



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 33

DEFAMING POLITICIANS
A RESPONSE TO
LANGE V ATKINSON

A discussion paper

*The Law Commission welcomes your comments on this paper
and seeks your response to the questions raised.*

These should be forwarded to the Law Commission
PO Box 2590, DX SP 23534, Wellington
com@lawcom.govt.nz

September 1998
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Commissioners are:

The Honourable Justice Baragwanath – President
Joanne Morris OBE
Judge Margaret Lee
DF Dugdale
Denese Henare ONZM
Timothy Brewer ED

The office of the Law Commission is at 89 The Terrace, Wellington
Postal address: PO Box 2590, Wellington 6001, New Zealand
Document Exchange Number: SP 23534
Telephone: (04) 473–3453, Facsimile: (04) 471–0959
eMail: com@lawcom.govt.nz
Internet: <http://www.lawcom.govt.nz>

Use of submissions

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Commission will normally be made available on request, and the Commission may mention submissions in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

Preliminary Paper/Law Commission, Wellington, 1998
ISSN 0113–2245 ISBN 1–877187–23–2
This preliminary paper may be cited as: NZLC PP33

Contents

	<i>Para</i>	<i>Page</i>
Preface		v
Defaming Politicians: A response to <i>Lange v Atkinson</i>		1
<i>The problem</i>	1	1
<i>Lange v Atkinson</i>	7	2
<i>The history of reform</i>	8	3
<i>The issue defined</i>	14	5
<i>“Freedom of expression in its wider context”</i>	15	6
<i>Comparative material</i>	17	6
<i>The Court of Appeal’s conclusion</i>	22	9
<i>Summary</i>	23	9
<i>Recommendation</i>	24	10
<i>Afterword: Reynolds v Times Newspapers Limited</i>	27	11
APPENDIX: Report of the Committee on Defamation		13



Preface

LET US IMAGINE A PARLIAMENTARY CANDIDATE named Artemus Jones. Let us imagine further that on the Sunday preceding the election at which he is standing there appears on the front page of a nationally circulated newspaper, under a suitably lurid headline, the statement, “Would-be MP Artemus Jones has nine convictions for sexual offences with boys aged between 7 and 11 years”.

Let us suppose further that what appears in the newspaper is wrong and that the man with the regrettable criminal history is not the parliamentary candidate but his second cousin who has the same name. The newspaper has not acted maliciously. The situation has come about because a reporter, over-eager to use what appears to be a scoop, has failed to carry out the appropriate checking. (“Carelessness, impulsiveness or irrationality in arriving at a positive belief” do not constitute malice: *Horrocks v Lowe* [1975] AC 135, 150.)

Now, as a result of the decision of the New Zealand Court of Appeal in a case called *Lange v Atkinson* (unreported, 25 May 1998, CA 52/97), the unfortunate parliamentary candidate has no redress against the newspaper whatsoever. The court ruled that in the case of aspiring, present, and past members of Parliament statements touching on the individual’s fitness for office are of such widespread public concern that if they are published generally the defence of qualified privilege can be invoked. The Law Commission believes that this gives rise to difficulties. We are not so much concerned to provide Mr Jones with what has been cynically referred to in the Australian literature as a “Fairfax swimming pool” or a “Murdoch motor-launch”. Our view is, however, that individuals wronged as Mr Jones has been should not be compelled to rely on good journalistic practice. Rather, they should be in a position if need be to exert the pressure of a substantial damages claim to persuade news media to face up to the need for prominently stated retraction.

The remedy tentatively proposed by the Commission is to leave undisturbed the Court of Appeal’s ruling that the defence of qualified privilege is not in the circumstances excluded by the fact that publication is general. But it is proposed that in those circumstances the defence of qualified privilege may be relied on only if

- the defendant believed on reasonable grounds that the statement of fact was true, *and*
- the news medium in question complies with a request to publish a letter or statement by way of explanation or contradiction.

