proprietary company within the meaning of the *Companies Act 1961* or a company which under the law of its place of incorporation or of origin is a company analogous to a proprietary company;

(b) 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.

4. It is lawful to publish in good faith for public information or education, but only so far as the matter published relates to matters of public concern, a fair and accurate report of -

(1) The proceedings 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;

(2) The finding or decision of an association (as defined in provision 3 above) , or of a committee or governing body thereof, relating to a person who is a member of or is subject to the control of the association, being a finding or decision -

(a) made in Australia; or

(b) having effect, by law or custom or otherwise, within Australia.

(3) The proceedings at a general meeting of a company (as defined in provision 3 above) -

(a) having its place of incorporation or of origin in Australia; or

(b) wherever its place of incorporation or origin, if the meeting was held in Australia; or

(c) carrying on any part of its business or affairs in Australia or listed on a stock exchange in Australia.

(4) The proceedings of a public meeting in Australia, lawfully held for a lawful purpose and for the furtherance of discussion in good faith of a matter of public concern whether the admission to the meeting was open or restricted.

5. It is lawful to publish in good faith for public information or education any of the following, or a copy or fair summary of, or fair extract or fair abstract from, any of the following -

(1) a paper published in any country by order or under the authority of a parliamentary body for that country;

(2) a judgement of a court of any country, or a record of a court or any country relating to such a judgement or the enforcement or satisfaction of such a judgement;

(3) a notice or advertisement published by or on the authority of a court of any country or a judge or officer of such a court;

(4) a report made by the person who conducted an inquiry referred to in provision 2(6) above;

(5) 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 pursuant to the legislation of any of these, being a record or document which is open to inspection by the public;

(6) a notice or report issued for the information of the public by a Government office or department, local authority or police officer (in each case of an Australian State or of the Commonwealth or of a Territory of the Commonwealth) .

6. (1) The publication of a report, document or other matter mentioned in provisions 2, 4, and 5 above, not being -

(a) a report of the proceedings of a parliamentary body within Australia, or

(b) a report of the proceedings of a court exercising jurisdiction within Australia or a judgement, or a record relating to a judgement, of such a court,

shall lose the protection afforded by these provisions if it is proved that the publisher or his agent was requested by or on behalf of the person defamed to publish a reasonable letter or statement by way of contradiction or explanation of the defamatory matter 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:

Provided that, if it is not possible to publish the letter or statement in the manner in which the original publication was made, it shall be sufficient if it is published in a reasonable manner in a daily newspaper circulating in the area in which the defamatory matter complained of was published.

(2) The publication of a report or other matter mentioned in provisions 2, 4 and 5 above, in any document produced by mechanical or photographic means, shall lose the protection afforded by these provisions unless that document contained the names of the original publisher, editor and printer of the document and their places of business or residence, or contained other sufficient particulars to identify such persons.

(3) Provisions 2, 4 and 5 above shall not protect the publication of any matter which is prohibited by any other enactment in force in this State or by a court.

7. The *Imperial Act Adopting Ordinance 1847*, The *Newspaper Libel and Registration Act 1884, The Newspaper Libel and Registration Act 1884 Amendment Act 1888* (except s.5 thereof) and the *Newspaper Libel and Registration Act Amendment Act 1957* (except s.4 thereof) are hereby repealed.