In our imaginary scenario we would, if this were the law, expect the defence of qualified privilege to fail because the reporter’s failure to carry out elementary checks meant that belief in the truth of the statement was unreasonable. In other cases where the belief was reasonable but the fact was wrong we would expect media to be swift to publish suitable retractions.

This solution, it seems to the Commission, fairly holds the balance between the competing requirements of freedom of expression on the one hand, and on the other the protection of individual reputation.

This topic was included in the Commission's programme following the February 1997 first instance decision ([1997] 2 NZLR 22), our intention being to delay starting work until after the Court of Appeal had delivered judgment. We considered delaying the task even further because of the likelihood of an appeal to the Privy Council (conditional leave was granted on 20 July 1998) but decided against this. It needs to be remembered that since *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, New Zealand decisions out of line with the common law as settled in other jurisdictions may be left untouched by the Privy Council on the basis that "conditions in New Zealand are different" (519).

It has seemed proper, however, at this stage to publish only a preliminary paper. Partly this is because our final report will, should the appeal proceed to the stage of being heard, need to take into account the decision of the Privy Council. That decision may, of course, make the publication of a final report unnecessary. Although we solicited an expression of opinion from the Newspaper Proprietors Association of New Zealand (Inc), there have been no submissions from the representatives of other news media or from any other interested parties. It would be wrong for us to finalise our recommendations without first giving notice of our interim conclusions and inviting comment on them. Because the timing of the preparation of our final report would be affected by whether and when *Lange v Atkinson* gets to Downing Street, a closing date for submissions will be notified by advertisement.

At the time of preparing this report the Court of Appeal's judgment had not been reported in the law reports. It is, however, usefully paragraphed, and it has seemed more sensible in this report to refer to paragraph numbers than to pages of the transcript.

Submissions or comments on this paper should be sent to Nick Russell, Researcher, Law Commission, PO Box 2590, DX SP23534, Wellington, eMail NRussell@lawcom.govt.nz, phone (04) 473 3453; fax (04) 471 0959. We prefer to receive submissions by eMail if possible. This paper is also available on the internet at the Commission's website: <http://www.lawcom.govt.nz>.

Defaming Politicians: A response to *Lange v Atkinson*

The problem

- 1 **T**HE LAW OF DEFAMATION imposes liability for statements adverse to the plaintiff's reputation unless the statements made are shown to be true, or are made on an occasion of privilege, or are opinion which is honestly held. This report is concerned with two of these defences. One is *honest opinion*. It used to be called *fair comment* but in New Zealand its name was changed by the Defamation Act 1992 s 9. It is important that New Zealanders should be free to make known their views on matters of public interest, and so it is a complete defence to a defamation claim that the words complained of represent an expression of honestly held opinion. This is so even if the words are published for some ulterior purpose (Defamation Act 1992 s 10(3)). Although there is a clear logical distinction between a statement of fact and an expression of opinion, in ordinary speech and writing fact and opinion tend to be run together. For the defence of honest opinion to succeed it must be founded on facts (identified expressly or by implication) that are substantially true.
- 2 The second defence with which we are concerned is that of *qualified privilege*.[†] There is qualified privilege where a statement is made to a concerned party pursuant to a legal, social or moral duty. This privilege applies in an infinite variety of factual circumstances; examples are providing a reference to a person minded to engage a former employee, or a local body member at a council meeting criticising the performance of a roading contractor, or a company director discussing at a directors' meeting some aspect of a company's operations. But the defence of qualified privilege will not succeed if the plaintiff establishes that in publishing the statements in question the defendant was predominantly motivated by ill-will towards the plaintiff or otherwise took improper advantage of the occasion of the publication (Defamation Act 1992 s 19).
- 3 It is a necessary element of the defence of qualified privilege that the statement complained of has not been shouted from the rooftops but has been made only to a concerned party or parties. Therefore the defence will not usually be available where the defendant is a newspaper or radio or television broadcaster. It will be rarely that every member of the audience of a newspaper or broadcaster is a concerned party in relation to a statement published through such medium.

[†] Qualified privilege needs to be distinguished from *absolute privilege*. Absolute privilege applies to such statements as those made in Parliament or in court proceedings where the overriding concern is to be able fearlessly to speak one's mind.

- 4 In the case of defamation claims brought by aspiring, present or past members of Parliament against any of the news media, this aspect of the law of qualified privilege has been changed by the judgment of the New Zealand Court of Appeal in a case called *Lange v Atkinson* (unreported, 25 May 1998, CA 52/97, Richardson P, Henry, Keith, Blanchard and Tipping JJ). The court said:

We hold that the defence of qualified privilege applies to generally published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be Members, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities. The determination of the matters that bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than private concern. (para 1)

- 5 In the view of the Commission this judgment, to the extent that it leaves politicians without redress if they are harmed by the publication of false statements of fact, tilts the law against the right of the citizen to protect his or her reputation in favour of freedom of expression in a way that should be not allowed to stand. In the Commission's view there is an urgent need for corrective legislation.
- 6 In the balance of this report we first give more details of the *Lange* case. We then give an account of the history of relevant reform proposals. We then discuss the reasoning of the Court of Appeal and spell out why we believe that the Court of Appeal's ruling has left the law in a state of dangerous imbalance. Finally, we address the question of an appropriate reforming measure.

Lange v Atkinson

- 7 Mr Lange is a former Prime Minister of New Zealand. In October 1995 the monthly magazine *North and South* published an article by Mr Atkinson critical of Mr Lange's performance as Prime Minister. It is unnecessary to give further currency to the statements complained of by repeating them; it is sufficient for present purposes to note that they included such statements of fact as that

[h]e found it hard to sit still and often turned over the Cabinet chair to Geoffrey Palmer while he ambled off to the toilet, to his office, or even to the self-drive car that he liked to take out for a recreational spin on the Wellington motorway. . . .

and such mixed statements of fact and opinion as that Mr Lange's real reason for resigning as Prime Minister was

that he found the job too much like hard work.

Mr Lange issued proceedings claiming damages for defamation against Mr Atkinson and against the magazine's publisher. The defendants, in their defence, claimed to be protected by the law of qualified privilege. It is sensible where an issue is plain, and particularly where the trial is likely to be before a jury, to avoid cluttering the main hearing by disposing of such an issue in advance of the battle. In this spirit Mr Lange moved to strike out the part of the defence that invoked qualified privilege. The High Court was not, however, persuaded that it was so clear that the defence was untenable that it should strike out the defence before trial ([1997] 2 NZLR 22). The matter before the Court of Appeal was Mr Lange's appeal, which the appellate court rejected, from this decision by the High Court.

The history of reform

- 8 In July 1975 the Minister of Justice in a Labour administration, the Hon Dr AM Finlay QC, appointed a committee to study and make recommendations on the law of defamation. Its chairman was a practising barrister and solicitor Mr IL McKay (now the Rt Hon Sir Ian McKay, a retired judge of the Court of Appeal). Its members included besides practising lawyers and a law teacher, Professor GWR Palmer (now the Rt Hon Sir Geoffrey Palmer), journalists and the Chairman of Directors of New Zealand News Limited. The committee's report, published in December 1977, expressly considered the balance between freedom of speech on the one hand and the right to protection of reputation on the other. We are concerned in this narrative with two of the McKay committee's recommendations in particular. The Defamation Act 1952 s 6 provided for a (rarely invoked) defence of unintentional defamation where an apology was offered. The McKay committee recommended a strengthened version of this section (chapter 13). Secondly, the committee recommended a statutory defence for the media which it believed would properly hold the balance between the need of the news media for freedom of expression and the right of the individual to protect his or her reputation. In the appendix to this report we set out the entirety of chapter 10 of the McKay report in which this proposal is advanced.
- 9 By the time the McKay committee had reported there was a National government in power. It is a matter of historical fact that relations between its leader the Rt Hon Robert Muldoon and the news media were not invariably cordial. No action was taken to implement the reform proposals and the Labour Party included a promise of implementing those proposals in its 1984 and 1987 election manifestos. In August 1988, following a change of government, a Defamation Bill was introduced by Mr Palmer, by now Minister of Justice. He said in his speech during the first reading of the Bill:

It is the function of the law of defamation to find an acceptable balance between two competing principles. The first principle is the right of free speech, which has, of course, been hard won over the centuries. Free speech, a free press, and a free flow of information and comment are essential in a democratic society.

The second principle is to protect a person's reputation against unjustifiable attack. A person's good name is a valuable attribute that deserves reasonable protection. The Committee on Defamation was appointed because of concern that the balance had been tilted too far to protect individual reputations, and the committee came to the conclusion that the balance between reputation and freedom of speech in New Zealand needed some adjustment in favour of free speech and a free press. The committee therefore recommended a special defence for the news media that was without precedent in the Commonwealth. The essential feature of the defence was that the news media would enjoy qualified privilege in respect of any published matter of public interest when the publisher had acted with reasonable care and had given the defamed person an opportunity to publish a statement explaining or contradicting the offending statement.

The committee considered that the value of the new defence was that it gave both the plaintiff and the defendant an incentive to resolve the matter. It would have enabled the plaintiff to have an explanation or contradiction published promptly, and relieved the defendant of liability for damages. The Government has carefully considered the committee's major recommendation and it was discussed at length over a long period. There is a view that the news media environment has changed

dramatically since 1977. Government members have come to the conclusion that there is no justification for according the news media special privileges that are not enjoyed by ordinary citizens. In the view of the Government there was no pressing need to change the existing balance between freedom of speech and protection of reputation. The Bill therefore does not change that balance.

The Bill has been controversial among Government members, and divergent views are held upon it – that may even be true of the Opposition – so the submissions to the select committee will be particularly important on a Bill of this nature. I know of few subjects that excite more passionate concern among members of Parliament than this one. (491 NZPD 6369)

Not only did the Bill as introduced omit the chapter 10 proposal, but also the defence of honest mistake was done away with. In its place was the largely ineffective provision now to be found as s 25 of the current statute.

- 10 The matter was reported back from select committee in October 1989 with amendments that are irrelevant to the present subject matter. Then it sat. In an informal address to a Legal Research Foundation Symposium held on 15 October 1992, Mr Lange himself mused in the following terms:

The fact is that reform of the law is difficult. It raises a conflict of principle which will never easily be resolved, as the Bill itself shows. Prospective plaintiffs may rest easy that the Bill does not entrust the news media with a new defence of qualified privilege while representatives of the news media complain that the new correction orders may actually oblige them to publish the truth about plaintiffs.

You will gather from the last remark that there is a peculiar difficulty in the reform of the defamation law. The statute law is the responsibility of people who are collectively the most likely group of potential plaintiffs. I don't think it's any accident that the American position, which has raised free expression in matters of public concern to the level of a constitutional guarantee, is the product of the supreme court and not the legislature. There may be members of parliament who are capable of objectivity about the law. I don't claim to be one of them. But equally I'm no more inclined to attribute objectivity to the representatives of the news media. It is awareness of these difficulties as much as anything else which persuades members of parliament that the law may best be left to the courts. (*Media and Advertising Law*, Legal Research Foundation, 1992, 7)

- 11 Eventually, the Defamation Bill was read a second time in November 1992. By this time there had been a further change of government. The new government was equally opposed to the chapter 10 proposal of the McKay committee (see the interjection of the Minister of Justice, the Hon Mr DAM Graham, at 531 NZPD 12149). The Bill quickly completed its remaining stages and received the Royal Assent on 26 November 1992. It should be emphasised that both major political parties were as one in rejecting the suggestion of a need (to repeat Mr Palmer's words from his introductory speech) to change "the existing balance between freedom of expression and protection of reputation".
- 12 It is against this background of events that part 11 (set out here in full) of the Court of Appeal's judgment in *Lange v Atkinson* should be considered.

11 Court or legislature?

The appellant, citing the recent decision of this Court in *R v Hines* [1997] 3 NZLR 529, submitted that the Court should leave any development of the law in this area to Parliament. For three reasons we do not accept that argument. The first is that in this area the Court is not engaged in any extensive development of the law. Rather

it is a matter of the refinement and application of the law in yet another of the infinite variety of circumstances in which the defence of qualified privilege may be invoked. This judgment has already made it clear that the application of the defence to political debate is not new.

The second relates to the contention that the courts should not be making value judgments. That is for Parliament, it is said. No doubt as a general proposition that is true. But, as the cases have made clear in this particular area over the last 200 years, the courts have been making those judgments on the very broad basis indicated. Moreover, with a limit to be noted under the next point, Parliament has essentially not interfered with that judicial role.

The third reason relates to the appellant's argument based on the recent enactment of the Defamation Act 1992. While it is true that Parliament at that time had the opportunity to strike afresh the balance between the right to freedom of expression and the right of the individual to reputation and that it did in part exercise that right and did not act on the proposal to introduce a special defence for the media, it left the central core of the defence of qualified privilege untouched. The nearest it got to it was to reword the test for malice in s 19, probably without altering the substance. Far from altering the core test, what it did do, as it has frequently done in the past and has continued to do since 1992 (for instance in the Human Rights Act 1993 and the Health and Disability Commissioner Act 1994), was to specify other bodies and occasions to which the defence as established by the courts and not by it applies. It is possible to speculate about the reasons for this Parliamentary reluctance – a perception of self-interest by parliamentarians may be one, the relative ability of the courts to develop the law in this area in an incremental way another (as Cockburn CJ suggested last century) – but whatever be the reason the fact of Parliamentary reluctance remains. The courts have been left to determine the scope and application of qualified privilege in major areas and in particular to do that without distinguishing between publication by the media or in other ways; the defendants' pleading does not require special treatment for the press. We are to make that determination in the specific New Zealand context, guided and informed of course by the broader range of material already considered.

13 It may be thought that there are difficulties about the sentence

It is possible to speculate about the reason for this Parliamentary reluctance – a perception of self-interest by parliamentarians may be one, the relative ability of the courts to develop the law in this area in an incremental way another . . . – but whatever be the reason the fact of Parliamentary reluctance remains.

Members of Parliament made it clear that they were not changing the law of privilege because they regarded the balance between freedom of expression and protection of reputation as satisfactory. It is imprecise to treat this considered decision in favour of the existing law as if it were some blameworthy omission to grasp the nettle of reform. Aside from Mr Lange's pleasantries quoted above in para 10 (which of course in the events that have happened have their own irony) there is no firm basis for any suggestion that parliamentarians (who are occasionally required of necessity to legislate on matters affecting their own affairs) have in this matter been motivated by self-interest.

The issue defined

14 We agree with the view of the McKay committee (which is indeed also the view expressed in the first reading speech quoted in para 9) that the issue calling for determination is how best in the present context to hold the balance between

the laudable objective of freedom of expression, and the equally laudable objective of protecting the reputation of individuals. In our view, the solution ordained by the Court of Appeal tilts the balance against the rights of individuals too far.

“Freedom of expression in its wider context”

- 15 Under the above heading and by way of support for the emphasis it places on freedom of expression, the Court of Appeal refers to a number of general philosophic statements. The court quotes *Areopagitica*:

And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to mis-doubt her strength. Let her and falsehood grapple; whoever knew truth put to the worse, in a free and open encounter?

This passage does not assist the court’s reasoning. The whole effect of a successful plea of privilege is that truth and falsehood do not get to grapple; on the contrary the matter is determined in favour of falsehood without the contestants ever leaving their corners. Then the court quotes the famous passage from JS Mill that begins with the sentence:

If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

These are of course unexceptionable sentiments. But they relate to expressions of opinion, taken care of under New Zealand defamation law by the defence of honest opinion described in para 1. The criticism of the Court of Appeal’s decision is that it leaves the plaintiff without redress for *factual* misstatements.

- 16 The judgment then goes on to quote JF Stephen’s 1883 *History of the Criminal Law of England* on why “the time for prosecuting political libels has passed”. No doubt it has, but it is not obvious why this fact should stand in the way of a parliamentary candidate whose reputation has been damaged by a published misstatement. “Far from relaxing the law as to newspaper libel,” says Stephen a few pages later in the same chapter, “I should wish to see its stringency increased” (384). None of these passages advances the argument.

Comparative material

- 17 We agree with the Court of Appeal that there is assistance to be gained from considering how the issue we have defined has been dealt with in other jurisdictions, but we disagree with the court in the conclusions that it has drawn from that material. The leading Canadian case is the judgment of the Supreme Court in *Hill v Church of Scientology* (1995) 126 DLR (4th) 129. It is clear from this judgment that in the opinion of the Canadian Supreme Court the two concepts of protection of reputation and freedom of expression are of *equal* importance. Cory J delivering the Supreme Court’s judgment observed that

the protection of the good reputation of an individual is of fundamental importance to democratic society . . . [so that] the protection of a person’s reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression. (paras 120–121)

- 18 It is important to note in the light of the weight attached by the Court of Appeal to the New Zealand Bill of Rights Act 1990 s 14 (see part 13 of the judgment) that the Canadian Supreme Court arrives at its view despite the terms of s 2(b) of the Canadian Charter of Rights and Freedoms. That provision includes in the catalogue of fundamental freedoms “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”. The Supreme Court said:

Certainly, defamatory statements are very tenuously related to the core values which underlie s 2(b). They are inimical to the search for truth. False and injurious statement cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society. (para 106)

The Canadian Supreme Court rejects the approach of the United States Supreme Court in *New York Times Co v Sullivan* (1964) 376 US 254. That case emphasises freedom of expression at the expense of the protection of reputation and relied on the provision of the First Amendment to the United States Constitution that “Congress shall make no law . . . abridging the freedom of speech, or of the press”. Under that provision public officials (a term widely construed) can successfully sue for defamation only if able to establish by clear and convincing evidence that the defendant published the statement with knowledge of its falsity or in reckless disregard of whether it was true or false.

- 19 It is instructive to note how the issue of balancing in the present context the rights to reputation and freedom of speech is approached by the Australian High Court in the case of *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. In the view of the High Court:

The constitutionally prescribed system of government does not require – to the contrary, it would be adversely affected by – an unqualified freedom to publish defamatory matter damaging the reputations of individuals involved in government or politics. (568)

The court gives consideration to a provision of the New South Wales Defamation Act 1974 which makes it a requirement of the defence of qualified privilege that “the conduct of the publisher in publishing the matter is reasonable in the circumstances” (s 22). The court says:

Because privileged occasions are ordinarily occasions of limited publication – more often than not occasions of publication to a single person – the common law has seen honesty of purpose in the publisher as the appropriate protection for individual reputation. As long as the publisher honestly and without malice uses the occasion for the purpose for which it is given, that person escapes liability even though the publication is false and defamatory. But a test devised for situations where usually only one person receives the publication is unlikely to be appropriate when the publication is to tens of thousands, or more, of readers, listeners or viewers.

No doubt it is arguable that, because qualified privilege applies only when the communication is for the common convenience and welfare of society, a person publishing to tens of thousands should be able to do so under the same conditions as those that apply to any person publishing on an occasion of qualified privilege. But the damage that can be done when there are thousands of recipients of a communi-

ation is obviously so much greater than when there are only a few recipients. Because the damage from the former class of publication is likely to be so much greater than from the latter class, a requirement of reasonableness as contained in s 22 of the Defamation Act, which goes beyond mere honesty, is properly to be seen as reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication which the Constitution requires. (572)

The court goes on to consider what is reasonable and says this:

Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond. (574)

It will be noted that the matters referred to by the court are not dissimilar from the McKay committee recommendation.

20 The Court of Appeal in part 14(c) of its judgment rejects this approach. It says:

The basis of qualified privilege is that the recipient has a legitimate interest to receive information assumed to be false. How can that interest differ simply because the author has failed to take care to ensure that the information is true?

The Commission does not find this reasoning convincing. One might just as well say "How can that interest differ simply because the author is motivated by ill-will?". The privilege conferred by the defence of qualified privilege is that of the publisher and we see no reason why it is not a sensible way of maintaining the balance to which we have referred to impose obligations on the publisher. There seems no reason why the rules of qualified privilege should not be so framed as to reflect the premise that there can be no legal, social or moral duty carelessly to propagate inaccurate factual statements.

21 As might be expected the need to balance the two competing interests of freedom of expression and protection of individual reputation receives attention in the English authorities. We content ourselves with citing the famous passage by Cockburn CJ in *Campbell v Spottiswoode* (1863) 3 B & S 769; 122 ER 288:

It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction a tax upon them, destructive of their honour and character, and made without any foundation. (777; 291)

Some weight was placed by the Court of Appeal on the decision of the House of Lords in *Derbyshire County Council v Times Newspapers Limited* [1993] AC 534 which held that a local authority could not sue in libel because a democratically elected governmental body should be open to uninhibited public criticism. But that case with its emphasis on freedom of expression did not have to consider the competing right of individuals to protection of their reputations.

The Court of Appeal's conclusion

22 The Court of Appeal concluded as follows:

14 Qualified privilege and political statements: conclusion

(a) *Political statements may be protected by qualified privilege*

Our consideration of the development of the law leads us to the following conclusions about the defence of qualified privilege as it applies to political statements which are published generally:

- (1) The defence of qualified privilege may be available in respect of a statement which is published generally.
- (2) The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.
- (3) In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.
- (4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.
- (5) The width of the identified public concern justifies the extent of the publication.

(As appears from para (3) above this judgment is limited to those elected or seeking election to Parliament.)

It may be noted that the judgment is in terms limited to those elected or seeking election to Parliament. However, the ruling stated that

the wider public may have a proper interest in respect of generally published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office . . .

This statement is susceptible of extension by way of obvious analogy to other public officers (including judges) and for that matter to other influential persons in the private sector such as newspaper editors.

Summary

23 Parliament at the time of the introduction of the Defamation Bill in 1988 and its ultimate enactment in 1992 believed that in the relevant context the balance between protection of reputation and freedom of expression had been correctly struck. It rejected a proposal by the McKay committee that would have tilted the balance in favour of freedom of expression but with certain safeguards in favour of protection of reputation. In *Lange v Atkinson* the Court of Appeal has tilted the balance without imposing the safeguards that the McKay committee proposed. The consequence is that a particular category of citizens (aspiring, present and past members of Parliament) are left without remedy if (unless maliciously) they are subjected to defamatory statements of fact. The Commission's present belief is that this needs to be remedied.

Recommendation

- 24 So what is to be done? There are always problems of technique when changing a statute without codifying all the rules that are wholly or partly judge-made. The correct approach we think is to leave undisturbed the ruling that there can be circumstances in which general publication does not preclude a defence of qualified privilege but to impose safeguards by way of conditions to its invocation. In our reading, the separate judgment of Tipping J in *Lange v Atkinson* would be disposed to favour such a solution. We are minded to recommend the insertion in the Defamation Act 1992 of a new *section 19A* in the following terms:

19A Restrictions on qualified privilege where general publication

- (1) In any proceedings for defamation in respect of matter that consists of a statement of fact published generally a defence of qualified privilege shall fail unless the defendant proves that the defendant believed on reasonable grounds that the statement of fact was true.
 - (2) In any proceedings for defamation in respect of matter that consists of a statement of fact published generally by a news medium a defence of qualified privilege shall fail if the plaintiff alleges and proves
 - (a) that the plaintiff requested the defendant to publish, in the manner in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction; and
 - (b) that the defendant has refused or failed to comply with that request, or has complied with that request in a manner that, having regard to all the circumstances, is not adequate or not reasonable.
 - (3) This section does not apply where the publication is protected by qualified privilege conferred by section 16(1) or section 16(2).
- 25 Two points in relation to this draft call for comment. First, in the interests of consistency, the proposed *subsection (2)* replicates the provisions of s 18(2) of the 1992 statute.
- 26 Secondly, we gave some thought to whether a more precise requirement of reasonableness would be appropriate. The New South Wales Defamation Act 1974 s 22(1)(c) makes it a necessary element of the defence of qualified privilege that “the conduct of the publisher in publishing the matter is reasonable in the circumstances”. In considering this provision the Privy Council in *Austin v Mirror Newspapers Limited* [1986] AC 299 observed:

In considering whether the conduct of the publisher is reasonable the court must consider all the circumstances leading up to and surrounding the publication. These circumstances will vary infinitely from case to case and it would be impossible and most unwise to attempt any comprehensive definition of what they might be. (313)

We agree with this view and believe that it should be heeded by law reformers and legislators. We would expect a New Zealand court to be persuaded by the robust common sense of a further observation in the same case: “The harder hitting the comment the greater should be the care to establish the truth of the facts upon which it is based” (317); and by the observations of the Australian High Court in *Lange v Australian Broadcasting Corporation* (574) quoted in para 19. It may also get some help from the following passage from Dr Johnson’s essay *Of the Duty of a Journalist*:

A journalist is an historian, not indeed of the highest class, nor of the number of those whose works bestow immortality upon others or themselves; yet, like other

historians, he distributes for a time reputation or infamy, regulates the opinion of the week, raises hopes and terrors, inflames or allays the violence of the people. He ought therefore to consider himself as subject at least to the first law of history, the obligation to tell the truth. The journalist, indeed, however honest, will frequently deceive, because he will frequently be deceived himself. He is obliged to transmit the earliest intelligence before he knows how far it may be credited; he relates transactions yet fluctuating in uncertainty; he delivers reports of which he knows not the authors. It cannot be expected that he should know more than he is told, or that he should not sometimes be hurried down the current of a popular clamour. All that he can do is to consider attentively, and determine impartially, to admit no falsehoods by design, and to retract those which he shall have adopted by mistake.

Afterword: Reynolds v Times Newspapers Limited

- 27 On 8 July 1998, by which date preparation of this paper for publication was in its final stages, the English Court of Appeal delivered its decision in the case of *Reynolds v Times Newspapers Limited*, a defamation claim by a former Irish Taoiseach arising out of an account in the *Sunday Times* of the circumstances surrounding his resignation from that office in which the availability of the defence of qualified privilege was in issue. The court held that one test of the defence of qualified privilege was whether the nature, status and source of the material and the circumstances of the publication were such that the publication should in public interests be protected in the absence of proof of express malice. The English court carefully considered *Lange v Atkinson* but declined to accept that its conclusions represented English law because the New Zealand court, in rejecting any requirement of reasonable care, failed to apply that test. Where publication is to the general public the immunity from liability which qualified privilege provides is available only in circumstances where such precautions as careful checking and the provision to the persons referred to of an opportunity to rebut have been observed. It will be apparent that these statements of what English law is do not differ in substance from this Commission's tentative proposals as to what New Zealand law should be.
-